

<b>Title:</b> Hate Crime: the Case for Extending the Existing Offences <b>IA No:</b> LAWCOM0038  <b>Lead department or agency:</b> Law Commission  <b>Other departments or agencies:</b> Ministry of Justice Home Office	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 28/05/2014		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
<b>Contact for enquiries:</b> Catherine Heard 020 33343162/David Connolly 020 3334 3968			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
N/Q	£m	£m	No	In/Out/zero net cost

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

The criminal law recognises the concept of “hate crime” in respect of five characteristics: race, religion, sexual orientation, disability and transgender identity. However the five characteristics are not treated in the same way. When certain criminal offences are aggravated by hostility, dedicated offences with longer maximum sentences apply, but only in respect of racial and religious hostility, not sexual orientation, disability and transgender identity. Furthermore, the stirring up of hatred on the basis of race, religion and sexual orientation is prohibited, but not on the basis of disability or transgender identity. This unequal treatment may be unfair, and damaging to confidence in the justice system.

**What are the policy objectives and the intended effects?**

The policy objectives are:

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

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

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

**Option 0:** Do nothing. Undesirable due to problem of equity outlined above.

**Option 1:** Measures to improve use of the enhanced sentencing provisions.

**Option 2:** Conduct a wider review of the aggravated offences, to determine whether to retain them in their current form or amend them prior to extending to other groups.

**Option 3:** Extend the current aggravated offences to cover hostility on the basis of all five characteristics.

**Option 4:** Extend the stirring up offences to cover hatred on the basis of all five characteristics.

We would like Option 1 (which we consider straightforward and necessary) to be implemented, along with Option 2 (although if Option 2 is not implemented, Option 3 would be an acceptable, but less preferable, solution). Option 4 rejected due to lack of evidence of need.

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

*I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.*

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

## Description:

Measures to improve the operation of the enhanced sentencing provisions

Price Base Year 2014	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: N/Q

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

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

It is not possible to monetise the costs because there are significant gaps in the available data. It is difficult to isolate the potential impact of reforms from the wider context of the Government's hate crime action plan. However we indicate likely cost sources as follows:

Drafting and implementing a new sentencing guideline (transitional). Facilitating recording of enhanced sentences on court records and the PNC (transitional), and application on an ongoing basis. Increase in prison costs if longer custodial sentences are handed down more frequently.

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

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

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

There are no transitional benefits. It is not possible to monetise the ongoing benefits because there are significant gaps in the available data. It is also difficult to isolate the potential impact of these reforms from the wider context of the Government's hate crime action plan.

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

More consistent and rigorous application of the enhanced sentencing provisions laid down by Parliament. Victims of crime will benefit as the hostility they have suffered is recognised by the justice system, and society as a whole may benefit as this type of offending is deterred. Decisions about offenders by the police, courts, employers and others, will be better informed as they will be made aware when an offence on a person's criminal record was recognised by a court as a "hate crime".

### Key assumptions/sensitivities/risks

Assumption: Court clerks accurately and consistently record findings of hostility on the PNC.

Risks: Potential for harm to the reputation of the law and the criminal justice system as other characteristics (for example, age and gender) do not get the same protection. Potential legal challenges to recording hostility on PNC and inclusion on criminal records.

### Discount rate (%)

## BUSINESS ASSESSMENT (Option 1)

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

# Summary: Analysis & Evidence

# Policy Option 2

## Description:

Conduct a wider review of the operation of enhanced sentencing and aggravated offences provisions

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: N/Q

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

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

It is not possible to monetise the costs because we have not prescribed which bodies should conduct the review, or the preferred methodology. This would be for Government to decide and cost, should it choose to implement our recommendation. A previous (albeit narrower) review whose approach might be adopted cost c.£80k (it examined disability hate crime only). For obvious reasons it is not possible to monetise the costs of implementing the review's recommendations prior to the review commencing.

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

Members of the additional groups that would be covered by aggravated offences if they were extended immediately may see the wider review as a less satisfactory solution than immediate extension, for example due to the risk of delay or slippage which a review may be seen to entail.

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

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

No transitional benefits identified.  
On-going benefits: Savings from the elimination of waste as a result of the unnecessary complexity, practical difficulties and uncertainty of outcome which have been identified in relation to the current regime.

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

An improved response to hate crime arising from the review's findings would directly benefit victims of hate crime. It would also help to increase reporting and raise confidence in the justice system among members of the protected groups. The criminal justice system would benefit from the removal of barriers and complexities currently hampering the effective response to hate crime, and the resulting costs of these. An effective response would deter hate crime offending and therefore reduce crime overall.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>
Risk that a review will be stopped early, under-resourced, delayed, or allowed to drift due to resourcing issues or changed priorities. Risk its recommendations will not be implemented due to cost, political issues, or changed priorities.	

## BUSINESS ASSESSMENT (Option 2)

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

# Summary: Analysis & Evidence

# Policy Option 3

## Description:

Extend the aggravated offences so that they cover hostility on the basis of all five characteristics

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: N/Q

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

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

It is not possible to monetise the costs because it is not possible to predict the number of prosecutions that would take place under the new offences. Transitional costs: Training in new offences (police, CPS, judiciary/magistracy, Bar). On-going costs: additional court cases (HMCTS, Legal Aid Agency, CPS); longer sentences (NOMS); legal argument, appeals, other consequences of extending aggravated offence system which has been identified as over-complex and potentially flawed.

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

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

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

No monetisable benefits.

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

Increased confidence in the justice system among disabled, LGB and transgender groups, as current perceived inequality of treatment by the justice system is removed. Potential increase in reporting of hate crime. Possible reduction in hate crime levels if offences have a deterrent effect, benefiting victims, members of new protected groups, and society as a whole.

### Key assumptions/sensitivities/risks

Discount rate (%)

Risks: Practical difficulties currently encountered with the aggravated offences could cause difficulties with the new offences. Further practical difficulties due to the offences having been designed for racial hate crime, rather than hate crime on the basis of sexual orientation, disability or transgender identity.

## BUSINESS ASSESSMENT (Option 3)

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

# Summary: Analysis & Evidence

# Policy Option 4

## Description:

Extend the stirring up offences to cover hatred on the basis of all five characteristics

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

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

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

Transition costs: training on new offences – police, CPS, judiciary/magistracy, Bar.  
Ongoing costs: investigation and prosecution of offences – police, CPS, Attorney General (must consent to prosecution), courts, legal aid; cost of appeals and failed prosecutions due to high threshold of offences, and likely challenges on ECHR art 10 grounds – police, courts, Attorney General, legal aid.

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

Limitation on freedom of speech in respect of speech and other content concerning matters of disability or transgender identity; "chilling effect" on speech that may be perceived as offensive but in fact falls outside the scope of the offences or on the borderline.

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

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

No monetisable benefits identified.

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

Increased confidence in justice system among disabled, transgender people, who may feel better protected if offences extended, or who are aggrieved by the current perception of inequality of treatment compared with race, religion, and sexual orientation.

### Key assumptions/sensitivities/risks

Discount rate (%)

A lack of evidence of conduct or material that meets the high threshold of stirring up hatred means that offences would be drafted without the benefit of specific examples of the conduct they are intended to capture. There is therefore a risk that they would be drafted too broadly or too narrowly, or that they would lack suitable saving provisions similar to those in the religious hatred and sexual orientation hatred offences, designed to safeguard freedom of expression.

## BUSINESS ASSESSMENT (Option 4)

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

# APPENDIX B

## IMPACT ASSESSMENT

### BACKGROUND

#### Terms of reference

- B.1 The hate crime project was referred to the Commission by the Ministry of Justice. Our terms of reference requested us to look at:
- (a) extending the aggravated offences in the Crime and Disorder Act 1998 (“CDA”) to include where hostility is demonstrated<sup>1</sup> towards people on the grounds of disability, sexual orientation or gender<sup>2</sup> identity;
  - (b) the case for extending the stirring up of hatred offences under Public Order Act 1986 (“POA”) to include stirring up of hatred on the grounds of disability or gender identity.
- B.2 Our focus was solely to examine extension of the two existing statutory regimes so that all five characteristics were protected by both types of offence. It was not within our terms of reference to examine the rationale for the two sets of existing offences.<sup>3</sup> Nor could we consider whether they should be extended to include characteristics other than those specified under (a) and (b) above. We did not examine whether the existing offences should be retained in their current form, amended or repealed.
- B.3 In addition to these offences, a statutory sentencing regime applies in the hate crime context. Under the Criminal Justice Act 2003 (“CJA 2003”), in any offence other than one prosecuted as an aggravated offence, the sentencing court must treat hostility as an aggravating factor in sentencing the offender. The court must be satisfied that the offender demonstrated or was motivated by hostility. Significantly, the enhanced sentencing provisions apply to all five protected characteristics.<sup>4</sup> The maximum sentence that can be imposed for any offence

<sup>1</sup> We have interpreted these terms of reference as requiring review of both limbs of s 28(1) CDA– namely demonstration of, and motivation by, hostility.

<sup>2</sup> It was subsequently confirmed that this was intended to mean transgender identity.

<sup>3</sup> The separate paper by Dr J Stanton-lfe published online with the CP considered the underlying arguments legitimising criminalisation in the context of hate crime, with a specific focus on the proposed extensions under review in this project: [http://lawcommission.justice.gov.uk/docs/Hate\\_Crime\\_Theory-Paper\\_Dr-John-Stanton-lfe.pdf](http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-lfe.pdf).

<sup>4</sup> CJA 2003, s 145 deals with racial and religious hostility and CJA 2003, s 146 deals with hostility on grounds of sexual orientation, transgender identity and disability.

under the enhanced sentencing regime cannot exceed the maximum available for that offence.<sup>5</sup>

- B.4 Although this was not one of the questions referred to us, we also considered whether effective solutions to dealing with hate crime might lie in better use of these enhanced sentencing provisions, as an alternative to extending the aggravated offences, or in addition to extension.

### **The public consultation exercise**

- B.5 We published our Consultation Paper (“CP”)<sup>6</sup> on 27 June 2013. The CP looked at the case for extending both sets of offences, so that they would cover all five protected characteristics. We also looked at how enhanced sentencing works and how it affects the case for extending the existing offences. We asked whether changes would make enhanced sentencing more effective. The consultation closed on 27 September 2013.

### **Responses**

- B.6 We received 157 written responses to the consultation. They came from NGOs, criminal justice agencies, judges, magistrates, lawyers, academics and members of the public, some of them victims of hate crime.
- B.7 Responses to the consultation were extremely valuable in preparing our report. There was near unanimous support for our proposed improvements to the enhanced sentencing system. Most consultees believed the reforms would be capable of producing a sentencing system that could provide an adequate response to hostility-based offending in relation to disability, sexual orientation and transgender identity. Most consultees considered that these reforms should be implemented in any event, whether aggravated offences were also extended or not.
- B.8 A substantial majority of consultees, many with experience and influence in the criminal justice system, considered that the aggravated offences should also be extended. The reason most commonly given was a perceived inequality in the current system and the need to send a clear message that hostility-based offending is taken equally seriously, whichever of the five protected characteristics the hostility relates to. Arguments against extending the aggravated offences were made by a minority of consultees, albeit most of them professionals with direct experience of their prosecution or having made in-depth

<sup>5</sup> Unlike the aggravated offences, which have higher maximum sentences than the corresponding offences in their non-aggravated form.

<sup>6</sup> Hate Crime: The case for extending the existing offences (2013) Consultation Paper No 213, available at [http://lawcommission.justice.gov.uk/consultations/hate\\_crime.htm](http://lawcommission.justice.gov.uk/consultations/hate_crime.htm).

studies of their application, who pointed to risks in extending the offences in their current form as a result of flaws and complexities in their operation.

- B.9 Most consultees agreed that there was a case in principle and a need in practice to extend the stirring up offences. Again, the most common reason of principle was that the same characteristics should be protected in the same way by all hate crime legislation. Some consultees pointed examples of speech which they saw as showing a practical need. Consultees against extension pointed to concerns about freedom of expression, and a lack of clear evidence of conduct that would not be dealt with adequately under the existing law.
- B.10 As a result of our own research, and our analysis of the consultation responses, we decided to consider an additional option in our report to those canvassed in the CP. This was the option of recommending a review of the operation of enhanced sentencing and the aggravated offences over a longer term, and with wider terms of reference, than this project. Such a review would gather information and address questions of practice and principle, in order to ensure an optimal legal response to hate crime overall, and not be focused only on extending the offences as they currently stand.<sup>7</sup>

### **Structure**

- B.11 The structure of this Impact Assessment is as follows:
- (1) Terminology – paragraphs B.12 to B.19
  - (2) Government hate crime action plan – paragraph B.20
  - (3) Rationale for intervention - paragraphs B.21 to B.24
  - (4) Policy objectives – paragraph B.25
  - (5) Main groups affected by proposed reforms – paragraph B.26
  - (6) Scale and context – paragraphs B.27 to B.57
  - (7) Description of options – paragraphs B.60 to B.76
  - (8) Cost and benefit analysis – paragraphs B.77 to B.132
  - (9) Conclusion: preferred options – paragraphs B.133 to B.135

<sup>7</sup> The report sets out the reasons such a review would be desirable in Chapter 4, and considers its possible terms of reference in Chapter 5.



