

Law Commission

Consultation Paper No 213

**HATE CRIME: THE CASE FOR
EXTENDING THE EXISTING OFFENCES**

Appendix C: Impact Assessment

Title: Hate crime: the case for extending the existing offences IA No: Lead department or agency: Law Commission Other departments or agencies: Ministry of Justice	Impact Assessment (IA)		
	Date: 27/06/2013		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Other		
Contact for enquiries: Catherine Heard 0207 3334 0275			

Summary: Intervention and Options	RPC Opinion: Not Applicable
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
N/A	N/A	N/A	No	NA

What is the problem under consideration? Why is government intervention necessary?

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 towards people on the grounds of disability, sexual orientation or gender 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. It has since been agreed that the references to “gender identity” should be understood to refer to “transgender identity”, and that the reference to the CDA 1998 includes both limbs of hostility: demonstration and motivation.

What are the policy objectives and the intended effects?

The policy objectives are:

- To ensure that the criminal law provides an adequate response to hate incidents against each group.
- To ensure that the law on hate crime is, as far as possible, fair, modern, clear, simple, and works effectively and consistently in practice, and to increase public confidence in the criminal justice system.
- To avoid extending or exacerbating any problems with current hate crime provisions if and when those provisions are extended to the other groups.
- To ensure the law in this area is ECHR-compliant.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The options set out below can be implemented together or independent of one another.

Option 1: Enhanced sentencing provisions. We make two provisional proposals: a) a new guideline from the Sentencing Council dealing exclusively with enhanced sentences under sections 145 and 146 of the Criminal Justice Act 2003, and b) enhanced sentences under those provisions to be recorded on the Police National Computer.

Option 2: Creating new aggravated offences. This option would create new offences which involve hostility on the grounds of disability, sexual orientation or transgender identity.

Option 3: Creating new offences of stirring up hatred. This option would create new offences of stirring up hatred on grounds of disability and transgender identity.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year						
Does implementation go beyond minimum EU requirements?				Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro No	< 20 No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded: N/A		Non-traded: N/A

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Improvements to the operation of the enhanced sentencing provisions under the Criminal Justice Act 2003

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

It is not possible to monetise the costs (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised costs by 'main affected groups'

Costs to the Sentencing Council of drafting and implementing a new sentencing guideline. Administrative costs in recording enhanced sentences on the Police National Computer. Possible increase in prison costs if longer custodial sentences are handed down as a result of improvements to the sentencing regime. Potential for harm to the reputation of the criminal justice system as other groups (for example, older people and members of "alternative subcultures") do not get the same protection.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to monetise the benefits (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised benefits by 'main affected groups'

More consistent and rigorous application of the enhanced sentencing provisions. Benefits for victims, as the hostility they have suffered is recognised in open court. Benefits for society as a whole, as repeated, public condemnation of crimes involving hostility may reinforce the view that hate crime is unacceptable.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

Very high risk that any attempt to monetise the costs and benefits of these options would be flawed, because of the gaps in the data and because the Government's ongoing hate crime action plan makes it difficult to isolate the impact of any one reform. We have therefore limited ourselves to setting out the sources and likely scales of the potential costs and benefits.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 2

Description: Extend the aggravated offences in the Crime and Disorder Act 1998 to cover all five protected groups

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

It is not possible to monetise the costs (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised costs by 'main affected groups'

Possible increase in prison costs as longer custodial sentences are handed down for new aggravated offences. Potential for harm to the reputation of the criminal justice system as other groups (for example, older people and members of "alternative subcultures") do not get the same protection, and as some common offences are not capable of being aggravated offences.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to monetise the benefits (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised benefits by 'main affected groups'

Sufficiently serious label attached to conduct which is motivated by or which demonstrates hostility on the basis of one of the protected characteristics. Benefits for victims, as the hostility they have suffered is recognised in open court and in the offence for which the defendant is convicted. Benefits for society as a whole, as repeated, public condemnation of crimes involving hostility may reinforce the view that hate crime is unacceptable.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5%
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Very high risk that any attempt to monetise the costs and benefits of these options would be flawed, because of the gaps in the data and because the Government's ongoing hate crime action plan makes it difficult to isolate the impact of any one reform. We have therefore limited ourselves to setting out the sources and likely scales of the potential costs and benefits.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 3

Description: Extend the stirring up of hatred offences in the Public Order Act 1986 to cover all five protected groups

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

It is not possible to monetise the costs (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised costs by 'main affected groups'

Potential costs to the courts service and to the prison service as individuals are prosecuted and imprisoned for the new offences. Potential for harm to the reputation of the criminal justice system as other groups (for example, older people and members of "alternative subcultures") do not get the same protection.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

It is not possible to monetise the benefits (see paras C.79 - 81 below). This is because there are significant gaps in the available data, and because it is difficult to isolate the potential impact of these reforms from the wider context of the government's hate crime action plan.

Other key non-monetised benefits by 'main affected groups'

Criminal law would have an adequate response to any problem of stirring up hatred against a protected group. Emphasises that the groups in question are protected and that hate speech can be prosecuted.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

Very high risk that any attempt to monetise the costs and benefits of these options would be flawed, because of the gaps in the data and because the Government's ongoing hate crime action plan makes it difficult to isolate the impact of any one reform. Risk that there is no practical need for the new offences. Risk that the new offences will be perceived as having a chilling effect on freedom of expression. Risk that low levels of prosecution will undermine the effectiveness of the offences.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	IN/OUT/Zero net cost

APPENDIX C

IMPACT ASSESSMENT

BACKGROUND

Terminology

Hate crime

- C.1 It is important to be clear from the outset what is meant by “hate crime”. The term is used in two different senses: one broad and one narrow.
- C.2 The broad meaning of “hate crime” is the one used by the criminal justice agencies, which we set out below. This definition is deliberately wide, and allows the police, the Crown Prosecution Service (“CPS”) and others to record all offences which may involve an element of hostility towards the victim’s personal characteristics or perceived characteristics. In 2007, the police, CPS, the National Offender Management Service (at the time the Prison Service) and other agencies involved in monitoring or prosecuting “hate crime” agreed a common definition:
- 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.¹
- C.3 Notwithstanding this agreement, the different agencies appear to use slightly different definitions, at least in their publications. Furthermore, the different parts of a single agency may also use different definitions. For example, the Criminal Justice Joint Inspection report into disability hate crime noted that the CPS policy document on disability hate crime prosecutions uses a definition of hate crime which is different from the definition used in the CPS Equality Unit Aide Memoire.² As a result, data from different organisations cannot simply be read across from one stage of the criminal justice process to another, as they are not directly comparable. This is a limitation on the analysis which can be done using this data.
- C.4 “Hate crime” in the narrower sense refers to the specific legal provisions which are the subject of the consultation paper. They are:
- (1) the aggravated offences in sections 29 to 32 of the Crime and Disorder Act 1998 (“CDA 1998”);

¹ See, for example, Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) p 8. The definition aims to reflect the victim’s experience, and the reference to “any other person” aims to ensure that the relevant community’s perception of hate crime is reflected.

² Criminal Justice Joint Inspection (HMCPSP, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (Mar 2013) para 2.5.

- (2) the offences of stirring up hatred in the Public Order Act 1986 (“POA 1986”); and
 - (3) the enhanced sentencing provisions in sections 145 and 146 of the Criminal Justice Act 2003 (“CJA 2003”).
- C.5 Because the definitions of “hate crime” used by the police and the CPS are broader than the scope of these legal provisions, some incidents will be recorded as “hate crime” even though they do not fall within any of the three Acts mentioned above. To avoid confusion, when we are referring to the specific legal provisions discussed in the consultation paper we use the terms “aggravated offences”, “stirring up offences” and “enhanced sentencing provisions”. When discussing other statistics, we highlight the definition of “hate crime” used by the organisation in question.
- C.6 It should be borne in mind from the outset that when criminal justice agencies such as the police and the CPS refer to “hate crime”, they are generally not referring specifically, or only, to the three statutory regimes identified above. Instead, they are using “hate crime” in the much broader sense established by their definition. The focus of the Law Commission’s project is on the statutory regime for dealing with hate crime, but it is important to understand that this regime fits into a wider context of action directed towards hate crime across the criminal justice system.³
- C.7 In the “scale and context” section of this impact assessment, we outline the number of “reported hate crimes” which are outlined in surveys such as the British Crime Survey (now called the “Crime Survey for England and Wales”),⁴ the number of “recorded hate crimes” which are counted by the police,⁵ and the number of “prosecuted hate crimes” which are handled by the CPS.⁶ We also outline the available statistics on the number of sentences passed for the aggravated offences and the stirring up offences.⁷

Protected characteristics

- C.8 There are five protected characteristics or monitored strands with which the law on hate crime deals. They are: race, religion, sexual orientation, disability and transgender identity.⁸ Each of the groups is defined in the statutory provisions relating to hate crime. Separately from this, the police and CPS have wider

³ HM Government, *Challenge it, Report it, Stop it: the Government’s plan to tackle hate crime* (Mar 2012).

⁴ See para C.30 and following below. The BCS has now been renamed the “Crime Survey for England and Wales”. Because the Home Office document we cite refers to the “British Crime Survey”, we have used that title here.

⁵ See para C.47 and following below.

⁶ See para C.53 and following below.

⁷ See para C.61 and following below.

⁸ Local criminal justice organisations are free to record hate crime against other groups of people. Greater Manchester Police, for example, have recently started to record crimes against “alternative sub-cultures”, <http://www.gmp.police.uk/content/section.html?readform&s=C4D5E39C4F3817F680257961004019B9> (last visited 19 Jun 2013).

definitions of the groups.⁹ There are good operational reasons for these wider definitions (particularly because criminal justice agencies aim to recognise every situation where hate crime may be an issue). However, it means that those organisations' publications and statistics do not necessarily tie in with the statutory definitions or provide a clear picture of the extent to which the three statutory regimes are being used across each of the five monitored strands.

Terms of reference

C.9 The hate crime project is a reference from the Ministry of Justice. Our terms of reference requested us to look at:

- (1) extending the aggravated offences in the CDA 1998 to include where hostility is demonstrated towards people on the grounds of disability, sexual orientation or gender identity; and
- (2) the case for extending the stirring up of hatred offences under the POA 1986 to include stirring up of hatred on the grounds of disability or gender identity.

It has since been agreed that the references to "gender identity" should be understood to refer to "transgender identity", and that the reference to the CDA 1998 includes both limbs of hostility: demonstration and motivation.¹⁰

C.10 The scope of this project, based on our terms of reference, is therefore narrow. We are examining the case for extending the aggravated offences and the stirring up offences to cover disability, transgender identity and (in the case of the aggravated offences only) sexual orientation. If all these steps were taken, the result would be that all three specific legal provisions would cover all five protected groups. It is not within the scope of this project to recommend wider reform of the existing hate crime legislation or to recommend extension of the hate crime legislation to groups other than the five set out above.

