

Law Commission

Consultation Paper No 213

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

Summary for non-specialists

INTRODUCTION

- 1.1 This is a summary of our consultation paper on hate crime.¹ It gives an overview of the paper and is for people with no specialist legal knowledge. It explains the existing offences dealing with hate crime under the law of England and Wales. It examines the arguments about whether they should be extended to deal with hate-based offences against: people who have a disability; transgender people; and people on the basis of their sexual orientation, for example, who are lesbian, gay or bisexual (we call this last group “LGB”).
- 1.2 In its three year action plan on hate crime, launched in March 2012, the Government explained that it wants to focus on:
- preventing hate crime – by challenging the attitudes that underpin it, and early intervention to prevent it escalating;
 - increasing reporting and access to support – by building victim confidence and supporting local partnerships;
 - improving the operational response to hate crimes – by better identifying and managing cases, and dealing effectively with offenders.²
- 1.3 At present, the police and the Crown Prosecution Service (“CPS”) record as a “hate crime” any crime that is perceived, by the victim or another person, to have been motivated by hostility or prejudice based on a person’s race, religion, sexual orientation, disability or transgender identity. Although police and the CPS record “hate crimes” for all five of these “protected characteristics”, the criminal offences that specifically deal with hate crime only cover some of them, as we explain below.
- 1.4 The first set of hate crime offences are the “aggravated offences”. They are contained in the Crime and Disorder Act 1998 (“CDA”). If a person commits one of a list of offences and, in doing so, demonstrates, or was motivated by, hostility on the grounds of *race or religion*, that offence becomes a separate “aggravated” offence, with a higher sentence available. At present, the aggravated offences do not cover hostility based on sexual orientation, transgender identity or disability.
- 1.5 The second set of hate crime offences are the offences of “stirring up hatred”. These are contained in the Public Order Act 1986 (“POA”). They tackle the problem of stirring up hatred on grounds of *race, religion or sexual orientation*. At present, the stirring up offences do not cover hatred on grounds of transgender identity or disability.
- 1.6 Our consultation paper looks at the case for extending both sets of offences, so that they cover all five protected characteristics. Specifically, the Ministry of Justice has asked us to look at:

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

² HM Government, *Challenge it, Report it, Stop it: the Government’s plan to tackle hate crime* (Mar 2012) para 1.19.

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

(b) the case for extending the stirring up of hatred offences under the Public Order Act 1986 to include stirring up of hatred on the grounds of disability or gender [ie “transgender”] identity.”

- 1.7 As well as these offences, the law deals with hate crimes through special sentencing powers, as set out in sections 145 and 146 of the Criminal Justice Act 2003 (“CJA”). We call this “enhanced sentencing”. The judge can increase a sentence for an offender convicted of any offence, if it was motivated by hostility or involved a demonstration of hostility on the basis of any of the five characteristics. (The same demonstration or motivation test as under the aggravated offences applies here.) In this project, we look at how enhanced sentencing works and how it affects the arguments for and against extending the existing offences. We also look at whether changes are needed to make enhanced sentencing more effective.
- 1.8 This project does not ask why the existing hate crime offences are needed. Nor does it ask if the offences should cover other groups, such as older people, homeless people, sex workers or those in alternative sub-cultures, even though crimes based on hostility against these and other groups occur. We can only examine the case for extending the existing offences to cover the additional protected characteristics of disability, transgender and (for aggravated offences only) sexual orientation.

SOME STATISTICS

- 1.9 Statistics on hate crime are collected and reported on by several Government departments and other bodies working in the criminal justice system. There are statistics on the number of cases that are reported, recorded and prosecuted as hate crimes each year, broken down across the five groups. Also, there are statistics showing how many recorded hate crime cases are prosecuted by the CPS each year and how many convictions are obtained each year. In Appendix C of the consultation paper, we present the relevant statistics on hate crime. Some brief information is given below.
- 1.10 According to Home Office figures, in the year 2011 to 2012, crimes that were recorded by police as hate crimes represented around 1% of all recorded crimes. In 2011 to 2012, police recorded 43,748 crimes as hate crimes. The proportions across the five protected groups were as follows: race 82%; sexual orientation 10%; religion 4%; disability 4%; and transgender 1%.
- 1.11 Information on the annual number of hate crime prosecutions is contained in the CPS annual report on Hate Crime and Crime Against Older People. The last report from October 2012 states that in the year 2011 to 2012, the CPS prosecuted 14,196 hate crimes. (Owing to the wider definition they use for treating something as a hate crime, these will not just be prosecutions for the aggravated or stirring up offences or where enhanced sentencing was used.)

- 1.12 The available statistics do not allow us to assess the exact scale or nature of offending which is based on hostility towards disability, sexual orientation and transgender identity.