## Terminology

### *Hate crime*

- B.12 It is important to be clear from the outset what is meant by “hate crime”. The term is used in two different senses: one broad and one narrow.
- B.13 The broad meaning of “hate crime” is the definition used by the criminal justice agencies. It is deliberately wide, and allows the police, the Crown Prosecution Service (“CPS”) and others to record all offences which may involve an element of hostility towards the victim’s personal characteristics or perceived characteristics. In 2007, the police, CPS, the National Offender Management Service (then the Prison Service) and other agencies involved in monitoring or prosecuting “hate crime” agreed a common definition:
- any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice towards someone based on a personal characteristic [race, religion, sexual orientation, disability or gender identity].<sup>8</sup>
- B.14 Notwithstanding this agreement, the different agencies appear to use slightly different formulations of this definition in their publications. The notable common feature of all the agencies’ definitions is the focus on the victim’s or other person’s perception of the perpetrator’s motivation rather than on an objective test. Another common feature is the reference not only to hostility but also to prejudice as a motivating factor.<sup>9</sup>
- B.15 “Hate crime” in the narrower sense refers to the specific legal provisions which are the subject of this project. They are:
- (1) the aggravated offences in sections 29 to 32 of the CDA;
  - (2) the offences of stirring up hatred in Part 3 of the POA; and
  - (3) the enhanced sentencing provisions in sections 145 and 146 of the CJA.
- B.16 Inevitably, given the subjective nature of the broader definition used by the police and CPS,<sup>10</sup> many incidents will be recorded and reported as hate crimes by the CPS and police that do not meet the requirements of these three legal regimes. Consequently the extent to which the statistics for reported and recorded hate

<sup>8</sup> Ministry of Justice, Home Office, Office for National Statistics, *Overview of Hate Crime in England and Wales* (2013), p 11. Available from: <https://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales> (last accessed 7 May 2014).

<sup>9</sup> For instance, the CPS Hate Crime Report for 2012-2013, available from: [http://www.cps.gov.uk/data/hate\\_crime/index.html](http://www.cps.gov.uk/data/hate_crime/index.html) (last accessed 8 May 2014).

<sup>10</sup> See para B.13 above.

crime can be directly compared across different agencies, or with figures for prosecutions and convictions, is limited.

- B.17 To avoid confusion, when we are referring to the three distinct legal regimes set out above we use the terms “aggravated offences”, “stirring up offences” and “enhanced sentencing provisions” (or, collectively, to “legislation”). For statistics in this document which refer to “hate crime” rather than these regimes specifically, it is the broader, operational definition that is being discussed.
- B.18 In the “scale and context” section of this impact assessment,<sup>11</sup> we outline the number of “reported hate crimes” which are extrapolated from responses to the Crime Survey for England and Wales (“CSEW”); the number of “recorded hate crimes” which are counted by the police; and the number of “prosecuted hate crimes” which are handled by the CPS. We also outline the available statistics on the convictions and sentences for the aggravated offences and the stirring up offences.

### ***Protected characteristics***

- B.19 There are five protected characteristics covered by the law on hate crime. They are race, religion, sexual orientation, disability and transgender identity.<sup>12</sup> Statutory provisions exist to define these characteristics. Separately from this, the police and CPS have wider definitions of the characteristics.<sup>13</sup> There are good operational reasons for these wider definitions (particularly because criminal justice agencies aim to recognise every situation where hate crime may be an issue). However, this (and the wider definition of “hate crime” itself) means that those organisations’ publications and statistics do not necessarily tie in with the statutory definitions or provide a clear picture of the extent to which the three statutory regimes are being used to respond to hate crime in relation to the five characteristics.

<sup>11</sup> From para B.27 below.

<sup>12</sup> Local criminal justice organisations are free to record hate crime against other groups of people, for their own purposes. Greater Manchester Police, for example, record crimes against members of “alternative sub-cultures”.

<sup>13</sup> See, for example, Crown Prosecution Service, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (2007) p 43. The CPS definition of “trans people” includes a reference to transvestites, whereas the definition of transgender in s 146 of the CJA does not refer to them explicitly (although it is sufficiently general that transvestites may be included).

## **The Government's hate crime action plan**

- B.20 The Law Commission's review of hate crime is part of a wider governmental initiative to tackle the problem.<sup>14</sup> The Government action plan has a broad range of aims, which include preventing hate crime through: working with support organisations and media authorities to address negative media stereotypes of, for example, those with disabilities; improving the evidence base on hate crime; improving education on hate crime; working with national governing bodies to tackle homophobia and transphobia in sports; and working with industry, the police, courts and others to develop a programme of work to tackle hate crime on the internet.<sup>15</sup> The action plan also aims to improve the reporting of hate crime and access to support for victims.<sup>16</sup> In addition to national initiatives, the action plan has a focus on recording and dealing with hate crime at a local level.<sup>17</sup> A progress report on implementation of the plan was released in early May 2014.<sup>18</sup>

### **RATIONALE FOR INTERVENTION**

- B.21 The conventional economic approach to Government intervention in order to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate or in existing interventions. In both cases the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity.
- B.22 In this project, the rationale for any intervention would be based primarily on equity reasons. Under the current legal regime, hate crime targeting the victim's sexual orientation, disability or transgender identity is not subject to the same legislative treatment as hate crime targeting the victim's race or religion. This may be seen as wrong as a matter of principle.
- B.23 It may also perpetuate the problem of under-reporting of hate crime<sup>19</sup> and the lack of confidence among disabled, transgender and LGB citizens in the criminal

<sup>14</sup> HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (2012), available from <https://www.gov.uk/government/publications/hate-crime-action-plan-challenge-it-report-it-stop-it> (last accessed 6 May 2014).

<sup>15</sup> HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) pp 10 to 14.

<sup>16</sup> HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) pp 15 to 18.

<sup>17</sup> HM Government, *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (Mar 2012) p 16.

<sup>18</sup> Available from <https://www.gov.uk/government/publications/hate-crime-action-plan-challenge-it-report-it-stop-it> (last accessed 6 May 2014).

justice system's ability and willingness to address it. It may also be seen by those citizens as an indication that the law considers their protected characteristics as less deserving of protection, and as sending a message that hate crimes against them are not as serious as racial or religious hate crimes. Similar problems may arise from the fact that, while enhanced sentencing is in place in respect of those groups, it does not appear to be working as effectively as it could be.

B.24 The fact that legislation on stirring up hatred is not in place in respect of transgender identity and disability may give rise to a similar perception of inequity. It may also mean that damaging conduct of a kind that it has been judged necessary to prohibit in respect of sexual orientation, race and religion, is occurring in respect of transgender and disabled people, and ought to be prohibited against them for similar reasons.

### **POLICY OBJECTIVES**

B.25 The policy objectives are:

- (1) to examine the case for extending the aggravated and stirring up offences to all protected characteristics;
- (2) to ensure that the criminal law provides an adequate response to hate incidents committed against individuals and groups because of their disability, sexual orientation or transgender identity;
- (3) to ensure that the law on hate crime is, as far as possible, fair and modern, clear and simple, and works effectively and consistently in practice;
- (4) to avoid extending or exacerbating any problems with the current hate crime legislation if and when it is extended to the other protected characteristics;
- (5) to ensure that the law in this area is compliant with the European Convention on Human Rights; and
- (6) to increase public confidence in the criminal justice system.

### **MAIN GROUPS AFFECTED BY THE PROPOSED REFORMS**

B.26 The main affected groups are:

- (1) defendants, and those convicted, in hate crime cases;

<sup>19</sup> We discuss the CSEW's figures on the numbers of hate crimes which came to police attention from para B.40 below; unfortunately, these figures are for hate crime as a whole and not broken down by individual protected characteristic.

- (2) members of the protected groups (disability, transgender identity, sexual orientation, race and religion), particularly those who have been victims of hate crimes;
- (3) third party hate crime reporting centres;
- (4) the police, and bodies such as ACPO that provide training and guidance for police;
- (5) the Sentencing Council;
- (6) the Disclosure and Barring Service;
- (7) the Crown Prosecution Service;
- (8) Her Majesty's Courts and Tribunals Service;
- (9) the judiciary and magistracy;
- (10) the Probation Service; and
- (11) the National Offender Management Service.

### **SCALE AND CONTEXT**

B.27 Data on the number and types of "hate crime" is available from a number of different sources. Different agencies, operating at different stages of the criminal justice process, have responsibility for collecting this information. This impact assessment breaks the available statistics down into those different stages. The data we discuss below are:

- (1) "hate crimes" extrapolated from responses to the Crime Survey for England and Wales ("CSEW," formerly the British Crime Survey) for 2011/12 and 2012/13;<sup>20</sup>
- (2) "hate crime incidents" recorded by the police (2012/2013);<sup>21</sup>
- (3) offences flagged as "hate crime" charged and prosecuted by the CPS (2012 to 2013);<sup>22</sup>
- (4) sentences for the aggravated and stirring up offences, as recorded in the Ministry of Justice's sentencing statistics (up to 2012);<sup>23</sup> and
- (5) figures on presence of aggravating factors from the Sentencing Council's Crown Court Sentencing Survey relating to 2011.<sup>24</sup>

<sup>20</sup> See para B.32 and following below.

<sup>21</sup> See para B.42 and following below.

<sup>22</sup> See para B.46 and following below.

<sup>23</sup> See para B.53 and following below.

- B.28 As of December 2013, data categories (1), (2) and (4) above have been gathered together in a joint publication produced by the Home Office, Office for National Statistics and Ministry of Justice, entitled *An Overview of Hate Crime in England and Wales*,<sup>25</sup>
- B.29 For each source we have used the latest available information. Readers should note that the different sources are not directly comparable with one another (for example, the latest CSEW report figures are an average of the data gathered in the 2010/11 and 2012/13 surveys, whereas the police recorded data on hate crime covers 2012/2013). Readers should also note that cases will progress through the criminal justice system at different rates. A crime which is committed (and recorded by the police) in 2012 may not be prosecuted until 2013. This means, for example, that where numbers of cases prosecuted and numbers of convictions are provided for a given year, they will not cover precisely the same set of cases.
- B.30 To illustrate how each agency contributes to the data-gathering process it is helpful to imagine how a single incident might progress through the system. First, the crime may be recorded as a hate crime by the police, whether because the victim or a third party has reported it as such to the police, or because the police have recorded it as such on their own initiative. The incident would then show up in the police recorded statistics on hate crime. After an investigation, the police may then refer that incident to the CPS for a decision on whether to charge the defendant. If the CPS assess that it is a hate crime, it will appear in the statistics in their annual report. If the CPS decides to charge the defendant with a specific hate crime offence – for example, racially aggravated criminal damage – and the defendant is prosecuted and sentenced, that sentence will appear in the Ministry of Justice’s internal sentencing statistics. Separately from all of this, the victim may be interviewed for the CSEW (which is itself then used to make a national estimate of crime rates).
- B.31 We highlight throughout this document where there are limitations to these data sets. It should be noted that each of them is subject to a margin of error, either because of human error in the recording process or because the figures are extrapolated from survey results (in the case of the CSEW). Any conclusions drawn from the data must therefore be treated with caution. In addition, we note below<sup>26</sup> that there are limitations to the available data on the aggravated offences, stirring up offences and enhanced sentencing provisions. To assess

<sup>24</sup> See para B.57 and following below.

<sup>25</sup> Previously those bodies published their data in separate bulletins. Available from: <https://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales> (last accessed 29 April 2014).

<sup>26</sup> Para B.84 and following below.

the precise impact of our recommendations we would need to know what proportion of hate crimes committed in respect of each of the characteristics would be capable of being prosecuted by new aggravated offences or of being sentenced through the enhanced sentencing system. Data is not currently available to assess this with any precision. In particular, there is no reliable data on the current use of enhanced sentencing.