C.11 The consultation paper examines the existing law on the aggravated and stirring up offences, and assesses the case for extending them. It also examines the enhanced sentencing provisions (which already cover all five protected groups), and discusses whether the existence of these sentencing provisions negates the need for the aggravated and stirring up offences to be extended. This impact assessment outlines the potential economic impacts of the extension of the aggravated and stirring up offences, and the correct use of the enhanced sentencing provisions.

The Government's hate crime action plan

C.12 The Law Commission's review of hate crime is part of a wider governmental initiative to tackle the problem.¹¹ The Government action plan has a broad range of aims, which include preventing hate crime through: working with support

⁹ See, for example, Crown Prosecution Service, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (Nov 2007) p 43. The CPS definition of "trans people" includes a reference to transvestites, whereas s 146 of the CJA 2003 does not.

¹⁰ Para C.15 below.

¹¹ HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012).

organisations and media authorities to address negative media stereotypes of, for example, those with disabilities; improving the evidence base on hate crime; improving education on hate crime; working with national governing bodies to tackle homophobia and transphobia in sports; and working with industry, the police, courts and others to develop a programme of work to tackle hate crime on the internet.¹² The action plan also aims to improve the reporting of hate crime and access to support for victims.¹³ In addition to national initiatives, the action plan has a focus on recording and dealing with hate crime at a local level.¹⁴

PROBLEM UNDER CONSIDERATION

C.13 The three specific statutory regimes referred to above do not treat all the protected groups in the same way:

- (1) the aggravated offences under the CDA 1998 cover hate crime based on the victims' race or religion;
- (2) the offences of stirring up hatred in the POA 1986 protect groups based on their race, religion or sexual orientation; and
- (3) the enhanced sentencing provisions in sections 145 and 146 of the CJA 2003 cover all five protected groups.

We discuss the existing aggravated offences, stirring up offences and enhanced sentencing provisions in detail in the consultation paper,¹⁵ and they are summarised here. In line with the terms of reference for the project, the issue which the consultation paper seeks to address is the unequal application of these legal provisions to the different protected groups.

The aggravated offences under the Crime and Disorder Act 1998

C.14 In sections 29 to 32 of the CDA 1998 there is a list of "basic offences" which can be racially or religiously aggravated. The relevant basic offences that can become aggravated in this way include assault, criminal damage, public order offences involving threatening or abusive conduct, harassment and stalking, and putting people in fear of violence. This list of basic offences is fixed and the terms of reference for this project do not allow us to recommend that other basic offences be included.

C.15 Section 28 of the CDA 1998 provides that a basic offence is racially or religiously aggravated if:

- (1) 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

¹² HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) pp 10 to 14.

¹³ HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) pp 15 to 18.

¹⁴ HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) p 16.

¹⁵ See our discussion on the current law in Ch 2.

- (2) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.
- C.16 There are two main differences between the aggravated offences under the CDA 1998 and the enhanced sentencing provisions under the CJA 2003:
- (1) the aggravated offences are separate, specific criminal offences, and are charged and prosecuted as such. The enhanced sentencing provisions, by contrast, apply only at sentencing stage, once there has been a conviction for a non-aggravated offence. There is therefore a difference in labelling between the two regimes. For example, an assault which is racially aggravated can be prosecuted as a racially aggravated assault. However, an assault which is aggravated on the basis of hostility towards the victim's sexual orientation must be prosecuted as the basic offence of assault (with the aggravating factors being dealt with at sentencing); and
 - (2) the aggravated offences carry higher maximum penalties than the respective basic offences. The enhanced sentencing provisions, by contrast, provide that the hostility must be treated as an aggravating factor, but the sentence must still be at or below the maximum available for the basic offence.

The stirring up offences under the Public Order Act 1986

- C.17 The different stirring up offences are set out in the POA 1986 at sections 18 to 23 (racial hatred) and sections 29B to 29G (religious hatred or hatred on grounds of sexual orientation). The actions which are covered by these provisions include the use of words or behaviour or display of written material, publishing or distributing written material, public performances and plays, distributing, showing or playing a recording and broadcasting material. There are also offences of possessing inflammatory material with a view to displaying, publishing, distributing, playing or showing it, or including it in a cable programme service.
- C.18 There are key differences between the offences relating to racial hatred and those relating to religious hatred and hatred on the grounds of sexual orientation:
- (1) for the offences of stirring up racial hatred, it is enough that the defendant intended to stir up hatred or that hatred was likely to be stirred up. For the offences of stirring up religious hatred or hatred on grounds of sexual orientation, on the other hand, the defendant must have intended to stir up hatred. Awareness of the likelihood of hatred being stirred up is not enough;
 - (2) for the offences of stirring up racial hatred, the conduct must be threatening, abusive or insulting. For the offences of stirring up religious hatred or hatred on grounds of sexual orientation, however, the conduct must be threatening (not merely abusive or insulting); and
 - (3) there are express provisions for the protection of freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

The enhanced sentencing provisions under the Criminal Justice Act 2003

- C.19 The enhanced sentencing provisions under section 145 of the CJA 2003 do not apply to the racially or religiously aggravated offences under the CDA 1998. For all other offences, section 145 provides that the court must treat the fact that the offender demonstrated or was motivated by hostility towards the victim's race or religion as an aggravating factor in sentencing. In addition, the court must state in open court that the offence was so aggravated. Section 145 uses the definition of "racially or religiously aggravated" which is set out in section 28 of the CDA 1998.
- C.20 Section 146 of the CJA 2003 applies to offences where the offender demonstrated, or was motivated by, hostility towards the victim's disability, sexual orientation or transgender identity. In such a case, the court must treat those circumstances as an aggravating factor, and must state in open court that the offence was committed in those circumstances.

RATIONALE FOR INTERVENTION

- C.21 The conventional economic approach to Government intervention in order to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing interventions (for example, waste generated by misdirected rules). In both cases, the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (for example, to reallocate goods and services to more needy groups in society).
- C.22 In this project, the rationale for any intervention would be based primarily on equity reasons. Under the current legal regime, hate crime targeting the victim's sexual orientation, disability or transgender identity does not receive the same criminal justice response as hate crime targeting the victim's race or religion. It is difficult to quantify the impact of this. The unequal treatment may undermine the public perception of the justice system. The unintended consequence may be the perception that some protected characteristics are more deserving of protection than others or that some forms of hatred or hostility are more acceptable, and as a consequence there may be a tendency for victims of hate crimes relating to sexual orientation, disability or transgender identity not to report them to the police. In the long-term, this may give rise to a less tolerant society. In addition, if the existing legislation provides no protection against conduct which, it is felt, should be criminal, or if the sanctions available are not sufficiently strong, the criminal law may be seen as less effective in protecting the targeted groups.

POLICY OBJECTIVES

- C.23 The policy objectives are:
- (1) to examine the case for extending the aggravated and stirring up offences to all protected groups;
 - (2) to ensure that the criminal law provides an adequate response to hate incidents committed against individuals and groups because of their disability, sexual orientation or transgender identity;

- (3) to ensure that the law on hate crime is, as far as possible, fair and modern, clear and simple, and works effectively and consistently in practice;
- (4) to avoid extending or exacerbating any problems with the current hate crime provisions if and when those provisions are extended to the other protected groups;
- (5) to ensure that the law in this area is compliant with the European Convention on Human Rights; and
- (6) to increase public confidence in the criminal justice system.

MAIN GROUPS AFFECTED BY THE PROPOSED REFORMS

C.24 The main affected groups are:

- (1) potential defendants;
- (2) members of the protected groups (disability, transgender identity, sexual orientation, race and religion);
- (3) third party hate crime reporting centres;
- (4) the police;
- (5) the Association of Chief Police Officers;
- (6) the Crown Prosecution Service;
- (7) the Attorney General's Office;
- (8) Her Majesty's Courts and Tribunals Service;
- (9) the judiciary;
- (10) the Probation Service;
- (11) Her Majesty's Prison Service; and
- (12) the Legal Aid Agency.

SCALE AND CONTEXT

C.25 Data on the number and types of "hate crime" are available from a number of different sources. Different agencies, operating at different stages of the criminal justice process, have responsibility for collecting this information. This impact assessment breaks the available statistics down into those different stages, with the aim of demonstrating roughly the numbers of incidents which are said to be hate crimes at the various stages of the process. The data we discuss below are:

- (1) "hate crimes" reported in the British Crime Survey (2009 to 2011);
- (2) "hate crime incidents" recorded by the police (2011/2012);
- (3) offences flagged as "hate crime" charged and prosecuted by the CPS (2011/2012); and
- (4) sentences for the aggravated and stirring up offences, as recorded in the Ministry of Justice's sentencing statistics (2008 to 2011).

- C.26 For each source we have used the latest available information. Readers should note that the different sources are not directly comparable with one another (for example, the latest British Crime Survey report used data from the 2009/2010 and 2010/2011 surveys,¹⁶ whereas the police recorded data on hate crime covers 2011/2012). Readers should also note that cases will progress through the criminal justice system at different rates. A crime which is committed (and recorded by the police) in 2010 may not be prosecuted until 2011. This means, for example, that where numbers of cases prosecuted and numbers of convictions are provided for a given year, they will not cover precisely the same set of cases.
- C.27 We noted above¹⁷ that the term “hate crime” is used differently in different contexts. To reiterate, the statistics which are provided by the police, the CPS and others, and which are set out here, generally use the broad definition of “hate crime”. Unless we state otherwise, they are *not* counts of the numbers of prosecutions and sentences for the aggravated offences, stirring up offences or enhanced sentencing provisions.
- C.28 To illustrate how each agency contributes to the data-gathering process it is helpful to imagine how a single incident might progress through the system. First, the crime may be recorded as a hate crime by the police, whether because the victim or a third party has reported it as such to the police, or because the police have recorded it as such of their own initiative. The incident would then show up in the police recorded statistics on hate crime. After an investigation, the police may then refer that incident to the CPS for a decision on whether to charge the defendant. If the CPS assess that it is a hate crime, it will appear in the statistics in their report. If the CPS decide to charge the defendant with a specific hate crime offence – for example, racially aggravated criminal damage – and the defendant is prosecuted and sentenced, that sentence will appear in the Ministry of Justice’s internal sentencing statistics. Separately from all of this, the victim may be interviewed for the British Crime Survey (which is itself then used to make a national estimate of crime rates).
- C.29 We highlight throughout this document where there are limitations to these data sets. It should be noted that each of them is subject to a margin of error, either because of human error in the recording process or because they are based on sample surveys (in the case of the British Crime Survey¹⁸). Any conclusions drawn from the data must therefore be treated with caution. In addition, we note below¹⁹ that there are limitations to the available data on the aggravated offences, stirring up offences and enhanced sentencing provisions. In order fully to assess the impact of our proposals, we would need to know how many crimes, which would be caught by the new offences, are committed against individuals or groups with the protected characteristics. We would also need to know how often the existing enhanced sentencing provisions are used. Despite our extensive analysis of a wide range of sources, this data is not available.

¹⁶ The 2009/2010 and 2011/2012 surveys report crimes experienced by respondents between April 2008 and February 2011.