AIM OF THE CONSULTATION

- 1.13 The aim of this consultation is to invite responses that will help us in our analysis of the case for extending the current offences. As well as asking several questions, we make some provisional proposals in this paper. But this does not mean we have reached a final view: the proposals are *provisional*. We will review them in light of the responses we receive and will take these responses into account. After the consultation period, we will publish our final report and recommendations. We expect to do this in spring 2014.
- 1.14 We do not provide as much detail here as we do in our main consultation paper. We do not give references to our sources as we do there. But if you would like to find out more, our website gives access to the consultation paper with our proposals and questions set out in full.³ There are also appendices on: the relationship between the hate crime offences and the right to freedom of expression (Appendix A); the history of hate crime laws in England and Wales (Appendix B); and the potential economic impact of implementing our provisional proposals (Appendix C). The website also hosts a separate paper by Dr John Stanton-Ife on the wider legal theory underpinning hate crime law and how it relates to possible extension.

RESPONDING TO THE CONSULTATION

- 1.15 The views we express and the proposals we put forward are only provisional. We have not come to any final view. We will only be able to formulate final recommendations when we have considered the responses to our consultation. This consultation closes on **27 September 2013**. The full consultation paper, including the questions for consultees, is available on our website, at http://lawcommission.justice.gov.uk/consultations/hate_crime.htm. We would encourage you to use our response form, available on our website, at http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_response-form.pdf. This can be sent to us by email to hate.crime@lawcommission.gsi.gov.uk or by post to Criminal Law Team, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ.

³ http://lawcommission.justice.gov.uk/consultations/hate_crime.htm

1 AGGRAVATED OFFENCES AND ENHANCED SENTENCING

THE CURRENT LAW ON AGGRAVATED OFFENCES

- 1.16 It is important to understand how the aggravated offences dealing with hostility towards race and religion work because, if they were extended to cover disability, sexual orientation and transgender identity, the new offences would work in the same way.
- 1.17 Someone who commits one of the offences in the list below and, in doing so, either demonstrates, or is motivated by, hostility based on race or religion, commits an "aggravated offence".
- 1.18 "Aggravated offences" are the aggravated versions of certain other criminal offences, which we call "basic offences". The only basic offences which can be aggravated are set out in sections 29 to 32 of the CDA. They are:
- (1) grievous bodily harm;
 - (2) actual bodily harm;
 - (3) assault and battery;
 - (4) destroying or damaging property;
 - (5) threatening, abusive or insulting conduct towards someone with intent to cause fear of violence or provocation of violence;
 - (6) threatening, abusive or insulting conduct intended to cause harassment, alarm or distress;
 - (7) threatening, abusive or insulting conduct likely to cause harassment, alarm or distress;
 - (8) harassment and stalking; and
 - (9) putting people in fear of violence and stalking involving fear of violence, serious alarm or distress.
- 1.19 There are two separate ways in which an aggravated offence can be committed. The first is to *demonstrate* hostility towards the victim of a basic offence because of the victim's actual or presumed race or religion. The second is to be *motivated* to commit a basic offence by hostility towards members of a racial or religious group because of their membership of that group.

What does it mean to "demonstrate hostility"?

- 1.20 Hostility can be demonstrated through words, gestures and other behaviour, such as singing certain songs. It does not matter why the offender committed the crime. All that matters is that, in doing so, racial or religious hostility was demonstrated towards the victim. It also does not matter if the offender was mistaken about the victim's race or religion.
- 1.21 It is also an aggravated offence to demonstrate racial or religious hostility towards a victim because they mix or socialise with members of the race or religion which the offender is hostile towards, even if the victim does not belong to that group.

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

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

Higher sentences for aggravated offences

- 1.24 The aggravated offences can carry longer prison sentences than the basic offence versions. In the table below we show the differences between the maximum sentences for the basic, compared to the aggravated, offences.

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

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

THE CURRENT LAW ON ENHANCED SENTENCING

- 1.26 The law provides an alternative response to offending based on hostility that we have considered when looking at the need to extend the aggravated offences. If any crime is committed, other than an aggravated offence, that involved a demonstration of hostility or was motivated by hostility based on race, religion, disability, sexual orientation or transgender identity, the offender's sentence can be increased. We call this the "enhanced sentencing" scheme.
- 1.27 If this hostility has been shown, the court must take it into account when setting the sentence. The court must also state publicly when passing the sentence that hostility has been taken into account and how the sentence has been increased as a result.
- 1.28 The law on enhanced sentencing is in sections 145 and 146 of the CJA. Section 145 covers hostility based on race and religion. Section 146 covers hostility based on disability, sexual orientation and transgender identity.
- 1.29 The same explanations of what it means to demonstrate hostility and what it means to be motivated hostility that apply to the aggravated offences, also apply to enhanced sentencing. These were explained above at paragraphs 1.20 to 1.23.

The sentences available using the enhanced sentencing scheme

- 1.30 The sentence which is given using the enhanced sentencing scheme in sections 145 and 146 must come within the range of sentences available for the crime. The court cannot increase the maximum penalty. This is unlike the aggravated offences which have their own, higher, maximum sentences than the basic offence versions. For example, the maximum sentence for any ordinary assault is six months' imprisonment, so the maximum sentence for assault which involved hostility on the basis of disability, sexual orientation or transgender identity is six months' imprisonment. On the other hand, the maximum sentence for a racially or religiously aggravated assault, charged under the CDA, is two years' imprisonment.
- 1.31 The amount by which the sentence is increased will depend on the seriousness of the hostility based on race, religion, disability, sexual orientation or transgender identity. Factors which will be taken into account in deciding the seriousness include the impact which the offender's behaviour had on the victim and others and whether the hostility part of the crime was planned.

