Law Commission
Reforming the law

Hate Crime
Analysis of Consultation Responses

Law Com No 348 (Analysis of Consultation Responses)

CONTENTS

INTRODUCTION

1 This document analyses the responses of consultees to the consultation paper "Hate Crime: The Case for Extending the Existing Offences" ("the CP").[1] This analysis is designed to be read in conjunction with the Law Commission's final Report on this project, "Hate Crime: Should the Existing Offences be Extended?" ("the Report").[2]

2 The CP was published on 27 June 2013 and the consultation ran until 27 September 2013. We received 157 written responses.[3] They came from academics, criminal justice agencies, members of the judiciary and magistracy, legal practitioners and their professional associations, NGOs representing a broad spectrum of interests[4] and several members of the public. Appendix A to the Report lists those who responded.[5]

3 Most consultees replied using our pro forma response document, which enabled them to answer each provisional proposal and question individually if they wished to do so. Some preferred not to respond using this form but, for example, via the

[1] Law Commission CP No 213. Available from: http://lawcommission.justice.gov.uk/docs/CP213_hate_crime_amended.pdf.

[2] Law Com No 348. Available from: http://lawcommission.justice.gov.uk/areas/hate_crime.htm.

[3] This analysis addresses only responses made to the Law Commission. Articles published commenting on the CP will of course be taken into account, but they are not included in this analysis.

[4] Several of these NGOs had previously conducted surveys, research or discussions with their own networks in relation to hate crime and were therefore able to base their responses on their findings, in many cases representing thousands of individual experiences and views. See for example, references to surveys and reports by Galop, Stonewall, the National Union of Students and the Disability Hate Crime Network.

[5] Appendix A is can be found at the foot of the main Report document. Names are redacted for those members of the public who preferred to remain anonymous.

alternative easy-read response document[6] we produced, or in letters or emails dealing only with some of the points raised in the CP.[7]

4 During the three months following publication of the CP we held several events around the UK in order to promote awareness of the consultation, encourage responses and give people an opportunity to debate the issues with informed and/or interested parties. We reflect the views expressed during these events in this analysis. Some groups held events for their own members to discuss the CP and, in some cases, invited the Law Commission to attend as observers or speakers. The key events were as follows:

(1) On 29 July 2013 we held a seminar with members of the judiciary at the Royal Courts of Justice to discuss the CP;

(2) At a meeting on 30 July 2013 we presented our CP to the Government's Independent Advisory Group on hate crime;

(3) On 8 August 2013, Birkbeck College Gender & Sexuality Group held a discussion forum on our project, which we attended;

(4) Also on 8 August we gave a presentation to the Victim Services Alliance;[8]

(5) On 22 August 2013 we attended a meeting of the West Midlands Learning Disability Forum, where a presentation was given on key aspects of the CP;

(6) We gave a presentation to the annual conference of the Society of Legal Scholars, whose criminal law section met in Edinburgh on 3 September 2013;

(7) Independent Academic Research Studies held discussion workshops on our project as did a number of adult safeguarding and learning disability groups;

(8) We made a presentation to the Greater London Authority's Transgender Group on 4 September 2013, with a question session afterwards;

6 Where we give figures as to how many consultees agreed and how many disagreed with a given question in the CP, this figure does not include those who responded using the easy-read form. This is because the easy-read form had fewer questions, which were worded differently. Where figures on responses to the easy-read questions are referred to, these are in addition to the responses to the CP questions on the same topic.

7 83 consultees used the pro forma response document; 8 responses used the alternative easy-read Q&A document; 66 consultees sent their responses in the form of written submissions, letters and in a few cases emails. There were three joint responses: they were from the Bar Council and Criminal Bar Association; Christian Concern and the Christian Legal Centre; and the Royal National Institute of Blind People and Guide Dogs for the Blind. Separate responses in the same terms were provided by the Disability Hate Crime Network and Disability Rights UK. All these consultees have been counted separately in our analysis as they are all separate legal entities.

8 This is a network of 38 separate NGOs and agencies seeking to provide information and support for crime victims.

(9) During September 2013 several meetings in England and Wales were held to enable members of regional CPS local scrutiny and involvement panels to discuss our CP and we made presentations at two of these, one in London and one in Colwyn Bay;

(10) We made a presentation to the Sandwell Safeguarding Multi-Agency Best Practice Forum on 6 September 2013 and an open debate followed;

5 On 17 September 2013, we held a symposium at Queen Mary, University of London with 18 expert speakers from a range of NGOs, academia, criminal justice agencies and legal practice. The matters raised in each of the chapters of the CP were debated by the speakers before an audience of around 100 solicitors, barristers, academics, judges, government officials and NGO representatives. We have treated the presentations of panel members at the symposium and issues raised in the subsequent open debate on each chapter as responses to the consultation and so these comments are also reflected in this analysis.

6 A number of comments were made about the project's scope and terms of reference.[9] For example, John Troke said the consultation should have been broader and discussed the case for removing all hate crime legislation.[10]

7 Dr Findlay Stark was also concerned at the one-sided nature of the terms of reference in relation to the stirring up offences: noting

> the request to examine 'the case for extending' suggests that the Commission is to look at one side of the debate, which runs contrary to its general approach. The Commission has produced a well-rounded paper, and the supplementary material by Dr Stanton-Ife ensures a range of views are aired, but the MOJ should perhaps be more careful in the wording of its future referrals!

8 Dr Stark also noted:

> I am sympathetic to the Law Commission's proposals regarding sentencing, but am mindful of the fact that these have been arrived at as a result of the Ministry of Justice's very narrow frame of reference. It would, in my opinion, be far more sensible to start afresh with a "tailored response to the problem of hate crime against these groups" (CP para 3.21).

9 The Society of Legal Scholars (criminal law section) said:

> It is noted that the Law Commission was bound by the narrow terms of reference set by the Ministry of Justice, and so was unable to consider any changes to the current legislation. Hence, no principled rationale is given for the inconsistent treatment of the different characteristics, but rather a set of pragmatic reasons have been put

[9] As discussed in the CP at paras 1.6 – 1.8.

[10] This point was also made by two speakers at the symposium. As we explain later, several consultees in their written responses also raised repeal of the aggravated offences as an alternative way of achieving simplicity and parity of treatment: see para 1.154 below.

> forward for why the sentencing route might be preferable in relation to sexual orientation, disability and transgender identity. However, many of these reasons … apply equally to race and religion, and suggest that a wider consideration of the effectiveness of aggravated offences is necessary.[11]

10 At our symposium on 17 September 2013, several comments were made on the scope of the project and the desirability of a wider review. Paul Carswell of the Crown Prosecution Service asked whether the terms of reference could be read as permitting the Law Commission to recommend a broader rationalisation of hate crime legislation. Marian Duggan said that, rather than simply looking "to expand criminalisation using existing approaches as an unproblematised template for replication, I'd like to see the debate widened to focus on prevention and victim interests ie non-CJS routes of redress".

11 Professor Peter Alldridge and Ivan Hare both regretted that the Law Commission had not been briefed to consult on whether the current aggravated and stirring up offences should remain or be repealed, rather than focusing only on the case for extension.[12]

12 The Council of HM Circuit Judges also called for a wider review of the hate crimes and sentencing provisions.

Overview of main points arising from the responses

13 There was broad agreement as to the following:

(1) Enhanced sentencing under section 146 of the Criminal Justice Act 2003 ("CJA") is a potentially valuable system for dealing with crime driven by hostility towards the protected characteristics of disability, sexual orientation or transgender identity. However, there is currently insufficient use of enhanced sentencing.

(2) A further key problem identified in relation to enhanced sentencing is the absence of recorded data about its application and a general lack of procedural rigour and transparency about when it has, or should have been, sought. Many consultees pointed to the need for better statistical and qualitative information about cases in which enhanced sentencing has been applied. (A related but distinct point was made in the context of any decision to extend aggravated offences: see point (5) below.)

[11] Professor Leslie Moran made a similar point and argued that as part of a wider, deeper review it was important to ask how hate crime is actually experienced by all groups and communities whose members suffer violence and harassment due to who they are. He suggested that that the question whether current offences should be extended should be deferred until more is known about how well the current laws are serving their intended purpose. Professor Peter Alldridge also argued (at the symposium) that a deeper and broader review of hate crime legislation would have been a more worthwhile exercise.

[12] Comments made during presentations at the symposium on 17 September.

(3) Our proposal for a new Sentencing Council guideline dealing with hostility-related aggravation would bring greater clarity and consistency to the purpose, scope and application of sections 145 and 146 of the CJA. Such a guideline should be implemented whether or not aggravated offences are extended.

(4) Consultees broadly agreed with our proposal that, where section 145 or 146 CJA is applied, this should be recorded on the Police National Computer, just as conviction for an aggravated offence is currently recorded. Consultees favoured this step both as an aid to investigation, prosecution, sentencing and rehabilitation and as an indication on the offender's record that would benefit potential employers when conducting criminal records checks. Again, most consultees considered that our proposal about PNC recording should be implemented whether or not aggravated offences are extended.

(5) Several consultees said that better statistical and empirical evidence on the use of enhanced sentencing was needed to inform an appraisal of the effectiveness of the system and that its absence made it hard to assess the need for, or likely effectiveness of, aggravated offences being extended in their current form to hostility based on disability, sexual orientation or transgender identity.

(6) If the aggravated or stirring up offences were to be extended, the new offences should employ definitions of the relevant protected characteristics that are used in hate crime legislation currently in force in England and Wales.

(7) In any new stirring up offences, on the question whether the "broad" or "narrow" model of stirring up offences should be selected for any offences based on disability or transgender hatred, most consultees opted for the broad model. Under the broad model, the conduct must be "threatening, abusive or insulting", and either *intended* by the offender to stir up hatred against disabled or transgender people, or *be likely* to stir up hatred. Under the narrow model, an offender will be guilty only if the conduct was "threatening" and *intended* by the offender to stir up hatred.

(8) Although a substantial majority[13] of consultees considered that the aggravated offences should be extended (and that this should be *in addition* to sentencing reforms), many of these also expressed the view that a sentencing-only response to hostility-driven offending against people with one of the three characteristics was in fact capable of being sufficient. Some consultees called for a wider review of aggravated offences before any extension, particularly to see whether the list of basic offences capable of being aggravated required amendment.

14 There was less consensus about the following:

[13] 116 out of the 135 who responded on the point, together with a further 8 who expressed the same view in the easy-read response document. However, of the 116 consultees who opted for aggravated offences, 38 also agreed with Proposal 1: that a sentencing-only response could be sufficient. We discuss this further at para 1.161 below.

(1) Whether a properly functioning enhanced sentencing system (incorporating the improvements we provisionally proposed) would be capable of providing a sufficient response to crime driven by hostility based on sexual orientation, transgender identity or disability. Many consultees were unsure, saying more data was needed to assess how effective enhanced sentencing might be, or identifying other measures that would also be necessary (including extending aggravated offences).

(2) Whether there is a practical need to extend the stirring up offences to cover hatred on grounds of disability or transgender identity.[14] Most of the consultees who considered that there was such a need did not provide reasons or evidence supporting their view, although a small number did so. However, almost all of the examples consultees provided would fall short of the high threshold set by the stirring up offences and/or would be capable of being prosecuted by existing criminal offences.

(3) Whether freedom of expression should be protected explicitly in any new offences applying to disability or transgender hatred. The racial hatred offences have no such protection, but the offences later introduced for hatred based on sexual orientation and religious belief specify types of critical speech or conduct that will not, in themselves, amount to stirring up hatred.

[14] 103 consultees said that they believed there was a case in principle for extension, although many did not give reasons. For those who did, the main reasons given were the desirability of equal treatment of protected characteristics and the symbolic value of creating new offences specifically targeting stirring up hatred on grounds of disability or transgender identity. 73 consultees thought that there was a practical need for these offences, 19 thought that there was not and 33 were unsure or raised further questions.

PART 1
AGGRAVATED OFFENCES

REFORM OPTION 1: STRENGTHENING ENHANCED SENTENCING

1.1 In this section we begin, as we did in Chapter 3 of the CP, by examining the current operation of enhanced sentencing under section 146 of the Criminal Justice Act 2003 ("CJA").

1.2 First, we present consultees' views on where the problems lie in the system's current operation. We then analyse consultees' responses on the two specific reforms we proposed in order to strengthen its operation: the first, a Sentencing Council guideline dealing with hostility; and the second, the recording on the Police National Computer ("PNC") of sentencing uplifts imposed under sections 145 or 146 CJA. After setting out consultees' views on whether these reforms would be capable of dealing with the shortcomings in enhanced sentencing and whether they should be implemented in any event, we finally summarise consultees' views on whether enhanced sentencing is capable of providing a sufficient response to hostility-driven offending against people with the relevant characteristics, or whether other steps, including extending the aggravated offences, would also be required.

Problems with the current system of enhanced sentencing

1.3 Most consultees considered that the enhanced sentencing system currently operates less effectively than it might and that our proposed reforms could go a significant way towards putting this right. The majority of consultees also believed that the proposed reforms should be implemented whether or not aggravated offences are also extended because even if aggravated offences were to be extended, the system of enhanced sentencing will still exist for a range of offences that cannot be prosecuted as aggravated.

1.4 The following specific problems with sentencing were highlighted.

Failure to identify and investigate hostility early enough

1.5 Several consultees were of the view that police do not always actively seek evidence of hostility at the earliest possible stage for use under section 146 at sentencing hearings. Their focus is on gathering evidence to charge for an offence: any hostility reported by the victim based on one of the characteristics protected under section 146 is treated as a secondary issue. Stay Safe East said:

> For police investigating officers who are under pressure, the fact that evidence needs to be gathered not for a defined crime but for use at a much later date at the end of a trial means that this is rarely seen as a priority - in our experience in fact this lack of evidence begins the moment a report is made by an individual. Police officers do not have in their mind that they need to look for evidence of hate crime - by the time they do it is often too late.

1.6 Hertfordshire Constabulary acknowledged that investigating for hostility "is not done routinely". They also suggested there is insufficient understanding by police and prosecutors of the need to investigate for hostility. The Lesbian and Gay Foundation pointed to flaws in the operation of enhanced sentencing as observed by its volunteers since the enactment of the CJA, particularly the separation of the aggravation element from the main offence due to its "later point of entry into the criminal justice system".

1.7 An early failure to identify hostility as a separate issue on which evidence must be gathered was seen as partly responsible for a perceived failure by the courts to apply enhanced sentencing in all cases where it should be applied. For example, Teesside and Hartlepool Magistrates considered that "section 146 is only considered in exceptional cases and it would appear it is not embedded in the sentencing process". Devon and Cornwall Police also made this link, saying "the enhanced sentencing provisions are often not in the mindset of police officers at the outset of investigation and therefore associated evidence is not available to apply at the time of sentencing". Mencap made a similar argument.[1]

1.8 HM CPS Inspectorate referred to their report on disability hate crime, *Living in a Different World*,[2] noting that it found a "lack of awareness by police, CPS and probation staff" of the operation of enhanced sentencing", which they considered led to "poor application of s146". Several other consultees referred to the findings of this report to make similar points, including Jane Healy, Derbyshire Police, Black Crown Prosecutors Association and the National LGB&T Partnership.

1.9 Several consultees considered aggravated offences to be preferable to enhanced sentencing because successful prosecution is conditional on hostility being proved, either as having been demonstrated in the course of committing the offence, or as a factor that motivated the defendant to commit it. Thus, hostility can be seen as a central element of the case from the start, in a way that a potential aggravating factor for sentencing purposes may not be. As Dr Mark Walters argued:

> Without specific criminal proscription, the hate-motivation of a crime will often become a secondary issue in many cases. This inevitably results in the hate element of a hate crime not being raised as an issue during trial or at sentencing (see *R v Sheard* 2013).[3]

1.10 Greater Manchester Police were strongly in favour of extension. One reason given was it was a "possibility that extension of the aggravated offences … will support officers' understanding and awareness [of enhanced sentencing]" and Kent Police said extending "would definitely help – offences would be identified at an early stage".

[1] They considered that aggravated offences would help ensure hostility "is investigated thoroughly and evidence supporting it is robust" and suggesting that a lack of such evidence partly explains "the underuse of the sentence uplift".

[2] Produced jointly by HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Probation and published in March 2013, available from: http://www.hmic.gov.uk/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf (last accessed 13 May 2014).

[3] *R v Sheard* [2013] EWCA Crim 1161. See further footnote 5 below.

1.11 Some police forces identified other procedural drawbacks with enhanced sentencing as a response to hostility-driven offending, in comparison with aggravated offences. Kent Police pointed out that aggravated offences had the advantage of longer periods to investigate compared to summary-only cases, where a six month limit applies.[4] Hertfordshire Constabulary raised the disadvantage that police need to include an enhanced sentencing request in the case papers, whereas there is no similar requirement with aggravated offences.

Inconsistent sentencing practice; problems with Newton hearings

1.12 Despite the court being under a duty to apply sections 145 and 146 where hostility is made out, many consultees felt that, in practice, the approach of sentencers in applying the provisions is "discretionary" and "subjective", leading to inconsistent outcomes. This was seen as having an adverse effect on community confidence and victim satisfaction. Consultees making this point included Stop Hate UK, Jane Healy, the ACPO LGBT Portfolio, the Lesbian and Gay Foundation, Leicestershire Police, Cheshire Constabulary, British Transport Police and others.

1.13 Similarly, British Transport Police commented that the failure of the existing enhanced sentencing regime to provide a sufficient response "is due more likely to the vagaries of individual magistrates/judges as opposed to [inadequacies in] the powers available". They favoured extending aggravated offences but accepted that, short of this, "sentencing guidelines per se are probably adequate".

1.14 By contrast, the Senior Judiciary saw nothing inherently objectionable about judges deciding issues of fact that had a bearing on sentence, including "exceptionally", at *Newton* hearings, a system which in their view worked well. They gave the example of drugs cases where a factual assessment was often required about the nature of the defendant's role and the need to assess whether it had been a "leading, significant or lesser role within the meaning of the Sentencing Council guideline". The senior judges did, however, favour a new Sentencing Council guideline on hostility-related aggravation: see paragraph 1.32 below.

[4] Section 127 of the Magistrates Courts Act 1980 prevents magistrates from trying a case more than six months after commission of the offence, but this does not apply to offences that are triable on indictment only or that are triable either way (see Blackstone's at para D21.17 and following). Of the existing basic offences with aggravated equivalents, only common assault is summary-only, and accordingly this is the only offence in respect of which the police would gain additional time to investigate if new aggravated offences were to be introduced.

1.15 The *Newton* hearing as a means of determining whether hostility was an aggravating factor was seen by some consultees as introducing an unacceptable degree of judicial discretion and a risk of inconsistent application of enhanced sentencing. Stop Hate UK described the problem of "*Newton* hearings taking place following a guilty plea but where the defendant does not admit motivation or demonstration of hostility, and the hearing is allowed to take place without oral evidence from witnesses and the defendant chooses not to give evidence".[5]

1.16 Some consultees considered that procedural problems associated with *Newton* hearings made enhanced sentencing less effective than prosecuting for aggravated offences as a means of ensuring a full and proper consideration of hostility evidence.

1.17 Distinguishing aggravated offence trials from those at which hostility is only dealt with as an aggravating factor at sentencing, Victim Support felt that hearing hostility evidence only at a *Newton* hearing "encourages prosecutors and the court to accept guilty pleas for the basic offence only" (as opposed to an admission of separate hostility allegations which could result in a higher sentence albeit still within the threshold allowed for the basic offence).

1.18 The *Newton* hearing process was also of concern in relation to fairness towards defendants. For example, the Society of Legal Scholars (Criminal Justice Section) ("SLS") pointed out:

> As the law currently stands, *Newton* hearings challenge the conventional mode of jury trial in two ways: first, the judge has the power to decline to hear evidence on the issue in certain circumstances, and, if a *Newton* hearing goes ahead, it is the judge who decides the issue, not a jury… Given that the fact of an aggravation may be something which is considered far more serious than the substantive offence … it seems undesirable that the right to trial by jury should exist only in relation to the substantive offence and not the aggravation.

Unduly lenient sentences

1.19 Several consultees pointed to what they considered excessively lenient sentences handed down in cases prosecuted as "hate crime", even when enhanced sentencing had been applied. Merseyside Police and Diverse Cymru considered that sentences for basic offences, even when enhanced, are not always high enough to reflect the seriousness of the case. The Equality and Human Rights Commission ("EHRC") referred to their own research findings that "knowledge and application of s146 CJA 2003 is weak and underutilised" and said this resulted in sentences that were too low.

[5] As happened at the trial in the case of *Sheard* [2013] EWCA Crim 1161, where the defendant admitted manslaughter of an 18 year-old man and received a custodial sentence of three years and six months. Allegations of homophobic taunting and evidence of the victim's autism were raised in the prosecution case, albeit not with express reference to s 146 CJA, but these matters did not result in any sentence enhancement. The Court of Appeal held that if the prosecution's submissions on these aggravating factors had been supported by oral evidence, it is likely that the sentence would have been quashed as unduly lenient. Other consultees referring to this case included Bromley Experts by Experience and Inclusion London.

1.20 GIRES gave the case of David John Harris of Buxton[6] as an example of under-use of the section 146 uplift and said it showed a need for additional training. According to GIRES, "Harris admitted making offensive transphobic remarks to the complainant, a trans woman, and that he had issues with her transgender status, but was sentenced just to a fine of £73. As the victim lived next door to the offender a stronger message might have been more appropriate for her safety."[7]

1.21 Some NGOs referred to the fact that sentences for basic offences cannot be referred to the Court of Appeal as unduly lenient, even in cases where enhanced sentencing has or should have been used.[8] All sentences for aggravated offences, by contrast, can be referred as unduly lenient. Diverse Cymru called for all enhanced sentencing cases to be capable of being referred to the Court of Appeal under the Attorney General reference system (which applies to all aggravated offences). This is discussed further at paras 1.196 and 1.201 below.

Enhanced sentencing alone lacks the communicative, denunciatory effect of specific aggravated offences

1.22 Many consultees considered enhanced sentencing to be a weaker response to hate crime than aggravated offences because they felt that it failed expressly to recognise the additional seriousness and blameworthiness of hostility-based offending in the same way that specific offences do. Dr Mark Walters said this is not merely a matter of "fair labelling":

> There are additional and very important symbolic messages which the criminal law, as against sentencing laws, specifically provides for. This symbolic aspect of hate crime law works in two ways: First, the criminal law serves a communicative role by conveying social disapproval for hate-motivated offences to the wider community (Duff 2007). As such, the law contains a message to society that these conducts will not be tolerated by the state. The significance of symbolic denunciation is that it plays an important role in supporting positive social norms. … While there is an argument that such a process can, to some extent, be achieved by judges giving reasons for the sentences in court, it is unlikely that court declarations will have the same potency. Indeed, in most cases the message will be largely lost.

1.23 By contrast the Senior Judiciary considered that, if applied properly, section 146 could have the same (or a stronger) effect, noting that "reports of a judge's comments made during sentencing are likely to convey the desired message at

[6] We asked the CPS to confirm whether section 146 was sought and applied in that case. They confirmed that the CPS had sought an uplift. A judicial clerk informed the CPS that the court papers on the case record that an enhanced fine was given due to "transgender issues".

[7] We asked the CPS to provide us any details they had about this case. They told us that the prosecutor directed the court's attention to the presence of hostility and the requirements of section 146. They informed us that the court's records, which they requested from the local deputy justices' clerk, indicate that an enhanced fine had been imposed due to "transgender issues." The size of the hostility uplift was not recorded. This seems to us to be a good example of the shortcomings in the operation of section 146, as well as in the keeping of records and statistics on its use.

[8] This issue is discussed at para 2.50 and paras 3.42 to 3.44 of the CP.

least as effectively, and perhaps even more effectively, than new aggravated offences". This of course assumes that sentencing remarks are in fact reported (see the comments of other consultees in this regard at paragraphs 1.44, 1.61 and 1.205).[9]

1.24 Diverse Cymru did not consider the main issue to be how frequently the new offences would be prosecuted: "Rather the symbolic nature and stigma attached to the label of aggravated offences indicates that a modern, fair and just society does not accept hostility on any grounds and considers the demonstration or motivation of hostility to be particularly indefensible." Hertfordshire Constabulary also considered that extension would "send out the right message to offenders and members of society with the protected characteristics".

1.25 Mencap considered the label attaching to the aggravated offences not only sent a message that disability hate crime is taken just as seriously as other types of hate crime, but also would provide a more accurate way to "identify issues that must be tackled in effective rehabilitation". A similar point was made by Scope, and by the Royal National Institute of Blind People and Guide Dogs for the Blind in their joint response.

Proposals to improve the operation of enhanced sentencing

(1): Sentencing Council guideline on hostility[10]

1.26 76 consultees agreed with this proposal without expressing any particular caveat or concern.[11]

1.27 The majority of consultees who gave reasons for agreeing said that a new guideline dealing with hostility aggravation would bring greater clarity and consistency to the purpose, scope and application of sections 145 and 146 of the CJA and help to embed enhanced sentencing more firmly within the overall response to hate crime across all criminal justice agencies. Most considered that such a guideline should be implemented whether or not aggravated offences were also extended.

1.28 Our alternative easy-read question form[12] put the question in this way: "Do we need clearer and stronger rules to help courts use enhanced sentences?" All 8 of the groups or individuals who replied said "Yes". The reasons they gave included consistency, fairness, transparency and the importance of conveying a clear message through the sentencing process.

[9] Prof L Moran, Dr M Walters and Mencap made reference to the need for more reporting of sentencing decisions.

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

[11] Overall 100 consultees responded to this proposal.

[12] In addition to those who answered the questions in the main CP, there were 8 responses to our easy-read alternative questions. These came from several groups representing people with learning or other disabilities.

1.29 Consultees in agreement with the proposal for a new guideline highlighted the following perceived benefits.[13]

Clear rules; consistent, objective and transparent application

1.30 Victim Support said:

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

1.31 Similarly the Norfolk and Suffolk Probation Trust said a guideline "would provide clarity and consistency" and Stay Safe East said: "This will help the CPS and the courts understand the importance of the CJA in ensuring that these crimes are taken seriously." They added that in their view judges had "a very poor understanding of what constitutes disability hate crime".

1.32 The Senior Judiciary considered that a guideline would be "highly desirable" despite the fact that offence-specific Sentencing Council guidelines relating to some offences already refer to hostility as an aggravating factor.[14] They said:

> For the reasons set out at paragraphs 3.50 of the consultation paper it would be helpful to gather together and expound the relevant principles in a single guideline.

1.33 The Crown Prosecution Service said a guideline "would help ensure a proper application of the uplift principles by sentencers and a more consistent approach".[15] HM CPS Inspectorate said "any proposal that enhances the profile of s. 146 would be worthwhile". Devon and Cornwall Police said a guideline "would have a positive impact on the consistency of sentencing [and the] gathering of information and, in conjunction with other proposals, increase the robustness of statistics relating to Hate Crime".

1.34 The Law Society's Criminal Law Committee said:

[13] Some consultees, for example the National Black Crown Prosecution Association, referred specifically to – and endorsed – the reasons set out in our Consultation Paper at paragraph 3.50 for proposing a guideline.

[14] For instance the Assault definitive guideline, effective , available from: http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf (last accessed 13 May 2014).

[15] This view was echoed by Baljit Ubhey OBE, Chief Crown Prosecutor, national CPS hate crime champion and head of CPS London, when giving a presentation at the symposium. Ms Ubhey said that a guideline "would make a big difference in terms of proper application of the uplift principles and a more consistent approach."

> From a practical point of view all the practitioners on the Society's Criminal Law Committee, be they prosecutors or defenders, considered that the creation by the Sentencing Council of detailed guidelines for all hate crime offences would be very useful. Judges and magistrates should also be reminded to spell out precisely how the sentence was increased as a result. In Committee members' experience, people convicted of racially aggravated offences tend not to receive a perceptibly more severe punishment than would be handed down for a non-aggravated offence. It is certainly often not apparent to what degree the sentence has been increased as a result of the aggravation, and the courts should be encouraged to make this explicit in their sentencing remarks.

1.35 The SLS said that "not only will this enable sentencing judges to make fairer and more consistent decisions, it will also serve to highlight the need for these aggravating factors to be emphasised by prosecutors at the sentencing stage".

1.36 Stonewall said that a guideline

> could lead to greater use of these provisions. Since Sentencing Council guidelines are binding on judges, this would increase the likelihood that aggravation based on homophobic hostility would be sufficiently taken into account in relevant cases. New guidelines could also play an important role in educating judges about lesbian, gay and bisexual equality more broadly, since they would serve to emphasise the severity of homophobic hostility.

1.37 Stop Hate UK thought a guideline would "have a beneficial impact on the operation of section 145 and 146 cases by giving the principles more prominence in sentencing exercises. Prosecutors would be required to refer judges to the guideline and judges would be required to consider the guideline before sentencing. Further, where the guideline is departed from it would become necessary for the judge to explain their reasons for departing from it."

Status, scope and content of any guideline

1.38 The Bar Council and Criminal Bar Association considered that:

> The Sentencing Council should issue a 'Definitive Guideline' with minimal delay. From a practical perspective, we think that any such new guideline should either be incorporated in to the existing offence specific guidelines or should be a stand-alone document, cross referenced to the relevant existing guidelines. It may not be necessary for Parliament to pass major new legislation, as any new or ""enhanced"" sentencing regime can come under the auspices of the Sentencing Council on the basis of existing provisions, although minor amendments to parts of the Criminal Justice Act 2003 may be needed. The alternative is that lawyers and judges (and the increasing number of self-represented defendants) have to wait for a guideline decision by the Court of Appeal. That would depend on the Court receiving an appropriate case, which may not happen for a long time, if at all, and such a case may not cover the range as effectively as a Definitive Guideline by the Sentencing Council.

1.39 Professor Richard Taylor saw merit in the guideline also referring to certain other aggravating factors of potential relevance to hate crime. Specifically, he referred to the existing sentencing guideline, *Overarching Principles: Seriousness*. We explained in the CP[16] how this guideline (the *Seriousness guideline*[17]) lists three factors indicating higher culpability: motivation by hostility towards a minority group, or a member or members of it; that a vulnerable victim was deliberately targeted; or that there was an abuse of power or of a position of trust. Clearly these three factors are of potential value in cases flagged as "hate crime" where sections 145 or 146 CJA do not apply.[18]

1.40 The Magistrates Association saw a thematic, hostility-related guideline as "a stop-gap measure until hostility can be embedded as an aggravating factor into all new sentencing guidelines. The new format of guidelines is designed so that all the sentencing information can be found in the guideline for the offence. New guidelines already issued include hostility based on sexual orientation or disability as factors indicating higher culpability."

1.41 The Justices' Clerks' Society noted that although guidelines are contained in the *Seriousness* guidelineand in the Magistrates' Courts Sentencing Guidelines, "a more comprehensive new guide would be appropriate and welcome".[19]

1.42 Referring to *Sheard*,[20] Stop Hate UK asked when a guideline would come into play, noting that if this was only at the sentencing stage, the finding of hostility would not itself be governed by any guideline.[21] Stop Hate would prefer "that any guideline should cover both the proper approach to establishing whether proven hostility was present in an offence and the proper approach to sentencing where hostility has been proved".

[16] See para 2.179 of the CP.

[17] Sentencing Guidelines Council guideline, *Overarching Principles: Seriousness*, available from: http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf (last accessed 13 May 2014). (The Sentencing Guidelines Council was the predecessor of the Sentencing Council; its guidelines remain in operation).

[18] Prof Taylor, commenting on the *Seriousness* guideline, added: "This latter guideline currently however only expressly refers to hostile motivation and possibly ought to be extended to [cases where the defendant] demonstrated hostility although whether this more objective criterion ought to be extended to all minority groups perhaps needs careful consideration (age and gender are probably unproblematic but the wider one extends the protected group, the more one perhaps needs to be cautious)."

[19] The JCS added this further useful observation: "We note particularly the concerns that an offender who targets a victim because their disability makes them an easier target rather than through hostility to that group: we accept there will often be an overlap but agree that the new offences should focus on manifest hostility only, and that vulnerability should be accounted for elsewhere in the sentencing process." Again, the *Seriousness* guideline is relevant here as it specifically makes deliberate targeting of a vulnerable person an aggravating factor.

[20] [2013] EWCA Crim 1161.

[21] We interpret this to mean that the guideline would not cover the process by which a finding of hostility is arrived at but purely the approach to sentencing. The content and scope will be a matter for the Sentencing Council.