¹⁷ See para C.3 above.

¹⁸ See para C.31 below.

¹⁹ Para C.87 and following below.

(1) The Home Office Statistical Bulletin, British Crime Survey and the Life Opportunities Survey – data on reported hate crime

- C.30 Data on reported hate crime is taken from the Home Office Statistical Bulletin on hate crime.²⁰ The bulletin published in March 2012 combines the data from the 2009/10 and 2010/11 British Crime Survey and gives an average of the two.²¹ It defines hate crime as “any crime which is perceived as having been motivated (entirely or partially) by a hostility or prejudice to a personal characteristic or perceived personal characteristic, such as ethnicity or religion”.²² The bulletin states that:

Whether a crime or incident is hate-related has a subjective element as it relies on an individual’s perceptions and reporting of the incident and so what is included or excluded may vary between individuals.

- C.31 The British Crime Survey (“BCS”, now the “Crime Survey for England and Wales”) is a face-to-face survey in which people resident in households in England and Wales are asked about their experiences of crime in the 12 months prior to the interview. A large number of individuals are interviewed (in 2010/11, 46,754 adults were interviewed), the survey is weighted to account for possible non-response bias and the estimates of national crime are extrapolated from the results.²³ As they are based on a sample survey, the BCS results are subject to a margin of error.

- C.32 The figures given in the bulletin are 12-month averages of the estimates from the two survey years, and so they should be used only as an approximate guide to the level of reported hate crime. Respondents to the survey are asked about their *perception* of the offender’s motivation for the incident. The bulletin notes that:

This may result in some over-reporting since it is possible that some crimes considered here as hate crimes may actually be more a result of the victim’s vulnerability to crime, for example, distraction burglary, or an assumption on the victim’s behalf that the crime was motivated by the offender’s attitude.²⁴

More generally, self-reporting in surveys can produce a range of problems in addition to over-reporting. Individuals may misreport their experiences if they misunderstand the question, and their answers may be skewed by their personal experiences of crime. Under-reporting is also possible, for example if the respondents have forgotten about some incidents, or about some aspects of an incident.

²⁰ Home Office Statistical Bulletin, *Hate Crime, Cyber Security and the Experience of Crime Among Children: Findings from the 2010/11 British Crime Survey* (Mar 2012) (“Home Office Statistical Bulletin”).

²¹ The next set of statistics from the crime survey is likely to be released in autumn 2013. It may include statistics on sentencing.

²² Home Office Statistical Bulletin, p 13.

²³ Home Office, *User Guide to Home Office Crime Statistics* (Oct 2011) p 4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116226/user-guide-crime-statistics.pdf (last visited 19 Jun 2013).

²⁴ Home Office Statistical Bulletin, p 16.

C.33 Questions on hate crime motivated by the victim's transgender identity were not asked until 2011/12, and so no data on them is given here.

Victim identity

C.34 The surveys indicate that most perceived hate crime was directed against victims on the basis of their race.

Table 1: Home Office Statistical Bulletin - number of incidents of reported hate crime (and all crime) against adults (aged 16 and over) in England and Wales (average of estimates from 2009/10 and 2010/11)²⁵

Monitored characteristic	Number of incidents	Percentage of total hate crime
Race	136,000	52.3%
Religion	39,000	15%
Sexual orientation	50,000	19.2%
Disability	65,000	25%
Total hate crime	260,000	100%
Total crime	9,561,000	n/a

Using the figures in this table, hate crime accounted for 2.7% of all BCS crime. Statistics on hate crime targeting the victim's transgender identity are not included because questions on this strand were not included in the survey until 2011/12.

C.35 For personal (as opposed to household) hate crime,²⁶ the risk of being a victim varied by socio-demographic characteristics. The risk of being a victim of hate crime was highest for, among others:²⁷

- (1) people aged 16 to 24 (0.6% of whom experienced personal hate crime compared with, for example, fewer than 0.05% of those aged 75 and over);
- (2) people in ethnic groups other than white (0.8% compared with 0.2% of white adults); and
- (3) the unemployed (0.8% compared with 0.2% of adults in employment).

²⁵ Home Office Statistical Bulletin, p 27. The figure for "total hate crime" (260,000) is smaller than the figure which is given if all the hate crimes for each monitored characteristic are added together (290,000). This is because the victim may have said the crime was motivated by more than one characteristic. The percentages of total hate crime are calculated using the actual estimate of total hate crime given in the table: 260,000.

²⁶ The Home Office Statistical Bulletin states, p 17: "personal crimes relate to all crimes against the individual and only relate to the respondent's own personal experience (not that of other people in the household). Household crimes are considered to be all property-related crimes and respondents are asked whether anyone currently residing in the household has experienced any incidents within the reference period".

²⁷ Home Office Statistical Bulletin, pp 18 to19.

Table 2: Home Office Statistical Bulletin - proportion of adults (aged 16 or over) who reported that they were victims of all racially-motivated hate crime (personal and household), by ethnic group²⁸

Ethnic group	Percentage
White	0.1
Mixed	1.1
Asian or Asian British	1.8
Black or Black British	0.9
Chinese or other	1.1
All adults	0.3

- C.36 The bulletin notes that differences in victimisation rates between ethnic groups may be at least partly attributable to factors other than ethnicity. For example, the proportion of young people in the “mixed” ethnic group was, in previous research, found to be large in comparison to other ethnic groups, and young people are at higher risk of victimisation. Other personal characteristics are also inter-related²⁹ (for example, people from minority ethnic groups are disproportionately represented in unemployment figures³⁰).
- C.37 Nearly a third (31%) of the victims of hate crime were victimised more than once in the 12-month period, and 18% were victimised three or more times. The report notes that this is similar to the extent of repeat victimisation for crime overall (33% had been victimised more than once).³¹

Types of incident

Table 3: Home Office Statistical Bulletin - percentage of reported personal crimes against adults (aged 16 and over) in England and Wales which were perceived as hate crimes³²

Type of incident	% of incidents that were perceived as hate crime
Assault with minor injury or no injury	6
Wounding	6
Robbery	10
Theft from a person	1
Other theft of personal property	1
All personal crime	4

²⁸ Home Office Statistical Bulletin, p 31.

²⁹ Home Office Statistical Bulletin, p 19.

³⁰ See Parliamentary Briefing Note, *Unemployment by Ethnic Background* (last updated 24 Apr 2013), http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefing-papers%2Fsn06385.pdf&ei=raL_UfScJ6aY1AXumYC4BA&usg=AFQjCNE1LVKBed7s52-rPRXA8DYWXOWs3A&sig2=cGhQTjeqCtRc3-34DMOlXQ (last visited 19 Jun 2013). Additional information is available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcM%3A77-254386> (last visited 19 Jun 2013).

³¹ Home Office Statistical Bulletin, p 20.

³² Home Office Statistical Bulletin, p 18.

Table 4: Home Office Statistical Bulletin – percentage of reported household crimes against adults (aged 16 and over) in England and Wales which were perceived as hate crimes³³

Type of incident	% of incidents that were perceived as hate crime
Vandalism	3
Burglary	3
Vehicle-related theft	0
Bicycle theft	1
Other household theft	1
All household crime	2

Reporting hate crime

- C.38 Hate crime incidents were more likely to be reported to the police than other crimes: 49% of hate crime incidents reported in the BCS came to the attention of police, compared to 39% of reported criminal incidents overall.³⁴ The Government believes that under-reporting is a significant issue among: new migrant communities (including asylum and refugee communities); Gypsy, Irish Traveller and Roma communities; transgender victims; and victims with a disability.³⁵ A recent National Autistic Society survey asked 800 people about their experiences of disability hate crime. Eighty-one percent of respondents said they had experienced verbal abuse, while 47% reported that they had been victims of a physical assault. Despite these high percentages, 73% did not report the crime to the police. Of those who did, 54% said the police did not record it as a hate crime and 40% said the police did not act on their report.³⁶
- C.39 Respondents to the BCS who stated that they had not reported the incident to the police were asked why they had not reported it:

³³ Home Office Statistical Bulletin, p 18.

³⁴ Home Office Statistical Bulletin, p 20.

³⁵ HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) p 7.

³⁶ Results of National Autistic Society survey, <http://www.autism.org.uk/news-and-events/news-from-the-nas/autism-hate-crime-statistics.aspx> (last visited 19 Jun 2013).

Table 5: Home Office Statistical Bulletin - reasons for not reporting crime to the police (percentage)³⁷

Reason for not reporting	Hate crime	All crime
Trivial/no loss/police would not or could not do anything	55	73
Private/dealt with ourselves	19	15
Inconvenient to report	6	6
Reported to other authorities	4	5
Common occurrence	9	3
Fear of reprisal	5	2
Dislike or fear of police/previous bad experience with the police or courts	7	2
Other ³⁸	21	6

“Disabled peoples’ experiences and concerns about crime”

C.40 A project carried out on behalf of the Equality and Human Rights Commission used the data from the British Crime Surveys between 2007 to 2010 to analyse disabled people’s experiences of crime. It found that in 4% of incidents in which disabled people were targeted, the victims believed they were targeted because of their impairment. The report states that:

Disabled people were more likely to be affected ‘very much’ or ‘quite a lot’ by 81 per cent of incidents that were thought to be motivated by their impairment, compared with 62 per cent of other incidents that they had experienced.

This contrasts with the responses given by people without disabilities, who said that 49% of incidents of crime had such an emotional effect.³⁹

C.41 It should be noted that this analysis covers a different time period to the British Crime Survey data set out above. It is also not clear what is meant by “because of their impairment”. The questions used on the survey ask whether the respondent believed that the incident was “motivated by the offender’s attitude towards” any of the protected factors. It is possible that some respondents to the survey answered “yes” due to their belief that they were victimised because the offender thought they were vulnerable, and therefore an “easy target”. As such, it is not necessarily the case that all the incidents reported here were hate crimes in the “narrow” sense described above.⁴⁰

³⁷ Home Office Statistical Bulletin, p 34. The figures may add to more than 100 as more than one reason could be given.

³⁸ This category includes: something that happens as part of job; partly my/friend’s/relative’s fault; offender not responsible for actions; thought someone else had reported incident/similar incidents; tried to report but was not able to contact the police/police not interested; other.

³⁹ A Nocon, P Iganski and S Lagou, *Equality and Human Rights Commission Briefing Paper 3: Disabled people’s experiences and concerns about crime* (Autumn 2011) pp 3 to 4.

⁴⁰ See para C.4 above.

Life Opportunities Survey

- C.42 The Life Opportunities Survey (“LOS”) is a large-scale longitudinal⁴¹ survey of disability in Great Britain, commissioned by the Office for Disability Issues. It aims to explore disability in terms of the social barriers to participation that people experience. Respondents are asked questions about a wide range of issues, including employment, education, social and cultural activities and crime.
- C.43 In December 2011, the results of “wave one” of the survey were released.⁴² Fieldwork for wave one of the LOS was conducted between June 2009 and March 2011. For the purposes of LOS, “impairment” and “disability” are treated separately. In this report, a respondent is defined as having an impairment if they indicated the following in the questionnaire:
- (1) they experience either moderate, severe or complete difficulty within at least one area of physical or mental functioning; and
 - (2) certain activities are limited in any way as a result. “Activities” refer to different areas of physical or mental functioning, such as walking, climbing stairs or reading a newspaper.