What if hostility cannot be proved?

- 1.32 Sometimes crimes are committed against disabled, transgender or LGB people that are treated by the police and prosecution as hate crime because they were reported or recorded as a hate crime. Either the victim or someone else may have perceived them as hostility-driven. However, it might not be possible to show that there was a demonstration of hostility or that the crime was motivated by hostility. In such a case, it is still possible for the sentence to be increased to reflect the seriousness of the crime. For example, a disabled person might be a victim of a theft because the offender thinks that they are an easy target. In this situation, the court can still increase the sentence, by using other provisions in the CJA and guidance created to deal with sentencing serious offences.

THE AGGRAVATED OFFENCES: PROVISIONAL PROPOSALS

- 1.33 In chapter 3 of the consultation paper we set out our provisional proposals on extending the aggravated offences to cover disability, sexual orientation and transgender identity.
- 1.34 We set out two options to change the law, although they are not mutually exclusive – both options could be introduced. The first option is to improve the enhanced sentencing scheme in sections 145 and 146 of the CJA.
- 1.35 The second option is extending the aggravated offences so that they apply when someone commits one of the nine basic offences with hostility towards disability, sexual orientation or transgender identity. Those who think reform option 1 provides an adequate solution may think that reform option 2 is unnecessary. On the other hand, some consultees may prefer reform option 2, or feel that the two reform options complement each other and are both needed.
- 1.36 Our discussion of the reform options is led by our desire for the law on hate crime to be, as far as possible, fair and modern, clear and simple, and to work effectively and consistently in practice.

REFORM OPTION 1: ENHANCED SENTENCING PROVISIONS

- 1.37 The first option for reform is to make some changes to the enhanced sentencing scheme which we think would make it a better solution to the problem of hate crime. However, before setting out our proposed changes to the sentencing scheme, we look at the arguments for and against using section 146 as an effective response to hostility-based crimes. The arguments are as follows:

Ability to deal with the type and amount of offending

- 1.38 Section 146 applies to *all* crimes. In contrast, any new aggravated offences for disability, sexual orientation and transgender identity would only apply to the nine “basic offences” listed in the CDA. It is not clear that the basic offences reflect the type, or amount, of hostility-driven offending against these three groups. We cannot change the list of basic offences.

Ease of charge selection

- 1.39 If an offence can be charged as an aggravated offence, it cannot be looked at under the enhanced sentence scheme, even if that charge was not brought. This is because the aggravated offences and the enhanced sentencing scheme are mutually exclusive. It would be a clearer and simpler single approach to rely on section 146, without creating new aggravated offences. This could lead to a more effective and consistent operation in practice. It would mean that prosecutors would not have to decide whether to charge an offender for the aggravated offence or the basic offence, because the element of hostility would always be relevant at sentencing.

Maximum penalties

- 1.40 The maximum penalties available under section 146 are the same as for the basic offence, even though the hostility has been proved. In contrast, the aggravated offences have their own set of maximum sentences which are higher than their basic equivalents. These are set out in the table at paragraph 1.24 above. However, for most aggravated offences, the average sentences which are given in practice are well below the maximum which is available for the basic offence.

Labelling

- 1.41 In applying section 146, the judge must make a statement in open court about the hostility element of the offence, but the label, or name, of the offence does not change. In contrast, the aggravated offences carry with them an “aggravated label”. This means that an offender who commits an aggravated offence will be convicted of, for example, “racially aggravated assault”. The aggravated label, or name of the offence, makes it clear to the offender, the victim and the public, that the offender has committed a more serious crime than a basic offence. It also sends a message that wrongs against groups defined by race, religion, or in the case of any new offences, disability, sexual orientation and transgender identity, will receive special condemnation.

Recording on the Police National Computer

- 1.42 When an offender is convicted of an aggravated offence, it is recorded on the Police National Computer as “racially or religiously aggravated”. This will then appear on the offender’s criminal record. However, when a judge increases a sentence under section 146, this is not automatically recorded on the Police National Computer. One of our proposals, outlined below at paragraphs 1.51 and 1.52, is to change this so that the application of sections 145 and 146 is recorded on the Police National Computer in the same way that the aggravated offences currently are.

Use of the enhanced sentencing scheme in practice

- 1.43 In the consultation paper, we discuss whether section 146 is currently being used correctly in sentencing offenders. Our initial research suggests that it is being under-used. To rectify this, we propose new sentencing guidelines for the court. This proposal is outlined below at paragraphs 1.48 to 1.50.

Examination of hostility

- 1.44 The aggravated offences require either a demonstration of hostility or a hostile motivation to be proved during a trial. On the other hand, section 146 applies after the trial, when the offender has been found guilty of the crime and the court is determining the appropriate sentence. This means that only the sentencing judge must be convinced that there was a demonstration of hostility or that the crime was motivated by hostility towards the particular group. It may be practically easier and quicker for the assessment of the evidence of hostility to be made by an experienced judge (in applying section 146) than it is for a jury in the case of an aggravated offence.

