

<b>Title:</b> Hate Crime <b>IA No:</b> LAWCOM0068 <b>RPC Reference No:</b> <b>Lead department or agency:</b> Law Commission <b>Other departments or agencies:</b> Home Office, Ministry of Justice, Crown Prosecution Service	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 07/12/2021			
	<b>Stage:</b> Development/Options			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Primary legislation			
	<b>Contact for enquiries:</b> martin.wimpole@lawcommission.gov.uk			
<b>Summary: Intervention and Options</b>				<b>RPC Opinion:</b> RPC Opinion Status

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status
-£3.62 m <sup>1</sup>	£m	£m	Qualifying provision

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

Hate crimes are crimes that are motivated by, or the offender has demonstrated hostility towards a victim because of who they are. The law currently recognizes five protected characteristics: race, religion, sexual orientation, disability, and transgender identity. For the year ending March 2021 the police in England and Wales recorded 124,091 hate crimes<sup>2</sup> and there were 10,679 prosecutions. The criminal law does not treat the protected characteristics equally. This means someone who is assaulted because of hostility towards their disability is not afforded the same protection in law as someone assaulted because of their race. Government intervention is needed therefore to provide greater equality of treatment for protected characteristics in law, and to reduce some of the complexity caused by the current inconsistency.

**What are the policy objectives of the action or intervention and the intended effects?**

To ensure the criminal law provides an adequate and effective response to hate crime  
 To ensure that hate crime laws are fair, modern, clear and simple – in particular by providing equal protection for groups within hate crime  
 To address current concerns with hate crime laws, especially their complexity and inconsistency.

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

**Option 0:** Do nothing. Undesirable due to the concerns around equity and clarity noted above.  
**Option 1:** Extend the aggravated offences and stirring up offences so that they protect all characteristics equally; add the characteristic of “sex or gender” to the stirring up hatred offences only; modify the “motivation” limb of the legal test to include “hostility or prejudice”.  
**Option 2:** Amend the aggravated and stirring up offences to ensure that they cover the five current characteristics equally.  
 The preferred option is option 1 which addresses the challenges presented more completely.

<b>Will the policy be reviewed?</b> It will/will not be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Is this measure likely to impact on international trade and investment?			Yes / No		
Are any of these organisations in scope?		<b>Micro</b> Yes/No	<b>Small</b> Yes/No	<b>Medium</b> Yes/No	<b>Large</b> Yes/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, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

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

<sup>1</sup> 2020/21 prices

<sup>2</sup> Excluding unavailable data from Greater Manchester Police

**Description:** Extend the aggravated offences and stirring up offences so that they protect all characteristics equally; add the characteristic of “sex or gender” to the stirring up hatred offences only; modify the “motivation” limb of the legal test to include “hostility or prejudice”;

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2019	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -£1.70	High:-£5.70	Best Estimate:-£3.62

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant)	Total Cost (Present Value)
Low	Negligible	0.22	1.78
High	Negligible	0.73	6.15
Best Estimate	Negligible	0.45	3.80

**Description and scale of key monetised costs by ‘main affected groups’<sup>1</sup>**  
 Ongoing costs – Increased Crown Court/Magistrates’ Courts prosecutions with revised legal test, £0.01 million per year; Increased Crown Court cases, Aggravated offence extension, £0.28 million per year; Increased legal aid expense with transferred case from Magistrates’ Courts to Crown Court, £0.16 million per year;

**Other key non-monetised costs by ‘main affected groups’**  
 Transitional: Training expected to be incorporated within existing provision as extension of existing characteristics [Police/CPS/Judiciary]; Administrative and drafting costs - Redrafting/ reformulation of legislation containing the new legal test. Potential costs to Sentencing Council of drafting and implementing a new sentencing guideline.  
 On-going: New police investigations/reports [2,119 new reports]; Operational and enforcement costs (ie different recording methods).

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant)	Total Benefit (Present Value)
Low	0	0.01	0.09
High	0	0.05	0.44
Best Estimate	0	0.02	0.18

**Description and scale of key monetised benefits by ‘main affected groups’**  
 Transitional benefits: None identified  
 On-going benefit: Reduction in number of Magistrates’ Courts hearings as cases transfer to Crown Court, £0.02 million per year [central estimate]

**Other key non-monetised benefits by ‘main affected groups’**  
 Improved response to hate crime overall. Clear and consistent application of hate crime legislation which is easier to record and enforce across policing bodies. Fairer application of the law which will apply equally across protected groups. More capacity for law to respond to certain forms of exploitative disability hate crime. Direct benefit to more victims of hate crime with a sufficiently serious label attached. Increased confidence in the justice system; Societal benefit as greater awareness about other

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate</b>	3.5%
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See end of impact assessment

**BUSINESS ASSESSMENT (Option 1)**

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m:</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	

<sup>1</sup> Central estimates used throughout

Description: Extend the aggravated and stirring up offences to cover five current characteristics equally.

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2019	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:-£1.64	High: -£5.44	Best Estimate:-£3.33

1.2

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant	Total Cost (Present Value)
Low	Negligible	0.21	1.73
High	Negligible	0.70	5.88
Best Estimate	Negligible	0.44	3.51

On-going cost: Increased Crown Court cases, Aggravated offence extension to other characteristics, £0.28 million per year<sup>1</sup> Increased legal aid expense from Magistrates' Courts cases transferred to Crown Court, £0.16 million per year

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

Transitional costs: Training costs expected to be negligible as incorporated within existing provision as extension of existing characteristics [Police/CPS/Judiciary]. Administrative and drafting costs - Redrafting/ reformulation of legislation; Costs to Sentencing Council of drafting and implementing a new sentencing guideline.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant	Total Benefit (Present Value)
Low	0	0.01	0.09
High	0	0.05	0.44
Best Estimate	0	0.02	0.18

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

Transitional benefits: None identified  
On-going benefit: Reduction in number of Magistrates' hearings as cases transfer to Crown Court, £0.02 million per year [central estimate]

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

Improved response to hate crime overall. Clear and consistent application of hate crime legislation which is easier to record and enforce across policing bodies. Fairer application of the law which will apply equally across protected groups. Direct benefit to more victims of hate crime with a sufficiently serious label attached. Increased confidence in the justice system; Societal benefit as greater awareness about other forms of hate crime and deterrence of this offending.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate</b>	3.5%
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Risks: Harm to the reputation of the law and criminal justice system where some characteristics, such as sex or gender not protected in law and the rationale for this is not well understood.