### **(1) Crime Survey for England and Wales**

- B.32 The Crime Survey for England and Wales (CSEW) is a face-to-face survey in which people resident in households in England and Wales are asked about their experiences of crime in the 12 months prior to the interview. A large number of individuals are interviewed (in 2012/13 35,000 adults were interviewed, down from 46,754 in 2011/12<sup>27</sup>), the survey is weighted to account for possible non-response bias, and the estimates of national crime are extrapolated from the results.<sup>28</sup> As they are based on a sample survey, the CSEW results are subject to a margin of error.
- B.33 The CSEW data summarised below is taken from the *Overview of Hate Crime in England and Wales* bulletin,<sup>29</sup> published in December 2013. Due to the relatively low levels of hate crime incidents reported in each survey year, the figures are a twelve-month average of the incidents reported in the 2011/12 and 2012/13 surveys.<sup>30</sup> Figures for 2010/11 are, similarly, an average of the results from the 2009/10 and 2010/11 surveys.
- B.34 Self-reporting surveys are dependent on respondents correctly understanding the questions asked, their own perception of an offender's motivation for an incident, and on the accuracy of their recollection, both of the details of incidents and the number of incidents that occurred.
- B.35 For all these reasons the CSEW should be used only as an approximate guide to the number of hate crime incidents.

#### ***Victim identity***

- B.36 The data indicates that most perceived hate crime was directed against victims on the basis of their race.

<sup>27</sup> Office for National Statistics, *2012-13 CSEW Technical Report*, [1.1]. Available from <http://www.ons.gov.uk/ons/guide-method/method-quality/specific/crime-statistics-methodology/index.html> (last accessed 29 April 2014).

<sup>28</sup> *Overview of Hate Crime in England and Wales* (fn 25 above), p 12.

<sup>29</sup> Fn 25 above.

<sup>30</sup> These figures come with the warning that, due to the large confidence intervals in each year's figures, it is difficult to make meaningful comparisons over time. *Overview of Hate Crime in England and Wales*, pp 12 to 13.

**Table 1: CSEW - number of incidents of reported hate against adults (aged 16 and over) in England and Wales**

*For each characteristic, the percentage in brackets indicates the proportion of total hate crimes in the relevant period which were based on hostility towards that particular characteristic*

<b>Characteristic</b>	<b>Incidents, 2009/10 and 2010/11 data</b>	<b>Incidents, 2010/2011 and 2012/13 data</b>
Race	136,000 (52.3%)	154,000 (55.4%)
Religion	39,000 (15%)	70,000 (25.2%)
Sexual orientation	50,000 (19.2%)	39,000 (14%)
Disability	65,000 (25%)	62,000 (22.3%)
<b>Total hate crime</b>	260,000	278,000
<b>Total crime</b>	9,561,000	9,074,000

Using the figures in this table, hate crime accounted for 3.06% of all CSEW crime using the annualised average from the 2010/11 and 2012/13 surveys (compared with 2.7% from the 2009/10 and 2010/11 surveys).

B.37 For personal (as opposed to household) hate crime,<sup>31</sup> the risk of being a victim varied by socio-demographic characteristics. The risk of being a victim of hate crime was highest for, among others:<sup>32</sup>

- (1) people aged 16 to 24 (0.5% of whom experienced personal hate crime compared with, for example, fewer than 0.1% of those aged 75 and over);
- (2) people in ethnic groups other than white (0.6% compared with 0.2% of white adults); and
- (3) the unemployed (0.6% compared with 0.2% of adults in employment).

B.38 In addition,

<sup>31</sup> *Overview of Hate Crime in England and Wales*, p 13: "personal crimes relate to all crimes against the individual and only relate to the respondent's own personal experience (not that of other people in the household). Household crimes are considered to be all property-related crimes and respondents are asked whether anyone currently residing in the household has experienced any incidents within the reference period".

<sup>32</sup> *Overview of Hate Crime in England and Wales*, p 15.



- (1) Non-white people were more likely to experience racially motivated hate crime than white people (1.3% compared with 0.1%). 2% of Muslims experienced racial hate crime, as against 0.2% of Christians.<sup>33</sup>
- (2) 1.5% of Muslims experienced religiously motivated hate crime, compared with 0% of Christians, 0.5% of Hindus, and 0.5% of other religions. 0.7% of non-white people experienced religiously motivated hate crime, compared with 0% of white people.<sup>34</sup>
- B.39 26% of the victims of personal hate crime, and 36% of the victims of household hate crime, were victimised more than once in the 12-month period, and 18% were victimised three or more times. The report notes that this is higher than the rate of repeat victimisation for crime overall (21% for personal crime, and 27% for household).<sup>35</sup>

### ***Types of incident***

**Table 2: CSEW - percentage of reported crimes against adults (aged 16 and over) in England and Wales which were perceived as hate crimes**

<b>Type of incident</b>	<b>2010/11</b>	<b>2012/13</b>
<b>Personal crime</b>		
Assault with minor injury or no injury	6	9
Wounding	6	5
Robbery	10	6
Theft from a person	1	2
Other theft of personal property	1	1
<b>All personal crime</b>	<b>4</b>	<b>5</b>
<b>Household Crime</b>		
Vandalism	3	3
Burglary	3	4
Vehicle-related theft	0	1
Bicycle theft	1	1
Other household theft	1	1
<b>All household crime</b>	<b>2</b>	<b>2</b>

### ***Reporting hate crime***

<sup>33</sup> *Overview of Hate Crime in England and Wales*, Appendix Table 1.13,

<sup>34</sup> *Overview of Hate Crime in England and Wales*, Appendix Table 1.14,

<sup>35</sup> *Overview of Hate Crime in England and Wales*, p 16 and Appendix Table 1.07.

- B.40 The CSEW asks those who experienced crime whether the police came to know about the incident (whether because the victim reported it or in some other way, eg the police arrived at the scene). Hate crime incidents were very slightly more likely to have come to the attention of the police than other crimes: 40% of hate crime incidents reported in the survey came to the attention of police, compared with 39% of reported criminal incidents overall.<sup>36</sup>
- B.41 Respondents to the CSEW who stated that they had not reported the incident to the police were asked why they had not reported it (Table 3 below). The data indicates that the less benign reasons for which a person may choose not to report a crime are much more prevalent in relation to hate crime (namely, such crimes being a common occurrence, fear of reprisal, distrust of the authorities, and “other”).

**Table 3: CSEW- reasons for not reporting crime to the police (percentage)<sup>37</sup>**

<b>Reason for not reporting</b>	<b>Hate crime</b>	<b>All crime</b>
Trivial/no loss	21	34
Police would or could not do anything	43	45
Private/dealt with ourselves	12	15
Inconvenient to report	1	7
Reported to other authorities	2	4
Common occurrence	10	3
Fear of reprisal	8	2
Dislike or fear of police/previous bad experience with the police or courts	8	1
Other <sup>38</sup>	24	8

<sup>36</sup> *Overview of Hate Crime in England and Wales*, p 17. This is a marked change from the 2010/11 figures, which were 49% and 39% respectively. The Government believes that under-reporting is a significant issue among new migrant communities (including asylum and refugee communities); Gypsy, Irish Traveller and Roma communities; transgender victims; and victims with a disability: HM Government, *Challenge it, Report it, Stop it: the Government’s plan to tackle hate crime* (Mar 2012) p 7.

<sup>37</sup> *Overview of Hate Crime in England and Wales*, Appendix Table 1.09. The figures may add to more than 100 as more than one reason could be given.

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

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

- B.42 The Home Office collates data on the number of incidents recorded by the police as hate crimes. This data is reported annually by the Home Office and is also included in the *Overview of Hate Crime in England and Wales* bulletin.
- B.43 A single incident may be reported as more than one hate crime. For instance, if a victim of an offence tells the police that it was motivated both by their race and their disability, that offence will be shown in the police statistics as both a “race hate crime” and a “disability hate crime”, although it only relates to a single incident. Hence, there were 43,927 hate crimes recorded by the police in 2012/13, arising from 42,236 separate incidents (roughly 1% of overall police recorded crime).<sup>39</sup>

**Table 4: Hate crimes recorded by the police, broken down by monitored characteristic, 2012/13<sup>40</sup>**

*Percentage of total hate crimes in brackets<sup>41</sup>*

<b>Monitored characteristic</b>	<b>2011/12</b>	<b>2012/13</b>
Race	36,016 (81.7)	35,885 (85)
Religion	1,622 (3.7)	1,573 (3.7)
Sexual orientation	4,362 (9.9)	4,267 (10.1)
Disability	1,757 (3.9)	1,841 (4.4)
Transgender identity	309 (0.7)	361 (0.9)
<b>Total</b>	<b>44,066</b>	<b>43,927</b>

- B.44 In addition to collecting data on the number of recorded hate crimes, the Home Office received more detailed data on the types of offence recorded as hate crimes from 17 police forces (of a possible 44 – the 43 territorial forces plus the British Transport Police). The information is based on indicative findings that may not be representative of the other 27 forces and caution should be applied to interpretation of this data across England and Wales. The forces in question

<sup>39</sup> *Overview of Hate Crime in England and Wales*, p 18.

<sup>40</sup> *Overview of Hate Crime in England and Wales*, Appendix Table 2.02.

<sup>41</sup> Percentages add up to more than 100% because each incident may involve more than one motivating factor.

together account for only 20% of overall police-recorded hate crime.<sup>42</sup> The categories are broad and do not give any indication as to whether the reported hate crimes would meet the requirements of any of the three regimes by which the law responds to hate crime.

- B.45 Readers should also note that the table below shows the type of offence in percentage terms, for each hate crime strand. The *count* of hate crimes is not reflected, and the number of hate crimes on some grounds (notably transgender identity) is much smaller than others.

**Table 5: Police recorded hate crime by offence type, 2012/13 (data from 17 out of 44 police forces)<sup>43</sup>**

Offence type	Monitored hate crime strand					Total
	Race	Religion	Sex Orientn	Disab	G Ident	
Violence against the person	27	24	42	32	32	29
with injury	17	15	22	20	21	18
without injury	10	9	20	13	11	11
Public order offences	60	49	43	30	47	56
fear, alarm and distress	59	46	43	30	47	55
other	1	4	1	0	0	1
Criminal damage	11	21	12	17	15	11
Other notifiable offences	2	6	3	20	7	4
Total	100	100	100	100	100	100

### (3) Crown Prosecution Service data – prosecuted hate crime

- B.46 Information on hate crime prosecutions is contained in the CPS annual report on hate crime and crimes against older people. The latest report was published in early 2014.<sup>44</sup> An offence is included in this report if it is flagged as a hate crime by

<sup>42</sup> Many of them are rural or semi-rural; the forces responsible for major urban areas such as London, Birmingham, Manchester, Leeds-Bradford and Nottingham are not included. The forces in question are: Avon and Somerset, Bedfordshire, Cambridgeshire, Cheshire, City of London, Cleveland, Derbyshire, Dorset, Gloucestershire, Lincolnshire, Merseyside, Northamptonshire, Northumbria, North Yorkshire, South Yorkshire, Staffordshire and Surrey.

<sup>43</sup> *Overview of Hate Crime in England and Wales*, Appendix Table 2.03.

<sup>44</sup> Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2012-2013* (2014) ("CPS report 2012/13"), available from [http://www.cps.gov.uk/data/hate\\_crime/index.html](http://www.cps.gov.uk/data/hate_crime/index.html) (last visited 7 May 2014).

the CPS using the agreed definition of “hate crime” discussed above.<sup>45</sup> A prosecution that results in a conviction is reported as a successful conviction for “hate crime” if it was initially flagged by the CPS as a hate crime incident on receipt of the file from the police, regardless of whether the defendant was convicted of a specific hate crime offence or one in respect of which an enhanced sentence was passed.<sup>46</sup>

B.47 The figures in the CPS annual report on hate crime are therefore based on the CPS’ own initial assessment of their case files. They are not to be seen as statistics on the number of times the aggravated, or stirring up offences were prosecuted, the outcome of such prosecutions, or whether enhanced sentencing factors were applied and with what effect.

**Table 6: CPS report – total number of hate crimes prosecuted and convicted by the CPS<sup>47</sup>**

	2008/09	2009/10	2010/11	2011/12	2012/13
Prosecutions	13,030	13,921	15,284	14,196	13,070
Convictions	10,690	11,405	12,651	11,843	10,794
Conviction Rate	82%	81.9%	82.8%	83.4%	82.6%

B.48 In 2012/13 the number of hate crime cases referred to the CPS by the police for a charging decision was 12,306 (Table 7). This represented a 17% reduction on the number of referrals from the previous year;<sup>48</sup> prosecutions decreased by 7.9% (Table 6). This compares with a reduction in police recorded hate crime of just 1.7% over the same period.<sup>49</sup> The DPP has noted the reduction in prosecutions and in the conviction rate and has highlighted a need for improved flagging of hate crime cases, case handling, and knowledge on the part of prosecutors.<sup>50</sup>

<sup>45</sup> See para B.13 above. An offence will be flagged as a hate crime if it is perceived as such by the victim or by any other person, including the prosecutor.

