Law Commission

Consultation Paper No 213

HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman,* Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod QC and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: To consider the law and procedure on some aspects of hate crime. This consultation paper addresses:

- The aggravated offences under the Crime and Disorder Act 1998, and the case for extending them to create offences involving hostility on the grounds of disability, sexual orientation and transgender identity. Particular reference is made also to the enhanced sentencing provisions under the Criminal Justice Act 2003.
- The stirring up of hatred offences under the Public Order Act 1986, and the case for extending them to include hatred on the grounds of disability and transgender identity.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: The consultation paper is available on our website at

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

We have prepared some additional information relevant to this consultation which we have published on our website as a set of appendices, as follows:

- Appendix A: Hate crime and freedom of expression under the European Convention on Human Rights
- Appendix B: History of hate crime legislation
- Appendix C: Impact assessment

Duration of the consultation: 27 June 2013 to 27 September 2013.

Comments may be sent:

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We are happy to accept responses in any form – but we would prefer, if possible, to receive emails attaching the pre-prepared response form available on our website at

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

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance.

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THE LAW COMMISSION

HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES

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CHAPTER 1
INTRODUCTION

BACKGROUND TO THE PROJECT

1.1 The Law Commission's work on this project has arisen as part of a cross-departmental Government initiative on hate crime. The project was referred to us by the Ministry of Justice.

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:

- 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.[1]

1.3 At present, criminal justice agencies record as a "hate crime" any offence which is perceived by the victim or any other person to be motivated by hostility or prejudice based on a person's race, religion, sexual orientation, disability or transgender identity.[2] However, existing criminal offences dealing specifically with the problem of hate crime do not recognise the same five protected characteristics.[3]

1.4 In relation to several commonly occurring offences specified in the Crime and Disorder Act 1998 ("CDA 1998"), if the defendant, in committing such an offence, demonstrates, or was motivated by, hostility on the grounds of race or religion, that offence becomes an "aggravated" offence.

1.5 In a separate set of offences under the Public Order Act 1986 ("POA 1986"), the criminal law prohibits the stirring up of hatred on grounds of race, religion or sexual orientation.

[1] HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) para 1.19. In terms of the criminal justice response to hate crime, the Action Plan contains a number of action points at para 4.7.

[2] 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* (Oct 2012) p 8.

[3] People with these characteristics are often referred to as falling within "protected groups" in hate crime contexts.

1.6 Our terms of reference for this project are to look at:

> (a) extending the aggravated offences in the Crime and Disorder Act 1998 to include where hostility is demonstrated[4] towards people on the grounds of disability, sexual orientation or gender[5] 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.

1.7 It is not within our terms of reference to examine the rationale for the existing offences.[6] Nor can we consider whether the current legislation should be extended to include characteristics other than the five mentioned above (race, religion, sexual orientation, disability and transgender identity).[7]

1.8 Our focus is solely to examine the case for extension of the existing statutory regimes to those five protected characteristics. We do not examine whether the existing offences should be retained in their current form, amended, or repealed. Our work is limited to an analysis of their operation and scope, so as to enable a fair assessment of whether those forms of offence should be extended so that all five personal characteristics are protected by both types of offence.

HATE CRIME: THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM

1.9 Although the focus of this project is on the two groups of statutory offences which deal with hate crime, it is important to understand that these fit into a wider context of action directed towards hate crime across the criminal justice system.[8]

1.10 "Hate crime" has become an umbrella term used by some to describe a wide range of criminal offences, from relatively low-level[9] harassment motivated by hostility based on personal characteristics at one end of the scale, to organised, pre-meditated activity designed to incite hatred against a group at the other. The term "hate crime" means different things in different contexts. At least four separate contexts are important for our purposes.

[4] We have interpreted these terms of reference as requiring review of both limbs of section 28(1) of the CDA 1998 – namely demonstration of, or motivation by, hostility: see paras 1.4 above and para 1.14 below.

[5] It has since been confirmed that this is intended to mean transgender identity.

[6] The separate paper by Dr John Stanton-Ife published on our website considers 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/areas/hate_crime.htm

[7] While individual police forces can introduce additional classifications of personal characteristics for hate crime victims, as for example Greater Manchester Police now do in relation to alternative subcultures following the murder of Sophie Lancaster in 2007, this is significant purely for recording and operational purposes. The statutory provisions dealing with hostility and hatred currently only deal with the characteristics listed in the official definition referred to in paras 1.14, 1.15 and 1.19 below.

[8] See generally, HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012).

[9] We do not mean by this term to minimise the impact of such harassment on those who suffer it.

(1) Recording hate crime

1.11 When criminal justice agencies, such as the police and the Crown Prosecution Service ("CPS"), refer to "hate crime", they are generally not referring specifically to the statutory regimes set out above.[10] In 2007, the CPS, police and criminal justice agencies adopted a broad, operational definition which is used primarily for recording purposes. Under this definition, a "hate crime" is:

> any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender.[11]

1.12 This definition is wider than the terms used in the two groups of statutory offences dealing specifically with hate crime. The definition covers all five protected characteristics of race, religion, sexual orientation, disability and transgender identity. Furthermore, it is enough, for the purposes of this definition, that the victim or any other person *perceived* the offence to be motivated by hostility or prejudice based on a person's protected characteristic. This is a different threshold to that set in the CDA 1998 for the aggravated offences, as explained below under (2).

1.13 This broad, operational definition of hate crime is not the focus of our attention in this consultation paper. We are concerned with the two sets of statutory offences, their operation and possible extension. We describe those two sets of offences in more detail below.

(2) Aggravated offences[12]

1.14 Aggravated offences under the CDA 1998 are also referred to as "hate crimes", although these offences in fact require proof of hostility, rather than hatred. An aggravated offence is committed when a defendant commits one of a list of "basic offences", and in doing so *demonstrates* or was *motivated by* hostility towards a person on the grounds of race or religion.[13] The basic offences that can be aggravated in this way are assault, criminal damage, and certain public order offences involving threatening, abusive or insulting conduct, harassment or stalking, and putting people in fear of violence.[14] An aggravated offence attracts a higher maximum sentence than its basic counterpart.

[10] See paras 1.4 and 1.5 above.

[11] See, for example, CPS, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 8.

[12] See Ch 2 at para 2.5 and following and Ch 3 generally.

[13] Religion was added by the Anti-terrorism Crime and Security Act 2001, s 39.

[14] See Ch 2 at para 2.7.

(3) Stirring up offences[15]

1.15 A further kind of "hate crime" involves the stirring up of hatred under the POA 1986. These offences apply where a person engages in certain forms of threatening, abusive or insulting conduct and either the intention was thereby to stir up racial hatred or, having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

1.16 The forms of conduct caught by the offences are:[16]

- 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 the public performance of a play involving the use of threatening, abusive or insulting words or behaviour;
- distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting;
- 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; or
- 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.

1.17 In 2007 these offences were extended to include the stirring up of hatred on grounds of religion and in 2010 were further extended to include sexual orientation. However, these later offences have some key differences to 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.

1.18 Prosecutions for stirring up hatred on grounds of race, religion or sexual orientation are far less common than those for aggravated offences.[17]

[15] See Ch 2 at para 2.51 and following and Ch 4 generally.

[16] POA 1986, ss 18 to 23.

[17] See Appendix C.

(4) Enhanced sentencing[18]

1.19 Finally, the term "hate crime" is also used in the context of sentencing. Where, in the commission of any offence,[19] an offender demonstrated or was motivated by hostility based on race, religion, disability, sexual orientation or transgender identity, the court can apply the enhanced sentencing provisions under sections 145 and 146 of the Criminal Justice Act 2003 ("CJA 2003").[20] These provisions require the court to treat such hostility as an aggravating factor in sentencing. The sentencer must make a statement in open court about the finding of hostility.

1.20 The amount by which a sentence can be increased will depend on the circumstances of the case and the seriousness of the aggravation. In some situations, the increase in sentence could result in a prison sentence being imposed when it would not have been imposed otherwise. Where an aggravating factor is found to apply, this cannot raise the sentence above the maximum tariff that the offence attracts.[21]

SOME STATISTICAL CONTEXT

1.21 Statistical information on hate crime is gathered in a variety of ways, for different purposes, by different Government departments and criminal justice agencies. The available data include statistics on the number of cases that are reported, recorded and prosecuted as hate crimes each year, broken down across the five protected groups. Information is also available on the number of recorded hate crime cases that are prosecuted and the number of convictions obtained each year. There are also data on the average length of custodial sentences passed for aggravated offences and on the number of sentences passed for stirring up offences. The statistics do not, however, enable an accurate assessment to be made of the precise scale or nature of hostility-driven offending on the basis of disability, sexual orientation and transgender identity.[22] In Appendix C we present the relevant statistical data on hate crime. Some of the key information is set out below.

[18] See Ch 2 at para 2.129 and following and Ch 3 at para 3.18 and following.

[19] Except where the offence is one that has been, or could have been, charged as an aggravated offence under CDA 1998.

[20] The original sentencing uplift only applied to racial hostility but the other four strands were added by subsequent amendment, with the transgender variant coming into force most recently (in Dec 2012). Section 145 deals with racial and religious hatred and s 146 with the other three strands.

[21] In Ch 2 at para 2.47, we compare the maximum sentences available for basic and aggravated offences.

[22] The principal limitations of the statistical evidence are explained in the impact assessment, at Appendix C.

Recorded hate crime[23]

1.22 According to the Home Office, in the year 2011 to 2012, crimes that were recorded by police as hate crimes represented around 1% of all recorded crimes.[24] In 2011 to 2012, there were 43,748 crimes recorded by police as hate crimes. These were broken down across the five protected groups as follows:

- race - 82%
- sexual orientation - 10%
- religion - 4%
- disability - 4%
- transgender identity - 1%.

Prosecuted hate crime

1.23 Information on hate crime prosecutions is contained in the CPS annual report on Hate Crime and Crime Against Older People. The latest report was published in October 2012.[25] The report states that in the year 2011 to 2012, the CPS prosecuted 14,196 hate crimes.[26] In the same period there were 11,843 successful hate crime prosecutions.[27]

1.24 An incident is recorded in the CPS hate crime report if it satisfies the criteria set out in the operational definition of "hate crime" discussed above.[28] To be reported as a successful hate crime prosecution in the annual report, a case must have (a) been flagged as a hate crime by the CPS in its internal records system (whether on receipt of the file from the police or at any point afterwards) and (b) have resulted in conviction, albeit not necessarily for an aggravated offence or a stirring up offence.

1.25 The figures in the CPS annual report on hate crime should not, therefore, be seen as statistics on the number of times the aggravated, or stirring up offences were prosecuted, the outcome of such prosecutions, or whether enhanced sentencing was applied and, if so, with what effect. Data on these matters would be useful in a project of this type but there is currently no system in place across the criminal justice system for capturing them.

[23] The report of the Stephen Lawrence Inquiry recommended adopting a definition of "racist incidents" for criminal justice purposes and called for better recording and reporting of racist crimes. This led to a number of local and national initiatives aimed at improving the criminal justice system's operational response to hate crime. See The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny (1999) Cm 4262-I, recommendations 12 to 17.

[24] Home Office, *Hate Crimes, England and Wales 2011 to 2012* (Sep 2012).

[25] CPS, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012).

[26] CPS, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 4. "Prosecutions" refers to cases the prosecution of which was commenced in a given year. By contrast, there are around 75,000 prosecutions per year for domestic violence.

[27] CPS, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 4. See para 1.24 below regarding the meaning of "successful hate crime prosecutions" and note that successful prosecutions in a given reporting year could relate to cases prosecuted in a previous year.

[28] See para 1.11 above.

THE WAY WE HAVE WORKED

1.26 In addition to reviewing the available statistical data, we have conducted preliminary fact-finding discussions with several organisations with relevant expertise. These include organisations that support and campaign on behalf of people with disabilities, transgender people, and the lesbian, gay and bisexual ("LGB")[29] community. Some of these organisations offer hate crime reporting services and assist those affected by hate crime to deal effectively with the police and provide the information necessary for further investigation and prosecution. We have also spoken to relevant public bodies and Government departments.

1.27 The organisations we have consulted are as follows: the Association of Chief Police Officers, the CPS, the Disability Hate Crime Network, Disability Rights UK, the Equality and Diversity Forum, the Equality and Human Rights Commission, GALOP, the Gender Trust, GIRES, the Government Equalities Office, Her Majesty's Crown Prosecution Service Inspectorate, the Home Office, Mencap, the Ministry of Justice, the National Aids Trust, the National Autistic Society, the National Offender Management Service, Press for Change, the Sentencing Council, Stonewall, StopHate UK, Trans Media Watch, Victims' Services Alliance and Victim Support.

THE STRUCTURE OF THIS PAPER

Chapter 2 - The current law

1.28 In Chapter 2, we begin by analysing the current law on racially and religiously aggravated offences. We then examine the current law dealing with the stirring up of hatred on grounds of race, religion and sexual orientation. We explain that the stirring up offences represent an entirely different regime from the aggravated offences. Finally in Chapter 2, we examine the enhanced sentencing provisions under sections 145 to 146 of the CJA 2003.

Chapter 3 - Aggravated offences: provisional proposals

1.29 Chapter 3 offers two reform options:

(1) amendments to the operation of the enhanced sentencing regime, designed to increase its effectiveness;

(2) alternatively, or in addition to such sentencing reform, extending the aggravated offences to cover hostility based on grounds of disability, sexual orientation and transgender identity.

[29] We use the term "LGB" in this consultation paper because we do not have any evidence of hostility-driven offending on the grounds of heterosexuality. It is important to note, however, that the stirring up of hatred on grounds of "sexual orientation" applies equally to heterosexuality, homosexuality and bisexuality. The definition of "sexual orientation" we provisionally propose in relation to new aggravated offences is framed in similarly inclusive terms: see Ch 3 at para 3.112 and following.

1.30 During our initial discussions with organisations that support disabled, LGB and transgender people who are victims of hate crime, concerns were raised that the enhanced sentencing regime under section 146 is not always used appropriately.[30] The chapter begins with an analysis of whether this enhanced sentencing regime, which is already familiar to criminal practitioners and judges, could be made to work more effectively. The enhanced sentencing regime applies to all five characteristics, including disability, transgender and sexual orientation. It is based on the same test of hostility as the aggravated offences.

1.31 We examine the enhanced sentencing regime in detail and contrast it with relevant aspects of the aggravated offences regime. Doing so leads us to the provisional conclusion that section 146 of the CJA 2003 could provide an adequate response to offences involving hostility on the grounds of disability, sexual orientation and transgender identity, if the provisions were properly applied and resulted in an adequate record of the wrongdoing. We therefore make two proposals:

(1) a new Sentencing Council guideline dealing exclusively with hostility based on any of the five characteristics under sections 145 and 146 of the CJA 2003;

(2) the recording of the application of sections 145 or 146 of the CJA 2003 on the offender's criminal record and on the Police National Computer.

1.32 We then turn to consider the case for extending the aggravated offences to include hostility based on disability, sexual orientation and transgender identity. We begin by asking whether these offences, if extended, would deal with the nature and prevalence of offending against these groups. We note that one of the inherent limitations of the aggravated offences is that they apply only to the fixed list of basic offences. It lies beyond our terms of reference to amend that list. The result would be that even if the aggravated offences were extended to include all five protected characteristics, a significant proportion of hostility-driven crime against disabled people would be untouched by new aggravated offences. We then consider the extent to which existing criminal offences and initiatives short of criminalisation are sufficient to address the conduct which new aggravated offences would capture. Finally, we ask whether new aggravated offences[31] are necessary to provide a label that adequately reflects the criminality of hostility-driven offending on the basis of disability, sexual orientation and transgender identity.

1.33 Our analysis leads us to offer provisional proposals for new aggravated offences. We ask consultees to consider whether these are necessary as an alternative to sentencing reform or as an addition to such reform. We then move on to consider in more detail the possible definitions of "disability", "sexual orientation" and "transgender identity" that might form the basis of any new aggravated offences.

[30] These concerns were echoed in the Criminal Justice Joint Inspection (Her Majesty's Crown Prosecution Service Inspectorate, Her Majesty's Inspectorate of Constabulary, Her Majesty's Inspectorate of Probation) report, *Living in a Different World: joint review of disability hate crime* (Mar 2013), http://www.hmcpsi.gov.uk/cjji/ (last visited 19 Jun 2013).

[31] By "new" offences we mean newly enacted amendments to the existing legislation by which the aggravated offences would be extended to criminalise the same conduct, in relation to additional groups.

We make provisional proposals in relation to these definitions and seek consultees' views on other elements that would feature in any new aggravated offences applicable to hostility on these grounds.

Chapter 4 - Stirring up offences: provisional proposals

1.34 In Chapter 4, we consider the case for extending the stirring up offences to include disability and transgender identity. We point out that in our initial discussions with stakeholders, the need for new stirring up offences[32] 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 respond more effectively to harassment and cyber-bullying.

1.35 We begin by considering the case in principle for extending the stirring up offences to include disability and transgender identity. As with the aggravated offences, we consider the extent to which existing criminal offences and initiatives short of criminalisation deal with the conduct that new stirring up offences would be designed to address. We then explore 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 also consider what impact criminalisation would have on other rights and freedoms. In particular, we examine whether new stirring up offences would amount to a justifiable interference with the right to freedom of expression under article 10 of the European Convention on Human Rights ("ECHR").[33] Concerns about this were at the forefront of the debates on whether the original racial hatred offences in the POA 1986 should be extended to cover hatred on grounds of religion and sexual orientation.[34]

1.36 In light of this analysis, we express the provisional view that there is a case in principle for extending the stirring up offences to include the stirring up of hatred on grounds of disability and transgender identity. Despite a considerable degree of overlap between the types of conduct addressed by existing criminal offences and that which would fall to be addressed by new stirring up offences, we conclude that stirring up offences would be different in kind. They would capture a unique, specific and grave type of wrongdoing not 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. Having identified this "gap" in the current criminal law, we then ask whether there is a practical need for these new offences, highlighting that the evidence on this is inconclusive.

[32] Again, by "new" offences we mean extended variants of the existing stirring up offences, to cover hatred against the additional groups of disabled and transgender people. These offences would be based either on the broader racial hatred model or the narrower model applicable to religion and sexual orientation.

[33] Appendix A contains a more detailed analysis of the interface between art 10 ECHR and the offences under consideration in this paper.

[34] These debates are detailed separately in Appendix B, dealing with the legislative history of all three regimes.

1.37 We then offer provisional proposals on appropriate models for any new offences. We examine whether they should be based on the broad racial hatred model of the stirring up offence or the narrower variants enacted for the stirring up of hatred on grounds of religion and sexual orientation. As in Chapter 3, we address questions about defining "disability" and "transgender" in respect of any new offences. We also examine the need for freedom of expression protections in any new stirring up offences.

1.38 Finally in Chapter 4, we return to the enhanced sentencing regime. We remind consultees that, although there are currently no offences of stirring up hatred on the grounds of disability or transgender identity, some of the conduct which would be targeted by any new stirring up offences is already addressed by existing offences (for example, other public order offences). Enhanced sentences under section 146 could therefore be applied to conduct prosecuted under those offences, as they could to any other hostility-based offending against the groups concerned.

1.39 Our provisional view, however, is that the enhanced sentencing regime under section 146 is not a sufficient solution to the problem, primarily because in cases where the conduct in issue is not already criminal, section 146 cannot bite.

Purpose of the consultation

1.40 The purpose of this consultation is to invite responses that will inform an analysis of the case for extending the current aggravated and stirring up offences. We make provisional proposals in this paper but consultees should not assume that we have reached a final or settled position on the case for extending the existing offences: the proposals are *provisional*. We also ask a series of further open questions designed to inform our future policies. We will review our provisional proposals in light of the responses we receive and take these into account when we formulate our policy. After the consultation period, we will publish our final report and recommendations. We expect to do so in spring 2014.

Appendices

1.41 To supplement this consultation paper, we have produced a number of appendices covering: the relationship between the statutory hate crime regime and the right to freedom of expression under the European Convention on Human Rights (ECHR); the history of hate crime legislation in England and Wales; and the potential impact of implementing our provisional proposals. A separate paper has also been produced by Dr John Stanton-Ife dealing with the wider legal theory underpinning hate crime legislation and its relevance to the questions of extension considered by this project. All of these documents are available on our website.[35]

ACKNOWLEDGMENTS

1.42 We would like to thank the organisations referred to in paragraph 1.27 above for their input into our preliminary fact-finding work. We would also like to thank the following individuals for their early advice on hate crime law and other aspects of this project: Professor Peter Alldridge, Professor Michael Cavadino, Professor

[35] http://lawcommission.justice.gov.uk/areas/hate_crime.htm

Antony Duff, Dr Kay Goodall, Dr Paul Iganski, Dr Rachael Lofthouse, Bridget Penhale, Professor Michael Salter, Professor Richard Taylor, Dr Mark Walters. Finally we would like to thank Dr John Stanton-Ife for producing the separate theory paper referred to above, available on the website.[36]

[36] http://lawcommission.justice.gov.uk/areas/hate_crime.htm

CHAPTER 2
CURRENT LAW

INTRODUCTION

2.1 As we explained in Chapter 1, the law currently responds to hate crime in three ways: through the use of aggravated offences, offences of stirring up hatred and enhanced sentencing provisions. This chapter examines the scope of the existing law in these three areas.[1]

2.2 We begin with an explanation of the offences aggravated by hostility under the Crime and Disorder Act 1998 ("CDA 1998").[2] We set out what is required to establish that an offence demonstrates, or was motivated by, hostility on grounds of race or religion, and examine how the offences are used in practice.[3]

2.3 We then consider the current law on stirring up hatred against groups under the Public Order Act 1986 ("POA 1986"). We discuss the law relating to the stirring up of racial hatred and the later additions to the Act dealing with hatred on grounds of religion and sexual orientation.[4] We also consider procedural aspects common to the stirring up offences and some ancillary issues.[5]

2.4 Finally, we consider the enhanced sentencing provisions under sections 145 and 146 of the Criminal Justice Act 2003 ("CJA 2003").[6] We also examine the sentencing regime for murder under schedule 21 of the CJA 2003, in so far as it is relevant to hate crime,[7] and some general principles of sentencing which are also relevant for our purposes.[8]

THE AGGRAVATED OFFENCES

2.5 The aggravated offences are aggravated forms of certain "basic offences" (as we shall call them), such as assault and criminal damage. They carry longer maximum sentences than their basic equivalents. There are currently two

1 We consider in Chs 3 and 4 how the law might be extended to cover grounds of disability, sexual orientation or transgender identity in so far as they are not already covered. Detailed examination of the theory behind hate crime offences, their history and the implications under the European Convention on Human Rights ("ECHR") for hate crime legislation can be found in Appendices A, B and C, available on our website: http://lawcommission.justice.gov.uk/areas/hate_crime.htm.

2 See para 2.5 and following below.

3 See para 2.10 and following below.

4 See para 2.51 and following below.

5 See para 2.126 and following below.

6 See para 2.129 and following below.

7 See para 2.169 and following below.

8 See para 2.176 and following below.

grounds on which the basic offences can be aggravated: hostility based on race and hostility based on religion.[9]

2.6 Section 28(1) of the CDA 1998 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 basic offences

2.7 The basic offences that can be aggravated are:

(1) malicious wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861;[10]

(2) assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861;[11]

(3) common assault;[12]

(4) destroying or damaging property contrary to section 1(1) of the Criminal Damage Act 1971;[13]

(5) threatening, abusive or insulting conduct towards someone with intent to cause that person to believe that violence will be used against them or another, or to provoke the use of violence by that person or another, or where that person is likely to believe that such violence will be used or it is likely that such violence will be provoked contrary to section 4 of the Public Order Act 1986;[14]

(6) threatening, abusive or insulting conduct intended to cause harassment, alarm or distress contrary to section 4A of the Public Order Act 1986;[15]

(7) threatening, abusive or insulting conduct likely to cause harassment, alarm or distress contrary to section 5 of the Public Order Act 1986;[16]

[9] Racially aggravated offences were introduced by ss 28 to 32 of the CDA 1998. Religiously aggravated offences were added to CDA 1998 by the Anti-terrorism, Crime and Security Act 2001, s 39.

[10] CDA 1998, s 29(1)(a).

[11] CDA 1998, s 29 (1)(b).

[12] CDA 1998, s 29(1)(c).

[13] CDA 1998, s 30(1).

[14] CDA 1998, s 31(1)(a).

[15] CDA 1998, s 31(1)(b).

(8) harassment and stalking contrary to sections 2 and 2A of the Protection from Harassment Act 1997;[17] 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.[18]

2.8 Parliament's selection in the CDA 1998 of those basic offences capable of being charged as aggravated offences was based on the main types of crime likely to be aggravated by hostility, but does not include offences which already carry a maximum sentence of life imprisonment, as no higher penalty is possible. All other cases in which there is racial or religious aggravation are dealt with at the sentencing stage under section 145 of the CJA 2003.[19]

2.9 A conviction for an aggravated offence necessarily requires the court to be satisfied that the basic offence has been committed. For example, if the defendant is charged with racially aggravated criminal damage, the prosecution must prove that the defendant intentionally or recklessly committed criminal damage and also that the defendant demonstrated, or was motivated by, racial hostility. If the prosecution fails to prove the aggravated element, a conviction for the basic offence can sometimes be returned.[20]

The two limbs of hostility

2.10 The racial or religious aggravation element of an offence may take one of two alternative forms,[21] as set out in the two limbs of section 28(1) above. Under limb (a), the prosecution must prove the outward demonstration of hostility, but no subjective intent or motivation is required: it is an objective test. Limb (b), on

[16] CDA 1998, s 31(1)(c). Section 57 of the Crime and Courts Act 2013, when brought into force, will remove the word "insulting" from section 5 of the POA 1986. See P Strickland and D Douse, "*Insulting words or behaviour": Section 5 of the Public Order Act 1986* (Jan 2013) SN/HA/5760. Section 6(4) of the POA 1986 provides that "a person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly".

[17] CDA 1998, s 32(1)(a).

[18] CDA 1998, s 32(1)(b).

[19] See para 2.136 and following below.

[20] Practice here differs in the Crown and magistrates' courts as explained at para 2.42 and following below. The CPS recommends having separate counts on the indictment, one for the basic offence and one for the aggravated offence, to ensure that if the prosecution fails under the aggravated variant, a conviction may nevertheless be returned for the basic offence.

[21] *Cox* [2010] EWCA Crim 1375, at [4].

the other hand, requires proof of the defendant's subjective motivation for committing the offence.[22]

2.11 The prosecution must make clear on which of the two limbs it is relying.[23] If evidence is available to support both limbs, the prosecution is free to rely on both provided this is made clear,[24] but in practice it is likely that a single charge based on one limb of the offence supported by the strongest evidence would be selected.

2.12 There has clearly been some misunderstanding in some lower courts of the difference between limbs (a) and (b), as demonstrated by the case of *SH.*[25] The judge had focused on the defendant's motivation for referring to a Nigerian national as a "black monkey" (section 28(1)(b)), rather than the objective demonstration of hostility (section 28(1)(a)). There had been no attempt to elucidate what section 28(1)(a) meant.[26]

Hostility

2.13 "Hostility" is not defined in the 1998 Act and there is no standard legal definition. The ordinary dictionary definition of "hostile" includes being "unfriendly", "adverse" or "antagonistic". Ultimately, it will be a matter for the fact-finder to decide whether a defendant has demonstrated, or been motivated by, "hostility". Burney and Rose suggest that a jury would probably accept that, while clearly less strong a word than "hatred", "hostility" must imply a degree of animosity, rather than "mere prejudice".[27]

[22] *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833. It was held in this case that the magistrates had "misdirected themselves on the law because they treated [*DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb)] as authority for the proposition that a subjective motivation of racial hostility had to be proved for each limb, which it is not", at [17] by Ouseley J. The comment of Richards LJ in the case of *Johnson v DPP* [2008] EWHC 509 (Admin), *The Times* 9 Apr 2008, misapplying *Howard* to s 28(1)(a), was similarly disapproved at [20]. See also *G v DPP* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313.

[23] *DPP v Dykes* [2008] EWHC 2775 (Admin), (2009) 173 *Justice of the Peace* 88.

[24] See also *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] by Ouseley J; and *G v DPP* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313, which established that the Crown are entitled to rely on both limbs of section 28(1) – "It is not necessary, nor necessarily the case, that a racially aggravated element of an offence has to be packed into one or other [limb] to the exclusion of the other", by May LJ at [15].

[25] [2010] EWCA Crim 1931, [2011] 1 Cr App R 14.

[26] Other examples include: *DPP v McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar); *DPP v Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan); *DPP v Green* [2004] EWHC 1225 (Admin), *The Times* 7 Jul 2004; *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833.

[27] E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) p 14. However, the CPS guidance on the distinction between vulnerability and hostility in the context of disability hate crime states that "in the absence of a precise legal definition of hostility, consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, contempt, prejudice, unfriendliness, antagonism, resentment, and dislike." Crown Prosecution Service, Disability Hate Crime - Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

Limb (a): "Demonstrates hostility"

What constitutes a demonstration of hostility?

2.14 The demonstration of hostility will tend to involve words[28] or gestures, but may be manifested in other ways, for example, by wearing insignia such as a swastika or singing certain songs.[29]

2.15 Section 28(1)(a) is concerned solely with the objective question of whether racial or religious hostility has been demonstrated.[30] In *DPP v Woods*,[31] the defendant had called the victim a "black bastard" prior to an assault. The motivation for the offence was the victim's refusal to admit the defendant's companion into a night club, but there was nonetheless a demonstration of racial hostility within the ambit of section 28(1)(a).

2.16 The victim's perception of the incident is not relevant to the question of whether there has been a demonstration of hostility. In *Woods*, Maurice Kay J noted that:

> The fact that the person to whom the words were directed may have had a personality which enables him to take a resilient or broad shouldered view of the situation is irrelevant to the question which arises under section 28(1)(a) … .[32]

2.17 Also irrelevant is the fact that the defendant's frame of mind was such that, while committing the basic offence, he or she would have used abusive terms towards *any* person by reference to other personal characteristics.[33]

2.18 Whether hostility was demonstrated will ultimately be a question of fact for the relevant tribunal to decide in light of all the circumstances.[34] In *DPP v Pal,* Simon Brown LJ stated that the use of racially abusive insults will ordinarily be found sufficient to prove demonstration of racial hostility.[35]

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

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

[30] See, eg, *DPP v Green* [2004] EWHC 1225 (Admin), *The Times* 7 Jul 2004; *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833.

[31] [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan).

[32] *DPP v Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan) at [10].

[33] *DPP v Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan) at [13].

[34] See *Johnson v DPP* [2008] EWHC 509 (Admin), *The Times* 9 Apr 2008 at [11]. In *SH* [2010] EWCA Crim 1931, [2011] 1 Cr App R 14 at [31], the Court of Appeal held that it was for the jury to decide, on all the evidence, whether referring to a Nigerian national as a "black monkey" constituted a demonstration of hostility based on race or mere vulgar abuse unconnected with hostility.

[35] *DPP v Pal* [2000] Criminal Law Review 756 at [16].

When must hostility be demonstrated?

2.19 The word "immediately" in section 28(1)(a) qualifies both "before" and "after".[36] Hostility must therefore be demonstrated either at the time of committing the basic offence or immediately before or immediately after doing so.

2.20 In *Babbs*,[37] 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.[38] The question for the jury was whether or not the words used had so affected the subsequent behaviour.[39]

2.21 Whether the target of hostility needs to be present at the time of the offence depends on the nature of the basic offence. For example, the target of racially aggravated criminal damage does not need to be present, whereas the target of an assault does.[40]

"Presumed membership"

2.22 In accordance with section 28(1)(a), it is sufficient that the hostility is demonstrated towards the victim based on their "presumed membership" of a racial or religious group. "Presumed" means presumed by the offender.[41] Thus, where words are used, these need not refer explicitly to the group to which the victim belongs, as when the defendant uses a racial slur in the mistaken belief that the victim belongs to that group. What matters is that the defendant has formed a view about the victim's racial or religious group.[42]

2.23 In accordance with section 28(2), "membership", in relation to 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. For example, in *DPP v Pal,* Simon Brown LJ suggested that a racially aggravated offence would be committed 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.[43]

[36] *Parry v DPP* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) at [19].