“Disability” is defined in the LOS results using the definition of disability used in the Equality Act 2010.⁴³

- C.44 The LOS samples private households in Great Britain using the small users Postcode Address File (“PAF”). This means that people in residential institutions, such as retirement homes, nursing homes, prisons, barracks, university halls of residence and homeless people are not in the scope of the survey. For wave one a total of 37,500 households were selected from a random sample from the PAF. This report is based on a total of 31,161 interviews with adults, aged 16 and over, across 19,951 households; a household response rate of 59% from the 33,921 eligible households. In addition, information about impairment and barriers to participation in education, leisure or play, transport and personal relationships for 2,910 children aged 11 to 15 was collected by parental proxy.
- C.45 The LOS asked respondents about their experiences of hate crime. The question given to consultees was as follows:

A hate crime is one committed against you or your property on the grounds of your personal characteristics, for example religion, ethnic origin, disability or sexual orientation. Do you feel you have ever been a victim of a hate crime?

⁴¹ This involves interviewing the same people over a long period of time.

⁴² Office for Disability Issues, *Life Opportunities Survey: Wave one results, 2009/11* (Dec 2011) (“LOS results”), http://statistics.dwp.gov.uk/asd/asd1/los/los_wave_one_200911.pdf (last visited 19 Jun 2013).

⁴³ LOS results, p 16.

If the respondent answered “yes” to this question, they were then asked whether the crime was motivated by age, sex, a health condition, illness or impairment, disability-related reasons, ethnicity, religion, sexual orientation, or none of these reasons.⁴⁴ The table below shows the perceived motivations for hate crime, as reported by the adults who had experienced that crime. The table gives the results for hate crimes experienced by adults who do not have impairments, by adults who do have impairments, and by all adults.

C.46 The definition of hate crime used here differs from that used by the police and the CPS,⁴⁵ and is much broader than those used in the three statutory regimes which are the subject of the consultation paper. The list of motivating factors is also not consistent with the five “protected characteristics” of hate crime – the LOS includes age and gender (which are not currently protected by the three statutory regimes) and does not explicitly include transgender identity.

Table 6: Life Opportunities Survey results – perceived motivations for hate crime committed against respondents in previous 12 months by impairment status, adults aged 16 and over (surveyed between June 2009 and March 2011)⁴⁶

Motivation for hate crime	Percentage of adults without impairment who felt they experienced hate crime motivated by that factor	Percentage of adults with impairment who felt they experienced hate crime motivated by that factor	Percentage of all adults who felt they experienced hate crime motivated by that factor
Age	6	9	8
Sex	4	6	5
A health condition, illness or impairment	3	15	8
A disability	-	18	8
Ethnicity	45	27	37
Religion	7	9	8
Sexual orientation	13	8	11
None of these reasons	30	34	32
Sample size	270	250	520

⁴⁴ Office for National Statistics, *Life Opportunities Survey Questionnaire* (Jun 2010) pp 116 to 117, <http://www.ons.gov.uk/ons/rel/los/life-opportunities-survey/life-opportunities-survey/index.html> (last visited 19 Jun 2013).

⁴⁵ See para C.2 above.

⁴⁶ LOS results, p 174. Respondents were asked to select all motivations that applied to them from the list of options provided. All respondents regardless of impairment status could select these response options.

(2) Home Office and police data – recorded hate crime

C.47 The Home Office releases data on the number of incidents recorded by the police as hate crimes. The latest dataset was released in September 2012.⁴⁷ “Hate crime” is defined as:

Any notifiable offence committed against a person or property that is motivated by hostility towards someone based on their disability, race, religion, gender-identity or sexual orientation, whether perceived to be so by the victim or any other person.

C.48 There were 43,748 hate crimes recorded by the police in 2011/12. A single incident may count as more than one type of hate crime, so this figure is not a count of crime. For example, if a victim of a crime tells the police that the crime was motivated both by his or her race and disability, that crime will be shown in the police statistics as both a “race hate crime” and a “disability hate crime”, but will still relate to a single incident.

Table 7: Home Office data – hate crimes recorded by police: 2011/12

Monitored characteristic	Number of recorded hate crimes	Percentage of total hate crimes
Race	35,816	82
Religion	1,621	4
Sexual orientation	4,252	10
Disability	1,744	4
Transgender identity	315	1
Total	43,748	100

C.49 Hate crimes make up roughly 1% of all recorded crimes based on police recorded crime figures for 2011/12, and race hate crimes accounted for the majority of recorded hate crimes in all forces.⁴⁸

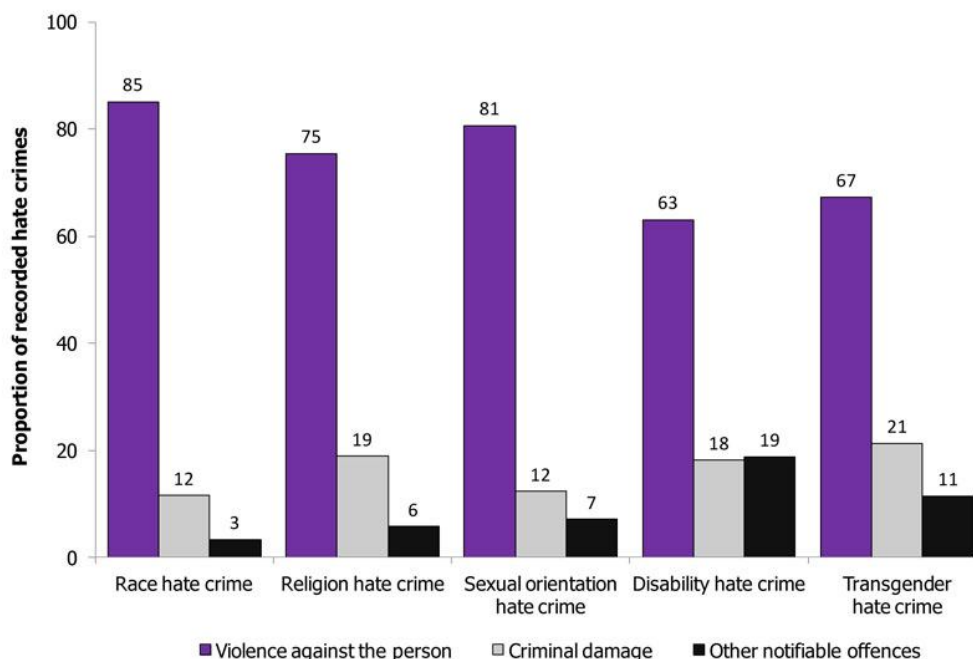
C.50 In addition to collecting data on the number of recorded hate crimes, the Home Office received more detailed data on the type of offences recorded as hate crimes from 17 police forces (out of 44, including the British Transport Police). The following information is based on indicative findings that may not be representative of the other 27 forces and caution should be applied to interpretation of these data across England and Wales. The categories are broad and do not give any indication as to the use of any of the specific aggravated offences or stirring up offences.

C.51 Readers should also note that the graph below shows the type of offence in percentage terms, for each hate crime strand. The *count* of hate crimes is not reflected in the graph, and the number of hate crimes on some grounds (for example transgender identity) is much smaller than others.

⁴⁷ Home Office, *Hate Crimes, England and Wales 2011/12* (Sep 2012) (“Home Office data”), <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hate-crimes-1112/hate-crimes-1112> (last visited 19 Jun 2013).

⁴⁸ Home Office data.

Table 8: Home Office data - police recorded hate crime by offence type, 2011/12 (data from 17 out of 44 police forces)⁴⁹



C.52 The Home Office data is also available on the number of recorded hate crimes, against each protected group, as recorded by the individual police forces.

(3) Crown Prosecution Service data – prosecuted hate crime

C.53 Information on hate crime prosecutions is contained in the CPS annual report on hate crime and crimes against older people. The latest report was published in October 2012.⁵⁰ An offence is included in this report if it is flagged as a hate crime by the CPS using the agreed definition of “hate crime” discussed above.⁵¹ A prosecution that results in a conviction is reported as a successful conviction for “hate crime” if it was initially flagged by the CPS as a hate crime incident on receipt of the file from the police, regardless of whether the defendant was convicted of a specific hate crime offence or one in respect of which an enhanced sentence was passed.⁵²

⁴⁹ Home Office data. Table reproduced with the consent of the Home Office.

⁵⁰ Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2011-2012* (Oct 2012) (“CPS report 2011/12”). The underlying data is available at http://www.cps.gov.uk/data/hate_crime/hate_crime_2011_12_report.html (last visited 19 Jun 2013).

⁵¹ See para C.2. An offence will be flagged as a hate crime if it is perceived as such by the victim or by any other person, including the prosecutor.

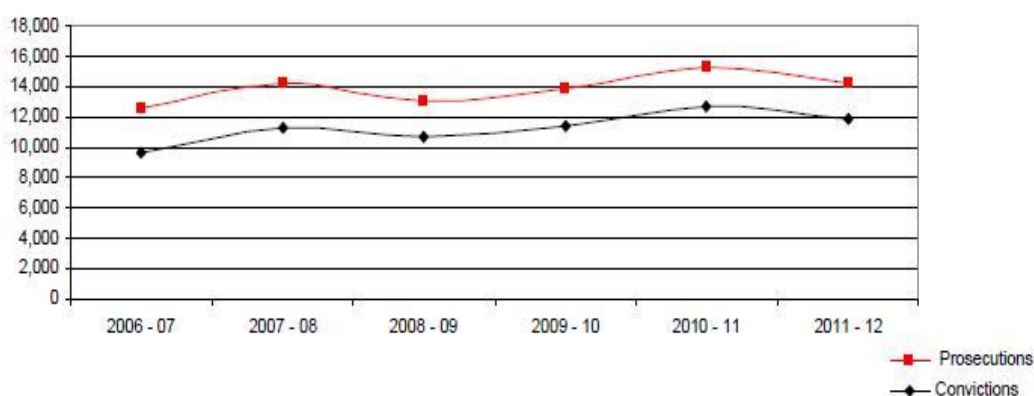
⁵² The CPS have told us that the required evidential threshold has to be met in order for the court to convict for an aggravated offence or to apply an enhanced sentencing provision, but that, separately from this, “a hate crime flag should not be removed from a case as that would be to undermine the individual’s perception of what happened to them”.

C.54 The figures in the CPS annual report on hate crime are therefore based on the CPS' own initial assessment of their case files. They are not to 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 factors were applied and with what effect.