Ability to challenge the sentence

- 1.45 It was explained above at paragraph 1.25 that if a sentence for an aggravated offence appears to be too low, then it can be referred to the Court of Appeal. The Court of Appeal will review the case and may increase the sentence. However, not all offences can be reviewed in this way. Cases in which an enhanced sentence was (or could have been) passed using section 145 or 146 can at present only be referred to the Court of Appeal if the particular offence in question is in a list of certain serious offences. The basic offences, for example, do not fall within this list.

Proposal regarding sentencing

- 1.46 We think that the enhanced sentencing scheme could provide an adequate response to offences which involve a demonstration of, or are motivated by, hostility on the grounds of disability, sexual orientation and transgender identity, if the law was properly applied and resulted in an adequate record of the offender's wrongdoing. We ask if consultees agree with this.
- 1.47 We also set out some simple changes to the enhanced sentencing scheme that could meet some of the problems we have identified in the current scheme. Here, we briefly outline these changes.

(1) New sentencing guidance for courts

- 1.48 At the moment, there is no specific guidance to help the court decide when and how to apply section 146. We consider that a new guideline from the Sentencing Council should be produced for this purpose. The guideline should also provide guidance on the application of section 145.
- 1.49 A new guideline could have a number of benefits. These include increasing the likelihood of police gathering information relating to the demonstration or motivation of hostility, and increasing the likelihood of judges using sections 145 and 146 to increase sentences in appropriate cases. The guideline could also make the sentences for hostility-based offences more consistent and lead to better monitoring and recording of the use of sections 145 and 146.
- 1.50 In the consultation paper, we ask if consultees agree with our proposal for a new guideline from the Sentencing Council to deal with aggravation on the basis of hostility under sections 145 and 146.

(2) Recording on the Police National Computer

- 1.51 We think that where sections 145 and 146 are applied, this fact should be recorded and should become part of the offender's criminal record.
- 1.52 In the consultation paper, we ask consultees if they consider that our proposals would properly address the problems we identify in relation to the inadequate recording of the nature of the offender's wrongdoing.
- 1.53 We also ask if these changes to the enhanced sentencing scheme should be introduced regardless of whether the aggravated offences are extended to include disability, sexual orientation and transgender identity (see below).

REFORM OPTION 2: CREATING NEW AGGRAVATED OFFENCES

- 1.54 The second option for reform is to extend the aggravated offences to include disability, sexual orientation and transgender identity.
- 1.55 Our terms of reference only allow us to examine the case for extending the existing offences. This means that any new offences would apply only in relation to the existing nine basic offences and would include all the elements of the existing aggravated offences, including the meaning of “demonstrating hostility” and being “motivated by hostility”.
- 1.56 In the consultation paper, we set out the core arguments for and against extending the aggravated offences. Here, we outline these arguments.

Would new offences deal with the type and amount of offending?

- 1.57 We do not know exactly how much hate crime is committed on the basis of disability, sexual orientation and transgender identity. Nor do we know exactly what type of crime is committed. Creating new offences could only have an effect on instances of hate crime which involve one of the basic offences. However, in these cases, new offences would also be able to address the hostility element of the offending behaviour. On the other hand, there may be more effective solutions which do not require any new criminal laws, such as improved education.

To what extent do existing criminal offences already address the behaviour that new aggravated offences would address?

- 1.58 The criminal law already protects the three characteristics under consideration through the basic offences (for example, it is a crime to assault a disabled person as it is an able-bodied person). In addition, there are public order offences which criminalise the demonstration of hostility when it is insulting, abusive or threatening. However, the existing criminal law does not cover all of the behaviour that would be covered by the aggravated offences. For example, the existing law does not address hostile motivations apart from in sentencing.

Does the existing criminal law adequately address the harms suffered?

- 1.59 There is no available evidence to determine clearly whether the harm suffered by victims of the aggravated offences is more serious, or different in type, to the harm suffered by victims of the basic offences.

Are the existing offences enough to encourage victims and witnesses to report hate crimes?

- 1.60 Many disability, sexual orientation and transgender hate crimes are not reported to the police. If new offences were created, that might encourage victims and witnesses to report hate crime. However, there may be other, more effective, ways of increasing reporting rates without creating new criminal offences. These could include education initiatives and supporting victims through the criminal justice process.

Would new aggravated offences help deter hate crime?

- 1.61 It is possible that extending the aggravated offences would deter people from committing crimes against others out of hostility on the basis of disability, sexual orientation or transgender identity. However, if the criminal law is effective at preventing people from committing crimes, then the basic offences which already exist should deter people from doing the kinds of things which would be covered by the aggravated offences. It is not possible to prove that the aggravated label or the higher maximum sentences, which come with the aggravated offences, would have any extra effect in preventing hate crime. But it is possible that new aggravated offences would have a positive long-term effect by contributing to changing attitudes in society.

Does the existing sentencing scheme provide a “label” reflecting the wrongdoing?