[37] [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct).

[38] *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8]. Compare to *Parry v DPP* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) where s 28(1)(a) was not satisfied because there was no sufficient connection between the words used and the offence. The defendant had left the scene and used the relevant words some 20 minutes after causing criminal damage.

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

[40] Compare *Parry v DPP* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) and *DPP v Dykes* [2008] EWHC 2775 (Admin), (2009) 173 *Justice of the Peace* 88.

[41] CDA 1998, s 28(2).

[42] 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).

[43] *DPP v Pal* [2000] Criminal Law Review 756 at [13].

2.24 In *Pal,* the defendant had called the victim a "brown Englishman" and a "white man's arse licker". The inference from the words used was that the defendant was accusing the victim of betraying his own racial group, by doing the bidding of another racial group. Both the defendant and the victim were of Asian origin. The court held that no racially aggravated offence was committed in the circumstances.

2.25 In *Rogers*, Baroness Hale commented that it was difficult to understand why, in *Pal*, the defendant's actions did not demonstrate hostility based on the victim's presumed association with white people within the meaning of section 28(2).[44] Simon Brown LJ had found this argument to be "an impossibly far-fetched submission to make on the facts of this case".[45] His Lordship felt it unreal to suggest that the defendant was anti-white men, taking account of the fact that the defendant had been in a group with two white people just before the incident occurred. Furthermore, it could still be argued that the basis for hostility was the victim's conduct, not his race or affinity with members of other races.[46] In *McFarlane*, the decision in *Pal* was said to be heavily dependent on its facts.[47]

2.26 Hostility can be demonstrated by the defendant towards somebody of his or her own racial or religious group.[48]

Limb (b): "Motivated by hostility"

What constitutes motivation?

2.27 Section 28(1)(b) turns on the defendant's subjective motivation. The defendant must be proved to have committed the basic offence wholly or partly because of hostility towards members of a racial or religious group based on their membership of that group. An important aspect of this provision is that racial or religious hostility does not need to be the sole motivation behind the commission of the basic offence.

2.28 Where the defendant's racial hostility was not in any way the motivation for the offence, the offence cannot be brought within the ambit of section 28(1)(b). In *DPP v Howard*,[49] for example, the sole motivation for the defendant's hostility was his intense dislike of his neighbours, irrespective of their race. Moses LJ said:

> The words of section 28 are carefully drafted. They require focus upon the motivation for the particular offence in question. In those circumstances the prosecutors should be careful not to deploy [the aggravated offences] where offensive words have been used, but in themselves have not in any way been the motivation for the particular offence with which a defendant is charged. It diminishes the gravity of

[44] *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [15] by Baroness Hale.

[45] *DPP v Pal* [2000] Criminal Law Review 756 at [13].

[46] *DPP v Pal* [2000] Criminal Law Review 756 at [6].

[47] *DPP v McFarlane* [2002] EWHC Admin 485, [2002] All ER (D) 78 (Mar) at [13].

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

[49] [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

> this offence to use it in circumstances where it is unnecessary to do so and where plainly it cannot be proved.[50]

When must the motivation occur?

2.29 In considering the time at which hostility arises, offences under section 28(1)(b) are different from those under section 28(1)(a). In *G v DPP,*[51] May LJ said:

> Section 28(1)(a) essentially requires proof of what the offender did, and what he or she did at the time of committing the offence or at a time closely related to it. The motive, in my judgment, is at least capable of being established by evidence relating to what the defendant may have said or done on another or other occasions.[52]

2.30 The motivation of racial or religious hostility may, therefore, be proved by evidence relating to conduct at any time before, or during, the commission of the offence.[53] It may also be proved by reference to things said or done by the defendant on separate occasions,[54] provided that the prosecution can establish relevance and admissibility either at common law or under the bad character provisions of the CJA 2003 as appropriate.[55]

How is motivation proved?

2.31 Whether the defendant's motivation was wholly or in part racial or religious is a question of fact. In *Kendall v DPP*[56] it was held that the magistrates had been entitled to find that displaying posters of black men who had been convicted of manslaughter with the title "Illegal Immigrant Murder Scum" was evidence of racial motive, notwithstanding the defendant's argument that the purpose was to increase support for the BNP.

2.32 However, there can be practical problems associated with proving motivation. The Crown Prosecution Service Guidance on Prosecuting Racist and Religious Crime states that establishing motivation

> may prove more difficult [than establishing demonstration of hostility] in practice. In the absence of a clear statement by the accused that his/her actions were motivated by his hostility to his victim based on his race or religious belief, for example, an admission under caution, how can motive be shown? 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

[50] *DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb) at [12].

[51] [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313.

[52] *G v DPP* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313 at [14] by May LJ.

[53] The evidence adduced to establish motivation will often involve the kind of demonstration of hostility captured by section 28(1)(a). See *Taylor v DPP* [2006] EWHC 1202 (Admin), (2006) 170 *Justice of the Peace* 485.

[54] *G v DPP* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313 at [14].

[55] CJA 2003, ss 98 to 112.

[56] [2008] EWHC 1848 (Admin), [2008] All ER (D) 356 (Jun).

evidence of expressed racist views in the past might, depending on the facts, be admissible in evidence.[57]

2.33 Even though evidence of the defendant's conduct on other occasions can be used to show motivation, it remains challenging for the prosecution to prove what was in the defendant's mind. It may be more difficult to prove *why* a defendant committed an offence than, for example, whether they intended the offence or foresaw the consequences of their conduct. For this reason, it is more common for prosecutions to be pursued under section 28(1)(a).[58]

Need a victim experience the hostility which motivated the defendant?

2.34 Section 28(1)(b) is concerned with the defendant's subjective motivations, whether or not a member or presumed member of the relevant racial or religious group is present at the time of the commission of the basic offence. The provision is not concerned with any relationship between the victim of the basic offence and the racial or religious element of the aggravated offence. In *Taylor v DPP*,[59] the Divisional Court upheld the defendant's conviction for a racially aggravated public order offence. During a confrontation with her boyfriend, the defendant had uttered a stream of racist abuse about a woman she alleged that her boyfriend had slept with. The woman concerned was not present, but it was clear that the motivation for the defendant's conduct was, at least in part, hostility towards the woman because she came from a different racial group.

Aggravating circumstances common to limbs (a) and (b)

Hostility based on other factors

2.35 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. However where the racial or religious hostility of the accused was not in any way the motivation for the offence it could not come within section 28(1)(b).[60]

2.36 It is irrelevant therefore that the defendant may have had some additional reason for his or her behaviour such as the victim parking the defendant's space,[61] the desire to avoid arrest,[62] or the victim's presumed membership of some other group towards which the defendant was hostile (for example, parking attendants[63]). Likewise, in *DPP v M*,[64] the magistrates had been wrong to treat hostility towards a racial group and a dispute about paying for food as two mutually exclusive motivations, rather than capable of being complementary.

[57] Crown Prosecution Service, *Racist and Religious Crime – CPS Guidance,* http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ (last visited 19 Jun 2013).

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

[59] [2006] EWHC 1202 (Admin), (2006) 170 *Justice of the Peace* 485.

[60] *DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

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

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

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

[64] [2004] EWHC 1453, [2004] 1 WLR 2758.

Meaning of "racial group"

2.37 "Racial group" is defined in section 28(4) of the CDA 1998 as a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.[65] Jews, Sikhs,[66] Romany gypsies,[67] and Irish Travellers[68] are recognised racial groups based on their ethnic origins.[69]

2.38 In *Rogers*, the House of Lords adopted a flexible and non-technical approach to the definition, such that it encompasses terms of exclusion, such as "foreigners".[70] Baroness Hale held that a flexible approach to interpretation was consistent with the underlying policy aims of the statute:

> The mischief 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 more deeply hurtful, damaging and disrespectful to the victims than the simple version of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.[71]

2.39 In the earlier case of *DPP v M*,[72] Auld LJ held that the question of whether the word "foreigner" was capable of describing a racial group depended on the context. In that case, the adjective "bloody" applied to the word "foreigners" was held to demonstrate hostility based on presumed membership of a racial group. In *Attorney General's Reference (No 4 of 2004)*, the Court of Appeal held that "someone who is an immigrant to this country and therefore non-British" could be a member of a racial group within section 28(4).[73] In *White*, the word "African" demonstrated hostility to a racial group. It was held that words are to be construed as generally used in the jurisdiction of England and Wales.[74]

[65] This definition is derived from that used in the Race Relations Act 1976 and is also used in section 17 of the Public Order Act 1986. Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2013) ("Blackstone's") para B11.150.

[66] *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 2 WLR 620.

[67] *Commission for Racial Equality v Dutton* [1989] QB 783, [1989] 2 WLR 17.

[68] *O'Leary v Punch Retail* (29 Aug 2000) (unreported) as cited in Blackstone's para B11.150.

[69] Blackstone's para B11.150.

[70] *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12].

[71] *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12] by Baroness Hale. See also the Court of Appeal's statement in the earlier case of *Saunders* [2000] 1 Cr App R 458, 2 Cr App R (S) 71 at [13]: "One of the most important lessons of this century … is that racism must not be allowed to flourish … it cannot coexist with fairness and justice. It is incompatible with democratic civilisation. The courts must do all they can, in accordance with Parliament's recently expressed intention, to convey that message clearly, by the sentences which they pass in relation to racially aggravated offences. Those who indulge in racially aggravated violence must expect to be punished severely in order to discourage the repetition of that behaviour, by them or others".

[72] [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758.

[73] [2005] EWCA Crim 889, [2005] 1 WLR 2810 at [24].

[74] [2001] EWCA Crim 216, [2001] 1 WLR 1352 at [17].

Meaning of "religious group"

2.40 "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. This is a wider definition than has been adopted in some other religious contexts, for instance, under ecclesiastical law.[75] However, it is narrower than the definition of "religion or belief" used in the Equality Act 2010[76] and article 9 of the ECHR.[77] An offence motivated by hostility towards a group defined by non-religious beliefs or philosophies (for example, vegetarianism) would not be a religiously aggravated offence.[78]

2.41 The inclusion of groups defined by a lack of religious beliefs means that if, for example, the defendant assaults the victim because the victim rejects all religious belief, the defendant would be guilty of a religiously aggravated offence.[79] By analogy with the interpretation of "racial group", it seems that terms of exclusion, such as "gentile", will suffice. The wide definition of "religion" might also include a cult where the victim claims some special relationship with the supernatural.[80] However, this would depend on whether the cult's beliefs can be said to amount to "religious beliefs".

Alternative verdicts and alternative charges

2.42 Alternative verdicts may be entered in respect of the aggravated offences. This means that, if the racially or religiously aggravated element of the offence is not proven, the tribunal may still find the defendant guilty of the basic offence. In the Crown Court, all aggravated offences triable on indictment may have verdicts returned for the alternative non-aggravated offences.[81]

2.43 In the magistrates' courts, there is no power to return an alternative verdict of guilty of a lesser or alternative offence. If only the racially aggravated offence is charged, and the racial aggravation is not proven, the defendant will be acquitted even if there is proof of the basic offence. For this reason the Crown Prosecution Service's Guidance on Racist and Religious Crime recommends considering charging both the basic and the racially or religiously aggravated offences.[82]

[75] See *Registrar General ex parte Segerdal* [1970] 2 QB 697, [1970] 3 WLR 479.

[76] Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief: Equality Act 2010, s 10.

[77] The right to freedom of thought, conscience and religion includes the right to change religion or belief and the right to manifest religion or belief: art 9 ECHR.

[78] N Addison *Religious Discrimination and Hatred Law* (2007) p 126.

[79] Blackstone's para B11.150.

[80] A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: theory and doctrine* (4th ed 2010) p 452.

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

[82] Crown Prosecution Service, *Racist and Religious Crime – CPS Guidance,* http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a15 (last visited 19 Jun 2013).

2.44 It has been suggested that there may be a disadvantage to the prosecution in specifying alternative charges in that it weakens the case for the aggravated offence and invites the defence to press for the aggravated version to be withdrawn in exchange for a plea to the substantive offence.[83] There is some evidence that a significant proportion of racial aggravation cases were either withdrawn entirely or reduced to the basic offence when the aggravated offences were first introduced.[84] However, since 2003, it has been established CPS policy that if the defendant is charged with both the aggravated and basic offence, a plea to the basic offence will generally not be accepted unless there are proper reasons for doing so.[85] Examples of such reasons could include the unavailability of evidence needed to prove the aggravating factor.

2.45 If the defendant has been charged and convicted of the basic offence, in circumstances where the aggravated version could have been charged but was not, evidence of racial or religious aggravation should not be taken into account in sentencing.[86] The same is true if alternative charges are brought and the defendant is found guilty of the basic offence, but not the aggravated form of the offence.[87] This makes it all the more important that, for those basic offences covered by the regime, where evidence of racial or religious hostility exists, prosecutors charge the aggravated form of the offence. Evidence of racial or religious hostility can be taken as an aggravating factor in sentencing for all offences which cannot be aggravated under the CDA 1998.[88]

2.46 A defendant, who, on the same set of facts, is charged with an aggravated offence and, alternatively, the basic offence, cannot be convicted of both offences.[89]

[83] E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) p 80.

[84] E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) ch 6.

[85] Crown Prosecution Service, *Racist and Religious Crime – CPS prosecution policy,* http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a30 (last visited 19 Jun 2013). If the prosecution has rejected a guilty plea to the basic offence, the plea must be treated as of no effect and withdrawn: *Al-Tamimi* [2011] EWCA Crim 1123.

[86] Blackstone's para E1.16. In *McGillivray* [2005] EWCA Crim 604, [2005] Cr App R (S) 60 at [5], it was held that "If it were appropriate to sentence the appellant on the basis of a racially aggravated assault, it was necessary for him to be convicted of or to plead guilty to that offence, which did not happen".

[87] *McGillivray* [2005] EWCA Crim 604, [2005] Cr App R (S) 60. See para 2.136 below.

[88] CJA 2003, s 145. See discussion at para 2.136 and following below.

[89] In *R (on the application of Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin), (2013) 177 *Justice of the Peace* 265, the defendant had been found guilty by magistrates of both a racially aggravated public order offence and the basic offence. Previous cases supported the proposition that the magistrates could convict of both offences. However, the Divisional Court granted the defendant's application for judicial review on the basis that for the defendant to be convicted twice for a single wrong was unfair and disproportionate. It was held that, in such circumstances, the magistrates should adjourn the basic charge before conviction, so that if an appeal succeeded against conviction on the aggravated charge, the basic charge could subsequently be dealt with. If that caused any practical difficulty, it could not override the principle that a person should be convicted only once for one wrong.

Sentencing

2.47 The maximum custodial penalties for the basic and aggravated offences (with the exception of the offences of behaviour likely to cause harassment, alarm or distress) are set out in the table below.

Basic Offence	Maximum Penalty	Aggravated Offence	Maximum Penalty
Malicious wounding	5 years	Aggravated malicious wounding	7 years
Actual bodily harm	5 years	Aggravated actual bodily harm	7 years
Common assault	6 months	Aggravated common assault	2 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 distress	6 months	Aggravated causing intentional harassment, alarm or distress	2 years
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

2.48 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.[90] The sentencer should first determine what the sentence would have been for the basic offence (and should state this publicly), before adjusting that notional sentence to take account of the aggravation.[91] The aggravated element may take the sentence past the custody threshold. The guidance further stated that no fixed distinction is to be made between cases of "demonstration" (limb (a)) and cases of "motivation" (limb (b)) for the purposes of sentencing, and that

[90] Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences* (Jul 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 s 29 of the CDA 1998.

[91] SAP guidelines para 36.

regard should instead be had to a number of factors which would indicate either a high or a low level of racial aggravation.[92]

2.49 These recommendations have largely been put into practice by the Court of Appeal.[93] The court has 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, stating simply that the court must "reach the appropriate total sentence, having regard to the circumstances of the particular case".[94] 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.[95] Certain cases seem to indicate that the amount by which the sentence can be increased is limited by reference to the difference between the maximum offence for the basic and aggravated offences. In relation to assault occasioning actual bodily harm, for example, the maximum penalty for the aggravated offence is seven years, compared to five years for the basic offence. As a result, the court has said, the additional element for racial or religious aggravation cannot exceed two years.[96]

2.50 The Attorney General has the power to refer to the Court of Appeal (with leave) a sentence from the Crown Court which appears to be unduly lenient for it to be reviewed by the Court of Appeal. This power only applies where the offence for which the sentence was passed is (a) triable only on indictment, or (b) appears in a limited list of certain either-way offences.[97] This latter list includes racially and religiously aggravated offences.[98] Therefore, all of the aggravated offences can be subject to review, provided that they are sentenced in the Crown Court. However, none of the basic offences can be reviewed since they are all either summary offences or non-applicable triable either way offences. The Attorney General's power does not apply to aggravated sentences passed under sections 145 or 146 of the CJA 2003 (which we consider below[99]) in and of themselves. Thus, an aggravated sentence would be referable as unduly lenient only if it was passed for an indictable only offence or one of the listed either way offences.

[92] SAP guidelines para 41. The factors indicating a high level of racial aggravation included, among others: 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.

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

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

[95] *Bailey* [2011] EWCA Crim 1979 concerned racist comments spray painted onto the victim's vehicle. The Court of Appeal stated that the case was not one of criminal damage plus an element of racial aggravation – it was racist abuse committed by way of criminal damage. In such a case the two-stage approach would not produce an appropriate sentence.

[96] *Reil* [2006] EWCA Crim 3141at [12]. See, however, the SAP guidelines at paras 19 to 23, where the SAP suggests that the differential increases in the maximum penalties, as set by Parliament, carry no special significance.

[97] Criminal Justice Act 1988, s 35(3) and s 36(1).

[98] Criminal Justice Act 1988 (Review of Sentencing) Order 2006, sch 1.

[99] See para 2.129 and following below.

STIRRING UP RACIAL HATRED – OFFENCES UNDER THE PUBLIC ORDER ACT 1986

Introduction

2.51 Part 3 of the POA 1986 introduced six offences dealing with words, behaviour, visual images, sounds, theatrical productions or other material of a threatening, abusive or insulting nature where these are intended, or likely, to stir up racial hatred. The POA 1986 was later amended to introduce similar offences – but with important differences – first with regard to religious hatred (with effect from 1 October 2007[100]) and then with regard to hatred on grounds of sexual orientation (with effect from 23 March 2010[101]). It is important to note that the stirring up offences represent an entirely separate regime from the aggravated offences and the enhanced sentencing provisions. The aggravated offences and enhanced sentencing provisions apply to pre-existing criminal offences, whereas the stirring up provisions create specific new offences of incitement to hatred.

2.52 In this section, we set out the law relating to stirring up racial hatred first. In the next section, we describe the later additions to the POA 1986 dealing with hatred on grounds of religion and sexual orientation. Finally, we consider procedural aspects common to all three sets of offences and some ancillary issues. In our analysis, we deal only with the general nature of the stirring up offences, focusing on matters we see as important to the question whether they should be extended to cover hatred on grounds of disability or transgender identity, and if so in what form. This approach reflects our terms of reference, discussed in more detail in Chapter 1.[102]

Stirring up racial hatred: common features of the offences

2.53 There are six offences covering a broad range of conduct.[103] In each offence the relevant conduct must involve the use of threatening, abusive or insulting words, behaviour or material. The prosecution must either show that the defendant intended by the relevant conduct to stir up racial hatred or that, having regard to all the circumstances, racial hatred was likely to be stirred up thereby. We will first examine some common features of the elements for all the offences, before turning to the specific features of each offence. As readers will note from what follows, the offences have a complex structure. Our terms of reference do not permit us to make proposals for amending the elements of the offences, but only to consider the case for their extension to disability and transgender identity.

[100] SI 2007 No 2490.

[101] SI 2010 No 712.

[102] See Ch 1 at para 1.6.

[103] There are mirroring offences (but with important differences as to mental element and as to freedom of expression), in relation to stirring up hatred on grounds of religion or sexual orientation.

Meaning of "threatening, abusive or insulting"

2.54 Whether words or conduct are "threatening, abusive or insulting" is a question of fact, to be decided on the basis of the facts in the case.[104] The words are to be given their ordinary meaning and whether they meet this test must be decided based on the impact such words, behaviour or material would be likely to have on a reasonable person.[105]

Meaning of "racial"

2.55 As with the aggravated offences, racial hatred is defined to mean hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.[106]

2.56 This definition is broad and has been applied widely by courts. The Court of Appeal has held[107] that the statutory language defining "racial group" must be given a broad, non-technical meaning and that the words in the definition are to be construed as they are generally used in England and Wales.[108]

Meaning of "hatred"

2.57 Hatred is not defined in the Act, but the Oxford English Dictionary defines hate as "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'". It is generally accepted that "hatred" is a stronger term than "hostility".[109]

2.58 The CPS guidance on the stirring up hatred provisions states:[110]

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

2.59 Therefore, the expression of political views expounding policies of a racially discriminatory nature but not intended or likely to stir up hatred against a racial

[104] See *Cakmak* [2002] EWCA Crim 500, [2002] Cr App R 10, regarding the objective test to be applied when the offence involves threatening words or behaviour. This case concerned a threat to destroy or damage property under the Criminal Damage Act 1971.

[105] *Brutus v Cozens* [1973] AC 854, [1972] 3 WLR 521 and *DPP v Clarke* (1991) 94 Cr App R 359, (1991) 156 *Justice of the Peace* 267.

[106] POA 1986, s 17. This broadly follows the definition of "racial group" in s 3(1) of the Race Relations Act 1976, repealed on October 1, 2010 by the Equality Act 2010, sch 27, part 1. See also Equality Act 2010, s 9.

[107] For example, in *White* [2001] EWCA Crim 216, [2001] 1 WLR 1352.

[108] A similar approach has been taken in respect of the aggravated offences, see para 2.37 above and following.

[109] 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".

[110] Crown Prosecution Service, *Racist and Religious Crime – CPS prosecution policy*, http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html (last visited19 Jun 2013).

group would not be an offence. However objectionable such views might be, the ECHR protects the right to shock, offend or disturb.[111]

Need an identifiable victim be threatened, abused or insulted?

2.60 It is enough that the words or conduct are threatening, abusive or insulting: the prosecution does not also need to prove that they in fact caused someone to feel threatened, abused or insulted.[112] In this respect the offence differs from that under section 4(1)(a) of the Public Order Act, which requires that the words are "directed at another person".[113] The stirring up offence is not expressly restricted in this way, although section 18(5), discussed at paragraph 2.65 below, implicitly requires consideration of the effect of threatening, abusive or insulting conduct on the likely audience.

2.61 Just as there is no need for the prosecution to identify a victim who has been threatened, abused or insulted, it is also unnecessary to show that hatred has in fact been stirred up.

The six offences

Use of words or behaviour, or display of written material: section 18

2.62 A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if he or she intends thereby to stir up racial hatred, or if having regard to all the circumstances, racial hatred is likely to be stirred up thereby.[114]

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.63 There are two alternative forms of the offence, both of which require the defendant to use or display threatening, abusive or insulting words, behaviour or material.

2.64 Under section 18(1)(a), the prosecution must prove:

(1) that the defendant used or displayed threatening, abusive or insulting words, behaviour or written material; and

(2) that the defendant intended thereby to stir up racial hatred.

The mental element may be difficult to prove in this context. There is no requirement that as a result of the defendant's behaviour anyone was incited to commit an offence. Nor is there a requirement to prove that anyone was in fact incited to hate another. What is required is that the defendant intended that people would be incited to racial hatred. It is that harm that the offence seeks to

[111] *Handyside v UK* App No 5493/72 at [49]. See Appendix A at para A.23.

[112] *Parkin v Norman* [1983] QB 92, [1982] 3 WLR 523. See R Card, *Public Order Law* (2000) p 188.

[113] *Winn v DPP* (1992) 156 *Justice of the Peace* 881, (1992)142 *New Law Journal* 527.

[114] POA 1986, s 18(1).

curb.[115] The general attitude or predisposition of the defendant towards persons in the group concerned may therefore be important in proving intention.[116]

2.65 If intention to stir up racial hatred is not alleged, an alternative form of the offence is available. Under section 18(1)(b), the prosecution must prove:

(1) that the defendant used or displayed threatening, abusive or insulting words, behaviour or written material;

(2) that the defendant intended the words, behaviour or material to be threatening, abusive or insulting or was aware that they might be threatening, abusive or insulting;[117] and

(3) that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

Awareness is tested subjectively by reference to the defendant's state of mind.[118] However, the test of what is "likely" is objective and the reference to "all the circumstances" shows this is a context-dependent question: the surrounding facts are important.[119] As with all the stirring up offences, there is no requirement to prove that racial hatred was in fact stirred up.

"WRITTEN MATERIAL"

2.66 Written material "includes any sign or other visible representation".[120] This has been held to extend to articles in electronic form and material disseminated through websites. "Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.[121]

IN PUBLIC OR IN PRIVATE

2.67 The section 18 offence can be committed in public or in private. However, no offence is committed where the words or behaviour are used, or the materials are displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. Furthermore, it is a defence[122] for a

[115] See Appendix B at para B.57 and following. The problem of racial discrimination and inequality was perceived as a risk to public order in that it created conditions in which harassment, violence and criminal damage could be targeted against racial groups and cause retaliation and social unrest.

[116] For this reason, prosecutors may seek to introduce extraneous evidence to prove intention, for example, material showing that the accused belonged to far right groups or possessed extremist literature.

[117] POA 1986, s 18(5).

[118] See *DPP v Clarke* (1991) 94 Cr App R 359, (1991) 156 *Justice of the Peace* 267, in the context of the offence under s 5 POA 1986. The defendant's liability is considered by reference to his or her state of mind as judged in the light of the whole of the evidence, including his or her own account if the defendant chooses to provide it.

[119] *Owens* (1986) CA (unreported).

[120] POA 1986, s 29.

[121] Interpretation Act 1978, s 5 and sch 1. For further consideration of this term, see Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.10 and following.

[122] POA 1986, s 18(4).

person accused under section 18 to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling. This affords some protection to the right to a private life and to freedom of expression under articles 8 and 10 of the ECHR.

2.68 The offence can be committed by the use of telephone, email and social media.[123] However, it is unclear whether the dwelling defence would apply if the offending words are perceived only by individuals who were in their own homes (for example, taking part in a video-conference or a discussion in an internet chat room), when the same words would clearly amount to an offence under section 18 if they had been said at a closed meeting in a pub or on work premises.

Publishing or distributing written material: section 19

2.69 This offence involves publishing or distributing written material that is threatening, abusive or insulting where the defendant intends to stir up racial hatred or where racial hatred is likely to be stirred up thereby.[124]

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.70 The offence under section 19 can be committed in one of two ways. Under section 19(1)(a), the prosecution must prove:

(1) that the defendant published or distributed written material that was threatening, abusive or insulting, and

(2) that the defendant intended thereby to stir up racial hatred.

2.71 Under section 19(1)(b), the prosecution must prove:

(1) that the defendant published or distributed written material that was threatening, abusive or insulting, and

(2) that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

Where the defendant is alleged to have committed the second form of the offence, under section 19(1)(b), his or her state of mind regarding the content of the publication is relevant to the defence in section 19(2).[125] We discuss the defence below. Under this second form of the offence there is no requirement that the defendant had any intention to stir up hatred or awareness of the likelihood of hatred being stirred up.

[123] Blackstone's, para B11.5.

[124] POA 1986, s 19(1).

[125] In contrast, under section 18(1)(b) above, the defendant's state of mind as to whether the conduct was threatening, abusive or insulting is treated as part of the mental element of the offence. See para 2.65 above.

"PUBLISHES"

2.72 Section 19 does not itself define what amounts to publishing and distributing. The meaning of "publish" in this context was considered in the cases of *Sheppard* and *Whittle*.[126] It was held that there is no need for there to be a "publishee" for something to be a publication to the public or a section of it. It was enough that the material was generally accessible or available to, placed before, or offered to the public. Where material was uploaded to a website it need not be shown that anyone had downloaded, read or listened to the material. Given that a significant amount of "hate" content is posted and distributed online[127] this may have implications for the stirring up offences.

2.73 Publication or distribution must be to the public or a section of the public.[128] In *Britton*,[129] the Court of Appeal quashed a conviction for distribution of pamphlets saying "Blacks not wanted here" which had been left in the porch of the home of an MP. It was held that this could not be a distribution to the "public" because an MP and his family were not a "section of the public". Parker CJ considered that it was not Parliament's intention to criminalise such conduct and stressed that it was the distribution that must be intended to stir up hatred, not the words used.

Defence

2.74 In cases where the allegation is not that the defendant intended to stir up hated, but that hatred was likely to be stirred up (section 19(1)(b) cases), it is a defence for the defendant to prove that he or she was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.[130] This would provide a defence to, for example, postal distributors or couriers who handle sealed envelopes containing racially inflammatory material, where they had no reason to suspect the content of the material inside.

[126] *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779.

[127] See, for example, the Home Affairs Committee inquiry into e-crime, where concerns were raised that YouTube was hosting recordings of Al-Qaeda's former Saudi Arabian head, "some of which could be seen to be inciting religious and racial hatred". Transcript of evidence available at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/uc618-v/uc61801.htm (last visited 19 Jun 2013). Likewise, see Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2010-2011* (Jan 2012) p 9: "The use of internet and social networking in perpetrating hate crime was raised in discussion by a number of [hate crime scrutiny] panels".

[128] POA 1986, s 19(3). On the meaning of this phrase in a different context, see Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.30 and following.

[129] [1967] 2 QB 51, [1967] 2 WLR 537, a case on a similar but not identical offence under s 6 of the Race Relations Act 1965. This made it an offence for a person, "with intent to stir up hatred", to publish or distribute written material of a threatening, abusive or insulting nature "being matter or words likely to stir up [racial] hatred".

[130] POA 1986, s 19(2).

2.75 The test of whether there was "reason to suspect" is objective:[131] the defendant must establish that no reasonable person in his or her position would have suspected that the content was threatening, abusive or insulting. This is a question of fact, assessed in light of the information that was available at the time.[132]

2.76 This defence, like the other statutory defences mentioned for the provisions under sections 20 to 23 below,[133] appears to reverse the legal burden of proof. This means that the defendant must prove the defence on the balance of probabilities. The courts will have to determine whether this reverse burden satisfies the requirements of article 6(2) of the ECHR.[134] That assessment will depend on whether it is fair and reasonable to depart from the usual principle that the prosecution should bear the burden of proving every element of the offence and, if so, whether the exception is necessary and proportionate in view of the legislation's aims.[135] If the courts conclude that the reverse burden would be incompatible with article 6 of the ECHR, the statutory defences may be re-interpreted in order to protect the defendant's rights by, for example, reading in a requirement that the prosecution must disprove evidence adduced by the defendant that he or she was not aware of the content and had no reason to suspect it was threatening, abusive or insulting.[136]

Public performance of a play: section 20

2.77 If a public performance of a play involves the use of threatening, abusive or insulting words or behaviour, any person who presents or directs it is guilty of an offence if he or she intends to stir up racial hatred or if racial hatred is likely to be stirred up thereby.[137]

[131] R Card, *Public Order Law* (2000) p 194.

[132] Compare *Chapman v DPP* (1988) 89 Cr App R 190, (1991) 153 *Justice of the Peace* 27, on the meaning of "reasonable grounds" for suspecting that an arrestable offence has been committed, under the Police and Criminal Evidence Act 1986, s 24(6). There may be other interpretations – compare the House of Lord's approach to interpreting "reasonable grounds for suspicion" in the context of conspiracy to launder money: *R v Saik* [2007] 1 AC 18, [2006] 2 WLR 993.

[133] See paras 2.81, 2.87, 2.92, 2.92 and 2.100 below.

[134] Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The chief European Court of Human Rights authority on reverse burdens of proof and the presumption of innocence is *Salabiaku v France* (1988) 13 EHRR 379 (App No 10519/83), which was considered in *DPP ex p Kebilene* [2000] 2 AC 326, [1999] 3 WLR 972; and *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264.