1.3

**BUSINESS ASSESSMENT (Option 2)**

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

<sup>1</sup> Central estimates

# Evidence Base

## Introduction

### Background

1. Hate crime laws in England and Wales respond to concerns about the additional harm caused by hostile criminal targeting on the basis of race, religion, disability, sexual orientation and transgender identity. The law does this through three main legal mechanisms:
  - The creation of “aggravated” versions of certain existing criminal offences, which have higher maximum penalties where the offence involves hostility on the basis of race or religion;<sup>1</sup>
  - The requirement for judges and Magistrates’ Courts to “enhance” the sentence for any criminal offence (within the existing maximum) where the offence involves hostility on the basis of race, religion, sexual orientation, disability or transgender identity;<sup>2</sup>
  - Offences of “stirring up hatred” in respect of race, religion and sexual orientation.<sup>3</sup>
2. There is also an offence of taking part in “racialist chanting” at a football match.<sup>4</sup>
3. There are several key differences between the “aggravated offences” regime under the Crime and Disorder Act 1998 (CDA 1998) and the “enhanced sentencing regime under section 66 of the Sentencing Code. The CDA 1998 allows for a higher maximum sentence when convicted of an aggravated offence, compared to the Sentencing Code which increases sentence length within the existing maximum. Secondly, for aggravated offences, hostility must be proven during trial whereas for enhanced sentencing, the sentencer (judge or magistrates) determines the hostility element at the sentencing stage. Thirdly, the racial or religious aggravation under the CDA 1998 will be part of the label of the offence appear on the defendant’s criminal record.
4. Police forces flag an offence according to one or more of the five monitored strands [race, religion, sexual orientation, disability and transgender] at the time the offence is reported. For the year ending March 2021 the police in England and Wales recorded 124,091 hate crimes.<sup>5</sup> As in previous years, hate crimes account for a small, but growing proportion of all crimes. In the year ending March 2021, hate crimes accounted for three percent of all notifiable offences, an increase of one percentage point from the previous period.
5. The continued rise in year on year recorded hate crimes (from police recorded statistics, as provided in the Home Office Bulletin), may appear to conflict with the fall in hate crime incidents as estimated by the Crime Survey for England Wales [CSEW].<sup>6</sup> However, the differential pattern is in part due to improved crime recording and better identification of hate crime by the police over time whereas CSEW data is unaffected by changes in recording as it relies on face to face victim surveys providing information on their experiences. Notwithstanding this conflicting evidence, there have been noticeable spikes in hate crime following trigger events such as the EU Referendum June 2016 and most recently in 2020, the widespread Black Lives Matter protests and far right counter protests.

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<sup>1</sup> Crime and Disorder Act 1998, ss 28 to 32.

<sup>2</sup> Sentencing Code, s 66.

<sup>3</sup> Public Order Act 1986, Pts 3 and 3A.

<sup>4</sup> Football (Offences) Act 1991, s 3.

<sup>5</sup> See Hate Crime, England and Wales, 2020/21. See <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021> The reported hate crime stats exclude those from the Greater Manchester police which were unavailable. There is no mention of any disruption in data collection as a result of COVI-19 restrictions.

<sup>6</sup> Combined year ending March 2018 to March 2020 CSEW surveys estimated an average of 190,000 hate crime incidents compared to 307,000 per year in combined 2007/08 and 2008/09 surveys. See Home Office, “Hate Crime, England and Wales, 2017/18” (Statistical Bulletin 20/18, 16 October 2018) p 21.

6. The most recent annual CPS report for 2020/21 covers the time when COVID-19 restrictions were in place. The restrictions continued to impact the Criminal Justice System into Q4 2020/21. The report notes that social distancing continues to impact the progression of cases through the courts, however the number of completed prosecutions is around the same as pre-COVID levels. The volume of finalised prosecutions is 2% higher than pre-COVID levels in the magistrates' courts, with Crown Court finalised prosecutions 6% above pre-COVID levels.
7. CPS data shows that in 2020-21 there were 10,679 prosecutions and 9,263 convictions for *all* hate crime flagged cases (both aggravated offences and enhanced sentencing).
8. In 2012, the government asked the Law Commission to consider the disparity of treatment amongst the five characteristics recognised in hate crime laws: race, religion, sexual orientation, disability and transgender identity. We were asked whether the reach of the criminal law should be extended to cover these communities equally. In our 2014 report, we recommended extension of the aggravated offences regime to all five of these characteristics, but found insufficient evidence to justify an equivalent extension of the "stirring up" hatred offences to the characteristics of disability and transgender identity. We also argued that a wider and deeper review of all hate crime laws was needed.
9. In late 2018, the government asked us to undertake this wider and deeper review. In addition to the issue of parity addressed in our earlier review, we were asked to consider whether "hatred based on sex and gender characteristics, or hatred of older people or other potential protected characteristics" should also be included within hate crime laws.
10. Our terms of reference ask us to review the adequacy and parity of protection offered by the law relating to hate crime and to make recommendations for its reform.
11. The publication of our consultation paper in 2020 posed 62 questions and received over 2,500 responses. Stakeholder engagement has been ongoing through stakeholder events; an academic conference at Oxford Brookes University; meetings with legal and academic experts, police and the Crown Prosecution Service, charities and civil society groups, and numerous individuals with an interest in hate crime laws.

## **Problem under consideration**

### Unequal protection

12. There is inconsistency within the hate crime framework in terms of who is included within the protection of hate crime laws:
  - (a) Aggravated offences apply only in respect of racial and religious hostility.
  - (b) Enhanced sentencing applies to offences motivated by or where the offender demonstrated hostility to race, religion, sexual orientation, disability and transgender identity.
  - (c) Stirring up offences apply to racial, religious and sexual orientation based hatred.
    - i. For race, the conduct can be "threatening, abusive or *insulting*" and must be intended to or likely to stir up hatred.
    - ii. For religion and sexual orientation, the conduct may only be "threatening" or "abusive" and must be intended to stir up hatred. There are also express provisions protecting freedom of expression covering criticism of religious beliefs or sexual conduct.
  - (d) The offence of "racist chanting" under section 3(1) of the Football (Offences) Act 1991 applies to race only.
13. These discrepancies have been criticised as leading to a "hierarchy of hate", whereby certain groups – notably LGBT and disabled people – feel that the law treats them as less deserving of protection.

### Ineffectual and inconsistent law

14. We have been looking into whether the existing enhanced sentencing regime in the Sentencing Code and the aggravated offences in the Crime and Disorder Act 1998 are working well and how they can be improved.
15. One key issue is that the hate crime and hate speech laws in England and Wales have developed in a piecemeal way in recent decades. This has meant that, in addition to the unequal application of the laws to protect different characteristics, the law is overly complex. The current hate crime laws are also spread across several different statutes and utilise multiple overlapping legal mechanisms.
16. The issues with inconsistency and lack of clarity of hate crime law have an impact on enforcement:
  - (a) There are inconsistent practices amongst police, prosecutors and the judiciary which is the cause of some concern.
  - (b) Concerns about the handling of hate crime or lack of knowledge about rights and normalisation of abuse lead to barriers to reporting by certain groups.
  - (c) The purely criminal justice response is limited – a more effective response to tackle the causes of hate crime and provide adequate support for victims is needed.

## **Policy objective**

17. The policy objectives are:
  - (1) 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;
  - (2) To avoid extending or exacerbating any problems with the current hate crime legislation if and when it is extended to other protected characteristics;
  - (3) To ensure that the law in this area is compliant with the European Convention on Human Rights, in particular, Article 10 (freedom of expression); and
  - (4) To increase public confidence in the criminal justice system.

## **Rationale for intervention**

18. 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 recommended intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity.
19. In this project, the rationale for any intervention would be for reasons of equity. 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.
20. It may also perpetuate the problem of under-reporting of hate crime and the lack of confidence among disabled, transgender and LGB citizens in the criminal justice system's ability and willingness to address it. It may also be seen by those citizens as an indication that the law considers them 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.

21. 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.

## Scale and Scope

### Data Background

22. Data on the number and types of “hate crime” is available from various sources. Different agencies, operating at different stages of the criminal justice process, have responsibility for collecting this information. Since the Law Commission’s previous 2014 report, hate crime data now includes online hate crimes.
23. The data discussed below are:
- (1) “hate crimes” from responses to the CSEW combines three annual data sets [2017/18 to 2019/20] to provide a larger sample and more robust estimates on the annual incidence of hate crime as a single year is too unreliable to report upon. Estimates were last published in 2019/20;<sup>7</sup>
  - (2) “hate crime incidents” recorded by the police (2020/21);<sup>8</sup>
  - (3) offences flagged as “hate crime” charged and prosecuted by the CPS (2020 to 2021);
  - (4) sentences for the aggravated and stirring up offences, as recorded in the Ministry of Justice’s sentencing statistics (up to 2021); and
  - (5) Crown Court Sentencing Survey relating to 2015.<sup>9</sup>
24. Data categories (1), (2) and (4) are available in a joint publication produced by the Home Office, Office for National Statistics and Ministry of Justice, entitled *Hate Crime in England and Wales*.
25. Readers should note that the various sources are not directly comparable with one another (for example, the latest CSEW report figures are an average of the annual data gathered from the year ending March 2018 to the year ending March 2020, whereas the police recorded data on hate crime covers 2020/21<sup>10</sup>). 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 2021 may not be prosecuted until 2022. 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.