- 1.62 As we have explained, the aggravated offences carry an “aggravated label”. This means that the aggravated offence has a different name than the basic equivalent offence, and that the greater seriousness of the offence will be clear to the offender, victim and the public. There is no similar label attaching to the offender when the enhanced sentencing scheme is used. However, although the name of the offence is an important way of communicating the offender’s wrongdoing, we think that sentencing can also be an important and effective tool for communicating the wrongdoing. The judge has to refer to its use in open court when passing sentence.

Is there a risk that the new aggravated offences will be ineffective?

- 1.63 There is always a risk that new criminal laws will not be as effective as was anticipated in sending out a desired message or preventing people from committing crimes. But if the aggravated offences are ineffective this could be especially serious. For example, the confidence of victims and wider society in the value of the criminal law could be undermined.

Proposal regarding aggravated offences

- 1.64 In the consultation paper, we ask consultees who think that our proposals in relation to the enhanced sentencing scheme would be inadequate, whether they think that an alternative, or additional, solution would be to extend the aggravated offences to include disability, sexual orientation and transgender identity.

MODELS FOR NEW OFFENCES

- 1.65 In the consultation paper, we look at the various models that any new aggravated offences might take.
- 1.66 Any new aggravated offences that might be created would be based on the existing form of aggravated offences in the CDA. This means that they would require a demonstration of hostility or a hostile motivation based on disability, sexual orientation or transgender identity. We explained above at paragraphs 1.20 to 1.23 what it means to demonstrate hostility and what it means to be motivated by hostility.

- 1.67 Here we consider how “disability”, “sexual orientation” and “transgender identity” would be defined in any new offences because these definitions will affect the scope of the offences.
- 1.68 For each of the three characteristics, we would prefer that any new offences used the same definitions as the enhanced sentencing scheme. These definitions are in section 146 of the CJA. We prefer these definitions because, in practical terms, it would be easier to have the same definitions applying to sentencing and offences. This would avoid any inconsistencies or gaps arising between the aggravated offences and behaviour which can be given a longer sentence using section 146. Other definitions may not achieve this same consistency.

Defining “disability”

- 1.69 Disability is defined in section 146 as “any physical or mental impairment”. It is for the courts to decide whether something counts as a disability and they have not yet set out any guidance on this. This makes it difficult to know what would be an aggravated offence on the basis of disability. We do not know exactly which impairments would amount to a disability and what effect the impairment must have on a person before it can be considered a disability.
- 1.70 However, we do believe that there are clear benefits in applying this definition to any new aggravated offences. This is because it would create consistency between the aggravated offences and the enhanced sentencing scheme, and because judges and lawyers are already familiar with it. In the consultation paper, we propose that the definition of disability in any new aggravated offences should be the same as the definition in section 146: “any physical or mental impairment”. We ask consultees whether they agree.
- 1.71 In the consultation paper, we also consider (and reject) other definitions of disability which exist in other areas of law.

Defining “sexual orientation”

- 1.72 The term “sexual orientation” is not defined in section 146 of the CJA. However, the courts have adopted a definition which is the same as the definition set out in other areas of the law, including for the stirring up offences. Under this definition, “sexual orientation” means orientation towards people of the same sex, the opposite sex or both. It does not include asexual people, or people with no sexual orientation.
- 1.73 We think that the definition of sexual orientation in any new aggravated offence should be the same as the existing definition in section 146: “orientation towards people of the same sex, opposite sex or both”. In the consultation paper, we ask consultees whether they agree.

Defining “transgender identity”

- 1.74 Reference to being transgender in section 146 includes reference to being transsexual, or undergoing, proposing to undergo or having undergone any part of a process of gender reassignment. It is for the courts to decide how this definition should be interpreted and they have not yet set out any guidance on this.

- 1.75 In chapters 2 and 3 of the consultation paper, we discuss in detail what the term “transgender identity” can refer to and how the section 146 definition might be applied to any new aggravated offences. We understand that the term is not always used consistently. For example, it sometimes, but not always, includes transvestites.
- 1.76 We propose that the definition of transgender identity for any new aggravated offence should be the same as the definition in section 146: “references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment”. We ask consultees whether they agree.
- 1.77 We also look at a definition of “transgender identity” which is set out in Scottish law. This explains that transgender identity is a reference to: transvestism, transsexualism, intersexuality or having changed gender, or any other gender identity that is not standard male or female gender identity.
- 1.78 This definition would provide certainty that transvestites and intersex people would be protected by new aggravated offences. However, there would be inconsistency between the aggravated offences and the enhanced sentencing scheme if section 146 were interpreted differently to this.
- 1.79 In the consultation paper, we ask consultees whether they consider that this definition set out in Scottish law would be better than that in section 146 for any new aggravated offences.