1.43 Stop Hate also noted that enhanced sentencing applied to a large number of criminal offences and that "in practical terms to produce a guideline incorporating all offences would be unwieldy and require constant updating". They considered that a useful balance might be struck if the guideline were to give examples of the categories of offence in which hostility towards a protected group is commonly present.

1.44 Professor Leslie Moran suggested any guideline should contain a requirement that the sentencing remarks referring to the aggravating factors and their assessment should in all cases be written up and published on the internet. (See paragraph 1.50 below.) Stay Safe East also complained that the application of enhanced sentencing "is rarely publicised in the media, thus missing the opportunity to put a clear message out about hate crime".[22] Mencap said "judges and magistrates should issue summary judgments as a matter of course - available to the public and publicised in the media - so the public understands better how sentencing decisions are made. As well as informing the public, this will ensure sentencers are bearing in mind all of the factors the public expects them to when they make decisions."

Caveats

1.45 A further 22 consultees, while agreeing with the proposal, sounded a note of caution as to how much a guideline might be expected to achieve. (Most of these consultees wished to see aggravated offences extended, in addition to sentencing reforms being implemented.)

1.46 UNISON believed that a guideline would be "insufficient in itself to ensure consistency of sentencing". The ACPO LGBT Portfolio and several regional forces[23] saw the "potential for guidelines to be ignored resulting not only in [an] inconsistent approach but also the possibility of reinforcing the view that the courts do not take hostility-based offences on the grounds of disability, sexual orientation and transgender identity as seriously as [those on grounds of race or religion]". Members of the CPS London Scrutiny and Involvement Panel said the guideline "would address the perception of a divided hate crime sentencing mechanism that protects some groups more than others", but noted that its use "would need active encouragement and application".

1.47 Several consultees did not consider our proposed sentencing reforms as adequate in and of themselves because they considered there would still be a need for aggravated offences to be extended. Galop said they "would not oppose new hate crime sentencing guidance being produced as a temporary measure,[24] but do not feel this is a long-term solution". Similarly the EHRC stated that they would also want to see the extension of aggravated offences, in part, because of

[22] Professor Stephen Whittle of the transgender campaign group Press for Change made the same point when speaking from the floor at the symposium on 17 September 2013. He added that the lack of coverage or publicity about sentence uplifts means "there is no real awareness of the sentence uplift… It's not reported in the newspapers, ordinary people don't know that's going to happen."

[23] Leicestershire Police, Cheshire Constabulary, Cleveland Police, West Midlands Police, Hertfordshire Constabulary, West Yorkshire Police and the Metropolitan Police.

[24] We interpret this as meaning a step which, unlike extending aggravated offences, would not require legislation: clearly once any guideline is in place it will not be a temporary measure.

the inherent limitation currently in place with regard to unduly lenient sentencing referrals. (This issue is dealt with at paragraph 1.21 above.)

1.48 Scope were unsure about how much would change with a new guideline: "Our experience chimes with the findings in the `Living in a Different World' report[25] … which highlighted that section 146 has been used only in a very small proportion of disability hate cases." Mencap similarly believed sentencing guidelines "will certainly go some way to addressing the under-use of section 146, but this is not a silver bullet. The onus is - at least in part - on the police and CPS to gather strong evidence of hostility towards disability as an aggravating factor to ensure the judge or magistrate has adequate information to evaluate the level of hostility. Hence the need, we believe, for aggravated offences…"

1.49 North Yorkshire Police expressed doubt as to the sentencing reform option generally due to what they considered to be a dearth of reliable data by which to assess the effectiveness of the current system (see further paragraph 3.44 below).

1.50 Professor Leslie Moran believed that sentencing decisions "provide an opportunity for wider public dissemination of the 'hate crime' message in law" but that the value of this potential message is currently under-used:

> At present the production and dissemination of summaries in general and those relating to the operation of enhanced sentencing in hate crime contexts is at best hit and miss or at worst disorganised. The size of the court system, the number of judges, the large number of judges taking relevant decisions, and the small scale of judicial communications support staff are particularly challenging. One way of dealing with this would be to call for the inclusion of a provision in any sentencing guidelines, or other relevant guidelines given to the CPS, courts and judges that a short written summary of the sentence should be produced in all enhanced sentence cases and that this should be posted on the internet. Ideally this should be on the judiciary's website which services all the judicial family.

Disagreement with guideline proposal

1.51 Only two consultees disagreed with the proposal. Ursula Solari considered all proposals for reform or extension of existing offences to be misplaced and she would prefer to see the emphasis on "restorative justice and funding for education around the issues of equality, community healing". John Troke disagreed because he considers all hate crime legislation to be disproportionate and misguided.

[25] HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Probation, *Living in a Different World: Joint Review of Disability Hate Crime* (2013),available from: http://www.hmic.gov.uk/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf (last accessed 14 May 2014).

(2): Sentence enhancement to be recorded on the Police National Computer[26]

1.52 89 consultees agreed with the proposal without expressing any particular caveat or concern.[27]

1.53 We asked the following alternative question in our easy-read response document: "Should police files and the person's files show when someone has been given an enhanced sentence?" Of the 8 responses given, all were in favour. Advantages identified included: employers' checks revealing information that could aid the protection of vulnerable people against possible future offending; and accurate labelling of serious offending.

1.54 Consultees in favour of the proposal identified the following as potential benefits.

Labelling and safeguarding

1.55 The Bar Council and Criminal Bar Association observed that "criminal law has a communicative and public function, which also serves to deter potential offenders." Accurate recording of wrongdoing gave practical effect to this principle.

1.56 Correct designation and description of offending was also seen as necessary to protect and safeguard people whom the offender may come into contact with, for example, through employment. Stop Hate UK said:

> Organisations that work with children and adults at risk and in need of safeguarding, such as Stop Hate UK, would also be served well by the introduction of this measure. If we were able to discover from a Disclosure and Barring Service check that someone had a previous conviction for an offence in which hostility based on one of the five monitored strands of Hate Crime was present, we may take the view that their appointment as a member of staff or volunteer would be inappropriate. At present we would not know if a conviction for an offence was for one which was motivated by hostility.

1.57 Victim Support said: "Correct labelling on an offenders record is important to protecting victims in the future. While the label of hostility is not recorded, offenders of hate crimes could gain employment in public sectors dealing with these vulnerable groups, for example care homes for disabled people, or the voluntary sector, which rely on Disclosure and Barring Service to reveal this information." Other consultees raising similar points included CPS London Scrutiny and Involvement Panel and Diverse Cymru, who said: "Accurate recording of offences is vital to the DBS [Disclosure and Barring Service] check procedure and to ensuring that adults and children are safeguarded from inappropriate conduct and threats."

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

[27] Overall 98 consultees responded to this proposal.

1.58 Anna Scutt felt that “at present, crimes that are 'racially aggravated' receive a label which sets them apart as worse than crimes against disabled people” and that this proposal would help address this imbalance. Full of Life said this would help “the victim feel like justice has been served”. For Suzanna Hopwood and Michelle Ross there was no reason not to take this step as long as the offender had been properly convicted, given the “very serious and damaging physical and psychological consequences for the victim”.

Detection, investigation, character, sentencing

1.59 Trans Media Watch referred to “numerous situations in which individuals make sequential threats against more than one trans person. We feel it is important that police should be aware of a history of this sort, where convictions have been made, in the event of a potentially transphobic offence occurring, as in our view this would make it more likely that the new offence would be handled appropriately.” Diverse Cymru similarly considered this could “also assist in the identification of repeat offenders of hate crime, which can provide evidence of hostility in future criminal proceedings”.

1.60 Leicestershire Police and the ACPO LGBT Portfolio observed: “As there are limited aggravated offences, the recording of when section 145 or 146 is applied would provide a fuller offender history which could assist the criminal justice service in addressing repeat offending.” The same point was made by the Bar Council and the Criminal Bar Association who said: “The Judge or Magistrate should be informed that the offender’s previous convictions have the aggravating characteristics.” They added that the PNC record would “enable the prosecution to take an informed view as to whether or not bail is opposed and, if so, on what grounds. It will assist remand courts with what, if any, conditions are required to meet objections to bail.”

1.61 Referring to the need for accurate labelling to reflect seriousness on a person’s record, the Crown Prosecution Service said PNC recording “would be of benefit for future sentencers and for prosecutors in subsequent cases when considering such issues as bail and bad character applications.[28] Similarly the Magistrates Association pointed out that “when sentencing, it may be important to see how many of the previous offences were motivated by hostility”. This point was echoed by a number of police forces, as well as by the National Black Crown Prosecution Association, National LGB&T Partnership and Independent Academic Research Studies.

[28] The CPS also sounded this note of caution: “However, we recognise that such a proposal has practical considerations (especially for the police) to ensure that all such sentences are properly recorded on PNC.” This topic is further discussed from para 1.70 below.

Rehabilitation and re-education

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

Better statistics; more accurate reports

1.63 Several consultees pointed out that accurate recording of hate crime sentences on the PNC would produce better statistics and more reliable information for use by all CJS agencies. It would also enable agencies to monitor the effectiveness of such sentences and better direct future initiatives to deal with hate crime in a more targeted and tailored way across the different characteristics affected.

1.64 The CPS London Scrutiny and Involvement Panel felt that this would help to show how effectively the current enhanced sentencing system was working and how often the provisions were being applied. Devon and Cornwall Police and the Hate Crime Lead at West Yorkshire Police raised similar points.

1.65 Stonewall said: "Recording instances of the use of the section 146 uplift could also lead to improved transparency around the operation of enhanced sentencing, provided the data was effectively monitored and published. Where this identified successful use of enhanced sentencing over time, this could improve confidence amongst victims to report homophobic hate crimes in the future."[29]

1.66 The advantages for inter-agency cooperation to tackle hate crime and its effects were also highlighted. HMCPSI saw it as a key advantage that the PNC is "a medium that is readily accessible and commonly used by those involved in the criminal justice system, hence allowing all agencies to be better informed". Disability Hate Crime Network and Disability Rights UK said they would welcome "a clear procedure for this information to be recorded and passed to other agencies" because currently

> the vast majority of reports are often based mainly on information provided by the offender. Naturally offenders minimise the seriousness of their conduct and the vulnerability of the victim. In less than a third of reports was there detailed information about the victim or recognition that the victim was disabled or even vulnerable, let alone that it was a disability hate crime.

[29] Stonewall added that their latest report, *Homophobic Hate Crime: the Gay British Crime Survey 2013* (see footnote 11 below), based on a poll of over 2,500 lesbian, gay and bisexual adults, found that under-reporting of homophobic hate crime continues to be a significant problem. The research found that more than three quarters of lesbian, gay and bisexual victims of homophobic hate crime don't report their experiences to the police and two thirds don't report them to anyone."

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

1.68 This point was echoed by the EHRC. Referring to their report, *Hidden in Plain Sight*,[30] they said: "Recording is a significant issue examined throughout the Commission's inquiry and recommendations. We support the collection and, where appropriate, sharing of data between authorities." In their view, this would "assist police to undertake better preventative action. It will also help increase the recognition of s146 CJA 2003 within criminal justice agencies. The data may also provide useful mapping of offender profiles over time in relation to disability related harassment and hate crimes and allow the National Offender Management Service to work with hate crime offenders on their rehabilitation and the police to build perpetrator profiles and put preventative measures in place."

1.69 The Bar Council and Criminal Bar Association said "it may assist penological and sentencing research by the Home Office, other government departments, and academia". Stop Hate UK said it "would help to better identify patterns of Hate Crime offending behaviours". The Royal College of Nursing also thought PNC recording would "assist with improving understanding about incidents and severity of hate crime".

Mechanics

1.70 While in agreement with the proposal, the Senior Judiciary considered that its implementation "might prove difficult in practice" due to the "limitations and shortcomings of the current regime for recording details of offences". They said that, assuming the court record is the source of information input to the PNC:

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

1.71 Engaging directly with this issue, the Justices' Clerks' Society noted that the current system for recording disposal-related matters is undermined by "the weaknesses of IT systems to capture the necessary data". They said this could be addressed as follows:

[30] Equality and Human Rights Commission, Inquiry Report, *Hidden in Plain Sight* (2011) (see footnote 12 below).

> The police, when charging should be required to include in the charge any allegation that sections 145 or 146 apply. If this information were transferred to the court computer system, which should then similarly require an adjudication to the effect that that aggravation was or was not found, there would be a reasonably secure system to ensure the data could be captured. This proposal would also formalise the procedure in court preventing the parties or the court "fudging" the issue of aggravation. There is a danger that without such a mechanism the PNC will mark offences as aggravated even where the court does not find aggravation proved.

1.72 The Council of Circuit Judges said that they are in favour but they "have grave doubts whether it will actually work. Our experience when it comes to details of previous offences is that if available they are usually fairly scant and do not record where there has been a basis of plea which may be of importance." In a joint response, the Bar Council and the Criminal Bar Association agreed that a record of the aggravation finding would need to be made by the judge or the court clerk. In addition,

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

1.73 The Bar Council and the Criminal Bar Association suggested amending the enhanced sentencing provisions themselves, by "inserting into sections 145(2) and 146(3), respectively, the following words: 'must state in open court, and adequately record on the court record, which must be communicated to the police so as to be recorded on the Police National Computer, that the offence was committed in such circumstances.'"

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

1.75 A further 5 consultees agreed with the PNC proposal, but with caveats. UNISON considered that, while helpful, PNC recording would be "insufficient in itself to ensure change in societal behaviour". For Galop "this would be a step forward and we would welcome it as an interim measure.[31] However, it would not address the inequality of the 'two speed' legal system currently in place."[32]

[31] See footnote 24 above for our interpretation of the words "as an interim measure."

[32] We interpret this as a reference to an imbalanced system due to differing treatment of characteristics, as distinct from any suggestion that aggravated offences are prosecuted more quickly.

1.76 HMCPSI had similar concerns. “If this proposal were implemented alone, might this not be seen as a `lesser' step than the introduction of disability aggravated offences? Would it have the necessary impetus to introduce social change? Are there practical difficulties in PNC providing this facility?” This led them to ask whether the proposal “may be more effective if it were implemented alongside other recommendations for reform [including aggravated offences]”.

1.77 Professor Christian Munthe was concerned that in a small proportion of cases people prosecuted for hate crime could have been motivated by “carefully worked out ideological political and/or religious views” and that “PNC recording might amount to police registration of political or religious opinion... This may be solved by making the recording very generic, so that the more specific content of an ideologically based hostility does not shine through.”[33] (A similar worry regarding stigmatisation was expressed by the Society of Legal Scholars, but they rejected the proposed reform: see paragraph 1.85 below.)

1.78 Dr Andreas Dimopoulos, who was in favour of the proposal because it would “send out a message that hate crime is taken very seriously and that the stigma of hate crime offending will follow those convicted of it”, raised the problem of over-stigmatisation. He suggested “it might be worthwhile to consider automatically expunging the hate crime offender stigma from the criminal record after a period of time during which the ex-offender has not been involved in hate crime incidents”.

1.79 The issue of additional stigmatisation was also raised by Professor Leslie Moran, who did not expressly reject the proposal but who was concerned that “changing the recording practices on the Police National Computer may do little to enhance detection of future offences yet do much to further divide individuals and communities”. Professor Moran was of the view that PNC recording should only be pursued “if there is clear evidence that it will enhance delivery of improved criminal justice services to individuals and communities”.

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

Disagreement with PNC recording

1.81 4 consultees rejected the proposal on grounds of principle.

1.82 John Troke considered enhanced sentencing in itself to be disproportionate and therefore rejected the proposal.

[33] We consider that simply referring to an offender’s sentence having been enhanced due to the aggravating feature of hostility based on whichever protected characteristic featured would be sufficiently generic not to raise this concern.

1.83 Christian Concern and the Christian Legal Centre[34] said there was not enough evidence to prove enhanced sentencing is currently under-used.[35] They considered that placing sentencing provisions on the same footing as the aggravated offences as regards criminal records would "dilute the line between two separate forms of protection and justice". Defendants should "be protected from further negative stigma through a direct 'aggravated' label which is reserved for more serious offences dealt with under the CDA 1998". They considered it was "for the legislature to decide whether they meant to consolidate these two systems into one". They went on to observe: "Inevitably there would be calls for other serious aggravating features to be included by other minority groups e.g. an offence that demonstrated ageism. Potentially there is no end to possible aggravating features that could be recorded. Should such a change be thought of as necessary, this is a matter for Parliament."

1.84 The SLS expressed misgivings due to the fact that determination of hostility often takes place at a *Newton* hearing, which is markedly different from a full trial. (We deal at paragraphs 1.14 to 1.18 with the issues which the SLS and other consultees raised about *Newton* hearings and the suggestions made by others as to how a Sentencing Council Guideline and additional procedural guidance from the CPS would help to address these concerns.)

1.85 The second ground of concern expressed by the SLS related to the additional stigmatisation a PNC record of hostility would entail and its effect on an offender's future job prospects:

> If we assume that the grounds for aggravation at the sentencing stage will mirror the grounds for aggravation under the CDA offences, this will result in a wide category of behaviour being included on the PNC: as well as the offender who purposely sought out a victim on the basis of their characteristics, the current structure of the law also captures victims who demonstrate hostility towards their victims - even if the offender shares the characteristic with the victim, and even if the hostility was demonstrated in the heat of the moment with no evidence of systematic prejudice against the characteristic in question. It is questionable whether this latter behaviour is sufficiently blameworthy to be included on someone's record and, therefore, potentially affect an offender's future job prospects. This argument can be levelled equally against the current CDA provisions, and serves to highlight again the need for a wide-ranging appraisal of the CDA before it is extended further.

[34] These consultees made a joint response.

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

Would the proposed sentencing reforms address the shortcomings identified in the CP?[36]

1.86 Of the 94 consultees who responded to this question, 44 answered in the affirmative, without adding any concerns or caveats.

1.87 Among the reasons given, Dr Findlay Stark said "guidelines would focus attention on section 146, which would presumably increase its use, and hopefully improve the accurate recording of the nature of the offender's wrongdoing".

1.88 Several of these consultees considered that, to be effective in achieving their aims, sentencing reforms would need to be accompanied by clear guidance to the police, with training on hate crime, how to recognise and record it, and the importance of gathering hostility evidence.[37] Stonewall added that without effective record-keeping and monitoring, the measures would not be capable of achieving their aims in full.

Concerns and caveats

1.89 Of the 27 consultees who expressed doubts or were uncertain (but did not answer "no")[38] the key points raised were the following.

1.90 GIRES considered it was "too early to comment on the use of s 146 in respect of trans victims as [it] was only extended to cover transphobic offences in December 2012" although the reforms would be "steps in the right direction". The Learning Disability Partnership and the TUC felt it was impossible to know the answer to this question without more information.

1.91 Many consultees considered that without also extending aggravated offences these reforms would not be sufficient to deal with the problems underlying the under-use and misuse of enhanced sentencing.[39] Some consultees saw these problems as being due to wider cultural failings embedded in a criminal justice system that in their view had not rid itself of the "institutional discrimination" highlighted in the Macpherson Report[40] (for example, Professor Leslie Moran). The Lesbian & Gay Foundation felt that while these reforms "could be a solution to the problem of under-use of section 146 they amount to a small set of changes and are therefore unlikely to shift the culture of such large organisations. Primary legislation specific to the needs of the people affected by this legislation is required." UNISON said they were "far from confident they will be adequate to fully tackle the issues".

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

[37] West Midlands Police, Brandon Trust, Linkage Community Trust and Full of Life.

[38] Reasons given by those who answered "no" are set out separately from 1.96 below. (A further 62 consultees did not answer the question.)

[39] Disability Hate Crime Network, Disability Rights UK and the National LGB&T Partnership.

[40] *The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny* (1999) Cm 4262-I.

1.92 These concerns were shared by some consultees from within the criminal justice system. Devon and Cornwall Police thought that, while "likely to have positive impact upon the under-use of section 146 and the inadequate recording of the nature of the offender's wrongdoing" it was unlikely that amended sentencing guidance would address the lack of awareness of [sections] 145 and 146, or deal with the mindset of the investigator. Evidence from [Devon and Cornwall] suggests 146 is certainly under-used." CPS North Wales Local Scrutiny & Involvement Panel believed that the reforms would address underuse of enhanced sentencing, if "accompanied by training programmes for criminal justice professionals in particular the judiciary and magistracy". HM CPS Inspectorate said the sentencing reforms "[whilst potentially assisting] are unlikely in themselves to address some of the key causes of concern, such as improving social attitudes and increasing awareness levels amongst the public and police about disability hate crime".

1.93 For the Justices' Clerks Society, the success of these reforms would depend on whether a sufficiently "robust mechanism is found, [for] recording the nature of the offender's wrongdoing" and the use of the sentence uplift (see paragraph 1.71 above). Similarly Derbyshire Police considered there was also a need for "proper information transfer between CJS agencies and better inter-agency cooperation. Previous national guidelines have failed for want of this".

1.94 Stay Safe East considered that for the reforms to be fully effective there would also need to be "proactive responses by a range of agencies, correct identification of hate crimes through constant review of cases, hate crime scrutiny panels at local level… and of course wider public outreach and education". National Aids Trust said the reforms "would go a long way to improving the effectiveness of the enhanced sentencing regime" but they, too, considered wider improvements were needed across the CJS agencies in order for them to render enhanced sentencing fully effective. (See also Part 3: Other Comments from paragraph 3.1 below.) Police Constable Stephanie Mills said it was also necessary to address the reasons for hate crime and focus on better rehabilitation.

1.95 Victim Support were concerned that there would still be a risk that hostility allegations would be dropped in cases where a defendant was willing to plead guilty but contested the aggravating factors. Careful monitoring would be needed to ensure this does not happen. (See their comments on *Newton* hearings at paragraph 1.17 above.) They also felt that while these reforms could result in increased use of enhanced sentencing, "the time and cost pressures of bringing on separate *Newton* hearings could still result in plea bargaining out the hostility element before sentencing". They noted that the CPS had recently revised their guidance on *Newton* hearings[41] following the *Sheard* case and urged that monitoring be put in place to guard against similar problems recurring.

[41] CPS Legal Guidance *Newton* hearings, CPS website, available here: http://www.cps.gov.uk/legal/l_to_o/*Newton*_hearings/ (last accessed 13 May 2014). The guidance now points to the risk that the "defence version would be accepted" in cases where witness evidence is not called and the court determines the issues in dispute on submissions alone, as occurred at first instance in *Sheard* [2013] EWCA Crim 1161.

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

1.96 Of the 23 consultees who were of this view, several pointed to additional measures they saw as necessary to deal with problems with enhanced sentencing. Their principal argument was that it was necessary to extend aggravated offences. While this might not have any direct effect on the problems that our reforms were designed to deal with (namely, the under-use of the provisions and the absence of any system by which to record their application) consultees appeared to think there may be an indirect benefit. As Stop Hate UK put it, aggravated offences would "have a knock-on effect on the use of section 146 by elevating its status and promoting the use and proper application of it, as well as creating recognition of the meaning of a conviction for an offence to which section 146 has been applied".

1.97 Dr Mark Walters felt that, although reform would be welcome, "the provisions will still not be applied [due to] resistance amongst judges to accept the breadth of the provisions".[42] Dr Walters considered that without aggravated offences also being introduced, "evidence of hostility based on sexual orientation, disability and transgender status will be secondary to other evidence in a case".

1.98 Independent Academic Research Studies and Jane Healy said our proposed reforms would improve the operation of enhanced sentencing but would not address the inequality of treatment with racially and religiously aggravated offences. Several others also said no because aggravated offences were needed.[43] Pembrokeshire People First said extending aggravated offences "might change attitudes" around enhanced sentencing. The EHRC made the same point but also said more data would be needed in order to decide whether the reforms would be enough.

1.99 John Starbuck said that police must do more to publish annual records to publicise what they were achieving with the existing offences. The Discrimination Law Association said "there are other factors which impinge on the under use of section 146; namely, the lack of information and evidence taken when potential hate crimes are reported and investigated".

1.100 The Metropolitan Police considered that for the reforms to be effective there would have to be an "awareness raising campaign across the judicial system to increase the understanding and application of enhanced sentencing… Monitoring must be built into the process and results published at regular intervals addressing any evidence which demonstrates an under use of the process." Stop Hate UK said "it is also necessary for prosecutors to state from the outset of proceedings that they intend to present a case as a section 146 case [or] where it only becomes apparent during proceedings that the case is one to which section 146 might apply … at the earliest reasonable opportunity".

[42] Dr Walters referred to his article "Conceptualizing Hostility for Hate Crime Law: Minding 'the minutiae' when interpreting section 28 of the Crime and Disorder Act 1998" (2013) 34 *Oxford Journal of Legal Studies* 1.

[43] CPS London Scrutiny and Involvement Panel, Carole Gerada, Seamus Taylor CBE, Suzanna Hopwood and Michelle Ross all made this point.

1.101 Respond said “training for the judiciary and barristers must be a priority: not just in 'appropriate use of section 146', but in the context in which these crimes happen”. There needed to be “familiarisation with the lives of people with learning disabilities - a highly vulnerable group previously segregated from society, only relatively recently integrated into the community, and now at the sharp end of widespread and often violent, disability hate crime. In the most serious cases, where murders have taken place, victims have usually had a learning disability (as opposed to physical disability), and despite clear evidence of hostility towards the victim's disability section146 was not invoked. Unlike other groups (including those who only have physical disability), people with learning disabilities are significantly less able to recognise and challenge miscarriages of justice. (The Royal College of Psychiatrists made the same point about people with learning disabilities.)[44]

1.102 These concerns were echoed by Action Disability Kensington & Chelsea who felt the reforms alone

> will do little to address … the primary causes of the under-use of section 146 and inadequate recording of the nature of the offender's wrongdoing [which] are the lack of awareness of disabled people as potential targets of disability-specific hate crime and the specific kinds of, often daily and long-duration, harassment that disabled people experience, harassment that is often not perceived as or recorded as an offence and whose impact and consequences are both minimized and under-estimated.

1.103 In other respects, similar reasons were given by consultees answering “no” to this question as were given by those consultees listed as “not sure” from paragraph 1.89 above (“Concerns and caveats”). For example, Hate Free Norfolk said reforms would be a “huge step forward” but “unless the police and CPS are trained to ensure that hate crime is detected and dealt with appropriately it will not have the desired effect”. Several other consultees raised the need for additional measures to reinforce and raise the profile of enhanced sentencing and these are discussed further from paragraph 3.1 below.

If so, should they be implemented regardless of any extension of aggravated offences?[45]

1.104 Of the 87 consultees who responded to this question, 60 answered in the affirmative. 34 of these had agreed with the question on whether the reforms were “likely to be effective in achieving their stated aims”, 11 had been unsure and 11 had answered that they were unlikely to be effective.

1.105 The main reasons given by those who favoured implementation of sentencing reforms in any event were the following.

[44] See similar points made in Part 3: Other Comments from paras 3.4 and 3.34.

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

1.106 Under the present system at least, not all offences are capable of being prosecuted as aggravated, only a set list of nine. Therefore any reforms to the sentencing system and recording practices will be of benefit in relation to cases where the offence cannot be aggravated.[46]

1.107 Professor Richard Taylor, though in favour of sentencing reforms, said they should not be undertaken alongside extending the aggravated offences, which he was strongly against (see further paragraphs 1.111, 1.128 and 1.134 below). He considered that this:

> would simply replicate some of the difficulties already encountered in the relationship between the existing aggravated offences and s.145. The argument that this would perpetuate an inequality between the grounds of hostility protected by aggravated offences and those only covered by s.146[47] is best met not by extending the anomalously selected aggravated offences and the problems of their interrelationship with s.145 but by repealing these problematic offences in favour of a consistent and effective sentencing uplift across all the grounds thus producing both equality and effectiveness.

1.108 South Yorkshire Police also thought the combination of aggravated offences and enhanced sentencing caused confusion and "agree[d] that the level of sentencing could probably be adequately provided for by enhanced sentencing [whereas] the existence of aggravated offences in respect of racially and religiously aggravated creates confusion".

Do consultees agree that enhanced sentencing, if properly applied and adequately recorded, could provide an adequate response?[48]

Yes

1.109 116 consultees responded to this question. 54 consultees answered "yes" to this question; and a further 18 agreed, but with caveats, often to the effect that although they believed in theory that sentencing, if improved, could provide a satisfactory response to offending driven by hostility against the three protected characteristics in practice they were not convinced that it could. Reasons given for agreeing are now summarised.

[46] Leicestershire Police, CPS London Scrutiny and Involvement Panel.

[47] The equality arguments are considered later from paragraph 1.171.

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

SIMPLICITY, FLEXIBILITY

1.110 The Magistrates Association considered enhanced sentencing "is simpler to apply than creating new aggravated offences. It is also applicable to any crime, not only a specific group of [offences]". They were of the view that if our two proposed sentencing reforms were implemented, there would be "no need for any separate aggravated offences". The Senior Judiciary and the Council of Circuit Judges were of the same view.

1.111 Professor Richard Taylor preferred reform Option 1 on the basis that it "would avoid the complications that would arise if the existing aggravated offences were to be extended and would also deal with hostility on the three new grounds across a much wider range of offences than the somewhat arbitrarily selected aggravated offences under the CDA". Speaking from the floor at the symposium, Professor Taylor referred to enhanced sentencing as "the better, simpler, more easily administered and more transparent system" for dealing with hate crime.

1.112 Some consultees considered the judge to be in the best position to reflect in the sentence passed the degree of aggravation by hostility. See, for example, the points made in this context by the SLS (under "Repeal of aggravated offences", paragraph 1.159 below). Dr Andrew Wilson[49] felt that "sentencing powers for those who commit indictable offences against disabled and vulnerable people are fit for purpose and able to take into account aggravating factors". Tim Devlin, a barrister who both prosecutes and defends hate crime cases in the Crown Courts, considered that aggravation by reason of disability, and/or transgender identity "ought to be taken into account by a sentencing judge". Mr Devlin listed a number of problems with aggravated offences which meant they ought not to be extended (see further at paragraph 1.120 below).

1.113 Option 1 was also preferred by some consultees on the grounds that it would be simple to achieve. For example, the Bar Council and the Criminal Bar Association considered: "Any attempt to rationalise and improve existing sentencing provisions before moving direction to importing new ones is to be encouraged as an economy of legislation." The Community Safety Trust made a similar point.

1.114 The Law Society said: "We are conscious of an unfortunate recent trend for the law …to have become overly complicated. We are also concerned that a very large number of new criminal offences have been added to the statute book in the past decade and a half [whereas] the criminal law should be among the most simple, and both easy to understand and apply." They said it was necessary to examine whether the current legislation is sufficient and whether other non-criminal solutions could also assist. The Council of Circuit Judges is of the same view and echoed points made by the Senior Judiciary that the current sentencing regime is potentially capable of dealing effectively with hostility-driven offending.

[49] Dr Wilson did not submit a response to every question but instead provided a paper setting out his views on some of the key questions in the consultation and providing references to empirical and academic research on anti-social behaviour, bullying and victimhood. Dr Wilson noted that there is "a dearth of information about offender motivation in [hate crime] cases or unbiased detail about the nature of the conflicts." He referred to the findings of projects that he and others had worked on in high crime and disorder neighbourhoods, although these had not focused specifically on hate crime.

LACK OF EVIDENCE THAT NEW OFFENCES NEEDED

1.115 Christian Concern and the Christian Legal Centre considered the current framework to be adequate given that it applies to all five characteristics. They added: "There is simply no evidence that there is a high number of crimes which are hostility-based offences on the grounds of disability, sexual orientation and transgender identity." They also felt any shortcomings in the sentencing provisions could be addressed by "better education of the judiciary and practitioners to ensure they are used appropriately".

1.116 North Yorkshire Police said they could not express a view on Option 1 in the absence of

> evidence comparing like-for-like periods before and after the introduction of enhanced sentencing to ascertain: 1) whether there was an impact around the number of offences committed where the protected characteristics were an aggravating factor; 2) whether the use of an enhanced sentence had any reforming effect upon the attitude of the offender; and 3) what the rate of re-offending was for those receiving and enhanced sentence as opposed to those who did not. Because enhanced sentencing is currently in use for some hate-motivated crimes, it would seem pointless to extend the scheme unless there are demonstrable benefits to doing so.