[135] *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264.

[136] In accordance with Human Rights Act 1998, s 3(1).

[137] POA 1986, s 20(1).

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.78 There are, again, two forms of the offence. Under section 20(1)(a), the prosecution must prove:

(1) that the defendant presented or directed the public performance of a play which involved the use of threatening, abusive or insulting words or behaviour; and

(2) that the defendant intended thereby to stir up racial hatred.

2.79 Under section 20(1)(b), the prosecution must prove:

(1) that the defendant presented or directed the public performance of a play which involved the use of threatening, abusive or insulting words or behaviour; and

(2) that having regard to all the circumstances (and, in particular, taking the performance as a whole), racial hatred was likely to be stirred up thereby.

Section 20 follows the same approach as section 19. In relation to the second form of the offence the defendant's state of mind regarding the content of the performance is relevant to the defence provided in section 20(2).[138]

WHO CAN COMMIT THE OFFENCE

2.80 This offence targets those who direct or produce stage plays or live performances. Performers are not liable solely for having taken part, unless they perform other than in accordance with direction and, in so doing, commit the offence. Someone who has presented or directed a play could commit the offence even if they do not attend the performance.[139] The offence does not cover performances given solely or mainly for rehearsal purposes or to be included in a programme service (as for the latter, section 22 may apply).[140]

Defence

2.81 A defence is set out in section 20(2):

> (2) If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove—[141]
>
> > (a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour, or

[138] In contrast, under section 18 above, the defendant's state of mind as to whether the conduct was threatening, abusive or insulting is treated as part of the mental element of the offence. See para 2.65 above.

[139] POA 1986, s 20(4).

[140] See para 2.88 below.

[141] The same issues with regard to reverse burden and art 6, ECHR apply here: see para 2.76 above.

(b) that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting, or

(c) that he did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up.

Distributing, showing or playing a recording: section 21

2.82 It is an offence to distribute, show or play a recording of visual images or sounds which are threatening, abusive or insulting if the defendant intends to stir up racial hatred or if racial hatred is likely to be stirred up thereby.[142] "Recording" means any record from which visual images or sounds may, by any means, be reproduced.[143]

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.83 As with the other stirring up offences, there are two ways in which the offence can be committed. Under section 21(1)(a), the prosecution must prove:

(1) that the defendant distributed, showed or played a recording of visual images or sounds which were threatening, abusive or insulting; and

(2) that the defendant intended thereby to stir up racial hatred.

2.84 Under section 21(1)(b), the prosecution must prove:

(1) That the defendant distributed, showed or played a recording of visual images or sounds which were threatening, abusive or insulting; and

(2) that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

As in sections 19 and 20, there is no provision specifying a mental element for the second form of the offence. Instead, it is dealt with in the form of a defence, which we outline below.

"TO THE PUBLIC"

2.85 The "distribution, showing or playing" of a recording must be "to the public or a section of the public" (as in the section 19 offence above at paragraph 2.73). The defendant in *El-Faisal*[144] was convicted under section 18 for using threatening words with intent to stir up racial hatred, in taped lectures in which he had called for the murder of Jews and Hindus. He was also convicted under section 21 for distributing these tapes to shops where they were found on sale, and therefore held to be intended for a wider audience.

[142] POA 1986, s 21(1).

[143] POA 1986, s 21(2).

[144] [2004] EWCA Crim 456, [2004] All ER (D) 107 (Mar).

2.86 In addition to conventional recordings, home-made films or short recordings (including by the use of smart phones) can be made and uploaded to websites like YouTube, or to social networking sites, for further viewing by the public or sections of the public. It is likely that these recordings would also be covered by section 21.[145]

Defence

2.87 In cases where the allegation is not based on intention, it is a defence for the defendant to prove that he was not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.[146]

Broadcasting: section 22

2.88 It is an offence to include in a programme service a programme involving threatening, abusive or insulting visual images or sounds, with the intention to stir up racial hatred or where racial hatred is likely to be stirred up thereby.[147]

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.89 Under section 22(1)(a), the prosecution must prove:

(1) that the defendant was one of the persons outlined in para 2.91 below;

(2) that a programme involving threatening, abusive or insulting visual images or sounds was included in a programme service; and

(3) that the defendant intended thereby to stir up racial hatred.

2.90 Under section 22(1)(b), the prosecution must prove:

(1) that the defendant was one of the persons outlined in para 2.91 below;

(2) that a programme involving threatening, abusive or insulting visual images or sounds was included in a programme service;

(3) that the defendant knew, or had reason to suspect, that the offending material was threatening, abusive or insulting;[148] and

(4) that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

Under the section 22(1)(b) offence it is necessary for the prosecution to prove that the defendant knew, or had reason to suspect, that the material in question was threatening, abusive or insulting. The defences in section 22 deal with the

[145] As to potential liability for the "publishing" offence when the recorded material is hosted on websites such as YouTube, see para 2.69 above.

[146] POA 1986, s 21(3), with reverse burden issues equally applicable.

[147] POA 1986, s 22(1).

[148] POA 1986, s 22(6).

defendant's awareness of the content of the programme service and the circumstances of its broadcast. We discuss this below.

WHO CAN COMMIT THE SECTION 22 OFFENCE

2.91 Those who can be liable are:

(1) the person providing the programme service;[149]

(2) any person by whom the programme is produced or directed; and

(3) any person by whom the words or behaviour are used.

Defences

2.92 There are several defences that may apply in the absence of specific intent to stir up racial hatred.[150] Under section 22(4):

> (4) It is a defence for a person by whom the programme was produced or directed who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect—
>
> > (a) that the programme would be included in a programme service, or
> >
> > (b) that the circumstances in which the programme would be so included would be such that racial hatred would be likely to be stirred up.

2.93 In addition, under section 22(5):

> (5) It is a defence for a person by whom offending words or behaviour were used and who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect—
>
> > (a) that a programme involving the use of the offending material would be included in a programme service, or
> >
> > (b) that the circumstances in which a programme involving the use of the offending material would be so included, or in which a programme so included would involve the use of the offending material, would be such that racial hatred would be likely to be stirred up.

[149] This could include natural or legal persons: s 28 makes express provision for corporate liability and the vicarious liability of company officers.

[150] POA 1986, ss 22(3) to (5), in relation to which, issues with regard to reverse burdens and art 6, ECHR also apply: see para 2.76 above. In addition to the defences we set out here, s 22(3) provides another defence for producers, directors and providers who do not intend to stir up hatred. They must prove that they did not know or have reason to suspect that the programme would contain the offending material, and that it was not reasonably practicable for them to secure removal of the material.

Possession of racially inflammatory material: section 23

2.94 Section 23 provides that:

> (1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—
>
> > (a) in the case of written material, its being displayed, published, distributed, or included in a cable programme service, whether by himself or another, or
> >
> > (b) in the case of a recording, its being distributed, shown, played, or included in a cable programme service, whether by himself or another,
>
> is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

Elements of the offence

THE TWO FORMS OF THE OFFENCE

2.95 Unlike the other sections, section 23 does not deal with the "intent" and "likelihood" forms of the offence in two separate subsections. Nevertheless, there are still two ways of committing the offence. Under the first, the prosecution must prove:

(1) that the defendant had in his or her possession written material, visual images or sounds which were threatening, abusive or insulting;

(2) that this material was held with a view to it being displayed, published, distributed, included in a programme service, shown or played; and

(3) that the defendant intended racial hatred to be stirred up thereby.

2.96 Under the second form of the offence, the prosecution must prove:

(1) that the defendant had in his or her possession written material, visual images or sounds which were threatening, abusive or insulting;

(2) that this material was held with a view to it being displayed, published, distributed, included in a programme service, shown or played; and

(3) that having regard to all the circumstances, racial hatred was likely to be stirred up thereby.

This second form of the offence is similar to the offence under section 19(1)(b): in both cases the defendant's state of mind about whether the material in question was threatening, abusive or insulting is dealt with in the form of a defence. We outline the section 23 defence below.

2.97 For both forms of the offence, the court must have regard to such display, publication, distribution, showing, playing, or inclusion in a programme service as

the defendant has, or it may reasonably be inferred that he has, in view.[151] Precisely what the defendant has "in view" by the possession can be determined by reference to other evidence, for example, any other material the defendant has in his possession. As with section 19, the publication, distribution or showing that the defendant has "in view" must be to the public, or a section of it.[152]

"POSSESSION"

2.98 "Possession" is not defined but actual physical custody is probably not necessary, if the defendant has effective control over the material.[153] The offence is targeted at people who produce inflammatory material for a wider audience but where the actual distribution cannot be proven. Its scope is, however, wider than this and a defendant who holds racist material on his or her computer would potentially be covered, if it could be proved that this was held with a view to distribution, for example.

"WITH A VIEW TO"

2.99 Reported cases on section 23 offer no guidance on the term "with a view to", but the meaning of that term was considered in *Dooley*,[154] a case involving possession of indecent images of children with a view to their being distributed or shown. It was held that "the words 'with a view to' have a wider meaning than 'with the intention of'". If at least one of the defendant's reasons for holding the images in a folder in a shared internet library was for the material to be accessed by others, then the defendant did possess the material with a view to its distribution or showing.

Defences

2.100 In cases where the allegation is not based on intention, it is a defence[155] for the defendant to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

[151] POA 1986, s 23(2). Presumably, "for this purpose" means for the purpose of establishing whether the defendant intended to stir up hatred or if in the circumstances racial hatred was likely to be stirred up.

[152] POA 1986, s 29.

[153] We are not aware of any cases directly on this point. By analogy with offences of possessing a firearm, possession may be deemed when a third person has custody of the item on behalf of and subject to the control of the accused: *Sullivan v Earl of Caithness* [1976] QB 966, [1976] 2 WLR 361; *Hall v Cotton* [1987] QB 504, [1986] 3 WLR 681. In the context of drugs offences, section 37(3) of the Misuse of Drugs Act 1971 extends the definition of possession to include control over an object which is in the custody of another, but it is not clear whether the courts will necessarily adopt this extended interpretation outside drugs cases.

[154] [2005] EWCA Crim 3093, [2006] 1 WLR 775, dealing with Protection of Children Act 1978, s 1(1)(c).

[155] POA 1986, s 23(3). The same issues with regard to reverse burdens and art 6 ECHR apply here: see para 2.76 above.

2.101 The truth of the content of any written material or words has been held by the Court of Appeal not to provide a defence to the publishing and distribution offences, or to the separate possession offence in section 23. In *Birdwood*[156] the Court of Appeal confirmed that even if the defendant tells the truth, or sets out a foundation of reasonable facts in an effort to promote reasonable debate, this does not necessarily mean that he or she has a relevant excuse.

2.102 In *Birdwood* it was held not to be open to the defendant, who was convicted under sections 19 and 23 (on the basis that hatred was "likely to be stirred up"), to say she was not aware of the content, as she had admitted editing as well as publishing the booklets. Following *Brutus v Cozens*[157] the Court of Appeal affirmed that the decision on whether words or conduct was insulting or abusive was one for the tribunal of fact. The court held that if Parliament had intended truth, or belief in truth, to provide a defence, this would have been set out in section 19(2). In fact, far from providing such a defence, the subsection was "positively against that suggestion".[158] We consider that the reasoning in *Birdwood* would be likely to apply to all of the stirring up offences in their various forms.

Jurisdiction

2.103 Cases involving the provisions of the POA 1986, particularly where committed using the internet, may involve complex questions of jurisdiction. Where a substantial measure of the conduct constituting the crime takes place in this jurisdiction, the courts of England and Wales have jurisdiction to try the crime unless principles of comity require it to be prosecuted in another country. If, for example, material is prepared in England and is intended to be downloaded by a domestic audience, the fact that it is uploaded to the internet by means of a web server based in the United States does not prevent its prosecution in England.[159] However, difficult questions could arise in cases where the "substantial measure" test is harder to apply than it was in *Sheppard* and *Whittle* because, although the material was intended or likely to incite racial hatred in England and Wales, important elements of conduct were committed elsewhere.[160]

2.104 There is no developed jurisprudence on what constitutes a "substantial measure". Elsewhere 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

[156] *Birdwood* [1995] 6 Archbold News 2.

[157] [1973] AC 854, [1972] 3 WLR 521.

[158] *Birdwood* [1995] 6 Archbold News 2, 4.

[159] *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779.

[160] In *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779, "the only 'foreign' element was that the website was hosted by a server in Torrance, California and, as the [trial] judge observed, the use of the server was merely a stage in the transmission of the material", by Scott Baker LJ at [32]. The question whether the "substantial measure" test was the correct one to apply in cases involving the internet was one of the three points certified for appeal in this case.

was written and uploaded overseas and was merely made accessible to individuals in England or Wales.[161]

STIRRING UP RELIGIOUS HATRED, OR HATRED ON GROUNDS OF SEXUAL ORIENTATION – OFFENCES UNDER THE PUBLIC ORDER ACT 1986

2.105 With effect from 1 October 2007, the stirring up offences were extended to cover stirring up religious hatred.[162] There was then a further extension with effect from 23 March 2010 to cover stirring up hatred on grounds of sexual orientation.[163]

2.106 Although the types of activity targeted remain the same, these new offences contain important limitations to scope, both as to the external and mental elements, which narrow their operation considerably compared to the racial hatred offences. These limitations chiefly resulted from two objections. First, there were free speech concerns at extending the provisions beyond cases of racial hatred.[164] Secondly, opposition was voiced on the basis that racial characteristics are of a different nature to those of religious belief and sexual orientation.[165]

2.107 The key difference with regard to the external elements of the new offences, as compared to the racial offences, is that the words, behaviour or content must be "threatening": it is not enough that they may be "threatening, abusive or insulting". This reduces the scope of the new offences considerably. We are only aware of one trial to date for stirring up religious hatred (and this failed),[166] and one successful prosecution to date for stirring up hatred on grounds of sexual orientation: see paragraph 2.124 below.

2.108 In other respects, the elements required to be established are identical to the racial hatred provisions. They cover:

(1) using threatening words or behaviour or displaying any written material which is threatening (section 29B);

(2) publishing or distributing written material which is threatening (section 29C);

(3) presenting or directing the public performance of a play which involves the use of threatening words or behaviour (section 29D);

(4) distributing, showing or playing a recording of, visual images or sounds which are threatening (section 29E);

[161] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.87 and following.

[162] The new religious hatred offences were introduced by the Racial and Religious Hatred Act 2006.

[163] The sexual orientation provisions were introduced by the Criminal Justice and Immigration Act 2008. The new religious and sexual orientation hatred offences are at sections 29B to 29F of the POA 1986.

[164] See, eg, Appendix B at para B.191 and following.

[165] See, eg, Appendix B at para B.192.

[166] *Bamber* (Jun 2010) Preston Crown Court (unreported).

(5) providing a programme service for, or producing or directing, a programme involving threatening visual images or sounds, or using threatening words or behaviour therein (section 29F);

(6) possessing written material, or a recording of visual images or sounds, which is threatening, with a view to its being displayed, published, distributed, shown, played or included in a programme service whether by the defendant or another (section 29G).

2.109 Similar provisions apply regarding offences committed inside private dwellings.[167]

Meaning of "religious hatred"

2.110 "Religious hatred" is defined as hatred against a group of persons defined by reference to religious belief or lack of religious belief.[168] The reference to lack of belief means that if hatred is stirred up against a group of atheists or "unbelievers" this could still amount to "religious hatred". Whether something amounts to a "religious belief" will be for the courts to consider. The Home Office explanatory note attached to the Racial and Religious Hatred Bill stated that:

> The reference to "religious belief or lack of religious belief" is a broad one, and is in line with the freedom of religion guaranteed by article 9 of the ECHR. It includes, though this list is not definitive, those religions widely recognised in this country such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha'ism, Zoroastrianism and Jainism. Equally, branches or sects within a religion can be considered as religions or religious beliefs in their own right. The offences also cover hatred directed against a group of persons defined by reference to a lack of religious belief, such as Atheism and Humanism. The offences are designed to include hatred against a group where the hatred is not based on the religious beliefs of the group or even on a lack of any religious belief, but based on the fact that the group do not share the particular religious beliefs of the perpetrator.[169]

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

Meaning of "hatred on the grounds of sexual orientation"

2.112 "Hatred on the grounds of sexual orientation" is defined as "hatred against a group of persons defined by reference to sexual orientation (whether towards

[167] POA 1986, ss 29B(2) and 29B(4). For the equivalent provisions for racial hatred, see para 2.67 and following above.

[168] POA 1986, s 29A. The same definition applies to the religiously aggravated offences: see para 2.40 above.

[169] Home Office Explanatory Notes referring to the Racial and Religious Hatred Bill as brought from the House of Commons on 12th July 2005 [HL Bill 15]. Available online at http://www.publications.parliament.uk/pa/ld200506/ldbills/015/en/06015x--.htm, para13 (last visited 19 Jun 2013). This list includes belief systems that are not universally recognised as religions, such as Buddhism.

persons of the same sex, the opposite sex or both)".[170] This closely resembles the definition of sexual orientation in the Equality Act 2010.[171]

2.113 In guidance[172] on the offences of stirring up hatred on grounds of sexual orientation, the Ministry of Justice states:

> The term does not extend to orientation based on, for example, a preference for particular sexual acts or practices. It therefore covers only groups of people who are gay, lesbian, bisexual or heterosexual.

2.114 This guidance was recently expressly followed by the Court of Appeal in declining to uphold a first instance decision to treat an assault on a person believed to be a paedophile as aggravated by hostility based on sexual orientation.[173]

2.115 As to the meaning of "hatred" in this context, guidance by the Ministry of Justice states:

> 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.[174]

Protection of freedom of expression

2.116 All the new stirring up offences in respect of religion and sexual orientation are subject to interpretation provisions designed to protect freedom of expression.

Religious belief

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

> 29J 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.[175]

[170] POA 1986, s 29AB.

[171] Equality Act 2010, ss 4 and 12. The Equality Act definition derives from the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 2(1).

[172] Ministry of Justice, *Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010) para 7.

[173] *B* [2013] EWCA Crim 291: see para 2.156 below. This leaves a potential gap in relation to hatred being stirred up against, for example, asexual people.

[174] Ministry of Justice, *Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010) para 12.

[175] POA, s 29J.

2.118 It is difficult to assess the practical effect of this provision, in part because prosecutions under the religious hatred provisions are so rare. In any event, the provision cannot override the protection of articles 9 and 10 of the ECHR.[176]

2.119 There are no reported cases interpreting section 29J. In commentary, it has been argued that the saving would allow someone to say "Islam is a wicked evil faith" but not "Muslims are wicked and evil", because this could stir up hatred against Muslims as a group.[177] However, this can be a fine line and it may be an artificial exercise to distinguish between insulting and abusive attacks on belief systems, and similar attacks on a group of religious adherents.

2.120 An example of expression which fell on the wrong side of this line is *Bilal.*[178] In this case, the defendant pleaded guilty to an offence under section 29C. He had posted "highly abusive" anti-Hindu content on the "Islamic awakenings" website, about a college in India that had decided to ban Muslim students from wearing the burka. In his plea the defendant had claimed to have had an "emotional reaction" to what he perceived as anti-Islamic conduct by the college.

2.121 Some have argued that the narrowing of the offence (from the racial hatred version) and the insertion of free speech savings could render religious hatred offences unworkable.[179] One of the key potential difficulties is the narrowing of scope brought about by removing "abusive or insulting" to leave only "threatening". If it is an essential component of the conduct element of these offences that the words or material be threatening in nature, this rules out much content that could nonetheless incite hatred.

Sexual conduct or practice

2.122 As with the religious hatred provisions, there is similarly wide protection in section 29JA for the criticism of sexual conduct or practice (which does not, however, refer specifically to sexual orientation):

> 29JA 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.[180]

[176] See Appendix A at para A.91.

[177] The distinction is discussed in N Addison *Religious Discrimination and Hatred Law* (2007) p 145. These and similar words were the subject of a failed prosecution against BNP leader Nick Griffin and activist Mark Collett. The words were used in a speech to supporters at an event for supporters, held in a public house and attended (and recorded) by an undercover BBC reporter. http://news.bbc.co.uk/1/hi/england/bradford/6135060.stm (last visited 19 Jun 2013).

[178] *Bilal* [2012] EWCA Crim 959, [2013] 1 Cr App R (S) 17.

[179] See, for example, K Goodall, "Incitement to Religious Hatred: all talk and no substance?" (2007) *Modern Law Review* 89.

[180] POA 1986, s 29JA.

2.123 The Ministry of Justice has issued guidance stating that the offences "do not prevent the telling of jokes or the preaching of religious doctrine".[181]

2.124 As with religious hatred, the lack of judicial interpretation makes it hard to assess the scope of this free speech provision. It did not avail the defendants in the single case in which acts stirring up hatred on grounds of sexual orientation have been successfully prosecuted, that of *Ali, Javed and Ahmed*.[182] The defendants were all convicted of distributing material with the intention of stirring up hatred on grounds of sexual orientation. They sought to rely on their "freedom to preach strongly held beliefs: beliefs which may have some foundation in scripture". However, the court held that, whilst Parliament had sought to preserve the right to debate issues around homosexuality by introducing the freedom of expression provision, the protection did not extend to the leaflets distributed by the defendants, which showed a picture of a hangman's noose and stated that "the only debate among classical authorities about how to punish homosexuality was the method of carrying out the execution … [because] the death sentence was the only way that the immoral crime [of homosexuality] can be erased from corrupting society".[183]

Mental element

2.125 The defendant must have intended to stir up hatred on grounds of religion or sexual orientation. There is no equivalent to the alternative test based on the likelihood of hatred being stirred up, which is applicable to the racial hatred provisions. Some commentators have stated that requiring intention to be shown renders the new offences all but impossible to prosecute.[184]

MATTERS COMMON TO ALL STIRRING UP OFFENCES

Attorney General's consent

2.126 For certain offences, including all the existing stirring up offences,[185] Parliament has decided that the consent of the Attorney General is needed to bring a prosecution. The Protocol between the Attorney General and the Prosecuting Departments states:

[181] Ministry of Justice*, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010) para 12. This circular refers principally to the sexual orientation related offences but in parts also touches on the religious hatred offences.

[182] See sentencing remarks of HHJ Burgess in *Ali, Javed and Ahmed* (10 Feb 2012) (unreported), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf (last visited 19 Jun 2013).

[183] Sentencing remarks of HHJ Burgess in *Ali, Javed and Ahmed* (10 Feb 2012) (unreported). It is also interesting to note that the prosecution relied upon evidence from four homosexual men who testified to having felt threatened by the material, http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf (last visited 19 Jun 2013). Compare, in another context, *Hammond v DPP* [2004] EWHC 69 (Admin), (2004) 168 *Justice of the Peace* 601.

[184] For example, N Addison *Religious Discrimination and Hatred Law* (2007) p 145.

[185] POA 1986, ss 27(1) and 29L. See also Prosecution of Offences Act 1985, ss 25 and 26 and Consents to Prosecution (1998) Law Com No 255.

> It is a constitutional principle that when taking a decision whether to consent to a prosecution, the Attorney General acts independently of government, applying well established prosecution principles of evidential sufficiency and public interest.[186]

The Protocol states that where the CPS considers that there is sufficient evidence to prosecute for one of these offences and that a prosecution is or may be in the public interest,[187] it seeks the Attorney General's consent to bring a prosecution.

2.127 In describing the consent function, a previous Attorney General, Lord Goldsmith QC, has stated that the requirement is a "an important filter which prevents vexatious cases and unmeritorious cases coming to court" and 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".[188]

Penalties

2.128 A person convicted on indictment under sections 18 to 23 is liable to imprisonment for a term not exceeding seven years[189] or a fine or both; and on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both. Similar penalties apply to the offences under sections 29B to 29G.[190]

ENHANCED SENTENCING PROVISIONS

Introduction

2.129 The third type of statutory provision about hate crime is that requiring demonstrations of, or motivation by, hostility to be taken into account in sentencing. By statute, when sentencing an offender, the court must have regard to the five purposes of sentencing, namely:

(1) the punishment of offenders;

(2) the reduction of crime (including its reduction by deterrence);

(3) the reform and rehabilitation of offenders;

[186] Attorney General's Office, *Protocol Between the Attorney General and the Prosecuting Departments* (Jul 2009) para 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 19 Jun 2013). The Protocol explains the role of the Attorney General in other areas of prosecution policy and guidance.

[187] Under current CPS policy, such decisions are taken by the Counter Terrorism Division, the specialist unit to which all charging decisions involving stirring up offences are referred: see, for example, Crown Prosecution Service, *Sexual Orientation: CPS Guidance on Stirring up Hatred on Grounds of Sexual Orientation* (Mar 2010), https://www.cps.gov.uk/legal/s_to_u/sexual_orientation_/(last visited 19 Jun 2013).

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

[189] This was increased from two years under the Anti-terrorism, Crime and Security Act 2001.

[190] POA 1986, ss 27 and 29L(3). Note that s 282 of the CJA 2003 extends the power of magistrates' courts to sentence for some offences from six months to 12 months, but is not yet in force.

(4) the protection of the public; and

(5) the making of reparation by offenders to persons affected by their offence.[191]

2.130 The starting point when considering the appropriate sentence is to assess the seriousness of the offence: the sentence passed must be commensurate with the seriousness.[192] Seriousness is determined by two main parameters: (i) the culpability of the offender and (ii) the harm caused, or risked being caused, by the offence.

2.131 The CJA 2003 does not just concern hate crime. The Act contains a general code about how to sentence, of which the enhanced provisions are one ingredient. When considering the seriousness of an offence for sentencing purposes, the court must have regard to aggravating factors.[193] These factors are either:

(1) tied to the offender being motivated by or showing hostility on the grounds of the victim's membership in a particular group (specific aggravating factors);

(2) relevant to the court's determination of a minimum term in relation to a mandatory life sentence for murder; or

(3) to be taken into account by the court in sentencing the offender, as part of its consideration of all the information available to it about the circumstances of the offence (general aggravating factors).

2.132 In each case, the court has a duty to "state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence".[194]

2.133 Where aggravating factors are found to apply, they cannot raise the sentence above the maximum tariff that the offence attracts. This is in contrast to the position as regards the aggravated offences in sections 29 to 32 of the CDA 1998, where the basic and aggravated versions of the offences attract different maximum penalties.[195]

Specific aggravating factors

2.134 The CJA 2003 sets out the following specific aggravating factors. These are aggravation on the basis of hostility related to:

(1) race (section 145);

[191] CJA 2003, s 142(1). Different rules apply to offenders under 18 at time of conviction. See generally Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004), http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf (last visited 19 Jun 2013).

[192] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004) para 1.3.

[193] CJA 2003, s 143.

[194] CJA 2003, s 174(1)(a). This provision was substituted by s 64 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012"), effective from 3 Dec 2012. Note that under CJA 2003, s 174(4)(a), the Criminal Procedure Rules may prescribe cases in which this duty does not apply. For an example of an open court declaration, see *Moran* [2012] EWCA Crim 1952 at [7].

[195] See above at para 2.47.

(2) religion (section 145);

(3) disability (section 146);

(4) sexual orientation (section 146); and

(5) transgender identity (section 146).

2.135 Below we consider sections 145 and 146 in turn.

Section 145: racial or religious aggravation

2.136 As noted above,[196] sections 29 to 32 of the CDA 1998 create specific racially or religiously aggravated offences which have higher maximum penalties than the basic versions of those offences. Section 145 does not apply to these offences.[197] In *McGillivray*,[198] it was held that the court should not treat an offence as racially or religiously aggravated for the purposes of section 145 where a racially or religiously aggravated form of the offence was charged but resulted in an acquittal. It has also been held to be contrary to principle to treat an offence as racially or religiously aggravated at the sentencing stage if a racially or religiously aggravated form of the offence was available but was not charged.[199]

2.137 However, for all other criminal offences, section 145 of the CJA 2003 provides that the court must treat racial or religious aggravation as an aggravating factor in sentencing:

> (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).
>
> (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.[200]

[196] See above at para 2.47.

[197] CJA 2003, s 145(1).

[198] [2005] EWCA Crim 604, [2005] 2 Cr App R (S) 60.

[199] Anthony and Berryman's Magistrates' Court Guide (2013) para B5.2B, citing *O'Callaghan* [2005] EWCA Crim 317, [2005] 2 Cr App R (S) 514.

[200] This provision is in force from 4 Apr 2005: SI 2005 No 950, art 2, sch 1, para 7.

2.138 This means that, in addition to the definition of "racial or religious aggravation", both limbs of aggravation by hostility laid down in section 28(1) (limb (a) demonstration and limb (b) motivation) are equally applicable in this context.[201]

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

2.139 Section 146 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
>
> (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.

[201] For a discussion of the relevant case law, see para 2.10 and following above.

HOSTILITY

2.140 Section 146(2)(a) and (b) mirrors section 28(1)(a) and (b) of the CDA 1998 and so again, the case law on both limbs of aggravation by hostility laid down in section 28(1) (limb (a) demonstration and limb (b) motivation) are relevant.[202]

2.141 CPS legal guidance in the context of disability hate crime states that:

> The words "cripple out" spray painted on the home of a disabled person would be sufficient to prove a demonstration of hostility for the purposes of section 146(2)(a), as would the words "take that, you blind bastard" shouted by the perpetrator immediately after an assault on a blind victim.[203]

The guidance also 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.

MEANING OF DISABILITY IN THIS CONTEXT

2.142 Disability is defined in section 146(5) of the CJA 2003 as follows:

> In this section "disability" means any physical or mental impairment.

2.143 CPS guidance on disability hate crime states that, for the purposes of section 146(5), medical confirmation is not required in order to put a prosecutor on notice that a person might have a disability and may have been targeted because of it.[204] The guidance notes further that:

> In some cases, disabilities can be masked or exacerbated by alcoholism and drug dependency. Some people have a combination of disabilities. Some disabilities are obvious, some are hidden. Some people may not wish to disclose the fact that they have a disability.
>
> …
>
> It is important that prosecutors fully explore the surrounding circumstances to an offence. Difference is often a significant indicator in hate crimes … .[205]

[202] Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013). See para 2.10 and following above.

[203] Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013).

[204] Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[205] Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

Equality Act 2010

2.144 Section 146(5) is wider than the definition of disability under the Equality Act 2010. This is contained in section 6 and expanded upon by schedule 1 of the 2010 Act, as well as accompanying regulations and guidance.[206] Section 6 provides that:

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

2.145 The guidance in relation to the definition of disability in the Equality Act 2010 states that "mental or physical impairment" should be given its ordinary meaning.[207] "Substantial" adverse effect is more than minor or trivial:[208] this is thought to reflect "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people".[209] It includes, for example, taking much longer than it usually would take to complete a daily task like getting dressed.[210] Schedule 1, paragraph 8 of the Act provides that a person with a progressive condition is to be regarded as having an impairment which has a substantial adverse effect on his or her ability to carry out normal day-to-day activities before it does so.

2.146 An impairment will have a "long-term" adverse effect where it has lasted at least 12 months; where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or which is likely to last for the rest of the life of the person affected.[211]

[206] See the Equality Act 2010 (Disability) Regulations and the Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010).

[207] Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010) p 7.

[208] Equality Act 2010, s 212(1).

[209] Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010) p 15.

[210] Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010) p 15.

[211] Equality Act 2010, sch 1, para 2. Past impairments are also included, where they lasted for a period of at least 12 months: Equality Act 2010, sch 1, para 9.

2.147 The Act does not define what is to be regarded as a "normal day-to-day activity". The guidance states that it includes regular activities, such as shopping, reading and writing, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.[212]

2.148 Certain conditions are explicitly held to fall within the definition of disability. For instance, schedule 1, paragraph 8 provides that severe disfigurement is to be treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.[213] Babies and children under the age of six whose impairment does not have substantial adverse effect on their ability to carry out normal day-to-day activities will also be included where the impairment would normally have such an effect on a person aged six years or over.[214] Other conditions are explicitly excluded from the definition of disability in the Equality Act 2010. These include addiction to alcohol, nicotine or any other substance.[215]

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

2.149 It is important to distinguish between disability hate crime and a crime committed against a disabled person because of his or her perceived vulnerability.[216] The latter does not fall within the ambit of section 146. "Vulnerability" is taken by the CPS to mean vulnerability to crime, as the following example illustrates:

> In the case of the theft of a wallet from a blind person, if there is no demonstration of hostility based on disability 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.[217]

[212] Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010) p 31. The guidance provides further that normal day-to-day activities do not include work of any particular form or specialised activities such as playing a musical instrument to a high standard of achievement: see p 32. This is because these activities cannot be said to be "normal" for most people.