C.55 For the purposes of the CPS annual report, hate crime is defined as:

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.⁵³

Table 9: CPS report – total number of hate crimes prosecuted and convicted by the CPS⁵⁴



C.56 In 2011/12 the number of hate crime cases referred to the CPS by the police for a charging decision was 14,781. This represented a 5% reduction on the number of referrals from the previous year, and was the first time that the number of referrals had fallen since 2006/7.⁵⁵ The most commonly prosecuted crimes in 2011/12 were offences against the person (49.5%) and public order offences (31.5%).⁵⁶ Information released pursuant to a freedom of information request indicated that there has been a significant increase in the instances of community resolutions or restorative justice for racially or religiously aggravated offences between 2008 and 2012.⁵⁷ These incidents may not be referred to the CPS, and so may not show up in these statistics.

⁵³ CPS report 2011/12, p 8.

⁵⁴ CPS report 2011/12, p 4. Table reproduced with the consent of the CPS. We have been informed by the CPS that this table does not include stirring up offences.

⁵⁵ CPS report 2011/12, p 4.

⁵⁶ CPS report 2011/12, p 5.

⁵⁷ <http://www.labour.org.uk/police-are-doing-less-with-less> (last visited 19 Jun 2013). See the table headed "Violence against the person offences detected through community resolution/restorative justice".

Table 10: CPS report – number of cases flagged as “hate crime” referred for a charging decision, and charged, 2011/12⁵⁸

	Racially aggravated hate crime	Religiously aggravated hate crime	Homophobic and transphobic hate crime	Disability hate crime
Referred by the police for a charging decision	12,357	415	1,366	643
Proportion of referred cases which resulted in a decision to charge	73.8%	-	70.7%	70.0%

Table 11: CPS report – number of cases flagged as “hate crime” prosecuted and convicted, 2011/12⁵⁹

	Racially aggravated hate crime	Religiously aggravated hate crime	Homophobic and transphobic hate crime	Disability hate crime
Completed prosecutions	11,774	593	1,208 ⁶⁰	621
Convictions	9,933	479	951	480

Principal offence categories

C.57 The CPS report breaks the prosecuted hate crimes down by offence category. For each protected characteristic, the most common type of offence was an offence against the person, followed by the public order offences. Note that this information does not show how many completed prosecutions there were for the aggravated offences or the stirring up offences, because the CPS uses broad categories which do not necessarily relate to the offences which are covered by those specific legal provisions. For example, the CPS report gives the percentage of cases which were “public order offences”, but not all public order offences are stirring up offences or are capable of being aggravated under the CDA 1998.

⁵⁸ CPS report 2011/12. The report does not state how many cases of alleged religiously aggravated hate crime resulted in a decision to charge.

⁵⁹ CPS report 2011/12. The volume of prosecution outcomes for a period differs from the volume of pre-charge decisions for the same period. Where the pre-charge decision is to bring charges, the resulting case will only reach a conclusion in a later period. This will vary according to the outcome type: for example, the legal process is longer where a case is committed to the Crown Court and tried by jury. This is why the number of prosecutions for religiously aggravated hate crime exceeds the number of cases referred to the CPS for a charging decision in the same period.

⁶⁰ This figure is derived from the CPS report, which states that the number of convictions was 951, and that this represented 78.7% of concluded cases.

Nevertheless, it is a useful indication of the types of offences which the CPS deals with as “hate crimes”.

Table 12: CPS report – principal offence categories for each of the hate crime strands⁶¹

Principal offence category	Disability hate crime	Homophobic and transphobic hate crime	Racist 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%
Drugs offences	0.8%	0.6%	1.1%
Public order Offences	12.1%	31.7%	32.5%

CPS “MIS” data

C.58 In addition to the information provided in the 2011/12 report, the CPS also collates information on the number of charges brought for the aggravated offences and the stirring up offences (it refers to this as the “Management

⁶¹ Data contained in CPS report 2011/12, p 26. The information 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.

Information System” or “MIS” data).⁶² The information set out in the following tables records the number of offences charged and reaching a first hearing in the magistrates’ courts. Some of these offences may be committed and reach a conclusion in the Crown Court. The data does *not* give any indication of the final outcome, or if the charged offence was the substantive charge at the finalisation of the case. It should also be noted that the data does not include offences which are added to a Crown Court indictment without previously having been charged in a magistrates’ court.

Table 13: CPS MIS data – aggravated offences by offence: racially and religiously aggravated offences charged and reaching a first hearing in the magistrates’ courts⁶³

Offence	2008	2009	2010	2011	2012	Total
Malicious wounding/ GBH	72	52	58	42	31	255
Actual bodily harm	514	500	465	363	306	2,148
Assault	2,414	2,415	2,595	2,636	2,704	12,764
Criminal damage	725	706	728	629	688	3,476
Fear or provocation of violence	1,992	1,990	1,952	1,702	1,544	9,180
Intentional harassment, alarm or distress	3,366	3,432	4,011	3,730	3,889	18,428
Harassment, alarm or distress	5,433	5,457	5,902	5,289	5,016	27,097
Offence of harassment	393	336	371	271	253	1,624
Non-aggravated harassment ⁶⁴	60	68	26	34	45	233
Putting people in fear of violence	161	142	164	135	96	698
Indecent or racist chanting at football match	17	21	21	18	8	85

⁶² CPS data are available through its Case Management System (CMS) and associated Management Information System (MIS). The CPS collects data to assist in the effective management of its prosecution functions. The CPS does not collect data which constitutes official statistics as defined in the Statistics and Registration Service Act 2007. These data have been drawn from the CPS’ administrative IT system, which, as with any large scale recording system, is subject to possible errors with data entry and processing. The figures are provisional and subject to change as more information is recorded by the CPS. The official statistics relating to crime and policing are maintained by the Home Office and the official statistics relating to sentencing, criminal court proceedings, offenders brought to justice, the courts and the judiciary are maintained by the Ministry of Justice.

⁶³ Data provided by the CPS from the Management Information System. Offences recorded in the MIS Offences Universe are those which reached a hearing. There is no indication of final outcome or if the charged offence was the substantive charge at finalisation. Data relates to the number of offences recorded in magistrates’ courts, in which a prosecution commenced, as recorded on the Case Management System. Offence data are not held by defendant or outcome. This offence will remain recorded whether or not that offence was proceeded with.

⁶⁴ Section 32(5) of the CDA 1998 provides that a jury who finds a defendant not guilty of the racially or religiously aggravated offence of harassment may instead find him guilty of the basic offence. The figures here purport to show the number of cases where this has happened. As the MIS data only shows offences which are charged and reach a first hearing, and do not give any indication of final outcome, we believe that these figures have been recorded in error.

C.59 The data in Table 13, above, appears to show that the number of incidents being charged as aggravated offences and reaching a first hearing in the magistrates' courts has declined, for some offences. The number of incidents charged as aggravated actual bodily harm, for example, has declined year on year from 514 in 2008 to 306 in 2012. The number of offences is relatively small, however, so no firm conclusions can be drawn from this. Furthermore, the charging levels for other aggravated offences – such as assault or intentional harassment, alarm or distress – have gone up. This should be compared with the Ministry of Justice's data on sentencing, which seems to show a sharp fall in the number of sentences handed down for all aggravated offences.⁶⁵ Again, it should be noted that the CPS and Ministry of Justice data cannot be directly compared, because they relate to different time periods and because different cases progress through the criminal justice system at different rates.

Table 14: CPS MIS data – stirring up offences by offence: offences of stirring up hatred charged and reaching a first hearing in the magistrates' courts⁶⁶

Offence	2008	2009	2010	2011	2012	Total
Use of words or behaviour or display of written material intended or likely to stir up racial hatred	14	12	16	21	13	76
Publishing or distributing written material intended or likely to stir up racial hatred	5	1	0	0	3	9
Distributing, showing or playing a recording intended or likely to stir up racial hatred	4	5	4	0	0	13
Broadcasting or including in a programme service images or sounds intended or likely to stir up racial hatred	4	0	2	0	1	7
Possession of racially inflammatory material	0	3	1	4	0	8
Use of words or behaviour or display of written material intended to stir up religious hatred or hatred on grounds of sexual orientation	0	1	2	8	6	17
Publishing or distributing written material intended to stir up religious hatred or hatred on grounds of sexual orientation	0	0	0	1	0	1
Distributing, showing or playing a recording intended to stir up religious hatred or hatred on grounds of sexual orientation	0	0	2	0	0	2
Possession of inflammatory material – religious or sexual orientation hatred.	0	0	0	1	0	1

⁶⁵ See below at para C.63.

⁶⁶ Data provided by the CPS from the Management Information System.

C.60 The number of “stirring up” offences being charged and reaching a first hearing are shown in Table 14, above. The number of incidents charged appears to be relatively consistent, but the number of offences is extremely small. Again, therefore, no clear conclusions can be drawn from this. As for the number of stirring up offences which are reaching trial, the CPS annual report on hate crime states:

In 2011/12, we prosecuted nine relevant public order cases: 10 relating to distributing written material intended to stir up hatred on the grounds of sexual orientation; six of publishing racially inflammatory material or possession of racially inflammatory material with the intention of distributing it and one of publishing written material with the intention of stirring up religious hatred.

In total 17 charges were brought resulting in 13 guilty verdicts and four not guilty.⁶⁷

We understand from the CPS that the reference here to 10 public order cases relating to distributing written material intended to stir up hatred on grounds of sexual orientation is to the charges in the case of *Ali, Javed and Ahmed*⁶⁸ (the Derby leaflets case).

(4) Ministry of Justice data – sentences for hate crime

C.61 Data on the sentences given for the aggravated offences and the stirring up offences are recorded by the Ministry of Justice. Information is available on the average sentence length for the racially and religiously aggravated offences under the CDA 1998.

⁶⁷ CPS report 2011/12, p 31.

⁶⁸ *Ali, Javed and Ahmed* (10 Feb 2012) (unreported).

Table 15: Ministry of Justice data – average sentence length (months) for basic and aggravated offences under the Crime and Disorder Act 1998⁶⁹

Offence	2008	2009	2010	2011	Maximum sentence available ⁷⁰
Actual bodily harm	11.0	11.1	11.2	11.5	5 years and/or a fine
Actual bodily harm – aggravated	12.3	14.7	17.3	16.7	7 years and/or a fine
Causing intentional harassment	2.6	2.3	2.2	2.2	6 months
Causing intentional harassment – aggravated	3.9	3.4	3.8	5.5	2 years and/or a fine
Common assault	3.0	3.0	2.9	3.0	6 months and/or a fine
Common assault – aggravated	5.5	5.2	6.7	6.8	2 years and/or a fine
Criminal damage	3.9	3.6	3.3	4.5	10 years and/or a fine
Criminal damage – aggravated	5.7	3.7	6.5	7.8	14 years and/or a fine
Fear or provocation of violence	2.6	2.6	2.4	2.4	6 months
Fear or provocation of violence – aggravated	4.5	4.6	5.7	6.0	2 years and/or a fine
Harassment, alarm or distress	n/a	n/a	n/a	n/a	Fine of up to £1,000
Harassment, alarm or distress – aggravated	*	1.8	1.2	4.9	Fine of up to £2,500
Malicious wounding	18.1	18.2	18.0	19.3	5 years and/or a fine
Malicious	14.0	10.5	19.1	35.5	7 years

⁶⁹ Information provided by the Ministry of Justice. This data only records sentences where the offence in question was the principal offence in the case. Note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, the figures should be treated with caution. The Ministry of Justice states that “an asterisk means ‘not applicable’, as it refers to years when there were zero offenders sentenced to custody for the relevant offence”. The data provided by the Ministry of Justice states that “the custodial sentences for harassment, alarm or distress are believed to be misrecorded”.