1.117 Dr John Stanton-Ife referred to the arguments set out in his Theory Paper (published with the Consultation Paper on 27 June and available on our website with the other consultation materials). Discussing the communicative purpose of criminalisation he stated that, in his view, one of the strongest arguments against extending the aggravated offences as opposed to improving the current sentencing system, was that "doing so would not promise greater communicative gains than would accrue from the sentencing system" and that it was "too early to judge that sentencing is not a sufficient response.". Our proposed reforms to the sentencing system were, he considered, "the best means for declaring and communicating by means of the criminal law that we as a polity do not tolerate criminal conduct based on reasons of hostility towards disabled, gay, lesbian, bisexual and transgender persons".

AGGRAVATED OFFENCES TOO PROBLEMATIC TO EXTEND IN CURRENT FORM

1.118 The Law Society said "There is also a risk that the extended aggravated offences will be ineffective, perhaps because of difficulties with proof of aggravation or complications for prosecutors in the selection of charges, which may undermine confidence in the ability of the criminal law to address hate crime." This point was echoed by a number of others, as we now explain.

1.119 Several consultees with experience of hearing or litigating aggravated offence cases based their preference for reform Option 1 on what they considered to be serious practical and conceptual difficulties with the current aggravated offences, both in their own right and in combination with enhanced sentencing under section 145 CJA. They raised the following matters.

Aggravated offences hard to prosecute

1.120 Tim Devlin said that

> prosecutors have to weigh up the risks of litigation all the time, and make accommodations to what they can actually be sure of proving. Juries are reluctant to find guilt of the aggravated forms of offences, except in extreme cases, and defendants rarely plead to them. A plea is usually offered to the non-aggravated [ie basic] offence. If only the substantive [ie basic offence] were on offer the plea could be taken, and the defendant dealt with appropriately in sentencing. The creation of further aggravated offences will simply widen this problem. No-one pleads to a racially aggravated offence because it affects their employment prospects. Juries in London are reluctant to find guilt in my experience because insulting behaviour is part of life, and the individual calls… people of other ethnic groups as character witnesses.

1.121 The Senior Judiciary agreed, noting:

> Experience shows that where the aggravated offence is charged juries are often reluctant to convict. There are sometimes apparently unjust acquittals, which makes the situation even worse for the complainant. Defendants are certainly reluctant to plead guilty. Where the aggravated offence has been charged, there is rarely scope for compromise or withdrawal by the prosecution.

Aggravated charges get dropped when defendant pleads to basic offences

1.122 Some consultees considered this to be a risk arising from the current practice whereby, in most hate crime cases, the indictment contains alternative charges, one for the basic and one for the aggravated form of the offence. As we explained in the consultation paper,[50] this practice reflects CPS guidance on prosecuting racial and religious hate crime and is intended to deal with the problem of magistrates not being permitted to return alternative verdicts for lesser charges not specified in the indictment.

1.123 Northamptonshire Police indicated that CPS lawyers often drop the aggravated charge in order to ensure they obtain a conviction. Stonewall also referred to "anecdotal evidence [which] suggests that plea bargaining…can lead to the hostility element being dropped and the offender being prosecuted for the basic offence only".

1.124 Victim Support felt that hearing hostility evidence only at a separate *Newton* hearing "encourages prosecutors and the court to accept guilty pleas for the basic offence only" (as opposed to an admission of separate hostility allegations which could result in a higher sentence albeit still within the threshold allowed for the basic offence).

[50] CP, paras 2.42 to 2.45.

1.125 At the symposium, the President of the Justices' Clerks Society, Graham Hooper, pointed out that the difficulty in proving hostility with sufficient evidence, coupled with defendants' reluctance to admit to aggravated offences, often leads to prosecutors having to accept a plea to the basic offence to secure a conviction. He said that several magistrates with experience of hate crime trials were agreed as to the root cause of this: the information on the "abbreviated file" now used for all prosecutions in the magistrates' courts is very rarely detailed enough to withstand a defence challenge.[51]

1.126 A solicitor from Freemans speaking from the floor at the symposium) said that, based on her experience in defending clients against aggravated offence charges, plea deals are only made where evidence of the hostility element is weak but there is strong evidence in support of the basic offence.

Complexity

1.127 The Senior Judiciary were strongly of the view that aggravated offences should not be extended, adding a number of observations about the offences based on their experience and that of circuit judges, who deal with aggravated offence prosecutions. They noted there was "a certain illogicality in treating hostility based on sexual orientation, disability and transgender identity differently from racial and religious aggravation"[52] but added that this was "no more than a reflection of the piecemeal way in which the [legislative] developments have taken place". The judges described aggravated offences as "surprisingly complex to interpret and apply [and] notoriously difficult to litigate". They said:

> The distinction between what has to be proved in an offence brought under limb (a) (demonstration of hostility) and limb (b) (motivation by hostility) can be problematic conceptually and evidentially. The distinction is fundamental and has been the subject of several appellate decisions e.g. *G and T v DPP* [2004] EWHC 183 (Admin); (2004) 168 JP 313 and *DPP v M* [2004] EWHC 1453 (Admin); [2004] 1 WLR 2758. But it is not unknown for an indictment to plead both limbs in the same count. This is theoretically possible where the facts of the case satisfy both limbs simultaneously (*Jones v DPP* [2011] 1 WLR 833) but it makes for difficulty and confusion in presenting the case and can lead to highly technical legal arguments.[53]

1.128 Similarly, Professor Richard Taylor preferred reform Option 1 because of his unwillingness to see the complexities of the current aggravated offences

[51] Responding to the point, Arwel Jones of the CPS emphasized that the guidance is clear on accepting pleas to lesser charges, stating that this can never be done for reasons of "expediency." See further CP, paras 2.42-2.44. The CPS guidance on prosecution of aggravated offences also says that one reason for accepting a plea might be a lack of evidence strong enough to support hostility (see http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a30).

[52] The Council of Circuit Judges also described the "split system" between section 145 and aggravated offences as "illogical."

[53] We discuss these appellate decisions and the difficulties arising from the two alternative ways of establishing hostility at CP paras 2.10 to 2.12.

extended to further characteristics. He has written elsewhere[54] that there are "legal difficulties inherent in the legislation" chiefly as a result of the alternative two limbs of aggravation and that extension would be "inappropriate and counterproductive and would only exacerbate existing difficulties..." For these reasons he believes that creating new offences would be "an unnecessary diversion".

1.129 Many of the participants at a meeting of the Sandwell and Dudley Adult Safeguarding group on 6 September were sceptical of the benefits new aggravated offences would bring. They considered that adding new offences would add complexity to the legal system, whereas sentencing powers (including for hostility, under section 146, and to reflect the targeting of a vulnerable person or the abuse of power or trust, under general *Seriousness* guideline[55]), if used correctly were the best means of achieving the right sentence for crimes against people with disabilities.

1.130 At a meeting of the Government's Independent Advisory Group on hate crime,[56] Mr Iqbal Bhana (Deputy Chair) said that while in principle there should be no distinction between the regime applicable to race and religion and that applicable to the other three characteristics, equality of treatment was in practice capable of being produced by the better application of enhanced sentencing. He feared little would be gained by extending the aggravated offences in view of the further complexity they would introduce.

1.131 Dr Andrew Wilson preferred a sentencing-based only response because of the "potential for mistakenly assuming intent in actions that were not perceived as malicious by the perpetrator". He felt that specific aggravated offences relating to the three characteristics concerned are "more likely to create problems for the very groups [they] seek to protect", adding:

> Inferring hate from a "volley" of insults is problematic when it is likely to involve language that people may use to describe their own actions. It smacks of a middle class interpretation of language and conflict that lacks appreciation of the cultural context and situational factors. There is good reason to believe that individuals who engage in extreme violence against vulnerable people are themselves "damaged" in some way. The research on bully-victims suggests a link that if proven in a case should raise a question mark over the validity of ranking "hate" above the other emotions at play. Motive in such cases cannot be detached from the perpetrator's antecedents…

Combined system risks aggravating factors not being taken into account

1.132 For the Senior Judiciary, the additional complexity in the combined system currently applicable to racial and religious aggravation was a further reason to prefer a sentencing-only approach over extending the aggravated offences.

[54] Prof R Taylor, "The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?" (2014) 13 *Contemporary Issues in Law* 76.

[55] See footnote 17 above.

[56] This took place on 30 July 2013.

> Where the aggravated offence is charged but is not proved, the judge is not, of course, permitted to sentence for the basic offence in a way which reflects the aggravation which had been alleged: *R v McGillivray* [2005] 2 Cr App (S) 60. However, it has been suggested that, as a matter of principle, the same restriction may apply if the aggravated offence could have been charged on the evidence but was not charged: *R v O'Callaghan* [2005] 2 Cr App (S) 83. This raises a serious practical issue. For if the aggravated offences were extended to include hostility based on sexual orientation, disability and transgender identity and, in a particular case, such an offence could have been but was not charged, the court sentencing for the basic offence would be precluded from finding, even on proper evidence, that there was aggravation by relevant hostility under section 146. Thus the whole purpose of extending the aggravated offences would be defeated.

1.133 Professor Richard Taylor has raised the same problem in a recent article, which discusses *McGillivray* and *O'Callaghan*. He points out that in fact *O'Callaghan* "is not an authority for saying[57] that racial aggravation should not be considered at the sentencing stage where a racially aggravated offence could have been, but was not, charged" but that in fact, as long as the defendant has fair notice that the aggravating factor will be considered as part of sentencing and has an opportunity (for example at a *Newton* hearing) to respond, then section 145 in fact requires it to be considered at sentencing.[58]

1.134 Professor Taylor suggested in his consultation response that in view of these complexities, it would be preferable to repeal aggravated offences and focus on improving the enhanced sentencing system. At the symposium he said that the confused state of the authorities and practitioner guidance left it unclear whether enhanced sentencing under section 145 could be applied where (in a trial for a basic offence on the list of those that can be aggravated), evidence of racial or religious hostility emerges in the course of the trial itself.

1.135 Professor Leslie Moran pointed to the perceived failures of the existing combined regime and asked: "Is the creation of parallel offences and sentence enhancement a useful technique to effectively attack institutional discrimination in criminal justice services?"

Juror selection

1.136 The Senior Judiciary asked whether problems might arise around juror selection and whether it might prove an "intolerable intrusion" to have to ask questions of prospective jurors about their sexual orientation, disability or transgender identity or sympathies in the way that questions are currently asked about religious or racial identity or sympathies where the current aggravated offences are being prosecuted.

[57] As suggested in CPS guidance on prosecuting racial and religious hate crime (http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a11), Anthony and Berryman's at para B5.2B, and in Blackstones at para E1.16.

[58] This view is set out at greater length in Prof Taylor's article: "The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?" (fn 54 above).

ARE LONGER SENTENCES THE RIGHT FOCUS?

1.137 A further point made in relation to a pure sentencing-based approach to reform was that it rests on an assumption that longer sentencing is the main or only answer to the problem of hostility-based offending. Several consultees wanted to question this assumption. For example, Respond argued that community-based justice, mediation and restorative justice are insufficiently used. Similarly, Bromley Experts by Experience and Inclusion London asked whether longer sentences for hate crime are the right approach at all, referring to the high degree of mental health disorders of those in prison. They suggested that community mediation and restorative justice may be more effective in many cases.

1.138 Dr Mark Walters asked:

> Can amended sentencing provisions help to prevent anti-LGBT and disablist hate crime by challenging the prejudices which underlie it? I would assert that sentencing provisions alone cannot effectively achieve this… It is doubtful that enhancing penalties (at least at the sentencing stage) will have either any individual deterrent effect on offenders or any rehabilitative quality (see Jacobs & Potter 1998). It is therefore highly unlikely that punishing someone more will make them, or others, hate less (see Moran et al 2004).[59]

1.139 Independent Academic Research Studies also doubted the deterrent value of longer sentences in the context of hate crime and those who commit it.[60]

1.140 Similar points were made by many who attended the Birkbeck Gender and Sexuality forum meeting.[61] Participants argued that: it is wrong to think that stiffer penalties will help bring about greater equality for victims of hate crime when in fact the opposite is true; those who victimise are often victims themselves; hate crime legislation is not preventive but purely retributive; many victims of hate crime do not see longer punishment as an answer but rather they want the offending to stop and they would like to see more use of restorative justice and community-based healing processes. Participants felt that too big a focus on law and punishment risks losing sight of the bigger underlying problem: society's fears about difference, disability and dependency. They considered that new offences would probably be counterproductive when set against wider framework of cuts in budgets for justice, policing and disability benefits. Several members of the group spoke of a "disconnect between the laws on hate crime and people's day-to-day, lived experience of the reality of hate crime".

[59] See similar arguments raised by other consultees, as set out in Part 3: Other Comments below, from para 3.16.

[60] IARS (though in favour of extending the offences on equality grounds) said it was "highly unlikely that potential perpetrators of hate crime would be deterred by the prospect of higher sentencing or a more serious criminal record. [Their workshop participants] pointed out the vast majority of people are unaware of the detail of hate crime legislation, which precludes the possibility that it could be a factor informing their decisions."

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

1.141 Kent Police were concerned about over-penalising relatively low-level offending by bringing it into the aggravated offence framework. "The risks are that [extending] would aggravate lower offending in a minority of cases where it would be inappropriate to do so."

1.142 Dr John Stanton-Ife considered sentencing a preferable approach to extending aggravated offences, but added: "While in general prison sentences are currently too high,[62] the more accurately they are labelled and the more informatively they are communicated to offenders, victims and the public in general, the better." This led him to prefer reform Option 1, at least pending further review.

REVIEW OF AGGRAVATED OFFENCES REQUIRED

1.143 Other consultees argued that a more in-depth review of the current aggravated offence system is required than was permitted in this project. Dr Findlay Stark argues that "it would be far more sensible to start afresh with a tailored response to the problem of hate crime against these groups".

1.144 Seamus Taylor CBE said the aggravated offences were created to deal with racist crime, but:

> If the aggravated offences are extended to include all 5 protected characteristics, a significant proportion of hostility based crime against disabled people, lesbians and gay men and transgender people may be untouched by the new aggravated offences. A more appropriate response would involve identifying over time the most frequent and pertinent disability aggravated, sexuality aggravated and transgender aggravated crimes and devising strand specific aggravated offences which may share offence categories with all other protected strands whilst also having strand-specific dimensions. I think this is a key issue to be addressed in progressing the agenda appropriately and effectively.

1.145 Scope noted "the limitations of the current aggravated offences would be perpetuated in the case of extension as it falls beyond the remit of the Law Commission to consider changing the list of basic offences which are capable of being aggravated under the Crime and Disorder Act (CDA) 1998. We appreciate this may fall out of scope of the current inquiry, however there is nothing to pre-empt the prescribed list of basic offences being reviewed at a subsequent stage should the Government be minded to consider this."

1.146 Disability First said that while most disability hate crime involves "harassment, verbal abuse, intimidation, damage to property" there is a problem particularly with learning disabled people of "mate crime", extortion, theft and forgery and this suggested the need for a review of the aggravated offence regime to ensure all potential offence types were capable of being charged in the aggravated form where hostility was present.[63] Jane Healy also noted that while this level of review was "beyond the remit of this consultation … offending against disabled

[62] The same view was expressed by Professor Peter Alldridge at the symposium and by several members of the Birkbeck Gender and Sexuality Group.

[63] This consultee recognised this was outside the terms of reference but asked that it be "fed back to the MoJ."

people has historically included greater risks of victimisation through sexual offending, fraud, robbery and burglary, than the other strands". The issue was also raised by the CPS London Scrutiny and Involvement Panel, Dr. Andreas Dimopoulos and Action Disability Kensington & Chelsea.

1.147 Likewise, the TUC said

> the list of basic offences to which the "aggravated" label may be attached do not adequately cover the types of hate crime typically committed against people on the basis of their disability, sexual orientation or transgender identity. We encourage the government to review and potential[ly] expand the list of basic offences in light of this.

1.148 The EHRC also referred to emerging evidence that the

> types of crimes disabled victims of hate crime experience are different from those experienced by other hate crime victims… The addition of specific offences for disability related hate crimes under aggravated offences legislation would enable clarity of focus from the outset for frontline officers to explore and investigate.

1.149 Jo Thacker made a similar point in relation to learning disabled (LD) people:

> The sexual abuse of people with a LD is extremely common (some studies have suggested 90% of people with a LD have been sexually abused). This crime is motivated by the fact that people with a LD are easy to manipulate and frighten and there is a huge power difference between them and their abuser. Whether this is a hate crime is open to debate but it may help secure convictions and fair sentencing if it was treated as such.[64]

1.150 Professor Leslie Moran asked whether the same problem might exist in relation to homophobic and gender identity related hate crime, giving the particular example of "sexual assaults and rape in particular [which] are one form of violence more likely to be experienced by lesbians and trans people". This point was echoed by Galop who said they frequently dealt with cases of "homophobic robbery of men who use cruising grounds [and] transphobic sexual assault".

1.151 On the other hand, Stonewall referred to its latest report on homophobic hate crime and said its own research found that

[64] Note however that the sentencing guideline "Overarching Principles: Seriousness" already allows for the aggravating factors of deliberately targeting a vulnerable person, abuse of a position of power or trust. (See paragraph 1.139 above.)

> 85 per cent of victims of homophobic hate crimes and incidents experienced insults, pestering, intimidation or harassment, 18 per cent were threatened with violence, 13 per cent had their home, vehicle or property damaged and 10 per cent experienced a physical assault. These incidents would most likely be covered if the current list of aggravated offences were extended to cover hostility on the grounds of sexual orientation, in those cases where a criminal offence was committed.

1.152 Some consultees also called for further consideration of the basis on which a particular characteristic, whether "protected" under the Equality Act 2010 or not, should be covered by aggravated offences. Devon and Cornwall Police said: "it may be beneficial to consider how any amendment to regulation associated with aggravated offences will stand the test of time, in particular to consider how protected characteristics can be added or removed from regulations". The NUS considered that the aggravated offences should be "extended to include gender-based violence, that is, where the hostility is based on a person's gender" and referred to their own research on violence against women as students.[65] The SLS raised a similar issue, as did Dr Nathan Hall at a meeting of the Government's Independent Advisory Group on hate crime.[66] (See further from paragraph 1.171 below.)

1.153 Many consultees felt that insufficient statistical or empirical information is currently available to enable a decision to be taken about whether aggravated offences should be extended and if so, in what form.[67]

REPEAL AGGRAVATED OFFENCES TO ACHIEVE EQUAL TREATMENT?

1.154 Many consultees who did not agree that sentencing was capable of providing a sufficient response raised equality arguments as their primary reason for thinking aggravated offences were also needed (see from paragraph 1.171 below).

1.155 However, a few consultees suggested the reverse approach for dealing with the perceived inequality of different characteristics being treated differently: repealing the aggravated offences. Despite this option not having been within the scope of our terms of reference, several consultees expressly or implicitly pointed to it as a way of bringing about parity among the five characteristics as well as simplifying the criminal justice response to hate crime.

1.156 Galop were "open to the possibility of equalizing all hate crime sentencing up to the level of aggravated offences or down to the level of section 145/146". The Justices' Clerks Society added:

[65] NUS, *Hidden Marks: A study of women students' experiences of harassment, stalking, violence and sexual assault* (2010) available from: http://www.nus.org.uk/PageFiles/12238/NUS_hidden_marks_report_2nd_edition_web.pdf (last visited 13 May 2014).

[66] This took place on 30 July 2013.

[67] See further in Part 3: Other Comments, from paragraph 3.37 below.

> We recognise that a simpler and more consistent regime might be achieved if the specific aggravated offences were abolished and provisions such as s 145 and 146 applied to all offences. We believe this would require consideration being given to raising the maximum penalty for a small range of basic offences. We accept this would create difficulty as this could have the effect of making summary only offences ones triable either way and increasing the number of unaggravated offences being heard in the Crown Court.

1.157 Stop Hate UK's position was that "as long as aggravated offences exist for two of the annually monitored strands, we believe they should also exist for disability, transgender identity and sexual orientation". The National Aids Trust similarly stated that "whilst aggravated offences remain on the statute book they should apply equally to all the characteristics which the state considers need legal protection from discrimination". Professor Leslie Moran argued that the logical consequence of Proposal 1 would be that if enhanced sentencing is sufficient for some characteristics it must be so for all, thus rendering aggravated offences superfluous and causing unnecessary confusion.

1.158 South Yorkshire Police also pointed out that having different treatment for race and religion on the one hand and the other three characteristics on the other sent the wrong message and added that although "this is beyond the scope of this consultation it may be that race and religiously aggravated should be withdrawn. As discussed later the race and religiously aggravated offence restricts use of 145 and 146 and it could therefore be suggested that these groups are in fact disadvantaged." This echoes the point made by Professor Richard Taylor, who saw inherent difficulties in the aggravated offences and in the way in which they interact with enhanced sentencing under section 145 CJA 2003. (These points are discussed at paragraphs 1.111, and 1.132 to 1.133.)

1.159 The SLS acknowledged that "there may be good reasons for dealing with hostility at the sentencing stage rather than through the creation of new aggravated offences" and that some arguments against hate crime could be "partially assuaged by moving the focus away from the liability stage and towards sentencing instead. As such, the first proposal does have merit but only within a legislative framework that treats the five characteristics in the same way or gives principled…reasons for treating them differently."

CAVEATS EXPRESSED BY THOSE IN FAVOUR OF A PURE SENTENCING APPROACH

1.160 There were 18 consultees who said they agreed in principle with a pure sentencing approach, but expressed doubts on a practical level about the sufficiency of a pure sentencing approach to hate crime in relation to the three characteristics. Their reasons included: a lack of data on which to assess the system's effectiveness (Derbyshire Constabulary); the fact that enhanced sentencing for hostility towards these three protected characteristics is not yet embedded at all levels of the criminal justice system and wider cross-agency reforms and stronger guidance are needed to improve the response to hate crime (HMCPSI, Disability Rights UK, Disability Hate Crime Network); there is too much focus on longer sentences but not enough on alternative resolutions, for example restorative justice (Greenwich GAD CIL); and that the enhanced sentencing system has been in place long enough now, but its lack of impact would suggest it is cannot be relied on to the exclusion of aggravated offences (CPS).

SENTENCING COULD BE ADEQUATE, BUT AGGRAVATED OFFENCES SHOULD BE EXTENDED NONETHELESS

1.161 38 of the consultees who agreed with Proposal 1 (a pure sentencing approach) also agreed with Proposal 5, that sentencing reforms would not be adequate and that aggravated offences should also be extended. Although this is inherently inconsistent, we interpret it as part of the widely expressed desire to see a more effective criminal justice response to hostility-driven offending against the three protected characteristics and therefore to support all possible reform options. It may also be a reflection of the difficulty some consultees have expressed in making a decision about what measures are most likely to improve the response to hate crime in the absence of reliable information on how the current system is operating. Particularly notable in this regard is the absence of reliable statistics on the use of enhanced sentencing, an issue raised by many consultees. We discuss this further from paragraph 0Part 13.37 below.

1.162 A further explanation for so many consultees taking this position may be that, in their view, a system that differentiates between different characteristics is unfair or sends the wrong message about the seriousness with which all hate crime is taken. The response of the CPS (who were in this category) is indicative of this view. They considered that although section 146 was capable of providing an adequate response, extending the aggravated offences:

> sends out a strong message that will help to improve public confidence. As indicated in the Consultation Paper, there is a widely acknowledged problem of under-reporting in relation to disability, sexual orientation and transgender hate crime. Research suggests that many people with disabilities come to accept disability-related harassment as inevitable. This proposal would clearly demonstrate that this is unacceptable. This proposal is sensible and a step forward in harmonising the approach to hate crime by having a common approach for all five protected characteristics, rather than having two covered by specific statutory offences and the other three covered by the section 146 uplift provisions.

No

1.163 Overall, 44 consultees answered "no" to the question whether enhanced sentencing is capable of providing an adequate response. The reasons they gave fell into three categories:

(1) A small number were against the use of enhanced sentencing for hate crime in principle or did not think this should be the main focus of the criminal justice system.

(2) Many consultees, though in favour of enhanced sentencing and of our proposed reforms to make it more effective, considered that other measures and improvements, besides aggravated offences, were also required for an effective criminal justice system response to crime driven by hostility against the characteristics of disability, transgender and sexual orientation.

(3) In the opinion of some consultees, aggravated offences would need to be extended to cover the three characteristics, in addition to other reforms. For some, this was due to perceived advantages in the aggravated system but for others they key reason was a wish to address the formal inequality between protected characteristics.

We analyse these consultees' responses in the same order in the following sections, from paragraph 1.67.

1.164 In the alternative version of this question in our easy-read response document, we asked: "If we changed enhanced sentences would that be enough?" (This followed questions asking whether consultees agreed with our two sentencing reforms, which they did unanimously: see paragraphs 1.28 and 1.53 above.) All answered "no", expressing the view that aggravated offences also needed to be extended: for equality reasons: to ensure long enough sentences would be available: and to send a message to potential perpetrators and society at large that hate crime was treated equally seriously whichever protected characteristic was involved.

AGAINST ENHANCED SENTENCING IN PRINCIPLE

1.165 John Troke and Ursula Solari were against enhanced sentencing in principle, though for distinct reasons (those described at paragraph 1.51 above).

NO, BECAUSE OTHER MEASURES ARE ALSO NEEDED

1.166 Many of these consultees considered that enhanced sentencing alone was not sufficient and called for other reforms, many of which fall outside the scope of this consultation but may fall within the broader scope of the Government's ongoing hate crime action plan. Key issues raised are briefly discussed below.[68]

[68] Many of these issues are covered in greater depth later in Part 3: Other Comments.

1.167 Victim Support in addition to sentencing reform also wished to see more done "to deal with the overall problem of societal attitudes and intolerance towards diversity". They urged greater use of victim led restorative justice approaches and specific rehabilitation programmes "… [to] be offered as alternatives to increasing the sentence if appropriate, rather than increasing the sentence of an offender to spending more time in a hate filled environment such as prison." Reform said "a community based response is required for meaningful and lasting change".

1.168 The EHRC suggested that

> appropriate measures be put in place to ensure that criminal justice agencies are briefed, encouraged and supported in enabling all legal provisions to be appropriately applied, and monitoring of the application of s146 CJA 2003 by prosecutors and courts is undertaken to ensure it is being applied proportionately.

1.169 Other negative aspects of the enhanced sentencing system were raised in answer to this question but have been covered in the section above, "Current problems with enhanced sentencing"[69] so will not be repeated here.

NO, BECAUSE AGGRAVATED OFFENCES SHOULD ALSO BE EXTENDED

1.170 Overall this was the most common reason given by consultees who disagreed that sentencing alone was capable of providing a sufficient response. We now turn to their main arguments.

Equality: the same laws should apply to all characteristics

1.171 Many consultees who rejected the pure sentencing approach did so on the basis of equality arguments. They contrasted a pure enhanced sentencing system with the combined system of aggravated offences plus enhanced sentencing, which applies currently to racial and religious aggravation. They noted that our Proposal 1 would effectively leave that combined system in place, perpetuating an arrangement whereby racial and religious hostility is treated differently to hostility on grounds of disability, sexual orientation or transgender identity.

1.172 Many consultees felt that there should be complete parity as between the characteristics covered by the aggravated offences and the enhanced sentencing system. Having different systems in place for different characteristics in their view sent a message to hate crime victims, offenders and wider society that hate crimes against those with characteristics A and B are less serious than hate crimes that against those with characteristics C, D and E. In addition it was argued that the present state of the law is confusing for victims and professionals alike.

1.173 However, simply producing formal equality across groups was not seen as the main issue by some. For example, some of those who attended the Birkbeck Gender and Sexuality Group forum[70] said during workshop discussions that extending the existing hate crime offences risked "making bad law worse" and that it was wrong to suggest that simply "equalising and neatening" the current

[69] Outlined from para 1.3 above.

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

offences would be a good answer to the problem of hate crime. Instead, they felt, there should be more focus on examining people's actual experience of hate crime to ensure that the right methods, including educative, mediation-based, and non-custodial solutions based on a "social contract" approach to justice, were given sufficient resources.

1.174 Some consultees described hate crime legislation as deriving principally from a need to tackle discrimination and prejudice. For example, the National Aids Trust said the "discrepancy [between the characteristics] should not be allowed to continue in a protective framework which is meant to be about promoting equality" and Stop Hate said: "Hate Crime Legislation is (or should be) about equality."

1.175 The Equality and Human Rights Commission[71] backed the extension of aggravated offences on (inter alia) equality grounds. Similarly the Equality and Diversity Forum[72] said

> The law should offer equivalent quality of protection and benefits to all those who are at risk of discrimination. Part of our vision is for a society in which people can express their identities free from the threat of violence and everyone is treated with dignity and respect'. We therefore welcome the Law Commission's proposals to extend the law in relation to hate crimes which will provide greater protection for disabled people, as well as lesbian, gay and transgender people and will equalise the protection offered to them.

1.176 The Federation of Muslim Organisations referred to the need for equal treatment and saw our provisional proposals as a way of strengthening anti-discrimination provisions in the Equality Act. They explained that "Islam places special emphasis on the concept of protecting the vulnerable in society so that they receive the adequate support when confronted with discrimination or persecution in any form". Leonard Cheshire Disability similarly noted it was "important to offer equivalent protection to all who were "at risk of discrimination and hate crime".

1.177 Dr Mark Walters said hate crime legislation was

[71] This Commission described itself as: "a statutory body, established under the Equality Act 2006. Its statutory duties include, among other things, to promote equality of opportunity, work towards the elimination of unlawful discrimination, and promote awareness, understanding and protection of human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act".

[72] The Equality and Diversity Forum is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination.

> recognition of the history of prejudice-based victimisation that certain groups have had to endure and that the state is willing to do something about it. [Professor] Alon Harel (1999-2000)[73] refers to this as the "fair protection paradigm". This paradigm requires the state to take account of disparities among individuals who are vulnerable to victimisation. This aspect of hate crime legislation is essential to groups who feel vulnerable to abuse and who demand greater protection from it by the state - especially considering that it has been the state itself that has often been the cause of minority group oppression.

1.178 Stop Hate UK said:

> At the heart of Hate Crime legislation should be the promotion of equality. We believe it is necessary to extend the aggravated offences to promote equality between the five monitored strands (which link to some of the groups of people who are likely to experience Hate Crime).

1.179 Noting that sexual orientation, transgender identity and disability are all protected characteristics under the Equality Act 2010, some consultees regarded the current system as discriminatory, in that it operates a "two-tier" system or implies a "hierarchy of victims" (phrases used by, for example, Galop, Leicester Hate Crime Project, Independent Academic Research Studies).[74]

1.180 The SLS saw a need to ask why race and religion should be treated differently to the other three characteristics and said that for these purposes "a good starting point is to consider developments in equality legislation where equal protection is given to race, religion, sexual orientation, disability and transgender identity under the Equality Act 2010".

1.181 Several consultees referred specifically to the public sector duty set out in section 149 of the Equality Act.[75] Cheshire Constabulary and Leicestershire Police said: "Proposal 1 does not assist public bodies in achieving points 2 and 3 of the duty."[76]

1.182 Some consultees referred to the current law as creating a problem of "equality before the law". Professor Leslie Moran said:

[73] A Harel and G Parchomovsky, "On Hate and Equality," (1999) 109 *Yale Law Journal* 507.

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

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

> A foundational principle to be applied in relation to all proposals must be that of equality under the law. Offering a solution that limits official recognition to some status categories while denying it to others goes against equality under the law… It gives out a message to all that some citizens are more equal than others.

Professor Christian Munthe also referred to the need for equality before the law.

1.183 Galop saw sentencing reforms as a necessary first step but not a long-term solution to what they consider an inadequate CJS response to hate crime affecting LGB and T people. Galop considered that our proposed sentencing reforms "would narrow the current fairness gap" but would still leave "a measure of systemic inequality between hate crime strands" (one which they also said could be dealt with by repealing the current aggravated offences altogether: see above from paragraph 1.54).

1.184 The Lesbian and Gay Foundation referred to "sexual orientation, disability and gender identity appearing to sit below other characteristics such as race". Equalisation of the law "would send a positive message that hate crime motivated by sexual orientation, gender identity and disability is taken seriously". West Midlands Police saw a need to offer "better protection and service for some of our most vulnerable communities".

1.185 Greater Manchester Police pointed out that as legislation on sentencing already recognises all five characteristics "why should there be a difference in sentencing?[77] This creates a sense amongst those affected communities that "their hate crime" is not seen as serious, as impactive upon them and society and this should not be the case." Dr Mark Walters and Diverse Cymru made similar points.