### Crime Survey for England and Wales

26. The Crime Survey for England and Wales (CSEW) is a victimisation face-to-face survey covering adults aged 16 and over resident in households in England and Wales. Households are asked about their experiences of a selected range of offences in the twelve months prior to the interview including questions to determine whether an incident was a hate crime. The survey does not cover:
- Crimes against businesses;
  - Those not resident in households [e.g. living in care homes]; and
  - Homicides

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<sup>7</sup> See paragraph 1.5, Understanding differences between the CSEW and police recorded data, <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2019-to-2020/hate-crime-england-and-wales-2019-to-2020#fnref:14>, last accessed 14/11/2021

<sup>8</sup> See Hate Crime, England and Wales, 2020/2021 <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021#fn:6> last visited 14/11/2021

<sup>9</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf> last accessed 14th May 2020

<sup>10</sup> Interestingly Home Office data on the number of police recorded incidences of hate crime includes no mention of disruption through COV-19 restrictions.

- Crimes termed victimless such as many public order offences accounting for over half of police recorded hate crimes.

27. Because it is a general household population survey, the number of hate crime incidents and victims in a single survey year is too small to provide a reliable comparator. Instead hate crime data is generally provided as an annual average estimate of three annual datasets. Normal face-to-face interviewing narrowly avoided disruption through restrictions on social contact during the coronavirus (COVID-19) pandemic.

28. For the combined year ending March 2018 to March 2020 the CSEW estimates an annual average of about 190,000 hate crime incidents representing about 3 percent of all CSEW crime. A summary of evidence of hate crime is provided across the five monitored strands in Table 1 below:

- Racially motivated;
- Disability motivated;
- Religiously motivated;
- Sexual orientation motivated; and
- Gender identity motivated.<sup>11</sup>

**Table 1: Estimated number of incidents of hate crimes per year, England and Wales, 2017/18 to 2019/20**

Monitored strand of hate crime	Estimate <sup>1213</sup>
All hate crime <sup>14</sup>	190,000
• Race	104,000
• Religion	42,000
• Sexual orientation	23,000
• Disability	50,000
• Gender Identity	7,000

Source: Hate Crime, England Wales, 2019 to 2020, Appendix Tables, Appendix Table 7

29. Adults in non-white ethnic groups are more likely to be victims of hate crime than white adults. Moreover, non-white adults are also more likely to be victims of overall CSEW crime. Those within the Asian ethnic group were most at risk of hate crime and within this group Muslim adults were most likely to experience religiously motivated hate crime.
30. Sexual orientation hate crimes averaged 23,000 per year but there is the very strong likelihood of being significantly under-reported for reasons such “...as not thinking it would be taken seriously or because abuse has become part of their everyday lives...”<sup>15</sup>
31. After race and religiously motivated hate crime, disability is the next largest category averaging 50,000 hate crime incidents per year.
32. The number reporting transgender-identity hate crime is unreliable because it has only recently been included in CSEW questions, and numbers remain low. Gender identity had not been included in the previous report because although data was collected since 2011/12 the low

<sup>11</sup> Missing gender identity hate crime from table 1. Data collected since 2011/12 but remains small and is not a reliable indicator so excluded from report.

<sup>12</sup> The numbers are derived by multiplying incidence rates by the population estimates for England and Wales

<sup>13</sup> Adults aged 16 and over

<sup>14</sup> The total for hate crime might not be equal to the sum of incidents in the related equality strands as the victim may have said the incident was related to more than one strand

<sup>15</sup> See Stonewall online ‘In Britain today, homophobic, biphobic, and transphobic hate crime remains a very real problem’ <https://www.stonewall.org.uk/our-work/campaigns/2018-lesser-sentencing-lgbt-hate-crimes-be-reviewed> last visited 3<sup>rd</sup> June 2020



volume meant it was not a reliable indicator. However, for this report it is now visible as 7,000 incidents have been reported as haven taken place.

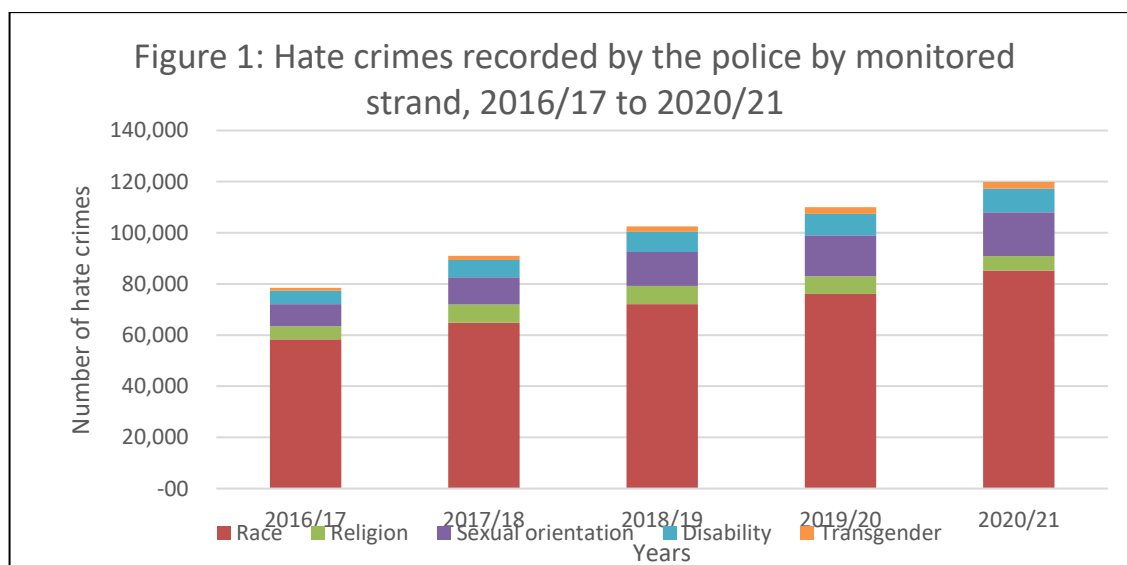
### Personal and Household crime incidents

33. Of the 190,000 hate crime incidents, an estimated 120,000 were personal hate crime, ie crimes against the individual, and 70,000 incidents were household hate crime, for example criminal damage targeted at the household more generally. The incidence of personal hate crime increased by 13,000 cases relative to the previous reporting period, although household hate crime fell by 7,000 cases.
34. For personal hate crime the risk of being a victim varied by socio-demographic characteristics. For the most recent three-year period people aged 16 to 24 were most at risk (0.4 percent), especially men (accounting for 0.4 percent of personal hate crimes). Muslims were more at risk than Christians (0.7 percent compared to 0.1 percent) and single or divorced adults were more vulnerable than married adults (0.3 percent compared to 0.1 percent).
35. Being a victim of the same type of hate crime more than once in the last year constitutes repeat victimisation and accounts for differences between CSEW estimates of victimisation rates and incidence rates. Household hate crime offences are more likely to be repeat experiences than personal crime offences.

### Home Office and police data – recorded hate crime

36. Police forces flag an offence according to one or more of the five monitored strands at the time the offence is reported. This is unlike the CSEW which is based on face to face victimisation interviews as part of a general household survey.