<sup>46</sup> The CPS have told us that the required evidential threshold has to be met in order for the court to convict for an aggravated offence or to apply an enhanced sentencing provision, but that, separately from this, “a hate crime flag should not be removed from a case as that would be to undermine the individual’s perception of what happened to them.”

<sup>47</sup> CPS report 2012/13, Table 1. This table does not include stirring up offences.

<sup>48</sup> CPS report 2011/12, p 4.

<sup>49</sup> See Table 4 above.

<sup>50</sup> Foreword to the CPS report 2012/13, p 2.

**Table 7: CPS report – number of cases flagged as “hate crime” referred for a charging decision, and charged, 2012/13<sup>51</sup>**

*Figures for 2011/2012 in brackets*

	<b>Race</b>	<b>Religion</b>	<b>Homophobic/transphobic</b>	<b>Disability</b>
Referred for charging decision	10,330 (12,357)	292 (415)	1,105 (1,366)	579 (643)
Proportion which resulted in a decision to charge	72.8% (73.8%)	72.6% (72.6%)	70.4% (70.7%)	65.0% (70%)

**Table 8: CPS report – number of cases flagged as “hate crime” prosecuted and convicted, 2012/13, by protected characteristic<sup>52</sup>**

	<b>Race</b>	<b>Religion</b>	<b>Homophobic/transphobic</b>	<b>Disability</b>
Completed prosecutions	10,935	399	1,096	640
Convictions	9,107	308	885	494

***Principal offence categories***

B.49 The CPS report breaks the prosecuted hate crimes down by offence category. For each protected characteristic, the most common type of offence was an offence against the person, followed by the public order offences (Table 9 below).<sup>53</sup> Note that this information does not show how many completed prosecutions there were for the aggravated offences or the stirring up offences, because the CPS uses broad categories which do not necessarily relate to the offences which are covered by those specific legal provisions. For example, the CPS report gives the percentage of cases which were “public order offences”, but not all public order offences are stirring up offences or are capable of being aggravated under the CDA. Nevertheless, it is a useful indication of the types of offences which the CPS deals with as “hate crimes”.

<sup>51</sup> CPS report 2012/13.

<sup>52</sup> CPS report 2012/13, Tables 4, 5, 7, and 9. The volume of prosecution outcomes for a period differs from the volume of pre-charge decisions for the same period. Where the pre-charge decision is to bring charges, the resulting case will only reach a conclusion in a later period. This will vary according to the outcome type: for example, the legal process is longer where a case is committed to the Crown Court and tried by jury. This is why the number of prosecutions for racially, religiously and disability hate crime exceeds the number of cases referred to the CPS for a charging decision in the same period.

**Table 9: CPS report – principal offence categories for each of the hate crime strands<sup>54</sup>**

	<b>Disability</b>	<b>Homophobic &amp; transphobic</b>	<b>Racist &amp; religious</b>
Homicide	0.5%	0.4%	0.1%
Offences against person	47.2%	51.8%	50.0%
Sexual offences	5.2%	1.2%	0.3%
Burglary	6.0%	1.0%	0.7%
Robbery	11.6%	2.2%	0.8%
Theft and handling	10.6%	1.5%	3.4%
Fraud and forgery	4.1%	0.2%	0.1%
Criminal damage	3.1%	4%	5.4%
Drugs offences	1.3%	0.6%	1.0%
Public order	7.4%	31.6%	31.7%

***CPS “MIS” data***

B.50 In addition to the information provided in the annual report, the CPS also collates information for internal use on the number of charges brought for the aggravated offences and the stirring up offences (it refers to this as the “Management Information System” or “MIS” data).<sup>55</sup> The information set out in the following tables records the number of offences charged and reaching a first hearing in the magistrates’ courts. Some of these offences may be sent for trial at the Crown court and reach their conclusion there. The data does *not* give any indication of the final outcome, or show whether the charged offence was the substantive charge at the finalisation of the case. It should also be noted that the data does not include offences which are added to a Crown Court indictment without previously having been charged in a magistrates’ court.

<sup>53</sup> However this was not the case for disability hate crime, with theft and robbery offences both surpassing public order offences.

<sup>54</sup> CPS report 2012/13, Table 10.

<sup>55</sup> These data have been drawn from the CPS’ administrative IT system, which, as with any large scale recording system, is subject to possible errors with data entry and processing. They do not constitute official statistics as defined in the Statistics and Registration Service Act 2007.

**Table 10: CPS MIS data – aggravated offences by offence: racially and religiously aggravated offences charged and reaching a first hearing in the magistrates’ courts<sup>56</sup>**

<b>Offence</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Malicious wounding/ GBH	52	58	42	31	32
Actual bodily harm	500	465	363	306	223
Assault	2,415	2,595	2,636	2,704	2,418
Criminal damage	706	728	629	688	572
Fear or provocation of violence	1,990	1,952	1,702	1,544	1,326
Intentional harassment, alarm or distress	3,432	4,011	3,730	3,889	4,067
Harassment, alarm or distress	5,457	5,902	5,289	5,016	4,522
Offence of harassment	336	371	271	253	248
Putting people in fear of violence	142	164	135	96	83
Indecent or racist chanting at football match	21	21	18	8	8

B.51 The data in Table 11 above appears to show that the number of incidents being charged as aggravated offences and reaching a first hearing in the magistrates’ courts has declined for most offence types over the last five years. The number of incidents charged as aggravated actual bodily harm, for example, has declined year on year from 500 in 2009 to 223 in 2013. The number of offences is relatively small, however, so no firm conclusions can be drawn from this. Furthermore, the charging levels for other common assault and intentional harassment, alarm or distress have gone up. This should be compared with the Ministry of Justice’s data on sentencing, which seems to show a sharp fall in the number convictions for all aggravated offences.<sup>57</sup> Again, it should be noted that the CPS and Ministry of Justice data cannot be directly compared, because they relate to different time periods and because different cases progress through the criminal justice system at different rates.

<sup>56</sup> Data provided by the CPS from the Management Information System. Offences recorded in the MIS Offences Universe are those which reached a hearing. There is no indication of final outcome or if the charged offence was the substantive charge at finalisation. Data relates to the number of offences recorded in magistrates’ courts, in which a prosecution commenced, as recorded on the Case Management System. Offence data are not held by defendant or outcome. This offence will remain recorded whether or not that offence was proceeded with.

<sup>57</sup> See Table 13 below.



**Table 11: CPS MIS data – stirring up offences charged and reaching a first hearing in the magistrates’ courts<sup>58</sup>**

	2008	2009	2010	2011	2012	2013
Hatred on the basis of race	27	21	22	25	17	9
Hatred on the basis of religion or sexual orientation	0	1	4	10	6	4

B.52 The number of “stirring up” offences being charged and reaching a first hearing is shown in Table 11, above. The number of incidents charged is extremely small – 13 in total for 2013. The CPS annual report on hate crime says:

Although a number of cases were referred to the Special Crime and Counter Terrorism Division by CPS Areas in line with CPS Legal Guidance on Prosecuting Cases of Racist or Religious Crime, none met the Code Test for prosecution as Part 3 Public Order Act (1986) offences.<sup>59</sup>

This may be because the MIS data refers to 2013 whereas the annual CPS hate crime report covers 2012/13. The cases in question may have been charged later in 2013 such that they will not appear until the 2013/14 annual report.

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

B.53 Data, including sentencing data, on the offenders found guilty of the aggravated offences and the stirring up offences is included in the *Overview of Hate Crime in England and Wales* bulletin. Information is available on the average sentence length for the racially and religiously aggravated offences under the CDA.

B.54 This data is broken down by “offence groups” rather than by individual offence. The offence groups refer to the following offences. (In the subsequent tables in this section, the context will make clear whether the non-aggravated or aggravated version is being referred to, or both.)

Group	Offences
Assault with injury	Malicious wounding/grievous bodily harm (Offences Against the Person Act 1861 ss 20 and 47; CDA s 29(1)(a) and (b))

<sup>58</sup> Data provided by the CPS from the Management Information System.

<sup>59</sup> CPS report 2012/13, p 35.

Assault without injury	Common assault (Criminal Justice Act 1988 s 39; CDA s 29(1)(c))
Harassment	Harassment and stalking offences (Protection from Harassment Act 1997 ss 2/2A, 4/4A; CDA s 32(1)(a) and (b))
Criminal damage	Criminal damage (Criminal Damage Act 1971 s 1; CDA s 30(1))
Public order <sup>60</sup>	Fear or provocation of violence; intentional harassment, alarm, or distress; harassment, alarm or distress (Public Order Act 1986, ss 4, 4A, 5; CDA s 31(1)(a)-(c))
Other	Stirring up offences (Public Order Act 1986 ss 18 to 23 and 29B to 29G); Racialist or indecent chanting (Football (Offences) Act 1991, s 3(1)). <sup>61</sup>

**Table 12: Completed prosecutions for the aggravated offences by venue, 2012<sup>62</sup>**

Offence group	Magistrates' courts	Crown Court
Assault with injury	37	131
Assault without injury	1,076	214
Harassment	147	34
Criminal damage	241	35
Public order	4,943	349
Other	6	5

<sup>60</sup> The *Overview* tables refer to this group as “causing fear, alarm or distress”, in order to distinguish them from other public order offences which do not have aggravated equivalents, such as affray. However in the reproductions here, “public order” is used for the sake of brevity and consistency with the terminology used in the Report.

<sup>61</sup> Neither of these categories of offences have aggravated equivalents.

<sup>62</sup> Magistrates' court figure is for all those presented at the magistrates court on an aggravated offence charge who are convicted or acquitted in that court; it includes guilty pleas, but not proceedings which were started but not completed (eg adjourned sine die, unfit to plead) nor cases where the defendant was committed to the Crown Court for trial. The figures for the Crown Court include all those presenting for trial at that Court who were convicted, acquitted, or pleaded guilty. *Overview*, Appendix Tables 3.07 and 3.08.

B.55 Table 12 above indicates that 89% of all hate crime prosecutions take place in the magistrates' courts, and 11% (albeit the most serious) in the Crown Court. Table 13 provides information on the absolute numbers, and proportions, of convictions that were for the aggravated form of the offence. This varies widely across the different offence types, from less than 1% of assaults with injury, to 18% of public order offences. Although it is impossible to predict how many aggravated offence prosecutions would take place if the offences were extended to disability, sexual orientation and transgender identity, these figures may (combined with data on the proportion of total hate crime that is in those three categories) allow very rough estimations to be made of the scale of possible convictions under new offences.

**Table 13: Number of convictions (all courts) for aggravated offences and non-aggravated equivalents, 2012<sup>63</sup>**

Offence group / type	2010	2011	2012
<b>Assault with injury - total offences</b>	<b>21,711</b>	<b>18,466</b>	<b>13,622</b>
<i>of which:</i>			
Racially or religiously aggravated	200	129	115
Non-aggravated	21,511	18,337	13,507
<i>% which were aggravated</i>	<i>0.9</i>	<i>0.7</i>	<i>0.8</i>
<b>Assault without injury - total offences</b>	<b>55,775</b>	<b>54,075</b>	<b>52,193</b>
<i>of which:</i>			
Racially or religiously aggravated	966	1,082	1,095
Non-aggravated	54,809	52,993	51,098
<i>% which were aggravated</i>	<i>1.7</i>	<i>2.0</i>	<i>2.1</i>
<b>Harassment - total offences</b>	<b>5,622</b>	<b>5,175</b>	<b>4,795</b>
<i>of which:</i>			
Racially or religiously aggravated	202	176	158
Non-aggravated	5,420	4,999	4,637
<i>% which were aggravated</i>	<i>3.6</i>	<i>3.4</i>	<i>3.3</i>
<b>Criminal damage - total offences</b>	<b>5,550</b>	<b>4,877</b>	<b>3,993</b>
<i>of which:</i>			
Racially or religiously aggravated	259	245	236
Non-aggravated	5,291	4,632	3,757
<i>% which were aggravated</i>	<i>4.7</i>	<i>5.0</i>	<i>5.9</i>
<b>Public order - total offences</b>	<b>38,637</b>	<b>34,207</b>	<b>27,213</b>
<i>of which:</i>			
Racially or religiously aggravated	5,619	5,104	4,846
Non-aggravated	33,018	29,103	22,367
<i>% which were aggravated</i>	<i>14.5</i>	<i>14.9</i>	<i>17.8</i>

<sup>63</sup> Overview of Hate Crime in England and Wales, Appendix Table 3.09, .