1.186 The Justices' Clerks Society believed that "the decision having been made that these groups require protection, it is appropriate that they should be afforded the same protection as those other groups".

1.187 For the Senior Judiciary the current system presented "a certain illogicality" in its differentiation between characteristics, but this was simply a consequence of the piecemeal introduction of different provisions. Equality before the law and the provisions of the Equality Act did not feature in the judiciary's response, nor in the responses of other legal professional bodies such as the Law Society, the Bar Council, the Criminal Bar Association, the London Criminal Courts Solicitors Association and Teesside and Hartlepool Magistrates. As for the Magistrates Association, the Equality Act did not necessarily provide the correct starting point in terms of selection of characteristics and, indeed, risked a loss of focus on the true purpose of hate crime law.

1.188 This view led the Magistrates Association to add that

[77] We interpret this to mean a difference in the maximum sentence available for racial or religiously aggravated offences, and the maximum sentence for offences in relation to which enhanced sentencing is the only way specifically to recognise the greater seriousness resulting from hostility as an aggravating factor.

> crimes committed where the perpetrator demonstrates or is motivated by hatred of any difference between the perpetrator and the victim should be sentenced in the same way. There is a danger otherwise that a wave of hate crime on the grounds of gender, occupation, social class etc would lead to the law being changed piecemeal as public opinion found such behaviour unacceptable.

1.189 Dr Nathan Hall[78] commented in a meeting of the Government's Independent Advisory Group on hate crime that a real difficulty arises as to a potentially unlimited list of characteristics vulnerable to hate crime, each with strong claims to equivalent protection. Adding further characteristics may solve one problem but it gives rise to another when a victimised group is not included: for example, the homeless, or those in alternative sub-cultures.

1.190 The Magistrates Association made a similar observation:

> The Equality Act 2010 stipulates these "protected characteristics" which must not be used to discriminate: - Disability - Gender reassignment - Pregnancy and maternity - Race - Religion or belief - Sex - Sexual orientation. What is the logic in having different characteristics for hate crime from those used to determine discrimination? The latter can lead to the former. The Magistrates Association considers that any inclusive list is counter-productive and serves to suggest that hostility on the grounds of other attributes is in some way more acceptable.

1.191 Victim Support said the "law needs to be reformed to indicate that a victim being targeted because of hostility towards their personal characteristics is wrong.[79]

1.192 Stop Hate UK raised the further issue of an additional duty towards persons with a disability, arising as a result of the UK's ratification of the UN Convention on the Rights of Persons with Disabilities ("CRPD"). As Stop Hate UK explained:

[78] Dr Hall is the author of *Hate Crime* (2nd ed 2013). The chapter on "Victims and Victimisation" discusses some of the arguments for and against the selection of particular characteristics for protection under hate crime legislation, including not only the characteristics currently protected under English law but also: gender, age, alternative subcultures and homelessness.

[79] A similar point was made by consultee Carole Gerada, a member of the public.

> Under [article] 5.1, states are required to recognise that all persons are equally entitled to the protection and benefit of the law, while 5.2 provides that states are required to prohibit discrimination against disabled people and guarantee disabled people equal and effective legal protection against discrimination. Hate Crime is one way in which discrimination manifests. Furthermore, Article 16.1 of CRPD requires states to take all appropriate legislative steps to protect disabled people, inside and outside of the home, from exploitation, violence and abuse. This is followed by 16.5, which requires states to put in place effective legislation and policies to ensure that instances of exploitation, violence and abuse are identified, investigated and, where possible, prosecuted. It is Stop Hate UK's view that a disability aggravated offence amounts to an appropriate and effective legislative measure for tackling this form of Hate Crime.

1.193 Dr Andreas Dimopoulos also argued that the CPRD provisions made the case for extending legislation for disability stronger than for sexual orientation or transgender identity.[80]

Parity would simplify system

1.194 Other consultees said that uncertainty and confusion are caused by the different treatment of characteristics under the current regime (Merseyside Police, Devon and Cornwall Police). They considered that the system for dealing with hate crime would be simpler for victims and professionals to understand if all the offences were extended to cover all five characteristics (Merseyside Police, Cleveland Police, and others).

1.195 Extending aggravated offences "would create more clarity", "provide police with clearer powers to deal with such incidents" (British Transport Police) and "enable a clearer understanding of the law and its application by professionals across the Criminal Justice System…in addition to aiding the public understanding of hate crime, which is currently lacking" (Diverse Cymru). It was also argued that clearer charging and sentencing guidelines applicable to all five groups, with a clear list of offences capable of being charged as aggravated would ensure appropriate charge selection and produce greater consistency of response to hate crime across all the five characteristics (Diverse Cymru).

Longer maximum sentences are needed in a few cases

1.196 The Justices' Clerks Society, Merseyside Police, the EHRC and Victim Support all raised the longer potential sentences as a key reason why aggravated offences should be extended. As some consultees also noted, sentences for basic offences cannot be referred to the Court of Appeal as unduly lenient, whereas sentences for all aggravated offences can be so referred.[81]

[80] Scope also referred to this provision.

[81] As discussed at paras 3.42 to 3.44 of the CP.

1.197 Several consultees pointed to what they considered excessively lenient sentences handed down in cases prosecuted as "hate crime". The Equality and Human Rights Commission, drawing a contrast with sentences handed down for cases of disability hate crime, even where section 146 had been applied, argued: "Aggravated offences provide punishments which more adequately reflect the hate crime." Victim Support said that the difference in maximum sentences for aggravated offences (compared with equivalent cases where only a basic offence can be used, with enhanced sentencing applied) fails to give due recognition to the ordeal of victims of crime driven by hostility based on one of these three characteristics. They said that enhanced sentencing could not be sufficient on its own because it "does not increase the available maximum sentence, and thus risks not reflecting or recognising the additional harm caused to the victim".[82]

1.198 People First made a similar argument. Referring to *Sheard*[83] and also to SCOPE's *Getting Away with Murder* report,[84] they said: "Lenient sentences shake disabled people's faith in the judiciary and act as a deterrent to reporting disability hate crime and taking court action." To put this right, in their view, there had to be parity of sentences available for all types of hate crime and other crime against people with disabilities. Greater Manchester Police also spoke of a "real sense of injustice in the maximum penalties a defendant can receive on conviction".

1.199 The Justices' Clerks Society accepted the Law Commission's findings that sentences handed down for aggravated offences rarely exceed the maximum level even of the basic offence equivalent, but pointed to the occasional need for the additional tariff provided by the aggravated offences for "lower end summary offences (Public Order Act and common assault)". The CPS also took this position.

1.200 On the other hand, the Senior Judiciary argued:

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

[82] Similar points were made by Merseyside Police and Diverse Cymru.

[83] See footnote 3 above.

[84] Scope, *Disability Hate Crime: Getting Away with Murder* (2008), available from: http://www.scope.org.uk/sites/default/files/pdfs/Campaigns_policy/Scope_Hate_Crime_Report.pdf (last accessed 13 May 2014).

1.201 Some consultees referred to the fact that sentences for some offences cannot be referred to the Court of Appeal as unduly lenient, even in cases where enhanced sentencing has or should have been used. All sentences for aggravated offences, by contrast, can be referred as unduly lenient.[85] On this point Diverse Cymru[86] said:

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

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

> We should be surprised if, on examination of the statistics, there have been more than a handful of racially or religiously aggravated offences (under ss.28-32 CDA 1998) which have been referred to the Court of Appeal solely because the element of racial or religious aggravation was not sufficiently marked in the sentence.[87]

Symbolic, communicative, denunciatory effect of specific offences

1.203 Many of the consultees who rejected Proposal 1 were of the opinion that aggravated offences go further than enhanced sentencing by expressly recognising the additional seriousness and blameworthiness of hostility based offending.[88]

1.204 Speaking at the symposium, Dr Mark Walters accepted that aggravated offences do not deter in any direct sense. He argued that their communicative value lies in their transformative effect on social norms and attitudes, displacing offenders' belief that their conduct is justifiable and has the tacit support of society. He gave the effect of the smoking ban as an example of how attitudes change when legislation is used to displace or challenge the view that harmful conduct is acceptable. Since the ban came into force, Dr Walters believed, people generally have become far less tolerant of smokers and smoking.

[85] This issue is discussed at para 2.50 and paras 3.42 to 3.44 of the CP.

[86] It was also raised by the EHRC, the TUC, Bromley Experts by Experience and Inclusion London, Royal National Institute of Blind People and Guide Dogs for the Blind.

[87] We have examined and reported cases and the available statistics these bear out the point made here.

[88] See paras 1.22 to 1.25 above for the views expressed by Dr M Walters and others to this effect.

1.205 On the other hand, Baljit Ubhey OBE, also speaking at the symposium, believed sentencing remarks were capable of expressing the clear message that hate crime is not tolerated, but more could be done in this respect. The CPS had progressed in this area by reporting in more detail about hate crime prosecutions and their sentencing, but magistrates' and Crown courts had a bigger part to play in making sure sentencing remarks in hate crime cases clearly emphasised the hostility finding.

REFORM OPTION 2: EXTENDING THE AGGRAVATED OFFENCES[1]

1.206 Of the 134 who responded to this proposal, 108 respondents were in favour of extending the aggravated offences[2] without qualification and a further 7 agreed but expressed caveats, largely about the need to look again at the basic offences capable of being aggravated to ensure they met the requirements of the three characteristics and the type and prevalence of hate crime against them.[3] All 8 consultees who replied using the easy-read form considered that aggravated offences ought to be extended.[4]

1.207 Several consultees provided comments explaining their reasons. Principal among these were considerations of: equality; the need for parity across characteristics already recognised as protected for sentencing and monitoring purposes; the communicative, symbolic and denunciatory effect of creating specific offences; longer maximum sentences; and flaws seen as inherent in the application of sections 145 and 146.

1.208 Much of the ground in relation to all these perceived benefits of extending aggravated offences has already been covered in this analysis (at paragraphs 1.170 to 1.205 above).

1.209 Where additional points were raised beyond those discussed under Option 1, we discuss these in the "Further arguments" section below from paragraph 1.212.

1.210 Some consultees in favour of the extension of aggravated offences expressly pointed out that they were also in favour of the reforms to sentencing proposed in the consultation paper and said they believed they would deal with the problems currently seen in enhanced sentencing. Nevertheless they did not consider the response to hate crime would be sufficient without also extending the aggravated offences.[5] Such consultees included the Crown Prosecution Service, Worcestershire Safeguarding Adults Board and Practitioner Alliance for Safeguarding Adults (PASAUK). Cumbria Constabulary felt that existing legislation did "not currently provide adequate protection" to those with the

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

[2] 38 consultees adopted an inherently ambiguous position, in that they agreed with both P1 and P5. We gave possible reasons for this at para 1.161 above.

[3] Jane Healy, Disability First, Action Disability Kensington & Chelsea, the TUC, Prof Leslie Moran and Dr Andreas Dimopoulos.

[4] Of these, five gave detailed comments, all of which advanced the argument that there should be equal treatment across the protected groups as a matter of principle, with Speaking Up Southwark additionally citing the need to ensure a clear message is sent regarding the unacceptability of harassment and other hate crimes against disabled people.

[5] On the other hand 38 consultees were both in favour of Option 1 (a pure sentencing reform approach) and Option 2: an inherently inconsistent position, as we discuss at para 1.161 above.

relevant characteristics but added: "We have no evidence of current sentencing powers being insufficient."[6]

1.211 Stonewall were in favour of extending but said that "improving the operation of the enhanced sentencing regime is likely to have the greatest impact in improving the criminal justice system's response to homophobic hate crime". Similarly Stop Hate UK, while also favouring extension of criminal offences, said that our combined sentencing reforms "could have the effect of vastly improving the operation of section 146 (and section 145) in the courts". Mr Iqbal Bhana expressed a similar opinion at a meeting of the Government Independent Advisory Group on hate crime.[7]

Further arguments for extending

1.212 Several consultees said that crime driven by hostility based on the characteristics of disability, transgender identity or sexual orientation is under-reported. They considered that extending the offences could improve public awareness of what hate crime is, raise levels of confidence in the criminal justice system's ability to tackle it, and help encourage more hate crime victims to report offences against them and more witnesses to come forward. Those expressing this view included HM CPS Inspectorate, Stop Hate UK, UNISON, Stonewall, Victim Support, Essex Police, Northamptonshire Police, Greater Manchester Police the Crown Prosecution Service, Diverse Cymru, Weston and North Somerset DIAL.

1.213 HM CPS Inspectorate referred to their findings in the report *Living in a Different World.*[8] They argued that new offences would bring disability hate crime into the "mainstream" for the police, for whom section 146 CJA was currently "an alien concept" according to their report's findings. "The proposed new offences would assist the police by clearly moving this type of offending into the same category as `racially or religiously aggravated offences' (which they are familiar with) and where the hostility/motivation is a `point to prove' for the police." Stop Hate UK also considered that new aggravated offences would "have a positive impact on the operation of section 146", for similar reasons, as did Greater Manchester Police, Devon and Cornwall Police and Weston and North Somerset DIAL.

1.214 Essex Police commented on the "vast increase in the amount of disability hate crime being reported to us". They explained this as being

> partly due to our improved recognition of this type of crime but also our improved links to community groups and their growing confidence in the police. Having a specific offence based on the grounds of disability, sexual orientation or gender identity will encourage victims to come forward and reports incidents to the police because a change in law will demonstrate our recognition of the different types of hate crime and our commitment to deal with their complaints positively and robustly.

6 See the similar remark made by British Transport Police at para 1.13 above.

7 This took place on 30 July 2013.

8 See fn 25 above.

1.215 Some consultees who were in favour of extending cited their own research on hostility-driven offending in support of their view. These included the NUS,[9] Galop,[10] Stonewall,[11] EHRC,[12] Mencap,[13] and the Mental Health Foundation.[14]

Arguments against extending

1.216 19 consultees disagreed with the proposal to extend, most commonly because they were of the view that sentencing reform was the preferred option and that, once reforms had been implemented, enhanced sentencing was capable of providing a sufficient response.

1.217 A number of further points were made by those rejecting or questioning the case for extension. In summary, apart from those who were against aggravated offences or longer sentences in principle, the arguments focused on: flaws with the aggravated offences; the fact that they were not tailor-made with other characteristics than race in mind; the advantages of enhanced sentencing as a response to hate crime; and the need to allow reforms to enhanced sentencing to take effect. We now give more detail on these arguments.

1.218 John Troke answered "no" because he considers hate crime legislation is disproportionate and should be repealed. Ursula Solari wanted to see more emphasis on restorative justice and community based systems:

> The criminal justice system is highly discriminatory, and sentencing patterns tend to target the most socially marginalised and vulnerable people in society. The same groups (ethnic minorities, disabled people and LGBT people) who are meant to be protected by the proposed legislation are most likely to end up in jail.

[9] National Union of Students, *No Place for Hate: Hate Crimes and Incidents in Further and Higher Education: Disability* (2011), available from: http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Disability.pdf (last accessed 13 November 2013) and *No Place for Hate: : Hate Crimes and Incidents in Further and Higher Education:: Sexual Orientation and Gender Identity* (2011), available from: http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Full_Report.pdf (last accessed 13 May 2014).

[10] Galop, *The Hate Crime Report* (2013). Available from: http://www.galop.org.uk/wp-content/uploads/2013/08/The-Hate-Crime-Report-2013.pdf (last accessed 13 May 2014).

[11] Stonewall, *Homophobic Hate Crime: The Gay British Crime Survey 2013* (2013), available from: http://www.stonewall.org.uk/documents/hate_crime.pdf (last accessed 13 May 2014).

[12] Equality and Human Rights Commission, *Hidden in Plain Sight: Inquiry into Disability-Related Harassment* (2011), available from http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/ (last accessed 13 May 2014) and *Out in the Open: A Manifesto for Change* (2012) available from http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/out-in-the-open-manifesto-for-change/ (last accessed 13 May 2014).

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

[14] Foundation for People with Learning Disabilities, *Loneliness and Cruelty: People with Learning Disabilities and their Experience of Harassment, Abuse and Related Crime In the Community* (2012), available from: https://lemosandcrane.co.uk/home/resources/loneliness.pdf (last accessed 13 May 2014).

1.219 A solicitor from BSB Solicitors (speaking from the floor at the symposium) warned of the adverse consequences of over-criminalisation, and suggested that sentencing reforms could have greater benefits than creating new offences. She noted the high number of mentally disordered defendants going through the criminal justice system and argued that over-proscription already results in too many of these individuals being prosecuted when there is nothing to be gained from their prosecution.

1.220 Christian Concern and Christian Legal Centre said:

> At present there is insufficient evidence to warrant the creation of additional offences akin to the existing aggravated offences created by section 29 to 32 of the Crime and Disorder Act 1998. The few instances of these crimes can be sufficiently dealt with by the sentencing court under section 146 Criminal Justice Act 2003, which allows the proposed aggravating features to be taken into account by judges during sentences. As the judiciary appear to be most unaware of these provisions, we believe that a programme designed to increase awareness for the judiciary and practitioners is the appropriate remedy, rather than the creation of new aggravated offences.

1.221 Action Disability Kensington & Chelsea were against extension as they felt that the list of basic offences would not be adequate for disability hate crime.[15] They said:

> The model of aggravated offence used does not readily extend from racist offences and anti-Semitic or sectarian offences motivated by religious intolerance to aggravated offences against disabled people as there are not widely recognized 'disablist' organizations, symbols and insignias and the majority of disablist language is often disregarded and downplayed, not considered 'hate speech'.

1.222 Dr Findlay Stark expressed the same concern and said the offences should not be extended because they "are not tailor-made for the additional groups, and – if the legislation were amended – there might be a feeling in Parliament that this problem has been dealt with adequately. The sentencing proposal is a superior stopgap, in that it leaves more open the possibility of wholesale consideration of the substantive aggravated offences at a later date."

1.223 A similar point was made by the Society of Legal Scholars who, despite considering that as a matter of principle the same legal provisions should be in place for all five characteristics, did not consider it appropriate to extend the aggravated offences at this stage. They said:

> Prior to any extension of the aggravated offences, the optimal approach would be for a comprehensive review of the CDA provisions in order to determine their effectiveness and doctrinal legitimacy. There are several problems with the current legislation, and so extending the CDA without further examination of the provisions would be ill-advised.

[15] Victim Support also referred to the need for a review of the basic offences to ensure all offences capable of being charged as aggravated not just a list of 9.

1.224 Others who were against extending aggravated offences included the Senior Judiciary, the Law Society Criminal Committee, Professor Richard Taylor and Tim Devlin, who all referred to their comments on flaws inherent in aggravated offences and the current system which combined these offences with enhanced sentencing, arguing that enhanced sentencing (alone, but with improvements) was a preferable system for dealing with hostility based offending. (See from paragraph 1.118 above.)

1.225 The Law Society Criminal Committee also considered aggravated offences to be problematic in themselves and felt that, if the offences were extended but were then under-used, little would have been gained. In addition they were concerned at the recent tendency to introduce new offences where these were not strictly required and called for an examination of other ways to address the problem.[16]

1.226 In addition to the specific issues they raised about the difficulty of litigating the aggravated offences (discussed from paragraph 1.118 above) the Senior Judiciary also noted:

> Another practical difficulty which has been encountered in the current aggravated offences arises where joint enterprise is alleged. Whilst all members of a group may be convicted of the basic offence on a joint enterprise basis, there is some authority for the proposition that joint enterprise is not apt to make all members of the group criminally liable for the aggravating feature of racial or religious aggravation, by analogy with dicta in *R v Davies and Ely* [2004] 2 Cr App (S) 29.

1.227 The Senior Judiciary were concerned that extending aggravated offences would have potentially adverse consequences, by "creating offences which are hard to prove and rarely used, ultimately undermining even their symbolic value". They said:

> In deciding whether a new criminal offence is workable it is sometimes instructive to consider how it might be pleaded in the Statement of Offence in the indictment. "Racially aggravated assault", or "religiously aggravated criminal damage" neatly convey the essence of the offence. It would be very difficult, by contrast, to encapsulate crisply in the Statement of Offence the essence of "criminal damage demonstrating or motivated by hostility based on transgender identity". This may be important in assessing the symbolic value of the "descriptor" of the aggravated offence, as compared with the full exposition of the aggravation in a judge's sentencing remarks applying s146 CJA 2003.

1.228 Other consultees were simply of the view that sentencing provided a sufficient response, including the Magistrates Association, Dr Lynne Harne and the London Criminal Courts Solicitors Association.

1.229 Thames Valley Police pointed out that enhanced sentencing already applies to all five groups and that average sentences are, in practice, well below the maximum available for the basic offence. They said:

[16] See also para 1.114 above.

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

1.230 Teesside and Hartlepool Magistrates sounded a note of caution about extending for the wrong reasons: "It would be folly to dismantle the sentencing landscape, create new aggravating offences or introduce new guidelines simply in the hope the public will attain a greater understanding of the [sentencing] process."

1.231 Dr John Stanton-Ife considered that it "is too early to judge that sentencing is not a sufficient response" and that time should be given to reforms of enhanced sentencing before considering whether the case for extension is met.

MODELS FOR NEW AGGRAVATED OFFENCES

1.232 We now turn to the views expressed by consultees on the provisional proposals and questions in our CP relating to the model any new aggravated offences might take. We deal first with disability (from paragraph 1.233), then sexual orientation (paragraph 1.273) and finally transgender identity (paragraph 1.289). In broad terms, the majority of consultees shared our view that any new offences should use the same definitions of all three protected characteristics that are already employed in hate crime legislation.[17]

Defining "disability"

1.233 Our provisional Proposal 6 was that, if the aggravated offences are extended, the same definition of "disability" should be used as the one used in section 146(5) of the Criminal Justice Act 2003 (which provides: "in this section, "disability" means any physical or mental impairment"). We noted that there is an absence of judicial authority on the interpretation of this definition, and therefore some uncertainty as to precisely what constitutes 'impairment'. Nevertheless we preferred it as it offers the advantages of ensuring consistency with the enhanced sentencing regime and of already being familiar to judges and practitioners.[18]

1.234 We also considered the alternative definitions contained in the Equality Act 2010[19] and in the UN Convention on the Rights of People with Disabilities (CRPD).[20] We concluded that the different context and broader focus of these definitions rendered them inappropriate for the more specific context of hate

[17] In ss145(5) and (6) of the Criminal Justice Act 2003 (disability and transgender identity, respectively), and s29AB of the Public Order Act 1986 (sexual orientation).

[18] See CP, paras 3.88 to 3.90.

[19] S6 Equality Act 2010 provides that a person has a disability if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. For further detail, see the CP para 2.145 and paras 3.92 to 3.93.

[20] Article 1 of which provides a non-exhaustive definition: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

crime legislation,[21] and asked consultees whether they agreed with this assessment (Question 2 and Question 3 of the CP respectively).

Is the section 146 definition preferable?

YES

1.235 The majority of consultees agreed[22] with us that the section 146 definition is preferable. Most of those who agreed did not elaborate, but some provided brief comments. Among these, the Disability Hate Crime Network considered that this definition is clear and the Crown Prosecution Service stated that it is sufficiently broad. Mencap advanced both of these points.

1.236 However the most common reason advanced was that of ensuring consistency with section 146, a point that was raised by eight consultees.[23] Among these, the Senior Judiciary said that:

> It would be highly undesirable for there to be a different definition from that in section 146. If any other definition were to be adopted for a new aggravated offence, it would be essential to amend the definition in section 146(6) as well. For criminal offences and sentencing the definition of disability should be broad and simple rather than prescriptive and complex.

Caveats on the section 146 definition

1.237 Thirteen consultees agreed but added caveats regarding the wording of the section 146 definition. They would prefer to see the section 146 definition modified so that it makes explicit reference to sensory impairments,[24] long-term health conditions such as HIV, hepatitis and MS,[25] learning disabilities such as autism,[26] and perceived disability.[27] Stay Safe East suggested that guidance should be issued that would clarify that these categories are included in the

[21] Noting also that the non-exhaustive CPDR definition, with its undefined reference to 'various barriers', would cause inconsistency and uncertainty (paras 3.95 to 3.99).

[22] 75 of the 99 who answered the question agreed, with a further 12 agreeing but with minor caveats, and 12 disagreeing.

[23] Victim Support, Leonard Cheshire Disability, Dr Findlay Stark, the Royal College of Nursing, the Disability Hate Crime Network, the Senior Judiciary, the Teesside and Hartlepool Magistrates, and the CPS London Local Scrutiny and Involvement Panel.

[24] Jane Healy, Anna Scutt, the Brandon Trust, Diverse Cymru, Worcestershire Safeguarding Adults Board (which noted that the fact that these are separated from physical impairments in the CRPD definition but not in s146 might cause uncertainty).

[25] National Aids Trust, Diverse Cymru (who proposed that the definition be amended to read "any physical or mental or cognitive or intellectual or sensory impairment, including long-term health conditions".

[26] Linkage Community Trust, Diverse Cymru, Worcestershire Safeguarding Adults Board, Stay Safe East.

[27] Derbyshire Police, Society of Legal Scholars, Dr Andreas Dimopoulos.

scope of the s146 definition.[28] Targeting by association, for instance of the carers of disabled people, was also advanced.[29]

1.238 The Metropolitan Police expressed the view that the section 146 definition might benefit from incorporating aspects of the CRPD definition, as deaf people and people with learning disabilities do not always identify as disabled.[30] The Metropolitan Police also noted that hate crime is often a result of social conditions and barriers, in the same way as the denial of equal treatment is.

NO

1.239 Several consultees were concerned that the section 146 definition does not adopt the 'social model' of disability.[31] Others felt that it was not inclusive enough and a fresh definition should be devised in consultation with disabled people and their representative groups.[32]

1.240 Stop Hate UK expressed the view that the definition fails to include sensory impairments and long-term health conditions, and that it should distinguish learning and cognitive impairments from mental health problems. It added that if an amended definition is adopted, section 146 ought to be similarly amended to ensure consistency.

1.241 Christian Concern and the Christian Legal Centre raised the concern that the definition is too broad and consequently that:

> there is a risk that people might be prosecuted for relatively trivial remarks undermining the gravity of these offences e.g. someone could be prosecuted for an offensive remark against someone who had a sore foot for a couple of days.[33]

NO OPINION

1.242 The Equality and Human Rights Commission said that for its Inquiry into Disability Related Harassment, it used:

[28] The categories they listed were "physical, sensory, mental health, learning difficulty/disability, long term health condition, deaf BSL user, and neuro-diversity." However they felt that guidance should be indicative as creating an exhaustive list would not be possible. They also wanted any guidance to refer to the "social model" of disability, discussed further from para 1.256and fn 43 below.

[29] Stay Safe East, Society of Legal Scholars, Dr Andreas Dimopoulos (who pointed to the case of Fiona Pilkington, a carer who killed herself and her disabled daughter following harassment).

[30] Although it should be noted that the 'impairment' would have to be assessed according to an objective standard, and it is unclear if another definition would result in greater willingess to report offending to the police; this is illustrated by the fact the same argument was used by Stay Safe East to argue against the Equality Act definition (para 1.247 below).

[31] This concept is explained at fn 43. Leicestershire Police, ACPO LGBT Portfolio, Cheshire Constabulary.

[32] Learning Disability Partnership and PA Funnell.

[33] This is the converse of the argument against the CRPD definition expressed by many consultees, that it is limited to long-term conditions.

> …the definition of a disabled person as given in the Disability Discrimination Act 1995 as amended by the Disability Discrimination Act of 2005 as this was current in 2009 when the inquiry started. A key factor informing the use of this definition was that it incorporates the social model of disability.
>
> Although we have not made specific recommendations in relation to definitions of disability within sentencing, we welcome proposals to use a single definition which supports the ECRC's [recent] recommendation on the importance of data-sharing, that there should be one widely accepted and understood definition of disability for the purpose of cross-monitoring data sets effectively across agencies... The Commission would welcome further consideration of this question to support its recommendation above.

1.243 Changing Faces, a disfigurement charity, did not advance a view as to what specific definition should be adopted. However it pointed out that Schedule 1, para 3(1) of the Equality Act 2010 provides that "an impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities." They asked that, in order to ensure that "people with disfigurements are properly protected from the risk of being ridiculed and harassed because of the way they look", the definition of "disability" adopted on foot of any change to the law on hate crime should be "broader" than that contained in the Equality Act.[34] It should be noted that the quoted provision from Schedule 1 clearly considers disfigurement to be an "impairment" and simply clarifies that it is to be treated as one having a substantial effect for the purposes of that Act; there is no requirement under the section 146 definition that impairments have a substantial effect. Therefore the definition in section 146 may arguably already bring disfigurement within its scope.

Is the Equality Act definition inappropriate?

1.244 Many consultees shared our concern that the Equality Act definition of disability had different purposes from the wider and simpler definition contained in section 146. This led them to share our opinion that the former definition would be inappropriate for use in a criminal offence.

1.245 A common view was that that the qualifier contained in this definition – the requirement for a substantial and long-term adverse effect – would result in too much emphasis on the details and nature of the victim's disability and its impact on that individual, rather than on the defendant's hostility as a factor in the offending. They were concerned that this definition may operate to place the onus on the victim to prove their disability,[35] set a high threshold that would unjustifiably exclude too many disabilities and impairments,[36] and unjustifiably exclude short-term impairments.[37] They also felt that the term "substantial" is

[34] It did not elaborate in what way they wished the definition to be "broader".

[35] UNISON, Stay Safe East, and the Senior Judiciary.

[36] Lesbian & Gay Foundation, Diverse Cymru, and Action Disability Kensington and Chelsea.

[37] Anna Scutt pointed out that the offender would not know whether the impairment is short or long term.

vague and nebulous.[38] Leicestershire Police expressed the concern that defendants would be able to argue that the effect of the impairment was insufficiently substantial, or that it was not short-term in nature, and victims would have their lives and disabilities examined in distressing and unnecessary detail.

1.246 The Senior Judiciary raised several of these concerns:

> The degree of impairment may be highly relevant in the wider context of rights and obligations but it is irrelevant to the question of whether an offence is motivated by or demonstrates hostility based on disability. The effect of a disability may not be particularly serious, but hostility towards the disability will be. Any investigation into the precise diagnosis of a victim's condition would be embarrassing and demeaning. It would be highly undesirable if expert evidence were to become necessary to prove the disability.

1.247 Stay Safe East observed that many people who are legally considered disabled do not define themselves as disabled people, and it would be a 'mockery' to require disabled victims of hate crime to prove they are disabled. This might deter victims from reporting offending.

1.248 Stop Hate UK said:

> We do not believe that it is necessary that a physical or mental impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities for a criminal act against that person to constitute a Hate Crime… The purpose of an aggravated offence is to reflect the hostility demonstrated by the perpetrator towards a disabled person or groups of disabled people.

1.249 Stop Hate UK added that the requirement to show "adverse impact" would operate unfairly, since the racial and religious offences do not require members of those groups to prove that their race or religion has an adverse impact on their daily activities. They noted that defendants could use evidence of the victim's degree of participation in society to rebut the suggestion that the defendant had presumed the victim to be disabled.

1.250 Among the nine consultees who disagreed that this definition was inappropriate, six either did not give any comments, or merely stated that the Equality Act is adequate (including the Police Superintendents Association, Linkage Community Trust and PC Stephanie Mills). Of those who gave substantive reasons, Christian Concern and Christian Legal Centre stated that (while they are opposed in principle to new aggravated offences), this definition would be most suitable as it would prevent remarks concerning trivial conditions from being caught. (In their response on the section 146 definition quoted above, they gave the example of a sore foot, which they feared would be captured by section 146.) Hate Free Norfolk felt that it would be helpful for the aggravated offence and Equality Act definitions to be consistent with one another, although they noted it might be

[38] The Practitioner Alliance for Safeguarding Adults and the Worcestershire Safeguarding Adults Board.

necessary to use training and awareness-raising to ensure that conditions such as autism are not excluded.

1.251 Additionally, in their response to the equivalent question[39] on the easy-read response form, Brent Mencap asked (seemingly rhetorically) why the Equality Act definition could not be used. It should be noted, however, that the easy-read version of the CP did not set out the text of the various definitions and the arguments for and against them, and accordingly Brent Mencap may not have had the benefit of seeing this question analysed in full.

Is the CRPD definition inappropriate?