**Figure 1: Hate crimes recorded by the police by monitored strand, 2016/17 to 2020/21**



37. For the year ending March 2021 the police in England Wales recorded 124,091 hate crimes. Figure 1 above reveals the noticeable upward trend in offences. The increase has been explained largely through improved police recording.<sup>16</sup> Improved identification of hate crime offences as hate crimes may also have been a contributory factor.
38. The number of motivating factors in 2020/21 [119,868] exceeds the number of offences as a crime may have more than one motivating factor. In 2018/19 about 12 percent of hate crime

<sup>16</sup> Following the 2014 review by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services [HMICFRS]. And also follows the removal of the designation of police recorded crime as National Statistics

offences were estimated to have involved several motivating factors. In most instances race and religion were the common factors. See table 2 below.

**Table 2: Number of motivating factors, 2018/19 to 2020/21**

Hate crime strand	2018/19	2019/20	2020/21	3 year average	% of total
Race	72,051	76,158	85,268	77,826	70
Religion	7,202	6,856	5,627	6,562	6
Sexual orientation	13,311	15,972	17,135	15,473	14
Disability	7,786	8,465	9,208	8,486	8
Transgender	2,185	2,542	2,630	2,452	2
<b>Total number of motivating factors</b>	<b>102,535</b>	<b>109,993</b>	<b>119,868</b>	<b>105,931</b>	
<b>Total number of offences</b>	<b>97,474</b>	<b>105,362</b>	<b>114,958</b>	<b>110,799</b>	

Source: Hate crime for England and Wales, 2020 to 2021, See <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021#fn:6> last visited 14/11/2021

### Hate crime outcomes

39. All 44 police forces in England and Wales are required to provide data on all racially and religiously aggravated offences. The latest available Bulletin [for year ending 31/03/2021] provides data on outcomes during the year based on data provided by 26 of the 44 police forces. For the preceding 12-month period 89 percent of racially and religiously aggravated offences were assigned an outcome compared to 94 percent of their non-aggravated counterparts, and were more likely to be dealt with by charges / summons reflecting their seriousness. See table 3 below

**Table 3: Percentage of racially or religiously aggravated offences and their non-aggravated equivalents recorded in 2020/21 resulting in charge/summons, by offence type**

	Percentage of offence recorded as a crime [charge / summons] <sup>17</sup>
<b>Racially or religiously aggravated offences</b>	
Public fear, alarm or distress offences	13
Assault with/without injury and harassment	9
Criminal damage	7
<b>Non-aggravated equivalent offences</b>	
Public fear, alarm or distress offences	6
Assault with/without injury and harassment	5
Criminal damage	5

Source: <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021#fnref:7>

<sup>17</sup> England and Wales

40. Reflecting their serious nature, racially and religiously aggravated offences are more likely to be dealt with by charges / summons than their non-aggravated counterparts. For example, aggravated public fear, alarm or distress offences were more than twice as likely to result in a charge or summons.

*Flagged hate crime offences*

41. The Home Office data hub captures record level crime data from the police forces' own crime recording systems. This approach allows for greater granularity identifying hate crime offences with the full range of relevant monitored strands. For the 2020/21 report, data was available for 66 percent of all police recorded data, i.e. 26 of the 44 police forces in England and Wales. About 9.6 percent of flagged hate crime offences were still under investigation and had not been assigned an outcome. Similarly 8 percent of non-hate crime offences had not been assigned an outcome for the same time period.

**Criminal Justice system**

42. The most recent annual CPS report for 2020/21 covers the time when COVID-19 restrictions were in place. The restrictions continued to impact on the Criminal Justice System into Q4 2020/21, the most recent period for which statistics are available.

43. The report notes that social distancing continues to impact the progression of cases through the courts, however the number of completed prosecutions is around the same as pre-COVID levels. The volume of finalised prosecutions is 2% higher than pre-COVID levels in the magistrates' courts, with Crown Court finalised prosecutions 6% above pre-COVID levels.

44. The total number of hate crime prosecutions each year is outlined in table 6 below.

**Table 6: CPS completed hate crime prosecutions by outcome, Volume and %, 2013/14 to 2020/21<sup>18</sup>**

Year	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Convictions	11,915 (84.7%)	12,220 (82.9%)	12,846 (83.2%)	12,072 (83.4%)	11,987 (84.7%)	10,817 (84.3%)	9,340 (85.3%)	9,263 (86.7%)
Non-convictions	2,159 (15.3%)	2,518 (17.1%)	2,596 (16.8%)	2,408 (16.6%)	2,164 (15.3%)	2,011 (15.7%)	1,610 (14.7%)	1,416 (13.3%)
<b>Total prosecutions</b>	<b>14,074</b>	<b>14,738</b>	<b>15,442</b>	<b>14,480</b>	<b>14,151</b>	<b>12,828</b>	<b>10,950</b>	<b>10,679</b>

Sources: CPS quarterly data summaries | The Crown Prosecution Service for Q4 2020/21; Crown Prosecution Service, Hate Crime Annual Report 2018-19 (2019).<sup>19</sup>

59. The latest available MOJ sentencing statistics for aggravated offences under CDA 1988 are indicated in table 7 below.

*Aggravated offences*

**Table 7: MOJ sentencing statistics for aggravated offences under CDA 1998, 2016 – 2018, Volume and %.**

<sup>18</sup> The CPS transitioned from annual to quarterly reports from Q2 2019/20. Q4 data release covers the period up to 31 March 2020. Whilst COVID-19 has had a significant impact on the Criminal Justice System, the impact on trends for 2019/20 is likely to have been marginal. For context, 'lockdown' measures were announced in the Prime Minister's 23 March 2020 statement on COVID-19, priority courts were put in place from 30 March

<sup>19</sup> See pp 30 to 31, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF>.

	2016	2017	2018	Total	Average
Prosecutions for racially or religiously aggravated offences	8,005	7,088	6,826	21,919	7,306
Convictions	5,969	6,084	5,264	17,317	5,772
Convictions/ Prosecutions [%]	75%	86%	77%	79%	

#### Enhanced sentencing

60. The 2018/19 Hate Crime Annual report indicates that the overall proportion of hate crime flagged convictions with an announced and recorded sentence uplift was 69.9%, up from 53.5% in 2016 to 2017.

#### Stirring up offences

61. In 2018-19 there were thirteen prosecutions for stirring up hatred offences under Parts 3 and 3A of the Public Order Act 1986, eleven of which resulted in convictions. While these numbers are low, they are higher than the figures for the previous year (2017-2018) (nine prosecutions and eight convictions, which was then the highest ever number).

#### Aggravated Offences

62. The equivalent data for enhanced sentencing is not available but one would anticipate a slighter higher sentence for an aggravated offence than an enhanced sentence. Under both regimes there is a requirement of an increased sentence. See table 8 below which shows the difference in the average sentence where a custodial sentence was imposed. (Note that for many of these convictions a non-custodial sentence was imposed, which is not reflected in the table below).