Stirring up/racialist or indecent chanting	19	19	8
<b>Racially or religiously aggravated offences - total</b>	<b>7,265</b>	<b>6,755</b>	<b>6,458</b>
<b>Non-aggravated corresponding offences - total</b>	<b>120,049</b>	<b>110,064</b>	<b>95,366</b>
<b>Offences - total</b>	<b>127,314</b>	<b>116,819</b>	<b>101,824</b>
<b>% which were aggravated</b>	<b>5.7</b>	<b>5.8</b>	<b>6.3</b>

B.56 We noted above that data from the CPS indicates that the number of aggravated offences being charged and reaching a first hearing in the magistrates' courts has declined for some offences but increased for others (Table 11 and paragraph B.51). In paragraph B.48 we also noted a 17% decline between 2011/12 and 2012/13 in cases referred by the police to the CPS for a charging decision. Table 14 above provides information on the number of convictions for the aggravated offences. This information indicates that the number of convictions for all types of aggravated offence (other than assault with injury) has fallen since 2009. This is in line with a decline in the number of such offences reported to the police.<sup>64</sup> However, the proportion of overall convictions that were for the aggravated forms of the offences has in most cases increased over the relevant period.

**Table 14: Conviction Ratio, 2012<sup>65</sup>**

<b>Offence group</b>	<b>Non aggravated</b>	<b>Aggravated</b>
Assault with injury	84.5	50.9
Assault without injury	67.7	68.4
Harassment	73.3	57.5
Criminal damage	78.8	57.7
Public order	76.6	76.1

<sup>64</sup> Which has declined by 21% since 2008/09: *Overview of Hate Crime in England and Wales*, Appendix table 2.04.

<sup>65</sup> *Overview of Hate Crime in England and Wales*, Appendix table 3.12.

**Table 15: Disposals, 2012<sup>66</sup>**

Offence group	Outcome	Aggravated	%	Non aggravated	%
<b>Assault with injury</b>	<b>Total number sentenced</b>	<b>114</b>		<b>13,434</b>	
	Immediate custody	69	61	5,479	41
	Suspended sentence	25	22	3,997	30
	Community sentences	18	16	3,423	25
	Fines	1	<1	134	1
	Other disposals	1	<1	401	3
<b>Assault without injury</b>	<b>Total number sentenced</b>	<b>1,106</b>		<b>51,211</b>	
	Immediate custody	236	21	7,022	14
	Suspended sentence	200	18	5,139	10
	Community sentences	500	45	23,672	46
	Fines	94	8	6,332	12
	Other disposals	76	7	9,046	18
<b>Harassment</b>	<b>Total number sentenced</b>	<b>157</b>		<b>4,635</b>	
	Immediate custody	26	17	704	15
	Suspended sentence	23	15	610	13
	Community sentences	76	48	1,931	42
	Fines	11	7	584	16
	Other disposals	21	12	806	17
<b>Criminal damage</b>	<b>Total number sentenced</b>	<b>228</b>		<b>3,696</b>	
	Immediate custody	20	9	239	6
	Suspended sentence	22	10	121	3
	Community sentences	126	55	1,387	38
	Fines	26	11	632	17
	Other disposals	34	15	1,317	36
<b>Public order</b>	<b>Total number sentenced</b>	<b>4,858</b>		<b>22,435</b>	
	Immediate custody	457	9	1,308	6
	Suspended sentence	286	6	892	4
	Community sentences	1,205	25	5,181	23
	Fines	1,971	41	8,599	38
	Other disposals	939	19	6,455	29
	Average custodial sentence	3.6		2.4	

<sup>66</sup> *Overview of Hate Crime in England and Wales*, Appendix table 3.15.

**Table 16: Average custodial sentence in months<sup>67</sup>**

<b>Offence group</b>	<b>Non aggravated</b>	<b>Aggravated</b>
Assault with injury	15.5	16.7
Assault without injury	3.1	4.9
Harassment	4.8	4.9
Criminal damage	3.9	5.2
Public order	2.4	3.6

### **(5) Crown Court Sentencing Survey**

- B.57 A further source of relevant information, although not on a formal statistical footing in the same way as the data considered thus far, comes from the Sentencing Council's ongoing survey of sentences at Crown Courts (where around 11% of hate crime prosecutions occur<sup>68</sup>). Sentencers are asked to fill out a form whenever passing a sentence for an offence, with different forms provided for different offence groups (assault, theft, etc). The forms ask the sentencer to tick a box when certain aggravating factors have been found to apply. Where possible, these boxes reflect the aggravating factors listed in the relevant sentencing guideline. The assault and theft guidelines include boxes for aggravation by race or religion; age, sex or gender identity; sexual orientation; and targeting a vulnerable victim.
- B.58 The Sentencing Council has provided us with statistics on the results of the survey as they apply to aggravating factors that may be relevant to hate crime. The year covered is 2011.<sup>69</sup> However, the overall national response rate to the survey is only 61%, varying between 25% and 95% across different Crown Court centres, and therefore it does not provide a complete picture.
- B.59 The following table indicates the proportion of cases for ten offences in which the sentencer ticked the box for aggravation by race or religion; age, sex or gender identity; or sexual orientation (however, sentencers did not indicate whether they

<sup>67</sup> Overview Appendix table 3.18. It is important not to confuse the average sentence with the average *custodial* sentence, which is the figure presented here. The average custodial sentence is the average of all the determinate custodial sentences imposed (it excludes life and indeterminate sentences). It does not indicate the severity with which the offence in question is generally sentenced overall, because not all sentences for the offence will be custodial. Eg if six people were convicted of an offence in 2012, five of them were given fines and one was given six months, the average custodial sentence would be six months. This does not mean that six months is the most typical sentence for the offence.

<sup>68</sup> See para B.55 above.

<sup>69</sup> However, for assault offences, only the period after June of that year is covered because the response form was changed in that month, following the introduction of a new guideline on assault offences. There is a possibility that some sentences after this date continued to use the old version of the form.

in fact applied section 145 or 146 to reflect that aggravation). The additional aggravating factor of targeting a vulnerable victim is also included in this table for comparison. That factor will frequently, but not always, be relevant in offending against disabled people.

**Table 18: Crown Court Sentencing Survey 2011 – Proportion of offences in which hostility was reported as a factor – by offence**

Offence	Race/ Religion	Age/Sex/ Gender Ident	Sexual orient'n	Disability	Targeting vulnerable victim
ABH s 47 OAPA <sup>70</sup>	0.7%	0.8%	0.2%	0.4%	13%
GBH s 20 OAPA	0.2%	0.5%	0.5%	0.2%	
GBH s 18 OAPA	1.5%	0.6%	0.2%	-	18%
Common assault	4.4%	1%	0.5%	-	15%
POA s 4	2.3%	-	-	-	8%
POA s 4A	3.1%	-	-	-	-
Violent disorder	2.4%	0.8%	-	-	-
Affray	1.1%	0.3%	0.1%	-	-
Harassment	13.2%	2.5%	-	-	28%
Theft from person	No data <sup>71</sup>	No data	No data	No data	26%

#### DESCRIPTION OF OPTIONS

B.60 As we noted above, the terms of reference for the project required us to look only at:

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

B.61 In light of this, the options we considered in the Report are as follows:

- (a) **Option 0:** do nothing, current arrangements are left unchanged;
- (b) **Option 1:** improvements to the operation of the enhanced sentencing provisions under the CJA;

<sup>70</sup> OAPA = Offences Against the Person Act 1861.

<sup>71</sup> No data means there was no option on the relevant form. A dash means there was no figure given in the Sentencing Council results at all, possible because there were no ticks in the relevant box.

- (c) **Option 2:** a full-scale review of the operation of the aggravated offences and of the enhanced sentencing system, to examine all the available data and establish whether such offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be selected;
- (d) **Option 3:** immediate extension of the aggravated offences under the CDA to the three additional characteristics; and
- (e) **Option 4:** extension of the stirring up offences in the POA 1986 to the two additional groups.

B.62 The aggravated offences, the stirring up offences and the enhanced sentencing provisions represent three separate legal regimes. With the exception of Options 2 and 3, which are mutually exclusive, each of these options can be implemented individually or in combination with other options.

B.63 In the Report, we recommend in favour of Option 1 in any event, and recommend against Option 4. We recommend in favour of Option 2, with the caveat that if no wider review takes place, Option 3 should be implemented as a second-best solution.

**Option 0: Do nothing (base case)**

B.64 This option would leave the current legal provisions on hate crime unchanged. The situation is as follows:

- (1) The aggravated offences in the CDA apply to hostility on grounds of race and religion, but not on grounds of sexual orientation, disability or transgender identity;
- (2) The stirring up of hatred offences under the POA apply to the stirring up of hatred on the grounds of race, religion and sexual orientation, but not on the grounds of disability or transgender identity;
- (3) The enhanced sentencing provisions in the CJA apply to all five characteristics.

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

B.65 This Option involves two measures to improve the operation of the existing enhanced sentencing scheme under sections 145 and 146 of the CJA. That scheme already covers all five protected characteristics. The consultation has indicated that this system is not working as well as it could, and that there is scope for considerable improvement. We also considered that an improved enhanced sentencing scheme could provide an effective response in practice, and this might obviate the need to extend the aggravated offences.



- B.66 There is no reliable data that shows how frequently section 146 is applied, in relation to which characteristics, or with what effect on sentences passed. However, consultees who represent victims of hate crime expressed concerns that section 146 is being under-used. Furthermore, a Criminal Justice Joint Inspection report on disability hate crime was published in March 2013,<sup>72</sup> which highlighted a number of inadequacies in the criminal justice agencies' response to and recognition of disability hate crime. Members of the judiciary who were interviewed as part of the review noted that they were only asked to consider section 146 in "exceptional" cases.<sup>73</sup>
- B.67 Application of sections 145 and 146 is not reflected on offenders' criminal records, and so the true nature of the wrongdoing is not adequately recorded or labelled, nor is this information available to the agencies in the criminal justice system who may need it.<sup>74</sup>
- B.68 Having made proposals in the CP, we then analysed responses. Based on this, in the report we recommend two improvements to the sentencing regime, which may lead to better use of the enhanced sentencing provisions and proper labelling of offenders' wrongdoing. They are:
- (1) That the Sentencing Council issue guidance on the approach to sentencing hostility-based offending, both under the aggravated offences and in accordance with sections 145 and 146 of the CJA. The form and content of any guidance will be a matter for the Sentencing Council. This would help to ensure that enhanced sentencing is applied in all appropriate cases, and that it is applied consistently; and
  - (2) A requirement that, where sections 145 and 146 are applied, this fact be recorded on the Police National Computer and included on criminal record certificates issued by the Disclosure and Barring Service (DBS). This would ensure that the fact that an offence was aggravated by hostility is available to the police, courts, prison and probation services, and potential future employers of convicted persons.
- B.69 Recommendation (1) would be a straightforward matter of the Sentencing Council fitting this recommendation into its programme of work. Recommendation (2) would involve work by the Home Office, which is in charge of the PNC, to determine how the recording should be done and to undertake

<sup>72</sup> Criminal Justice Joint Inspection (HMCPsi, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (2013), available at [www.hmcp.si.gov.uk/cjji/](http://www.hmcp.si.gov.uk/cjji/) (last visited 27 May 2014).

<sup>73</sup> Criminal Justice Joint Inspection, *Living in a Different World*, p 36.

<sup>74</sup> For instance, the prison and probation services responsible for the offender's punishment and rehabilitation, or courts sentencing the offender for subsequent offences, deciding a bail application, or assessing their credibility as a witness.

any modifications to the PNC needed to facilitate it. It would also involve HMCTS, to ensure that court clerks can and do send the information about the application of section 145 or 146 to the PNC each time a case reaches final disposal.<sup>75</sup>

## **Option 2: Carry out a wider review of enhanced sentencing and the aggravated offences**

- B.70 Consultees raised serious concerns about flaws and complexities in the current aggravated offences. These may be causing aggravated offence prosecutions to fail. Unnecessary complexities may also be compromising the operation of enhanced sentencing, because of their common features and due to confusion over their inter-relationship. If the aggravated offences are not working effectively, or if they are ill-suited in their current form to tackle crime based on hostility on grounds of disability, sexual orientation or transgender identity, then extension would risk being largely symbolic. The new offences would have little practical value; worse still, they may result in hostility aggravation not being addressed at all in the final outcome of cases, despite those cases having been reported and prosecuted as hate crimes.
- B.71 In addition to concerns about the current aggravated offences, some fundamental questions were raised by consultees about the principled basis for creating aggravated offences and for selecting characteristics for protection. These questions may require deeper consideration prior to any decision to extend the current offences. A decision on the case for extending this legislation may also consider the theoretical arguments against the offences and the case for their abolition.
- B.72 Therefore, in relation to the aggravated offences, we consider that a full-scale review of the operation of the aggravated offences and of the enhanced sentencing system could examine the following questions:
- (1) What are the purposes of laws specifically addressing hostility-based offending
    - (a) for victims?
    - (b) for the criminal justice system?
    - (c) for wider society?

<sup>75</sup> For Crown Court clerks, this would be done via the police, while magistrates' courts' clerks would send the information to the PNC via the Bichard 7 interface (which allows information entered on the magistrates' courts' Libra computer system to be transposed onto the PNC).