1.252 The concern that the Equality Act's proviso that an impairment must have a long-term and substantial adverse effect on a person's life in order for it to be considered a disability, was also raised by many consultees when commenting on the suitability of the CRPD definition. The CRPD defines disabled people as including people with "long term… impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[40]

1.253 It was felt that the references to the impact on the individual and their ability to participate in society "would again put more of an onus on the victim to prove that they were disabled, rather than on the perpetrator to prove whether or not they carried out the offence".[41] Dr Andreas Dimopoulos observed that the CRPD's definition is based on the notion that it is society's response to an impairment, and not the impairment itself, that renders it a disability, but that this is not the case in the context of disability hate crime, where it is the impairment that is at issue. Stay Safe East gave the example of a person with a mild learning disability that is not a significant barrier to participation in society, but where the person might be the victim of a hate crime because they are seen as "different".

1.254 Stop Hate UK was concerned that "`evidence' [quotation marks in original] of a victim's effective participation in society could be used to rebut the suggestion that the victim was presumed by the defendant to be disabled", and that the focus ought to be on "the perpetrator's intentions and demonstration of hostility towards someone who is or is presumed to be disabled, not on the victim's disability status". The Senior Judiciary was of the view that the long-term nature and the consequences of the impairment are irrelevant for the purposes of defining disability in the hate crime context.

1.255 The Practitioner Alliance for Safeguarding Adults and Worcestershire Safeguarding Adults Board stated that this definition is "too vague and ambiguous". The Bar Council questioned the use of the term "various barriers", noting that it is a term used mainly by experts and practitioners, and expressed the concern that it would not be readily understood by jurors and might therefore prove unworkable.

[39] Which was phrased "how can we decide what words like 'disability' mean?"

[40] See footnote 20 above. The Senior Judiciary observed that the definition is "partial and non-exhaustive" owing to the use of the word "includes."

[41] UNISON. The Bar Council also argued that this point applies equally to the CRPD and Equality Act definitions.

Arguments in favour of the CRPD definition

1.256 A number of consultees[42] rejected the section 146 definition in favour of the CRPD definition because they preferred the 'social model'[43] of disability reflected in the latter.[44] For instance, Leicestershire Police and the ACPO LGBT Portfolio (who submitted the same response) favoured the CRPD definition because:

> [It] is based more on the social model of disability which focuses on removing barriers to disabled people participating in society on an equal basis rather than the medical model which has shown to focus mainly on what a disabled person can or cannot do. This definition lends itself to hate crime which attempts to address the denial of equal respect and dignity to people who are seen as different.

Diverse Cymru argued that the social model is the best approach to disability, because:

> a clear message is sent across society that hate crime and hostility on the grounds of disability is unacceptable in all circumstances and that disabled people are not to be deemed at fault for their impairments…

However, Diverse Cymru recognised that the phrase 'long-term' in the CRPD might limit the definition unduly, and accordingly was undecided as to which definition should be used for any new aggravated offence.

1.257 Action Disability Kensington and Chelsea also felt that the social model should be reflected in the criminal law, while being unsure as to how, practically, to achieve this. It stated that the law should recognise "that it is not the fact of a disabled person's disability, impairment or 'condition' that attracts hostility and hostility-based harassment and violence, but rather an offender's beliefs about disabled people and his or her perception of a disability ... The 'burden of proof' should not fall on the victim [to prove they have an impairment] but should be centred on demonstrating that the offender perceived the victim as disabled." This consultee accepted, however, that using the CRPD definition might make the offences unworkable.

Difficulties in applying offence elements to disability

1.258 Question 4 asked consultees whether they anticipated any particular difficulties would be likely to arise in applying the elements of hostility, membership of a group and motivation to aggravated offences where hostility is based on disability.

[42] North Yorkshire Police, ACPO LGBT Portfolio, Leicestershire Police, and Cheshire Police.

[43] The "social model" is based on the premise that it is society's response and attitude to people with disabilities, not the disabilities themselves that cause the problems that disabled people experience participating in everyday life. It aims to shift the focus from disabled people onto the duty of society to adapt to their needs.

[44] Which follows the "social model" by referring to impairments which "in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1).

1.259 Answers to this question focused almost exclusively on the issue of the distinction between targeting a person based on hostility towards their disability, and choosing them as the victim because their disability makes them more an easy target.

Hostility and exploitation of vulnerability are the same

1.260 A small number of consultees did not accept that there was any distinction to be drawn here, stating that motivation based on greater vulnerability is (or should be considered) the same as motivation based on hostility, or amounts to a demonstration of hostility. This view was advanced by Jane Healy, Dr Andreas Dimopoulos, the Practitioner Alliance for Safeguarding Adults, Worcester Safeguarding Adults Board, one member of the CPS London Local Scrutiny and Involvement Panel, and Community Members of the CPS North Wales Scrutiny Panel.[45]

1.261 Dr Dimopoulos provided further reasoning for this view:

> Hostility should be understood as disablism: regarding someone as inferior because of her disability. Disablism therefore is a wider concept, but it is arguably more suited to capture the essence of what disability hate crime is about. By focusing on hostility (as we currently understand it) we lose sight of the wider picture about disability hate crime.

The hostility/vulnerability distinction can be overcome

1.262 Many consultees acknowledged that the hostility/vulnerability distinction can cause difficulties, and suggested ways to overcome these. Some of these[46] suggested that clear guidelines would help. Others said it was important for the police[47] and CPS[48] to understand the issues involved so that they bring the right approach to their evidence-gathering and charging decisions. The Disability Hate Crime Network was of the view that further thought and discussion on how to address this issue was necessary.

[45] Community Members of the CPS North Wales Scrutiny Panel said that "one member of the panel expressed that - 'targeting someone who is disabled because they are perceived to be an 'easy target' or 'vulnerable' or as an abuse of trust IS demonstrating hostility towards them because of their disability. Although I accept that the CPS guidance distinguishes between vulnerability and hostility I think there remains a tendency to interpret a situation or person as 'vulnerable' rather than as a demonstration of hostility. We need to consider the offender's motivations, not our perception of the victim."

[46] Including Mencap, the Linkage Community Trust, and UNISON. UNISON specifically cited the problems raised in *Living in a Different World* (see footnote 25 above) that the police and CPS do not always understand, identify and analyse disability hate crime issues correctly in their day-to-day work.

[47] Stay Safe East, who noted that police often struggle to distinguish opportunistic crime from hate crime. They said that this is often not clear cut, and give the example of anti-social behaviour that is not initially targeted at someone owing to their disability, but which escalates when the offenders realise that the victim is being particularly badly affected by it owing to their vulnerability. They also gave the example of blocking the person's ramp, which would not impact an able-bodied person in the same way: the person is being targeted because the offenders know the impact will be greater on them due to their disability.

[48] Senior Judiciary, HM CPS Inspectorate.

1.263 Stop Hate UK discussed the example of *Sheard*,[49] and argued that the stereotype of disabled people as being particularly vulnerable is the cause of this problem because it leads the authorities to focus on seeing the victim as a vulnerable person due to their disability, so that the offender's hostility to that disability is overlooked.

Difficulties are to be expected

1.264 Other consultees acknowledged that there might be practical difficulties, but were sanguine about them because they are not unique to aggravated offences, or are no more significant than the many other challenges that arise in prosecuting offences. Diverse Cymru felt that the matter was already adequately addressed, stating that:

> There is already comprehensive CPS guidance on these distinctions, which could apply to aggravated offences.[50] Therefore these concerns have been addressed in current legislation and we do not feel that creating a new offence where this distinction is relevant causes any particular difficulties.

1.265 South Yorkshire Police observed that "though there may be some difficulties in considering the question of hostility verses vulnerability this would be for the prosecution to consider and prove. It would be difficult to identify a different definition that would assist with this question." Mencap expressed opposition to trying to address any such difficulties by treating hostility and vulnerability as one and the same, as this would suggest that people's disabilities are the problem, rather than the attitude of offenders; furthermore it would be 'condescending' to suggest that all disabled people are vulnerable by definition. The Discrimination Law Association pointed out that the aggravated offences make it clear (in relation to motivation-based hostility) that hostility does not have to be the sole motivation, and so conviction would still be possible if both factors (hostility and vulnerability) had motivated the defendant.

Other points

1.266 UNISON were concerned that an excessive focus on the subjective motivation of the offender has rendered racially aggravated offences very difficult to prosecute successfully, and that this would be repeated with offences aggravated by disability.[51]

1.267 The Magistrates Association said:

[49] *Sheard* [2013] EWCA Crim 1161.

[50] Crown Prosecution Service, Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people. This guidance relates to the application of s146 and is discussed in the CP at paras 2.149 to 2.154. It can be accessed at, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 15 November 2013).

[51] Professor Leslie Moran's comment quoted at para 1.268 below counters this point. See also from para 1.122 above (regarding discussion of difficulties with current offences, which would carry over to any new offences).

> It is often difficult to establish motivation. Comments made at the time of the offence may be enough to demonstrate clear hostility but often the exact words used are in dispute and witnesses may not all remember them the same. However it should be noted that were section 146 to be relied on, even if hostility based on disability could not be proved as a factor indicating higher culpability, then vulnerability of the victim may still be taken as a factor indicating greater harm.

1.268 Professor Leslie Moran said that the motivation question is not an issue, since motivation by hostility does not in fact have to be proved in all cases, as the alternative of proving an objective demonstration of hostility is available.

1.269 Leicestershire Police and Derbyshire Police believed difficulties would arise if the list of basic offences was not tailored specifically for disability hate crime. Derbyshire police raised the same point regarding sexual orientation and transgender identity. They did not suggest alternative basic offences.[52]

Easy-read responses on defining disability

1.270 In our easy-read response form, we asked: "How can we decide what words like 'disability' mean?" It should be noted that the full section 146, Equality Act and CRPD definitions and our discussion of them were not set out in the easy-read version of the consultation, and therefore these consultees were not necessarily aware of the detailed arguments addressed by the CP on this topic.

1.271 Clair Coverdale said that there ought to be one standard definition, which should be set in consultation with charities, medical professionals and disabled people, as the several definitions currently existing in different contexts are sometimes contradictory.

1.272 Speaking Up Southwark suggested the definition "any physical or mental abnormality that has been medically defined/diagnosed as such". Making Our Choice felt that any definition ought to be wide enough to include long term health conditions, learning disabilities, autism, mental health issues and physical disabilities. Brent Mencap asked why the Equality Act definition could not be used.

DEFINING "SEXUAL ORIENTATION"

1.273 In the Consultation Paper we proposed[53] that the definition of "sexual orientation" in any new offences should mirror the existing definition:[54] "orientation towards people of the same sex, opposite sex, or both". We asked consultees whether they agreed.

1.274 A substantial majority of consultees (65 out of 77) who expressed a view on this question agreed unreservedly with our provisional proposal. Where substantive

[52] See discussion of what basic offences would be appropriate for disability hate crime from para 1.146 above.

[53] CP paras 3.112 to 115.

[54] Set out in *B* [2013] EWCA Crim 291, in which the Court of Appeal held that s 146 reflects the existing definitions in s 29AB of the Public Order Act 1986 and s 12 of the Equality Act 2010.

reasons were given, the most common was that this approach would ensure consistency across the existing law.[55] Several consultees also referred to the advantage of this definition being widely understood, including Stonewall.[56] The Senior Judiciary agreed with our analysis, and added that they had seen no evidence that the current definition is inadequate or unworkable.

1.275 Thames Valley Police supported using the current definition with the caveat that it might be more appropriate to include "orientation or presumed orientation".[57]

1.276 Radfem opposed retaining the current definition because they do not feel that hate crime on the grounds of heterosexuality is conceivable, and that providing for it may result in unintended consequences. They advanced the example of lesbians who wish for reasons of safety to provide themselves with a lesbian-only space.

Under-inclusiveness

1.277 Five consultees qualified their support for our proposal to adopt the existing definition, and a further five opposed it entirely, on the basis that it did not accommodate certain other orientations. Leicestershire Police and Stop Hate UK were concerned that those with "non-binary" genders would not be included. Several consultees believed asexuals ought to be included in any definition, including Diverse Cymru, the Practitioner Alliance for Safeguarding Adults, Worcester Safeguarding Adults, and Galop.

1.278 Galop also stated that some people identify in ways that are difficult to categorise, such as queer or pansexual (Diverse Cymru also suggested polysexual), and suggested that "it is more useful to broadly define sexual orientation in terms of sexual gender preference instead of naming the identity groups who are felt to lay within the definition of sexual orientation". They also expressed the view that it is important that any definition should encompass hostility against bisexuals; while section 146 does so, they said that the police and CPS in practice interpret it by reference to homophobia only.

1.279 Stop Hate UK said that:

> Anyone can experience Hate Crime because of their actual, self-defined or perceived sexual orientation, whatever that might be, or because of sexual orientation of someone they are associated with, whatever that might be. We do not believe that sexual orientation can only be defined by reference to the terms "gay", "lesbian", "bisexual" and "heterosexual"… We believe that there is a need for consistency but a sexual orientation aggravated offence should not and need not adopt such a narrow definition of sexual orientation in order to ensure

[55] Safe Durham Partnership, Victim Support, Cheshire Constabulary, West Midlands Police.

[56] Also Cheshire Constabulary, and Christian Concern and Christian Legal Centre.

[57] It should be noted that this is already the case under the existing aggravated offences. S 28 (1)(a) of the Crime and Disorder Act 1998 covers hostility "based on the victim's membership (or presumed membership)" of a racial or religious group, while s 28(1)(b) refers to motivation by hostility towards members of such groups, without specifying that the victim must be a member of the group in question. This is discussed in the CP at para 2.22.

consistency. Instead, a broader working definition should be adopted across all legislation relating to Sexual Orientation Hate Crime.

1.280 Professor Leslie Moran suggested that “sexuality” rather than “sexual orientation” would be a more inclusive definition, and would include asexuals.

1.281 Diverse Cymru noted the definition used by the CPS, namely: “a term used to describe a person’s emotional and/or physical attraction to another”.[58] However they did not endorse it because it excludes asexuality, and its broadness might mean case law would be required to interpret it (for instance, as to whether it covers sexual practices and behaviours). They suggested that these issues could be overcome by defining sexual orientation as:

> orientation towards people of the same sex or gender, opposite sex or gender, more than one sex or gender, or a lack of orientation based on sex or gender.

1.282 Prof Christian Munthe suggested that the definition "orientation of sexual desires or amorous attachments or emotions towards some particular type of person, being or object" should be adopted, in order to accommodate orientations towards animals (zoophilia) and inanimate objects (fetishism).

Difficulties in applying offence elements to sexual orientation

1.283 In Question 5 we asked consultees whether they anticipated any particular difficulties would be likely to arise in applying the elements of hostility, membership of a group and motivation to aggravated offences where hostility is based on sexual orientation.

1.284 Several consultees used this section to argue that the definition ought to encompass hostility based on presumed orientation, and on association with people of a particular orientation.[59] Diverse Cymru argued that this is vital to ensure that the emphasis would be on the offender’s motivation by hostility, rather than on how the victim identifies their orientation. The Crown Prosecution Service also suggested that ‘presumed association’ should be included.

1.285 Stonewall said that they “do not foresee any difficulties in establishing the victim's presumed sexual orientation, as suggested in the consultation paper”. This is because their research indicates that victims tend to believe that the perpetrator was aware of their orientation owing to where they were (eg outside a gay bar), who they were with (eg a partner), or the way the looked or dressed. They believe it would be straightforward for prosecutors to demonstrate these factors in court.

[58] This definition can be viewed on the CPS website at http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/ (last accessed 22 May 2014).

[59] Diverse Cymru, Anonymous, Stop Hate UK, Galop. See fn 57 above regarding presumed association. “Membership” of a racial or religious group for the purpose of the existing aggravated offences created by S 28 (1) of the Crime and Disorder Act 1998 has been interpreted to include association with members of that group: see the CP at paras 2.23 to 2.25.

1.286 Grip Project referred to our example[60] of a situation in which the offender did not know or presume a person to have a particular orientation, but used a hostile term relating to that orientation during the commission of the offence. They expressed the concern that the way aggravated offences are worded would therefore "provide cover for a defendant who is involved in a hate based attack".

1.287 Two consultees expressed the concern that some attacks take place owing to a combination of gender and orientation. Radfem said "lesbians are often attacked on the basis of a combination of their sex and sexual 'orientation'. In particular, for non-gender conformity." Professor Leslie Moran stated that:

> One of the problems with the status category approach of hate crime is that it tends to instil a silo mentality which may well work against dealing effectively with the violence and with effective prosecution. But these are problems affecting all status categories. So for example the gender violence against lesbians is potentially miscategorised as homophobic. Likewise gender related violence against gay men is understood as homophobic. Links with gender violence against women that may enhance understanding and the delivery of justice are potentially compromised though this silo mentality.

1.288 Derbyshire Constabulary noted that the use of the same nine basic offences designed for the racial and religious context might exclude other relevant behaviour.

DEFINING 'TRANSGENDER IDENTITY'

1.289 In the CP, we proposed[61] that any new aggravated offences should use the definition of 'transgender identity' currently used in the enhanced sentencing regime and set out in section 146(6) of the Criminal Justice Act 2003:

> In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

1.290 We noted that this definition has not yet been subject to judicial interpretation, and that it is unclear whether its scope extends to transvestites and cross-dressers, intersex people, and other non-standard gender identities. However we recognised that the definition is flexible and non-exhaustive, such that those categories would not necessarily be excluded. We also felt that consistency in the criminal law's approach to hate crime would be advantageous. We concluded that the need to avoid incoherence and inconsistency of interpretation would

[60] the CP, para 3.120.

[61] the CP, from para 3.125.

render the section 146 definition preferable to the alternative of adopting the Scottish definition, notwithstanding that the latter is clearer in its scope.[62]

1.291 There was no consensus among consultees as to which option was preferable. Consultees expressed similar concerns to those we raised in our discussion of the issue. While a majority of those who advanced an opinion agreed that the section 146 definition should be used, confusingly there was also a majority agreement that the Scottish definition would be preferable.[63]

Is the section 146 definition preferable?

Yes

1.292 Most of those responding affirmatively to this proposal did not advance reasons, although a small number provided brief comments. Victim Support, the Senior Judiciary, and Devon and Cornwall Police cited the need for consistency between any new offences and the current enhanced sentencing regime. The Senior Judiciary said:

> There is no suggestion (as yet) that the definition in section 146 (6) is unworkable or inadequate. We note, however, that the definition does not explicitly cover cross-dressers, although it may well be that any judicial interpretation is likely to include them. Cross-dressers are not necessarily motivated by a desire to change gender and may even be insulted by the suggestion that they fall within a definition which concentrates on the issue of gender change.

1.293 The Bar Council and Criminal Bar Association noted that this definition is "familiar and tested" and said that "it is neither too narrow nor insufficiently certain".

No, due to under-inclusiveness

1.294 A significant number of consultees disagreed with our proposal due to the possibility that it might be narrowly interpreted.[64] They were concerned at the possible exclusion of 'non-binary' gender identities such as intersexuals, cross-dressers and transvestites (who do not necessarily identify themselves as transgender), and others with non-standard gender identities who do not intend to undergo surgical reassignment.

1.295 For instance Suzanna Hopwood said that:

[62] Section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 provides that: "reference to transgender identity is reference to- (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity." Therefore, transvestites and intersex people are clearly explicitly included, in addition to a "safety net" for other non-standard gender identities.

[63] 43 agreed that section 146 should be used, and 29 disagreed; however, when asked whether the Scottish definition would be preferable, 32 agreed and 26 disagreed.

[64] 27 consultees disagreed on this basis, with a further two disagreeing for other reasons. 43 consultees agreed, and 82 did not answer this question.

> gender reassignment is not a defining characteristic of a gender variant person although it can be a characteristic of some gender variant people… there is a whole spectrum of "trans" identified presentations… including gender queer, non binary, inter sex, cross dressing and transvestite people, all of whom are potentially at risk of transphobic abuse and harm.

1.296 Stop Hate UK felt similarly, saying that:

> [we] prefer to talk about the wider concept of "Gender Identity Hate Crime", so as to encompass the many different ways in which people might define their gender (or not) and experience hostility on the basis of it.

1.297 Diverse Cymru were concerned that the section 146 definition would not address incidents affecting:

> other members of the trans community, including cross-dressers, transvestites, genderqueer, third gender and androgynous people. Whilst in many circumstances the hostility directed towards cross-dressers and transvestites may well be on the basis of presuming an individual is transsexual this may be difficult to prove in court.

1.298 The Lancashire Police and Crime Commissioner said:

> Perpetrators of transphobic hate crime would not normally be able to distinguish between a part time cross dresser (who does not fit into the proposed definition) and someone who is in the process of undergoing gender reassignment. The crime would still be motivated by hostility to transgender people.

1.299 Galop made similar points regarding under-inclusiveness, and also said that the phrase "gender transition" should be used instead of the "medicalised" term "gender reassignment", as trans people themselves readily use the former term, whereas the latter has been imposed on them.

Disagree for other reasons

1.300 Radfem argued that the section 146 definition is too inclusive, on the basis that it would be too "easy for men to claim to present as women in order to harass, intimidate and exploit women" or to violate their privacy. The London Criminal Court Solicitors' Association considered it "too vaguely/broadly defined" but did not indicate a preferred definition.

Is the Scottish definition preferable?

1.301 We next asked consultees whether they would find the Scottish definition preferable to section 146.[65] Among those who chose to respond to this question, a majority answered that it would be preferable.[66] This appears inconsistent and may have been due a mistake or misreading of the form.[67]

Yes

1.302 The majority of those who agreed and provided comments, put forward the converse of the arguments about under-inclusivity that arose in the previous question. For example Teesside and Hartlepool Magistrates said it would "provide greater clarity, and a `fall-back option' that would provide greater protection".

1.303 Stop Hate UK preferred it for the same reasons, although it noted that it would be preferable if it were "gender identity" and not "transgender identity" that is being defined; they are of the view that not all of those living with a different gender to their birth gender can be described as "transgender", including cross-dressers and those of no gender.

1.304 The Metropolitan Police was concerned that the Scottish definition refers to "transsexualism", which it noted is "not embraced" by transgender people as it wrongly identifies gender dysphoria as a problem of sexuality rather than of identity, which arguably has contributed to discrimination against transgender people.

No

1.305 Most negative responses to this question were on the basis that the definition used for any aggravated offences should be consistent with the one used under the enhanced sentencing regime.

1.306 A small number of consultees opposed the Scottish definition because they felt that transvestites ought not to be included. Radfem and Dr Lynne Harne argued that transvestism relates to sexuality or eroticism, not to transgender identity. The Magistrates Association preferred the section 146 definition and said:

> Scottish law appears to consider that transgender includes transvestism, which is not the case. However this again points up the disparities in sentencing which may arise from an inclusive list of hate factors. Why should victimising someone for being transvestite be any different to victimising someone for being transgender?

[65] Section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 provides that: "reference to transgender identity is reference to- (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity."

[66] 32 consultees said the preferred the Scottish option, and 26 said they did not.

[67] It would be possible to argue that using the same definition for section 146 and new aggravated offences would be preferable for consistency, but that the Scottish definition should be used for both; while some consultees made this point, none of those who selected 'Agree' for both the section 146 and Scottish questions gave any reason or comments with their answer. It therefore seems more likely that they misread the questions.

Difficulties in applying offence elements to transgender identity

1.307 We asked consultees whether they anticipated any particular difficulties would be likely to arise in applying the elements of hostility, membership of a group and motivation to aggravated offences where hostility is based on transgender identity.

1.308 The Crown Prosecution Service raised the point (which they also made regarding sexual orientation and disability) that "presumed association" ought also to be included.[68]

1.309 UNISON also advanced the point it had previously made regarding sexual orientation and disability, that guidelines and training would be needed to ensure correct identification of when an offender demonstrated or was motivated by hostility, and that they are concerned about the replication of problems they have encountered in relation to race hate crimes with the subjective assessment of motivation.

1.310 Diverse Cymru reiterated that, as with all three classes of hostility, it would be important that "the emphasis is on the words, actions, gestures or other demonstration of hostility or motivation by hostility than on the actual characteristics of the individual victim".

1.311 Derbyshire Police noted that the nine basic offences may be restrictive (a point they also made regarding disability and sexual orientation).

1.312 Police Sergeant Laura Millward and Anna Scutt were concerned that there might be difficulties regarding the understanding of transgender issue by those involved in the criminal justice system. Sergeant Millward cited the police and the courts, and Ms Scutt cited judges.

1.313 Northamptonshire Police observed that new offences might give an impression that those who are harassment or assault other than on the basis of protected characteristics is less serious, giving the example of the online bullying of a teenage girl (a point that they appeared to consider relevant to other strands of hate crime as well). While they were in favour of the extension of aggravated offences, they are concerned that protection of specific characteristics creates a "hierarchy" of hate crime.

1.314 The Senior Judiciary said that "it is difficult to predict what factual issues could arise. For example, it would be most regrettable if proof of the victim's transgender identity were to require expert evidence." They repeated that they prefer the option of improving the enhanced sentencing regime.

[68] See footnotes 57 and 59 above : the offences explicitly cover "presumed membership," and "membership" has been interpreted to include association.

PART 2
STIRRING UP HATRED

THE CASE IN PRINCIPLE TO EXTEND

2.1 Proposal 9 in the CP is as follows:

> On the basis of the arguments set out above, our provisional view is that there is a case in principle for new offences of stirring up hatred on grounds of disability and transgender identity. Do consultees agree? If not, why not? [paragraph 4.63]

2.2 Of those who answered this question, 103 agreed with the proposal; 12 disagreed; and 20 were unsure or raised further questions.

2.3 The 7 consultees who answered the corresponding question[1] using the easy-read form were unanimously in favour of extension, five on grounds of equality and one (Standing Up Southwark) arguing that equality is necessary in order to send the message that crimes against disabled people are as serious as those against other groups.[2]

Arguments for

2.4 Of those who agreed, 64 simply expressed agreement without giving reasons. Those who gave reasons fall into two groups:

(1) 21 said yes because they wanted parity and consistency, so that the same characteristics are protected in the same way by all hate crime legislation;

(2) 14 said that incidents of stirring up hatred against disabled and transgender people occur in practice and that the offences are needed to address this.[3]

We deal with each group in turn.

Parity, consistency

2.5 An example of the first approach was provided by Merton Centre for Independent Living, who answered:

[1] This was worded "do we need new stirring up offences or can we deal with this in other ways?"

[2] One consultee using the easy-read format did not answer this question. In addition, an anonymous consultee's reason for favouring extension was that "if the law is not dealing with certain crimes it should be changed. Purely as a deterrent if necessary."

[3] The remaining 4 consultees in favour and not falling into either group gave other reasons, for example, UNISON: "Legal recognition of such types of hate crimes may help to empower victims and encourage them to report such crimes."

> Merton CIL does not understand why there is not currently parity in the way hate crime offences are applied across disability, sexual orientation, transgender identity, race and religion. Merton CIL agrees with the Law Commission's proposal to extend 'aggravated offences' and 'stirring up hatred offences', so there is parity across all five characteristics. We hope that this will result in disability hate crime being taken more seriously and dealt with more effectively in the future.

2.6 Similarly the Crown Prosecution Service answered:

> There is a commonality of experience in relation to hate crime across the five strands, and this would provide the opportunity to meet the experience of those involved with these communities and provide for the equalisation of legislation that has evolved in a piecemeal fashion over the last 20 years.

2.7 Dr Andreas Dimopoulos argued that such an offence is required on the basis of the UN Convention on the Rights of Persons with Disabilities, and that its absence could be regarded as discriminatory. (See further under paragraph 2.139 below.) This could be regarded as a form of the consistency argument; for example, if one were to argue that to have a specific form of protection for homosexuals but not for disabled people constitutes discrimination against the latter.

2.8 Professor Gavin Phillipson answered:

> However, I would also argue that 'practical need' is not necessarily the right question to ask. The key reason for the offence is the need for the law to be consistent and principled – to exhibit integrity. As argued above, if the law protects one vulnerable group, but not another, it becomes itself a source of discrimination and status-inequality. It is the avoidance of this harm that the extension of the law would address.

2.9 The Senior Judiciary acknowledged the force of the consistency argument, but went on to consider other factors:[4]

> We see force in the argument that the stirring up offences potentially fill a gap in the criminal law in that they criminalise the encouragement of hatred against the particular groups as opposed to the encouragement of offending against those groups, hatred not being unlawful in itself. They differ from the extended offences under ss 28-32 CDA 1998 [ie aggravated offences] in that they are not grafted onto existing "basic" offences but capture offending which consists entirely of encouraging hatred. Thus it might be said to be illogical not to extend the stirring up offences to disability and transgender identity, when they are treated identically to other groups at least in s146 CJA 2003.

[4] For the other part of the Senior Judiciary response, see para 2.27 below.

Practical need

2.10 The argument about practical need concerns two questions:

(1) What type and level of harm is required in order to justify criminalisation?

(2) Is that harm actually occurring?

2.11 In this section we address only the first question. While many respondents, in their comments on Proposal 9, did address the question of occurrence in fact, this is more logically considered under Question 8 concerning the practical need for the offences, from paragraph 2.35 below.

2.12 On the first question, John Stanton-Ife argued that the "strong harm principle" was too narrow a criterion for criminalisation and should not be accepted uncritically. By the "strong harm principle" he meant the view that the only justification for criminalising a given form of behaviour was that each instance of that behaviour did identifiable harm to one or more individuals. There were at least two other possible approaches, the "weak harm principle" and "legal moralism". Following these, it is justifiable to criminalise behaviour where harm is caused, not by each individual instance but by an accumulation of instances, or where the harm consists of the creation of a social atmosphere in which harm to individuals becomes more likely.[5]

2.13 Professor Gavin Phillipson dismissed the argument that the behaviour in question is adequately covered by other offences.[6] He argued that the public order offences only legitimately cover behaviour targeted at individuals, not remarks of a generally insulting nature in the public media. The latter should not be criminalised except when they involve attacks on particular groups; but it is important to treat all groups as equally as possible. The Malicious Communications Act 1988 and Communications Act 2003 offences are minor compared with the stirring up offences, and would not cover situations such as the performance of a play. The new offences would not have the effect of silencing the offending communications, but would authoritatively express disapproval of them. Professor Phillipson said that this is a justifiable purpose of criminalisation and any chilling effect would not be greater than that of the existing social disapproval of such conduct.[7] The argument that offences would unduly infringe freedom of expression,[8] and the argument that criminalisation would cause resentment against the protected groups, are not strong enough to mean that no offences should be created; but they require that the offences be drafted narrowly.

[5] At paras B.60 and following of Appendix B to the CP, we discuss several distinct ways in which the stirring up of hatred can be seen to cause harm. Dr Stanton-Ife's separate Theory Paper contains a fuller discussion of these issues, from para 55.

[6] See also from para 2.173 (whether enhanced sentencing can address the conduct in question). We examined the chief criminal offences capable of addressing conduct amounting to the stirring up of hatred, at paras 4.14 to 4.37 of the CP.

[7] These arguments seem to contradict each other. If public opinion is already an effective enough restraint on conduct, the offence cannot be needed either in order to influence public opinion or as a restraint on conduct.

[8] Para 2.17(1) below.

2.14 The Discrimination Law Association answered:

> … The lack of prosecutions under the existing offences cannot be taken as a lack of a practical need for extending them ... Also, the law should not be limited to responding to developments in society, but should play a role in shaping how we want society to be.

Penalty

2.15 Stop Hate UK raised a further issue, relating to adequacy of available penalty. They argued that the seven year maximum penalty set for the stirring up offences reflected the greater harm that can flow from the conduct concerned. They noted that the same penalty (a maximum of seven years) is available both for the broad and narrow models, indicating that the harm could be considered equally serious, whether conduct was threatening, or abusive/insulting.

2.16 Against this, Ivan Hare[9] (who is opposed to the stirring up offences and to their extension) noted that the racial hatred offences had a far lower maximum sentence when first enacted under the Race Relations Act 1965.[10]

Arguments against

2.17 The main arguments against extension were:

(1) that the offences are an undue infringement of freedom of expression and inhibit discussion of disability and transgender issues and of social attitudes or practices relevant to them;

(2) that they are unnecessary in practice because there is insufficient evidence that the conduct in question is widespread;

(3) that they are unnecessary in practice because the conduct in question is covered by other offences;

(4) that it is undesirable to encourage feelings of victimhood.