[213] Equality Act 2010, Sch 1, para 3.

[214] See the Equality Act 2010 (Disability) Regulations, para 6.

[215] Other than in consequence of the substance being medically prescribed: Equality Act 2010 (Disability) Regulations, para 3. Note also that liver disease as a result of alcoholism could amount to an impairment: Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010) p 8. The guidance makes clear that it is the effect of an impairment which must be considered, not its cause: see p 8.

[216] Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013).

[217] Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013).

In this example, the blind person is targeted because they are perceived to be a "soft" or easy target. In other cases, disabled people may have "unequal access to safety", for example where the defendant is the victim's carer.[218]

2.150 CPS guidance also emphasises that a disabled person is not a vulnerable or easy target per se. Rather, "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".[219]

2.151 The guidance cautions prosecutors not to describe disabled people as "vulnerable".[220] It is true that many disabled people, by reason of a range of factors including poverty and social exclusion, find themselves in vulnerable situations. However, to call a person vulnerable conflates their *situation* with their *identity.*[221] This is problematic for two reasons:

(1) it evokes a damaging misperception of disabled people as weak and in need of paternalistic protection;

(2) it fails adequately to capture the fact that the offender has exploited the person's disability "and is all the more culpable for it".[222]

2.152 In a speech given in October 2008, the then DPP, Lord Macdonald QC, warned of the dangers of focusing on vulnerability rather than hostility. This speech was given against the backdrop of concerns, shared by the then DPP, that prosecutors were setting the threshold for prosecuting disability hate crime too high:

> The biggest barrier to effective prosecution is a widespread mindset that doesn't perceive disabled people as targets of hostility. Rather, it prefers to see them being taken advantage of for being "vulnerable". It is a common view that where disability is a factor in a case, it's not because disabled people are "hated". It's because they are an "easy target" … .

[218] Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[219] Emphasis added. Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[220] There are some exceptions to this advice, for instance in the context of s 16 of the Youth Justice and Criminal Evidence Act 1999.

[221] As argued by *Disability Now,* a specialist magazine: see Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[222] Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013). See also the concerns about the use of the term "vulnerable" in the context of the Law Commission's work on adult social care: Adult Social Care (2011) Law Com No 326 para 9.21.

> A mistaken and misplaced focus on vulnerability risks enhancing an already negative image of disabled people as inherently "weak", "easy targets" and "dependent". This approach is wrong. It means that the opportunity to condemn the prejudice and hostility of the offender is missed … .
>
> Recognising the importance of building a case based on evidence of hostility is not just about semantics. Parliament did not pass [section 146 of the CJA 2003] in a bout of political correctness. The way that we prosecute sends a message. The messages we send have real consequences. The wrong message damages the confidence of disabled people.[223]

2.153 The guidance notes further that targeting a particular person *because* they are disabled is often, though not always, a strong indication of hostility. The fact that the disabled person is an easy target does not detract from this; indeed, victims of crime often tend to be the easiest target available at the time (for instance, an offender may not pick a safeguarded property to burgle when there is one left unlocked).[224]

2.154 Where section 146 does not apply, the vulnerability of a victim may nonetheless be relevant to sentencing as a general aggravating factor.[225]

MEANING OF SEXUAL ORIENTATION IN THIS CONTEXT

2.155 Section 146 does not define sexual orientation. CPS guidance defines sexual orientation as "a term used to describe a person's emotional and/or physical attraction to another".[226] Reference has been made in the above discussion on stirring up offences to the Public Order Act definition and to the additional guidance provided by the Ministry of Justice on this point.[227]

2.156 In *B,*[228] the Court of Appeal set out definitions from a number of sources, including the Oxford English Dictionary,[229] section 12 of the Equality Act 2010 and Ministry of Justice Guidance, and concluded that section 146 was to be construed as reflecting those definitions. On the facts of the case (the appellant had attacked a man he believed to be a paedophile), it was held that the trial

[223] The speech is cited in annex A of the guidance: Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[224] Crown Prosecution Service, *Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited19 Jun 2013).

[225] *Bridge* [2012] EWCA Crim 2270. See para 2.176 and following below.

[226] Crown Prosecution Policy, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (Nov 2007) p 43, http://www.cps.gov.uk/publications/docs/htc_policy.pdf (last visited 19 Jun 2013).

[227] See para 2.112 and following above.

[228] [2013] EWCA Crim 291.

[229] This provides that sexual orientation is "the fact of being heterosexual, homosexual or bisexual".

judge had erred in making a finding of higher culpability on the basis that the attack was motivated by the victim's sexual orientation.

2.157 The CPS considers homophobic crime to be "particularly serious" because it "undermine[s] people's right to feel safe and be safe in their sexual orientation". The guidance goes on to state that such crimes are based on "prejudice, discrimination and hate and they do not have any place in an open and democratic society".[230]

MEANING OF TRANSGENDER IDENTITY IN THIS CONTEXT

2.158 Section 146(6) of the CJA 2003 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".

2.159 This can be compared with section 7 of the Equality Act 2010, which defines gender reassignment. It states that:

> (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.
>
> (3) In relation to the protected characteristic of gender reassignment—
>
> > (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
> >
> > (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

PRESUMED MEMBERSHIP

2.160 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.[231] The case law on presumed membership discussed in relation to the aggravated offences is relevant here.[232]

[230] Crown Prosecution Policy, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (Nov 2007) para 1.3, available at http://www.cps.gov.uk/publications/docs/htc_policy.pdf (last visited 19 Jun 2013). The same applies to transphobic crime.

[231] See also *English v Thomas Sanderson Blinds* [2008] EWCA Civ 1421, [2009] 2 All ER 468, 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 sexual orientation but also perceived sexual orientation.

[232] See para 2.22 and following above.

The approach to sentencing under sections 145 and 146

2.161 The amount by which a sentence should be increased where any of the statutory aggravating factors is proved will depend on the circumstances of the case.[233] In August 2000, the Sentencing Advisory Panel published advice on racially aggravated offences,[234] which was largely adopted by the Court of Appeal in *Kelly and Donnelly*.[235] The original advice applies to offences charged as specific racially aggravated offences under sections 29 to 32 of the CDA 1998, and to offences where racial aggravation is treated as an aggravating factor under section 82 of the CDA 1998.[236] However, guidance from the CPS suggests that the approach in *Kelly and Donnelly* also applies for the purposes of sections 145 and 146 of the CJA 2003.[237]

2.162 Following that guidance, the extent to which the sentence is increased under sections 145 and 146 will depend on the seriousness of the aggravation. Factors relevant to the seriousness of the aggravation are the defendant's intention and the impact of the conduct.[238]

2.163 With regard to the defendant's intention, a number of features could indicate a high level of aggravation, including: that the element of aggravation based on race, religion, disability, sexual orientation or transgender identity was planned; the offence was part of a pattern of offending by the offender; the offender was a member of, or was associated with, a group promoting hostility based on race, religion, disability, sexual orientation or transgender identity; 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.[239]

[233] *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.

[234] SAP guidelines. See para 2.48 above.

[235] [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [62] and following.

[236] CDA 1998, s 82 (which provided for increased sentences on the basis of racial aggravation) has been repealed and re-enacted in s 145 of the CJA 2003. See *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73; *Pells* [2004] EWCA Crim 924, *The Times* 21 Apr 2004; *Slater* [2005] EWCA Crim 2882, [2006] 1 Cr App R (S) 129; and *Reil* [2006] EWCA Crim 3141.

[237] Crown Prosecution Service, *Racist and Religious Crime – CPS Guidance,* http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ (last visited 19 Jun 2013) and Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013). This is also implicit in Anthony and Berryman's Magistrates' Court Guide (2013) para B5.2B.

[238] Anthony and Berryman's Magistrates' Court Guide (2013) para B5.2B.

[239] *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. In *Ferrar*, the defendant had pleaded guilty to an offence of religiously aggravated intentional harassment after placing a severed pig's head outside a community centre used as a place of worship and Madrasah by a Muslim prayer group. In sentencing the defendant to a suspended custodial sentence, Temperly DJ noted that the offence was "planned, premeditated and targeted" and that "the pig's head was positioned in such a way that it could not be avoided by all those … who had the misfortune to enter the building that morning": see http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/liam-ferrar-sentencing-remarks-18022013.pdf (last visited 19 Jun 2013).

2.164 With regard to the impact of the conduct on the victim or others, the features 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;[240] or the offence caused particular distress to the victim and/or the victim's family.[241]

2.165 The aggravation may be regarded as less serious if it was limited in scope or duration; if the offence was not motivated by hostility on the basis of race, religion, disability, sexual orientation or transgender identity; or the element of hostility or abuse was minor or incidental.[242]

EFFECT OF A DISPUTE AS TO THE PRESENCE OF AGGRAVATING FACTOR(S) AFTER A PLEA OF GUILTY

2.166 A defendant may plead guilty to an offence but dispute the presence of any element of aggravation within the meaning of sections 145 or 146. Given that such a dispute is serious enough to have a significant effect on sentence, the prosecution will either have to call evidence in support of their version of events at a so-called *Newton* hearing[243] or allow sentence to be passed on the basis of the defence version.[244]

2.167 A *Newton* hearing in the Crown Court takes the form of the judge sitting alone (that is, without a jury being empanelled) and deciding the relevant issues of fact.[245] The burden of proof is on the prosecution to satisfy the judge beyond

[240] 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. At sentencing in *Ferrar*, Temperley DJ held that he could not ignore the context in which the offence had been committed. It should have been obvious to the defendant that "what [he] did was intimidatory and would only serve to enflame an already tense and volatile situation". The effect was to shock, distress and disgust those who saw the pig's head, and to prompt alarm, fear and insecurity to spread throughout the local community and beyond. See http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/liam-ferrar-sentencing-remarks-18022013.pdf (last visited 19 Jun 2013).

[241] *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].

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

[243] 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. In a *Newton* hearing, 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.

[244] Blackstone's para D20. A *Newton* hearing need not be called, however, where the defendant's story is manifestly false or implausible: *Hawkins* (1985) 7 Cr App R (S) 351, [1986] Criminal Law Review 194, 353 and *Walton* (1987) 9 Cr App R (S) 107, [1987] Criminal Law Review 512,109.

[245] As held in *Gandy* (1989) 11 Cr App R (S) 564, [1990] Criminal Law Review 346, in assessing the evidence and acting as the tribunal of fact, the judge must observe the directions which he or she would have given the jury for their guidance.

reasonable doubt that their version of events is correct.[246] The aim is to ensure that so far as possible, the defendant is sentenced on a basis which "accurately reflects the facts of the individual case".[247] Judge LJ in *Underwood* emphasised that the overarching principle is that "the sentencing judge must do justice".[248]

2.168 If the issues raised in the *Newton* hearing are resolved against the defendant, the credit he or she is due for pleading guilty may be reduced. Relevant factors to be taken into consideration include whether the defendant shows a lack of genuine remorse or insight into the consequences of the offence.[249] It appears to be only in exceptional cases that "the normal entitlement to a credit for a plea of guilty is wholly dissipated by the *Newton* hearing".[250]

"Determination of minimum term in relation to mandatory life sentence": Schedule 21 to the CJA 2003

2.169 We now consider the separate sentencing provisions in respect of murder. This crime carries a mandatory life sentence. Except in cases where the offender is to receive a "whole life order", the court must specify the minimum term the offender is to serve before being considered for release on licence.[251] In fixing the minimum term, the court is required to have regard to the seriousness of the offence. In so doing, the court is further required by section 296(5) to have regard to the "general principles" set out in schedule 21 to the CJA 2003.

2.170 Under schedule 21, the court must first allocate a starting point and then consider any aggravating or mitigating factors.[252] The court has a duty to state in open court and in ordinary language its reasons for arriving at the minimum term,[253] including which starting point in schedule 21 it has selected and why.[254] The court retains discretion to determine the minimum term; while it must have regard to the statutory guidance, it need only do so to the extent it considers appropriate, and is not bound to follow it.[255] Following *Kelly (Marlon)*, the provisions of

[246] *Ahmed* (1985) 80 Cr App R 295, (1984) 6 Cr App R (S) 391. In *Kerrigan* (1993) 14 Cr App R (S) 179, (1992) 156 *Justice of the Peace* 889, it was held that the preferable approach was for the judge to openly direct him- or herself as to the relevant standard and onus of proof, though the failure to do so would not necessarily be fatal. See also Judge LJ in *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [9].

[247] *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [2].

[248] [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [2].

[249] See Judge LJ in *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [11].

[250] See Judge LJ in *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [11].

[251] CJA 2003, s 269. Following *Anderson v Secretary of State* [2002] UKHL 46, [2003] 1 AC 837, the minimum term for murder is no longer set by the Home Secretary, but instead by reference to the provisions of the CJA 2003. For background, see D Thomas, "The Criminal Justice Act 2003: Custodial Sentences" [2004] Criminal Law Review 702, 703.

[252] As well as the effects of the defendant's previous convictions, any plea of guilty and whether the offence was committed on bail.

[253] CJA 2003, s 174.

[254] CJA 2003, s 270.

[255] *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].

schedule 21 are not to be treated as "impenetrable compartments".[256] If, however, the court departs from the guidance, it must state its reasons for doing so.[257]

Starting points

2.171 For offenders aged 18 years or over, where the offence is not so serious as to warrant a whole life order[258] but the seriousness of the offence is "particularly high", the appropriate starting point is 30 years.[259] One instance normally indicating "particularly high" seriousness is a murder that is racially or religiously aggravated,[260] or aggravated on the basis of sexual orientation, disability or transgender identity.[261]

Aggravating factors

2.172 After choosing a starting point, the court should take into account any aggravating factors, to the extent that it has not allowed for them in its choice of starting point.[262] Paragraph 10 of the schedule provides a non-exhaustive list of potential aggravating factors.[263] Here reference is made to cases in which the murder was racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity.[264]

2.173 The Court of Appeal in *Blue*[265] 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.

2.174 Paragraph 9 of the schedule provides that detailed consideration of aggravating factors "may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order".

[256] *Kelly* [2011] EWCA Crim 1462, [2012] 1 WLR 55 at [5] by Lord Judge CJ. See also *Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101 at [5] by Judge LJ: "justice cannot be done by rote".

[257] CJA 2003, s 270(2)(b).

[258] Under CJA 2003, sch 21, para 4.

[259] CJA 2003, sch 21, para 5(1). For offenders under the age of 18, the starting point in all cases is 12 years: CJA 2003, sch 21, para 7. 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.

[260] The meaning of "racially or religiously aggravated" is to be taken from s 28 of the CDA 1998: see sch 21, para 2 of the CJA 2003.

[261] CJA 2003, sch 21, para 5(2)(g). Disability and transgender identity were added by section 65(9) of the LASPO 2012, effective from 3 Dec 2012. The meaning of aggravation on grounds of sexual orientation, disability or transgender identity is to be taken from s 146 of the CJA 2003: see sch 21, para 3 of the CJA 2003.

[262] CJA 2003, sch 21, para 8.

[263] *Last* [2005] EWCA Crim 106, [2005] 2 Cr App R (S) 64 at [17]; *Sullivan* [2004] EWCA Crim 1762, [2005] 1 Cr App R 3 at [16]; *Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101 at [6]; *A-G's Reference (No 106 of 2004)* [2004] EWCA Crim 2751, [2005] 1 Cr App R (S) 120 at [23].

[264] CJA 2003, sch 21, paras 10 and 5(2)(g).

[265] [2008] EWCA Crim 769, [2009] 1 Cr App R (S) 2.

2.175 The Court of Appeal in *Davies*[266] held that in deciding whether aggravating factors apply so as to increase the appropriate starting point of the minimum term, the court must apply the criminal standard of proof.[267]

General aggravating factors: section 156(1) of the CJA 2003

2.176 In respect of offences other than murder, if the aggravating factor is not an inherent feature of the offence itself, then section 156(1) of the CJA 2003 will be relevant. Under section 156(1), the court is directed to take into account any aggravating factors both in imposing community sentences and in imposing discretionary custodial sentences.[268]

2.177 In sentencing offenders, the court must follow any sentencing guidelines which are relevant to the offender's crime, unless it would be contrary to the interests of justice to do so.[269] In *Thornley*,[270] Lord Judge CJ said that guidelines are neither "tramlines … nor are they ring-fenced". Below we consider the sentencing guidelines of potential relevance to hate crime.

Sentencing guidelines

2.178 The sentencing guideline *Overarching Principles: Seriousness*[271] sets out a non-exhaustive list of the most important general aggravating features.[272] These are split into factors which indicate higher culpability and those which indicate a more

[266] [2008] EWCA Crim 1055, [2009] 1 Cr App R (S) 15.

[267] *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".

[268] As noted above at para 2.166 above, a defendant may plead guilty to the offence but dispute any element of aggravation. Here again, either the prosecution would have to call evidence in support of their own version at a *Newton* hearing or allow sentence to be passed on the basis of the defence version.

[269] Coroners and Justice Act 2009, s 125(1). In *Ahmad (Shabbir)* (14 Jan 2013) (unreported), the Court of Appeal held that the trial judge had been justified in departing from the sentencing guidelines and the recommended starting point after having identified a number of aggravating features. See also *Tutte-Melluish* (20 Feb 2013) (unreported). Factors relevant to the "interests of justice" have been held to include subsequent statutory change and appellate case law: *Thornley* [2011] EWCA Crim 153, [2011] 2 Cr App R (S) 62 at [13].

[270] [2011] EWCA Crim 153, [2011] 2 Cr App R (S) 62 at [13].

[271] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004). Part 4 of Coroners and Justice Act 2009 abolished the Sentencing Guidelines Council and replaced it with a new body, the Sentencing Council, which also has a number of additional functions. Guidelines issued by the Sentencing Guidelines Council remain in operation, at least until they are reconsidered by the Sentencing Council: see Coroners and Justice Act, sch 22, part 4, para 28(2) and *H* [2011] EWCA Crim 2753, [2012] 1 WLR 1416 at [14] by Lord Judge CJ.

[272] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004) para 1.21.

than usually serious degree of harm. Many of these factors are mirrored in sentencing guidelines which apply to specific groups of offences.[273]

2.179 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;[274]

(2) that a vulnerable victim was deliberately targeted;[275]

(3) that there was an abuse of power or abuse of a position of trust.[276]

2.180 A factor in the sentencing guideline indicating a more than usually serious degree of harm is that the victim is "particularly vulnerable".[277]

[273] See, in particular, Sentencing Council for England and Wales *Assault* (Jun 2011); *Burglary Offences: Definitive Guideline* (Jan 2012); and *Dangerous Dogs Offences: Definitive Guideline* (Aug 2012).

[274] 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 para 2.37 that "racial group" includes Irish Travellers, and it is not clear whether this is a case in which s 145 CJA 2003 could have been applied.

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

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

[277] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004) 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. 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 above, at para 2.149 and following, the distinction between vulnerability and hostility in the context of disability hate crime.

CHAPTER 3
THE AGGRAVATED OFFENCES: PROVISIONAL PROPOSALS

INTRODUCTION

3.1 In Chapter 2, we analysed the current law of racially and religiously aggravated offences. In this chapter, we examine the case for extending the aggravated offences to include disability, sexual orientation and transgender identity.[1] The arguments for extension of the aggravated offences are wholly different from those in relation to the stirring up offences. We therefore consider the case for extending the existing stirring up offences separately in Chapter 4.

3.2 In relation to the aggravated offences, we offer two reform options:

(1) amendments to the enhanced sentencing regime under the Criminal Justice Act 2003 ("CJA 2003") which applies to hostility-based crimes;

(2) alternatively, or in addition to sentencing reform, extending the aggravated offences.

3.3 We begin by considering whether an effective solution might lie in better use of the existing powers for the court to increase the sentence for any offence where the offender demonstrated, or was motivated by, hostility on the basis of disability, transgender identity or sexual orientation. We propose some amendments to the existing sentencing regime which we consider would render it more likely to provide an effective solution to the problem.

3.4 We then turn to examine the case for extending the existing aggravated offences. Consultees may accept the proposal to amend the sentencing regime as sufficient to tackle the problem of hostility-based crimes. Those who do not may consider it appropriate to extend the aggravated offences in addition to, or as an alternative to, the enhanced sentencing regime with amendments.

3.5 Finally, we examine various models that the new offences might take should they be felt to be necessary.

3.6 Our discussion throughout this chapter is led by our desire for the law on hate crime to be, as far as possible, fair and modern, clear and simple, and work effectively and consistently in practice.

3.7 Before examining the arguments relating to either option for reform, it is important to have some idea of the prevalence of the conduct in question and what forms it takes. Understanding the scale and nature of the problem should enable us to identify the most appropriate and proportionate solution(s). We begin by considering the statistical evidence of the prevalence of hate offending against disabled, LGB and transgender people.

[1] Consultees may find it helpful to refer to the theory paper by Dr John Stanton-Ife published on our website ("theory paper") for a more detailed discussion about the theoretical arguments militating for and against an extension of the aggravated offences.

The scale and nature of the problem

3.8 The available evidence from research and statistics does not provide a clear picture of the types of offences that are accompanied by hostility on grounds of disability, sexual orientation or transgender identity. This is partly a result of under-reporting.[2] It is also explained by the fact that the definition of "hate crime" used by criminal justice agencies is wider than the hostility-based test set out in the existing aggravated offences and the enhanced sentencing provisions.[3] This means that what might be considered a hate crime for one purpose (such as reporting by victims or internal recording procedures by the police) may not be considered as such for another (such as use of the enhanced sentencing provisions under section 146 of the CJA 2003).

Crown Prosecution Service data

3.9 The following table gives some indication of the principal offences recorded as "hate crimes" against the five protected groups by the Crown Prosecution Service ("CPS"):[4]

Principal offence category	**Disability hate crime**	**Homophobic and transphobic hate crime**	**Racial and religious hate crime**
Homicide	0.3%	0.6%	0.1%
Offences against person	41.7%	52.2%	49.6%
Sexual offences	6.2%	0.2%	0.2%
Burglary	7.4%	0.6%	0.5%
Robbery	9.5%	1.7%	0.8%
Theft and handling	9.0%	2.9%	3.6%
Fraud and forgery	5.0%	0.1%	0.1%
Criminal damage	3.2%	3.5%	4.9%

[2] See, eg, Stonewall, *Homophobic Hate Crime: The Gay British Crime Survey* (2008); Equality and Human Rights Commission, *Hidden in Plain Sight* (2011); and P Kelley, *Filling in the Blanks: LGBT hate crime in London* (2009).

[3] We discuss this in Appendix C at paras C.1 to C.6. We also note, at para C.3, how different agencies sometimes appear to use slightly different definitions of "hate crime".

[4] Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 26. The table was introduced by the CPS in order to underline the differences in the types of offences which make up "disability hate crime", as opposed to racial, religious homophobic and transgender hate crime, and to outline the basis for the legal and policy response of the CPS to those offences.

Drugs Offences	0.8%	0.6%	1.1%
Public Order Offences	12.1%	31.7%	32.5%

3.10 To give this data some context, in the period 2011 to 2012, the CPS recorded 480 convictions for disability "hate crime" and 951 convictions for homophobic and transphobic "hate crime".[5]

3.11 The table details a number of "offence categories". It is important to note that most of these (homicide, sexual offences, burglary, robbery, theft and handling, fraud and forgery, and drugs offences) are not "basic offences" within the meaning of sections 29 to 32 of the Crime and Disorder Act 1998 ("CDA 1998").[6] Of the offence types in this table, only offences against the person, public order offences and criminal damage are basic offences which would be capable of aggravation in the context of any new aggravated offences.[7]

3.12 Care must be taken when referring to these data. They give the impression that approximately 61.8% of hostility motivated offences against disabled people could potentially be charged as an aggravated offence if the CDA 1998 were extended to include disabled people. However, the true figure will almost certainly be much lower. There are two key reasons for this:

(1) the definition of "hate crime" adopted by the CPS is wider than the scope of the aggravated offences set out in the CDA 1998. The CPS definition is based on perception: "any criminal offence *which is perceived by the victim or any other person* to be motivated by a hostility or prejudice based on a person's … disability or perceived disability".[8] By contrast, it is not enough for the purposes of the CDA 1998, and would not be enough for any definitions of new offences that might be created, that the offence is *perceived* to be motivated by hostility or prejudice based on a person's disability: it must be shown that the defendant demonstrated, or was motivated by, hostility on grounds of disability; and

(2) not all offences against the person and public order offences are basic offences listed in the CDA 1998.

[5] See Appendix C at para C.56. Note that the categorisation adopted by the CPS groups homophobic and transphobic hate crime together.

[6] For a definition and explanation of the "basic offences", see Ch 2 at para 2.7 and following.

[7] This is because our terms of reference do not permit us to consider altering the list of basic offences in ss 29 to 32 of the CDA 1998: see para 3.57 below.

[8] Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 8 (emphasis added).

3.13 Care must also be taken when referring to these data in the context of hostility-driven LGB and transgender offences. Although it appears that approximately 93.3% of offences against LGB and transgender people could potentially be charged as aggravated offences if the CDA 1998 were extended to include LGB and transgender people,[9] the true figure is likely to be much lower. This is for the same two reasons outlined above.[10]

Examples of hostile conduct identified by disability, transgender and LGB organisations

3.14 During the early part of this project, we had some preliminary discussions with organisations representing disabled, LGB and transgender people. We have reviewed numerous studies and reports by such organisations and looked at individual case reviews and reports. This has given us some insight into what members of these groups perceive the nature and scale of the problem of hate crime to be.

3.15 In the disability context:

(1) hostility towards disabled people commonly manifests itself through incidents of harassment, anti-social behaviour, name-calling and similar forms of often "low level abuse",[11] frequently taking place close to the home;[12]

(2) the abuse is frequently perpetrated by children or young people, often on a persistent basis; and

(3) in a few cases, matters eventually escalated, for example with abuse becoming more violent or, in extreme cases, victims taking their own lives.

3.16 In relation to sexual orientation:

(1) verbal abuse, threats and physical violence are the most common types of reported hate crime, with the majority of such incidents taking place in or near the home;[13]

(2) the perpetrator is often known to the victim;[14]

(3) incidents are often repeated over a period of time, usually by the same perpetrator(s).[15]

[9] This is similar to the figure for racially and religiously aggravated offences: 93.6%. See the CPS data set out at para 3.9 above.

[10] See para 3.12 above.

[11] Of course we do not mean to suggest that "low level" abuse cannot have a significant impact on the victim.

[12] It should be noted that some of these may not necessarily amount to a basic offence.

[13] See, eg, P Kelley, *Filling in the Blanks: LGBT hate crime in London* (2009).

[14] See, eg, P Kelley, *Filling in the Blanks: LGBT hate crime in London* (2009).

[15] See, eg, Metropolitan Police Service, Diversity and Citizen Focus Directorate, *Women's Experience of Homophobia and Transphobia: survey report* (2008).

3.17 In relation to transgender identity:

(1) verbal and written abuse (often on the internet), as well as physical violence, are the most common types of reported hate crime;[16]

(2) negative media representation fuels an increase in harassment and other forms of crime against transgender people.[17]

REFORM OPTION 1: ENHANCED SENTENCING PROVISIONS

3.18 We begin by examining the existing law on the enhanced sentencing provisions, before setting out some possible amendments to the operation of this regime. We consider whether better use of the enhanced sentencing provisions made likely by these proposed amendments might provide an effective and proportionate response to the problem of hate crime involving hostility based on disability, sexual orientation or transgender identity.

3.19 Section 146 of the CJA 2003 provides that if an offender is proved to have demonstrated, or been motivated by, hostility based on disability, sexual orientation or transgender identity,[18] a court must treat that as an aggravating factor in sentencing.

3.20 We are proposing amendments to the enhanced sentencing regime because we consider that it could offer a straightforward solution to the problem using a statutory approach that is already familiar to criminal practitioners and judges. The question is whether it would be effective. We seek to address the arguments about its potential effectiveness, and we conclude that there are a number of important ways in which the section 146 approach to hate crime represents a principled and proportionate response to the problem.

(1) Ability to deal with the prevalence and nature of offending

3.21 Our terms of reference are to consider extension of the existing aggravated offences to cover disability, sexual orientation and transgender identity.[19] They do not permit us to amend the list of basic offences capable of being aggravated. The basic offences capable of aggravation are a creature of their historical context: they were chosen when the first set of aggravated offences – those applying to race – were enacted.[20] They do not necessarily reflect the prevalence or nature of hostility-driven offending against disabled, LGB and transgender people. If enacted, the new aggravated offences proposed below would not therefore constitute a tailored response to the problem of hate crime against these groups. For instance, as noted above in our discussion of the CPS data, a substantial proportion of offences committed against disabled people that are

[16] See, eg, P Kelley, *Filling in the Blanks: LGBT hate crime in London* (2009).

[17] See, eg, http://www.transmediawatch.org/index.html (last visited 19 Jun 2013).

[18] Or presumed sexual orientation, disability or transgender identity: see CJA 2003, s 146(2).

[19] See Ch 1 at para 1.6.

[20] See Appendix B at para B.22 and following.

recorded as hate crimes by the CPS would be excluded from any new aggravated offences.[21]

3.22 In contrast to the fixed list of basic offences capable of being aggravated, the court's duty under section 146 to treat hostility related to disability, sexual orientation or transgender identity as an aggravating factor in sentencing applies to all offences.[22] The all-encompassing scope of the existing sentencing provisions avoids the arbitrariness and incompleteness of the fixed list of basic offences.

3.23 Arguably, therefore, section 146, if properly applied, provides a fair and simple response to the problem of crime committed on the basis of the victim's disability, sexual orientation or transgender identity. Our proposals discussed below in relation to section 146 are designed to increase the likelihood that it is properly applied in all cases.

(2) Ease of charge selection

3.24 The existing regime provides for aggravated racial or religious offences and for sentencing to be increased under section 145 where the offence is a non-aggravated one and there was a demonstration of racial or religious hostility or the offence was motivated by such. The aggravated offence and section 145 sentencing regimes are mutually exclusive.[23] Case law has confirmed that section 145 should not be applied where a racially or religiously aggravated form of the offence was (a) charged but resulted in an acquittal[24] or (b) available but not charged.[25] This mutual exclusivity of the offence and sentencing regimes would be mirrored if the aggravated offences were extended to cover disability, sexual orientation or transgender identity.

3.25 Relying on section 146 without the creation of new aggravated offences would allow for a single approach to all offences which is likely to be clearer and simpler, therefore leading to more effective and consistent operation in practice. Prosecutors would have no decision to make about whether to charge the aggravated offence or the basic offence alone.[26]

(3) Maximum penalties

3.26 The aggravated offences under sections 29 to 32 of the CDA 1998 attract higher maximum penalties than the basic offences.[27] That would be true of any new aggravated offences proposed. In contrast, the application of section 146 does not give the judge any power to raise the sentence above the maximum penalty

[21] See para 3.12 above.

[22] CJA 2003, s 146(1) reads: "This section applies where the court is considering the seriousness of *an* offence committed in any of the circumstances mentioned in subsection (2)" (emphasis added).

[23] On s 145(1) of the CJA 2003 see Ch 2 at para 2.45 and 2.136.

[24] *McGillivray* [2005] EWCA Crim 604, [2005] 2 Cr App R (S) 60.

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

[26] This advantage would not apply, of course, if consultees opted for extension of the aggravated offences *and* amendments to the enhanced sentencing regime.

[27] See Ch 2 at para 2.47.

for the basic offence charged. The difference in maximum penalties between the two regimes raises a number of issues:[28]

(1) *The interests of victims.* If the aggravated offences were not extended and therefore higher maximum penalties were not available, it is possible that some victims of disability, sexual orientation or transgender hate crime might have the sense that the wrongdoing against them has not been adequately recognised, even though the sentence imposed would include some increase under section 146 to reflect the hostility. Other victims, however, may not consider higher maximum sentences to be a priority, perhaps because they see the fact of conviction, coupled with the open court declaration that the sentence has been increased under section 146, as sufficient. Likewise, some victims may place higher value on measures such as restorative justice or education than they do on higher maximum sentences.