- (2) To what extent do the current systems of aggravated offences and enhanced sentencing (individually and in combination) serve those purposes?
- (3) For victims, what is the best way for the law to respond to hate crime?
- (4) If aggravated offences are needed or desirable:
  - (a) What model should be used to criminalise the hate or hostility element?
    - (i) Should the offences refer to “hostility”, or some other attitude such as “prejudice” or “bias”?
    - (ii) Or should they criminalise the “deliberate targeting” of a person due to their characteristic, or vulnerability/inability to defend or report the attack?
    - (iii) How should this be assessed: through evidence of the defendant’s motivation or evidence of the circumstances surrounding the offence, eg what did the defendant say or do to the victim when committing the offence?
  - (b) For each protected characteristic, what forms of hate crime are most common and should they all be listed as offences that can be aggravated?
- (5) If enhanced sentencing is needed or desirable, what model should be used? If it is “hostility” based, how should that be assessed (questions (4)(a) (i) to (iii) above)? Should the general aggravating factors of abuse of trust or power, or targeting a vulnerable victim, be placed on the same statutory footing as section 146 of the CJA?
- (6) What protected characteristics should be specifically referred to in offences and/or the enhanced sentencing system? On what principles should they be selected?
- (7) What other initiatives or measures could be introduced? Should they include, for example: better guidance for those applying the legislation; more effective use of alternatives to the criminal process, such as restorative justice; anti-bullying and other education initiatives; more effective internet and social media control; press and media regulation; rehabilitation; prison-based re-education? All of these were called for in the consultation responses and many people said they were as important as legislation, or more so, in responding to hate crime effectively.

### **Option 3: Extend the aggravated offences under the Crime and Disorder Act 1998 to cover all the protected characteristics**

- B.73 This option would extend the aggravated offences to cover disability, transgender identity and sexual orientation. The offences would be extended in their current form, including the same hostility test, and the list of offences of which aggravated versions would be created would be the same.
- B.74 Despite our view that a reformed scheme of enhanced sentencing could provide an effective response, we share the view expressed by most consultees that it is undesirable for the aggravated offences not to apply equally to hostility based on race, religion, transgender identity, sexual orientation and disability. It sends the wrong message about the seriousness with which such offending is taken and the severity of its impact, if offences attaching a specific aggravated label and a potentially higher sentence only exist in relation to two of the five statutorily protected hate crime characteristics. Thus, notwithstanding difficulties that have been identified with the aggravated offences, we consider that the argument for equal treatment is compelling and have considered this Option as an alternative, though less preferable, solution to the problem under consideration in this project.

### **Option 4: Extend the stirring up offences under the Public Order Act 1986 to cover all the protected characteristics**

- B.75 This option would extend the stirring up offences to cover the stirring up of hatred on grounds of disability and transgender identity.<sup>76</sup>
- B.76 We asked consultees whether they considered that there was a case in principle for extending these offences, as well as whether there was a need in practice. Consultees were in favour of extension, as a matter of principle. However they did not identify examples of conduct that would pass the threshold of the offences, nor did they provide any evidence that such conduct is taking place on a significant scale. Thus, evidence of practical need was lacking.

### **COST AND BENEFIT ANALYSIS**

- B.77 We have highlighted below some of the likely costs and benefits of each option. There are significant gaps in the available data (as we noted above at B.31), which would make any firm estimates of costs difficult.
- B.78 In addition, we noted above<sup>77</sup> that the Commission's project is one part of a broad governmental action plan on hate crime. The action plan has a very wide range of

<sup>76</sup> Following consultation we could, in theory, recommend extension to only one of these groups.

<sup>77</sup> See para B.20 above.

aims, covering education, reporting and the criminal justice system's response to hate crime. Given this wider context, it is difficult to isolate the potential impact of any one reform. The Commission's project forms just one part of a much wider effort to improve every stage of the response to hate crime. If this effort succeeds, there may be an increase in the reporting of hate crime (due to increased confidence in the system), as well as better preventative measures and more effective responses to it through the criminal justice system. In the latter regard, there may be better and more accurate recoding and reporting by the police, improved identification and prosecution of complaints flagged as hate crimes, and more familiarity on the part of police officers and prosecutors with the hate crime legislation (particularly the enhanced sentencing scheme, which is not always well understood by the police and prosecutors).

- B.79 There is thus a very high risk that any attempt to monetise the costs and benefits of these options would be flawed. We have therefore limited ourselves to setting out the sources and likely scales of the potential costs and benefits.

### **Option 0: Do nothing (base case)**

#### **Costs**

##### ENHANCED SENTENCING

- B.80 As has previously been discussed, it appears that enhanced sentencing is not being applied consistently, and that hostility is not being recognised in all cases where it is present. This is undesirable for several reasons (which apply equally to racial and religious hate crime, in respect of which enhanced sentencing applies for all offences which do not have aggravated versions):

- (1) Legitimacy: as some offenders receive a higher sentence when hostility is present and some do not, the legitimacy of longer sentences in those cases where it is applied is undermined, bringing the justice system into disrepute, and doing unfairness to offenders who do receive higher sentences;
- (2) Victims: it is distressing and unfair for victims of hate crimes if the nature of the offending against them is not recognised by the court and reflected in the sentence it imposes;
- (3) Confidence, under-reporting: failure to ensure hate crime is recognised and punished accordingly is likely to lead to low confidence in the justice system on behalf of disabled, LGB and transgender people, and to perpetuate the under-reporting of hate crime;
- (4) Deterrence: any deterrent effect that would result from the consistent application of higher sentences is lost, and incidence of hate crime is therefore higher than it would otherwise be;
- (5) Decision-making: failing to systematically record the hostility-based nature of offences on the PNC means the criminal justice system and employers will not make fully informed decisions in their dealings with hate crime offenders.

## AGGRAVATED OFFENCES

- B.81 The inapplicability of the aggravated offences to transgender identity, disability and sexual orientation may give rise to a perception that the law is unfair and discriminatory, and may undermine faith and confidence in the justice system among disabled and LGB people. In addition, complexities in these offences, and serious practical difficulties in their application, may mean that retaining them in their current form for racial and religious hate crime may have costs in terms of:
- (1) Under-use: in many instances, aggravated charges are dropped, or rejected by the finder of fact.<sup>78</sup> This may lead to the adverse consequences listed at paragraph B.80(1) to (4) above;
  - (2) Court time: the complexity of the offences, in particular the hostility test, is likely to mean wasted court time and public funds spent in legal argument, and in the resulting appeals.

## STIRRING UP OFFENCES

- B.82 The cost of taking no action on stirring up offences is low compared to aggravated offences and enhanced sentencing. While there is some dissatisfaction with the present situation on equality grounds, we do not see any evidence of widespread or serious conduct such as could only be adequately addressed by new offences rather than by existing criminal offences. Hence we do not consider that taking no action would mean allowing seriously harmful behaviour to continue unchecked.

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

#### **Costs**

##### ***Costs of improving enhanced sentencing generally***

- B.83 Because sections 145 and 146 relate to the sentencing stage, the defendant must already have been convicted of an offence before those sections can apply. As a result, the correct use of sections 145 and 146 would not result in any additional cases coming before the courts (but may result in additional *Newton* hearings). The impact of these proposals would be felt at sentencing and they could result in longer prison sentences. There are two areas of uncertainty here: the number of cases in which sections 145 and 146 should be applied; and the amount by which the sentence would be uplifted when they are applied.

<sup>78</sup> See Table 14 above, which shows the low conviction ratios for aggravated offences.

#### NUMBERS OF CASES

- B.84 There is no data available from which to establish the number of cases in which sections 145 and 146 should be applied. We noted above that the CPS provides figures on the number of “hate crimes” they have prosecuted. In 2012 to 2013, the CPS prosecuted 10,935 cases of racially aggravated hate crime, 399 cases of religiously aggravated hate crime, 1,096 cases of homophobic and transphobic hate crime and 640 cases of disability hate crime.<sup>79</sup> It does not necessarily follow that sections 145 or 146 should have been applied in every one of these cases because, again, the definition of “hate crime” which the CPS use in recording their statistics is wider than the test for demonstrating or motivating hostility in sections 145 and 146. In addition, section 145 would have been inapplicable in some of these cases, because they would have been prosecuted with aggravated offences and section 145 would have no application.
- B.85 In addition, the Criminal Justice Joint Inspection report suggested that police are not adequately considering hate crime issues when investigating offences. If this is correct then the data provided in the CPS report may lead to under-estimation of the number of cases where sections 145 and 146 should be applied, as it will only capture hate crimes that have been reported to the CPS by the police.<sup>80</sup>

#### NEWTON HEARINGS

- B.86 Since sections 145 and 146 are relevant only at the sentencing stage of the trial process, the Crown does not need to offer evidence at trial that the defendant demonstrated or was motivated by hostility on grounds of the victim’s disability, sexual orientation or transgender identity in order to establish guilt. The evidence is only relevant for sentencing. Therefore only the sentencing judge, and not the tribunal of fact (as with the aggravated offences), must be satisfied to the criminal standard that the aggravating factor was present. When the defendant contests hostility (even where he or she pleads guilty to the offence) there will have to be a *Newton* hearing, at which the issue is decided by the sentencing judge and which may involve the calling of witnesses. It is not possible to predict how many additional *Newton* hearings would take place if the operation of enhanced sentencing was improved, but some increase is likely.

#### SENTENCE UPLIFT

- B.87 The more frequent use of enhanced sentencing would incur a cost to the prison service, as offenders are incarcerated for longer than they would otherwise have been. However, there is no data on the average increases in sentence length when sections 145 and 146 are used. The Ministry of Justice does publish data

<sup>79</sup> See Table 8 above.

<sup>80</sup> Criminal Justice Joint Inspection, *Living in a Different World* (fn 72 above). See also para B.49 and Table 7 above, which shows a substantial drop in the numbers of hate crime cases referred to the CPS for a charging decision by the police.

on the average custodial sentences for the aggravated offences. The difference in the average custodial sentence from the basic to the aggravated form of the offence ranges from almost negligible (with an average of 4.8 and 4.9 months for the non-aggravated and aggravated harassment offences, respectively) to around 50% (in respect of public order and assault without injury).<sup>81</sup> These averages cannot, however, be applied to sections 145 and 146, because:

- (1) Unlike the aggravated offences, sections 145 and 146 do not permit the sentencer impose a sentence higher than the maximum that is available in the absence of hostility;
- (2) The data only shows the average length of custodial sentences, so this may overestimate the severity with which that offence is punished.

### ***Costs of implementing Sentencing Council guidance***

- B.88 Sentencing guidance could take the form either of a single, dedicated “thematic” guideline that would apply to all enhanced sentencing or aggravated offence cases, or incorporation of the guidance into guidelines relating to specific offences (adding it to existing guidelines, and incorporating it into future ones). The former approach may entail administrative costs for the Council, who would have to draft, consult on and circulate the new guideline. However, these costs would not require any additional resources to be allocated, because producing guidelines is the ordinary work of the Council. The main cost for them would be the opportunity cost, as by producing a guideline on hate crime they do not produce one on some other topic. The approach of adding the information to existing guidelines would be less onerous and more easily incorporated into the Council’s ongoing work.
- B.89 The Judicial College has indicated that they do not believe there would be any significant costs involved in training and notifying judges about the new guideline. The College routinely updates sentencers on the introduction of new guidelines, and where necessary includes them in the training sessions which are held on a regular basis as part of judicial continuing professional development (CPD).
- B.90 Barristers, prosecutors and (ideally<sup>82</sup>) the police would also need some training in the new guidance. How this would be done would be a matter for the Bar Council, CPS and police, and it is therefore not possible for us to estimate the costs involved.

<sup>81</sup> Table 15 above.

<sup>82</sup> Sentencing guidance does not relate specifically to the police, since it applies much later in the process, and hence new guidance would not in the ordinary course of things trigger any additional professional training for them. However such training would be desirable because sections 145 and 146 can only be applied if sufficient evidence of hostility is available; if the police are familiar with the enhanced sentencing process, they may be more likely to look for and find such evidence.