2.18 One example of the first criticism is that of RadFem, who argued that such an offence would stifle legitimate criticism of gender reassignment surgery and create difficulties for those women-only organisations which preferred to admit only those born as women. (They expressed no view on the disability offence.) Similarly, Dr Lynne Harne answered:

> I do not agree that there should be new stirring up offences, particularly in relation to transgenderism. There is no definition offered as to what this would mean and it could limit the freedom of expression of those who criticise the concepts and practices of transgenderism.

2.19 John Troke feared that:

[9] In a presentation to the symposium on 17 September 2014.

[10] The original penalty was £200 and/or 6 months imprisonment (tried summarily), or £1000 and/or two years imprisonment (on indictment): Race Relations Act 1965 s 6(3).

> It allows the state to prosecute people based on their views. There are many laws adequate for existing crimes to person or property. Parliament should not enact crimes or pass sentences that are motivated by a desire to make people hold different beliefs and thoughts. "Freedom of speech and conscience, and the ability to act on those beliefs, should not be curtailed unless, to use John Stuart Mill's classic statement of liberalism, it is for self-protection or to prevent harm to others.[11]

2.20 Professor Eric Heinze, in a presentation to the symposium, argued against the stirring up offences and, accordingly, their extension. He considered it vital for the state and the law to protect public discourse in all its forms, arguing that only an unfettered right to public discourse legitimises democratic regimes. Stirring up offences are aimed at public, as distinct from private, acts and discourse. They are entirely distinct from offences targeting stalking, harassment and other conduct against identifiable individuals. They represent the punishment of bad opinions. There is an insufficient chain of causation from the conduct intended or likely to stir up hatred to the acts that may or may not be committed by those stirred to hatred. There is a stronger causative link between the act of driving a car and deaths caused by driving, yet no one argues that driving a car should be a criminal offence.

2.21 Ivan Hare, also presenting at the symposium, described the stirring up offences as a violation of free speech. He noted that the criminal law does not define the term "threatening" and this can lead to a serious chilling effect. His concerns were not lessened by "safeguards" such as the narrowing of the model or the free speech protections: there was every chance that these would go in the future when the low number of successful prosecutions placed Parliament under pressure to remove them. He appreciated that the Law Commission could not recommend their abolition, but said that they should certainly not be extended.

2.22 As against these, the Crown Prosecution Service, while recognising the right to "shock, offend or disturb", noted that it was not an unfettered right, and argued:

> However when dealing with disability hate crime, we cannot see that freedom of expression arguments should prevail as the nature of the hatred is similar to that of racial hatred whereby it is singling out the individual's characteristics as opposed to their practices, beliefs or conduct.

2.23 On the second criticism, again we distinguish between responses discussing:

(1) what level of need should be required to create the offence; and

(2) whether that level of need exists in fact.

We consider the second type of response under the heading of Question 8, from paragraph 2.38 below.

[11] Mr Troke here cites part of an article by Jon Holbrook, published in *Spiked* on 9 July 2013, entitled: "Punish criminals for their actions not their thoughts," available here: http://www.spiked-online.com/newsite/article/hate_crime/ (last visited 15 May 2014).

2.24 As to the first type of response assessing the level of need, the joint response of the Bar Council and Criminal Bar Association was:

> We are not persuaded that there is a pressing need for the canvassed new offences. We invite the Commission to consider afresh its provisional view that there is a case in principle for these new offences… At its height, the argument advanced by the Commission in support of new offences is moot and overly abstract: the Commission contends that the existing offences do not "capture the true nature of the wrongdoing or harm in the same way that stirring up offences would" (see paragraph 4.49 of the consultation). ...
>
> We remind the Commission of our firmly held view that economy is a virtue of law reform.

2.25 Dr Findlay Stark answered:

> If such hatred were being stirred up on a sufficiently large scale, and the existing range of offences surveyed in the consultation paper were proving inadequate, I agree that there is no reason in principle to not criminalise it. That said, criminalisation might appear a heavy-handed approach in the absence of evidence that it, rather than alternative measures, is required. This might seem a practical complaint, but it is also principled: criminal law ought not to be used to cover every form of actual or potential wrongdoing, because its necessarily minimal enforcement (due to the small number of incidents) might dilute the strong condemnatory message of the criminal sanction. The criminal law does more than merely state propositions about right and wrong – through its enforcement it shows that the state means it. I think more evidence is required.

2.26 Professor Richard Taylor observed that the use of existing stirring up offences was very limited, and that the effect of introducing new ones would be largely symbolic. He argued that it is undesirable to create offences purely for symbolic purposes. The same point was made by the Society of Legal Scholars.

2.27 The Senior Judiciary also questioned the merits of creating offences for symbolic purposes.

> This is essentially a matter of policy for political decision. … However, the "symbolic" case for extension is arguably undermined by the points made at paragraph 4.52 of the consultation paper, which identify the potential negative consequences of extending the stirring up offences.

The points made at paragraph 4.52 of the CP were that criminalisation of hate speech can:

(1) prevent debate, including arguments challenging hateful attitudes;

(2) create resentment against the protected groups;

(3) contribute to a perception of the protected group as weak and helpless;

(4) drive hate speech underground, making it harder to detect.

The Council of Circuit Judges "strongly opposed" new stirring up offences for the same reasons as the Senior Judiciary.

2.28 An example of the third criticism is that of Christian Concern and the Christian Legal Centre, who responded that the behaviour in question is adequately covered by section 1 of the Malicious Communications Act 1988 and section 127(1) of the Communications Act 2003.[12]

2.29 The Law Society's Criminal Committee expressed concern that the law, "and particularly the criminal law – be it substantive, procedural or sentencing", was becoming too complicated and that there was an undesirable proliferation of criminal offences. The CP was right in the Committee's view to ask whether the problem might be dealt with by means other than the criminal law, for example education and media publicity.

2.30 In relation to the fourth criticism, Pembrokeshire People First feared that the new offence would have the effect of reinforcing a perception of people with disabilities as victims.

Other points of principle raised

2.31 Devon and Cornwall Police noted that in one sense a perceived hierarchy of characteristics was confusing for hate crime victims and so extension might seem a "natural progression". Nonetheless, they questioned the impact of the current or any new stirring up offences and made a further point:

> In addition, the case for stirring up offences is more complicated and controversial than that of the aggravated offences; with potentially wider considerations and impacts on other freedoms.

2.32 Professor Leslie Moran was against extension, both on the ground of freedom of expression and on the ground that it was undesirable to have a proliferation of victim groups with different levels of protection. There was already a distinction between groups protected by the "broad" and "narrow" models: whichever way new offences were drafted would only add to the confusion.

2.33 Professor Peter Alldridge, in a panel debate at the symposium on 17 September, said: "Most societies most of the time should put up with an awful lot of free speech before they start imposing criminal sanctions."

2.34 Several respondents did not approve of the phrase "stirring up". The London Criminal Courts Solicitors Association said that it was "far too vague a concept". Teesside and Hartlepool Magistrates said that "we dislike the phrase 'stirring up' and would much prefer the previous 'incitement' terminology". In answer to this, it should be noted that the existing offences do use the phrases "intends thereby to stir up … hatred", "hatred is likely to be stirred up" or both, and have done so since 1965.

[12] These offences are discussed at paras 4.14 to 4.37 of the CP.

NEW STIRRING UP OFFENCES: THE PRACTICAL NEED

2.35 Question 8 of the CP asked: Do consultees consider that there is a practical need for the new offences? If so, why?[13]

2.36 Of those who responded on this question: 66 thought there was a practical need for new offences; 15 thought that there was not; and 11 were unsure or raised further questions.

2.37 Many of the replies to this question reproduced points made under Proposal 9 (considering the case in principle). Therefore, we only set out those that discuss whether there is concrete evidence that the behaviour in question is in fact occurring. Arguments about equal treatment between disadvantaged groups, and about the theoretical question of what kind of harm justifies creating an offence, are covered above, under Proposal 9.

Arguments for practical need

2.38 Respondents who considered that there was a practical need for the new offences advanced two types of argument.

(1) Some reported that, in their experience, examples of hate speech against disabled or transgender people were frequent.

(2) Others admitted that reported examples of this kind of conduct were few, but they argued that this was because of under-reporting.

Examples of hate speech

IN RELATION TO DISABLED PEOPLE

2.39 Weston and North Somerset DIAL (Disability Information Advice Line) reported:

> We have noticed an increase in hate crime particularly around clients being called 'scroungers'. We and our clients support any moves to make disability hate crime more of a priority. In response to the question of whether or not stronger measures would act as a deterrent we feel that legal recognition will help to send a message that this behaviour is unacceptable and help to generate a gradual societal shift in attitude. We also feel the stirring up hatred guidelines could be used to clamp down on newspapers like the Daily Mail using false statistics and hate filled language. We have had unsatisfactory dealings with local police who will only record something as a hate crime if THEY feel it is hatred motivated and have little concern for the perspective of the victim. This may be why the official statistics for disability hate crime are relatively low. Hopefully this legislation will help guide police officers and make things clearer and easier for them.[14]

2.40 Action Disability Kensington & Chelsea commented:

[13] the CP, para 4.66

[14] The Royal National Institute of Blind People and Guide Dogs for the Blind reported similar findings, as did the Mental Health Foundation.

> Documented and anecdotally narrated increases in hostility and hostility-based harassment of disabled people may be correlated with negative and stereotypical press portrayals of disabled people. Public use of disablist language and offensive stereotypes has been shown to escalate towards a range of offences that can be prosecuted as hate crimes including life-threatening physical violence. The practical need for these new stirring up offences relates to deterrence, prevention and early intervention, especially in community settings where disabled people's quality of life is diminished by behaviours that are not currently offences.

2.41 Full of Life answered made a similar point. They also said:

> It is important for there to be new stirring up offences as well as aggravated offences and enhanced sentencing, as stirring up offences can lead to convictions of more indirect offences that can be equally as damaging, such as cyber bullying.[15]

2.42 The Learning Disability Partnership commented:

> We think there is a practical need for this. Some of the high profile cases involve people being targeted because they are perceived as "different". Low level nuisance can soon turn nasty very quickly. Some disabled people have been wrongly accused of being "paedophiles" and the lynch mob mentality kicks in.[16] Many people with learning disabilities or mental health issues are seen as "dangerous" or "scroungers" and they are often targeted by other members who live in that community.

2.43 Mencap referred to two recent examples of speech that, in their view, revealed a gap in the law. They said the examples represented "compelling evidence" that hatred was actively being stirred up against disabled people, evidence the government had concluded was lacking in 2010.[17]

[15] The same argument was made by the Learning Disability Partnership.

[16] For instance, see the case of Bijan Ebrahimi, a man with a learning disability who was accused of being a paedophile by his neighbours, and subsequently murdered. While no reference was made at sentencing to the presence of hostility on grounds of disability, the Disability Hate Crime Network has argued that it was present and has written to the Attorney General's Office requesting he refer the matter to the Court of Appeal on the grounds of undue leniency (one of their co-ordinators has made their correspondence with the AG available on her blog: see http://katharinequarmby.wordpress.com/2013/11/28/letter-to-attorney-general-asking-him-to-review-sentences-handed-down-in-ebrahimi-case/ and http://katharinequarmby.wordpress.com/2014/01/06/attorney-generals-letter-to-disability-hate-crime-network-re-bijan-ebrahimi-case/). The sentencing remarks are available here: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/james-norley-sentencing-remarks-28112013.pdf.

[17] See para 4.10 of the CP and Ministry of Justice, Circular 2010/05 - Offences of Stirring up Hatred on the Grounds of Sexual Orientation (March 2010).

(1) The first case involved a local county council candidate who had called on his website for an NHS review to examine the case for "compulsory abortion when the foetus is detected as having Down's, spina bifida or similar syndrome which, if it is born, could render the child a burden on the state as well as on the family". The candidate was suspended from his party.

(2) In the second incident a local councillor told a disability charity worker at a council event that "disabled children cost the council too much money and should be put down". He later apologised and resigned, saying his remarks had been intended to stir up debate. After being re-elected, he was questioned on the earlier comment during an interview with a journalist. During the interview he was reported to have used the analogy of a farmer killing "misshapen lambs" in arguing there was a good argument for killing some disabled babies with high support needs because of the cost of providing them with services. The local police force, following complaints on the matter, investigated, but according to Mencap no charges were brought on the basis that in the police's view, no crime had been committed.

2.44 Mencap argued that the conduct described in these two examples "fundamentally called into question the equal value of disabled people and their right to life. Both men publicly advocated the killing of disabled children on grounds of their disability". They pointed to a gap in the law because, as they saw it, it is not an offence to make public statements dismissing disabled people's right to life. They also argued that new offences criminalising such statements would have strong symbolic value and, in light of the higher maximum sentence applicable to stirring up hatred, would send a stronger message than other existing offences about the kind of speech that society finds unacceptable.

IN RELATION TO TRANSGENDER PEOPLE

2.45 An example in relation to transgender people was provided by Trans Media Watch:

> We frequently deal with instances of this sort, including situations in which individuals post uncensored comments in the online versions of national newspapers arguing that trans people or even the children of trans people should be killed. We have dealt with a number of cases in which individual trans people demonised by newspapers have subsequently been subject to threats made by strangers, or even physical attacks.

2.46 Suzanna Hopwood described several kinds of transphobic behaviour, ranging from "stereotypical, demeaning and false representations of gender variant expressions and identities and gender variant people which may be presented as banter, humour or analysis and social/political discourse but which in effect deny their humanity and human rights and de facto validate transphobic behaviours and victimisation". Ms Hopwood also referred to "pseudo "feminist" critique/analysis of gender variant people in articles and other media comment while using stereotypical and distorting representations and exemplifications which in fact misrepresent gender variant people and are grossly inaccurate".

2.47 Ms Hopwood added:

> These examples are not necessarily about "stirring up hatred" but they are complicit with attitudes which are transphobic and can therefore be interpreted as validating them.

2.48 Ms Hopwood described these transphobic representations as having "two broad impacts. First it has the effect of undermining the confidence of gender variant people themselves to the effect they are afraid to "come out" and express themselves for fear of ridicule, abuse and physical attack. Second it has the effect of reinforcing and validating rather than confronting transphobic behaviours and attitudes which in turn victimise and thus undermine the confidence of gender variant people."

2.49 Trans Media Watch described a different kind of conduct targeting transgender people:

> The publication of suggestions that trans people should be assaulted, raped or killed is endemic. Trans people report high levels of threatening behaviour from strangers and other, more severe forms of aggression. Given the relationship between stirring up and incidents of direct aggression that has been established in the case of other minority groups, it is logical to assume that such a relationship also exists in this case. If we are to reduce the overall level of direct threat and danger faced by trans people in society, we must tackle the problem of incitement.

ANSWERS ENCOMPASSING BOTH TRANSGENDER AND DISABILITY

2.50 The National Union of Students agreed, citing its own research in support:

- 28 per cent of respondents stated they had witnessed the distribution or display of writing, signs or visible representation that they found threatening, abusive or insulting and that they believed to be prejudiced against disabled people.[18]

- 15 per cent of gay respondents, 13 per cent of lesbian respondents, and 7 per cent of bisexual respondents stated that they had witnessed the distribution of writing, signs, or visible representation that they found to be threatening, abusive, or insulting, and that these messages had an element of prejudice against certain sexual orientations.[19]

- 8 per cent of trans respondents and 10 per cent of those who preferred not to disclose their gender identity reported incidents of distribution or display of material prejudiced against their gender identity.[20]

2.51 Victim Support answered:

[18] NUS, *No Place for Hate: Disability* (cited at fn 9 above).

[19] NUS, *No Place for Hate: Sexual Orientation and Gender* Identity (cited at fn 9 above).

[20] NUS, *No Place for Hate: Sexual Orientation and Gender* Identity (cited at fn 9 above).

> Inciting hatred itself has tremendous effects on victims. Although many may argue these people are not directly victimised, victims themselves would take a different view. The effects of these crimes go beyond distaste and causing offence, it also represents the effect of the 'drip' of offences on victims which can seriously affect their health and well-being. The creation of new offences also sends a clear message throughout society of what is and what is not acceptable. As previously stated, statute laws are not only powerful in recognising changing attitudes, but actually changing public attitudes too.

2.52 Victim Support disputed the adequacy of existing public order offences to prosecute individuals who intend their audience to hate particular groups of people. This would not capture the seriousness of the conduct or the harm it causes, given that victims of hate crime report more serious feelings of victimisation, psychological and emotional trauma which ought to be recognised both in the label of an offence and the applicable sentence range.

Under-reporting

2.53 Several consultees argued that the reason that the existing stirring up offences are little used is that hate crime incidents, even against groups already protected by such offences, are under-reported. Hate speech against disabled and transgender people are even more under-reported, because this kind of hate speech is not an offence. Making it an offence would lead to more reporting.

2.54 UNISON said the practical need should not be dismissed on grounds that prosecutions of stirring up offences are so rare, as this was because "victims are reluctant to report such crimes" and police and prosecutors are failing to record hate crime correctly. They continued:

> The British Crime Survey (analysed in 'Equality groups perceptions and experience of crime' Equality & Human Rights Commission, 2011) shows that 57% of hate crimes are not reported to the police, "yet 1 in 8 LGB people are the target of homophobic abuse each year" ('The Hate Crime Report: Homophobia, biphobia and transphobia in London', from Galop, 2013[21]) and we believe this is similarly reflected with regard to disability and transgender identity hate crime.

2.55 The Metropolitan Police said:

> The transgender population within the UK is estimated to equate to over 80,000 yet the number of transphobic hate crimes is the lowest recorded of all hate crimes and there appears to be a slight declining trend since 2010/11. For the financial year 2012/13 there has been a 29% decrease in disability hate crime offences. The new offences could enable further reporting by victims of transphobic and disability hate crime. In addition the new offences will give parity across the protected characteristics.

[21] Cited at fn 10 above.

2.56 Stop Hate UK pointed to the reluctance of victims to report incidents fuelled by hostility which fell short of being criminal offences and said this stemmed from a sense that nothing would be done because the matter was not serious enough. Stop Hate believed stirring up offences would change this, increase victim confidence in the overall hate crime agenda, and lead to more reporting, referring to a "practical need to know about community tensions, even if ultimately nobody is charged with or convicted of an offence". They did not believe the low number of prosecutions for stirring up hatred meant that there was no practical need for the offences. They added:

> At present, because the stirring up offences do not exist, there is no way of properly categorising and recording how often conduct is occurring which would amount to an offence of stirring up hatred on the grounds of disability of gender identity if the offences did exist. All we have at the moment is anecdotal evidence from individuals and some information collated by interested groups. An extension of the stirring up offences would enable us to monitor trends and patterns.

2.57 Other examples of this type of argument are as follows.

(1) "Despite an increase in the reporting of such an offence in the media, this type of case is still relatively under-reported within the Criminal Justice System. A new offence in this area would mean the potential for an increase in the reporting and therefore the understanding of such matters." (Police Superintendents Association of England & Wales)

(2) "Although, as the Law Commission states in their consultation paper, very few stirring up offences are prosecuted, we do not believe this is because the offence is necessarily rare, rather that victims are reluctant to report such crimes, that the police and CPS are failing to fully consider hate crime issues and cases are not being properly recorded." (UNISON)

(3) "Yes, offences against disabled people are under reported and rarely lead to convictions. We hope that if new offences are created to protect disabled people, offences against them are more likely to be discouraged." (Full of Life)

(4) "'The Hate Crime Report' published by Galop in 2013[22] states that there are only about 300 transphobic crimes recorded in the UK each year, yet 3 in 4 trans people are the target of transphobic abuse each year. We believe that within the huge bulk of unreported and misrecorded transphobic crime are incidents which would meet the criteria of a new transphobic incitement law. It is also not possible to know whether previously reported incidents would have hit the criteria of the new offence, as it does not currently exist." (Galop)

(5) "In addition, the lack of existing offences may result in underreporting of the problem (if people think that authorities will only be interested in existing crimes)." (Discrimination Law Association)

[22] Cited at fn 10 above.

Arguments questioning practical need

2.58 Several respondents disapproved of the proposed offences on the ground of freedom of expression or other reasons of principle. We do not repeat these arguments here, as they are already described above under Proposal 9.

2.59 Others agreed with the case in principle to extend, provided that the evidence showed a practical need, but believed that so far the evidence was not sufficient. We cite a selection of these views below.

2.60 The Senior Judiciary's collective response was:

> Again this is a matter of policy for political decision. But on the evidence presented in the consultation paper it seems very doubtful that there is any practical need for the new offences. There are likely to be more effective ways of addressing the problems, in particular by working with the Press Complaints Commission and the media generally.

2.61 The Teesside and Hartlepool Magistrates answered:

> Your paper would indicate there is little demand for new offences therefore we would prefer this question be addressed by the organisations and agencies more directly affected by such criminal behaviours. What we would not wish to see is further unnecessary and piecemeal legislation that adds nothing and dilutes and confuses existing legislation.

2.62 The North Yorkshire Police answered:

> This has already been debated by Parliament and found not to be required. Again, there is no evidence within the report which demonstrates what the need for this legislation is, either in terms of how many instances have happened where this offence had it been in statute, nor of these, how many could not be dealt with using existing legislation. If evidence can be adduced that this legislation would be beneficial then I would support it, however at present this does not seem to exist.

2.63 Hampshire Police referred to our conclusion[23] that "evidence of a practical need for the new offences is inconclusive".

2.64 Other respondents said that the behaviour in question was covered by other offences, but did not give details. For example Cleveland Police said "they are rarely used and other offences could be found if necessary".

[23] See CP para 4.65.

2.65 Superintendent Paul Giannasi,[24] in a presentation to the symposium, discussed the substantial recent increase in reported internet hate crime which, he explained, is due to increased use of social media. Superintendent Giannasi referred to the following specific challenges currently presented by the internet and widespread use of social media:

(1) Volume: There is now more hate speech on the internet than police have resources to address

(2) Jurisdiction: the internet is global and the majority of web-hosting entities are based in the USA, where legislation is relatively permissive due to the strong constitutional protections for free speech.

He added that the "vast majority" of disability and transgender internet hate crime reports received via the True Vision website would not meet the threshold set by the existing stirring up offences.[25] Commonly, a highly offensive content is tweeted to a small number of people, with no specific intention that the message be spread, nonetheless when the message is "re-tweeted" it can reach thousands of others very rapidly. Sometimes this is done by people who do not share the views of the original sender and wish to draw attention to what they regard as the unacceptable nature of the content.

2.66 In view of these challenges Superintendent Giannasi considered that there would be greater benefit in continuing the current collaboration between the police and the internet industry, to monitor and control offensive and hateful material on the internet. He saw little benefit in extending the stirring up offences, which would fail to capture the bulk of the material being reported as hate speech. (The Law Commission has been asked to undertake a project on social media and the criminal law as part of its next programme of law reform.[26])

DISABILITY OFFENCE: BROAD OR NARROW MODEL?

2.67 Question 9 in the CP asked:

> If consultees consider that a new offence of stirring up hatred on grounds of disability is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above? [paragraph 4.76]

2.68 Briefly, the "broad" model consists of "threatening, abusive or insulting" conduct which is either *intended* or *likely* to stir up hatred against a particular group, in this

[24] Supt Giannasi leads the government's Hate Crime Strategy and is a member of the Association of Chief Police Officers Hate Crime Group. He has responsibility for the True Vision website, an on-line hate crime reporting portal supported by ACPO and police forces in England, Wales and Northern Ireland.. The True Vision site is available here: http://www.report-it.org.uk/home.

[25] In the CP we discuss alternative criminal offences that can be used to prosecute this type of conduct at paras 4.14 to 4.37. See however the CPS's recent guidelines on when it will prosecute offences committed via social media, which are available from: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/ (last accessed 13 May 2014).

[26] Further information on this proposal is available on our website here: http://lawcommission.justice.gov.uk/docs/social-media.pdf.

case people with disabilities. In the "narrow" model the act must be "threatening", and must be *intended* to stir up hatred. (A third difference is that, in the "narrow" model, there is an explicit protection for freedom of expression, but this is discussed separately below.)[27]

2.69 At present, the offence of stirring up racial hatred follows the broad model, while the offences of stirring up religious hatred and hatred based on sexual orientation follow the narrow model.

2.70 Several respondents argued that the existence of this distinction is undesirable and discriminatory.[28] However, they differed about the desired remedy for this.

(1) Some believed that all the stirring up offences (present and future) should follow the broad model.

(2) Some believed that all should follow the narrow model.

(3) Some used the existing disparity as a reason not to extend the offences.[29]

2.71 Other respondents approved of the distinction, usually on the ground that race is an unalterable characteristic whereas there may be legitimate criticism of practices associated with religion and sexual orientation.

2.72 Overall, 59 respondents said they favoured the broad model and 15 the narrow model, were the stirring up offences to be extended.

Arguments for broad model

2.73 Arguments for the broad model fell into the following groups.

(1) Against the distinction between the broad and narrow models, preferring that all the offences should follow the broad model.[30]

(2) Not against the distinction but believing that disability was analogous to race, as it concerned unalterable characteristics.[31]

(3) Preferring the broad model on pragmatic grounds (that intention is hard to prove and that the broad model gives a greater chance of conviction and more effective protection).[32]

(4) Preferring the broad model as more in line with the generality of criminal offences.[33]

[27] From para 2.110.

[28] Devon and Cornwall Police.

[29] Ivan Hare; Professor Leslie Moran.

[30] Stop Hate UK; Diverse Cymru.

[31] Crown Prosecution Service.

[32] Full of Life; Dr Andrew Dimopoulos; South Yorkshire Police; Carole Gerada; Anonymous.

[33] Practitioner Alliance for Safeguarding Adults, Worcestershire Safeguarding Adults Board.

Broad model for all stirring up offences

2.74 Stop Hate UK answered that they would prefer consistency across all characteristics but, in light of the current inconsistency, they would prefer the broad model for any new offences.

2.75 Diverse Cymru said that protection should be comparable across all five characteristics, otherwise a message is sent that stirring up racial hatred is more serious than stirring up hatred against those with the other characteristics. They added:

> We recognise addressing [the current] offences is beyond the scope of this project, however we recommend that the UK Government investigates extending the broad model to all 5 protected characteristics, as to state there is a difference between race and religion and sexual orientation implies that one can simply change their orientation or religion or chooses how to live, rather than that being who they are and/or a strongly embedded belief.

Disability should be treated like race

2.76 The Crown Prosecution Service answered:

> … when dealing with disability hate crime, we cannot see that freedom of expression arguments should prevail as the nature of the hatred is similar to that of racial hatred whereby it is singling out the individual's characteristics as opposed to their practices, beliefs or conduct. Accordingly we consider that the "broad" model should be followed, thereby protecting victims not only when the conduct is "threatening" but also when it is "abusive or insulting".

2.77 Derbyshire Police said:

> The broad definition should be introduced to be consistent with the existing law on race.

Greater effectiveness of broad model

2.78 Diverse Cymru considered that the wider scope of conduct caught by the broad model (not only threatening but also abusive or insulting conduct) and the fact that intention need not be established make this model preferable, pointing out that the narrow model offences are hardly ever prosecuted. Referring to the statutory defences[34] available for the broad model, they felt this provided the necessary protection for defendants and would justify use of that model for the two additional characteristics.

2.79 Diverse Cymru also considered that there is some conduct that is abusive or insulting, but not necessarily threatening, which is intended or likely to stir up hatred against disabled or transgender people. (They did not provide examples.) Stop Hate UK and UNISON made the same observation. All three consultees preferred the broad model.[35] Stop Hate believed the requirement for Attorney

[34] We set these defences out at paras 2.74, 2.81, 2.87, 2.92 and 2.100 of the CP.

[35] Diverse Cymru and Stop Hate UK also referred to the difficulty of proving intent.

General consent was a sufficient safeguard against prosecutions not in the public interest, if the broad model were adopted.

2.80 Stop Hate UK asked us to imagine a case in which two men hand out leaflets outside a council building, which say: "People with disabilities are a drain on resources – don't let them get away with it", "Let's get rid of the disabled scroungers – should we bring back eugenics?" and "In times of austerity we should have a survival of the fittest approach to disabled people." On arrest they deny any intention to stir up hatred (saying they did not care whether this happened or not) and claim they were trying to publicise their view that disabled people are to blame for the state of the economy. In Stop Hate's view it was "obvious" that hatred against disabled people would be likely to be stirred up by such conduct. They considered that the same degree of culpability should be attributed, on these facts, as if they had intended to stir up hatred.

2.81 UNISON and Full of Life both said disability should be treated in the same way as race.

2.82 The Practitioner Alliance for Safeguarding Adults and the Worcestershire Safeguarding Adults Board pointed to the harm caused by the stirring up of hatred and said that people should be held to account for the consequences of their actions, whether or not intention could be proved.

2.83 The National Aids Trust said that only the broad model was capable of reflecting the seriousness of the harm. They pointed out that the threshold set by the "hatred" element was safeguard enough and that this test would, in practice, be harder to satisfy if the conduct or speech was not threatening but "merely" abusive or insulting.

2.84 Mencap considered the "broad" model a better one for disability related hatred "because the sort of incitement we have seen is less about intent to do physical harm and more about fundamental dismissal of disabled people's right to life". They added that the example they had given,[36] while "not necessarily directly threatening to an individual or individuals … is certainly abusive and insulting and stirs up hatred towards disabled people, questioning their right to life, equal value as people and marginalising them". Mencap added that this appeared to meet the Ministry of Justice's description[37] of conduct that is "divisive and damaging [and] creates an atmosphere where bullying and violence are deemed acceptable, and where individuals' rights are abused or groups are socially marginalised".

2.85 The Justices' Clerks' Society appreciated the arguments for both models but opted for the broad one, believing it "more likely to achieve its objective without criminalising behaviour inappropriately".

Arguments for the narrow model

2.86 Arguments for the narrow model were as follows.

[36] The Brewer case, referred to in the CP at para 4.12. See "Brewer Case Exposes Gaping Holes in Legislation" Disability News Service 31 May 2013, http://disabilitynewsservice.com/2013/05/brewer-case-exposes-gaping-holes-in-legislation/ (last accessed 14 May 2014).

[37] Contained in Ministry of Justice, Circular 2010/05 - *Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (Mar 2010).

(1) The broad model, in essence, imposes strict liability, which is unjustifiable except in special circumstances.

(2) The narrow model should be the default for stirring up offences generally: the broad model only applies to race, which is the earliest offence to be created and should be regarded as a special case.

(3) The broad model is a greater infringement of freedom of expression.

(4) No offence is necessary, but if there has to be one the narrow model is the lesser of two evils.

Strict liability

2.87 The Society of Legal Scholars saw no basis to differentiate between race on the one hand and religion and sexual orientation on the other, but preferred the narrow model on principle, given what they called the "strict liability element of the racial offence".

2.88 Dr Findlay Stark (who was against extension) said that a narrow model would be preferable, because otherwise the defendant's conduct is too remote from the "real" or "final" harm, such as an assault or harassment committed by someone who has been induced or encouraged to hate. The law is, he said, most concerned about that harm: any more remote harm is too distant to merit criminalisation.

2.89 The Bar Council and Criminal Bar Association said that in this matter, too, they agreed with Professor Ashworth that intent should be the foremost requirement, quoting him as follows:

> [...] [A]ny move in the direction of extending the offences of stirring up hatred would require a choice between a narrow form of definition that requires an intent to stir up hatred, and a broader form of definition that extends to situations in which hatred is likely to be stirred up (without requiring proof of intent). The Commission does not pin its colours to the mast on this issue. The presumption ought surely to be strongly in favour of a requirement of intent, unless there are cogent arguments for departing from this. There is also a question about whether, and (if so) to what extent, any new offences of stirring up hatred on grounds of disability or transgender identity should include explicit protection for freedom of expression under art. 10 ECHR. The strongest case for this is surely in relation to religion.[38]

Narrow model as default

2.90 The Senior Judiciary considered that Parliament clearly chose, for good reason, to treat racial hatred as a special case. They added:

[38] These views were contained in Professor Andrew Ashworth's article "Hate Crime," 9 *Criminal Law Review* 709 (2013).

> As a matter of logic, and in the interests of consistency, there seems no justification for treating hatred based on disability and transgender identity any differently from hatred based on religion and sexual orientation. Although it is purely a policy decision, it would, therefore, seem logical that the "narrow" model should be followed in each case if the stirring up offences are to be extended.

2.91 The Leicester Hate Crime Project (Dr Neil Chakraborti's group) considered that the narrow model presented "the most realistic and least problematic legal path" despite the likelihood that few cases would be successfully prosecuted. They felt it was "important symbolically" to have all of the recognised hate crime characteristics covered by the stirring up offences.