(2) *Reflecting culpability and/or harm.* There may be extreme cases in which the maximum sentence for the basic offence does not adequately meet the level of culpability and/or harm which the aggravation on grounds of hostility entails. We understand that the number of such cases is very small.

(3) *Deterrence.* It is notoriously difficult to prove the deterrent effect of criminal sanctions, and even more difficult to establish a causative link between higher sanctions and greater deterrent effects.[29]

3.27 When considering the significance of the higher maximum penalties which attach to the aggravated offences under the CDA 1998, it should be noted that these penalties were not set on the basis of any particular reasons of principle or policy. Guidance by the Sentencing Advisory Panel states that in each case, Parliament "simply chose the next available maximum from the progressive tariff of seriousness which is conventionally used in determining the maximum penalty for a given offence".[30] This pragmatic approach explains why the level of increase is not consistent across the range of aggravated offences. For instance, in the case of actual bodily harm, the uplift between the maximum penalty for the basic

[28] We accept that the maximum penalty available for an offence may be misleading because the court very rarely hands down a sentence close to or at the maximum provided for in statute. In *Pinto* [2006] EWCA Crim 749, [2006] 2 Cr App R (S) (87), for instance, it was held that the maximum should be passed only in the most truly exceptional cases, which are so serious that it was difficult to imagine a yet more serious example of the offence. In practice, therefore, the range of sentences available is smaller than that theoretically provided for in statute.

[29] See para 3.68 below.

[30] Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences*, (Jul 2000), This guidance originally applied to offences charged as racially aggravated offences under ss 29 to 32 of the CDA 1998, and to offences where racial aggravation was treated as an aggravating factor under s 82 of the CDA 1998 (s 82 has been repealed and re-enacted in s 145 of the CJA 2003). However, guidance from the CPS states that the advice also applies to ss 145 and 146 of the CJA 2003: Crown Prosecution Service, *Racist and Religious Crime – CPS Guidance,* http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ (last visited 19 Jun 2013) and Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013).

offence (five years) and that for the aggravated offence is 40% (seven years).[31] For common assault, by contrast, the uplift is 300%.[32]

3.28 It is also important to emphasise that in practice, there a very few instances in which the sentence for an aggravated offence under the CDA 1998 exceeds the maximum that would have been available for the basic offence, had it been charged.[33] For instance, the maximum sentence for aggravated actual bodily harm is seven years and/or a fine, while in 2011 the average sentence length actually handed down for the aggravated offence was 16.7 months (which is well within the maximum sentence of five years' imprisonment for the basic offence). Similarly, the maximum sentence for aggravated criminal damage is 14 years and/or a fine, while in 2011 the average sentence length for the aggravated offence was 7.8 months (which is well within the maximum sentence of 10 years' imprisonment for the basic offence).[34] The position in practice, therefore, diminishes the significance of the difference in maximum penalties between the aggravated offences and the sentencing provisions. Although in theory higher maximum penalties are available for the aggravated offences, these do not appear to be being used in practice.

(4) Labelling

3.29 The aggravated offences carry a unique descriptor (for instance, "racially aggravated assault"), reflecting the fact that they are considered to be more serious than their basic counterparts.[35] The denunciatory effect of the label is clear: to aggravate is to make worse. Furthermore, singling out the basis of the aggravation (race or religion, or in the case of any new offences, disability, sexual orientation or transgender identity) sends a clear message that wrongs against these groups will invoke special condemnation. The "aggravated" label is designed to carry and communicate a stigma which "stings" more deeply than the mere fact of conviction for the basic offence, even with an enhanced sentence.[36]

3.30 In contrast, while under section 146(3)(b) the judge must declare in open court that the offence was aggravated by hostility on grounds of disability, sexual orientation or transgender identity, the offence itself will not carry the "aggravated" label.

3.31 While the enhanced sentencing powers under section 146 do not perform the same labelling function as the aggravated offences, they nonetheless play a role

[31] The respective maximum penalties are five years' imprisonment and/or a fine for the basic offence and seven years' imprisonment and/or a fine for the aggravated version of the offence.

[32] The respective maximum penalties are six months' imprisonment and/or a fine for the basic offence and two years' imprisonment and/or a fine for the aggravated version of the offence.

[33] Information provided by the Ministry of Justice. See Appendix C para C.61.

[34] See Appendix C para C.61. Unfortunately we do not have any comparable reliable data for the average sentences received in cases where s 146 is applied.

[35] Aggravated offences are recorded as such on the PNC. However, our understanding is that the record does not distinguish between race and religion. See para 3.33 below. The use of s 146, by contrast, is not automatically recorded on the PNC.

[36] See para 3.72 below.

in communicating the greater seriousness of hate crime.[37] The application of section 146 can result in a higher sentence, thereby reflecting the greater culpability attaching to hate crime. The use of section 146 also provides an opportunity for the judge to articulate in a public setting the fact that the offender demonstrated or was motivated by a particular kind of hostility. The length of sentence and sentencing remarks are often as widely reported (and perhaps reported in more detail) than the fact of the offence label on conviction itself.[38]

3.32 We recognise, however, that in some cases, there may be a number of aggravating factors relevant at the sentencing stage, of which hostility on the basis of a protected characteristic is just one. There is, therefore, a risk that the full weight of the "hate" aspect of the offence could be lost amidst the court's treatment of a range of other aggravating factors. This stands in contrast to the singular focus of the aggravated offences. We make some proposals in relation to the enhanced sentencing provisions that would improve this position.

(5) Recording on the Police National Computer

3.33 Unlike the existing aggravated offences, the application of section 146 is not automatically recorded on the Police National Computer and does not show on the offender's criminal record. Since the existing aggravated offences can be recorded, we would expect the same practice to be adopted in relation to new aggravated offences. Below we propose the extension of this practice to the enhanced sentencing provisions.[39]

(6) Sufficiency of the sentencing model in practice

3.34 Our consideration here is whether the sentencing provisions could, if applied properly, provide an adequate response to the problems of "hate crime" against disabled, LGB and transgender groups. An important issue in addressing that concern is whether section 146 is currently being used appropriately in sentencing offenders and, if not, whether reforms could readily ensure that it was.

3.35 The grounds of disability, sexual orientation and transgender identity were added to the sentencing provisions more recently than religion (included since 2001)[40] and race (included since 1998).[41] Provision for sentencing uplift for hostility on grounds of disability and sexual orientation was made in 2003, while transgender identity was added in December 2012.[42] We have not been able to find any reliable data on how frequently, or infrequently, section 146 is applied by the courts. However, in preliminary discussions with some hate crime charities concerns have been expressed that section 146 is being under-used. These concerns are also reflected in a recent Criminal Justice Joint Inspectorate ("CJJI")

[37] See para 3.74 below.

[38] See para 3.74 below.

[39] See para 3.53 below.

[40] Originally added to s 153 of the Powers of Criminal Courts (Sentencing) Act 2000 by the Anti-terrorism, Crime and Security Act 2001.

[41] Originally s 82 of the CDA 1998, eventually repealed and re-enacted as s 145 by the CJA 2003.

[42] By s 65 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 3 Dec 2012.

report, which highlighted a number of shortcomings in the criminal justice agencies' treatment of disability hate crime.[43] These include that:

(1) Disability hate crime issues are not always adequately identified in day-to-day investigative work.[44] This can result in insufficient evidence being obtained to support the court in fulfilling its duty under section 146. There is also a concern that consideration of the use of section 146 is not always sufficient often because "the detail within the file [is] insufficient for the charging lawyer to make that judgement".[45]

(2) Even in cases where a decision is made that section 146 CJA 2003 was relevant, the reasoning in CPS documentation is not always as full as it might be.[46] The report also suggests improvements in CPS management of disability hate crimes to reduce errors and to enable lawyers to identify cases against "clear and understandable criteria".[47]

(3) Members of the judiciary interviewed as part of the review noted that they were only asked to consider section 146 in "exceptional" cases.[48] Section 146 does not currently appear to have been "embedded" in the sentencing process.[49]

(4) Information supplied to probation trusts by the CPS and police was not always adequate to assist in the preparation of pre-sentence reports, resulting in an over-reliance on information provided by offenders who tended to minimise the seriousness of their wrongdoing.[50]

3.36 As far as we know, no similar inspection has been carried out in relation to hate crime on the basis of sexual orientation or transgender identity.[51]

3.37 It should be noted that the Government in its hate crime action plan has set an agenda for criminal justice agencies to improve their performance in relation to all hate crimes.[52] The CJJI report notes that this presents "a unique opportunity for the police, CPS and probation trusts to contribute to tackling the underlying

[43] Criminal Justice Joint Inspection (HMCPSI, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (Mar 2013), ("CJJI, *Living in a Different World*"), available at www.hmcpsi.gov.uk/cjji/ (last visited 19 Jun 2013).

[44] CJJI, *Living in a Different World* p 3.

[45] CJJI, *Living in a Different World* p 26. See also p 27.

[46] CJJI, *Living in a Different World* p 28.

[47] CJJI, *Living in a Different World* p 4.

[48] CJJI, *Living in a Different World* p 36.

[49] CJJI, *Living in a Different World* p 4.

[50] CJJI, *Living in a Different World* p 37.

[51] See para 3.128 below: transgender identity was not added to the CJA 2003 until Dec 2012, so a review of its operation would be premature. Sexual orientation, however, was included in 2003.

[52] HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012).

prejudice and ignorance that drives hate crime".[53] The report also cites examples of good practice amongst police forces across the country.[54]

3.38 Our proposals below to improve the enhanced sentencing regime will address some of these concerns.

(7) Examination of hostility

3.39 Since section 146 is relevant only at sentencing, the Crown does not need to adduce evidence at trial that the defendant demonstrated or was motivated by hostility on grounds of the victim's disability, sexual orientation or transgender identity. Therefore only the sentencing judge, and not a jury, must be satisfied (to the criminal standard) that the aggravating factor was present. This is in contrast to the position in relation to sections 29 to 32 of the CDA 1998, where the hostility must be proved at trial in order for the aggravated offence to be made out.

3.40 The position under section 146 might avoid the need for the victim to adduce evidence about (1) the presence of hostility and (2) his or her status (or presumed status)[55] as a disabled, LBG or transgender person. This may be attractive to some victims but not others. It may also have some cost savings.

3.41 However, while potentially beneficial to victims, the position under section 146 could be potentially disadvantageous to defendants. Where a defendant pleads guilty to an offence but disputes the presence of any element of aggravation, the only route of challenge is via a *Newton* hearing.[56] In a *Newton* hearing, the prosecution must either call evidence in support of their version or allow sentence to be passed on the basis of the defence version. However, this requires a separate hearing (with the associated cost, time and stress) which the defendant may wish to avoid. Furthermore, the defendant will run the risk of the hearing being resolved against him or her, in which case any credit he or she is due for pleading guilty may be reduced (although it appears to be only in exceptional cases in which such credit will be wholly dissipated[57]). In practice, therefore, a defendant may be deterred from going down the route of a *Newton* hearing, even if he or she in fact was not motivated by, or did not demonstrate, hostility on grounds of one of the protected characteristics.

[53] CJJI, *Living in a Different World* p 5.

[54] CJJI, *Living in a Different World* pp 6 and 7.

[55] Under s 146(2), it is sufficient for hostility to be demonstrated towards the victim based on their "presumed membership" of one of the listed groups.

[56] See Ch 2 at para 2.166 and following.

[57] See Judge LJ in *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [11].

(8) Availability of challenge

3.42 As we describe in Chapter 2,[58] the Attorney General has the power to refer to the Court of Appeal as unduly lenient any sentence passed in relation to "indictable only" offences[59] and to a limited list of "either way offences".[60] Where such a referral is made, it is open to the Court of Appeal to quash the sentence and substitute a sentence it considers appropriate and that was within the power of the lower court to pass.[61] The purpose of the system is to correct gross error and to allay widespread public concern in cases where there appears to have been an unduly lenient sentence.[62]

3.43 The limited list of either-way offences contained in statute includes the racially and religiously aggravated offences.[63] This means that a sentence for any of the offences currently contained in sections 29 to 32 of the CDA 1998 may be referred to the Court of Appeal as unduly lenient. We assume that any new aggravated offences relating to disability, sexual orientation or transgender identity, if created, would be treated in the same way as the existing aggravated offences.

3.44 By contrast, in cases where section 145 or 146 was misapplied or not applied at all,[64] the prosecution could only refer the sentence for review if the offence in question was indictable only or appeared on the limited list of either-way offences. In other words, the Attorney General's power to refer a sentence as unduly lenient does not apply to all sentences passed under sections 145 or 146.

3.45 **Proposal 1: 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?**

[58] See Ch 2 at para 2.50.

[59] Criminal Justice Act 1988, s 35(3)(b)(i). "Indictable only" offences are those triable only in the Crown Court.

[60] Criminal Justice Act 1988, s 35(3)(a) or (b)(ii). "Either-way" offences are those which can be tried either in the magistrates' or Crown Court. "Either-way" offences which can be referred include threats to kill, cruelty to persons under 16, trafficking people for exploitation and sexual assault: see Criminal Justice Act 1988 (Review of Sentencing) Order 2006/1116, sch 1, paras 2 and 3.

[61] Criminal Justice Act 1988, s 36(1).

[62] The distinction between a lenient sentence and an "unduly" lenient sentence is an important one, and careful consideration of the individual circumstances is required before the Court of Appeal decides to make the case the subject of a reference. *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41, (1990) 90 Cr App R 366; *Attorney-General's Reference (No 5 of 1989)* (1990) 90 Cr App R 358, (1989) 11 Cr App R (S) 489; and *Attorney-General's Reference (No 132 of 2001)* [2002] EWCA Crim 1418, [2003] 1 Cr App R (S) 41.

[63] Criminal Justice Act 1988 (Review of Sentencing) Order 2006/1116, sch 1, para 2(i).

[64] One of our suggested amendments to the sentencing process – clearer sentencing guidance for courts – should reduce the number of cases in which ss 145 or 146 are misapplied or not applied at all: see para 3.47 below.

Possible proposals to improve the operation of the enhanced sentencing provisions

3.46 Here we set out some simple amendments to the enhanced sentencing provisions that could meet some of the limitations of the existing regime. We consider that these amendments would strengthen the utility of the sentencing provisions as a viable alternative to the creation of new aggravated offences. Although our primary concern (in light of our terms of reference) is to improve the operation of section 146, any amendments we propose would apply equally to section 145.[65] This would promote consistency and avoid complexity.

(1) Clearer sentencing guidance for courts

3.47 As noted in Chapter 2, there is no specific guidance to assist the courts in applying section 146.[66] The main guidance that exists was published by the Sentencing Advisory Panel in 2000[67] in relation to racially aggravated offences and offences in which racial aggravation was treated as an aggravating factor.[68] The CPS has assumed that this advice also applies to section 146 of the CJA 2003.[69]

3.48 The guidance of the Sentencing Advisory Panel (the majority of which was accepted and elaborated on by the Court of Appeal in *Kelly and Donnelly*)[70] sets out a number of general principles designed to assist the court in assessing the level of seriousness of the hostility factor. These principles relate both to the offender's intention and the impact of the crime on the victim.[71] However, much of the guidance and case law applying it is directed at the means by which the courts should calculate the uplift in sentence. The key principle here is that the sentencing judge should adopt the "two-stage" approach discussed in Chapter 2.[72] Under this approach, the sentencer should first determine what the sentence would have been for the basic offence, before adjusting that notional

[65] Apparent under-use of s 145 powers is evidenced in Crown Prosecution Service, *Anti-Muslim Hate Crime: learning from casework* (Nov 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.

[66] See Ch 2 at para 2.161 and following. Note, however, that sentencing guidelines on specific offences include motivation or demonstration of hostility based on sexual orientation and disability as factors indicating higher culpability at sentencing. See Sentencing Council, *Assault – Definitive Guideline* (2011) and Sentencing Council, *Burglary Offences – Definitive Guideline* (2011). Neither guideline has been updated to include motivation or demonstration of hostility based on transgender identity, which was added to s 146 in Dec 2012 by s 64 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[67] Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences*, (Jul 2000).

[68] A more recent guideline also states that the "two-stage" approach should be applied to three racially or religiously aggravated offences under s 29 of the CDA 1998: see Sentencing Council, *Assault – Definitive Guideline* (2011) pp 9, 13 and 25.

[69] See Ch 2 at para 2.161.

[70] [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73.

[71] See *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65].

[72] See Ch 2 at para 2.49.

sentence to take account of the degree of hostility.[73] Given the dearth of reported judgments in which section 146 has been applied, we are not able to draw any definitive conclusions as to whether (a) this two-stage approach is being adopted in cases in which section 146 is relevant and (b) whether the two-stage approach is the appropriate route to take in such cases.

3.49 The two-stage approach has been departed from in cases concerning aggravated offences where the essence of the offence itself was hostility on grounds of a protected characteristic. For instance, in *Bailey*,[74] where the defendant spray-painted racist comments onto the victim's lorry, the Court of Appeal held that the offence could not be separated out into its discrete elements of criminal damage and racial aggravation; this was "entirely racial abuse committed by way of criminal damage".[75] Again, we are not able to draw any firm conclusions as to whether a similar approach is, or should be, being taken in cases relating to disability, sexual orientation and transgender identity, if such new offences are created.

3.50 We consider that a new guideline from the Sentencing Council should be produced to deal exclusively with aggravation on the basis of hostility under sections 145 and 146 of the CJA 2003. There are several 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 both the prosecution and defence advocates to draw guidelines from the Sentencing Council to the judge's attention.[76]

(2) It will increase the likelihood of the police gathering information relating to section 146.

(3) 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.[77]

(4) It would enhance the likelihood of consistency in sentencing for crimes involving hostility based on disability, transgender or sexual orientation.

(5) It would lead to better monitoring and recording of the application of sections 145 and 146, thus providing more robust statistical data.

[73] Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences*, (Jul 2000). See also the more recent Sentencing Council, *Assault – Definitive Guideline* (2011), which at pp 9, 13 and 25 states that the two-stage approach should be applied to three offences under s 29 of the CDA 1998.

[74] [2011] EWCA Crim 1979.

[75] *Bailey* [2011] EWCA Crim 1979 at [6].

[76] Under s 125(1) of the Coroners and Justice Act 2009, when sentencing an offender 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 an offender for an offence committed before 6 April 2010, the court must have regard to any relevant sentencing guidelines: see http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm (last visited 19 Jun 2013).

[77] CJJI, *Living in a Different World* p 4.

3.51 **Proposal 2: We provisionally propose that a new guideline from the Sentencing Council should be produced to deal exclusively with aggravation on the basis of hostility under sections 145 and 146 of the CJA 2003. Do consultees agree? If not, why not?**

(2) Recording on the Police National Computer

3.52 We consider that where sections 145 or 146 are applied, this fact should be recorded. It should be part of the offender's record that appears specifically on the Police National Computer. This would bring the position as regards the sentencing provisions into line with the practice in relation to the aggravated offences, which are automatically recorded on the Police National Computer.[78]

3.53 **Proposal 3: We provisionally propose that where section 145 or 146 is applied, this should be recorded on the Police National Computer and reflected on the offender's record. Do consultees agree? If not, why not?**

3.54 **Question 1: 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?**

3.55 **Proposal 4: 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?**

REFORM OPTION 2: CREATING NEW AGGRAVATED OFFENCES

3.56 We now offer proposals relating to the extension of the aggravated offences to include disability, sexual orientation and transgender identity. We include proposals on the various models that such aggravated offences might take.

3.57 We begin by examining the core arguments for and against the extension of new aggravated offences to include disability, sexual orientation and transgender identity. It is important to note from the outset that our terms of reference permit us to consider only the extension of the existing aggravated offences contained in the CDA 1998. This means that we have to accept that any new offences:

(1) would apply only in relation to the basic offences;

(2) would retain all the core statutory elements of the racially and religiously aggravated offences (other than the definitions of race and religion), such as "hostility", "membership", "presumed membership";[79] and

(3) would be limited to disability, sexual orientation and transgender identity.

[78] On which, see para 3.33 above.

[79] See para 3.101 and following below and Ch 2 at para 2.13 and following.

(1) Would new offences deal with the prevalence and nature of offending?

3.58 It is difficult to identify the precise scale and gravity of the problem of hate crime against disabled, LGB and transgender people.[80] However, as we note in our discussion of the CPS data detailing the prevalence of certain offences against disabled, LGB and transgender people, not all of the conduct complained of would amount to a basic offence.[81] This means that creating new aggravated offences would have no effect on some of the alleged wrongdoing. Particularly in relation to disability, a significant proportion of wrongdoing (at least 38.2%) would be untouched.[82] The fixed list of basic offences is one of the inherent limitations of the aggravated offences, which would be perpetuated in the case of extension.

3.59 The conduct which constitutes the basic offences is already criminalised, but the demonstration of hostility is not. Extending the aggravated offences could tackle both. However, in doing so, there is a risk that the fact of creating new offences might inhibit other, non-legislative solutions which could potentially address the nature and scale of the problem more effectively. For instance, improved education and an end to offensive and discriminatory media representation. Furthermore, a recent report which identified shortcomings on the part of relevant criminal justice authorities in responding to hate crime against people with disabilities, makes a number of non-legislative recommendations to improve performance.[83]

(2) To what extent do existing criminal offences already address the conduct that new aggravated offences would address?

3.60 The criminal law already affords members of the three groups under consideration protection from assaults, criminal damage, public disorder, harassment and stalking through the basic offences, just as it does for everyone else. In addition to the basic offence in question, a defendant who demonstrates hostility towards the victim can also be charged under section 5 of the Public Order Act 1986 ("POA 1986"). Section 5 makes it an offence to use threatening or abusive words or behaviour within the hearing or sight of anyone likely to be caused harassment, alarm or distress. It is therefore arguable that section 5, charged in conjunction with the offence in question, can already address much of the conduct which would be criminalised by new aggravated offences.

3.61 However, even using the basic offences in conjunction with section 5, the existing law has a number of limitations:

(1) it does not address those cases in which the defendant has acted with hostile motivation (arguably the worst forms of offences in this context);

(2) it requires two separate offences to be charged;

(3) it does not convey a label which precisely and accurately reflects the criminal behaviour. This is because the basic offences do not make it

[80] See paras 3.8 and 3.12 above.

[81] See para 3.9 above.

[82] The figure is much lower in relation to sexual orientation and transgender identity, at 6.7%: see para 3.9 above.

[83] CJJI, *Living in a Different World*. For more detailed discussion on this report see para 3.35 and following above.

apparent that there was an element of hostility towards members of a particular group; and

(4) the basic offences might not provide punishment which adequately reflects the wrongdoing. The addition of a section 5 offence does not redress this inadequacy because the penalty for a section 5 offence is limited to a fine.

3.62 In short, the substantive criminal law does not provide a complete response to the conduct by the use of charges under existing offences.

(3) Does the existing criminal law adequately address the harms suffered?

3.63 If the harms suffered by victims of basic offences aggravated by hostility are greater in severity and/or different in type from the harm suffered by people who are victims of basic offence, this may provide an argument for extending the aggravated offences to include additional groups.

3.64 Unfortunately, there is no empirical evidence from which the level of harm caused by the aggravated offences, as distinct from the basic offences, can be definitively determined.[84]

(4) Are existing offences and/or initiatives short of criminalisation sufficient to encourage victims and witnesses to report hate crimes?

3.65 There is a widely acknowledged problem of under-reporting in relation to disability, sexual orientation and transgender hate crime.[85] New offences might encourage victims and witnesses to report crime by:

(1) sending a message to all members of society that such behaviour is unacceptable and should not be tolerated. This is important since research suggests that many people with disabilities come to accept disability-related harassment as inevitable;[86]

(2) increasing confidence in the criminal justice system's response to hate crime. For example, new offences could send a message that police and

[84] The theory paper addresses this question in more detail, examining the most commonly discussed forms of potential greater harm caused by hate crime. For some evidence that hate crimes may cause greater levels of harm than non-hate crimes, see: Home Office Statistical Bulletin, *Hate Crime, Cyber Security and the Experience of Crime Among Young Children: Findings from the 2010/11 British Crime Survey* (Mar 2012) and P Iganski, *Hate Crime and the City* (2008).

[85] There are numerous studies and reports which indicate that many offences go unreported. See, eg, Stonewall, Homophobic Hate Crime: The Gay British Crime Survey (2008); Equality and Human Rights Commission, *Hidden in Plain Sight* (2011); and P Kelley, *Filling in the Blanks: LGBT hate crime in London* (2009). However, combined data from the 2009/10 and 2010/11 British Crime Survey (BCS) found that a greater number of incidents of hate crime (49%) came to the attention of the police compared with incidents of BCS crime overall (39%). See Home Office Statistical Bulletin, *Hate Crime, Cyber Security and the Experience of Crime Among Young Children: findings from the 2010/11 British Crime Survey* (Mar 2012).

[86] See Equality and Human Rights Commission, *Hidden in Plain Sight* (2011) p 57. This report suggests that many disabled people come to accept disability-related harassment as inevitable.

prosecutors will take the homophobic element of an offence seriously;[87] and

(3) imposing a duty on police and prosecutors to investigate and present evidence of hostility, rather than focusing only on proving the basic offence.

3.66 However, we also recognise that the use of the criminal law to prohibit conduct should be restricted to cases where it is truly necessary. The problem might be tackled effectively by initiatives short of criminalisation. These include:

(1) education, with schools encouraging diversity and tolerance;

(2) initiatives to discourage discrimination;

(3) rehabilitation of previous hate crime offenders;

(4) removing barriers to effective handling of all reported crime which stem from the victim's disability, sexual orientation or transgender identity; and

(5) taking necessary steps to support victims through the criminal justice process.

3.67 It is a matter of speculation whether these measures, even in combination and even if rigorously applied, would have the same effectiveness as a new offence. However, it may be that the argument for exceptional caution before creating new criminal offences is less strong in this context than elsewhere. The conduct complained of is already criminal under the basic offences, so this is not a case of the State deciding to deploy its most coercive sanction against an individual for conduct that would not previously have triggered investigative powers, arrest, trial and punishment. The question is more about the appropriateness of the type and label of criminal offence that is to be applied.

(5) What greater deterrent effect might any new aggravated offences have?

3.68 The law already provides the basic offences. If criminalisation is an effective deterrent, then the existence of those offences should deter people from engaging in the conduct which also forms the core element of the aggravated offences. It is possible, however, that extending the aggravated offences would increase the deterrent effect over and above that of the basic offences and would, in particular, deter people from committing crimes against others out of hostility on the basis of disability, sexual orientation or transgender identity. This could be a result of: the addition of the "aggravated" label and the extra stigma which flows from it, and the potentially harsher sentence which follows conviction of an aggravated offence.

3.69 It is not clear, however, that any of these factors, on their own or in combination, are sufficient to deter offending against people based on hostility relating to disability, sexual orientation or transgender identity. This is, in part, because the

[87] See Stonewall, *Homophobic Hate Crime: The Gay British Crime Survey* (2008) pp 25 to 26. Respondents indicated that there was a lack of support or information from the police and some felt that the police were homophobic or would not take homophobic hate crime seriously.

deterrent effect of labels and harsher sentences is difficult, if not impossible, to prove.[88]

3.70 In the long-term, it is possible that extending the aggravated offences could have a positive effect by contributing to the changing attitudes in society. The new aggravated offences could send a message that people with disabilities, particular sexual orientations and transgender people, should be treated with dignity and respect, regardless of their personal characteristics.

(6) Do the existing sentencing provisions provide a label that adequately reflects the criminality?

3.71 As noted above, a key distinction between the aggravated offences and the enhanced sentencing provisions is that only the former give rise to the "aggravated" label.[89] This raises the question whether use of the sentencing provisions, even with the proposed reforms, adequately respects the principle of "fair labelling".[90] Broadly speaking, the concern of fair labelling is:

> to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.[91]

In other words, offence labels are thought to perform a symbolic or "declaratory" function, signalling to society the nature and degree of the wrongdoing.[92]

3.72 In the present context, the "racially/religiously aggravated" label carries a strong stigma which reflects the fact that hate crimes are considered to be more serious, and different in kind, to basic offences.[93] A defendant who demonstrates racial hostility while carrying out an assault will be convicted of a "racially aggravated assault", and that label will attach to the offender in the form of his or her criminal record - the Police National Computer will reflect this. By contrast, under the present law, a defendant who demonstrates hostility on the basis of disability while carrying out an assault will simply be convicted of assault. While the hostility can be taken into account at sentencing – and discussed in open court during the sentencing hearing – the *label* attaching to the offending behaviour will

88 For a general discussion of the deterrent effect of criminal sanctions, see Ch 4 at para 4.46 and following.

89 See para 3.29 and following above.

90 For the first discussion of fair labelling, see A Ashworth, "The Elasticity of *Mens Rea*" in C Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) p 45, 53. Ashworth initially termed the principle "representative labelling": see G Williams, "Convictions and Fair Labelling" (1983) 42 *Cambridge Law Journal* 85 for a discussion of why Glanville Williams thought "fair" is more appropriate.

91 A Ashworth and J Horder, *Principles of Criminal Law* (6th ed, 2013) p 77.

92 See B Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling" (2001) 64 *Modern Law Review* 393 and V Tadros, "The Homicide Ladder" (2006) 68 *Modern Law Review* 601.

93 For an in-depth discussion about the scope and justification of fair labelling, see J Chalmers and F Leverick, "Fair Labelling in Criminal Law" (2008) 71 *Modern Law Review* 217.

be silent as to the element of aggravation.[94] The application of section 146 is not recorded on the Police National Computer.[95] Our proposal above addresses that.

3.73 While offence labels are one important way in which the criminal law communicates censure, other processes also perform this function. Sentencing does so in two key ways. First, the sentence itself should fairly represent the nature and magnitude of the law-breaking.[96] Secondly, the sentencing hearing provides a public forum in which the judge can set out the aggravating or mitigating factors which speak to the culpability of the offending behaviour.[97]

3.74 The utility of sentencing in communicating censure in practice depends in large part on the extent to which the public are attuned to sentencing processes. On the one hand, some research suggests that public perceptions of sentencing are "shaped by misperceptions of actual sentencing patterns".[98] This can be contrasted with the position as regards certain criminal offences which are more widely understood and which have entered the public consciousness.[99] On the other hand, while the public may struggle to comprehend the intricacies of sentencing practices and patterns, it is arguable that the length and type of sentence awarded in any individual cases is readily understandable. Indeed, these are commonly reported in local and national media. Furthermore, while certain long-established offences may have captured the public imagination, it is far from clear that any new aggravated offences would do so. If this is the case, it may be that reports of judges' comments made during open court declarations

[94] It should be noted that the utility of denunciatory labels has been called into question by some commentators. It has been argued, for instance, that stigma is connected with offenders experiencing anger, alienation and rejection of the court's "ethical position". This, it is suggested, may have an overall counterproductive effect by leading to repetition of the offending behaviour "unless there is some process to resolve the shame". This may particularly be the case where the offender does not accept the hostility element of the offence. See E Burney, "Using the Law on Racially Aggravated Offences" [2003] *Criminal Law Review* 28, 35, citing E Ahmed, N Harris, J Braithwaite and V Braithwaite, *Shame Management Through Reintegration* (2001).

[95] See the amendment we suggest in relation to the recording of s 146 on the Police National Computer at paras 3.52 and 3.53 above.

[96] As set out by the Sentencing Guidelines Council, the starting point for the court in considering the appropriate sentence is to assess the seriousness of the offence. Seriousness is determined both by the culpability of the offender and the harm caused, or risked being caused, by the offence: see *Overarching Principles: Seriousness* (Dec 2004) para 1.3. The CJA 2003, s 142(1) provides that when sentencing an offender, the court must have regard to the five purposes of sentencing, namely (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; (e) the making of reparation by offenders to persons affected by their offence.