Other elements of the offences

- 1.80 The other elements of the existing aggravated offences – “demonstrating hostility” and being “motivated by hostility” – would apply to the new offence as they do to race and religion. For example, it would be an aggravated offence to demonstrate hostility towards a victim of a basic offence because the victim mixes or socialises with people who belong to one of the three characteristics. We think that this would include carers, doctors and other medical staff who care for people with disabilities, people who support charities working with LGB people, and those involved with charities which support transgender people.
- 1.81 One particular difficulty that may arise for any new disability aggravated offences is deciding whether an offender was motivated, wholly or partly, by hostility or whether the crime was committed because the victim was seen as vulnerable. For example, an offence might be committed against a disabled person because they are seen as an “easy target”, and not because the offender is motivated by hostility towards people with disabilities. This would not be an aggravated offence unless there was a demonstration of hostility towards the victim because of the victim’s disability.
- 1.82 In the consultation paper, we ask consultees whether they think that any particular problems would occur with the existing elements of the aggravated offences if there were new aggravated offences based on disability, sexual orientation and/ or transgender identity.

2 THE STIRRING UP OFFENCES

- 1.83 There are a number of specific offences which make it a crime to engage in conduct which is intended to, or likely to, stir up hatred towards a group of people because of their race, or is intended to stir up hatred towards a group of people because of their religion or sexual orientation. The racial hatred offences are in sections 18 to 23 of the Public Order Act (“POA”) 1986. The offences of stirring up hatred on the grounds of religion and sexual orientation are in sections 29B to 29F.
- 1.84 The six types of behaviour covered by these offences are:
- using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting;
 - publishing or distributing written material which is threatening, abusive or insulting;
 - presenting or directing a play in public involving the use of threatening, abusive or insulting words or behaviour;
 - distributing, showing or playing a recording of pictures or sounds which are threatening, abusive or insulting;
 - providing, producing or directing a programme (for example, a TV or radio programme) where the programme involves threatening, abusive or insulting pictures or sounds, or use of threatening, abusive or insulting words or behaviour; or
 - possessing written material, or a recording of pictures or sounds, which is threatening, abusive or insulting, with a view to it being displayed, published, distributed, shown, played or included in a programme.
- 1.85 The stirring up offences have different elements for racial hatred than for hatred based on sexual orientation or religion. We give more detail later, but the key differences are:
- (1) **Race** - the words or conduct must be *threatening abusive or insulting* and there must have been an *intention* to stir up hatred, or a *likelihood* that it might be stirred up.
 - (2) **Religion** - the words or conduct must be *threatening* and there must have been an *intention* to stir up hatred. Also, a specific defence is provided to protect free speech. This says that criticising, insulting or ridiculing religious beliefs is not an offence under the stirring up law.
 - (3) **Sexual orientation** - the words or conduct must be *threatening* and there must have been an *intention* to stir up hatred. A specific defence is provided to protect free speech. This says that criticising sexual conduct or practices or urging restraint is not an offence under the stirring up law.
- 1.86 We call the racial hatred model the “broad” model and the model for religious and sexual orientation hatred the “narrow” model. More information on these different elements is at paragraph 1.109 below.

- 1.87 The stirring up offences are very different from the aggravated offences and the enhanced sentencing law. The aggravated offences apply to pre-existing crimes (like assault, harassment or criminal damage), as explained above at paragraph 1.18. But the stirring up offences create specific new crimes of stirring up hatred against a particular group. Prosecutions for the stirring up offences are rare compared to the aggravated offences.

Common features of the offences

Meaning of “threatening, abusive or insulting”

- 1.88 The words “threatening, abusive or insulting” do not have any special legal meaning. This means that the jury or the magistrates deciding the case will also decide whether the words or behaviour were threatening, abusive or insulting, given their ordinary meaning.

Meaning of “hatred”

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

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

The arguments for and against new offences

- 1.90 We now look at the case for extending the stirring up offences, to include hatred against people with disabilities and transgender people. In our initial discussions with interested groups, the need to extend the stirring up offences in this way did not emerge as a central issue: most groups highlighted the need to tackle negative media reporting on disability and transgender issues and respond better to harassment and cyber-bullying. But, having set out the arguments, we reach the provisional view that there is a case in principle for extension. We summarise the arguments as follows.

Do existing offences already deal with the same conduct that stirring up offences would deal with?

- 1.91 The answer to this is: yes, but not completely. Some of the behaviour that would be targeted by any new stirring up offences is already covered by existing crimes. For example:
- (1) Other sections of the POA make it a crime to use threatening, abusive, or insulting words or behaviour; to cause someone to fear violence; to provoke someone to violence; or to intentionally cause harassment, alarm or distress.
 - (2) The Malicious Communications Act 1988 makes it an offence to use a public electronic network (such as the internet), to send a message that is grossly offensive or indecent, obscene or menacing.

- (3) The Serious Crimes Act 2007 makes it an offence to encourage someone to commit a crime, regardless of whether any crime is carried out.
- 1.92 All of these could be used where the target or victims of the abuse or other crime was transgender or had a disability. And, if the court decided the offender demonstrated or was motivated by hostility against the victim's disability or transgender status, the sentence could be increased to reflect that under section 146 CJA.
- 1.93 But, despite this overlap, the existing offences do not cover all of the behaviour that new stirring up offences would cover. Extended offences would cover a unique and serious type of wrongdoing that is not directly addressed by the existing law: the spreading of hatred against a group - in this case, disabled or transgender people. They would also cover conduct that encouraged people to hate disabled or transgender people but did not in the process also encourage anyone to commit a crime against disabled or transgender people.