2.92 The Devon and Cornwall Police could not comment on the appropriate model without better evidence of the practical need for a new offence, but felt the narrow model more likely to seen as acceptable. They also, however, thought consistency across all characteristics would be preferable.

2.93 The Royal College of Psychiatrists answered:

> The narrow model would be better as it would establish a more balanced approach to the issue.

Freedom of expression requires narrow model

2.94 Professor Gavin Phillipson argued that:

(1) "threatening" has a clear meaning (usually the possibility of physical harm);

(2) "abusive" and "insulting" are vague, and can extend to the strong expression of any view that the victim disagrees with;

(3) the broader model therefore risks undesirable consequences, such as police harassment of religious spokespersons and a backlash of resentment against the target group and sympathy for those prosecuted;

(4) there is a role for robust debate on how far disabled people should be entrusted with different responsibilities, eg as a parent, or in certain types of employment.

He continued:

> At the cruder, blunter and less well-informed outer edges of this debate, there may well be expression that some disabled people would find insulting. While of course there is always the requirement under the broad model that 'hatred be likely to be stirred up', this is an inherently uncertain requirement, and difficult for the person at the time to judge. Moreover, as argued above, the key point behind the narrow model is to send a very clear message not only to prosecutors but also, importantly, to the police, that merely offensive speech comes *nowhere near* the threshold of criminal liability.

2.95 The Safe Durham Partnership answered:

> Broad approach would limit freedom of expression, in order to ensure quality [equality?] this should be the same as existing.

2.96 Christian Concern and the Christian Legal Centre answered:

> We do not believe that the proposed new stirring up hatred offences are necessary. However, should they be introduced, we submit that the narrow model is better tailored than the broad model since the words, material, or conduct must be deemed as "threatening" to be in violation of a stirring up offence. The narrow approach reduces the possibility of wrongful prosecution.

2.97 Dr Findlay Stark could also be included in this group: while not definitely opposed to these offences he believed the evidence was insufficient.[39] He considered that if there were to be an offence it should be narrow.[40]

TRANSGENDER OFFENCE: BROAD OR NARROW MODEL?

2.98 Question 10 in the CP asked:

> If consultees consider that a new offence of stirring up hatred on grounds of transgender identity is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above? [paragraph 4.77]

2.99 The question of whether the distinction should exist in principle is discussed above under the heading of the disability offence. Here we address only the question of how the transgender offence should be classified.

2.100 50 respondents were in favour of the broad model and 17 of the narrow model.

Arguments for the broad model

2.101 Several respondents considered the merits of the broad model in general, without reference to transgender issues as such, and therefore repeated or referred to their responses to question 9, concerning the disability offence. [41]

2.102 South Yorkshire Police preferred the broad model as otherwise it would be too easy to deny intention.

2.103 Galop answered that the broad model was more appropriate for transgender hatred. It was unclear whether "threatening" would encompass only physical threat or also threats to wellbeing, a person's sense of identity which might not be seen by police and prosecutors as having a realistic prospect of success if prosecuted. In addition, people and communities suffer harm from the stirring up of hatred whether the perpetrator intended to stir up hatred or not. Galop also pointed to the low number of prosecutions for stirring up racial hatred, in comparison to the overall number of recorded race hate crimes. They added that

[39] Para 2.25 above.

[40] Para 2.88 above.

[41] UNISON (para 2.81 above); Diverse Cymru (para 2.78 to 2.79above); Practitioner Alliance for Safeguarding Adults (para 2.82 above); Worcestershire Safeguarding Adults Board (para 2.82 above); Stop Hate UK (para 2.79 to 2.80 above);

transphobic hate crime is "massively under-reported" and they considered this also to weigh in favour of the broad model.

2.104 Professor Christian Munthe answered:

> But note my reservations against "transgender identity" being too narrow as well. It should be even broader and include all sexual identities (see proposed definition earlier).

Arguments for the narrow model

2.105 Again several respondents simply repeated or referred to their response to question 9, concerning the disability offence.[42]

2.106 Christian Concern and Christian Legal Centre answered:

> We do not believe that the proposed new stirring up hatred offences are necessary. However, should they be introduced, we suggest that the transgender characteristic falls much more in line with sexual orientation and religion as opposed to race and disability, thus transgender should follow the "narrow" approach. In many instances, transgender identity is linked with the lesbian, gay, bisexual community through the acronym "LGBT" which is all under the banner of sexual orientation. Thus there can even be an argument that transgender should not even be a separate category and linked-in directly with sexual orientation under the "narrow" model.

2.107 The Crown Prosecution Service said:

> Here we consider that freedom of expression arguments merit the "narrow" model being followed. Criminalisation should not disproportionately interfere with the rights of others to have freedom of thought, conscience and religion under Article 9 ECHR as well as allowing freedom of opinion and expression under Article 10 ECHR – however shocking, offensive or disturbing. The "narrow" model would allow for the criticism of the sexual practice or conduct whilst not directly threatening the individual involved. This would also be consistent with the current "stirring up" offence on the basis of sexual orientation.

2.108 Radfem answered:

> As much protection as possible should be afforded to those critiquing "gender" on feminist grounds and in line with Human Rights legislation. In relation to transgender identity only, we do not consider the new offence is necessary in either principle or practice but, if it goes ahead, it should be narrow to avoid the pitfalls described in previous answers.

2.109 Devon and Cornwall Police gave the same response they gave under disability.[43]

[42] These were: Dr Findlay Stark, Professor Gavin Phillipson, Safe Durham Partnership, the Leicester Hate Crime Project, the Senior Judiciary, and the Bar Council and Criminal Bar Association.

DISABILITY: FREEDOM OF EXPRESSION CLAUSE?

2.110 Question 11 in the consultation paper asked:

> If a new offence of stirring up hatred on grounds of disability were created, should it include explicit protection for freedom of expression? If so, what should it cover? [paragraph 4.84]

2.111 33 respondents answered that there should be an explicit protection, 30 answered that there should not and 18 were unsure or had other observations.

2.112 This question is related to the choice between the broad and narrow models. In existing law, the racial hatred offence follows the broad model and has no free speech protection; the religious and orientation-based offences follow the narrow model and have a free speech protection.[44]

2.113 The provision in question, in the existing offences, does not call itself a "defence" or "exception" exempting certain utterances that would otherwise constitute offences of stirring up hatred.[45] Rather, the provision makes it clear that certain types of discussion, debate, criticism or other content will not of themselves amount to an offence of stirring up hatred. It is designed to offer reassurance that legitimate debate about religious beliefs and sexual practices will not be affected and is entirely distinct from the behaviour targeted by the offences.

2.114 Two further arguments have been advanced to show that there is no overlap between stirring up hatred and protected free expression.

(1) One is that, as every statute has to be read in a way compatible with the European Convention on Human Rights, a reservation in favour of freedom of expression is already implicit in the sections creating the offences.

(2) The other is that the Convention right to freedom of expression may be restricted, among other reasons, "for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others". Hate speech legislation is therefore compatible with the Convention.

Unfortunately these arguments pull in opposite directions. Given any expression that seems to be on the borderline between permitted free expression and unlawful stirring up,[46] one could equally argue "it's free speech, so it's not hate crime" or "it's hate crime, so it's not free speech".

2.115 Similarly these arguments could be used either for or against the creation of a freedom of expression clause for any new stirring up offences. If there is no

[43] See para 2.92 above.

[44] Explained at paragraph 2.113 above.

[45] In the Parliamentary debates on the religious hatred offence, several earlier drafts of this provision were rejected because they did convey this suggestion.

[46] For example Holocaust denial or advocating the elimination of people who are obese or unfit for eugenic reasons.

overlap between hate speech and legitimate free expression, it follows equally that the clause is of no use and that it does no harm. On the other hand one could argue that, given the exceptions to the Convention right described above, the Convention protection is not strong enough and there must be a clear protection for legitimate debate, hence there is a need for the clause.

Arguments for a freedom of expression clause

2.116 Arguments for a freedom of expression clause are as follows.

(1) The clause may not be necessary in practice but will provide needed reassurance.[47]

(2) The clause should be included as part of the narrow model, which is preferable in principle to the broad model.[48]

(3) The clause should be included on the analogy of the provisions for religion and sexual orientation.[49]

(4) The clause is even more necessary if, in other respects, the broad model is adopted.[50]

(5) The clause will protect legitimate debate.[51]

(6) The clause will ensure compatibility with the ECHR.[52]

(7) The offence is unnecessary, so anything that narrows its scope is desirable.[53]

(8) Some respondents did not give reasons for the clause, but had observations about the way it should be implemented.[54]

Reassurance

2.117 The Justices' Clerks' Society answered:

[47] Justices' Clerks' Society, Society of Legal Scholars.

[48] Professor Gavin Phillipson.

[49] Leicestershire Police, ACPO, Cheshire Constabulary, West Midlands Police, Senior Judiciary.

[50] Practitioner Alliance for Safeguarding Adults, Worcestershire Safeguarding Adults Board.

[51] Royal College of Psychiatrists, Anonymous, Thames Valley Police, South Yorkshire Police, West Yorkshire Police, Action Disability Kensington & Chelsea, Professor Leslie Moran.

[52] Derbyshire Police, National Black Crown Prosecution Association.

[53] Christian Concern, Christian Legal Centre.

[54] Jan Evans, Merseyside Probation Trust, Anonymous, London Criminal Courts Solicitors Association.

> We have sympathy with the view[55] that the protection does not add significantly to the protection provided in the ECHR but we see no reason for parliament not to clarify the point and reassure citizens who may fear the legislation will inappropriately curtail their rights to express themselves.

2.118 The Society of Legal Scholars, Criminal Justice Section, answered:

> Yes, in order to allay any fears that these provisions might be an incursion on free speech.

Consistency with narrow model

2.119 Professor Gavin Phillipson answered:

> Since I support the narrow model, which is designed primarily to guard against the chilling effect that may come from over-broad interpretation of these offences, it follows that I support specific savings for freedom of expression, whose primary purpose is to make the points discussed above clear beyond doubt, for the benefit of prosecutors and police officers. I also do not agree that the distinction that e.g. the religious hatred offence seeks to draw between expressing antipathy for particular religious practices or beliefs and expressing hatred of the adherents is one that collapses in practice (Consultation, para 2.119). The effect of these provisions is that beliefs or doctrines may be attacked even in vituperative language: but threats may not be made against the actual adherents. The difference is between attacks upon actions and beliefs on the one hand, and attacks on people on the other. I believe that this is a fairly robust and stable distinction and could be applied to speech about transgender status and disability.

What should it cover?

2.120 Professor Phillipson continued:

> Clearly such clauses must be very carefully drafted and, if draft legislation is brought forward, will doubtless be subject to very detailed scrutiny and amendment by Parliament and its committees. Therefore I offer only some very preliminary thoughts here. The clause could include words to the effect that nothing in the relevant provisions should be read or given effect in a way which prohibits or restricts any of the following: discussion of what roles in employment and other spheres (eg parental) people with particular disabilities persons may carry out, and any risks they may pose to others through their disability; proselytising or discussion of religious views on the causes of disability; discussion of when very severe disability may warrant voluntary euthanasia where that is the clear wish of the disabled person.

[55] This was our view expressed at para 4.79 of the CP.

Consistency with religion and sexual orientation

2.121 Several police forces considered that the clause should mirror those introduced for hatred on grounds of religion and sexual orientation.[56]

2.122 The Senior Judiciary also considered it logical that a freedom of expression clause should be included for disability given the broad definition of "disability", which would potentially include obesity. They added that it was "difficult to envisage how there could ever be legitimate discussion or criticism of disability which was intended to stir up hatred".

Necessary if broad model adopted

2.123 The Practitioner Alliance for Safeguarding Adults and the Worcestershire Safeguarding Adults Board both appeared to consider that clarification was needed as to what the offence was intended to deal with, if the broad model were adopted. They also suggested that guidance was required about comments posted on Twitter and other social media networks.

> "Freedom of expression" brings with it the "freedom to offend"; what it should not do is bring with it the "freedom to incite" hate, violence or crime. Explicit protection is needed to ensure the above distinctions are recognised and respected, while retaining the principle that ignorance of the law or the outcomes of your actions should be no defence, in line with the "broad" model of disability. Recognition is also essential of the different mediums being used to exercise the freedom of expression. Comments made via social networks or twitter can be more easily misinterpreted than ones made to face-to-face. for example, and can also be made anonymously, causing greater distress and fear, particularly for "vulnerable adults"/"adults at risk" who may rely on these networks for staying in touch with friends, family etc.

Protection of legitimate debate

2.124 The Royal College of Psychiatrists suggested that explicit protection was required for material whose "primary aim [is] to debate or explore issues, or to educate". Due consideration should also be given to the platform on which these matters are expressed. For instance, if views are expressed through a medium with millions of viewers there should be a proportionate response. Due consideration should also be given to the opportunity given for expression of the opposing view via the same medium.

2.125 A consultee who wished to remain anonymous said such a clause "should cover non-inciting discussion of medical ethics questions around embryo selection etc".

2.126 Thames Valley Police answered:

[56] Leicestershire Police, ACPO, LGBT Portfolio, Cheshire Constabulary. West Midlands Police said the protection should be "similar as for race/religion": the reference to race is incorrect as no express freedom of expression clause applies to the racial hatred offences.

> Fair comment should be protected. Due consideration as to how press /commentators etc would have been treated under such a law given their recent comments and coverage of those who have become disabled through their own acts of criminality etc such as Abu Hamza.

2.127 South Yorkshire Police said the clause should protect "discussion about the treatments of persons with a disability or views about disability". The West Yorkshire Police Hate Crime Lead said the clause should protect the expression of someone's personal view and beliefs and not prohibit discussion or criticism but not the wider provisions within 29J.[57]

2.128 Action Disability Kensington & Chelsea said the clause should protect use of:

> disablist language in the context of training and learning, a context in which professionals and children and young people need to be free to use such language to challenge and explore historical and contemporary usage, prejudice and awareness of disability-specific hate crime and materials produced by disabled people or co-produced with disabled people that reclaim historically disablist language and imagery in the context of academic study or political discourse referencing identity, social movements and empowerment.

2.129 Professor Leslie Moran (although he was against the offences and, therefore, their extension) argued that there should be such a clause for all new stirring up offences if any were introduced. He questioned the basis for differentiating between race and sexual orientation as the current legislation does, by providing freedom of expression in relation to discussion of "sexual conduct or practices" but not racial conduct or practices. This was wrong in principle in his view because sexual orientation, like race, is better understood as part of an individual's personal identity.

Compatibility with ECHR

2.130 Derbyshire Police pointed to the need to respect Article 10(2) ECHR, as did the National Black Crown Prosecution Association. The latter also noted the potential relevance of Article 9 ECHR in this context and concluded that any new offences should only capture the far more extreme, inflammatory conduct which is intended or likely (depending on the definition of any new offences) to stir up hatred.

Offence not necessary

2.131 The Christian Concern and Christian Legal Centre said new offences were not needed but, if introduced, should have explicit protection for freedom of expression.

Other points

2.132 Merseyside Probation Trust said it was uncertain what such a clause should cover and pointed to the need to "consult widely with disabled groups

[57] This refers to s 29JA Public Order Act 1986 which sets out the freedom of expression savings for offences of stirring up hatred on grounds of sexual orientation: as discussed in para 4.80 of the CP.

transgender groups and writers and actors comedians et cetera of both groups to be able to get the parameters".

2.133 A consultee who wished to remain anonymous answered:

> Freedom of expression is great but should not be directed at an individual it has to include moderation and sensitivity if it is going to lead to stirring up hate then it is unfortunate but freedom of speech should be infringed.

2.134 The London Criminal Courts Solicitors Association, while in favour of a freedom of expression clause, noted that a "fundamental problem with the "stirring up" offence [was that] save in the most extreme and clear cut of cases, and perhaps not even then, the "freedom of expression" defence is likely to render it almost impossible to secure a conviction".

Arguments against a freedom of expression clause

Convention rights are a sufficient protection; a clause may be unhelpful[58]

2.135 Several consultees pointed to the broad protections already provided by the ECHR (Articles 9 and 10). UNISON said that introducing clauses for new offences when they are absent from racial hatred offences might indicate that the latter are seen as more serious.

2.136 Diverse Cymru added that they had "anecdotal evidence that these protections for freedom of expression, by their explicit nature, are being interpreted by police in a far wider context and meaning that religious individuals are entitled to preach hatred against LGB people, In their view, the current protections should now be subjected to a broader review given that reformulation of the existing stirring up offences was outside the scope of the current project.

2.137 Stop Hate UK argued that explicit protection for freedom of expression was not only unnecessary but would not have the effect of furthering the right to freedom of expression.

2.138 The Leicester Hate Crime Project (Dr Neil Chakraborti's group) answered that such a clause would not necessarily provide clarity regarding what amounted to incitement of hatred.

2.139 Dr. Andreas Dimopoulos argued that Article 8 of the Convention on the Rights of People with Disabilities obliges states to encourage the media to portray disabled people in a manner consistent with the Convention's purpose, particularly having regard to the social model of disability.[59] This did not equate to a requirement to criminalise disablist speech, but nonetheless a clause explicitly protecting free expression in this context would "unnecessarily complicate the interpretation of the offence".

2.140 Anna Scutt said that such a clause would be "used as carte blanche to bully, insult and belittle disabled people and to stir up hatred on the grounds of

[58] UNISON, National Aids Trust, Diverse Cymru, St Helens Council, Seamus Taylor CBE, Safe Durham Partnership, Stop Hate UK, Leicester Hate Crime Project.

[59] This concept is explained at para 1.192 above.

disability. Providing any sort of protection for freedom of expression would completely negate any new offence created."

The offence is too narrow to engage freedom of expression[60]

2.141 The Bar Council and Criminal Bar Association answered that the strongest case for an express freedom of expression clause was in relation to religious hatred. They went on:

> The question highlights a tension between two considerations. On the one hand, there is the necessary and proportionate curtailing of Convention rights in furtherance of pursuing legitimate aims. On the other hand, we recognise that the Convention protects the right to shock, offend or disturb (for the references to case law see paragraph 4.62 of the [CP]). We note the observations of the Commission that the offences would only capture the far more extreme, inflammatory conduct which is intended or likely (depending on the definition of any new offences) to stir up hatred (also at paragraph 4.62 of the [CP]).
>
> Ultimately, we are of the view that stirring up hatred in respect of disability is not conceivably a legitimate exercise of, or claim to, freedom of speech. On that basis, we think that there should not be explicit protection for freedom of expression which is aimed at stirring up hatred regarding disabled individuals, where the result may be crime and disorder. We rely on the argument which is cogently set out at paragraph 4.60 of the [CP] (why religious beliefs and sexual orientation are fundamentally different from racial characteristics). We think that those arguments apply to, and are interchangeable with, any debate as to stirring up hatred in respect of disability.

2.142 Mencap replied that as the offences were only meant to capture the most extreme conduct, any concerns that "genuine public discourse or expression of opinion will be threatened" were ill-founded. Professor Christian Munthe expressed a similar opinion.

Disability is analogous to race[61]

2.143 The Crown Prosecution Service answered ""disability" hate crime has similar characteristics to "racial" hate crime and therefore should not have specific provisions for the "protection of freedom of expression".

2.144 The Discrimination Law Association answered:

> No. Religion and sexual orientation should be viewed as exceptions as there are arguments (not endorsed by the DLA) that a person can change their sexual orientation or religious belief. We are not aware of such arguments even existing in relation to disability.

[60] Bar Council, Criminal Bar Association, Mencap, Seamus Taylor CBE.

[61] Crown Prosecution Service, Full of Life, Discrimination Law Association, Mencap, UNISON.

Reasons for uncertainty

2.145 Several respondents were uncertain how to answer this question. Some put the arguments on both sides, while others expressed uncertainty about how the freedom of expression clause would work.

There are arguments on both sides

2.146 Devon and Cornwall Police answered:

> It is felt that equal treatment of all protected characteristics offers the most appropriate solution, and that prevention of freedom of expression can in turn have significant negative impact. Therefore, in line with religion and sexual orientation, it is possible that explicit protection for freedom of expression would be beneficial. However, there is insufficient evidence to assess whether this is certainly necessary or to assess whether this has significant impact within the existing provisions.
>
> However, it is also noted that inclusion of clauses enabling freedom of expression can also have detrimental impact when endeavouring to address cultural issues.

2.147 The Linkage Community Trust said:

> A balance needs to be struck between protecting freedom of expression and protecting vulnerable people from becoming victims of hate crime. More consideration over how this balance could be achieved is needed.

2.148 A consultee who wished to remain anonymous answered:

> Freedom of speech is very important – but not when it impinges on someone else's freedom or puts them in danger in any way. With freedom of speech also comes the social responsibility.

2.149 The Disability Hate Crime Network and Disability Rights UK gave a joint response:

> This is an area where opinions are widely divided. Many feel that too much freedom exists and that it abuses disabled people by social stigma and misinformed hostility. Benefits fraud and cheating is a point in mind. However some disabled people do see that acceptable standards of freedom of opinion must be consistent in any legal matters, and by common knowledge this is not applied in the CJS.

Uncertain how it would work or what it would cover

2.150 The Merseyside Probation Trust, Respond and the Linkage Community Trust all questioned how such a clause operated in practice and whether it would be effective in striking the balance between protecting freedom of expression and protecting the vulnerable from becoming victims of hate crime. The Police Superintendents Association of England & Wales answered:

> That depends entirely on the situation. An individual should be allowed to freely express their opinion, but not at the expense of another individual, who may feel that such an expression could be considered as stirring up hatred – from their point of view.

2.151 The Learning Disability Partnership answered:

> We are not sure. We cannot think of an example where freedom of expression could be justified to stir up hatred against disabled people.

TRANSGENDER: FREEDOM OF EXPRESSION CLAUSE?

2.152 Question 12 of the CP asked:

> If a new offence of stirring up hatred on grounds of transgender identity were created, should it include explicit protection for freedom of expression? If so, what should it cover? [paragraph 4.85]

2.153 29 respondents considered that there should be an explicit protection, 29 considered that there should not and 10 were unsure or had other observations.

2.154 Many of the issues are the same as in the disability offence, and many of the responses either duplicated or referred to the responses to question 11. Here we only describe those responses that differed or went further.

2.155 One distinction that could be drawn between the two offences is that being disabled is not the result of personal choice, and is in this way analogous to race. Gender dysphoria may also be innate, but there is arguably more room for personal decision about what gender identity to present and whether to seek surgical and other medical intervention: in this way, it is argued, transgender identity is more analogous to sexual orientation than it is to race. It is therefore possible, though not necessary, to favour a broad model for the disability offence and a narrow model, including a freedom of expression clause, for the transgender offence. However, of all the consultees who responded on this question, only the Crown Prosecution Service favoured distinguishing the stirring up offences in this way, putting a case for including a clause for transgender hatred, on the grounds that this was more akin to sexual orientation hatred, but not for disability hatred because "disability hate crime has similar characteristics to racial hate crime and should not have specific provisions for the protection of freedom of expression".

Arguments for a freedom of expression clause

2.156 Christian Concern and the Christian Legal Centre argued that the new offence is unnecessary and, if introduced, should have an explicit protection for freedom of expression. They quoted several examples where overzealous police officers had detained or questioned religious spokesmen for speaking against homosexuality, even though no convictions had resulted. Similar results could follow from a transgender offence.

> All these examples go to show that if a new stirring up offence is to be created for the transgender identity, there must be greater and explicit protection for the freedom of expression, especially when it comes to religious liberties. These cases also show that there seems to be a trend of creating a hierarchy when it comes to the five protected characteristics, with the protection of sexual orientation and possibly transgender identity trumping any conflict with the protection of religion and the subsequent freedom of expression. This is concerning where both judiciary and enforcement officers are following this same trend and thus, there is even more necessity to the creation of explicit safeguards for the protection of the freedom of expression.

2.157 The Crown Prosecution Service said it would be appropriate to include an express clause mirroring that in the existing offences relating to sexual orientation.[62] Radfem answered that such a protection is necessary to protect

> the right of (radical) feminists to critique gender and for women to identify where there are differences in life experiences and material reality (biology) between female humans and transgendered people (M to F) without accusations of "transphobia" and "hate speech." … Similarly there should be a right to criticise surgical interventions and to argue for the creation of female-only spaces.

2.158 Dr Lynne Harne answered:[63]

> There should be explicit protection for freedom of expression on transgender identity. It should be the same as for freedom of expression as is defined in terms of religion, i.e. criticism, expressions of antipathy and dislike and criticism of transgender practices.

2.159 The Justices' Clerks' Society referred to their response to question 11 and proceeded:

> We are particularly conscious that some groups have strong views about transgender groups which they may wish to express in a manner that will not stir up hatred and should not be proscribed.

2.160 Professor Gavin Phillipson also referred to his response to question 11, and argued:

> With the proviso above about preliminary thoughts in mind, the clause should include words to the effect that nothing in the foregoing provisions should be read or given effect in a way which prohibits or restricts any of the following: proselytising or discussion of critical or other religious views on the legitimacy or morality of changing gender identity including surgery and other treatment; discussion of the

[62] Section 29JA of the Public Order Act 1986, discussed in the CP at paras 2.122 to 2.124 and 4.82 to 4.83.

[63] This response was accidentally attached to question 11, concerning the disability offence, but is clearly concerned with the transgender offence only.

causes of gender dysphoria; the expression of traditional religious and cultural views on gender roles and human sexuality.

2.161 Stay Safe East answered:

> As with all other free speech, the right to express a private and moderated opinion about difference but not the right to speak or write in ways which are inflammatory, so for example a reasonable debate about whether being transgender is a social or physical issue should be encouraged, but incitement to ostracise people would not be acceptable.

Arguments against a freedom of expression clause

2.162 Trans Media Watch answered:

> We do not accept that there can be any legitimate justification for stirring up hatred against a group. We do not believe that, for instance, articles querying scientific ideas about the nature of transgenderism would fall under the remit of such laws anyway unless they included incitement unnecessary to making a scientific case. We believe that those feminist groups opposed to the inclusion of trans women in certain socio-political spaces could adequately debate the politics of inclusion/exclusion without recourse to stirring up hatred. We believe that religious groups could express faith-based objections to people being transgender without stirring up hatred. If such dialogues spill over into stirring up hatred, we believe that they thereby lose their legitimacy as free speech.

2.163 Galop said:

> We do not feel any extra caveats to this law [are necessary][64] and would only create extra complexity.

2.164 The Bar Council and the Criminal Bar Association, in their joint response, answered:

> If stirring up hatred on grounds of disability should not be protected by freedom of expression principles, then neither should it in the case of transgender identity. While transgender identity may involve an element of choice that disability plainly lacks, we are not persuaded that this is a material or plausible distinction. We consider that transgender identity is so fundamental to a person's identity that it is indistinguishable to other features of identity which are intrinsic.

2.165 GIRES answered:

> The right to freedom of speech should not supersede the rights of protected categories to protection.

[64] Their response read "is unnecessary" but we take this as a typographical error.

DEFINING "DISABILITY" AND "TRANSGENDER IDENTITY" IN ANY NEW OFFENCES

Should the same definitions be used for aggravated and stirring up offences?

2.166 Our provisional Proposal 10 was that, if new aggravated offences and stirring up offences are created, the same definitions of "disability" and "transgender identity" should be adopted in relation to both.[65] In our view, the interests of coherence and consistency required this approach, unless there were in the absence of any compelling arguments of principle or practice to justify different definitions. We asked consultees whether they agreed with this view.

2.167 Most consultees who responded on these questions agreed with us, without further comment. Where comments were made, consultees referred to the importance of consistency. For example, the Practitioner Alliance for Safeguarding Adults said that consistency is required to ensure "equitable and consistent access to the criminal justice system"; Devon and Cornwall Police said that consistency would "reduce uncertainty for victims, law practitioners and offenders alike". The CPS said consistency would "greatly assist practitioners and help to ensure successful identification, investigation and prosecution of these hate crimes". Victim Support said that consistency was required to ensure victims' confidence in the criminal law.

2.168 Only four consultees[66] disagreed with this proposal. In some cases this was due to their opposition to the extension of the offences generally, or to the specific definitions already in place, rather than because they felt there was an argument for different definitions to be used across the two classes of offence.

Should the section 146 definition of "disability" be used?

2.169 Having taken the view that definitions should be consistent as between any aggravated and stirring up offences, we asked consultees whether they agreed that the section 146 definition,[67] which was the one we had preferred in the aggravated offences context, would be suitable for stirring up offences.[68]

2.170 The majority of consultees who answered this question reiterated or referred back to the reasons they had given to the equivalent question under aggravated offences.[69] These mainly related to concerns that the definition should explicitly take account of specific types of disability, such as sensory impairment, long-term health conditions and learning difficulties, as well as that view that the definition should capture offences motivated by the victim's perceived disability or by association with disabled people (eg carers). Several consultees[70] also felt strongly that any definition should adopt the "social model" of disability that is

[65] See the CP at paras 4.86 and 4.87.

[66] Radfem, the Royal College of Psychiatrists, the Disability Hate Crime Network, Disability Rights UK.

[67] Section 146 (5) of the Criminal Justice Act 2003 provides that "in this section, 'disability' means any physical or mental impairment."

[68] See the CP at paras 3.86 to 3.100 and paras 1.233 to 1.234 above for our reasoning.

[69] These reasons are set out in detail from para 1.235 above.

[70] Leicestershire Police, Cheshire Constabulary, the ACPO LGBT Portfolio.

used in the UN Convention on the Rights of People with Disabilities. No consultees introduced additional arguments regarding the suitability or otherwise of the section 146 definition in the specific context of stirring up offences.

Should section 146 or the Scottish definition of "transgender identity" be used?

2.171 We had preferred the section 146 definition[71] for any new aggravated offences, and accordingly we asked consultees whether they felt that it would be suitable for stirring up offences. We also asked whether the Scottish definition[72] would be preferable.[73]

2.172 Again, consultees repeated or referred back to their responses to the corresponding definition questions on aggravated offences, and no new arguments were advanced relating to stirring up offences specifically. Consultees had earlier advanced concerns that the lack of judicial interpretation of the section 146 definition might operate to exclude groups such as asexuals, transvestites, cross-dressers, and other non-standard gender identities.[74] Many of them preferred the Scottish definition as a result, feeling it was clearer and more inclusive by virtue of enumerating more categories and containing a "catch-all" clause.

CAN ENHANCED SENTENCING CAPTURE THE WRONGDOING?

2.173 Question 14 of the CP asked:

> Do consultees agree that the sentencing provisions in section 146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people? [paragraph 4.100]

2.174 67 respondents agreed that the sentencing provisions could not capture this kind of wrongdoing, 14 respondents thought that the sentencing provisions were sufficient and 5 were unsure or made other observations.

2.175 Most of the respondents made general observations about whether the wrongdoing in question occurs or whether the proposed stirring up offences are a good idea. On the specific comparison between stirring up offences and sentencing provisions, two arguments stand out.

[71] Section 146 (5) of the Criminal Justice Act 2003 provides that "references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment."

[72] Section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 provides that: "reference to transgender identity is reference to- (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity."

[73] the CP at para 4.92; our full examination of the definitions in the aggravated offences context is at para 3.127 of the CP and following.

[74] See from para 1.292 above.

(1) Several consultees[75] argued that the type of harm, or the type of wrongdoing, targeted by the proposed stirring up offences is fundamentally different from those targeted by offences to which section 146 applies. The former consists of incitement to society to hate people in protected categories. The latter consists of direct wrongdoing against individuals belonging to those categories, in which hostility is a factor. Some raised the 7 year maximum sentence available for the offences of stirring up hatred.

(2) As against that, some consultees questioned the existence of any extreme, discrete wrongdoing which the sentencing regime could not capture.[76]

Sentencing provisions insufficient

2.176 The Crown Prosecution Service answered:

> Although, as with the current stirring up offences, there are not likely to be large numbers of prosecutions and it has not been identified as a specific problem so far in the cases that the CPS has seen, we consider it will still be useful for prosecutors to have these new stirring up offences available to them in the event of potential cases arising in the future as it will fill the gap between minor public order offending and the serious offences of encouraging crime.