[97] Under s 174(1)(a) of the CJA 2003, the court has a duty to "state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence". This provision was substituted by s 64 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 3 Dec 2012. Under s 174(4)(a) of the CJA 2003, the Criminal Procedure Rules may prescribe cases in which this duty does not apply.

[98] J V Roberts, M Hough, J Jacobson and N Moon, "Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis" [2009] *Criminal Law Review* 771, 782.

[99] Gardner, for instance, argues that the certain legal expressions - "grievous bodily harm" and "actual bodily harm" (and even their abbreviations "GBH" and "ABH") - have entered the "popular imagination, and now help to constitute the very moral significances which they quaintly but evocatively describe". See J Gardner, "Rationality and the Rule of Law in Offences Against the Person" in J Gardner, *Offences and Defences* (2007) p 50.

convey the desired message at least as effectively, and perhaps even more effectively, than new aggravated offences.

(7) Is there a risk that the new aggravated offences will be ineffective?

3.75 One of the risks inherent in creating new aggravated offences is that they will not be effective in practice. This risk exists when any new offence is created, but may be particularly pertinent in this context, because the new aggravated offences would be grafted onto an existing legislative regime which was not designed with the three new groups in mind. The new offences may (1) fail to send the desired message (that all individuals should be treated with dignity and respect, regardless of any personal characteristics or attributes); (2) fail to deter the proscribed behaviour; and (3) be rarely prosecuted (or prosecuted successfully). Such ineffectiveness could undermine the confidence of victims and wider society in the utility of the criminal law, and by extension their perceptions of the criminal law's legitimacy.

3.76 **Proposal 5: If proposals 2 and 3 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 basic 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?**

MODELS FOR NEW OFFENCES

3.77 We now consider the various models that the new aggravated offences might take. We offer provisional proposals in relation to each new aggravated offence. In each case, the provisional model and questions are based on the assumption that the creation of new offences, is felt to be necessary and that reform of the enhanced sentencing regime is not a sufficient option for reform.

Defining the new protected characteristics

3.78 To allow consultees to assess more fully the merits of reform involving the creation of new offences, it is important to provide some discussion of how "disability", "sexual orientation" and "transgender identity" should be defined in any new offences. The definitions adopted would have an impact on the scope of the new offences. However, we are not at this stage engaged in an exercise in statutory drafting. The purpose of the discussion below is to facilitate discussion of possible definitions that might be adopted if new offences were to be recommended.

3.79 It was noted in Chapter 2 that the definitions of "racial group" and "religious group" (as set out in sections 28(4) and 28(5) of the CDA 1998) have been interpreted broadly. For example, "racial group" includes non-inclusive terms, such as "foreigners".[100] By way of analogy, "religious group" could include non-inclusive terms, such as "unbeliever". Therefore, while the aggravated offences were enacted primarily in order to address the denial of equal respect and dignity

[100] *Rogers* [2007] UKHL 8, [2007] 2 AC 62. See Ch 2 at para 2.38.

to minorities and people who are generally seen as "other",[101] they have also been held to apply in a neutral way. It is as much an offence to demonstrate racial hostility against someone who is white as against someone who is black.[102] Although the case law suggests that the most common victims of the existing aggravated offences are indeed members of minority groups, one of the advantages of the all-encompassing definition is that the offences protect all members of society equally.

3.80 It is necessary to consider, therefore, whether our proposed definitions of disability, sexual orientation and transgender identity could be interpreted in a similarly encompassing manner. We think that the same, neutral approach could be adopted in relation to sexual orientation, offering equal protection to all members of society irrespective of their orientation. This would be consistent with the approach taken in section 29AB of the POA 1986, which includes heterosexual people as well as lesbian, gay and bisexual people.[103] It would be more difficult, however, to draft neutral definitions for disability and transgender identity. Of the several possible definitions of disability and transgender identity we set out below, even the broadest would exclude able-bodied people and people who fall within typical gender norms or those who identify as the gender they were assigned at birth.

3.81 A further rather obvious general point about definitions is worth making. Open or broad definitions may seem attractive because they provide protection to a wider pool of individuals. However, the flexibility of such definitions is likely to invite more judicial discretion, which can have the potentially detrimental effect of creating uncertainty, inconsistencies and an overall lack of coherence.

The relationship between any new offences and section 146

3.82 In our discussion of definitions of "disability", "sexual orientation" and "transgender identity" we give greatest weight to the definitions in section 146 of the CJA 2003 because this provision already applies to the three groups in the context of the enhanced sentencing provisions. Section 146 and any new aggravated offences would be mutually exclusive in the same way that section 145 and the existing racially and religiously aggravated offences are.[104] This means that if the relevant conduct amounts to a basic offence, and there is evidence of hostility, it should be charged as an aggravated offence. It is not possible to apply section 145 to offences which could be charged as aggravated offences under the CDA 1998.[105] Applying the section 146 definition to any new aggravated offences would therefore ensure consistency in the approach to hate crimes.

3.83 Adopting the section 146 definitions would also ensure that there are no gaps or overlaps between what constitutes an aggravated basic offence and what

[101] *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12].

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

[103] Although we do note that this definition would exclude asexual people, who have no sexual orientation: see para 3.114 below.

[104] See para 3.24 above.

[105] The same would apply as regards s 146, if new aggravated offences were introduced for disability, sexual orientation and transgender identity.

constitutes an aggravating factor at sentencing for all other offences. Other definitions may not achieve this same unity, resulting in the same conduct amounting to an aggravated offence but not an aggravated factor at sentencing, or the other way around.

DISABILITY: A new aggravated offence

3.84 As we have already pointed out, any new aggravated offence would be based on the existing form of the aggravated offences in the CDA 1998 and be limited to the same basic offences.

3.85 In this section we examine the possible definition of "disability" which would lie at the heart of any new offence. We then consider whether the generic elements of the section 28 offence ("demonstration of hostility" and "motivation by hostility") would generate particular difficulties in a new aggravated disability offence.

(1) Defining "disability"

3.86 There are numerous definitions of "disability" to consider. We examine three possibilities drawn from recent legislation.

(a) The CJA 2003, section 146(5)

3.87 Disability is defined in section 146(5) of the CJA 2003 as follows:

> In this section "disability" means any physical or mental impairment.

3.88 The scope of the section 146 definition is uncertain. There is no judicial guidance on how it is to be applied as it has not yet been interpreted by the appellate courts.[106] This makes it difficult to know precisely which impairments would amount to a "disability" and what effect an impairment must have on a person before it can be considered to be a disability.[107] We do note, however, that the section 146 definition is potentially very wide.[108] This carries both advantages and disadvantages. On the one hand, a wide definition avoids the need to draw fine and potentially arbitrary distinctions between different forms of impairment. On the other hand, there is a risk that a wide definition may lead to unjustifiable uncertainty and inconsistency as to the outer limits of what counts as disability.

3.89 The definition adopted in section 146 is mirrored in other statutes. For instance, Northern Irish legislation, which makes provision for enhanced sentencing based

[106] If a new aggravated offence were to be enacted, the definition of disability would be a question of law to be decided by the judge. If the judge directs that a certain condition amounts to a disability within the terms of the definition adopted, it would then be a question of fact for the jury to determine whether the victim in fact has that disability.

[107] CPS guidance does provide some useful indication, however. For instance, the guidance explicitly states that s 146 includes people living with HIV or AIDS (although it does not refer to any other medical conditions): see Crown Prosecution Service, *Disability Hate Crime,* http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 19 Jun 2013).

[108] Though in the absence of any case law on how the definition is to be interpreted, we are unable to speculate as to the types of conditions which may fall within its ambit.

on hostility, adopts the same definition as section 146: "any physical or mental impairment".[109]

3.90 Despite the uncertainty as to the scope of section 146, the definition has clear attractions. It would maximise consistency between the new aggravated offence and the enhanced sentencing regime. It would therefore avoid gaps or overlaps between what constitutes an aggravated basic offence and what constitutes an aggravating factor at sentencing for all other offences. Furthermore, criminal practitioners and judges are already familiar with the definition.

3.91 **Proposal 6: We consider that the definition of disability in any new aggravated offence should mirror the definition in section 146: "any physical or mental impairment". Do consultees agree? If not, why not?**

(b) The Equality Act 2010

3.92 A narrower definition of disability is contained in section 6 of the Equality Act 2010, and is expanded upon by schedule 1 of the Act, as well as accompanying regulations and guidance.[110] Section 6 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.

3.93 A key difference between section 146 and the Equality Act definition is that the latter alone requires explicit consideration of the effects of the impairment on the individual.[111] One of the key rationales of the Equality Act 2010 was to create equal treatment in a number of contexts, including access to employment, services and education.[112] An important use of the definition of disability in the Act, therefore, is to ensure that employers and service providers fulfil their duty to make reasonable adjustments so that protected persons are not put at a

[109] Criminal Justice (No 2) (Northern Ireland) Order 2004, art 2(5). Art 2 makes it an aggravating factor in sentencing if the offence is shown to have been aggravated by hostility on the grounds of the victim's actual or presumed race, religion, sexual orientation or disability. We are not aware of any criminal cases in which the definition of disability has been addressed by the courts. In addition to the sentencing provisions, Northern Irish hate crime legislation also includes offences relating to the stirring up or arousing of fear, which include (since 2004) disabled people: Public Order (Northern Ireland) Order 1987, part III, arts 8 to 17. Disability is left undefined in this Order.

[110] See the Equality Act 2010 (Disability) Regulations and the Office for Disability Issues, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2010). For further detail, see Ch 2 at para 2.145 and following.

[111] See *Walker v Sita Information Networking Computing Ltd* [2013] Equality Law Reports 476. The Employment Appeal Tribunal in that case held that although obesity itself did not render a person disabled, it might make it more likely that a person was impaired. It was not necessary to consider how the impairment was caused; the key question was the effect of the impairment.

[112] Another key rationale for the Equality Act 2010 was to harmonise existing discrimination legislation.

"substantial disadvantage" in comparison with persons who are not disabled.[113] The fact that the Equality Act definition requires consideration of the effects of the impairment on the individual must be seen in this context. Although one of the underlying purposes of hate crime legislation is to tackle hostility-driven offending which has the effect of undermining the equality and dignity of disabled people, we consider that the Equality Act has a different, broader focus on equal treatment. For this reason, we consider it inappropriate for a new disability aggravated offence.[114]

3.94 **Question 2: Do consultees agree that the definition of "disability" in the Equality Act 2010 is inappropriate for any new disability aggravated offence that might be enacted? If not, why not?**

(c) The United Nations Convention on the Rights of Persons with Disabilities

3.95 The United Nations Convention on the Rights of Persons with Disabilities ("CRPD") includes a partial definition of disability in article 1:[115]

> 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.

3.96 Although at first glance the reference in article 1 to "long-term" impairments might suggest a narrower focus than section 146 ("any … impairment"), the word "include" suggests that the definition is non-exhaustive. This is further supported by the preamble, which states that disability is an "evolving concept". Therefore, persons with short-term impairments (and impairments other than those listed in article 1) should in theory be able to claim the protection offered by the CRPD.

3.97 The CRPD definition differs from section 146 in that it explicitly adopts a "social model" of disability which, by linking a person's impairment with external "attitudinal and environmental barriers",[116] emphasises the relationship between

[113] Equality Act 2010, s 20. We note that the focus on the effect of impairments and the corresponding duty to make reasonable adjustments could be said to accord with a "social model" of disability which focuses on the need for society to remove barriers to equal participation of disabled people. For further discussion of this, see para 3.97 and following below.

[114] For a criticism of the Equality Act definition in a different context, see Adult Social Care (2010) Law Commission Consultation Paper No 192 paras 9.44 to 9.46. The definition under discussion in that report was contained in the now repealed Disability Discrimination Act 1995, s 1(1). This definition is identical to that set out in s 6 of the Equality Act 2010.

[115] The definition is not intended to be exhaustive, in part because the definition of disability adopted by states parties is likely to vary.

[116] Preamble, CRPD, http://www.un.org/disabilities/convention/conventionfull.shtml (last visited 19 Jun 2013).

the individual and society.[117] The "social model" of disability is thought to avoid an undue focus on the individual as a passive recipient of medical or social care, instead shifting the onus onto society to adapt to the needs of persons with disabilities.[118] This resonates with the overall aim of the CRPD, which is to maximise the participation of people with disabilities in society on an equal basis with others.[119]

3.98 While section 146 itself does not make any explicit statement about societal responses to disability or the aim of removing barriers to participation, it might be argued that the overarching purpose of hate crime legislation is broadly analogous to that of the CRPD. A key aspect of the wrongdoing which hate crime offences seek to capture is the denial of equal respect and dignity to people who are seen as "other".[120] The effect of this denial is to undermine the ability of targeted people to feel safe and secure in society because of their impairment. However, the CRPD has a broader focus than hate crime legislation. It sets out all the rights that disabled people have on an equal basis with others, as well as the steps which need to be taken to ensure that disabled people are able to enjoy those rights. It is therefore not clear that adopting a definition which focuses on "various barriers" to participation would be appropriate in the context of the more specific focus of aggravated offences under the CDA.

3.99 Given the different context from which they are drawn, we consider that adopting the definition of disability in the CRPD would cause unacceptable uncertainty and inconsistency in the prosecution of disability hate crime.

3.100 **Question 3: Do consultees agree that the definition of disability in the UN Convention on the Rights of Persons with Disabilities is inappropriate for a new disability aggravated offence? If not, why not?**

(2) Demonstration of hostility

Definition of "disability"

3.101 The types of conduct which could amount to a demonstration of hostility depend on the definition of "disability" employed.[121] If the wide definition under section 146 were adopted, as we propose, any new offences would have a broader application than if the narrower definition under the Equality Act 2010 were adopted.

[117] On the social model of disability, see the following: P Bartlett, "The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law" (2012) 75(5) *Modern Law Review* 752, 758; D MacKay, "The United Nations Convention on the Rights of Persons with Disabilities" (2006-7) 34 *Syracuse Journal of International Law and Commerce* 323, 328; A Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?" (2006-7) *Syracuse Journal of International Law and Commerce* 563, 571; United Nations High Commissioner for Human Rights, *Annual Report* (A/HRC/10/48, 26 Jan 2009) para 35.

[118] See P Bartlett, "The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law" (2012) 75(5) *Modern Law Review* 752, 758.

[119] Preamble to the CPRD.

[120] *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12]. See also para 3.79 above.

[121] For a discussion of the various different possible definitions, see para 3.86 and following above.

Membership of a group

3.102 The offence under section 28(1)(a) applies where a demonstration of hostility is based on the victim's membership or presumed membership of a particular group. A defendant could be found guilty of a new aggravated offence if he or she demonstrates hostility towards the victim on the basis of a mistaken presumption that they are disabled. On the one hand, given the range of possible mistaken presumptions a defendant may hold about disability, this could result in a potentially wide aggravated offence (even if a narrow interpretation of "disability" were adopted). At the same time, reference to "presumed membership" might in fact limit the applicability of the offences. Limb (a) of the aggravated offences would only cover offensive demonstrations of hostility where there is, at the very least, evidence of a presumption that the victim is in fact disabled. The indiscriminate use of abusive or insulting terms or behaviour relating to disability which is not directed towards persons who are *actually* presumed to be disabled would continue to be governed by sections 4, 4A and 5 of the POA 1986.

3.103 New aggravated offences on the basis of disability could also include the demonstration of hostility towards a victim on the grounds of their "association" with people with disabilities. By analogy with the case law on racially or religiously aggravated offences, it is likely that "association" with disabled persons would be interpreted broadly. We consider that it would include family and social relationships and could extend to encompass carers, health professionals and medical staff.

(3) Motivation by hostility

3.104 An important aspect of section 28(1)(b) of the CDA 1998 is that the relevant hostility does not need to be the sole motivation behind the commission of the basic offence: there may be some additional explanation for the defendant targeting the victim.[122] It will therefore be irrelevant if the defendant and victim were also engaged in a dispute unrelated to the victim's disability, or if the defendant was also motivated by hostility towards other characteristic of the victim, such as their occupation. However, if the relevant hostility is not in any way the motivation for the offence, the offence cannot be brought within the ambit of section 28(1)(b).[123]

Vulnerability vs hostility

3.105 Determining whether there has been a hostile motive may prove particularly difficult in relation to offences aggravated on the basis of disability. For example, there may be uncertainty around whether a crime was motivated, wholly or partly, by hostility on the basis of disability, or whether the crime was purely an exploitation of perceived vulnerability or an abuse of trust, and not because the defendant was hostile towards disabled people.[124]

3.106 If, for example, a defendant harasses a physically disabled person in the belief that they are less likely to retaliate, the defendant's motivation is the victim's perceived vulnerability, rather than hostility towards the victim on the basis of

[122] CDA 1998, s 28(3).

[123] *DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

[124] See Ch 2 at para 2.149 and following.

disability. Unless there is some outward demonstration of hostility towards the victim based on their disability, the offence would not fall within either limb of a new aggravated offence on grounds of disability. In this case, while the victim is targeted because of a disability, the necessary "hostility" requirement is absent. Vulnerability and abuse of trust are not factors which would suffice to establish an aggravated offence on grounds of disability. In contrast, such factors can be taken into account as general aggravating factors during sentencing.[125]

3.107 In the context of disability hate crime, the CPS use the term "vulnerable victim" to describe someone who was in a vulnerable situation that was exploited by the offender.[126] It need not imply that the victim was in fact vulnerable because they have a disability. The CPS approach to the distinction between vulnerability and hostility is considered in Chapter 2.[127]

3.108 There may be cases where the defendant acted both on grounds of hostility and because the victim was vulnerable and could therefore be easily exploited. CPS guidance recognises that targeting a particular person on grounds of their disability is often, though not always, a clear indication of hostility based on disability. Seeing the particular disabled person as an easy target for a particular criminal offence does not alter this: the victim is still being targeted specifically because of their disability.[128] However, there may also be cases where it cannot be proved either that the accused was motivated by hostility or that the accused targeted the victim because of their disability, or even that the accused knew that the victim was disabled.

3.109 Other opportunistic crimes, such as breaking into the home of a physically disabled person because they are less likely to be in a position to prevent theft, would not come within the ambit of the aggravated offences. Not only is there no hostile motivation on the basis of disability (or, alternatively, a demonstration of hostility), but the offences of burglary, robbery and theft are not basic offences which are capable of being aggravated under the CDA 1998.[129] Any new aggravated offences would operate only in relation to the existing list of basic offences.

3.110 **Question 4: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on disability? If not, why not?**

[125] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (Dec 2004) para 1.22. The guideline does not define vulnerability or abuse of trust in the context of aggravating factors, but in setting out general points relating to culpability, it refers to vulnerability by reason of old age or youth, disability or by virtue of the job the victim does: see para 1.17.

[126] Crown Prosecution Service, *Disability Hate Crime - Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[127] See Ch 2 at para 2.149 and following.

[128] Crown Prosecution Service, *Disability Hate Crime - Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[129] It is possible, however, that these types of offences are reported and recorded by the police and CPS as disability hate crimes.

SEXUAL ORIENTATION: A new aggravated offence

3.111 In this section we examine the possible definition of the term "sexual orientation", which would lie at the heart of any new offence. We then consider whether the generic elements of the section 28 offence ("demonstration of hostility" and "motivation by hostility") would generate particular difficulties in a new aggravated offence based on sexual orientation.

(1) Defining "sexual orientation"

3.112 Unlike disability, sexual orientation is not defined in section 146 of the CJA 2003. As noted above, there is CPS guidance on the meaning of sexual orientation in this context, and the question has been considered in case law.[130] In *B,*[131] the Court of Appeal concluded that section 146 was to be construed as reflecting existing definitions.[132] These definitions focus on gender preference and do not extend to other sexual preferences.[133]

3.113 "Sexual orientation" has been defined consistently in existing legislation. In the POA 1986, "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)".[134] This closely resembles the definition of sexual orientation in the Equality Act 2010.[135] Ministry of Justice guidance on the offences of stirring up hatred on grounds of sexual orientation states that the term covers "groups of people who are gay, lesbian, bisexual or heterosexual".[136]

3.114 Adopting the existing definition would mean that in the context of a new aggravated offence, "sexual orientation" would refer to orientation towards people of the same sex, the opposite sex or both. It would not encompass preferences for particular acts or sexual preferences. It would also not include asexual people, who have no sexual orientation.[137]

3.115 Adopting the existing definition would ensure consistency and uniformity in the law's response to sexual orientation hate crime through the aggravated offences, aggravated sentencing provisions and the stirring up offences. It would also align with CPS policy,[138] government guidance and equality and public order

[130] See Ch 2 at para 2.155 and following.

[131] [2013] EWCA Crim 291.

[132] Including s 29AB of the POA 1986, s 12 of the EA 2010, and guidance in Ministry of Justice*, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010) para 7. See *B* [2013] EWCA Crim 291 at [9] to [11].

[133] In *B*, paedophilia was held not to be a sexual orientation.

[134] POA 1986, s 29AB.

[135] Equality Act 2010, ss 4 and 12. The Equality Act definition derives from the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 2(1).

[136] Ministry of Justice*, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010) para 7.

[137] We have no evidence that there is a problem of hate crime against asexual people.

[138] Crown Prosecution Service, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (Nov 2007), http://www.cps.gov.uk/publications/docs/htc_policy.pdf (last visited 19 Jun 2013). See Ch 2 at para 2.155.

legislation. Applying a different definition of sexual orientation to the aggravated offences could result in instances where the same conduct would not amount to an aggravated offence but could lead to a higher sentence using section 146, despite both requiring either a demonstration of hostility or a hostile motive. For this reason, orientation towards people of the same sex, opposite sex or both is our preferred definition of sexual orientation.

3.116 **Proposal 7: We consider that the definition of sexual orientation in any new aggravated offence should mirror the existing definition adopted in case law: "orientation towards people of the same sex, opposite sex or both". Do consultees agree? If not, why not?**

(2) Demonstration of hostility

Definition of "sexual orientation"

3.117 Adverse or antagonistic words or gestures related to sexual orientation could amount to a demonstration of hostility. This would include using generally offensive terms related to sexual orientation. It would also include terms which are not necessarily associated with hostility, but could demonstrate hostility in the particular context. These could include, "gay", "lesbian" and "homosexual". As with the existing aggravated offences, the demonstration of hostility must occur in the context of a basic offence.

Membership of a group

3.118 The offence under section 28(1)(a) applies where a demonstration of hostility is based on the victim's membership or presumed membership of a particular group. A new aggravated offence could be proved where the accused demonstrated hostility towards the victim on the basis of a mistaken presumption about the victim's sexual orientation. This could result in a potentially wide aggravated offence, particularly in light of offensive stereotypes which abound in relation to certain sexual orientations.

3.119 At the same time, reference to "presumed membership" could limit the applicability of the offences. Limb (a) of the aggravated offences would not cover offensive demonstrations of hostility towards a particular sexual orientation unless there is, at least, a presumption by the defendant that the victim is of that sexual orientation. Extending section 28(1)(a) would not, therefore, affect the indiscriminate use of abusive or insulting terms or behaviour relating to sexual orientation which is not directed towards persons who are *actually* presumed to be of a particular sexual orientation. However, such conduct could fall within section 28(1)(b) if there is evidence that the defendant was motivated by hostility towards a particular sexual orientation.

3.120 Taking another example, if the defendant was unaware that the victim had a particular sexual orientation, but used a hostile term related to sexual orientation during the commission of a basic offence, it may be difficult to establish an aggravated offence under limb (a). The defendant could argue that the term was merely an offensive remark and that the demonstration of hostility was not *based on* the victim's actual or presumed sexual orientation.

3.121 New aggravated offences on the basis of sexual orientation could also include the demonstration of hostility towards a victim on the grounds of their "association" with people of a particular sexual orientation. We consider that a broad interpretation of "association" analogous to that adopted in the context of race and religion could include not only family and friends, but also those involved with or those who support LGB organisations.

(3) Motivation by hostility

3.122 A hostile motivation can be proved through reference to things said or done in the context of the basic offence, or through the accused's conduct on other occasions.

3.123 Since the relevant hostility need not be the sole motivation behind the commission of the basic offence, it would be irrelevant if the defendant and victim were also engaged in a dispute unrelated to the victim's sexual orientation, or if the defendant was also motivated by hostility towards another characteristic of the victim, such as their occupation. However, if the relevant hostility is not in any way the motivation for the offence, the offence cannot be brought within the ambit of section 28(1)(b).[139]

3.124 **Question 5: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on sexual orientation? If not, why not?**

TRANSGENDER IDENTITY: A new aggravated offence

3.125 In this section we examine the possible definition of the term "transgender identity" which would lie at the heart of any new offence. We then consider whether the generic elements of the section 28 offence ("demonstration of hostility" and "motivation by hostility") would generate particular difficulties in the context of a new aggravated offence based on transgender identity.

(1) Defining "transgender identity"

3.126 There are numerous definitions of "transgender identity" that might be considered. We examine two possibilities drawn from recent legislation.[140]

(a) The CJA 2003, section 146(6)

3.127 Section 146(6) provides that:

> In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

3.128 Section 146(6) came into force in December 2012. It has not yet been subject to judicial guidance or interpretation and so its scope remains uncertain. Lord

[139] *DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

[140] We do not here consider the definition of a "transsexual" person set out in s 7 of the Equality Act 2010 because the protected characteristic set out in s 146 of the CJA 2003 relates to "transgender identity".

McNally, in introducing the amendment to include transgender identity in section 146, said that:

> It will be for the courts to determine in individual cases whether or not the words or behaviour of the offender constitute hostility based on the victim's transgender identity or presumed transgender identity.[141]

3.129 According to Trans Media Watch,[142] transsexual people are those who wish to undergo, have undergone, or are undergoing "transition". Transition describes the process of changing gender presentation. Though not all those who identify as transsexual undergo medical therapy, the term transsexual is considered most appropriate when used in relation to clinical practice.[143] It appears that "people undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment" could appropriately be described as "transsexual". It is not clear why section 146(6) explicitly refers both to transsexual people and people undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

3.130 The section 146(6) definition may also include other groups of people. The phrase "references to being transgender *include* … ." suggests a non-exhaustive definition.[144] It is possible, therefore, that the following groups may also be found to fall within the definition of transgender identity:

(1) transvestites/cross-dressers;[145]

(2) intersex people;

(3) any other gender identity that is not standard male or female gender identity.[146]

[141] *Hansard* (HL) 7 Feb 2012, vol 735 col 153.

[142] A charity which aims to improve the accuracy of media coverage on "trans and intersex" issues: see http://www.transmediawatch.org/ (last visited 19 Jun 2013).

[143] Trans Media Watch, *Media Style Guide*, available at http://www.transmediawatch.org/Documents/Media%20Style%20Guide.pdf (last visited 19 Jun 2013). Transsexualism is described by GIRES (Gender Identity Research and Education Society) as follows: "when gender variance is experienced to the degree that medical intervention is necessary to facilitate a permanent transition to a gender role that accords with the gender identity thus alleviating the intense discomfort": see http://www.gires.org.uk/glossary.php (last visited 19 June 2013).

[144] This is supported by discussions in Parliament: Lord McNally, who moved the amendment to add transgender identity to s 146, explained that: "… 'transgender' is an umbrella term that includes, but is not restricted to, being transsexual": *Hansard* (HL) 7 Feb 2012, vol 735, col 153.

[145] We note that some US-based charities make reference to the term "transvestite" carrying pejorative overtones: see, eg, the National Center for Transgender Equality, http://transequality.org/Resources/NCTE_TransTerminology.pdf (last visited 19 Jun 2013); the Human Rights Campaign (http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited 19 Jun 2013); The Lesbian, Gay, Bisexual and Transgender Community Center, http://www.gaycenter.org/gip/transbasics/glossary (last visited 19 Jun 2013). However, the term "transvestite" appears in glossaries composed by the UK-based charities GIRES and Trans Media Watch.

[146] See the definition in s 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 discussed at paras 3.137 to 3.140 below.

3.131 Many charities supporting transgender people adopt a wide definition of "transgender":

(1) *GIRES* (UK): Transgenderism has had different meanings over time, and in different societies. Currently, it is used as an inclusive term describing all those whose gender expression falls outside the typical gender norms; for example those who cross-dress intermittently for a variety of reasons including erotic factors (transvestism), as well as those who live continuously outside gender norms, sometimes with, and sometimes without, medical intervention.[147]

(2) *Trans Media Watch* (UK): Trans (adj) is an umbrella term, describing people who experience the need to present themselves as, and/or who identify as other than the gender they were assigned at birth. … Trans has tended to supersede the term "transgender" (adj) although this is still useful when [people] may be unfamiliar with current terminology such as trans person/people.[148]

(3) *The Lesbian, Gay, Bisexual and Transgender Community Center* (US): Transgender is an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, and other gender-variant people.[149]

3.132 Criminal justice agencies also appear to adopt a wide definition of transgender identity. For instance, the CPS, in its policy guidance on prosecuting cases of homophobic and transphobic hate crime, states that "trans is an umbrella term which includes transsexual, transvestite (cross-dressers) and transgender people, amongst others".[150]

3.133 On the one hand, the open and non-exhaustive nature of section 146(6) may be seen as an advantage. This is because:

(1) it does not unduly restrict the category of persons to be protected by the new aggravated offences; and

(2) its flexibility accommodates changing perceptions and understanding of transgender issues.

3.134 Furthermore, as with the definitions of disability and sexual orientation, adopting the definition of transgender identity in section 146(6) would ensure consistency in the criminal law's approach to hate crimes. It would also avoid gaps or overlaps between what constitutes an aggravated basic offence and what constitutes an aggravating factor at sentencing for all other offences.

[147] http://www.gires.org.uk/glossary.php (last visited 19 Jun 2013).

[148] http://www.transmediawatch.org/Documents/Media%20Style%20Guide.pdf (last visited 19 Jun 2013). We note that the National Center for Transgender Equality regard "trans" as shorthand for "transgender": see http://transequality.org/Resources/NCTE_TransTerminology.pdf (last visited 19 Jun 2013).

[149] http://www.gaycenter.org/gip/transbasics/glossary (last visited 19 Jun 2013).

[150] Crown Prosecution Service, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (Nov 2007), http://www.cps.gov.uk/publications/docs/htc_policy.pdf (last visited 19 Jun 2013).

3.135 The potential disadvantage of an open and non-exhaustive definition, however, is that it creates uncertainty and therefore the possibility of inconsistencies and an overall lack of coherence in the case law.

3.136 **Proposal 8: We consider that the definition of transgender identity in any new aggravated offence should mirror the definition in section 146: "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". Do consultees agree? If not, why not?**

(b) Offences (Aggravation by Prejudice) (Scotland) Act 2009, section 2(8)

3.137 Scottish law makes provision for aggravated offences on grounds of transgender identity where the defendant evinces, or is motivated by, "malice and ill-will" towards persons who have (or are presumed to have) a "transgender identity".[151] Section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 provides that:

> In this section, reference to transgender identity is reference to-
>
> (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or
>
> (b) any other gender identity that is not standard male or female gender identity.[152]

3.138 This is a more explicit definition than the open-ended section 146(6) definition since transvestites, transsexual people, intersexual people and those who have changed gender are clearly listed in section 2(8)(a) as protected groups. In addition, section 2(8)(b) provides a "safety-net" designed to catch any person who does not fall within the listed groups in subsection 2(8)(a) but who has a gender identity that is not a standard male or female gender identity.

3.139 On the one hand, adopting the Scottish definition would provide clear certainty that transvestites/cross-dressers and intersexual people would be protected. By including a "fall-back" option in section 2(8)(b), the Scottish definition also reduces the risk of inflexibility that might arise from adopting a fixed list. On the other hand, adopting the Scottish definition for the new aggravated offences could be problematic if the courts, in sentencing offenders, interpret section 146(6) more narrowly than the Scottish definition, thereby creating inconsistency and incoherence.

[151] Section 2(5) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides that where such malice and ill-will is found, the court must (a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity, (b) record the conviction in a way that shows that the offence is so aggravated, (c) take the aggravation into account in determining the appropriate sentence, and (d) state – (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or (ii) otherwise, the reasons for there being no such difference.