### ***Costs of recording on the PNC specifically***

- B.91 The PNC already has a functionality allowing it to record a finding of hostility as a qualifier to the information it holds about the offender's sentence. Some work would need to be done to the magistrates' courts' computer system (Libra), and to its interface with the PNC,<sup>83</sup> to ensure that sentence qualifiers for hostility entered on Libra can translate onto the PNC system. However we have been advised by HM Courts and Tribunals Service (HMCTS) that this would be straightforward.
- B.92 While implementation of this recommendation would not be possible without the technical facility being in place to record hostility, the greater challenge, given that the technical issues do not seem to be problematic, would be ensuring that the facility is used correctly and systematically. This would mean ensuring that the clerks of magistrates' courts and Crown Court centres are aware of the importance of noting when sections 145 and 146 have been applied, and of supplying this information to the police - whether directly to the PNC using Libra, or to the police teams responsible for entering Crown Court results on the PNC. The latter teams would also need to be aware that they must record the information whenever it is sent to them by the Crown Court.
- B.93 Such training would appear to be the responsibility of HMCTS and the police respectively. We are not in a position to say how they would choose to carry this out, and thus cannot predict the cost or burden involved. However we cannot see that doing so would impose a significant additional cost over and above their ordinary process of notifying personnel of changes to policy and system functionality, and of ensuring that information is recorded accurately and systematically.
- B.94 We note that as part of the Government Hate Crime Action Plan, steps are being taken to raise awareness of "hate crime flags" that have been added to court recording systems to allow the better collection of data.<sup>84</sup> This appears to be with a view to including such data in the annual police and CPS hate crime statistics. It seems likely that their work in raising awareness for statistical purposes should facilitate the task of ensuring recording for the purposes of the PNC.

### **Benefits**

#### ***Better use of enhanced sentencing generally***

- B.95 A significant benefit to the current enhanced sentencing provisions under the CJA is their wide scope. The provisions apply when the court is sentencing for any

<sup>83</sup> Using an interface known as Bichard 7.

<sup>84</sup> HM Government, *Challenge It, Report It, Stop It: progress report (2014)* (fn 18 above) p 38.

offence (except one prosecuted as an aggravated offence under the CDA). The aggravated offences, by contrast, only apply to certain basic offences, which may not adequately reflect the kinds of hate crime committed against disabled, LGB or transgender people. Improvements to the enhanced sentencing regime, therefore, should have a beneficial effect covering a wider range of criminal offences than would be covered by an extension of the CDA.

- B.96 More frequent, transparent and consistent use of the enhanced sentencing provisions would send a clear message that hate crime on the basis of any of the protected characteristics is unacceptable. The provisions require the court to state, in open court, that the offence involved hostility towards the victim due to his or her race, religion, disability, sexual orientation or transgender identity. When judges' sentencing remarks are published, as they sometimes are, they can convey the state's and society's condemnation of hate crime. They give expression and recognition to the severe harm it causes to victims and wider communities.

#### ***Benefits of recording on the PNC***

- B.97 The recording of an enhanced sentence on the Police National Computer would ensure that the offender's wrongdoing was properly recorded and labelled. This could have benefits both for the victims of those crimes (who may feel that the harm they have suffered is more clearly recognised), and for society as a whole, as this additional consequence of hostility-based offending may help reinforce the unacceptability of such offending.
- B.98 Recording on the PNC would allow other state bodies who subsequently encounter the offender to be aware of the nature of his or her offence. These include the prison and probation services, who would be able to target rehabilitation programmes to help address the offender's prejudice or hostility; the courts, when considering the offender's record in order to pass sentence for a later offence; and the police, who may be assisted by knowing of the offender's history of hostility-based offending if they were a suspect or person of interest in a later hate crime incident.
- B.99 Furthermore, recording on the PNC will enable the Disclosure and Barring Service to include the hostility-aggravated nature of the offence on the person's criminal record.<sup>85</sup> This will help to ensure that employers can make informed decisions when considering hiring ex-offenders. For example, a care home might consider an application from a person with what appears to be a minor conviction (for example, common assault). The fact the conviction was aggravated by hostility towards the victim's disability would be of considerable relevance to their

<sup>85</sup> Subject to a necessary amendment to secondary legislation.

decision. Providing employers with this information would enable them to better protect vulnerable people under their care.<sup>86</sup>

### ***Risks and assumptions***

- B.100 There is a small risk that sentencers would not apply the enhanced sentencing provisions in all appropriate cases, notwithstanding their inclusion in a sentencing guideline. However we consider this risk to be small, given that sentencers are bound to apply such guidelines, and they have experience of doing so on a regular basis.
- B.101 Sections 145 and 146 can only be applied if sufficient evidence of hostility is available to the sentencing court. If the police or prosecutors are unfamiliar with sections 145 and 146 and the enhanced sentencing process, they may not prioritise gathering such evidence. There is anecdotal evidence that this is a difficulty at present, and if it continues there is a risk that it would render our proposed reforms less effective.
- B.102 There is a risk that court clerks would not consistently record the application of the enhanced sentencing provisions, perhaps due to a lack of awareness and training, or because sentencers were insufficiently clear that they were relying on those provisions. This would result in incomplete information being available on the PNC for criminal justice system users and the DBS, and would be unfair on offenders as some would have the hostility finding on their records and others would not.

### **Option 2: A full-scale review of the operation of the aggravated offences and of the enhanced sentencing system**

#### ***Costs***

- B.103 We are not prescriptive about the methodology or the terms of reference of the wider review we recommend, or by whom it should be conducted. This would be a matter for the Government should they decide to take up this recommendation. However we do set out some questions that a review could usefully consider.<sup>87</sup>
- B.104 We do envisage that, in order to answer the key questions about how the enhanced sentencing system is operating and how aggravated offences are working in practice, any review would need to engage in empirical and quantitative research into all the available material on the current use of

<sup>86</sup> Conversely, if such information was routinely included, its absence on the person's record would indicate that there was no history of hate crime against disabled people; this measure could therefore help to assist the integration of ex-offenders into the community.

<sup>87</sup> The questions we have proposed are listed above, para B.72.

enhanced sentencing, and of the outcomes in a representative range of cases. This may entail:

- (1) Putting in place improvements to CPS records, to ensure that reliable data is gathered systematically on when prosecutors seek uplifts under section 145 or 146 in cases flagged as hate crime, and when this succeeds;
- (2) Interviews with police officers, prosecutors, judges and magistrates who have been involved in hate crime cases;
- (3) A qualitative analysis of a selection of concluded CPS case files to establish what improvements would lead to sections 145 and 146 being applied for and being successful in a greater number of appropriate cases;<sup>88</sup>
- (4) Gathering qualitative data on the application of sections 145 and 146 from magistrates' courts and the Crown Court. This might be led by the MoJ or HMCTS. Such work might be facilitated by the introduction of guidance from the Sentencing Council, as we recommend, and any positive impact of that guidance could be quantified.<sup>89</sup>

B.105 For the aggravated offences, there is already data available on the numbers of prosecutions, sentence, and conviction rate. For these offences, qualitative analysis of a representative selection of cases would be able to identify the scale of the problems identified in the operation of the offences.

B.106 Because we are not prescriptive about these matters, it is not possible to provide a meaningful estimate of the costs of a review. However, we do consider that the review could adopt some of the same methodology as two previous studies into aggravated offences and the enhanced sentencing system, namely the Burney

<sup>88</sup> In her foreword to the 2012/13 CPS annual hate crime report, the Director of Public Prosecutions, Alison Saunders CB, refers to recent research conducted by the CPS and ACPO on the handling of hate crime cases, which aims "to identify any potential issues that may be impacting on the decline in volumes and prosecutions". The findings of this research may produce useful e likely to produce useful data for the full-scale review we recommend. See page 2, available from [http://www.cps.gov.uk/publications/docs/cps\\_hate\\_crime\\_report\\_2013.pdf](http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2013.pdf) (last accessed 15 May 2014).

<sup>89</sup> For the Crown Court, more reliable information might be sought through the Crown Court Survey which is carried out on an ongoing basis by the Sentencing Council. The survey asks sentencers to record details of all sentences, and includes questions on aggravating factors including hostility. At present, however, not all Crown Courts reply to the survey, and the data released focuses on the most common aggravating factors found, without indicating the number of cases in which section 145 or 146 was applied.

and Rose research paper examining the operation of the aggravated offences, which was carried out shortly after their introduction,<sup>90</sup> and the more recent Joint Inspection of disability hate crime.<sup>91</sup>

- B.107 The Joint Inspection adopted several of the methods suggested above. It involved: site visits to local probation services, police forces and CPS offices, interviewing staff and external stakeholders there; observations of the court proceedings in a selection of cases that had been flagged as disability hate crime, and interviews with participants (including the judiciary); and examination of a number of CPS case files.<sup>92</sup> HMCPSP has helpfully provided us with an estimated figure of its cost, which was £80,500 (almost all of it staff costs).
- B.108 The Burney and Rose exercise adopted an approach of case studies involving interviews with police officers, prosecutors, magistrates and judges; statistical analysis; and national surveys. A similar exercise would have access to the statistics on the operation of the offences over fifteen years rather than the two years of data available for the original research paper. We do not have information on the cost of that exercise, but it was commissioned by the Home Office, which may have access to that information.

### **Benefits**

- B.109 This Option would provide a comprehensive examination of the operation of the aggravated offences and enhanced sentencing system across all five protected characteristics.<sup>93</sup> Combined with broad terms of reference, this will allow it to address the practical difficulties and questions of principle we have identified in a fully informed way. We have outlined at paragraphs B.80 to B.82 above the costs of continuing with the present approach. The specific benefits to the operation of hate crime legislation that would arise from such a review would be:

- (1) Ensuring that the hostility test, and other complexities in the legislation are improved or simplified wherever possible;

<sup>90</sup> E Burney and G Rose, Home Office Research Study 244, *Racially Aggravated Offences - how is the law working?* (2002).

<sup>91</sup> Criminal Justice Joint Inspection (HMCPSP, HMIC, HMI Probation), *Living in a Different World: Joint Review of Disability Hate Crime* (March 2013).

<sup>92</sup> *Living in a Different World* (fn 91 above), Annex A (Methodology).

<sup>93</sup> As noted in the previous section, useful exercises have been carried out at various time in relation to individual aspects of the hate crime system, but this recommendation would involve an examination of the whole system as it currently operates.

- (2) Setting out clear principles for the selection of new protected characteristics, saving the resources involved in revisiting this topic each time a new one is proposed, as well as the complexities and inconsistencies that can creep into legislation as a result of piecemeal or incremental additions;<sup>94</sup>
- (3) If the aggravated offences are retained or extended, the list of offences with aggravated versions would be tailored to the type of hostility-based offending that actually occurs in respect of each characteristic, as well as being brought up to date (for instance by adding offences relating to hate crimes that can be committed online);
- (4) The review would ensure an improved and updated response across all five currently protected characteristics, not just the recently added ones of disability, transgender identity and sexual orientation. This would make the system more coherent as a whole.

B.110 The overall benefits of providing an effective and principled response to hate crime include increased deterrence, fair labelling of offending, and the resulting increase in confidence in the criminal justice system (particularly on the part of victims and members of the groups affected by hate crime).

***Risks and assumptions***

B.111 Given the scope of the review, and the considerable time and resources that would be involved, there is a risk that, once commenced, it would be terminated prematurely for cost reasons or due to changes in priorities. Such issues might also lead to delay or drift, or to the review being unable to complete its work effectively. There is also a risk that resources, changed priorities or other factors would lead the review to be given narrower terms of reference than we consider necessary to allow it to ensure an optimal response to the problem of hate crime. If these risks materialised, it would mean all or part of the present, unsatisfactory system would continue to operate, with the attendant difficulties and costs we have already identified. There is a further risk in the results of the review not being followed up, or not being implemented effectively, due to arguments about costs or priorities,<sup>95</sup> or due to the difficulties involved in coordinating effective

<sup>94</sup> For instance, the fact that targeting by association is covered by the aggravated offences and by section 145 of the CJA, but not by section 146, which appears to be the result of an oversight and the convoluted semantic construction of the various provisions.

<sup>95</sup> Be it about the up-front costs of introducing changes, or arising from the impossibility of accurately predicting the costs to, for example, the prison system of introducing new aggravated offences (if this were recommended by the review).

action across numerous agencies and departments to achieve full implementation.<sup>96</sup>

- B.112 It is possible that the conclusion of the review would be the aggravated offences should simply be extended as per Option 3 below. In that event, the resources spent on the review would arguably have been unnecessary, and the additional protection afforded by the offences would not have been delayed. However in our view, even if this were so, there is a clear advantage to ensuring that such a policy is, and can be seen to be, based on a thorough examination of all the available evidence.