2.177 Diverse Cymru answered:

> As mentioned previously in this response, the range of offences that can be charged do not necessarily cover all incidences of stirring up hatred; cannot capture the severe and damaging nature of these offences; do not provide a clear label as to the prejudiced nature of the offence; and do not attract an increased sentence commensurate with the impact of this type of wrongdoing. Additionally the enhanced sentencing provisions can only be used where there is a direct victim in most cases, which fails to recognise the discrete nature and wide-spread harm that can be related to these offences.

2.178 Dr Findlay Stark answered:

> Yes, because of the gaps identified in the Consultation Paper. If those gaps are being exposed regularly enough, the extension of the stirring up offences seems the better approach to addressing them. There is insufficient evidence of the case being made out here, however.

2.179 Stay Safe East answered:

[75] Victim Support, Lesbian & Gay Foundation, Bar Council and Criminal Bar Association, Diverse Cymru, CPS London Scrutiny and Involvement Panel – Community Members, Derbyshire Police, National LGB&T Partnership, Stay Safe East, Society of Legal Scholars, Stop Hate UK, GIRES, Dr F Stark, Full of Life – Supporting families of disabled children and one anonymous consultee.

[76] The Senior Judiciary, Christian Concern and the Christian Legal Centre, Radfem, Devon and Cornwall Police, North Yorkshire Police, Anna Scutt .

> Stirring up hatred, to the point of advocating killing disabled children at birth, or that disabled people are in effect 'useless eaters', or that transgender people are 'unnatural' is in a different category of crime from individual crimes against disabled people or transgendered people.

Sentencing provisions <u>are</u> sufficient

2.180 Christian Concern and the Christian Legal Centre said there was insufficient evidence of the specific and extreme kind of wrongdoing which the new offences would target. North Yorkshire Police agreed there was insufficient evidence (and, for this reason, could not agree or disagree with the question posed).

2.181 Radfem also questioned the assumption that this kind of wrongdoing existed. They argued that the real problem, in transgender context, is one of "prejudice against gender non-conformity".

2.182 The Senior Judiciary answered:

> Section 146 is adequate to capture wrongdoing that is criminal, because the aggravation can be properly reflected in sentence. There will be very few cases where the maximum penalty would not be adequate. A single malicious communication might be an example (where the maximum is only 6 months) but serious offending is likely to involve multiple communications, affording scope for consecutive sentences. Even if section 146 does not apply, community impact is always a relevant aggravating factor. If the wrongdoing is not criminal because it merely involves encouraging hatred rather than encouraging offences, then section 146 cannot apply. Theoretically at least, this leaves a gap in the sentencing powers for extreme and discrete wrongdoing against disabled or transgender people. But we doubt whether such cases are likely to occur very often. Such an offence might very well be committed with other offences which could be regarded as aggravated under section 146.

2.183 Anna Scutt answered that the sentencing provisions would be sufficient, but only:

> … if judges use them properly. The belittling by judges of hate crime against disabled people is all too frequent. The sentencing provisions will only work if judges can be trusted not to see hate crimes as 'horseplay gone wrong'.[77]

[77] This is a reference to reported remarks by the trial judge in *Sheard*: see fn 5 above.

PART 3
OTHER COMMENTS

3.1 Many consultees used the "Other comments" section in our pro forma response document to discuss the work their own organisations do to support those with the relevant protected characteristics when they are victims of hate crime, prejudice and discrimination. Many discussed the impact that hate crime has on its victims as well as their families, partners and carers. Some referred to their own research and reports (or those of other bodies) and gave examples of the abuse, harassment, violence and other offences that were representative for their community, which in many cases they considered should be better addressed by hate crime legislation and in particular by the enhanced sentencing system.

3.2 Many useful comments were also made about non-legislative measures that consultees considered could be taken by Government and/or criminal justice agencies to help ensure a more effective overall response to hate crime. We cover the key points raised below. Whilst most are beyond the remit of this particular project, some could help to address deficiencies in the current operation of enhanced sentencing and others may be of interest in terms of future action to be taken, perhaps as part of any subsequent review of the Government's work under the hate crime action plan. [1]

3.3 Many consultees emphasized that legislative change is only a small part of the picture in improving the overall response to hate crime. As UNISON put it:

> We are particularly concerned that with the possible creation of new sentencing provision for hate crime, the Government will consider the matter dealt with. We therefore urge the Government to consider much greater access to properly resourced restorative justice, education and training at all levels within the criminal justice system to increase understanding and improve performance, greater access to properly resourced support services for victims, and preventative education within schools and communities.[2]

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

[2] UNISON continued: "These demands are echoed amongst the key recommendations of the July 2013 report *Understanding who commits hate crime and why they do it* commissioned by the Welsh Government (http://www.mesmacnortheast.com/wp-content/uploads/2013/08/understanding-who-commits-hate-crime-and-why-they-do-it-en.pdf), calling for "the use of restorative justice interventions … `wider and deeper' third-party hate crime reporting mechanisms, particularly with regard to disability hate crime and other minority hate crime sectors, coupled with appropriate publicity, training and awareness campaigns... [and] essential `bridging' activities that bring people together from different communities in a meaningful way, in order to demystify narratives of difference."

Extent and impact of hate crime

3.4 Mind said its research showed that nine out of ten people with mental health problems faced stigma and discrimination in their day to day lives.[3] Mind's *Another Assault* campaign found that people with mental health problems faced "shockingly high levels of crime and victimisation, with many feeling disempowered by the criminal justice system".[4]

3.5 Mind, Victim Support and four universities have since carried out further research on the issue, which they say reveals that people with mental health problems are significantly more likely to be a victim of crime than the general population and more likely to be a victim more than once. [5]

3.6 Weston and North Somerset DIAL said they had "noticed an increase in hate crime particularly around clients being called 'scroungers'". A focus group held by Action Disability Kensington & Chelsea noted "a lot of the negative attitudes that they experienced daily couldn't be called 'crime' but were more like bad manners and selfish, thoughtless behaviour".

3.7 Full of Life noted that carers "have been subject to significant harassment and abuse by association with disability".

3.8 Leonard Cheshire Disability said they had received 45 responses to a recent online survey and also spoken directly with a number of disabled people who had been victims of hate crime or knew others who had. One person had told them:

> I was under constant physical and mental attack from gangs of young people on my estate for nearly seven years. I was trapped in a nightmare situation. The daily harassment, intimidation and attacks wore me down, stopped me enjoying my life and left me frightened to leave my home.

3.9 70% of people who responded to the Leonard Cheshire survey said they had

> experienced verbal abuse related to their disability and a significant minority (20%) [had] been victims of physical violence. As well as the immediate physical and emotional impact of abuse, attacks and harassment, victims of disability hate crime often continue to suffer lasting fear and intimidation in the long term, detrimentally affecting their physical and mental health and leaving them isolated and cut off from their family, friends and local communities.

[3] Time to Change, *Stigma Shout: Service user and carer experiences of stigma and discrimination* (2008), http://www.time-to-change.org.uk/sites/default/files/Stigma%20Shout.pdf (last visited 15 May 2014).

[4] Mind, *Another Assault: Mind's campaign for equal access to justice for people with mental health problems* (2007), http://www.mind.org.uk/assets/0000/4014/Anotherassault.pdf (last visited 15 May 2014).

[5] *At risk, yet dismissed: The criminal victimisation of people with mental health problems* (2013), http://www.victimsupport.org.uk/~/media/Files/Publications/ResearchReports/1390_MHJR_final_lores.ashx (last visited 15 May 2014).

3.10 Transgender campaigners Suzanna Hopwood and Michelle Ross also spoke about the severe impacts of hate crime, saying:

> Much of what counts as the everyday expression of transphobia and the experience of transphobic behaviour by gender variant people, is what might be termed as "petty" (but nevertheless deeply offensive), insult, for example, in the forms of rude remarks, laughter, unwanted approaches and deliberate mis-gendering, either by service providers or by private individuals. It seems to us that at present in law it is only when this "petty" transphobic hate behaviour escalates that it becomes practically actionable but only then if the victim of it is willing to pursue it. Otherwise the victim of this kind of behaviour, (which is the frequent if not everyday experience of many gender variant people), currently appears to have no protection or recourse.

They noted that extending the aggravated offences would have an important symbolic effect and, although it would not change matters overnight, it would still help establish an environment

> in which gender variant people can live their lives free from what we know to be the all too frequent fear of abuse, discrimination and harm which disfigures and limits their lives and which as we also know, is associated with a significantly higher incidence of self harm, suicide and mental illness in this group.

3.11 Changing Faces, a charity working to combat prejudice against people with disfigurements, said that such individuals were subject to prejudice, ridicule, harassment and physical attack, with the result that “their opportunities are restricted and their risk of low self-esteem and poor mental health, including suicide, is much higher than the general population’s”.

A coordinated response to hate crime

3.12 Leonard Cheshire Disability said that if sentencing reforms or new offences were to be effective, there needed to be a stronger focus on tackling hate crime throughout the criminal justice system and with effective coordination with other agencies:

> It is vital that the police work in partnership with local communities, other statutory agencies and community and voluntary groups to ensure that victims of hate crime are adequately supported, and that improvements are made in identifying, recording and handling instances of hate crime….Victim services, training programmes and awareness raising initiatives are all essential to build safer communities and enable disabled people to live their lives free from intimidation and abuse.

3.13 Leonard Cheshire also said there is a need for

> joined-up services, whereby the police, police and crime commissioners, health commissioners, healthcare staff, support agencies and local and national governments work together to improve services for people with mental health problems who are the victims of crime. This would include training all relevant staff on the experiences and needs of people with mental health problems as victims of crime and how to respond appropriately.

3.14 This was echoed by Derbyshire Police who said

> There is still a lack of transfer information between CJS agencies in regard to hate crime. Historically we have seen national guidelines produced which have failed to elicit the results they were intended for. This may be due to a lack of governance. What is also required is inter-agency co-operation.

3.15 Stay Safe East wanted to see

> proactive responses by a range of agencies (e.g. police even when no crime has been committed, housing providers, social services, health, voluntary agencies etc) to reports of hate crime, the correct identification of hate crimes through constant review of cases, hate crime scrutiny panels at local level etc and of course wider public outreach and education.

Challenging negative attitudes: media and education

3.16 Mind, Leonard Cheshire and others noted an increase in negative coverage and public discourse around disability. Mind said:

> Over the past couple of years there has been an increasing negative rhetoric created by the media, and to an extent the government, regarding welfare claimants. It is fair to suggest (as have various press and many leading charities) that this rhetoric may have contributed to an increase in the victimisation of those on disability benefits, with more resentment and abuse being directed at disabled people. Not only this, but as data shows the number of disability hate crimes has risen from 1211 crimes in 2009[6] to 1744 crimes in 2011/2012,[7] the question of whether there is some correlation must be asked.

3.17 Action Disability Kensington & Chelsea said the majority of those in their focus group "had experienced name-calling and mockery as children and felt very strongly that there needs to be more positive representations of disabled people in schools and more emphasis on inclusion… A majority cited 'investigative' and fictional TV shows as encouraging and providing a model for disablist language

[6] *Guardian*, 14 August 2012, *Disability hate crime is at its highest since records began,* http://www.theguardian.com/news/datablog/2012/aug/14/disability-hate-crime-increase-reported-incidents-data (last visited 15 May 2014).

[7] Home Office (2012), *Hate crimes, England and Wales 2011 to 2012,* https://www.gov.uk/government/publications/hate-crimes-england-and-wales-2011-to-2012--2/hate-crimes-england-and-wales-2011-to-2012#data-tables (last visited 15 May 2014).

and mockery." This point was also made by Ann Marie Bishop.

3.18 Mencap and Pamela Mahindru both considered that more positive media and online coverage of diversity was needed to change attitudes leading to hate crime. The Senior Judiciary also considered a more practical approach to tackling hate speech to be work with the media and the Press Complaints Commission as opposed to introducing new criminal offences. Ursula Solari did not think extending the current legislation was the right response to dealing with a justice system which she considered was itself discriminatory against the communities experiencing hate crime. Instead she called for "more funding for education around the issues of equality, community healing and for bringing the dialogue to the front line policing".

3.19 Changing Faces, a charity working to combat prejudice against people with disfigurements, pointed to the tendency of the media and toy manufacturers to associate disfigurement exclusively with villainous characters, and to use disfigurement as an indication of negative characteristics. It argued that this contributes to stereotyping, prejudice, name-calling and bullying.

3.20 Professor Peter Alldridge argued against introducing specific new offences to deal with hate crime and noted that this involved funds and resource allocation better deployed elsewhere. In particular he wanted to see more emphasis on education of police and prosecutors around offending of all kinds against people with disabilities, as well as better monitoring and transparency. That enhanced sentencing was not working was not the fault of the legislation but about its use and the wider response to offending against people with disabilities.

3.21 Kate Hillier, Mencap, Royal National Institute of Blind People and Guide Dogs for the Blind and Independent Academic Research Studies (IARS) felt that education was very important in preventing hate crime. As IARS put it:

> Ignorance and misconception [are] important factors contributing to hate crime. Many [of our workshop participants] felt that misunderstood cultures, sexual practices, gender identities, and disabilities frequently sparked fear and resentment in those who encountered them. It was felt that too little time was spent in school on the kind of 'citizenship' education that could equip young people with the knowledge to engage constructively with people from all walks of life, and that this should be added to the government's plan to tackle hate crime.

3.22 IARS also believed an educative and community benefit would flow from wider use of restorative justice and that this, together with more targeted rehabilitation work, could help to prevent re-offending. (In contrast they doubted the deterrent effect of aggravated offences.) The Learning Disability Partnership also saw merit in use neighbourhood resolution panels where "minor non-criminal activities" can be dealt with earlier and more effectively.

3.23 Greenwich Association of Disabled People Centre for Independent Living (GAD CIL), despite agreeing that aggravated offences should be extended, said they doubted longer sentences on their own were a deterrent, that a large proportion of those in prison had one or more mental impairments, that custody was not suitable for such offenders. In addition: "Community mediation/restorative justice methods may also be more effective than prison."

Better support for victims and witnesses

Reporting hate crime

3.24 Hate Free Norfolk, the Lesbian & Gay Foundation, Lancashire PCC, National LGB&T Partnership and Leonard Cheshire Disability all called for more effective support for victims and witnesses of hate crime when reporting and when giving evidence. Several consultees commented on what could be done to tackle the problem of under-reporting in hate crime affecting these three characteristics.[8]

3.25 UNISON, Inclusion London, Greenwich Association of Disabled People Centre for Independent Living (GAD CIL): Under-reporting caused in part by system for reporting not being accessible to all. Information on how to seek advice and help should be made more accessible to everyone, including guidance and accompanying processes that are tailored to the needs of people with disabilities, across the whole spectrum of disabilities (Royal College of Psychiatrists). This included better guidance about the legal system and process (UNISON, Inclusion London, Greenwich Association of Disabled People Centre for Independent Living (GAD CIL)).

3.26 Special problems were highlighted in connection with the reporting of transgender hate crime. Suzanna Hopwood referred to "significant under-reporting of transphobic hate crime" and asked whether part of the reason might be "the closeted nature of many gender variant people and the feeling that even if they do come out & take the risk of complaining and all that it entails they will not be taken seriously by the police". This point was also made by several participants at the meeting of the Greater London Authority's Transgender Group on 4 September 2013.

3.27 Victim Support also said that those involved in hate crime reporting need better training. They urged that better use be made of Victim Personal Statements and community impact statements. Stay Safe East gave a case study describing how they had assisted a disabled hate crime victim by producing a Victim Personal Statement for use at sentencing, but the judge "chose not to use the opportunity to impose an additional tariff on the defendant" under section 146.[9]

3.28 Mind also considered that more needed to be done to encourage people with mental health problems to report hate crime. For this to happen, the police

[8] The problem of under-reporting was acknowledged by ACPO's lead on hate crime, Assistant Chief Constable Drew Harris, in his response to the CP, although his focus was on disability hate crime in particular.

[9] The case was one of "prolonged domestic violence by her former partner over a period of three years. This involved physical and emotional violence including repeated abuse of our client because of her disability." Stay Safe East argued: "Had the law allowed for disability aggravated actual bodily harm, the defendant may have received a longer sentence possibly five years, thus ensuring that our client would receive full justice."

needed to build trust and undertake outreach work in their local community, providing information on what a crime is and how to report it and ensuring the information is in accessible formats. Mental health professionals supporting people with mental health problems should also be encouraged to report incidents to the police and be clearly informed of their right to talk to the police.

Special measures

3.29 Stephen Brookes MBE said (at the symposium) that disabled people often do not report to police the "daily grind" of abusive and insulting remarks. He said that his disability hate crime network has around 2,800 members and a further 4,000 online followers, many of whom refer to a common lack of confidence in reporting cases to the police because of a fear of what the adversarial legal system will require. There is in his view insufficient use of special measures to help disabled crime victims to report crime and give evidence.[10]

3.30 The Lesbian & Gay Foundation, Lancashire PCC and the National LGB&T Partnership felt that more sensitivity was needed around individuals having to disclose their sexual orientation and/or gender identity when coming into contact with the police. They also suggested the wider use of special measures to support vulnerable people in reporting and giving evidence about hate crime. CPS North Wales Scrutiny Panel made the same point about people's sexuality being revealed as a consequence of prosecution.

3.31 At a meeting of the Greater London Authority's Transgender Group on 4 September 2013, many participants argued that transgender people should be protected through the application of special measures when giving evidence about hate crime. Where transgender-based hostility is an issue at sentencing, it was argued, the hearing at which this was to be established should be held *in camera.* Judges frequently refuse these measures, it was stated, because they always gave preference to the requirements of open justice. Several participants said there was a significant amount of hostility-driven sexual assault and rape against transgender people and the police and CPS did not always know what steps to take to ensure a successful prosecution (including the adducing of hostility evidence at sentencing).

[10] The Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The measures are collectively known as "Special Measures" and are subject to the discretion of the court. The CPS website contains legal and procedural guidance on special measures: http://www.cps.gov.uk/legal/s_to_u/special_measures/ (last visited 15 May 2014). This provides that special measures may be granted in cases where witnesses including victims of crime have "particular difficulties attending court and giving evidence due to their age, personal circumstances, fear of intimidation or because of their particular needs" and in particular, in cases where they may be either vulnerable or intimidated in such a way as to hinder their giving the best evidence they can. The guidance states that victims of sexual offences will automatically be regarded as "intimidated" unless they choose to opt out of the regime; and adds that others who may fall into this category include "victims of domestic violence, racially motivated crime and repeat victimisation" among others. There is no specific reference to sexual orientation, transgender identity, or HIV/AIDS status. Regarding the designation "vulnerable" the examples given by the YJCEA are children (defined as those under 18) and "any witness whose quality of evidence is likely to be diminished because they: are suffering from a mental disorder (as defined by the Mental Health Act); have a significant impairment of intelligence and social functioning; or have a physical disability or are suffering from a physical disorder."

3.32 The National Aids Trust commented on the need for greater assurances that special measures be put in place in cases where a person with HIV or AIDS has been a victim of crime and does not wish their status to be revealed to the media or general public as a result of the proceedings. These and other issues needed attention from Government to make sure people with HIV/AIDS do not become "hate crime victims twice over from a hostile legal system". Dr Yousef Azad, speaking on behalf of the National Aids Trust at the symposium, noted that their survey of 900 people who are HIV-positive showed around 12% of respondents saying they had been physically assaulted as a result of hostility towards their HIV status. There were also reports of people's HIV status being disclosed without consent, via social media. He noted that the continuing stigma around HIV and AIDS led to many individuals choosing not to disclose their status. A reluctance to report hate crime can result from this and Dr Azad agreed that special measures would assist in this respect.

3.33 Participants at the meeting of Sandwell & Dudley Adult Safeguarding group on 6 September 2013 pointed to difficulties being encountered in making sure the best support is given to learning disabled victims and witnesses so that their evidence is seen as reliable. Much could be learned, it was felt, from the way in which the evidence of victims or witnesses of domestic violence and sexual offences is now obtained and the individuals offered the necessary support and protection. This would help ensure fewer cases fail due to "victim or witness issues".[11] One member of the group who worked as a police investigator said that, in many cases, the first step ought to be to ask the victim what impact the offence had on him or her personally: though an obvious step, this is sometimes overlooked but produces valuable leads to follow up on when seeking to build a case of hostility for sentencing purposes. This is a more effective way than relying solely on the victim impact statement.

Training, guidance

3.34 Several consultees called for better training for the police and the judiciary on disability and transgender issues and hate crime, on the operation of section 146, on gathering evidence of hostility as well as "improvements to the Codes of Practice and guidance for both CPS and the police for all aggravated offences and stirring up offences so that these laws can be used to their fullest potential".[12] CPS North Wales Local Scrutiny and Involvement Panel said training was particularly necessary for the judiciary and magistracy on section 146.

3.35 As to the kind of training needed for those working in the criminal justice system, Susanna Hopwood said (regarding transgender hate crime):

[11] The CPS annual hate crime reports contain statistics on the number of hate crime cases that fail due to "victim issues", defined in the 2011-12 report (p5) as including cases where "a victim retracts, unexpectedly fails to attend or their evidence does not support the case." According to this report there has been an increase in such cases from 19.9% (524) of failed hate crime cases in 2010-11 to 23.4% (551) in 2011-12. The report for 2012-13 shows 22.9% failures for "victim issues".

[12] Disability Hate Crime Network, Suzanna Hopwood, Action Disability Kensington and Chelsea, Anna Scutt, Leonard Cheshire Disability, UNISON, Scope, People First, Barnsley LGBT Forum, and several participants at meeting of Sandwell & Dudley Adult Safeguarding group on 6 September 2013. LGBT Sheffield and GIRES all identified the need for hate crime training for those working in the criminal justice service.

> We suggest that guidance should be given to the police as to the importance of taking a comprehensive account of the incident in terms of the context and the words and actions used, of exemplifying what a "comprehensive account" would mean in practice and providing guidance as to good practice in terms of soliciting such an account from the "victim". We would suggest this guidance should not simply be instructional and imperative but should also set out to explain the harm done to gender variant people by transphobic abuse and the way in which it can disfigure their lives.

Similarly regarding disability, Action Disability Kensington and Chelsea saw as the main cause of under-use of section 146 in disability hate crime cases:

> the lack of awareness of disabled people as potential targets of disability-specific hate crime and the specific kinds of, often daily and long-duration, harassment that disabled people experience, harassment that is often not perceived as or recorded as an offence and whose impact and consequences are both minimized and under-estimated.

3.36 Another consultee wanted "mandatory disability awareness training within the judicial system to ensure that these offences are seriously considered by all involved".[13]

Data, monitoring, evaluation

3.37 The National AIDS Trust felt it was vital for police and CPS records to capture in all hate crime cases information about the hostility evidence to be relied on, and clearly note whether this is to form part of the prosecution's case regarding sentence and any enhancement.

3.38 Many consultees commented on the need for better data on the way hate crime is currently prosecuted and sentenced and how that data is used and reported. Some felt that both a Sentencing Council guideline and a new practice of recording sentence enhancements onto the PNC would assist with this. Stay Safe East said it was "essential that the record include some monitoring of which impairment group the victim belongs to, as used by the Metropolitan Police CRIS system e.g. physical, sensory, learning or mental health impairment or other. This will help identify gaps and trends."

3.39 Teesside and Hartlepool Magistrates said: "Data should be available to demonstrate how frequently, or infrequently, s 146 is applied." National AIDS Trust agreed, noting the "need for further clarity from the magistrate/judge when enhanced sentencing is applied …citing both the relevant section of the Act and spelling out the relevant hostility and its impact on sentencing." Stonewall also regretted the lack of data to demonstrate how the enhanced sentencing regime is working in practice and called on criminal justice agencies to gather and publish this evidence as a matter of routine. Diverse Cymru made the same point, arguing:

[13] Full of Life.

> It is essential to ensure that data captured not only includes the recording of the application of sections 145 and 146 in prosecutions, but also reasons why cases may not have been pursued to prosecution and may have been unsuccessful at prosecution. Recording and publishing these reasons will assist individuals and communities to better understand the hate crime recording and prosecution framework in the UK, leading to increased confidence in the criminal justice system and addressing one of the barriers to reporting hate crime and incidents.[14]

3.40 Rita Grootendorst, the EHRC, Diverse Cymru, Barnsley LGBT Forum, Action Disability Kensington and Chelsea Practitioner Alliance for Safeguarding Adults and Worcestershire Safeguarding Adults Board all said that better monitoring and evaluation of the existing legislation was needed, to ensure the law is applied properly and proportionately and that reported hate crime cases are not mis-recorded by police and prosecutors.

3.41 It was also considered necessary to improve the way transgender hate crime is reported on by the CPS. Suzanna Hopwood said the CPS should change its current practice of reporting aggregate figures for homophobic and transphobic hate crime, in order to show both groups separately. There should also be additional efforts to publish regional variations on the incidence of transphobic hate crime.[15]

3.42 Greater Manchester Police referred to a "disability hate crime perpetrator profile" currently being developed by the College of Policing. They noted this was likely to reveal important information about why such offending takes place.[16]

3.43 As already discussed (from paragraph 6) a number of consultees saw a need for a wider review of the current system prior to any further extension of existing offences. In addition to those who wanted aggravated offences reviewed, National Black Crown Prosecution Association[17] said it was time to review the operation of enhanced sentencing, noting "The provisions have been around for a while and they are still not being applied correctly. Section 146 has not yet been embedded in the sentencing process."

[14] See also the comments made at paras 1.44, 1.61 and 1.205 above regarding the need for publication of sentencing remarks when ss 145 or 146 have been applied.

[15] Many regional police forces already publish breakdowns of hate crimes reported and their outcomes but they do not all distinguish transphobic from homophobic. One force that does so is Devon and Cornwall Police, who included in their consultation response three years' worth of data on all five hate crime characteristics. These showed a substantial increase in cases recorded as "transphobic hate crime" and a similar rise in "disablist hate crime" while numbers in the other three strands had remained fairly static.

[16] Jane Healy said she would like "future legislation [to] consider the motivations of the offenders more, and the individual identities of the victims less." Each time another characteristic is added, there will be other "neglected minority groups feeling that justice is less interested in serving them."

[17] This consultee was in favour of extending the aggravated offences.

3.44 For some consultees, the current absence of reliable data was a reason not to introduce new criminal offences. North Yorkshire Police felt it was "pointless to extend" current legislation without evidence of the impact current legislation was having including data showing the number of cases where hostility against the protected characteristics was an aggravating factor, and on the effectiveness of enhanced sentencing in terms of reoffending rates.

Selection of protected characteristics

3.45 The Magistrates Association pointed out:

> The Equality Act 2010 stipulates these "protected characteristics" which must not be used to discriminate: - Disability - Gender reassignment - Pregnancy and maternity - Race - Religion or belief - Sex - Sexual orientation. What is the logic in having different characteristics for hate crime from those used to determine discrimination? The latter can lead to the former. The Magistrates Association considers that any inclusive list is counter-productive and serves to suggest that hostility on the grounds of other attributes is in some way more acceptable. The MA considers that crimes committed where the perpetrator demonstrates or is motivated by hatred of any difference between the perpetrator and the victim should be sentenced in the same way.[18] There is a danger otherwise that a wave of hate crime on the grounds of gender, occupation, social class etc would lead to the law being changed piecemeal as public opinion found such behaviour unacceptable.

3.46 Victim Support said the "law needs to be reformed to indicate that a victim being targeted because of hostility towards their personal characteristics is wrong. We suggest the Government could use `targeted violence and hostility' as suggested by Sin in 2009 (Sin, et al., 2009). The case of Sophie Lancaster shows the devastating effects hate crimes can have on those belonging to subcultures. Homeless people, young people and even those belonging to the armed forces continue to suffer targeting and discrimination."

3.47 The NUS said: "Although not specifically the subject of this consultation, NUS would like to note that we also believe that the stirring up of hatred offences should be extended to include hatred based on gender."

3.48 Cambridgeshire Constabulary (despite opting for extension of aggravated offences) had this concern:

[18] A similar point was made by Carole Gerada, who argued that hate crime can occur against people with no protected characteristic.

> If the legislation is extended, the overall impact could ultimately be lessened - an unintended consequence possibly being more characteristics and groups defined as `protected'. This may lead to a situation whereby a majority of offences could be classified as hate, or aggravated. If the essence of these offences and the sentencing powers is to treat these type of offences more seriously, then this principle is lost if the majority are then treated in the same way as this then becomes the norm. A question that I would pose is when will this come to its natural conclusion?[19]

3.49 Devon and Cornwall Police said that "it may be beneficial to consider how any amendment to regulation associated with aggravated offences will stand the test of time, in particular to consider how protected characteristics can be added or removed from regulations".

3.50 Community Security Trust said: "All forms of hate crime should be recognised in law. However, we do believe that it is not possible to extend the categories indefinitely, and that if there is an intention to add more categories, it may be necessary to do away with all categories, and for the law to recognise only the substantive offence (eg assault or incitement) and for the courts to have to power to enhance sentence if this was motivated by hate.

3.51 CPS North Wales Scrutiny Panel said the current law on hate crime "does not easily address the cynical or targeted exploitation of a disabled person because they are deemed to be an easy target or "vulnerable". Proving hostility in these cases is difficult. Although outside of the terms of reference for this project, members would welcome a further project that would consider legislation to clarify and respond to this type of behaviour." They make the same point re older people.

3.52 Lynne Harne was in favour of sentencing reforms for hostility based on disability or sexual orientation but would only be willing to accept stronger measures based on transgender hostility if the system also recognised "hate crime against women born as women" noting that gender was also a protected characteristic under the Equality Act 2010. She added that "prolific" hatred and insult is directed by transgender women towards non-transgender women and considered it "extremely ironic that a female can claim protection from hate crime because she has been targeted as a lesbian or as heterosexual but not because she has been born a woman".

3.53 Radfem raised a similar concern about transgender identity and argued for a clear statement that "women seeking to protect female segregated spaces for the purposes of safety should not be viewed as "hostility"". They also raised a broader concern about protected characteristics:

[19] Similarly, Northamptonshire Police had this concern: "We are in danger of making the law too complicated. Causing public disorder, assault, murder etc is wrong, full stop. To pick on someone because they are gay, elderly, vulnerable, black, a traveller, overweight or dressed as a Jedi knight is wrong. Why should the victim who has been harassed or assaulted to the same degree as someone say with a disability not have the same protection under the law with the offender being sentenced accordingly?"

> There is a danger that there will be unintended consequences where the rights of one group with protected characteristics "trump" the rights of another group with protected characteristics.

Other matters

3.54 Merton CIL identified the need for safer public transport to protect people from hate crime, particularly on buses, and noted that this needed to be better dealt with by transport providers.

3.55 Participants at the meeting of the Greater London Authority's Transgender Group on 4 September 2013 argued that more funding should be made available to transgender groups to enable victims of hate crime to report it and understand the process by which it will be investigated and prosecuted. Currently the funding provided to transgender people for reporting hate crime is disproportionately less than that available to those with disabilities.[20] The group felt that this funding would help address the problem of under-reporting, particularly if coupled with a change of culture among police, prosecutors and the judiciary in understanding the particular sensitivities for transgender people when their gender identity has to be disclosed in the context of criminal prosecutions.

3.56 The National Aids Trust gave several examples of the kind of criminal offending experienced by people with HIV and AIDS and called for greater research into the extent and impact of hate crime against these people.

3.57 RadFem raised an issue about "insult". Though they do not refer specifically to the recent amendment removing "insulting" from section 5 of the Public Order Act 1986 they do express concern "that including the word "insult" in the definition of hate crime makes the position of women who wish to protect female segregated communal spaces and those who wish to critique transgenderism much more vulnerable and open to the possibility of prosecution".

3.58 RadFem argued that

> as the Equality Act 2010 makes provision for the lawful exclusion of people with a "transgender identity" the same safeguards should be in place under criminal law. This should ensure in future RadFem are not accused by "transgender activists" of committing a hate crime for excluding them from all-women events open only to women born as women. They also consider that an Equality Impact Assessment will be needed before any extension to current law is introduced, in order to take account of its "impact on women as a group with a protected characteristic." ""Women born women" should be free to speak, and meet, to specifically discuss matters of relevance to biology (e.g. menopause, menstruation, childbirth) and/or with the goal of critiquing gender, including transgender practices if they are to be politically analysed, without being accused of "hate speech" or "hate crime" or "stirring up" offences.

[20] GIRES have estimated that there are around 1.2 million gender-variant people in the UK. (Figure provided at meeting of GLA transgender group, 4 September 2013. Gender-variance is a more inclusive term than transgender.)