[152] See also the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, ss 1 and 4, which sets out an almost identical definition of transgender identity.

3.140 **Question 6: Do consultees consider that in any new aggravated offence the definition in section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146 of the CJA 2003?**

(2) Demonstration of hostility

Definition of "transgender identity"

3.141 As with disability and sexual orientation, the range of the types of conduct which could amount to a demonstration of hostility depends on the definition of "transgender identity" employed.[153]

3.142 The kind of conduct that could amount to a demonstration of hostility includes any adverse or antagonistic words or gestures used in the context of a basic offence committed against a victim who is in fact, or is presumed to be, transgender. This could include generally offensive terms related to transgender identity, as well as terms which are not necessarily associated with hostility but which demonstrate hostility in a particular context.

Membership of a group

3.143 As with race and religion, a defendant could be found guilty of a new aggravated offence by demonstrating hostility towards the victim on the basis of a mistaken presumption about their transgender identity. This could result in a potentially wide aggravated offence. This situation might occur, for example, where the victim is clearly one sex but is wearing clothing or displaying mannerisms usually associated with the opposite sex.

3.144 At the same time, reference to "presumed membership" could limit the applicability of the offence. Limb (a) of the aggravated offences would not cover offensive demonstrations of hostility unless there is, at the least, a presumption by the defendant that the victim is transgender. This could cause particular difficulties if the courts were to adopt a narrow interpretation of section 146(6) which excluded transvestites/cross-dressers. If transvestites/cross-dressers do not fall within the definition of "transgender", the defendant could simply argue that the hostility was based on the victim being a transvestite/cross-dresser and that he or she did not presume that the victim was transgender.

3.145 New aggravated offences on the basis of transgender identity could also include the demonstration of hostility towards a victim on the grounds of their "association" with people who are transgender. We consider that a broad interpretation of "association" analogous to that adopted in the context of race and religion could include not only family and friends, but also those involved with organisations which support transgender people.

(3) Motivation by hostility

3.146 A hostile motivation can be proved through reference to things said or done in the context of the basic offence, or by the defendant's conduct on other separate occasions.

[153] For a discussion of the various different possible definitions, see para 3.126 and following above.

3.147 Since the relevant hostility need not be the sole motivation behind the commission of the basic offence, it would be irrelevant if the defendant and victim were also engaged in a dispute unrelated to the victim's transgender identity, or if the defendant was also motivated by hostility towards another characteristic of the victim, such as their occupation. However, if the relevant hostility is not in any way the motivation for the offence, the offence cannot be brought within the ambit of section 28(1)(b).[154]

3.148 **Question 7: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on transgender identity? If not, why not?**

[154] *DPP v Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

CHAPTER 4
THE STIRRING UP OFFENCES: PROVISIONAL PROPOSALS

INTRODUCTION

4.1 As we explained in Chapter 2, the Public Order Act 1986 ("POA 1986") contains a group of offences dealing with conduct involving the stirring up of hatred on grounds of race, religion or sexual orientation. These are sometimes referred to as "incitement" offences. We refer to them as the "stirring up offences". In this chapter, we consider the case for extending those offences to the stirring up of hatred on grounds of disability or transgender identity.[1]

4.2 It is important to note that the stirring up offences represent an entirely separate regime from the aggravated offences and the application of the enhanced sentencing provisions discussed in the previous chapter. The aggravated offences and enhanced sentencing powers relating to hate crime apply to pre-existing criminal offences, while the stirring up provisions create specific new offences of stirring up hatred. Hatred itself is not a crime, whereas the basic offences capable of being aggravated by hostility are already crimes.

4.3 We begin by noting the current pattern of prosecutions for stirring up offences, as well as views from various sources on the need for new stirring up offences. At paragraphs 4.14 to 4.63 we consider some of the main arguments of principle which have been advanced for and against the extension of the stirring up offences to hatred on grounds of disability and transgender identity.[2] We then ask whether there is a practical need for new stirring up offences.[3]

4.4 If consultees consider that there is a need for new stirring up offences both in principle and in practice, we then invite their views about which model should be used. We consider whether any new stirring up offences ought to be based on :

(1) the offence of stirring up racial hatred ("the broad model"); or

(2) the stirring up offences relating to religion or sexual orientation ("the narrow model").

[1] In Appendix B we explain the public order origins of the first stirring up offences which address racial hatred. We also explore the aims of criminalising such conduct, which included curbing social unrest and preventing other potential harms, such as the risk of retaliation and the escalation of conflicts, likely to damage communities. We chart the sometimes difficult legislative passage of later amendments extending the stirring up offences, first to cover religious hatred and second to include hatred on grounds of sexual orientation.

[2] Consultees are reminded that the theory paper by Dr John Stanton-Ife published on our website ("theory paper") contains a detailed analysis of the theoretical arguments for and against extending the offences. The arguments elaborated in that appendix concern the theoretical grounds for criminalising the conduct targeted by the potential new offences. Those arguments address both the nature of the wrongdoing and the types of direct and indirect harm it may cause.

[3] See para 4.64 below.

4.5 As we have explained in full in Chapter 2, the narrow model differs in two key respects to the broad model:

(1) the proscribed conduct must be threatening (the fact that it is merely abusive or insulting is not enough);[4]

(2) there must have been an intention to stir up hatred (a likelihood of hatred being stirred up is not enough);[5]

4.6 We then deal separately with the question of provisions protecting freedom of expression. There are explicit provisions in the existing legislation protecting freedom of expression in relation to religion and sexual orientation (but not in relation to race).[6] We ask consultees whether similar provisions should be included in any new offences.

4.7 Finally, we explain why the enhanced sentencing provisions in the Criminal Justice Act 2003 ("CJA 2003") do not provide a response to the conduct which would be covered by any new stirring up offences.

Prosecutions for the existing stirring up offences

4.8 In comparison with the existing racially and religiously aggravated offences discussed in Chapter 2, the existing stirring up offences are rarely prosecuted. Between 2008 and 2012, a total of 113 offences charged under the racial hatred provisions reached the first hearing in the magistrates' courts. In the same period, 21 charges of conduct intended to stir up hatred on grounds of religion or sexual orientation reached the first hearing in the magistrates' courts (the data lists charges, rather than defendants or cases). By contrast, between 2008 and 2012, 75,903 aggravated offence charges under the Crime and Disorder Act 1998 ("CDA 1998") reached a first hearing.[7]

Views on the stirring up offences

4.9 The Ministry of Justice has stated that conduct stirring up hatred, though it may not in every case lead to violence, is "in itself divisive and damaging. It creates an atmosphere where bullying and violence are deemed acceptable, and where individuals' rights are abused or groups are socially marginalised".[8]

[4] See Ch 2 at para 2.107.

[5] See Ch 2 at para 2.125.

[6] See Ch 2 at para 2.116 and following.

[7] See Appendix C at para C.114.

[8] Ministry of Justice, *Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010) paras 12, 16 and 17.

4.10 During the passage of the legislation in 2008 extending the stirring up offences to sexual orientation, the Government invited debate about whether the stirring up offences should also cover the stirring up of hatred against people with a disability or transgender people.[9] However:

> On balance the Government considered that the existing law, including sentencing guidelines,[10] was satisfactory and did not at this stage require the provisions of the 1986 [Public Order] Act to be further extended to cover these groups. This is because, despite research and contact with a large number of individuals and groups of people, no compelling evidence emerged that hatred was actively being stirred up against them.[11]

4.11 During the early part of this project we held informal discussions with several organisations involved in supporting and advocating on behalf of people with disabilities and transgender people, including in the context of their experience of crime and the criminal justice system. We have reviewed numerous studies and reports by such bodies and looked at individual case reviews and reports to gain some understanding of how far the available evidence shows a need for changes to law or practice in general or for new stirring up offences in particular.

4.12 We have only been made aware of one direct call for new disability-related stirring up offences.[12] In preliminary discussions, stakeholders placed more emphasis on other issues such as improving reporting of hate crime and making more effective use of section 146 of the CJA 2003. Concerns have also been raised by some stakeholders about negative media representation of people with disabilities and transgender people, which was considered to be fuelling an increase in bullying, harassment and crimes against them.[13] The preferred solution to this problem expressed by stakeholders thus far has been for better control of media reporting. Participants in studies of disability hate crime have

[9] Ministry of Justice*, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010) paras 19 and 20.

[10] We assume that this is a reference to the enhanced sentencing provisions under s 146 CJA 2003. We discuss the relationship between the enhanced sentencing provisions and the potential offences of stirring up hatred on grounds of disability or transgender identity at paras 4.95 and following below.

[11] Ministry of Justice*, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010) para 20.

[12] "Brewer Case Exposes Gaping Holes in Legislation" *Disability News Service* 31 May 2013, http://disabilitynewsservice.com/2013/05/brewer-case-exposes-gaping-holes-in-legislation/ (last visited 19 Jun 2013).

[13] Similar concerns are referred to in a study by the Department for Work and Pensions, *Fulfilling Potential: Building a deeper understanding of disability in the UK today* (2013) p 74.

also called for better use of restorative justice, improved education and an end to discriminatory media representation.[14]

4.13 Our preliminary consultations with stakeholders and practitioners, including specialist prosecutors at the Crown Prosecution Service ("CPS") responsible for dealing with stirring up cases, have not identified any specific practical problems relating to the existing stirring up offences which could affect the case for extension to include disability or transgender identity.[15]

THE CASE FOR EXTENSION

The arguments for and against the new stirring up offences

(a) To what extent do existing criminal offences deal with the conduct that new stirring up offences would be designed to address?

4.14 Some of the conduct that would be targeted by any new stirring up offences is already addressed by existing offences.[16] However, despite the overlap in the types of conduct addressed, we do not consider that the existing offences cover all the conduct that new stirring up offences would cover.

4.15 There are two broad categories of existing offences, which we consider in turn below.

(1) THREATENING, ABUSIVE, INSULTING, INDECENT, OBSCENE OR MENACING WORDS OR CONDUCT

4.16 Conduct of this kind which affects disabled or transgender people could fall within the ambit of the following offences.[17]

Offences under the POA 1986

4.17 There are three potentially relevant offences under the POA 1986:

(1) Section 4 (threatening, abusive or insulting conduct towards someone with intent to cause that person to believe that violence will be used

[14] Unpublished evidence provided to the "When Law and Hate Collide" project. This is a University of Central Lancashire, Lancashire Law School project based on various symposia with NGOs and in-depth qualitative interviews with representatives from different elements of the criminal justice system. The full series of reports will be available at http://www.uclan.ac.uk/research/environment/projects/when_law_and_hate_collide.php (last visited 19 Jun 2013). For an examination of the potential benefits of community mediation as an alternative to retributive penalties, see M Walters and C Hoyle, "Exploring the Everyday World of Hate Victimisation through Community Mediation" (2012) 18 *International Journal of Victimology* 7.

[15] There is little guidance to be derived from the case law on the precise scope of the stirring up offences because these offences are rarely prosecuted: see para 4.8 above. The few cases which reach the appellate courts usually involve appeals against sentence, rather than consideration of questions such as what amounts to "hatred" or whether the offences are a legitimate interference with the right to freedom of expression.

[16] CJA 2003, s 146 already applies to these offences if the offender is shown to have demonstrated, or been motivated by, hostility on grounds of disability or transgender identity.

[17] This is not designed to be an exhaustive list, but merely an illustration of the types of offences which may cover some of the same conduct that the new stirring up offences would cover.

against them or another, or to provoke the use of violence by that person or another, or where that person is likely to believe that such violence will be used or it is likely that such violence will be provoked); and

(2) Section 4A (threatening, abusive or insulting words or conduct with intent to cause harassment, alarm or distress); and

(3) Section 5 (threatening, abusive or insulting[18] conduct, where the conduct takes place within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby).

4.18 Whether conduct is "threatening, abusive or insulting" is an objective question of fact, to be determined in accordance with the ordinary meanings ascribed to those terms.[19]

4.19 An offence under section 4 can be committed in four ways:[20] (1) where the defendant intends the target to believe that immediate unlawful violence will be used against him or her or another by any person; (2) where the defendant intends to provoke the immediate use of unlawful violence against him or her or another; (3) where the person against whom the conduct is directed is likely to believe immediate unlawful violence will be used; or (4) where it is likely that immediate unlawful violence will be provoked.[21]

4.20 For all four forms of the offence, the defendant must intend his or her conduct to be threatening, abusive or insulting, or be aware that it may be threatening, abusive or insulting.[22]

4.21 Sections 4A and 5 both include the concepts of "harassment, alarm and distress". (section 4A is essentially an aggravated version of the section 5 offence requiring intent to cause harassment, alarm or distress).[23] These terms have not been conclusively defined, though in *R (R) v DPP*[24] they were described in relatively strong terms. "Distress" in this context requires emotional disturbance or upset.[25]

[18] The term "insulting" will be removed from the s 5 offence by the Crime and Courts Act 2013, s 57(2) (not yet in force): see Appendix B at para B.34.

[19] PJ Richardson (ed), *Archbold*: *Criminal Pleading, Evidence and Practice* (2013) ("Archbold") para 29-28. See *Hammond v DPP* [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601, citing *Brutus v Cozens* [1973] AC 854, [1972] 3 WLR 521. In *Hammond* the Divisional Court applied the traditional approach of *Brutus v Cozens* (that words should have their ordinary meaning) and held that, in addition, full account of art 10 ECHR should be taken. See *Masterson v Holden* [1986] 1 WLR 1017 at [1023]. "Words or behaviour cannot be insulting [or, seemingly, threatening or abusive] if there is not a "human target which they strike whether they are intended to strike that target or not", and the defendant must be aware of that human target.

[20] *Winn v DPP* (1992) 156 Justice of the Peace Reports 881.

[21] *Winn v DPP* (1992) 156 Justice of the Peace Reports 881. See also Blackstone's para B11.53.

[22] Public Order Act 1986 ("POA 1986"), s 6(3).

[23] P Thornton, R Brander, R Thomas, D Rhodes, M Schwarz and E Rees, *The Law of Public Order and Protest* (2010) para 1.206.

[24] [2006] EWHC 1375 (Admin), (2006) 170 Justice of the Peace Reports 661 at [12].

[25] [2006] EWHC 1375 (Admin), (2006) 170 Justice of the Peace Reports 661 at [12]. See also Blackstone's para B11.76.

"Harassment" does not require emotional disturbance to be shown, but the harassment must nonetheless be more than merely trivial.[26]

4.22 Although closely related, sections 4A and 5 differ in some key respects. Section 4A requires both an intention to cause harassment, alarm or distress[27] and the actual causing of harassment, alarm or distress to the victim.[28] Section 5 does not require either of these, but only that the conduct take place "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby".[29] Several cases in which section 5 has been used involve abuse or insults directed at a group as a whole (although in each case there has been an individual or a number of individual victims who have been harassed, alarmed or distressed). In *Hammond v DPP*,[30] for example, an evangelical Christian preacher carried a large double-sided sign with the words "Stop Immorality! Stop Homosexuality! Stop Lesbianism!" while preaching in a town centre. Some of the individuals who saw this placard found the words insulting or distressing. He was prosecuted and convicted and the conviction was upheld.

4.23 The existing public order offences in sections 4, 4A and 5 of the POA 1986 criminalise a range of threatening, abusive or insulting conduct. Given that under the new stirring up offences the conduct of the defendant would have to be either (a) threatening, abusive or insulting (if the "broad" racial hatred model were adopted) or (b) threatening (if the "narrow" religious and sexual orientation model were adopted),[31] they would capture much of the same conduct as the existing offences in sections 4, 4A and 5. However, there remains a further kind of conduct which is not specifically caught by the existing offences – that is, where the conduct is intended or likely to cause the recipient to hate disabled or transgender people.

The Malicious Communications Act 1988, section 1

4.24 Section 1 of the Malicious Communications Act 1988 makes it an offence to send a message with the intention of causing distress or anxiety. The sender must intend the message to cause distress or anxiety to the recipient and the message must be either (a) indecent or grossly offensive; a threat; or information known or believed to be false; or (b) of an indecent or grossly offensive nature.

[26] *Southard v DPP* [2006] EWHC 3449 9 (Admin), [2007] Administrative Court Digest 53 at [23].

[27] This intention may be inferred from the words used, although this is a matter for the tribunal of fact in each case: see Blackstone's para B11.65 and P Thornton, R Brander, R Thomas, D Rhodes, M Schwarz and E Rees, *The Law of Public Order and Protest* (2010) para 1.214.

[28] And there must be a causal connection between what the defendant does and the victim's harassment, alarm or distress: *Rogers v DPP* 22 Jul 1999, unreported: Blackstone's para B11.63.

[29] POA 1986, s 6(4) also provides: "A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly".

[30] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601.

[31] For a discussion of the alternative models, see para 4.67 and following below.

4.25 The offence would cover, for example, a threatening email or grossly offensive letter sent to a disabled or transgender person.[32] Again, the words "indecent" and "grossly offensive" are to be given their ordinary English meaning.[33] The offence does not, however, require proof of the recipient's actual reaction, but rather proof of the intention of the sender.[34] This means the offence could still be made out if a disabled or transgender person receives a message intended to cause distress or anxiety[35] which does not have this effect (for example, because the disabled or transgender person in question is "thick-skinned" by nature or accustomed to receiving such messages).[36]

4.26 To a certain extent, section 1 of the Malicious Communications Act 1988 covers much of the same conduct that new stirring up offences would be designed to address. First, although section 1 does not require an intention or likelihood that the defendant's conduct will cause the recipient to hate disabled or transgender people, it could still capture this conduct. Secondly, section 1 is satisfied on proof of the use of indecent, grossly offensive, threatening or false information or conduct. While the new stirring up offences would require the content of the words, conduct or material to be (a) threatening, abusive or insulting (if the racial hatred model is adopted) or (b) threatening (if the religious and sexual orientation model is adopted), it is likely that some forms of conduct could fall within both of these tests. However, section 1 would not cover all the conduct that new stirring up offences would be designed to address. Section 1 is limited to the sending of messages, while the new stirring up offences would cover additional types of conduct,[37] such as the public performance of a play.[38]

The Communications Act 2003, section 127(1)

4.27 Section 127(1) of the Communications Act 2003 provides that a person is guilty of an offence if he or she sends by means of a public electronic communications

[32] Lord Bingham in *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [7] noted that the object of the Malicious Communications Act 1988 was "to protect people against receipt of unsolicited messages which they may find seriously objectionable".

[33] *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276. For a discussion of the definition of "grossly offensive", see *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9] and [22]; see also [14] for a discussion of the implications of art 10 ECHR.

[34] D Ormerod *Smith and Hogan's Criminal Law* (13th ed 2011) p 1081.

[35] The message must also be either a threat, of an indecent or grossly offensive nature or contain false information, following s 1(1) of the Malicious Communications Act 1988. The Malicious Communications Act 1988 differs in this respect from certain other offences, such as the offence of harassment under ss 1 and 2 of the Protection from Harassment Act 1997 because it sets a minimum bar for the nature of the proscribed conduct: see N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 251.

[36] The same would also be true if the communication were never received: see I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.200.

[37] See Ch 2 at para 2.53 and following.

[38] POA 1986, s 20.

network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.[39]

4.28 The offence is complete as soon as the message is sent: it is not necessary to prove receipt of the message. The test is whether the message is "couched in terms liable to cause gross offence *to those to whom it relates*":[40] not necessarily to the recipient, if any.[41] This means the offence could cover communications between two people which included offensive remarks about disabled or transgender people.

4.29 The test of whether the communication is grossly offensive or of an indecent, obscene or menacing character is an objective one.[42] In *DPP v Collins*, it was held that in making this determination the standards of an "open and just multiracial society" had to be applied, and that "the words must be judged taking account of their context and all the relevant circumstances".[43] Lord Carswell in that case said that he was "satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive".[44] This may be relevant to offensive communications made to or about a disabled or transgender person, but the test is objective.

4.30 To some extent, section 127 of the Communications Act 2003 also covers much of the same conduct that new stirring up offences would be designed to address. First, although section 127 does not require an intention or likelihood that the defendant's conduct will cause the recipient to hate disabled or transgender people, it could still capture this conduct. Secondly, section 127 is satisfied on proof of the sending of a message or other matter which is grossly offensive or of an indecent, obscene or menacing character. While the extended stirring up offence would require the content of the words, conduct or material to be (a) threatening, abusive or insulting (if the racial hatred model is adopted) or (b) threatening (if the religious and sexual orientation model is adopted), it is likely that some forms of conduct could fall within both of these tests. Section 127 would not, however, cover all the conduct that the new stirring up offences would be designed to address. Section 127 is limited to the sending by means of a public electronic communications network a message or other matter, while the

[39] This includes, eg, communications made by webcam, telephone messages, text messages, email, Facebook and Twitter: see *I v Dunn* [2012] HCJAC 108, 2012 SLT 983; *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223; *Jude v HM Advocate* [2011] UKSC 55, 2012 SLT 75; *R v Bland* [2012] EWCA Crim 664; and *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [25].

[40] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [8] and [9].

[41] An offence under this section may be committed even where the communication was welcomed by the recipient, provided that it was liable to cause gross offence to those to whom it relates: *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [26]. This is a key difference between s 127(1) of the Communications Act and s 1 of the Malicious Communications Act 1988: only the latter requires the sending of a message to cause distress or anxiety to its immediate or eventual recipient: see Lord Brown in *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [25] to [27].

[42] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9].

[43] *DPP v Collins DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9].

[44] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [22].

new stirring up offences would cover additional types of conduct,[45] such as the public performance of a play.[46]

The Director of Public Prosecutions' guidelines on prosecutions involving social media

4.31 The Director of Public Prosecutions has released guidelines on prosecuting cases involving communications sent via social media.[47] The guidelines cover the offences that are "likely to be most commonly committed by the sending of communications via social media", so they are relevant to prosecutions under the Communications Act 2003, the Malicious Communications Act 1998, the Protection from Harassment Act 1997 and other provisions, where the offence involves the use of social media.

4.32 Where the communication specifically targets an individual or individuals, involves credible threats to people or property, or is in breach of a court order, it will generally be "prosecuted robustly" where the case satisfies the test set out in the Code for Crown Prosecutors.

4.33 Where the communication does not fall into any of those categories, and is "grossly offensive, indecent, obscene or false", the case "will be subject to a high threshold, and in many cases a prosecution is unlikely to be in the public interest."

Conclusion on the alternative offences relating to threatening, abusive, insulting, indecent, obscene or menacing words or conduct

4.34 The offences outlined above cover much of the same conduct that the new stirring up offences would capture. However, any new stirring up offences would be different in kind to the existing offences which might also encompass threatening, abusive or insulting conduct. The stirring up offences are specifically designed to curb the spread of hatred against particular groups. Such hatred can be seen as inimical to social cohesion by threatening group members' sense of security and belonging in their communities. The existing offences outlined above have no such purpose. They may incidentally encompass some of the same type of conduct which would fall within the new stirring up offences. But the fact that they do not require an intention or likelihood that hatred will be stirred up shows that the stirring up offences capture a unique and specific type of wrongdoing. Indeed, the fact that a much higher maximum penalty attaches to the stirring up offences than the other existing offences (seven years' imprisonment as opposed to six months' imprisonment and/or a fine[48]) illustrates that they are designed to capture a more serious type of wrongdoing.

[45] See Ch 2 at para 2.53 and following.

[46] POA 1986, s 20.

[47] Crown Prosecution Service, *Guidelines on Prosecuting Cases Involving Communications Sent via Social Media* (issued on 20 Jun 2013), http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html (last visited 20 Jun 2013).

[48] With the exception of s 5 of the POA 1986, for which the maximum penalty is a fine.

4.35 The new offences, then, would capture a unique, specific and grave type of wrongdoing not captured 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 the circumstances.

(2) ENCOURAGING OR ASSISTING CRIME

Serious Crime Act 2007, sections 44 to 46

4.36 Sections 44 to 46 of the Serious Crime Act 2007 could be used to prosecute conduct capable of encouraging or assisting another in the commission of an offence[49] against a disabled or transgender person, irrespective of whether that offence is actually carried out.[50]

4.37 However, sections 44 to 46 do not cover conduct which seeks to encourage behaviour not amounting to a criminal offence. Again, then, the new stirring up offences would capture a different kind of wrongdoing to the Serious Crime Act 2007 provisions: the encouragement of hatred against a particular group as opposed to the encouragement of offending against a particular group.

(b) Does the existing criminal law adequately address the harms?

4.38 As explained in Chapter 2, the stirring up offences are intended to curb the negative consequences of the spread of hatred against particular groups. Although hatred itself is not illegal, the effect of the stirring up offences is to criminalise acts intended to or likely to stir up such hatred.

4.39 The new stirring up offences would address various harms, some of which are more direct than others.

(1) HARMS WHICH FLOW FROM A CRIMINAL OFFENCE COMMITTED WHERE HATRED HAS BEEN STIRRED UP

4.40 Although it is not a necessary element of the stirring up offences that a person is in fact incited to commit an offence against someone, the stirring up of hatred may produce that consequence in a particular case.

4.41 Where a criminal offence is committed against a disabled or transgender person as a consequence of someone having stirred up hatred, the victim will obviously suffer the harm which constitutes the criminal wrongdoing (whether physical,[51] psychological or proprietary). However, a victim of such crime may also suffer additional harm relating to the fact that they were targeted out of hatred relating

[49] The offence under s 44 can be committed by encouraging or assisting any offence. The offences under ss 45 and 46 can be committed by encouraging any offence except those listed in Parts 1 to 3 of Sch 3 and the offences under ss 44, 45 and 46. See s 49(4), Serious Crime Act 2007.

[50] Serious Crime Act 2007, s 49(1). See s 47 for the elements required to prove an offence under ss 44 to 46.

[51] Writing in the slightly different context of "bias" crime, Lawrence argues that crimes committed with "bias motivation" are more likely to involve physical assaults (and more serious physical assaults) than crimes do generally: F Lawrence, *Punishing Hate: Bias Crimes under American Law* (1999) pp 39 to 42. See the theory paper for more detail. For a similar argument, see also S B Weisburd and B Levin, "'On the Basis of Sex': Recognizing Gender-Based Bias Crimes" (1994) 5 *Stanford Law and Policy Review* 21, 23.

to their "membership" of a particular group.[52] A number of studies suggest that this is the case,[53] but we do not have any specific, empirical evidence that victims of hate crime suffer such greater harm. There is an argument, however, that a crime motivated by hatred could lead to a heightened sense of vulnerability in the victim, as well as the possibility of suffering more profound psychological symptoms than in the case of crime other than hate crime.[54]

4.42 In addition, although members of the victim's "group" may not experience direct harm, they may experience indirect harm which other members of the public are not subject to. For example, where a transgender person is the victim of a brutal physical assault, other transgender people may feel that they too are potential targets of crime and experience feelings of vulnerability and anxiety as a result. Where it is clear that the crime was the result of hatred directed towards a particular characteristic (such as disability or transgender identity), others who share that characteristic may also experience that crime "as an attack on themselves directly and individually".[55] Beyond a physical or psychological sense of insecurity, then, those sharing the target characteristic may feel that they no longer belong in the communities in which they live. They may further feel that their place in wider society is threatened because the criminal justice system has no means of tackling the conduct which stirs up hatred against them.

(2) HARMS WHICH FLOW FROM THE STIRRING UP OF HATRED UNACCOMPANIED BY A CRIMINAL OFFENCE

4.43 Even in the absence of a criminal offence being perpetrated against members of the group as a result of the stirring up of hatred, the fact that hatred has been stirred up may in and of itself result in harm similar to the "indirect" harms identified above. Hatred alone could threaten people's sense of security and belonging in their communities, and may undermine their ability to feel comfortable with personal characteristics.

4.44 In addition, the stirring up of hatred may be deemed to be harmful to the fabric of society as a whole. One of the effects of such hatred is likely to be the generation of prejudice and discrimination against a particular group, which in turn has a divisive effect and runs contrary to the ideals of equality, dignity and respect which a liberal democratic society strives to protect and embody.

[52] For an in-depth discussion of this, see P Iganski, "Hate Crimes Hurt More" (2001) 45(4) *American Behavioral Scientist* 626.

[53] See, eg, Home Office Statistical Bulletin, *Hate Crime, Cyber Security and the Experience of Crime Among Young Children: Findings from the 2010/11 British Crime Survey* (Mar 2012) and P Iganski, *Hate Crime and the City* (2008).

[54] Again, writing in the context of "bias" crime, Lawrence argues that victims of such crime are more likely to suffer psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness and a sense of isolation: F Lawrence, *Punishing Hate: Bias Crimes under American law* (1999) pp 39 to 42. See the theory paper for more detail.

[55] F Lawrence, *Punishing Hate: Bias Crimes under American law* (1999) pp 39 to 42. See the theory paper for more detail.

(3) ARE THESE HARMS ADDRESSED BY EXISTING OFFENCES?

4.45 As outlined above, it is only the direct harm suffered by a victim of a criminal offence which is captured by the criminal law as it stands. If the more remote harms which arise from the stirring up of hatred are actually occurring (or are at risk of occurring) in relation to disabled or transgender people, it would seem that this is a gap in the criminal law in this respect.

(c) Do existing offences deter the conduct in question?

4.46 The existing offences discussed above may already serve as a deterrent against conduct that is offensive, abusive or threatening towards disabled or transgender people. If criminalisation is an effective deterrent,[56] these offences should deter people from engaging in the conduct which forms the basis of these offences. It is possible, however, that extending the stirring up offences would not only increase the deterrent effect of these existing offences but also deter the stirring up of hatred which may lead to the commission of such conduct in the first place. This could be a result of the greater maximum penalties which attach to the stirring up offences than the existing offences (seven years' imprisonment as opposed to six months' imprisonment and/or a fine).[57]

4.47 However, there are no precise data on the extent of the problem of people encouraging others to hate (but not to commit offences against) disabled or transgender people, nor about the extent to which stirring up offences deter such conduct. It is therefore impossible, on the evidence available, to assess the extent to which new stirring up offences would act as a deterrent.

4.48 The effectiveness of particular offences in reducing the conduct that they target depends in large part on awareness of the offences. In this regard, it may be argued that the existing stirring up offences come so infrequently to public attention, and are so rarely prosecuted,[58] that their general ability to deter must be open to question. The argument for deterrent effect may therefore be further diluted if the particular individuals or organisations likely to commit the offences are unaware of their existence. We can make no claim of any greater likelihood of deterrence in relation to the new offences than there may be for the existing offences.

(d) In view of the symbolic value of criminalisation, would new offences better express the criminal law's denunciation of the wrongdoing?

4.49 Another important factor in assessing the value of extending the stirring up offences is whether they would emphasise the state's recognition of the need to accord disabled or transgender people the same respect and dignity as other

[56] On deterrence arguments 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.

[57] With the exception of s 5 of the POA 1986, for which the maximum penalty is a fine.

[58] See para 4.8 above. Although the stirring up offences are rarely prosecuted, they tend to attract media coverage when they are. The prosecutions of Nick Griffin, Mark Collett, Abu Hamza al-Masri, Simon Sheppard and Stephen Whittle, and the Derby leaflets case are recent examples.

members of society. Existing offences such as those outlined at paragraphs 4.14 to 4.37 above may go some way towards criminalising the harassment, abuse or provocation to be targeted. They may not, however, capture the true nature of the wrongdoing or harm in the same way that stirring up offences would.

4.50 Extending the stirring up offences could have symbolic benefits by criminalising conduct that promotes hatred towards a group. Defendants convicted of the stirring up offence will be labelled more accurately and meaningfully in relation to the seriousness of their wrongdoing. Society in general, and people who are transgender or disabled in particular, would see that the law has developed to recognise the importance of their right to be protected from expressions of hatred based on their membership of that group. If they believe that the expression of hatred increases the risk of crimes being committed against them, members of these groups may see symbolic value in the new offences. Similarly, members of the groups may see a link between hate speech and their experience of less direct harms, such as discrimination, prejudice or harassment, which the introduction of new offences could help, indirectly, to curb.

4.51 It could also be argued that extending the stirring up offences would fulfil the law's supposed "educative" or "moralising" effects.[59] The creation of new offences would fill a gap left by existing offences.[60] That gap may be narrow but nevertheless, filling it sends a message that the conduct and harm are serious enough to justify the ultimate form of condemnation by the state: criminalisation.