⁷⁰ Where an offence is triable either way, the maximum penalty shown here is for trial on indictment.

wounding – aggravated					and/or a fine
Harassment	*	*	*	*	6 months
Harassment – aggravated	5.9	6.4	6.3	7.3	2 years and/or a fine
Putting people in fear of violence	8.5	6.6	7.0	10.3	5 years
Putting people in fear of violence – aggravated	19.3	7.9	11.9	11.3	7 years and/or a fine

C.62 It should be borne in mind that the data only shows the average length of custodial sentences, so it may overestimate the severity with which a given offence is punished. Let us assume, for example, that five people are sentenced for a given offence in one year. If four of those people receive a non-custodial sentence and the fifth receives a 6 month sentence, the average custodial sentence length for that offence will be given as 6 months. However, this fact alone is not a true reflection of the severity of the typical sentence for that offence, as most people convicted of that offence have received non-custodial sentences.⁷¹

C.63 We noted above that data from the CPS indicates that the numbers of aggravated offences being charged and reaching a first hearing in the magistrates’ courts seems to have declined for some offences but increased for others (Table 13). The table below provides information on the number of sentences handed down for the aggravated offences.⁷² The information indicates that the number of sentences for all types of aggravated offence has fallen since 2009 (while the number of sentences for the basic offences has remained steady or, in some cases, increased). This could potentially be because of an issue with the way offences are recorded or because the number of crimes for these type of offence are actually decreasing. We noted above⁷³ that there has been a significant increase in the instances of community resolutions or restorative justice for racially or religiously aggravated offences. These offences may not get to court, and as a result may not show up in the sentencing statistics, and so they

⁷¹ In order to work out the true severity of the typical sentence for a given offence, it would be necessary to compare the variety of disposals, including custodial and non-custodial sentences. The Ministry of Justice releases quarterly Criminal Justice Statistics, the latest edition of which are available at <https://www.gov.uk/government/publications/criminal-justice-statistics-quarterly-update-to-december-2012> (last visited 19 Jun 2013). Volume 1 and Volume 2 provide breakdowns of the types of sentences handed out for each offence category (at table S1.1A and S2.2A). The data does not show the disposals specifically for the basic and aggravated offences, because the categories used in the statistics are broad (for example, the assault-type offences are all collected under the heading “Other Wounding etc”). They may, however, give a general indication of the ratios of custodial and non-custodial penalties for the general categories of offences.

⁷² Again, it should be borne in mind that direct comparisons cannot be drawn between the CPS and the Ministry of Justice data, as they relate to different time periods and because different cases progress through the system at different rates.

⁷³ See para C.56 above.

could account for part of the decrease in sentences for the aggravated offences. However, they would account only for a small part of that decrease.

Table 16: Ministry of Justice data – the numbers sentenced for racially and religiously aggravated offences under the Crime and Disorder Act 1998, and the basic offences⁷⁴

Offence	2008	2009	2010	2011
Actual bodily harm	15,509	15,714	16,507	13,701
Aggravated actual bodily harm	147	142	116	49
Causing intentional harassment	2,296	2,653	3,114	2,988
Aggravated causing intentional harassment	1,252	1,433	608	226
Common assault	51,677	52,305	54,895	52,158
Aggravated common assault	837	881	423	203
Criminal damage	7,087	5,468	5,300	4,551
Aggravated criminal damage	281	250	96	30
Fear or provocation of violence	11,843	11,658	11,548	10,449
Aggravated fear or provocation of violence	775	697	343	122
Harassment, alarm or distress	19,988	18,268	18,403	15,342
Aggravated harassment, alarm or distress	2,632	2,956	1,056	291
Malicious wounding	4,341	4,664	4,921	4,441
Aggravated malicious wounding	68	104	54	13
Putting people in fear of violence	777	729	761	717
Aggravated putting people in fear of violence	43	51	35	16

C.64 Finally, there are some statistics on the number of people sentenced for the incitement offences. A number of the incitement offences are not included in the table below. This is because there were no proceedings under those offences.

⁷⁴ Information provided by the Ministry of Justice. The data includes all sentence types: custodial, community sentence, discharge, fine, suspended sentence, otherwise dealt with. The data for the offence of harassment is incomplete, so it has not been included here. This data only records sentences where the offence in question was the principal offence in the case. Note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, the figures should be treated with caution.

Table 17: Ministry of Justice data – the number of persons “for sentence” at all courts by stirring up offence (only shows offences of stirring up racial hatred, not hatred on grounds of religion or sexual orientation)⁷⁵

Offence	2007	2008	2009	2010	2011
Use of words or behaviour or display of written material intended or likely to stir up racial hatred	7	9	4	7	5
Distributing, showing or playing a recording intended or likely to stir up racial hatred	0	4	0	2	0
Publishing or distributing written material intended or likely to stir up racial hatred	0	1	0	0	1
Broadcasting or including a programme in a programme service intended or likely to stir up racial hatred	0	0	2	0	0

C.65 We are aware of one successful trial for distributing material with the intention of stirring up hatred on grounds of sexual orientation⁷⁶ and one trial (which resulted in a not guilty verdict) for stirring up religious hatred.⁷⁷

DESCRIPTION OF OPTIONS

C.66 As we noted above,⁷⁸ the terms of reference for the project require us to look at:

- (1) extending the aggravated offences in the CDA 1998 to include where hostility is demonstrated towards people on the grounds of disability, sexual orientation or gender identity; and
- (2) the case for extending the stirring up of hatred offences under the POA 1986 to include stirring up of hatred on the grounds of disability or gender identity.

C.67 In the consultation paper we consider whether effective solutions might lie in better use of the enhanced sentencing provisions under the CJA 2003. The consultation paper looks at three reform options:

- (1) amendments to the operation of the enhanced sentencing provisions under the CJA 2003;

⁷⁵ Information provided by the Ministry of Justice. This data only records sentences where the offence in question was the principal offence in the case. Note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, the figures should be treated with caution.

⁷⁶ *Ali, Javed and Ahmed* (10 Feb 2012) (unreported).

⁷⁷ *Bamber* (Jun 2010) Preston Crown Court (unreported).

⁷⁸ See para C.9 above.

- (2) extension of the aggravated offences in the CDA 1998 to cover incidents based on the victim's sexual orientation, disability or transgender identity; and
- (3) extension of the stirring up offences in the POA 1986 to cover incidents of stirring up hatred on grounds of disability and transgender identity.

C.68 Each of these options could be implemented individually or in combination with other options – they are not mutually exclusive. The aggravated offences, the stirring up offences and the enhanced sentencing provisions represent three separate legal regimes.⁷⁹ At this stage we make provisional proposals. Our final recommendations will take into account consultees' responses to the consultation paper.

Option 0: Do nothing (base case)

C.69 This option would leave intact the current legal provisions on hate crime. The situation is as follows.

Relevant legal provision	Application to the protected groups
The aggravated offences under sections 28 to 32 of the Crime and Disorder Act 1998	These aggravated offences only apply to incidents where the defendant demonstrates, or is motivated by, hostility towards the victim based on race or religion. They do not cover sexual orientation, disability or transgender identity.
The stirring up offences in the Public Order Act 1986 sections 17 to 23 (racial hatred) and sections 29A to 29G (hatred on grounds of religion or sexual orientation)	This Act applies (in different ways, as noted above ⁸⁰) to acts which stir up hatred on grounds of race, religion or sexual orientation. They do not cover disability or transgender identity.
The enhanced sentencing provisions in sections 145 and 146 of the Criminal Justice Act 2003	These provisions apply to all five protected groups. Where an offence involves hostility towards the victim on the basis of his or her race, religion, disability, sexual orientation or transgender identity, the court must treat that as an aggravating factor at the sentencing stage.

Option 1: Measures to improve the operation of the enhanced sentencing provisions under the Criminal Justice Act 2003

C.70 The enhanced sentencing provisions under sections 145 and 146 of the CJA 2003 already cover all five protected groups.

⁷⁹ With the exception that the enhanced sentencing provisions in s 145 do not apply to the aggravated offences.

⁸⁰ See para C.18 above.

- C.71 We are not aware of any robust data on how frequently, or infrequently, section 146 is applied by the courts. However, in preliminary stakeholder discussions, some stakeholders who represent victims of hate crime have expressed concerns that section 146 is being under-used. Furthermore, the Criminal Justice Joint Inspectorate recently published a report on disability hate crime.⁸¹ As we note in the consultation paper, the report highlighted a number of inadequacies in the criminal justice agencies' treatment of disability hate crime. Members of the judiciary who were interviewed as part of the review noted that they were only asked to consider section 146 in "exceptional" cases.⁸²
- C.72 In the consultation paper, therefore, we set out some possible amendments to the sentencing regime, which may lead to better use of the enhanced sentencing provisions and proper labelling of offenders' wrongdoing. They are:
- (1) a new guideline from the Sentencing Council to assist the courts in applying sections 145 and 146 of the CJA 2003; and
 - (2) a requirement that, where sections 145 and 146 are applied, this fact should be recorded on the Police National Computer.

The consultation paper asks consultees whether these proposals would adequately address the problems of non-application of sections 145 and 146, and the inadequate recording of the nature of the offender's wrongdoing.

Option 2: Extend the aggravated offences under the Crime and Disorder Act 1998 to cover all the protected characteristics

- C.73 This option would extend the aggravated offences to cover disability, transgender identity and sexual orientation.⁸³
- C.74 It is not open to us to suggest amendments to the way the offences are framed in section 28 of the 1998 Act⁸⁴ or to the list of basic offences which can be aggravated. In the consultation paper, we ask consultees whether there is a case for extending the aggravated offences.
- C.75 If the aggravated offences were extended to cover incidents based on hostility towards a victim due to his or her transgender status, sexual orientation or disability, the new provisions would need to define those characteristics. There are several different definitions which could be used for each characteristic,⁸⁵ and we ask consultees for their views. The potential definitions vary widely in their scope, and the impact of any new offences would depend on which definition is used.

⁸¹ Criminal Justice Joint Inspection (HMCP, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (Mar 2013).

⁸² See Ch 3 at para 3.35.

⁸³ Following consultation we could, in theory, recommend extension of the aggravated offences to only one or two of these groups.

⁸⁴ See para C.15 above.

⁸⁵ A definition of "disability" and guidance on the meaning of "transgender identity" are provided in s 146 of the CJA 2003, in the context of the enhanced sentencing provisions. Each of the three terms is defined in the Equality Act 2010. There are other possible definitions, found in, for example, international treaties.