### **Option 3: Extend the aggravated offences under the Crime and Disorder Act 1998 to cover all five protected characteristics**

#### **Costs**

##### NEW CASES

- B.113 Because all the offences which would be subject to the new provisions are already criminal offences, we would not expect this Option to result in a substantially increased number of cases coming before the courts or to the attention of the police (subject to what is said about reporting levels below). Under the current law, incidents of harassment, assault or criminal damage and so on, which are aggravated by hostility based on disability, sexual orientation or transgender identity, can be prosecuted as the basic offences of harassment, assault or criminal damage, for example.
- B.114 It is possible that the extension of the aggravated offences to the new characteristics could increase confidence in the criminal justice system in the long term, both among victims of crime and the wider communities in question. There would be increased publicity around the offences when they are prosecuted. The higher sentences available, as well as the symbolic value of the “label” of aggravated offences, may encourage more victims to come forward. As a result, the change could lead to increased reporting of these offences.<sup>97</sup>
- B.115 As noted above,<sup>98</sup> the Law Commission's project is one part of a wider action plan on hate crime, which has as one of its main aims the increased reporting of hate crime. As a consequence, it is virtually impossible to determine to what extent any increase in reporting would result from the extension of the offences

<sup>96</sup> Recommendations relating to practices to be followed by police officers and prosecutors, for example, would involve ensuring they are adhered to by large numbers of individuals in many offices throughout the country.

<sup>97</sup> However, many of these potential benefits, which were advanced by consultees as arguments in favour of immediate extension, are speculative or unpersuasive.

<sup>98</sup> See para B.20 above.

as opposed to the implementation of other measures in the action plan. In addition, any increase in the number of reported hate crimes would have to be balanced against the long term effects of the new provision and of the action plan as a whole, which may lead to gradual cultural changes and acceptance across society that the conduct these offences target is unacceptable.<sup>99</sup>

B.116 In order to estimate the number of new cases of aggravated offences, we would need to know:

- (1) how many offences there are where:
  - (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates hostility, or
  - (b) the offence is motivated by hostility,  
  
towards victims based on their disability, transgender identity or sexual orientation; and
- (2) how many of those offences took the form of one of the basic offences which can be aggravated.

B.117 However, the available statistics do not provide this information because:

- (1) Section 146 of the CJA employs the same test for hostility as aggravated offences. If there was data on its application (in offences that would have aggravated equivalents if the aggravated offences were extended), it might be possible to estimate the number of cases that would engage new aggravated offences. However, no such data is available.
- (2) The CPS uses the broad definition of “hate crime” for the purposes of its statistics on hate crime prosecutions.<sup>100</sup> Therefore, these statistics encompass offences which would not pass the threshold for offences in the CDA, and give no indication of the number of incidents which pass that threshold.
- (3) The CPS annual report on hate crime also provides a breakdown of the “hate crime” cases the CPS has prosecuted by “principal offence category”.<sup>101</sup> This is a useful table, but it does not give an indication of the precise offences which are being prosecuted, or of whether they are on the list of offences that can be prosecuted as aggravated. Without a

<sup>99</sup> In the report we discuss whether any new offences would have a deterrent effect. We suggest that the deterrent effect of labels and harsher sentences is difficult, if not impossible, to prove.

<sup>100</sup> See Table 9 above.

<sup>101</sup> See Table 9 above.



further breakdown of the specific offences within these categories, it is not possible to determine the proportion that would be captured by any new offences.<sup>102</sup>

- B.118 It is therefore not possible at this stage to know how many of the offences prosecuted by the CPS would be capable of being prosecuted by the new aggravated offences.

#### LONGER SENTENCES

- B.119 As well as the label which attaches to the offences, the significance of the aggravated offences is that they carry higher maximum sentences than the equivalent basic offences. In addition, custodial sentences are imposed more frequently for aggravated offences than for their non-aggravated counterparts.<sup>103</sup> As a result, new aggravated offences could lead to greater prison costs, as offenders are given longer sentences for the aggravated offences. It should be noted, however, that section 146 of the CJA already applies to the basic offences when they involve hostility on the basis of disability, sexual orientation or transgender identity. Therefore, hostility-based offences against those groups could already be the subject of an enhanced sentence (albeit within the maximum sentence for the basic offence in question). However, as with the number of new cases, there is insufficient data to estimate the increased prison costs.

#### ***Benefits***

- B.120 New aggravated offences would mean that a more serious label is attached to the conduct in question. Victims of these incidents may feel that the defendant's conviction for "assault aggravated by hostility towards the victim due to his/her sexual orientation", for example, is a more accurate reflection of the harm they have suffered than a conviction simply for "assault."
- B.121 Similarly, the increased stigma which attaches to a conviction for an aggravated offence, along with the higher maximum penalty, may lead to a gradual change of culture, and acceptance across society that hate crime of this sort is unacceptable.
- B.122 These reasons were all advanced by a number of our consultees, the majority of whom favoured extension of the offences. However by far the most common argument they advanced, and in our view the most compelling, is that extension

<sup>102</sup> We note, however, that roughly 50% of prosecutions for disability, racial/religious and homophobic/transphobic offences related to offences against the person. The main offences against the person – common assault, and sections 20 and 47 Offences Against the Person Act 1861 – do have aggravated equivalents.

<sup>103</sup> See Table 15 above: for each offence type other than harassment, the proportion of cases in which immediate custody is imposed is roughly 50% higher for aggravated offences than for their non-aggravated equivalents.

would end the current situation whereby the five characteristics identified by the law for hate crime purposes are dealt with differently, with race and religion singled out for the potentially harsher<sup>104</sup> aggravated offence regime.

***Risk: Problems carried over from the current law***

- B.123 The current aggravated offences are problematic in a number of ways. For example, only certain basic offences can be aggravated. This incomplete coverage is one of the inherent shortcomings of extending aggravated offences. It was not within our terms of reference to propose reform or repeal of these existing provisions, nor was it open to us to suggest that any new aggravated offences should follow a substantially different model.<sup>105</sup> The fact that the new aggravated offences would be restricted to the fixed list of basic offences means that they would not necessarily address significant and prevalent types of wrongdoing against people with a disability, for example. In relation to disability hate crime, the CPS data set out above indicates that 5.2% of “disability hate crimes” were sexual offences, 6% were burglary, 11.6% were robbery, 10.6% were theft, and 4.1% were fraud.<sup>106</sup> None of these, which taken together are 37.5% of the disability offences prosecuted as hate crimes, would be caught by new aggravated offences. The failure of the reform to deal with those harms may lead to a loss of confidence in the criminal justice system.
- B.124 In addition, if an offence is charged as one of the aggravated offences but results in an acquittal, the enhanced sentencing provisions in section 145 of the CJA cannot be applied. This fragmented approach has introduced unnecessary complexity into the legal regime for dealing with racial and religious hate crime. If the aggravated offences were extended to cover the other protected characteristics this complexity would be extended in relation to prosecutions for those offences.

<sup>104</sup> The greater harshness derives principally from the higher maximum sentences; however, in practice it is rare for the additional sentencing range to be used, and as we discussed above (para B.81), the average custodial sentence is not necessarily significantly higher for aggravated offences than for their non-aggravated equivalents. Given the difficulties we have identified in the application of the aggravated offences, it may be that they are actually a less effective way of addressing hate crime than enhanced sentencing (perhaps taking into account the improvements we recommend in our report), and thus that it is in fact victims of racial and religious hate crime who are at a disadvantage. This is one of the reasons for our recommendation that a wider review take place in preference to immediate extension.

<sup>105</sup> The fact that a wider review could consider such questions is one of the reasons why we have preferred to recommend such a review rather than immediate extension.

<sup>106</sup> See para B.49 above.

## **Option 4: Extend the stirring up offences under the Public Order Act 1986 to cover all the protected characteristics**

### **Costs**

- B.125 This option involves criminalising behaviour that is currently lawful. The only potential cost associated directly with this option would be that of investigating and prosecuting instances of this behaviour.
- B.126 Because the threshold for these offences is extremely high (even on the broad model<sup>107</sup>), it is unlikely that there would be a significant number of prosecutions brought. No cases were judged by the CPS to meet the prosecution threshold of the existing stirring up hatred provisions in their annual reporting period of 2012 to 2013.<sup>108</sup> The cost of bringing prosecutions for newly created offences is therefore likely to be small. However, the complexity of the offences, the high sentences,<sup>109</sup> and the article 10 ECHR issues involved, mean that they are likely to be more difficult and expensive to prosecute. There is a correspondingly higher risk of failed prosecutions and appeals, both of which will involve financial cost to the police, CPS, courts and legal aid budget.
- B.127 Our consultees raised numerous examples of behaviour they believed stirred up hatred on the grounds of disability and transgender identity, as evidence of practical need for the new offences. These examples, although offensive, fell well short of the high threshold set by the stirring up offences.<sup>110</sup> It may be that, if the offences are extended, police and prosecutor resources would be wasted in investigating and considering complaints that do not result in a decision to charge.<sup>111</sup> It is not possible to quantify the extent to which this might occur, however; furthermore, some such complaints may be charged under other provisions such as harassment and communications offences.

<sup>107</sup> The broader model being the form used for the racial hatred offences in the current law, and which covers conduct that is “threatening, abusive or insulting” and intended, or likely, to stir up hatred. The narrow model requires that the conduct be threatening, and that it be intended to stir up hatred; it is not enough that it is abusive or insulting, or only likely to stir up hatred. The narrow model also has clauses designed to protect free expression.

<sup>108</sup> See para B.52 above (although see also Table 12 relating to the MIS data for 2013, which discloses that 13 cases were charged and reached first hearing in the magistrates’ courts).

<sup>109</sup> Which is seven years, much higher than for other offences that may currently be used to cover this kind of conduct, such as s 1 Malicious Communications Act 1988 and s 127(1) Communications Act 2003 (six months, in each case).

<sup>110</sup> Some examples of why these offences are necessary were wholly misconceived, and even included the Government’s recent changes to social welfare provision for disabled people.

<sup>111</sup> See para B.52 above: as the CPS noted, all of the cases referred to them by the police as stirring up offences were judged to fall below the threshold for those offences.

B.128 A further potential cost relates to the loss of a certain amount freedom of expression, in that the offences would criminalise words, writing, and other behaviour that is currently lawful. This arises chiefly with regard to the “broad” model of offences, because “abusive or insulting” is a much lower and vaguer threshold than only “threatening”, and is more likely to inhibit the expression of ideas and arguments in the course of everyday public debate and policymaking. It is possible that as a result, public discourse relating to matters of disability and transgender identity would be less frank and free, resulting in less effective public policy, as individuals and public representatives feel less able to articulate their stances on issues of disability or transgender identity.<sup>112</sup> Such costs may, however, be judged necessary in situations where hostility towards those with a particular characteristic is sufficiently widespread or organised to present a danger of public disorder or social conflict, loss of social cohesion, or acts of violence.

### **Benefits**

B.129 Although we note that the existing stirring up offences are rarely used, and that we have not seen any evidence that behaviour which would be captured by extended offences is taking place on any significant scale, it is possible (although unlikely) that it is in fact taking place but no evidence has come to our attention. In this event, extension of the offences may help to deal with this behaviour, and the potential benefits of this may include a greater feeling of safety and security among the two protected groups.

B.130 The clearest benefit of extending the offences would be to place all five protected characteristics on an equal footing as regards hate crime legislation, removing any perception on the part of those with excluded characteristics that they are being unjustly discriminated against, and ending the situation whereby the law forbids the stirring up of hatred against three characteristics but permits it against the other two.<sup>113</sup> This may have the benefit of making the law more consistent, and increasing confidence in it, particularly among disabled and transgender people.

<sup>112</sup> To give an example, consider that a policy of requiring transgender toilets in public buildings was being debated in Parliament and in the media. Such a policy would involve considerable expenditure, and might arouse very passionate feelings on either side. Some might be angered at the spending of such a large sum of money on what they see as a numerically insignificant group; or they might wish to attack the motives or good faith of transgender groups in requesting such facilities. Consideration of the merits of the policy might be rendered less rigorous if broad stirring up offences meant that those who felt the high cost was disproportionate to the benefits the policy would confer on a relatively small minority felt inhibited from contributing fully and frankly to the debate.

<sup>113</sup> Although the footing would not be entirely equal, since the offences are currently wider in scope for race than for religion and sexual orientation,

### **Risks**

- B.131 Owing to the lack of evidence and specific examples of behaviour that would meet the threshold for stirring up offences, it would be extremely difficult to design effective and proportionate offences; notably, it would be difficult to take an informed decision as to whether the broad or narrow model of the offences should be used, or what if any freedom of expression provisions should be used. Extending the offences without analysing evidence of the mischief they are supposed to address risks the creation of offences that turn out to be over- or under-inclusive, or that lead to unintended consequences.
- B.132 Given how hard the offences are to prove, there is a higher risk of failed prosecutions, and the wasted costs involved.

### **Conclusion: preferred options**

- B.133 We consider that the advantages offered by Option 1, and their straightforward nature, means that this option should be implemented (regardless of what is done in relation to the other options).
- B.134 We have recommended Option 2 due to the considerable advantages it offers in ensuring a coherent and effective response to hate crime as a whole. However, in recognition of the risk that such a review may not be carried out, we have also recommended Option 3 as an alternative, though less preferable, solution.
- B.135 We consider that Option 4 ought not to be implemented.