4.52 However, the following arguments may undermine the symbolic case for extension:

(1) Criminalisation could have the adverse effect of leaving hateful content unchallenged,[61] rather than subjecting it to open scrutiny and debate, including by those with strong opposing arguments. The absence of the opportunity to challenge views expressed in hateful terms against disabled or transgender people risks stifling well-informed debate and

[59] The "moralising" effect of the criminal law has been outlined by Bottoms (A Bottoms, "Morality, Crime, Compliance and Public Policy" in A Bottoms and M Tonry (eds), *Ideology, Crime and Criminal Justice: A Symposium in Honour of Sir Leon Radzinowicz* (2002) p 20) and Andenaes (J Andenaes, "General Prevention - Illusion or Reality?" (1952) 43 *Journal of Criminal Law, Criminology and Police Science* 176, 179). The prohibition on drink driving is often said to be an example of the "educative" effect of law. Bottoms argues that there is now "substantially greater moral disapproval of such behaviour than was the case thirty or so years ago when it was first made a criminal offence". Both commentators stress, however, that the capacity of the law to influence the development of morality is not true of every case.

[60] See para 4.14 and following above.

[61] Except to the extent that it can be successfully prosecuted, resulting in the formal denunciation that would entail.

opinion and undermining the educative function that they might fulfil in society more generally.[62]

(2) It can also be argued that criminalisation that is designed to protect some minority groups may tend to produce resentment towards those groups because they are seen to be unfairly favoured.[63]

(3) It has been argued that the existence of crimes protecting particular groups can result in members of the group coming to be seen as weaker than others in society, both by themselves and by others.[64]

(4) New stirring up offences may simply have the effect of driving hate speech underground, making it harder to detect and prosecute because it would be restricted to communication between like-minded individuals or groups.

(e) Are initiatives short of criminalisation, taken in combination with existing offences, sufficient to address the problem of stirring up hatred?

4.53 Criminal law must represent a necessary and proportionate response to the wrong and harm it addresses. This requires consideration of the effectiveness of initiatives short of criminalisation which target the stirring up of hatred against disabled or transgender people.

4.54 We noted above that disability and transgender groups have expressed concerns about negative and prejudiced media coverage relating both to disability and transgender issues and individual disabled or transgender people.[65] Preliminary discussions with stakeholders revealed a perception that such reporting is fuelling an increase in bullying, harassment and crime against disabled and transgender people.[66] It has also been noted that the rise of the internet and increasing use of

[62] Examples of such debates taking place in response to controversial or offensive opinions on the subject of disability and transgender identity, respectively, can be seen in recent coverage of commentary on learning disabled children here: http://www.mencap.org.uk/news/article/ukip-abortion-call-sparks-mencap-outrage (last visited 19 Jun 2013) and on transgender teachers, here: http://www.guardian.co.uk/commentisfree/2013/mar/26/lucy-meadows-death-not-in-vain (last visited 19 Jun 2013). In each case, powerful expressions of opinion against the original comments were made. In the latter case a petition with over 200,000 signatures resulted, calling for the sacking of the journalist who had written the original article.

[63] Research findings suggesting this unintended consequence are discussed in B Dixon and D Gadd, "Getting the message? 'New Labour' and the Criminalisation of 'Hate'" (2006) 6 *Criminology and Criminal Justice* 309.

[64] See, eg, S Gellner, "Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence?" (1991) 39 *UCLA Law Review* 333. An opposing view is expressed in F Kamm, "A Philosophical Inquiry into Penalty Enhancement" (1992-1993) *Annual Survey of American Law* 629, 635.

[65] See para 4.12 above.

[66] See para 4.12 above. See also Equality and Human Rights Commission, *Hidden in Plain Sight: inquiry into disability-related harassment* (Aug 2011) p 158 to 159 and Office for Disability Issues, *Fulfilling Potential: building a deeper understanding of disability in the UK today* (Feb 2013) p 74.

social media allows such negative or prejudicial coverage to spread more quickly and widely.[67] A number of initiatives exist to combat this problem:

(1) Work with the Press Complaints Commission as part of the Government's hate crime action plan to address negative stereotypes in media reporting.[68] Complaints can already be made to the Press Complaints Commission, for example to enforce the Editors' Code of Practice.[69]

(2) A work programme as part of the Government's hate crime action plan to tackle hate crime on the internet. This refers to initiatives with organisations, such as the Society of Editors, to develop good practice guidance for those who moderate online content.[70] The aim is to create a simple and speedy solution to the problem of hateful online content, in that once moderators report content to website hosts, it can be removed.

(3) Education initiatives, often with voluntary sector partners to ensure that schools have the necessary tools and resources to help prevent, and deal with, bullying motivated by prejudice.[71]

4.55 These initiatives would only present a direct substitute for criminalisation if they tackled the same type of wrongdoing which the stirring up offences aim to capture. The question, therefore, is whether the conduct which the initiatives seek to address would meet the threshold of "threatening" or "threatening, abusive or insulting" conduct intended to, or likely to, stir up hatred against disabled and transgender people.[72] This is a difficult question (to which there is perhaps no clear answer) which we address in more detail below when discussing the elements of the new stirring up offences.[73]

[67] See, eg, ACPO's hate crime reporting site, True Vision, which points out that the internet has caused offensive content to be spread to an increasingly wide audience, often without editorial control and behind a veil of anonymity: http://report-it.org.uk/reporting_internet_hate_crime (last visited 19 Jun 2013).

[68] HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) para 2.8, actions 2 and 3.

[69] Early Day Motion 1256, *Misrepresentation of Transgender People in the Media* (26 Mar 2013) condemned the fact that "some media organisations continue to misrepresent transgender people deliberately … in breach of the editors' code". The motion pointed to the damaging impact of such coverage, on individuals, on the wider transgender community and on the public's perception of transgender people. It called for action by the Press Complaints Commission (PCC) to ensure compliance with the Editors' Code of Practice in the reporting of transgender issues, http://www.parliament.uk/edm/2012-13/1256 (last visited 19 Jun 2013). It is worth noting that the PCC has recently issued a range of guidance notes for editors, which are intended to provide assistance on various aspects of the Editors' Code of Practice, http://www.pcc.org.uk/news/index.html?article=ODQyMg (last visited 19 Jun 2013).

[70] HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) para 2.8, action 15.

[71] HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) para 2.8, actions 5 and 6.

[72] Depending on the model adopted: see para 4.67 and following below.

[73] See para 4.67 and following below.

(f) What impact would criminalisation have on other rights and freedoms?

4.56 Concerns about restricting free speech formed a central ground of opposition to extending the racial hatred provisions to cover hatred on grounds of religion and then sexual orientation.

4.57 As the stirring up offences target several kinds of expressive conduct, they all potentially engage the right to freedom of expression.[74] Criminalisation by means of the stirring up offences must be capable of fulfilling the criteria laid down in article 10(2) ECHR and applicable case law: in short, it must be a proportionate response to the wrongdoing and must meet a pressing social need for criminalisation.

4.58 The right to freedom of expression under article 10 protects all the types of expressive conduct listed in the stirring up offences. The protection extends both to the substance of what is expressed (whether constituting fact or opinion) and the manner of its expression (however shocking, offensive or disturbing). Article 10 also protects the right to receive and impart information without state interference. The precise scope of the protection, and the extent to which the state may criminalise certain types of speech and conduct without unlawfully infringing article 10, are analysed in detail in the ECHR appendix.[75]

4.59 During the Parliamentary debates, it was argued by some that the extension of the stirring up offences to include religion and sexual orientation would disproportionately interfere with the ability of religious adherents to preach in strongly disapproving terms on subjects such as homosexuality. Offences that criminalise the stirring up of hatred against particular groups also engage the right to freedom of thought, conscience and religion under article 9 ECHR.[76]

4.60 It was argued in Parliament that religious beliefs and sexual orientation are fundamentally different from racial characteristics and that it was necessary to protect people's rights to criticise and debate in such areas.[77] A key rationale for this view was the proposition that race is not voluntary or something one can change, whereas religion is, at least to some extent, a matter of choice.[78] Some MPs accepted that sexual orientation was not a matter of choice in the same way as religion but argued that it was important to preserve the right to criticise sexual orientation or practices.[79]

4.61 As explained in Chapter 2 and Appendix B, the debate over potential infringements of articles 9 and 10 ECHR led to the introduction of provisions

[74] On their face, these issues will fall within the scope of art 10, ECHR, but consideration must also be given to art 17: see Appendix A for a more detailed discussion.

[75] See also the theory paper.

[76] See Appendix A n 128.

[77] *Hansard* (HL), 28 Nov 2001, vol 629 col 385 to 446; *Hansard* (HC), Jan 2008, vol 470 col 449.

[78] This was not uncontroversial. See, eg, the comments by Frank Dobson MP, who argued in the House of Commons debate that the argument that religion is voluntary is fallacious: often one is born into a particular religion, and to argue that one can avoid persecution by changing it is to legitimise intimidation: *Hansard* (HC), 21 Jun 2005, vol 435 col 668 See also the discussion in the theory paper about immutable characteristics.

[79] See Appendix B at para B.250.

designed to protect those freedoms. These are discussed further in paragraphs 4.78 to 4.83 below.

4.62 Similar arguments and objections on article 9 or 10 grounds may arise in the present context. For example, it is conceivable that some religious bodies would wish to comment in objectively offensive terms about some aspects of disability or transgender identity. Political or sociological debates over the use of state resources, or over health or education policy,[80] may also be given as examples of speech which, even if in objectively offensive terms, should be expressly preserved from the scope of the offence. The ECHR protects the right to shock, offend or disturb,[81] and new offences would not criminalise conduct falling into that category. The offences would only capture the far more extreme, inflammatory conduct which is intended or likely (depending on the definition of any new offences) to stir up hatred.

4.63 **Proposal 9: 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?**

The need for new stirring up offences

4.64 If consultees consider that there is a case in principle for extending the offences the question then arises whether there is a practical need for new offences.

4.65 We noted above that the existing stirring up offences are rarely prosecuted.[82] We also noted above that in 2008 the Government decided, on balance, not to introduce new offences of stirring up hatred against transgender people or people with a disability because "no compelling evidence emerged that hatred was actively being stirred up against them".[83] In addition, we have only been made aware of one express call for new disability-related stirring up offences during our preliminary research and discussions with stakeholders.[84] These factors suggest that the evidence of a practical need for the new offences is inconclusive.

4.66 **Question 8: Do consultees consider that there is a practical need for the new offences? If so, why?**

DEFINING ANY NEW OFFENCES

4.67 We turn now to consider the question of what form any new stirring up offences applying to disability or transgender identity might take. As noted, the key question in this section is whether any new offences should follow the broad or narrow models of the different elements of the offences.

[80] We discuss the idea of "public interest speech" in Appendix A A.20 and following.

[81] *Handyside v UK* (1979) 1 EHRR 737 (App No 5493/72).

[82] See para 4.8 above.

[83] Ministry of Justice, *Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010) para 20.

[84] "Brewer Case Exposes Gaping Holes in Legislation" *Disability News Service* 31 May 2013, http://disabilitynewsservice.com/2013/05/brewer-case-exposes-gaping-holes-in-legislation/ (last visited 19 Jun 2013).

4.68 As mentioned above, the elements of the narrow model differ in two key respects to the broad model.[85] The broad model criminalises certain forms of conduct which is threatening, abusive or insulting, where there is an intention to stir up hatred or where hatred is likely to be stirred up.[86] The narrow model only criminalises conduct which is threatening, and which is accompanied by an intention to stir up hatred.[87]

4.69 We will be inviting consultees to consider whether, in the case of extension, any new offences should take the form of the broad or the narrow model. We are keen to avoid any further complexity and fragmentation in this area of the law. We will not, therefore, be inviting consultees to formulate an alternative model comprised of elements from both the broad and narrow models.

4.70 In addition to the different elements of the two types of offence, there are explicit provisions protecting freedom of expression in relation to religion and sexual orientation (but not in relation to race). We deal separately with the question of whether any new stirring up offences should have such a provision below.[88]

(1) Threatening, abusive or insulting

4.71 As discussed above, whether words, material or conduct are to be construed as "threatening, abusive or insulting" is a question of fact, to be decided in all the circumstances.[89] The courts have held that the concepts of "threatening, abusive or insulting" are to be given their ordinary meanings; whether they meet the requisite threshold is to be decided in light of the impact the words or conduct are likely to have on a reasonable person.[90] Under the narrow model, merely abusive or insulting forms of expression would not be enough to establish liability. The requirement that the expression must be "threatening" therefore reduces the scope of the offence considerably.[91]

4.72 Nonetheless, the exact scope of the narrow model of the offence remains uncertain. There are two, linked reasons for this. First, a lack of case law on the religious hatred and sexual orientation stirring up offences means there is little judicial guidance in this area.[92] Secondly, the question of what amounts to

[85] See para 4.5 above.

[86] See Ch 2 at para 2.53 and following.

[87] See Ch 2 at paras 2.105 and 2.125.

[88] See para 4.78 and following below.

[89] See *R v Cakmak* [2002] EWCA Crim 500, [2002] Cr App R 10, regarding the objective test to be applied when the offence involves threatening words or behaviour. This case concerned a threat to destroy or damage property under the Criminal Damage Act 1971.

[90] *Brutus v Cozens* [1973] AC 854, [1972] 3 WLR 521 and *DPP v Clarke* (1991) 94 Cr App R 359, (1991) 156 *Justice of the Peace* 267. It need not be proved that the words or conduct in fact caused someone to feel threatened, abused or insulted: *Parkin v Norman* [1983] QB 92, [1982] 2 All ER 583.

[91] See, in the context religious hated, K Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" (2007) *Modern Law Review* 89.

[92] We are aware only of one trial to date for stirring up religious hatred (which failed) and one trial to date for stirring up hatred on grounds of sexual orientation (which was successful): see *Bamber* (Jun 2010) Preston Crown Court (unreported) and *Ali, Javed and Ahmed* (10 Feb 2012) (unreported) respectively.

"threatening" conduct, particularly in the specific context of stirring up hatred,[93] is open-ended. While the test is an objective one, the concept of "threatening" does not appear to have a fixed meaning. For instance, it is not clear what the threat must relate to, and whether only physical threats to security are included, or whether less direct threats to an individual's sense of wellbeing, identity or sense of belonging in a community might also suffice.

(2) Intention to stir up hatred, or likelihood of hatred being stirred up

4.73 As discussed in detail in Chapter 2,[94] the broad model is comprised of two alternatives: (1) the defendant must intend by his or her conduct to stir up hatred[95] **or** (2) having regard to all the circumstances, the conduct must have been likely to stir up racial hatred. There are a number of defences which may apply to cases in which the allegation is based on likelihood rather than intention.[96] The mental element for the narrow model, by contrast, is only satisfied on proof that the defendant intended by his or her conduct to stir up hatred.

4.74 The inclusion of the second alternative in the context of the racial hatred offences (that conduct was likely to stir up hatred in the circumstances) was the subject of considerable controversy during Parliamentary debates.[97] This is because it made it possible to establish the stirring up offence without proving any intention to stir up hatred. It was argued, for instance, that it is easy to say or do things that are insulting and that might have the effect of stirring up hatred without really meaning to;[98] that the effect of criminalising such conduct would cause more resentment than it solves;[99] and that dispensing with the requirement of intent in the context of such offences runs contrary to basic principles of English criminal law.[100] On the other side, it was argued that the threshold of threatening, abusive or insulting conduct was sufficient;[101] that it would be almost impossible to prove intent (as opposed to recklessness);[102] that comparable offences such as those relating to a breach of the peace did not require intent;[103] and that the penal codes of other countries look only to the result of a defendant's conduct.[104]

4.75 The decision to require intention in the later offences of stirring up religious hatred and hatred on grounds of sexual orientation was a conscious attempt to

[93] We note that there is case law on the definition of "threatening, abusive or insulting" in other contexts, for instance the public order offences: see Ch 2 at paras 2.54 and 2.60.

[94] See Ch 2 at para 2.62 and following.

[95] For the definition of intention in this context, see POA 1986, s 18(5).

[96] See Ch 2 at paras 2.74, 2.81, 2.87, 2.92, and 2.100.

[97] See Appendix B at para B.94 and following.

[98] *Hansard* (HC), 27 Oct 1976, vol 918, cols 646 to 649.

[99] *Hansard* (HC), 27 Oct 1976, vol 918, cols 646 to 649.

[100] *Hansard* (HL), 4 Oct 1976, vol 374, col 1046 and following.

[101] *Hansard* (HL), 4 Oct 1976, vol 374, col 1049.

[102] *Hansard* (HC), 27 Oct 1976, vol 918, cols 630 to 633.

[103] *Hansard* (HC), 27 Oct 1976, vol 918, col 635.

[104] *Hansard* (HC), 27 Oct 1976, vol 918, cols 630 to 633.

pitch the offences at the highest level, in order to take account of concerns about freedom of expression.[105]

4.76 **Question 9: If consultees consider that a new offence of stirring up hatred on grounds of disability is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above?**

4.77 **Question 10: If consultees consider that a new offence of stirring up hatred on grounds of transgender identity is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above?**

(3) Provisions for the protection of freedom of expression

4.78 As explained in Chapter 2,[106] provisions for the "protection of freedom of expression" apply to the stirring up of hatred on grounds of religion and sexual orientation, but not on grounds of race.[107] Below we invite consultees to consider whether such provisions might be considered necessary in the context of both disability and transgender identity, and ask consultees about the appropriate content of any such potential provisions.

4.79 The effect of the provisions is to specify significant areas of expression as being excluded from the scope of the stirring up offences. It is not clear that these provisions necessarily add anything to the article 9 or 10 assessment the court would be required to undertake in any case:[108] they seem to have been included for the avoidance of doubt. The arguments advanced in debates in the House of Lords in favour of such provisions for religious hatred and hatred on grounds of sexual orientation were that they:

(1) prevent a chilling effect resulting from the new offences;[109]

(2) provide clarification as to the scope of the new offences, by offering guidance on the threshold for prosecution in light of articles 9 and 10;[110] and

[105] See generally, Public Bill Committee, *Hansard* (HC), 29 Nov 2007, cols 681 to 710, http://www.publications.parliament.uk/pa/cm200708/cmpublic/criminal/071129/pm/71129s01.htm (last visited 19 Jun 2013). See also Appendix B at para B.217 and following.

[106] Ch 2 at para 2.116 and following; see also Appendix B at para B.228.

[107] This is the heading given to the provisions in the legislation: see POA 1986, ss 29J and 29JA. We consider, however, that some of the forms of conduct listed in the provisions would also engage art 9 rights. For instance, "proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system" (s 29J) is an aspect of manifesting one's religion which is protected by art 9: see, eg, P Edge, "Extending Hate Crime to Religion" (2003) 8 *Journal of Civil Liberties* 5; K Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" (2007) *Modern Law Review* 89; and *Kokkinakis v Greece* (App No A/260-A) (1994) 17 EHRR 397. Despite the heading, therefore, the effect of the provisions is not only to make explicit the protection provided by the ECHR to art 10 rights, but also that provided to art 9 rights.

[108] By virtue of the Human Rights Act 1998: see Appendix A at para A.4.

[109] See, eg, *Hansard* (HL), 21 Apr 2008, vol 700, col 1372.

[110] See, eg, *Hansard* (HL), 21 Apr 2008, vol 700, col 1374.

(3) curb over-zealous reliance on the offences by police officers and prosecutors.[111]

Religious hatred

4.80 The provision in section 29J relating to the stirring up of religious hatred provides that:

> 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.

4.81 This provision was created to protect believers without protecting beliefs.[112]

Sexual orientation

4.82 The provision in section 29JA relating to the stirring up of hatred on grounds of sexual orientation provides that:

> 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.[113]

4.83 The focus of the provision is expression relating to conduct or practices undertaken by people on account of their sexual orientation,[114] rather than hatred of those individuals themselves.[115] The reference to "of itself" in the provision clarifies that merely urging a person to change their sexual conduct or practices would not amount to "threatening" conduct or conduct intended to stir up hatred. Something in addition would be required for such expression to meet the threshold of threatening conduct or conduct intended to stir up hatred.

[111] See, eg, *Hansard* (HL), 21 Apr 2008, vol 700, col 1372 and K Goodall, "Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland" (2009) 13 *International Journal of Human Rights* 211.

[112] See Appendix B at para B.228 and, eg, *Hansard* (HC), 21 Jun 2005, vol 435, col 668. In practice, of course, this distinction may be difficult to draw: ridicule towards the central tenets of a person's religion may be experienced, and intended as, ridicule of a person who is an adherent of that religion: see Ch 2 at para 2.117 and following. Compare the comments of Evan Harris MP in the House of Commons debate: he argued that it is possible to criticise sexual orientation without intending hatred towards individuals who have that sexual orientation. See *Hansard* (HC), 6 May 2008, vol 475, col 617.

[113] POA 1986, s 29JA.

[114] This can be seen from the debates when the amendment was first introduced (in slightly different form) in the House of Commons: it was thought important to maintain a distinction between protecting people from personal attack and protecting their beliefs and practices from criticism or satire. The latter was thought to merit explicit protection on freedom of expression grounds: see *Hansard* (HC), 9 Jan 2008, vol 470, col 449.

[115] As in the case of religious hatred, this distinction may be difficult to draw in practice: criticism of homosexuality may be experienced, and intended as, criticism of a homosexual person.

4.84 **Question 11: If a new offence of stirring up hatred on grounds of disability were created, should it include explicit protection for freedom of expression? If so, what should it cover?**

4.85 **Question 12: If a new offence of stirring up hatred on grounds of transgender identity were created, should it include explicit protection for freedom of expression? If so, what should it cover?**

(4) Defining "disability" and "transgender identity" in any new stirring up offences

4.86 It is important to consider how "disability" and "transgender identity" should be defined in the context of any new stirring up offences. The definitions adopted will have an impact on the scope of the new offences.

4.87 As we noted above, any reform of the law of hate crime should be as clear and simple as possible, and work effectively and consistently in practice. We have already discussed in some detail the alternative legislative definitions of "disability" and "transgender identity" which could be adopted in the context of new aggravated offences.[116] We gave greatest weight to the definitions in section 146 of the CJA 2003 because this provision already applies in the context of sentencing hate crime against disabled and transgender people.[117] We acknowledge that there is not the same pressure to conform to section 146 in the context of the stirring up offences because section 146 is not as tightly linked to the stirring up offences as it is to the aggravated offences.[118] Nonetheless we consider that if both the aggravated and stirring up offences were extended to cover disability and transgender identity, the same definitions should be adopted in relation to each offence, in the interests of promoting coherence across the three distinct legal regimes. We do not consider that there are any compelling arguments of principle or practice which justify different definitions being adopted in relation to each offence. If different definitions were seen as necessary in light of the different regimes, some incoherence would be an unavoidable consequence.

4.88 **Proposal 10: Our provisional view is that if new stirring up and aggravated offences were created, the same definitions of "disability" and "transgender identity" should be adopted in relation to both. Do consultees agree? If not, why not?**

4.89 For further possible legislative definitions, consultees should refer to the section on the aggravated offences in Chapter 3. Those definitions will assist consultees in answering the following questions.

[116] See, respectively, Ch 3 at para 3.86 and following and Ch 3 at para 3.126 and following.

[117] We noted that adopting alternative legislative definitions in the context of the aggravated offences could result in inconsistency, as the same conduct might amount to an aggravated offence but not an aggravated sentencing factor (or the other way around): see Ch 3 at paras 3.82 to 3.83.

[118] See para 4.95 and following below.

(a) Defining "disability"

4.90 In Chapter 3, we set out and discussed three existing legislative definitions of "disability" contained in:

(1) Section 146(5) of the CJA 2003;[119]

(2) Equality Act 2010;[120]

(3) Article 1 of the UN Convention on the Rights of Persons with Disabilities.[121]

4.91 **Proposal 11: We consider that the definition of "disability" in section 146 would be suitable for new stirring up offences. Do consultees agree? If not, why not?**

(b) Defining "transgender identity"

4.92 In Chapter 3, we set out and discussed two existing legislative definitions of "transgender identity":

(1) Section 146(6) of the CJA 2003;[122]

(2) Section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.[123]

4.93 **Proposal 12: We consider that the definition of transgender identity in section 146(6) would be suitable for new stirring up offences. Do consultees agree? If not, why not?**

4.94 **Question 13: Do consultees consider that in any new stirring up offence the definition of transgender identity in section 2(8) of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146(6) of the CJA 2003? If so, why?**

EXISTING SENTENCING PROVISIONS VS NEW STIRRING UP OFFENCES

4.95 We now consider to what extent, if at all, the existing sentencing provisions would provide an effective and proportionate response to a problem of stirring up hatred against those with disability and those with transgender identity.

4.96 At present, there is no offence of stirring up hatred on the grounds of disability or transgender identity. As we discuss at paragraphs 4.14 to 4.37 above, some of the conduct which would be targeted by any new stirring up offences is already addressed by existing offences, namely sections 4, 4A and 5 of the POA 1986, section 1 of the Malicious Communications Act 1988, section 127(1) of the Communications Act 2003, and the encouraging or assisting crime offences under the Serious Crime Act 2007, sections 44 to 46.

[119] See Ch 3 at para 3.87 and following.

[120] See Ch 3 at para 3.92 and following.

[121] See Ch 3 at para 3.95 and following.

[122] See Ch 3 at para 3.127 and following.

[123] See Ch 3 at para 3.137 and following.

4.97 Section 146 of the Criminal Justice Act 2003 is applicable to all these offences. A judge in sentencing the offender convicted of any of these offences must apply the enhanced sentencing provisions in section 146 if the offender is shown to have demonstrated or been motivated by hostility on grounds of disability or transgender identity.[124] However, we concluded above that these offences cannot be regarded as capturing all the potential harms generated by the stirring up of hatred against people on grounds of disability or transgender identity.[125] This remains the case even if aggravating factors in sentencing under section 146 are found to apply.

4.98 We noted above that the absence of stirring up offences relating to disabled and transgender groups may lead to the following gaps in the law:

(1) a failure to criminalise certain forms of wrongdoing at all; or

(2) where the wrongdoing is criminalised, a failure to capture the nature of the conduct and its impacts which the stirring up offences would have captured.

4.99 Section 146 does not help to meet either deficit because:

(1) where wrongdoing is not criminal, section 146 cannot bite – the sentencing provisions apply only once a defendant has been convicted of an offence;

(2) where the wrongdoing is criminal, but not captured by a specific stirring up offence,[126] the application of section 146 does not:

(a) change the label of the offence to make clear that it is the stirring up of hatred which is the wrong at issue; or

(b) operate so as to increase the maximum penalty beyond that available for the offence in question.[127]

4.100 **Question 14: Do consultees agree that the sentencing provisions in s 146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people?**

[124] For example, an offender convicted under section 1(1) of the Malicious Communications Act 1988 of sending a threatening email to a transgender person with the intention of causing them distress or anxiety, may attract a higher sentence if the judge is satisfied of proof of the aggravating factor of hostility on the basis of transgender identity.

[125] See para 4.14 and following above.

[126] Where, for instance, the threatening, abusive or insulting conduct is dealt with under s 1(1) of the Malicious Communications Act 1988, as opposed to a new stirring up offence.

[127] Following on from the same example, were the conduct to be dealt with under s 1(1) of the Malicious Communications Act 1988 (with s 146 of the CJA 2003 being found to apply), the maximum penalty available would be six months' imprisonment and/or a fine. By contrast, were the conduct dealt with under a new stirring up offence, the maximum penalty would be seven years' imprisonment.

CHAPTER 5
PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSULTEES

The proposals and questions on which we seek consultees' views appear below in the same order as they appear in the consultation paper.

THE AGGRAVATED OFFENCES

Reform option 1 - enhanced sentencing provisions

Proposal 1: 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? [paragraph 3.45]

Possible proposals to improve the operation of the enhanced sentencing provisions

Proposal 2: We provisionally propose that a new guideline from the Sentencing Council should be produced to deal exclusively with aggravation on the basis of hostility under sections 145 and 146 of the CJA 2003. Do consultees agree? If not, why not? [paragraph 3.51]

Proposal 3: We provisionally propose that where section 145 or 146 is applied, this should be recorded on the Police National Computer and reflected on the offender's record. Do consultees agree? If not, why not? [paragraph 3.53]

Question 1: 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? [paragraph 3.54]

Proposal 4: 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? [paragraph 3.55]

Reform option 2: creating new aggravated offences

Proposal 5: If proposals 2 and 3 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 basic 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? [paragraph 3.76]

Disability: A new aggravated offence

DEFINING "DISABILITY"

Proposal 6: We consider that the definition of disability in any new aggravated offence should mirror the definition in section 146: "any physical or mental impairment". Do consultees agree? If not, why not? [paragraph 3.91]

Question 2: Do consultees agree that the definition of "disability" in the Equality Act 2010 is inappropriate for any new disability aggravated offence that might be enacted? If not, why not? [paragraph 3.94]

Question 3: Do consultees agree that the definition of disability in the UN Convention on the Rights of Persons with Disabilities is inappropriate for a new disability aggravated offence? If not, why not? [paragraph 3.100]

MOTIVATION BY HOSTILITY

Question 4: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on disability? If not, why not? [paragraph 3.110]

Sexual orientation: A new aggravated offence

DEFINING "SEXUAL ORIENTATION"

Proposal 7: We consider that the definition of sexual orientation in any new aggravated offence should mirror the existing definition adopted in case law: "orientation towards people of the same sex, opposite sex or both". Do consultees agree? If not, why not? [paragraph 3.116]

MOTIVATION BY HOSTILITY

Question 5: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on sexual orientation? If not, why not? [paragraph 3.124]

Transgender identity: A new aggravated offence

DEFINING "TRANSGENDER IDENTITY"

Proposal 8: We consider that the definition of transgender identity in any new aggravated offence should mirror the definition in section 146: "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". Do consultees agree? If not, why not? [paragraph 3.136]

Question 6: Do consultees consider that in any new aggravated offence the definition in section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146 of the CJA 2003? [paragraph 3.140]

MOTIVATION BY HOSTILITY

Question 7: Do consultees consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on transgender identity? If not, why not? [paragraph 3.148]

THE STIRRING UP OFFENCES

The arguments for and against the new stirring up offences

Proposal 9: 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? [paragraph 4.63]

The need for new stirring up offences

Question 8: Do consultees consider that there is a practical need for the new offences? If so, why? [paragraph 4.66]

Defining any new offences

Question 9: If consultees consider that a new offence of stirring up hatred on grounds of disability is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above? [paragraph 4.76]

Question 10: If consultees consider that a new offence of stirring up hatred on grounds of transgender identity is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above? [paragraph 4.77]

Provisions for the protection of freedom of expression

Question 11: If a new offence of stirring up hatred on grounds of disability were created, should it include explicit protection for freedom of expression? If so, what should it cover? [paragraph 4.84]

Question 12: If a new offence of stirring up hatred on grounds of transgender identity were created, should it include explicit protection for freedom of expression? If so, what should it cover? [paragraph 4.85]

Defining "disability" and "transgender identity" in any new stirring up offences

Proposal 10: Our provisional view is that if new stirring up and aggravated offences were created, the same definitions of "disability" and "transgender identity" should be adopted in relation to both. Do consultees agree? If not, why not? [paragraph 4.88]

DEFINING "DISABILITY"

Proposal 11: We consider that the definition of "disability" in section 146 would be suitable for new stirring up offences. Do consultees agree? If not, why not? [paragraph 4.91]

DEFINING “TRANSGENDER IDENTITY”

Proposal 12: We consider that the definition of transgender identity in section 146(6) would be suitable for new stirring up offences. Do consultees agree? If not, why not? [paragraph 4.93]

Question 13: Do consultees consider that in any new stirring up offence the definition of transgender identity in section 2(8) of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146(6) of the CJA 2003? If so, why? [paragraph 4.94]

Existing sentencing provisions vs new stirring up offences

Question 14: Do consultees agree that the sentencing provisions in s 146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people? [paragraph 4.100]