Option 3: Extend the stirring up offences under the Public Order Act 1986 to cover all the protected characteristics

- C.76 This option would extend the stirring up offences to cover the stirring up of hatred on grounds of disability and transgender identity.⁸⁶
- C.77 We ask consultees whether any new stirring up offences should use the broad approach taken by the offences of stirring up racial hatred, or the narrower approach taken by the offences of stirring up religious hatred or hatred on grounds of sexual orientation. The two models are very different in scope, and which model is chosen could have a significant impact on the use of any new provisions.
- C.78 As with the aggravated offences, the scope of any new offences will also be determined by the definitions used for “disability” and “transgender” identity.⁸⁷

COST AND BENEFIT ANALYSIS

- C.79 We have highlighted below some of the likely costs and benefits of each option. There are significant gaps in the available data (as we noted above at C.29), which would make any firm estimates of costs difficult. In addition, the scope of any new offences would vary depending on the model of offence and definition of the protected group which is used.
- C.80 In addition, we noted above⁸⁸ that the Commission’s project is one part of a broad Governmental action plan on hate crime. The action plan has a very wide range of aims, covering education, reporting and operational responses to hate crime. Given this wider context, it is difficult to isolate the potential impact of any one reform. The Commission’s project forms just one part of a much wider effort to improve every stage of the response to hate crime. If this effort succeeds, there may be an increase in the reporting of hate crime (due to increased confidence in the system), as well as better preventative measures and more effective responses to it.
- C.81 There is therefore a very high risk that any attempt to monetise the costs and benefits of these options would be flawed. We have therefore limited ourselves to setting out the sources and likely scales of the potential costs and benefits. We discuss the core arguments of principle for and against each approach in the consultation paper, and we refer to some of them briefly here.

⁸⁶ Following consultation we could, in theory, recommend extension to only one of these groups.

⁸⁷ See para C.75 above.

⁸⁸ See para C.12 above.

Option 0: Do nothing (base case)

Costs

- C.82 Under the current legal system, crimes which involve hostility towards the victim based on disability, sexual orientation or transgender identity cannot attract a higher maximum sentence than that available for the offence in question. The inapplicability of the aggravated offences to these characteristics may, therefore, mean that there is a gap in the sentencing powers of the courts, which should be remedied. We also note in the consultation paper that existing criminal offences cover much of the conduct, and deal with many of the harms, that would be addressed by new offences of stirring up hatred against those with disabilities or transgender identities. However, we suggest that there may be a narrow range of conduct which is not dealt with by any existing offences. If this is the case, and if there are instances of such conduct occurring, the existing law does not provide a response to it.
- C.83 In addition, we note in the consultation paper that there are concerns about the inadequate application of the enhanced sentencing provisions under the CJA 2003, and the extent to which the recording of those sentences provides an adequate label for the offender's wrongdoing.
- C.84 Whether or not these apparent gaps in the current law do represent a problem, and whether the proposed extensions are the correct response, is something on which we seek consultees' views. If members of the protected groups do believe that the existing legislation is inadequate, this may lead to distrust of the legal system and perceptions of unfairness and discrimination.
- C.85 The "do nothing" option is compared against itself and, therefore, its costs and benefits are necessarily zero, as is its net present value ("NPV").⁸⁹

Option 1: Measures to improve the operation of the enhanced sentencing provisions under the Criminal Justice Act 2003

Costs

- C.86 Because sections 145 and 146 relate to the sentencing stage, the defendant must already have been convicted of an offence before those sections can apply. As a result, the correct use of sections 145 and 146 would not result in any additional cases coming before the courts (but may result in additional *Newton* hearings⁹⁰). The impact of these proposals would be felt at sentencing and they could result in longer prison sentences. There are two areas of uncertainty here: the number of cases in which sections 145 and 146 should be applied; and the amount by which the sentence would be uplifted when they are applied.

⁸⁹ The NPV shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

⁹⁰ See para C.89 below.

NUMBER OF CASES

- C.87 There is no available data on the number of cases in which sections 145 and 146 should be applied. We noted above that the CPS provides figures on the number of “hate crimes” they have prosecuted. In 2011 to 2012, the CPS prosecuted 11,774 cases of racially aggravated hate crime, 593 cases of religiously aggravated hate crime, 1,208 cases of homophobic and transphobic hate crime and 621 cases of disability hate crime.⁹¹ It does not necessarily follow that sections 145 or 146 should have been applied in every one of these cases because, again, the definition of “hate crime” which the CPS use in recording their statistics is wider than the test for demonstrating or motivating hostility in sections 145 and 146. In addition, section 145 would have been inapplicable in some of these cases, because they would have been dealt with under the aggravated offences.
- C.88 In addition, the Criminal Justice Joint Inspectorate report suggested that police are not adequately considering hate crime issues when investigating offences. If this is correct then the data provided in the CPS report may underestimate the numbers of cases where sections 145 and 146 should be applied as it will only capture hate crimes that have been reported to CPS by the police.⁹²

NEWTON HEARINGS

- C.89 Since sections 145 and 146 are relevant only at the sentencing stage of the trial process, 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 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. There are two different scenarios:
- (1) the defendant pleads guilty to the offence but contests the allegation that he or she demonstrated or was motivated by hostility towards one of the protected characteristics. These issues are decided by the sentencing judge at a *Newton* hearing; or
 - (2) there is a trial. There could in theory also be a separate *Newton* hearing to determine whether there was any hostility towards one of the protected characteristics, but this is very unlikely to occur in practice (it could occur if the defendant decided not to testify at trial, but then disputed the evidence at sentencing).

⁹¹ See para C.53 and following above.

⁹² Criminal Justice Joint Inspection (HMCPSP, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (Mar 2013). The report related to disability hate crime. We ask consultees whether they think the same problems are occurring when the authorities investigate and prosecute hate crime against the other protected groups.

C.90 A separate *Newton* hearing would lead to additional costs (both in terms of time and the resources of the court and legal aid). However, a *Newton* hearing is likely to be more efficient than a trial. We note in the consultation paper that *Newton* hearings may be preferable from some victims' points of view. However, while potentially beneficial to victims, the position under the enhanced sentencing provisions could be potentially disadvantageous to defendants. We discuss this in the consultation paper.⁹³

SENTENCE UPLIFT

C.91 We are not aware of any available data on the average increases in sentence length when sections 145 or 146 are applied. The Ministry of Justice has provided data on the average sentence lengths for the aggravated offences in the CDA 1998, and we set this out above.⁹⁴ Taking 2011 as an example, the uplift in sentence from the basic to the aggravated form of the offence ranged from 10% (in the case of putting people in fear of violence), to 150% (in the case of causing intentional harassment).⁹⁵ These averages cannot, however, be applied to sections 145 and 146, for several reasons.

- (1) The data is subject to a number of caveats and qualifications which make it unsuitable for predictions of this sort. In particular:
 - (a) We noted above⁹⁶ that the data only shows the average length of custodial sentences, so this may overestimate the severity with which that offence is punished.
 - (b) We highlight elsewhere that the number of sentences passed for the aggravated offences has decreased dramatically since 2009.⁹⁷ As the number of sentences for these offences decreases, the figures for average sentence length become less reliable, and more subject to skewing by anomalous cases.
- (2) A court which is sentencing for one of the aggravated offences will have in mind the different maximum sentences which are available for the basic and the aggravated forms of the offence. Sections 145 and 146, however, do not impose a higher maximum sentence; they simply provide that the hostility has to be treated as an aggravating factor when the defendant is sentenced. The sentence will still be within the range of sentences available for the offence in question. As a result, the court's approach to sentencing will not necessarily be the same for the aggravated offences and the enhanced sentencing provisions.

⁹³ See Ch 3 para 3.39 and following.

⁹⁴ See para C.61 and following above.

⁹⁵ The aggravated offences under the CDA 1998 and the stirring up offences under the POA 1986 are offences for which prisoners will be presumed unsuitable for release from prison under the home detention curfew scheme, <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-43-2012-home-detention-curfew-scheme.doc> (last visited 19 Jun 2013).

⁹⁶ Para C.62 above.

⁹⁷ See para C.61 above.

SENTENCING GUIDANCE AND RECORDING ON THE POLICE NATIONAL COMPUTER

- C.92 A new sentencing guideline would need to be drafted by the Sentencing Council. This may entail administrative costs for the Council, who would have to draft, consult on and circulate the new guideline.
- C.93 There may also be administrative costs associated with the recording of enhanced sentences on the Police National Computer. However, we anticipate that any costs would be minimal, as the proposal would simply involve adding a small amount of extra detail to the information which is already uploaded to the system.

UNPROTECTED GROUPS

- C.94 We noted above that our terms of reference do not permit us to consider extending the aggravated or stirring up offences, or the enhanced sentencing provisions, to cover protected characteristics other than race, religion, disability, sexual orientation or transgender identity. Although the enhanced sentencing provisions under the Criminal Justice Act 2003 already cover all five protected characteristics, it is possible that members of other groups may feel that the enhanced sentencing provisions should apply also to them. There is therefore a risk of damage to the reputation of the criminal justice system if it is seen to be favouring some groups over others, without any clear justification

Benefits

- C.95 Repeated and consistent use of the enhanced sentencing provisions would send a clear message that hate crime against all the protected groups is unacceptable. They require the court to state, in open court, that the offence involved hostility towards the victim due to his or her race, religion, disability, sexual orientation or transgender identity. Similarly, recording of an enhanced sentence on the Police National Computer would ensure that the offender's wrongdoing was properly recorded and labelled. This could have benefits both for the victims of those crimes (who may feel that the harm they have suffered is better recognised), and for society as a whole, as the repeated, public use of these provisions may lead to a cultural shift and an acceptance that hate crime is unacceptable.
- C.96 Another benefit to the use of the enhanced sentencing provisions under the CJA 2003 is their wide scope. The provisions apply when the court is sentencing for any offence (with the exception that section 145 does not apply where the offence is an aggravated offence under the CDA 1998).⁹⁸ The aggravated offences, by contrast, only apply to certain basic offences, which may not adequately reflect the kinds of harms which are often suffered by members of the protected groups.

⁹⁸ This means that a court cannot use s 145 to enhance the sentence on the grounds that the offence was racially or religiously aggravated, where the offence is one of the racially or religiously aggravated offences under the CDA 1998. However, the court could apply s 146 even when the offence in question is an aggravated offence. Therefore, a defendant may be convicted of, for example, racially aggravated assault, and s 146 could also be applied to take account of any homophobic abuse which was said in the course of the offence. We are not aware of any cases where this has happened.