Does the law already address the negative impact of this wrong-doing?

- 1.94 Stirring up offences are aimed at stopping the negative effects of the spread of hatred against certain groups. For example:
- (1) Where a crime is committed against a disabled or transgender person as a consequence of someone having stirred up hatred, the victim will obviously suffer the harm of that offence (whether physical, mental or harm to their property).
 - (2) This victim of the crime may also suffer extra harm, from being targeted out of hatred due to their being in that group. That could lead them to feel more vulnerable or suffer worse mental harm as a result of the crime.
 - (3) Indirect harm may occur where people in the particular group see the stirring up of hatred as meaning they no longer belong in the communities in which they live and their place in society is threatened, because the criminal justice system cannot tackle the stirring up of hatred against them.
 - (4) The stirring up of hatred can also be seen as harmful to the fabric of society, because hatred can encourage prejudice and discrimination, which are considered bad for society as a whole.
- 1.95 It is only the first two direct kinds of harm suffered by a disabled or transgender victim of a crime that are addressed by existing criminal offences. For example, where a disabled person is assaulted as a result of the offender having been encouraged to hate disabled people, then that offender is prosecuted, perhaps with an enhanced sentence under section 146 CJA. But the criminal law does not address the other, less direct, harms listed above in the way that a specific stirring up offence would.

Do existing offences deter the stirring up of hatred?

- 1.96 The offences listed under paragraph 1.91 above may already deter people from behaving in a way that is offensive, abusive or threatening, towards disabled or transgender people. But extending the stirring up offences might be more of a

deterrent, because they carry longer maximum penalties (up to seven years). However, it is not possible to prove that higher maximum penalties deter crime.

What about the symbolic value of making something an offence?

- 1.97 Extending the stirring up offences could have symbolic benefits by criminalising behaviour that promotes hatred towards a group. Offenders who are convicted of the stirring up offence will be “labelled” in a way that reflects the serious nature of their wrongdoing.
- 1.98 Society in general, and transgender and disabled people in particular, would see that the law thinks it is important to protect them from hatred and its harmful effects. Members of the groups may see a link between hate speech and their experience of other offences or harms, such as harassment, discrimination, or prejudice, which the new offences could indirectly help to stop.
- 1.99 On the other hand, the following arguments may weaken this symbolic case for extension:
- (1) Making it criminal to express deeply hateful views about disabled or transgender people might mean these views are less likely to be debated or criticised forcefully by others with different views.
 - (2) New stirring up offences designed to protect some groups may produce resentment towards those groups and their members, because they may be seen to be unfairly favoured.
 - (3) Crimes protecting particular groups may result in members of the group being seen as weaker than others in society.
 - (4) New stirring up offences may drive hate speech underground.

Are there other solutions to the problem?

- 1.100 Our early discussions with disability and transgender groups revealed a sense that negative and prejudiced media coverage is fuelling an increase in bullying, harassment and crime against disabled and transgender people. The rise of the internet and social media may allow this coverage to spread more quickly and widely. Initiatives already exist to combat some of these problems (some are part of the Government’s ongoing hate crime action plan):
- (1) Work with the Press Complaints Commission to address negative media reporting.
 - (2) A programme to tackle hate crime on the internet. This includes work to develop guidance for moderators of online content. The aim is to create a simple, fast solution to the problem of hateful online content, so once moderators report this content to website hosts, it can be removed.
 - (3) Education initiatives, including with charities and other groups, to ensure that schools have the necessary tools and resources to help prevent, and deal with, bullying motivated by prejudice.
- 1.101 These types of action would only be an alternative for new offences if they tackled the same type of wrongdoing as the stirring up offences. So the question, to which there may be no clear answer, becomes this: does the behaviour that

these steps would target amount to “threatening” or “threatening, abusive or insulting” conduct intended to, or likely to, stir up hatred against disabled and transgender people? We discuss which types of wrongdoing any new offences should cover – using the “broad” or “narrow” model – at paragraph 1.109 below.

How would any new offences affect free speech rights?

- 1.102 The kinds of behaviour these offences target are all forms of expression. Concerns about how they might restrict free speech rights led some people to oppose offences of stirring up hatred on grounds of religion and sexual orientation.
- 1.103 Any new stirring up offences that might be created must respect article 10(2) of the European Convention on Human Rights (ECHR), which protects the right to free expression. This right protects all the types of behaviour listed in the stirring up offences. The right to free expression covers both the substance of what is expressed (for example, whether it is factual or an opinion) **and** the way it is expressed (even if it is offensive or shocking). In order to respect article 10(2), any new offences must be a reasonable response to the wrongdoing of stirring up hatred.
- 1.104 Offences that criminalise the stirring up of hatred against particular groups also raise the right to freedom of thought, conscience and religion, which is protected under article 9 of the ECHR.
- 1.105 In order to respect these rights, there are provisions in the offences of stirring up of hatred on grounds of religion and sexual orientation which expressly protect freedom of speech. These make it clear that certain types of expression will not be an offence. The provisions are discussed at paragraphs 1.110 to 1.115 below.