**Table 8: Hate crime offences average custodial sentence (where imposed), Non-aggravated and Aggravated, 2018.**

Section <sup>20</sup>	Offence	Non-aggravated version	Aggravated version
OAPA, s 20	Malicious wounding / grievous bodily harm	23.4 months	30.3 months
OAPA, s 47	Actual bodily harm	13.6 months	14.1 months
CJA 1988, s 39	Common assault	2.8 months	3.7 months
CDG, s 1	Criminal damage	6.0 months	3.1 months
POA, s 4	Fear or provocation of violence	2.4 months	3.8 months
POA, s 4A	Intentional harassment, alarm or distress	2.0 months	2.9 months

<sup>20</sup> OAPA: Offences Against the Person Act 1861; CDG: Criminal Damage Act 1971; PHA: Protection from Harassment Act 1997; CJA 1988: Criminal Justice Act 1988; POA: Public Order Act 1986

POA, s 5	Harassment, alarm or distress	£111	£181
PHA, s 2	Harassment	2.7 months	N/A
PHA, s 2A	Stalking	3 months	3.4 months
PHA, s 4	Putting people in fear of violence	11.1 months	N/A
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	16.1 months	5.3 months

Source: Ministry of Justice data

59. The three most prevalent racially or religiously aggravated offence convictions in 2018 were intentional harassment, alarm or distress contrary to s 4A POA (2580 convictions), harassment, alarm or distress contrary to s 5 POA (1070 convictions) and common assault (852 convictions).
60. Two of these offences – common assault and intentional harassment, alarm or distress – have a maximum that includes a custodial sentence (s 5 POA carries a maximum of a fine only).
61. For the racially or religiously aggravated form of the offence of intentionally causing harassment alarm or distress contrary to section 4 of the POA, where a custodial sentence was imposed (approximately 18% of cases) the average sentence was 2.9 months, which was 0.9 months more than the non-aggravated version of the offence.
62. For the offence of racially or religiously aggravated common assault, where a custodial sentence was imposed for racially or religiously aggravated common assault (approximately 22% of cases) the average sentence was 3.7 months – also 0.9 months more than the average custodial sentence for non-aggravated equivalent of the offence.

*Crown Court and Magistrates' Courts hearing time and costs*

63. Both the Crown Court and Magistrates' Court have 5 hour long sitting days where the average cost of judicial and staff salaries is indicated in table 9 below.<sup>21</sup>

**Table 9: Crown Court and Magistrates' Court average staff and judicial cost per sitting day [5 hours]**

	Crown Court	Magistrates' Court
Judicial	£981	£130
Non-judicial	£541	£981
Total	£1,522	£1,111
Updated 2020/2021 cost	£1794	£1309
Hourly cost <sup>22</sup>	£359	£262

<sup>21</sup> Her Majesty's Courts and Tribunal Services Annual Report and Accounts 2013-14 (24 June 2014), page 7.

<sup>22</sup> Rounded to nearest £10

64. The average [median] hearing time for Crown Court cases with a guilty plea [70 percent of cases] was 1.2 hours<sup>23</sup> and 7.2 hours for a not guilty plea. Data for the Magistrates' Court is not available in such granularity.<sup>24</sup>

## Main Stakeholders

The main affected groups are:

- defendants, and those convicted, in hate crime cases;
- members of the protected groups (disability, transgender identity, sexual orientation, race and religion), particularly those who have been victims of hate crimes;
- third party hate crime reporting centres;
- the police, and bodies such as the College of Policing that provide training and guidance for police;
- the Sentencing Council;
- the Disclosure and Barring Service;
- the Crown Prosecution Service;
- Her Majesty's Courts and Tribunals Service;
- the judiciary and magistracy;
- Her Majesty's Prison and Probation Service.

## Description of options considered

65. This impact assessment compares Options 1 and 2 against the do nothing [option 0]:

- (1) Option 0 – Do nothing
- (2) Option 1 – Implement all recommendations: extend the aggravated offences and stirring up offences so that they protect all characteristics equally; add the characteristic of “sex or gender” to stirring up offences only; modify the “motivation” limb of the legal test to include “hostility or prejudice”.
- (3) Option 2 – Extend characteristics for the aggravated and stirring up offences to cover five current characteristics equally. Exclude changes to the legal test and introduction of an offence of stirring up hatred on the basis of sex or gender.

### Option 0 – Do nothing

70. This option would be to retain existing arrangements

- (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 Sentencing Code apply to all five characteristics.

**Option 1 – Extend the aggravated offences and stirring up offences so that they protect all characteristics equally; add the characteristic of “sex or gender” to stirring up offences only; modify the “motivation” limb of the legal test to include “hostility or prejudice”.**

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<sup>23</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895063/ccsq\\_bulletin\\_jan\\_mar\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895063/ccsq_bulletin_jan_mar_2020.pdf), page 9

<sup>24</sup> We rely on anecdotal evidence and an early activity based exercise of the average length of a prosecution in Magistrates' court of about 20 minutes.

The focus here is on the main changes that we think will give rise to costs or benefits.

**Table 10: Option 1 - Current situation and recommendations**

Current Situation	Recommended Changes
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.	Extend the aggravated offences to cover five current characteristics equally.
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.	Extend the stirring up offences to cover five current characteristics equally.  Additionally, extend further to cover hatred on the basis of sex or gender

<p>The legal test for both aggravated offences and enhanced sentencing is proof that the offence the crime was motivated by hostility towards the protected characteristic, or the defendant demonstrated hostility towards the protected characteristic at the time of committing the offence.</p>	<p>Revise the motivation limb of the legal test for the application of hate crime laws to recognise crimes that are motivated by <i>prejudice</i> towards the characteristic (in addition to hostility).</p>
<p><b>For racial hatred, the conduct must be “threatening, abusive or insulting.” The defendant must either have intended to stir up hatred, or it was likely to be stirred up.</b></p> <p>For sexual orientation and religion, the words or conduct must be threatening (not merely abusive or insulting); there must have been an intention (a likelihood is not enough); and there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.</p>	<p>i. Revise the test for stirring up hatred so that there is a single test applying to all forms of hatred. Under this test a person would be guilty of stirring up hatred if they used words or behaviour intended to stir up relevant hatred; or used threatening or abusive words or behaviour likely to stir up relevant hatred.</p> <p>ii. For the “likely to” limb of this test, the prosecution would have to prove that the person knew, or ought to have known, that the words or conduct were threatening or abusive, and knew, or ought to have known, they were likely to stir up relevant hatred.</p>
<p>At present hate crime laws are contained within four different statutes.</p>	<p>Bring together stirring up offences and aggravated offences into a single act. Enhanced sentencing provisions to remain in the Sentencing Code.</p>

**Option 2** - Extending characteristics for the aggravated and stirring up offences to cover five current characteristics equally. Exclude changes to the legal test and the offence of stirring up hatred on grounds of sex or gender. See table 11 below

**Table 11: Option 2 - Current situation and recommended changes**

Current Situation	Recommended Changes
<p>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.</p>	<p>Extend the aggravated offences to cover five current characteristics equally.</p>
<p>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.</p>	<p>Extend the stirring up offences to cover five current characteristics equally.</p>



<p><b>For racial hatred, the conduct must be “threatening, abusive or insulting.” The defendant must either have intended to stir up hatred, or it was likely to be stirred up.</b></p> <p>For sexual orientation and religion, the words or conduct must be threatening (not merely abusive or insulting); there must have been an intention (a likelihood is not enough); and there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.</p>	<p>iii. Revise the test for stirring up hatred so that there is a single test applying to all forms of hatred. Under this test a person would be guilty of stirring up hatred if they used words or behaviour intended to stir up relevant hatred; or used threatening or abusive words or behaviour likely to stir up relevant hatred.</p> <p>iv. For the “likely to” limb of this test, the prosecution would have to prove that the person knew, or ought to have known, that the words or conduct were threatening or abusive, and knew, or ought to have known, they were likely to stir up relevant hatred.</p>
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## Consultation Process

71. We began this review in March 2019, publishing a brief background paper, and hosting an academic conference at Oxford Brookes University. Throughout the remainder of 2019 we conducted several pre-consultation events across England and Wales. This included meetings with legal and academic experts, police and the Crown Prosecution Service (“CPS”) – charities and civil society groups, and numerous individuals with an interest in hate crime laws. With the assistance of the CPS, Citizens UK, HEAR (a London-based equality network) and Dimensions UK (a Learning Disability charity), we also had the opportunity to speak directly with many victims of hate crime, who bravely shared their stories with us. We were humbled by these experiences, and we are extremely grateful for these important contributions.
72. In addition to meetings in London, we visited various locations across England and Wales including Cardiff, Manchester, Birmingham, Leeds, Nottingham, Norwich, Newcastle, Durham, Liverpool and Leicester.
73. These initial meetings, together with our own research, helped shape the consultation paper that we published in September 2020. Publication was slightly delayed by the impact of the COVID-19 pandemic, which also meant that subsequent consultation meetings that we conducted between October and December 2020 were held remotely using video conferencing technology.
74. The consultation paper contained 62 questions, and a number of provisional proposals for reform. There was also a summary version of the paper that contained 20 of the most important questions.
75. We then received over 2500 written responses to our consultation paper.
76. A high proportion of the written responses we received were personal, and a significant majority of these personal responses indicated strong opposition to hate crime laws altogether, or any extension of those that currently exist. It followed that these responses generally opposed most of our proposals for reform. In quite a number of cases these responses did not directly address the specific question that had been asked. This was because many of our questions were premised on the continued use of hate crime laws – a proposition with which the response fundamentally disagreed. These responses have influenced our final recommendations in a number of key respects.

77. By contrast, there were 173 responses on behalf of organisations; comprising law enforcement agencies, legal experts, government and local authorities, charitable and community organisations, civil society groups and religious bodies with an interest in hate crime laws. The majority of these responses were supportive of the broad direction of our proposals, and in particular the emphasis on parity of protection amongst the existing five characteristics already recognised under hate crime laws. There was more variation in responses to some of the more detailed questions we asked about how the law should work, and the potential inclusion of additional characteristics in hate crime laws. For example, a wide range of views were expressed in relation to our provisional proposal to add a new characteristic of sex or gender to hate crime laws.

### **Monetised and non-monetised costs and benefits of each option**

78. This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the “do nothing” option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised. These might include how the recommendation impacts differently on particular groups of society or produces changes in equity and fairness, either positive or negative.

79. When calculating the net present social value<sup>25</sup> (“NPSV”) for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in year 0, the current year, unless otherwise indicated. Ongoing costs and benefits accrue in years 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2019 prices, and have been updated using the GDP deflator to adjust for inflation.

80. Hate crime data and Criminal Justice System statistics have to a greater or lesser extent been impacted by COVID-19 restrictions. In instances where the narrative identifies adverse data impact for 2020/21 that year has been excluded from informing cost benefit estimates. For example data reliant on the average number of prosecutions excludes 2020/21 data provided by the CPS [see table 6]. In contrast, the Home Office report on police records of hate crimes for 2020/21 makes no mention of an adverse impact on the quality of data and 2020/21 statistics are therefore retained.

### **Option 0: Do nothing [base case]**

81. Because the “do nothing” option is compared against itself its costs and benefits are necessarily zero, as is its NPSV.

82. Retaining the current framework includes the following:

- (a) Aggravated offences contained in the CDA 1998 encompass eleven existing criminal offences and apply to racial and religious hostility.
- (b) Enhanced sentencing under section 66 of the Sentencing Code is available for all offences and applies to hostility on the basis of race and religion as well as disability, sexual orientation and transgender identity.
- (c) The legal test for both aggravated offences and enhanced sentencing is proof that the offence was motivated by hostility toward the protected characteristic or the defendant demonstrated hostility towards the protected characteristic at the time of committing the offence.

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<sup>25</sup> Costs to society are given a negative value and benefits a positive value. After adjusting for inflation and discounting, costs and benefits can be added together to calculate the Net Present Social Value (NPSV) for each option. See HMT Green Book at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/685903/The\\_Green\\_Book.pdf#page=1&zoom=auto,-47.842](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685903/The_Green_Book.pdf#page=1&zoom=auto,-47.842) page 21

- (d) The stirring up hatred offences contained in the POA 1986 apply to race, religion and sexual orientation. For race, hatred must be intended or likely to be stirred up and the offence covers “threatening, abusive or insulting” conduct. For religion and sexual orientation, there is only an intention element; it does not apply to “insulting” conduct and there are express free speech provisions.
- (e) The football offences contained in the Football (Offences) Act 1991 apply to race only, covering “racialist chanting”.

**Option 1: Extend the aggravated offences and stirring up offences so that they protect all characteristics equally; add the characteristic of “sex or gender” to the stirring up hatred offences only; modify the “motivation” limb of the legal test to include “hostility or prejudice”.**

83. The cost and benefit analysis below pertains to the main following recommendations:

- (a) Aggravated offences contained in the CDA 1998 to be extended to cover five current characteristics equally.
- (b) Revise the legal test for the application of hate crime laws (aggravated and enhanced sentencing). The motivation limb of the test to be modified to proof the offence was “motivated by hostility *or prejudice*”.
- (c) Expand the protection of the stirring up offences contained in the POA 1986 to sex or gender, transgender identity and disability.
- (d) Revise the test for the stirring up hatred offences to equalise the threshold for the offence in relation to different characteristics. The “likely to” limb will apply to all characteristics at a single threshold of “threatening or abusive” conduct. Where there is evidence of intention to stir up hatred, it will not be necessary to demonstrate the conduct was “threatening or abusive”.
- (e) Include an express freedom of speech provision to apply in respect of all characteristics contained within the stirring up offences.

## **Costs**

### *Transitional costs*

#### Familiarisation and Training on recommended changes

- 84. The key stakeholders requiring training on changes to the scope of hate crime offences are the CPS legal practitioners, police officers and the judiciary.
- 85. We think that a newsletter will be adequate for training and updating judges about the changes. This is because our recommendations attempt to simplify the law and merely extend to other characteristics, therefore this would not require extensive training.

#### Administrative and drafting costs

- 86. There will be an initial administrative and drafting cost due to implementation of the recommendations to reform hate crime law.

87. There will be costs for redrafting the legislation. The current legislation containing the legal test (in the CDA 1998) will need to be redrafted to contain the new legal test recommended, and extension of aggravated offences to all characteristics.
88. The Sentencing Code will also need to be updated. The stirring up offences contained in the POA 1986 will need to be updated to include the two-limb test recommended and the extension of characteristics.
89. Additionally, there may be costs to the Sentencing Council for the drafting of updated sentencing guidelines to cover all the recommended changes, therefore resulting in further costs. Administrative costs will be incurred to ensure distribution of updated guides on the legislation as well as administrative costs involved in the drafting procedure. The additional resources directed to this task are not anticipated to be so significant as to warrant increased staff, but this depends to some extent on whether there is sufficient spare capacity. In any case redrafting imposes an opportunity cost as resources can no longer be allocated to other areas.

#### Increased number of Appeals

90. Following the recommended change, we anticipate an increase in appeals lasting at least 4-5 years as the structure is tested to its boundaries.

#### *Ongoing costs*

##### Increased police investigation costs

91. Marginal increase in resources and time spent on investigating aggravated offences and enhanced sentencing factors when aggravated offences are extended to LGBT and disabled groups due to anticipated increased community confidence in reporting. However, this is not anticipated to be significant given the seven-point plan that many forces have in place ensuring best practice in hate crime investigations. The larger forces will have a dedicated hate crime unit with specialist hate crime investigators.<sup>26</sup>

**Table 14: Number of reported hate crimes with additional characteristics, (Volume)**

	Low estimate	Central estimate	High estimate
Average No. of Offences	105,931	105,931	105,931
Proportion of new reports due to increased confidence from LGBT and disabled victims	0.5%	1.0%	1.5%
Total No. of new reports	1,059	2,119	3,178

<sup>26</sup> <https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf> Last visited 18th September 2020.

Assumption:

- Average number of offences over three year period [2018/19 – 2020/21]
- New offences reflect a similar proportional increase as seen in share of new characteristics in total motivating factors. About 80 percent of existing motivating factors fall with race or religion.

Increased prosecution following additional protected characteristics.

92. The recommended extension of the availability of aggravated offences to the characteristics of disability, transgender identity and sexual orientation is likely to mean more cases are heard in the Crown Court rather than the magistrates’ courts and there will be increased court costs. However, about 75-80% of hate crimes relate to race which is already covered by aggravated offences.

**Table 15: Annual cost of prosecutions in Crown Court following extension of aggravated offences to disability, sexual orientation and transgender identity, (Volume and £ million)**

	Low estimate	Central estimate	High estimate
Prosecutions	13,570	13,570	13,570
% increase	1	2	3
No. of new cases	136	271	407
Crown Court costs	£0.14	£0.28	£0.42

Assumptions:

- Average number of prosecutions [2015/16 -2019/20] – low/central/high estimate
- Enhanced sentencing currently covers the five characteristics – marginal increase in number of cases prosecuted in the Crown Court, 1 – 3% [2% central estimate of total prosecutions];
- Crown Court prosecutions, (70% guilty plea, 30% not guilty)
- Hearing times: Guilty plea – 1.2 hours; Not guilty plea – 7.2 hours

**Estimated annual cost = £0.28 million (central estimate)**

**Estimated present value over 10 years = £2.34 million (central estimate)**

Increased prosecutions following change to the legal test

93. The recommended change to the legal test from “motivated by hostility” to “motivated by hostility or prejudice” may result in more disability hate crime prosecutions. The addition of “prejudice” to the motivation limb may capture more disability hate crime. Notwithstanding this, the vast majority of hate crime prosecutions rely on the other limb – “demonstration of hostility”. This is unlikely to change substantially. See table 17 below.

**Table 17: Annual cost of prosecutions following new legal test (Volume and £ million)**

	Low estimate	Central estimate	High estimate
Prosecutions	13,570	13,570	13,570
No. of new cases	136	271	407
Crown Court + Magistrates' Court Costs	£0.01 <sup>27</sup>	£0.01	£0.03

Assumptions:

- Marginal increase in number of cases prosecuted in the Crown Court, 0.5% - 1.5% [1% central estimate of total prosecutions] to reflect mainly disability impact
- Crown Court prosecutions, (70% guilty plea, 30% not guilty)
- Crown Court Hearing times: Guilty plea – 1.2 hours; Not guilty plea – 7.2 hours
- Magistrates' Court prosecutions, Number heard = Total new cases less Crown Court cases, 100% guilty plea with a low/central estimate of 20 minutes hearing time [30 minutes, high estimate]

**Estimated annual cost = £0.01 million (central estimate)**

**Estimated present value over 10 years = £0.11 million (central estimate)**

Increased prosecution from changes to stirring up hatred offences

94. The recommended extension of the stirring up hatred offences to disability, transgender identity and sex or gender, and adjustments to the legal test, are expected to have a negligible cost impact. Only 10 or so offences are currently charged each year, and we do not anticipate this to rise significantly. However the symbolic impact of these offences is very significant. The characteristic abuse not already covered by these offences may already be prosecuted under different (though less serious) offences.

Increased legal aid expense

95. The average legal aid cost in the Magistrates' Courts is around £500 and generally involves just a solicitor defending. In the Crown Court, however, there are advocate costs as well as litigator costs. The average legal aid cost of a burglary case<sup>28</sup> in the Crown Court is about £1,200. Although this average would be slightly weighted by appeals from the Magistrates' court, which should be taken out of any calculation, it does show that there is still an increase in legal aid costs

<sup>27</sup> Rounded up to £10k from about £6k for presentation purposes.

<sup>28</sup> The average legal aid cost of burglary is used as a proxy because it does not contain the wide variation in resourcing that might attend a murder investigation.

in like offences. Following the estimated increase in Crown Court prosecutions there will be a parallel increase in legal aid costs. See table 19 below.

**Table 19: Annual additional legal aid cost of new Crown Court prosecutions (Volume and cost)**

	Low estimate	Central estimate	High estimate
New Crown Court prosecutions	136	271	407
Legal aid per Crown Court case	£1,000	£1,100	£1,200
Legal aid per Magistrates' Court case	£500	£500	£500
Additional legal aid expense	£500	£600	£700
Total additional legal aid expense	£0.07m	£0.16m	£0.28m

Assumptions:

- Increase in number of Crown Court prosecutions, 1 – 3% [2% central estimate of total prosecutions];
- Difference in legal aid costs based on average legal aid cost incurred in burglary offences [used as a proxy for Crown Court legal aid] less existing legal aid expense incurred in Magistrates' Courts.

**Estimated annual cost = £0.16 million (central estimate)**

**Estimated present value over 10 years = £1.35 million (central estimate)**

Increased costs to probation

96. The breakdown of convictions is unknown but there will be an impact on probation. The longer sentences handed down will result in a longer period on license which will need to be managed by Her Majesty's Prison and Probation Service (HMPPS) and for offences that do not receive prison sentences there will be costs incurred for monitoring alternative programmes such as community service.

**Benefits**

*Transitional Benefits*

None identified

*On-going Benefits*

Savings from reduced number of hearings in Magistrates' Courts

97. The parallel reduction in Magistrates' Courts' hearings as some enhanced offences are transferred to the Crown Court and face a higher sentence as aggravated offences. See table 20 below.

**Table 20: Annual savings in prosecutions in Magistrates' Courts following extension to disability, sexual orientation and transgender identity, (Volume and £ million)**

	Low estimate	Central estimate	High estimate
Reduction in No. of Prosecutions	136	271	407
Avoided annual costs	£0.01	£0.02	£0.05

**Assumptions:**

- New Crown Court prosecutions represent transfer from Magistrates' Courts

**Estimated annual cost = £0.02 million (central estimate)**

**Estimated present value over 10 years = £0.18 million (central estimate)**

Improved response to hate crime overall.

98. Our main recommendation seeks to equalise protection across the current five protected characteristics. We consider that this change will help to tackle existing hostility and hate crimes toward these groups and make people feel safer in their communities.

Clear and consistent application of hate crime legislation

104. Our central recommendation is to expand and equalise the law across the different characteristics. This recommendation among others, will achieve a clearer and more consistent application of the law which will also help to improve responses to hate crime. It will be more straightforward for law enforcement bodies and the CPS to apply the law because of its equalisation and simplification.

Fairer application of the law

105. There will be fairer application of hate crime law where it is applied equally across protected groups. This will subsequently resolve issues of inconsistency within the law and make it easier for the public to understand as well as to apply.

Deterrence effect on hate crime

106. There is a societal benefit in respect of these recommendations because there will be greater awareness about other forms of hate crime. This will help to educate people about hate crime and have a deterrent effect fostering the prevention of offending.

**Option 2: Extending characteristics for the aggravated and stirring up offences to cover the five current characteristics equally. Exclude changes to the legal test and introduction of an offence of stirring up hatred on the basis of sex or gender.**

**Costs**

*Transitional costs*

Familiarisation and Training on recommended changes



107. The key stakeholders requiring training on changes to the scope of hate crime offences are the CPS, legal practitioners, police officers and the judiciary.
108. We think that a newsletter will be adequate for training and updating judges about the changes. This is because our recommendations attempt to simplify the law and merely extend to other characteristics, therefore this would not require extensive training.

#### Administrative and drafting costs

115. There will be costs for reformulating and redrafting the legislation. For instance, the CDA 1998 will need to be redrafted to apply to the five recommended protected characteristics. The stirring up offences contained in the POA 1986 will need to be updated to include five recommended protected characteristics.
116. Additionally, there will be costs to the Sentencing Council for the drafting of updated sentencing guidelines to cover the recommended change to extend aggravated offences to the five protected characteristics. Administrative costs will be incurred in terms of ensure distribution of updated guides on the legislation as well as administrative costs involved in the drafting procedure. The additional resources directed to this task are not anticipated to be so significant as to warrant increased staff but this depends to some extent on whether there is sufficient spare capacity. In any case redrafting imposes an opportunity cost as resources can no longer be allocated to other areas.

#### Increased number of Appeals

117. Following the recommended change, we anticipate an increase in appeals lasting at least 4-5 years as the structure is tested to its boundaries.

#### *Ongoing costs*

##### Increased police investigation costs

118. Marginal increase in resources and time spent on investigating aggravated offences and enhanced sentencing factors when extended to other characteristics. However, this is not anticipated to be significant given the seven-point plan that many forces have in place ensuring best practice in hate crime investigations. The larger forces will have a dedicated hate crime Unit with specialist hate crime investigators.<sup>29</sup>

##### Increased prosecution following additional characteristics.

119. Similar to option 1, the recommended extension of the availability of aggravated offences to the characteristics of disability, transgender identity and sexual orientation is likely to mean more cases are heard in the Crown Court rather than the Magistrates' Courts and there will be increased court costs.

**Estimated annual cost = £0.28 million (central estimate)**

**Estimated present value over 10 years = £2.34 million (central estimate)**

##### Increased prosecution from changes to stirring up hatred offences

120. The recommended extension of the stirring up hatred offences to disability and transgender identity, and adjustments to the legal test, are expected to have a negligible cost impact. The impact is expected to be negligible in practical terms. Only 10 or so offences are charged each year, and we do not anticipate this to rise significantly. However the symbolic impact of these

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<sup>29</sup> <https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf> Last visited 18th September 2020.

offences is very significant. The characteristic abuse not already covered by these offences may already be prosecuted under different (though less serious) offences.

Increased costs to legal aid

121. Similar to option 1, additional legal aid expense is anticipated from the increased volume of Crown Court cases transferring from the Magistrates' Courts.

**Estimated annual cost = £0.16 million (central estimate)**

**Estimated present value over 10 years = £1.35 million (central estimate)**

Increased costs to probation

122. The addition of new characteristics to the aggravated offence regime introduces new offenders into the criminal justice system. The breakdown of convictions is unknown but there will be an impact on probation. The longer sentences handed down (due to the extension of characteristics within the aggravated offences framework) will result in a longer period on license. These license periods will need to be managed by HMPPS and for offences that do not receive prison sentences there will be costs incurred for monitoring alternative programmes such as community service.

**Benefits**

*Transitional Benefits*

None identified

*On-going Benefits*

Savings from reduced number of hearings in Magistrates' Courts

123. Similar to option 1, the parallel reduction in hearings in the Magistrates' Courts as some enhanced offences are transferred to the Crown Court and face a higher sentence as aggravated offences.

**Estimated annual cost = £0.02 million (central estimate)**

**Estimated present value over 10 years = £0.18 million (central estimate)**

Improved response to hate crime overall

124. Our main recommendation seeks to equalise protection across the current five protected characteristics. We consider that this change will help to tackle existing hostility and hate crimes toward these groups and make people feel safer in their communities. This also provides proper redress and an acknowledgement of hate crime experienced by *all* protected groups and can be documented on record.

Clear and consistent application of hate crime legislation

125. Clarification of the law will also help to improve responses to hate crime. There will be an easier, more consistent method by which to record hate crime. It will also be much easier for enforcement bodies to apply the law because of its equalisation and simplification. The law will also apply in the same way across the different constabularies and therefore avoid the inconsistency where different approaches have been adopted.

Fairer application of the law

126. The logical extension of aggravated offences and stirring up hatred offences to additional characteristics will maximise protection for victims of hate crime. There will be fairer application of hate crime law where it is expanded to protect additional groups and applied equally across these protected groups. This will subsequently resolve issues of inconsistency within the law and make it easier for the public to understand as well as to apply.

Increased confidence in the justice system

127. There will be increased confidence in the criminal justice system response to hate crime among groups previously not recognised within the stirring up hatred and aggravated offences framework. This will result in increased reporting of hate crime as victims feel more able to report their experiences.

Deterrence effect on hate crime

128. There is a societal benefit in respect of these recommendations because there will be greater awareness about other forms of hate crime. This will help to educate people about hate crime and have a deterrent effect fostering the prevention of offending.

**Table 22: Summary of Options 1 and 2 annual costs and benefits and NPSV, £million, 2021.**

	<b>Low Estimate</b>	<b>Central Estimate</b>	<b>High Estimate</b>
<b>OPTION 1</b>			
<b>Costs</b>			
<b>Transitional costs:</b>	Negligible	Negligible	Negligible
<b>On-going Costs:</b>			
Increased Crown Court [CC] Prosecutions from Aggravated Offence Extension	0.14	0.28	0.42
Increased Prosecutions with Revision to legal test	0.01	0.01	0.03
Increased legal aid expense with increased CC cases	0.07	0.16	0.28
<b>Total on-going cost</b>	<b>0.22</b>	<b>0.45</b>	<b>0.73</b>
<b>Benefits</b>			
<b>Transitional benefits</b>	0	0	0
<b>On-going benefits:</b>			
Avoided costs in Magistrates	0.01	0.02	0.05
<b>Total savings</b>	<b>0.01</b>	<b>0.02</b>	<b>0.05</b>
<b>NPSV</b>	<b>-1.70</b>	<b>-3.62</b>	<b>-5.70</b>
<b>OPTION 2</b>			
<b>Costs</b>			
<b>Transitional costs:</b>	Negligible	Negligible	Negligible
<b>On-going Costs:</b>	0	0	0
Increased Crown Court Prosecutions from Aggravated Offence Extension	0.14	0.28	0.42
Increased legal aid expense	0.07	0.16	0.28
<b>Total on-going cost</b>	<b>0.21</b>	<b>0.44</b>	<b>0.70</b>
<b>Benefits</b>			
<b>Transitional benefits:</b>	0	0	0
<b>On-going benefits:</b>			
Avoided costs in Magistrates	0.01	0.02	0.05
<b>Total savings</b>	<b>0.01</b>	<b>0.02</b>	<b>0.05</b>

<b>NSPV</b>	<b>-1.64</b>	<b>-3.33</b>	<b>-5.44</b>
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Source: Law Commission, own estimates, 2021

## Assumptions and Risks:

### Option 1:

#### Assumptions

Police have ability and capacity to gather evidence of hostility amounting to hate crime as it concerns additional groups necessary for aggravated offence conviction.

*Prejudice* as an addition to the motivation limb of the hostility test presents a sufficiently narrow test and therefore won't significantly increase number of cases meeting the legal threshold.

#### Risks

Practical difficulties encountered with proof of aggravated offences when extended to new characteristics.

The legal test is too complex and therefore prosecution unable to prove *prejudice* and jury unable to understand.

Potential 'chilling effect' of speech due to misconception of new approach.

Increased appeals concerning new offences/extension of offences and new legal test.

## Wider impacts

**Statutory equality duty:** We have completed an initial screening of the equality impact assessment and identified positive impacts that flow from our recommendations. The Law Commission's recommendations would make the law fairer by equalising the protection of the law. No adverse implications were identified. There is no need to undertake a full assessment.

**Justice impact assessment:** We have assessed the impact on the criminal justice system throughout the impact assessment.

**Health impact assessment:** Our main recommendation, to equalise the protection afforded by hate crime laws will have a positive impact on public health. Victims of hate crime will have their experiences recognised in the law and feel encouraged to report their experiences. Overall, this may have a positive impact on the mental health of victims and also physical health, whereby they receive greater support and protection.