- C.97 Where the defendant pleads guilty and no trial is held, the use of *Newton* hearings may save court time and resources when compared against a full trial.⁹⁹

Option 2: Extend the aggravated offences under the Crime and Disorder Act 1998 to cover all the protected characteristics

Costs

NEW CASES

- C.98 Because all the offences which would be subject to the new provisions are already criminal offences, we would not expect the change itself to result in an increased number of cases coming before the courts or to the attention of the police. Under the current law, incidents of harassment, assault, criminal damage and so on, which are aggravated by hostility based on disability, sexual orientation or transgender identity, can be prosecuted as the basic offences of harassment, assault or criminal damage or the public order offences.
- C.99 It is possible that the extension of the aggravated offences to the new groups could increase confidence in the criminal justice system in the long term, both among victims of crime and the wider communities in question. There would be increased publicity around the offences when they are prosecuted. The higher sentence tariff, as well as the symbolic value of the “label” of aggravated offences, may encourage more victims to come forward. As a result, the change could lead to increased reporting of these offences. As noted above,¹⁰⁰ the Law Commission’s project is one part of a wider action plan on hate crime, which has as one of its main aims the increased reporting of hate crime. As a consequence, it is virtually impossible to determine to what extent any increase in reporting would result from the extension of the offences as opposed to the implementation of other measures in the action plan. In addition, any increase in the number of reported hate crimes would have to be balanced against the long term effects of the new provision and of the action plan as a whole, which may lead to gradual cultural changes and acceptance across society that the conduct these offences target is unacceptable.¹⁰¹

LONGER SENTENCES

- C.100 As well as the label which attaches to the offences, the significance of the aggravated offences is that they carry higher maximum sentences than the equivalent basic offences. As a result, new aggravated offences could lead to greater expenditure on prison costs, as offenders are given longer sentences for the aggravated offences. It should be noted, however, that section 146 of the CJA 2003 already applies to the basic offences when they involve hostility on the basis of disability, sexual orientation or transgender identity, so offences against those groups could already be the subject of an enhanced sentence (albeit within the maximum sentence for the basic offence). In addition, the increase in

⁹⁹ There may not be a direct reduction in court costs, as savings may not be cashable.

¹⁰⁰ See para C.12 above.

¹⁰¹ In the consultation paper we discuss whether any new offences would have a deterrent effect. We suggest that the deterrent effect of labels and harsher sentences is difficult, if not impossible, to prove.

sentence for the existing aggravated offences when compared to the basic offences is relatively modest.¹⁰²

C.101 The increase in prison costs which would follow from the use of any new aggravated offences is therefore likely to be small. In order to estimate the number of new cases of aggravated offences, we would need to know:

- (1) how many offences there are where:
 - (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates hostility, or
 - (b) the offence is motivated by hostility,

towards victims based on their disability, transgender identity or sexual orientation; and
- (2) how many of those offences took the form of one of the basic offences which can be aggravated.

C.102 However, the available statistics do not provide this information.

- (1) The statistics on prosecuted hate crime which are produced by the CPS stated that, in 2011 to 2012, the CPS prosecuted 1,829 homophobic, transphobic and disability hate crimes, leading to 1,431 convictions.¹⁰³ We stressed above¹⁰⁴ that the definition of “hate crime” used by the CPS and other criminal justice bodies is wide (in order to allow those agencies to capture as many incidents as possible), and that it encompasses offences which would not pass the threshold for offences in the CDA 1998. As a result, there is no indication in the available statistics of the number of incidents which are committed on the basis of hostility towards victims’ disability, transgender identity or sexual orientation.
- (2) The CPS annual report on hate crime also provides a breakdown of the “hate crime” cases the CPS has prosecuted by “principal offence category”.¹⁰⁵ This is a useful table, but it does not give an indication of the basic offences which are being prosecuted, and which would be prosecuted under the new aggravated offences. The CPS report uses broad categories which do not necessarily correspond to the list of basic offences which can be aggravated. For example, the report states that in 2011 to 2012, 12.1% of all “disability hate crimes” which were prosecuted by the CPS were “public order offences”. However, not all public order offences are capable of being aggravated within the meaning of the CDA 1998. Without a further breakdown of the specific offences within these categories, it is not possible to determine the proportion that would be captured by any new offences.

¹⁰² See para C.61 above.

¹⁰³ See Table 11 above.

¹⁰⁴ See para C.2 above.

¹⁰⁵ See Table 12 at para C.57 above.

- C.103 It is therefore not possible at this stage to know how many of the offences prosecuted by the CPS would be capable of being prosecuted by the new aggravated offences.

PROBLEMS CARRIED OVER FROM THE CURRENT LAW

- C.104 In the consultation paper we suggest that the current aggravated offences are problematic in a number of ways. For example, only certain basic offences can be aggravated. This incomplete coverage is one of the inherent shortcomings of extending aggravated offences. It is not within our terms of reference to propose reform or repeal of these existing provisions, nor is it open to us to suggest that any new aggravated offences (which would apply to disability, sexual orientation and transgender identity) should follow a substantially different model. The fact that the new aggravated offences would be restricted to the fixed list of basic offences means that the new offences would not necessarily address significant and prevalent types of wrongdoing against people with a disability. If the basic offences which can be aggravated do not adequately address the harms suffered by the protected groups, the new aggravated offences will not deal with those harms. In relation to disability hate crime, for example, the CPS data set out above indicates that 6.2% of “disability hate crimes” were sexual offences, 7.4% were burglary, 9.5% were robbery and 9% were theft.¹⁰⁶ None of these would be caught by new aggravated offences. The failure of the reform to deal with those harms may lead to a loss of confidence in the criminal justice system.
- C.105 We also note in the consultation paper¹⁰⁷ that if an offence is charged as one of the aggravated offences but results in an acquittal, or if it could be charged as one of the aggravated offences but is not, the enhanced sentencing provisions in section 145 of the CJA 2003 cannot be applied. In the consultation paper we suggest that this fragmented approach has introduced complexity into the legal regime for dealing with racial and religious hate crime. If the aggravated offences were extended to cover the other protected groups this complexity would be extended in relation to prosecutions for those offences.

UNPROTECTED GROUPS

- C.106 It is not within our terms of reference to recommend that the aggravated offences be extended to cover groups other than the five “protected characteristics”. Other groups, for example those defined by age, gender or membership of an “alternative subculture”,¹⁰⁸ may feel that they should also have the extra protection of the aggravated offences. There is, therefore, a risk of damage to the reputation of the criminal justice system if it is seen to be favouring some groups over others, without any clear justification.

¹⁰⁶ See para C.57 above.

¹⁰⁷ See Ch 3 at para 3.24.

¹⁰⁸ See n 8 above.

Benefits

- C.107 New aggravated offences may mean that a sufficiently serious label is attached to the conduct in question. Victims of these incidents may feel that the defendant's conviction for "assault aggravated by hostility towards the victim due to his/her sexual orientation", for example, is a more accurate reflection of the harm they have suffered than a conviction simply for "assault".
- C.108 Similarly, the increased stigma which attaches to a conviction for an aggravated offence, along with the higher maximum penalty, may lead to a gradual change of culture, and acceptance across society that hate crime of this sort is unacceptable.
- C.109 Finally, the extension of the aggravated offences to the rest of the protected groups would entail consistency in how the five protected groups are dealt with in respect of aggravated offences..

Option 3: Extend the stirring up offences under the Public Order Act 1986 to cover all the protected characteristics

Costs

NEW CASES

- C.110 We cannot make an accurate prediction of the number of times any new stirring up offences would be prosecuted, for two reasons:
- (1) there is no reliable statistical or other information on the prevalence of the kind of conduct which would be caught by the new offences, and
 - (2) we do not yet know what form those offences would take. As we noted above, the two potential models for any new offences are very different in scope. In the consultation paper we seek consultees' views on which model, if any, should be used.

We would, however, expect the number of prosecutions under any new stirring up offences to be very small, for the reasons set out below.

The existing criminal offences

- C.111 In the consultation paper, we discuss, in detail, some existing offences which criminalise the use of threatening, abusive or insulting words or actions.¹⁰⁹ They include offences under the POA 1986, the Malicious Communications Act 1988, the Communications Act 2003 and the Serious Crime Act 2007.

¹⁰⁹ See Ch 3 at para 3.60 and following.

- C.112 The number of additional prosecutions under any new “stirring up” offences will be determined by the wrongdoing which falls into the gaps left by the existing offences. To the extent that the conduct criminalised by any new stirring up offences overlaps with these existing criminal offences, conduct towards those who have a disability or who are transgender (and to anyone else) which is threatening, abusive or insulting can already be prosecuted. New stirring up offences may be necessary where the wrongdoing in question is so serious that the existing offence, that would cover the conduct, represents an inadequate response.
- C.113 We suggest in the consultation paper that the existing criminal law covering public order offences and incitement has a wide reach. The circumstances in which an extended stirring up offence might be needed are accordingly relatively narrow. They include circumstances where D’s conduct does not in itself amount to a public order offence such as causing harassment, alarm or distress, and where D does not encourage others to commit an offence. The potential gap is where no existing criminal offences apply, and:
- (1) D intends to cause others to hate people with a disability or transgender people; or
 - (2) D’s conduct is likely to cause hatred towards people with a disability or transgender people.¹¹⁰

Comparison with the existing stirring up offences

- C.114 The number of prosecutions for the existing stirring up offences (which cover race, religion and sexual orientation) suggests that the number of prosecutions under any new stirring up offences would be very low. The CPS has provided us with information on the number of offences which are charged and which reach a first hearing in the magistrates’ courts, and we set this data out above.¹¹¹ That data shows that in the years 2008 to 2012 inclusive, a total of 113 offences charged under the racial hatred provisions of the POA 1986 reached a first hearing in the magistrates’ courts. Twenty-one charges of conduct intended to stir up hatred on grounds of religion or sexual orientation reached a first hearing in the magistrates’ courts. In the same period, 75,903 aggravated offences (under the CDA 1998) reached a first hearing. The existing stirring up offences are therefore rarely used.
- C.115 The data above covers offences charged and reaching a first hearing in the magistrates’ courts. The number of cases which reach a trial is lower still. CPS lawyers confirmed that there has only been one prosecution for inciting religious hatred, and one for inciting hatred on the grounds of sexual orientation.

¹¹⁰ Depending on the model which is used for any new offences.

¹¹¹ See Table 13 at para C.58 above.

UNPROTECTED GROUPS

- C.116 As with the aggravated offences, it is not within our terms of reference to recommend that the stirring up offences be extended to cover groups other than those who have any of the five “protected characteristics”. Other groups, for example those defined by age, gender or membership of an “alternative subculture”,¹¹² may feel that they should also have the extra protection of the stirring up offences. There is, therefore, a risk of damage to the reputation of the criminal justice system if it is seen to be favouring some groups over others, without any clear justification.

Benefits

- C.117 As with the aggravated offences, extension of the stirring up offences would ensure that people with any of the protected characteristics are protected against the stirring up of hatred.¹¹³ This in turn could have a symbolic effect. It would make it clear that the groups in question are protected and that hate speech directed against those groups can be prosecuted. It should be noted, however, that all the available evidence suggests that the stirring up offences are rarely used in comparison with the aggravated offences, probably because the conduct they cover is far rarer. On the other hand, when a prosecution for one of the stirring up offences does take place, these prosecutions are widely reported and so are more visible than prosecutions of aggravated offences.

¹¹² See n 8 above.

¹¹³ Note, however, that this would not amount to equal protection, as the scope of the different offences is different.