Preliminary conclusion on the case in principle for new offences

- 1.106 Having weighed up these arguments, our view is that there is a case in principle for new offences of stirring up hatred on grounds of disability and transgender identity. We ask if consultees agree.

The need for new stirring up offences

- 1.107 If there is a case in principle for extending the offences, we need to ask if there is a practical need for new offences. The existing stirring up offences are rarely prosecuted. This may be because the sort of extreme conduct they cover does not occur very often, or that other offences are being used instead, perhaps because they are easier for the prosecution to prove. That might be especially true of the “narrow” models where both an *intention* to stir up hatred and *threatening* behaviour must be shown.
- 1.108 In our early fact-finding work we have not heard many calls for new stirring up offences. In 2008, the Government decided not to extend the stirring up offences to cover hatred against disabled or transgender people. The Government felt there was not enough strong evidence that this kind of hatred was “actively being stirred up”. We ask consultees if they think that there is a practical need.

FORM OF ANY NEW OFFENCES

1.109 We next examine what form any new stirring up offences applying to disability or transgender identity might take. As we said at paragraph 1.85, there are different versions of the stirring up offences for hatred based on (1) race; and (2) religion or sexual orientation. The first version is broad so it can apply to a wider amount of activity. The second is narrow. The key question we look at is whether any new offences for transgender or disability hatred should follow the “broad” or “narrow” models of the current offences.

- (1) under the broad model, an offender will be guilty if they do any of the kinds of conduct listed at paragraph 1.84, that conduct is “threatening, abusive or insulting”, and is either intended by the offender to stir up hatred against disabled or transgender people, or likely to stir up hatred.
- (2) under the narrow model, an offender will be guilty if they do any of the kinds of conduct listed at paragraph 1.84, that conduct is “threatening” and is intended by the offender to stir up hatred against disabled or transgender people.

Protection for freedom of expression

1.110 There are express protections for freedom of speech in the offences of stirring up of hatred on grounds of religion and sexual orientation.

1.111 The free speech provision for religious hatred identifies the following kinds of expression and says they will not be an offence:

Criticism, expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or urging those of a certain religion or belief system to stop practising it.

1.112 The free speech provision for sexual orientation hatred protects the following kinds of expression:

Criticism of sexual conduct or practices, urging people to refrain from or change their sexual conduct or practices.

1.113 These provisions protecting free speech were enacted especially for the sexual orientation and religion offences. They do not apply to the racial hatred offences.

1.114 It is not clear that they are really necessary because the court would have to apply European human rights law in any case and that protects free speech. They seem to have been included for the avoidance of doubt. The arguments put forward in favour of having them were that they would:

- (1) help to stop people from feeling inhibited about speaking freely, or writing or reporting on sensitive religious or sexual orientation issues, because they were unsure how far the new laws might restrict that (this is called a “chilling effect”)
- (2) make the scope of the new offences clear by giving examples of what would not be covered, and
- (3) discourage police officers and prosecutors from using the offences except in the serious cases they were meant for.

- 1.115 In the consultation paper, we ask whether, if new offences of stirring up hatred on grounds of disability and/or transgender identity were created, they should include explicit protection for freedom of expression and, if so, what this should cover.

How should “disability” and “transgender” be defined in any new stirring up offences?

- 1.116 If there are going to be new stirring up offences, they would have to define “disability” and “transgender identity”. We ask some questions about how they should be defined. This is important, as the definitions will have an impact on the scope of the offences and how much conduct they would apply to. After setting out some alternative definitions in the consultation paper we give our provisional view. We say that if both the aggravated and stirring up offences were extended to cover disability and transgender identity, the same definitions should be used for each offence, as this will help make the law simpler and easier to follow. If different definitions were used, this could result in the law being confusing.

ENHANCED SENTENCING VS NEW STIRRING UP OFFENCES

- 1.117 As we have explained, some of the behaviour that would be covered by any new stirring up offences is already covered by existing crimes dealing with, for example, threatening words or behaviour and malicious communications. But there are gaps. Existing offences do not cover this unique and serious type of wrongdoing: the spreading of hatred against disabled or transgender people. Nor does the existing law make it a crime to encourage people to hate disabled or transgender people unless, in the process, the offender also encourages someone to commit a crime.
- 1.118 Although enhanced sentencing can be used to address hostility against disabled or transgender people where a crime has been committed, it does not provide a complete response. This is because where the wrongdoing is not criminal, section 146 cannot be used – enhanced sentencing can only be used once a defendant has been convicted of an existing crime. Also, even where the wrongdoing *is* criminal, applying section 146 cannot
- (a) change the label or description of the offence to make clear that it is the stirring up of hatred that is the wrongdoing in question; or
 - (b) increase the maximum penalty.

RESPONDING TO THE CONSULTATION

- 1.119 As we have explained, the full consultation paper, including questions for consultees, is available on our website. This consultation closes on **27 September 2013**. We would encourage you to use our response form, available online at http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_response-form.pdf, which can be sent to us by email to hate.crime@lawcommission.gsi.gov.uk or by post to Criminal Law Team, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ.