Law Commission
Reforming the law

Hate crime laws

A Consultation paper

Consultation Paper 250

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23 September 2020

This publication is available at https://consult.justice.gov.uk/law-commission/hate-crime

The Law Commission – How we consult

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: We are consulting on hate crime and hate speech laws in in England and Wales: in particular the aggravated offences regime under sections 28 to 32 of the Crime and Disorder Act 1998, the enhanced sentencing regime under sections 145 and 146 of the Criminal Justice Act 2003, the "stirring up" offences under Parts 3 and 3A of the Public Order Act 1986, and the offence of "racialist chanting" contrary to section 3(1) of the Football Offences Act 1991. The consultation will focus on two main questions:

1. Who should these laws protect?
2. How should these laws work?

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 23 September 2020 to 24 December 2020.

We would appreciate responses using the online response form available at https://consult.justice.gov.uk/law-commission/hate-crime.

Otherwise, you can respond:

1. by email to hatecrime@lawcommission.gov.uk; or

2. by post to Hate Crime Team, Law Commission, 1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG. (If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically).

Availability of materials: The consultation paper is available on our website at https://www.lawcom.gov.uk/project/hate-crime/

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email hatecrime@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission: We aim to be transparent in our decision-making, and to explain the basis on which we have reached conclusions. We may publish or disclose information you provide in response to Law Commission papers, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response itself. We may also share responses with Government. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your family, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

Any queries about the contents of this Privacy Notice can be directed to: enquiries@lawcommission.gov.uk.

Contents

Glossary

Actus reus: The external elements of an offence, that is, the elements of an offence other than those relating to the defendant's state of mind or fault. They divide into conduct elements, consequence elements and circumstance elements.

Aggravation: In this paper we use the term "aggravation" to refer to factors which render the commission of a criminal offence more serious, such as evidence of hostile motivation or hostile demonstration by the defendant in relation to a protected characteristic of the victim.

Aggravated offences: The offences found in sections 29 to 32 of the Crime and Disorder Act 1998. These are a series of separate aggravated offences which have higher maximum penalties than the "base offences" to which they relate (see also the definition of base offences). The prosecution must prove not only that the base offence was committed, but also that in committing it, the defendant demonstrated, or the offence was motivated by hostility towards a person's race or religion. The aggravated offences only apply to the characteristics of race and religion in England and Wales.

Alternative subculture: Defined by the Sophie Lancaster Foundation as an umbrella term to describe groups characterised by a strong sense of collective identity and a set of group-specific values that typically centre around distinctive clothing, make-up, body art and music preferences. Groups that may come under this umbrella include: goths, emos, punks and metallers, as well as some variants of hippie and dance culture.

Alternative charge: This is where a defendant faces two charges but may only be found guilty of one. The jury is required first to give their verdict on the more serious charge – if they return a verdict of not guilty, they will also be required to return a verdict on the less serious charge. In the context of racially and religiously aggravated offences under sections 29 to 32 of the CDA 1998, prosecutors usually charge both the aggravated and non-aggravated versions of the offence.

Alternative verdict: This is where a defendant is found guilty of a less serious offence than the one they were charged with.

Antisemitism: When we refer to antisemitism in this paper, we refer to hatred, prejudice or discrimination against Jews or Judaism. We do however acknowledge that there are other, more detailed, definitions of antisemitism.

Apostate / Apostacy: People who have given up their religious beliefs or left their religion.

Asexuality: A type of sexual orientation, describing those who experience little or no sexual attraction.[1]

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[1] This is the definition adopted by Galop, a London based LGBT anti-violence charity.

Base offences: We use the term base offences in this paper to refer to the non-aggravated versions of offences that have racially or religiously aggravated equivalents under sections 29 to 32 of the Crime and Disorder Act 1988. They include assaults, criminal damage, public order and harassment offences.

BAME: This is an acronym for black and minority ethnic.

Caste: A form of identity that is used as a basis for social differentiation. It is acquired at birth and sustained by endogamy (ie the fact that marriage is restricted to individuals of the same caste). It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora.

Charge: The crime that the defendant is formally accused of committing.

Cisgender or **Cis**: Someone whose gender identity is the same as the sex they were assigned at birth.[2]

Count: A statement, on the indictment, of the crime the defendant is formally accused of committing (see also the definition of indictment).

Deadnaming: Calling someone by their birth name after they have changed their name –used in the context of trans people who have changed their name as part of their transition.[3]

Defendant ("D"): the person accused of an offence.

Disability: The law defines disability as any physical or mental impairment.

Either-way offence: An offence that can be tried either in the Crown Court or in a magistrates' court.

Elder abuse: Defined by the World Health Organization as a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. Elder abuse can take various forms such as financial, physical, psychological and sexual. It can also be the result of intentional or unintentional neglect.

Enhanced sentencing: The enhanced sentencing provisions are contained in sections 145 and 146 of the Criminal Justice Act 2003. They require that where a defendant is found guilty of an offence, and the sentencer is satisfied that in committing the offence the defendant demonstrated, or the offence was motivated by hostility towards a protected characteristic of the victim, the severity of the sentence must be increased. The provisions relate to the protected characteristics of race or religion (section 145) and sexual orientation, disability, or transgender identity (section 146).

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2 See further, *Stonewall, Glossary of terms, "Cisgender"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

3 See further, *Stonewall, Glossary of terms, "Deadnaming"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

Ethno-religious group: We use this term to refer to groups that have been recognised as both religious and racial groups in law, for example Jews and Sikhs.

Fault element: Also known as the mental element or mens rea – the state of mind necessary for a defendant to be guilty of an offence, for example intention, recklessness, knowledge or belief (or the lack of it). In some cases, fault is not about the state of mind of the defendant as the standard is one of negligence.

GRT: An acronym for "Gypsy, Roma, Traveller". This includes a range of groups who may be defined in relation to their ethnic origins or way of life.

The UK Government defines Gypsies and Travellers as persons of nomadic habit of life whatever their race or origin. This includes people who have stopped travelling temporarily owing to their family's or dependents' educational or health needs. It excludes members of an organised group such as circus people, who are travelling together for show purposes

Roma people originated from the Punjab and Rajasthan areas of India. Although Roma people maintained nomadic lifestyles for centuries, many have settled, most commonly in Central and Eastern Europe.

Hate Crime: There is no statutory definition of "hate crime". When used as a legal term in England and Wales, "hate crime" refers to two distinct sets of provisions:

(1) Aggravated offences under the Crime and Disorder Act 1998 ("CDA 1998"), which are more serious versions of certain existing criminal offences (with higher maximum penalties), where the defendant demonstrated, or the offence was motivated by racial or religious hostility;

(2) Enhanced sentencing provisions under the Criminal Justice Act 2003 ("CJA 2003"), which increase the severity of the penalty that a sentencer must apply to criminal offences (within the existing maximum) where the defendant demonstrated, or the offence was motivated by hostility on the grounds of race, religion, sexual orientation, disability or transgender identity.

A different definition is used by the police, Crown Prosecution Service and National Offender Manager Service for the purposes of identifying and flagging hate crime. The focus of this definition is on victim perception:

> Any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender.

The term hate crime is sometimes also used to describe "hate speech" offences, such as offences of stirring up hatred under the Public Order Act 1986, and the offence of "indecent or racialist chanting" under the Football (Offences) Act 1991.

Hostility: We use the term "hostility" in this paper primarily in the context of its use in the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. There is no standard legal definition. The ordinary dictionary definition of hostility refers to being unfriendly, adverse or

antagonistic. The CPS note that they use the everyday understanding of the word which includes ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike.

Humanism: A set of non-religious beliefs which trust scientific methods, evidence, and reason to discover truths about the universe, as well as placing human welfare at the centre of ethical decision-making. Humanism rejects the existence of an afterlife and supernatural explanations of the universe.

Indictment: The document containing the charges against the defendant for trial in the Crown Court.

Indictable offence: An offence triable in the Crown Court (whether or not it can also be tried in a magistrates' court); contrasted with a summary offence.

Indictable-only offence: An offence that can be tried only in the Crown Court.

Incel: Refers to a self-defined "involuntary celibate" person. In this paper we refer to online incel communities, primarily made up of men who largely blame women for the fact they are unable to find sexual partners.

Intersex: Having biological attributes which do not align with societal assumptions about what constitutes male or female biological attributes.[4]

Islamophobia: When we refer to Islamophobia, we refer to hatred, prejudice or discrimination against Muslims or Islam. We do however acknowledge that there are other, more detailed definitions of Islamophobia.

Jurisdiction: The right of a court to try a case (especially in relation to cases where some of the events took place outside England and Wales).

LGB: An abbreviation for lesbian, gay and bisexual.

LGBT: An abbreviation for lesbian, gay, bisexual and transgender.

Monitored strands: A term used by the CPS to discuss the protected characteristics for hate crime purposes. The CPS describes three monitored strands of hate crime:

- Racially and religiously aggravated
- Homophobic, biphobic and transphobic
- Disability hate crime

Mens rea: See "fault element".

Mental element: See "fault element".

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[4] See further, *Stonewall, Glossary of terms, "Intersex"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

Naturism: The practice of going without clothes.

Non-binary: An umbrella term for people whose gender identity doesn't sit comfortably with "man" or "woman". It can include people who identify with some aspects of binary gender identities, and others who completely reject binary gender identities. Non-binary people may also identify under the transgender umbrella.

Philosophical belief: This term has a specific meaning in equality and human rights law. Case law has established several criteria that must be satisfied for a philosophical belief to be protected under the Equality Act 2010. These require that a belief is; genuinely held, not an opinion or viewpoint based on the present state of information available, relates to a weighty and substantial aspect of human life and behavior, has a certain level of cogency, seriousness, coherence and importance, is worthy of respect in a democratic society and is not incompatible with human dignity or in conflict with the fundamental rights of others.

Police recorded hate crime: This term describes hate crime recorded by the police, using the police and CPS definition of hate crime. Data reflecting the extent of hate crime recorded by the police is published annually by the Home Office.

Prejudice: When using this term in the consultation paper, we refer to the definition of prejudice in the Oxford English Dictionary, which includes unreasoned dislike, hostility, or antagonism towards, or discrimination against, a race, sex, or other class of people.

Protected characteristics: In the context of hate crime this refers to characteristics that are specified in hate crime laws in England and Wales, namely; race, religion, sexual orientation, disability and transgender status. The term is also sometimes used in the context of the Equality Act 2010, which specifies 9 protected characteristics. There is some overlap between the two, but in this consultation paper we are referring to the hate crime characteristics unless we specify otherwise.

Prosecuted hate crime: This describes an incident that is flagged as a hate crime by the CPS using the police/CPS definition and taken forward to prosecution. A "successful prosecution for hate crime" refers to a crime that was flagged as a hate crime when the file was received from the police and the prosecution results in conviction.

Recklessness: A criminal standard used in respect of the "fault element" for some offences. Recklessness refers to the state of mind in which the defendant is aware of the risk of a particular result or circumstance, but unreasonably (given the facts as the defendant knows or believes them to be) takes that risk.

Residual category: An open-ended category. In the context of hate crime laws, this means that the list of protected characteristics is not closed. New Zealand, New South Wales and Canada all have residual categories in their hate crime provisions.

Sectarianism: In its broadest sense, sectarianism refers to prejudice, discrimination, or hatred arising from attaching relations of inferiority and superiority to differences between subsections of a group. It is most commonly used in the context of religious subdivisions.

Sexual orientation: Hate crime law defines sexual orientation as attraction towards persons of the same sex, the opposite sex or persons of both sexes.

Sex worker: There is no legal definition of "sex worker" in England and Wales. When we use this term in the consultation paper, we refer to a person who exchanges sexual acts for payment or other benefit or need. We also acknowledge that the definition of sex worker might vary depending on context and the preferences of individual sex workers.

The legal test: When we refer to the legal test for hate crime, we are referring to the hostility requirement within the aggravated offences and enhanced sentencing provisions. In both cases, it must be shown that the offence was motivated by, or the defendant demonstrated hostility towards a protected characteristic (see also the definition of hostility).

Transgender or **Trans:** An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. In this consultation paper, we discuss how the term transgender might be defined in law for the purposes of hate crime.[5]

Sentencer: The person or people who determines an offender's sentence after conviction. For example, a judge or a bench of lay magistrates.

Summary offence: An offence triable only in a magistrates' court; in contrast to an indictable offence.

Stirring up offences: We use this to refer to the offences of stirring up hatred on the basis of race, religion or sexual orientation that are found in Parts 3 and 3A of the Public Order Act 1986.

Strict liability: In an offence of strict liability, the defendant may be guilty despite not intending or being aware of one or more of the facts or results specified in the external elements of that offence (for example having sex with a child under 13 where there is no need to prove the defendant's knowledge of the child's age).

Transgender man: Someone who was assigned female at birth but identifies and lives as a man.[6]

Transgender woman: Someone who was assigned male at birth but identifies and lives as a woman.[7]

VAWG: An acronym for violence against women and girls.

Victim ("V"): The person against whom an offence is said to have been committed. Also, until conviction, formally called the complainant.

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5 See further, *Stonewall, Glossary of terms, "Trans"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

6 See further, *Stonewall, Glossary of terms, "Transgender man"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

7 See further, *Stonewall, Glossary of terms, "Transgender woman"*, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.

Foreword

This consultation paper has been written in unprecedented circumstances. First, in March 2020, we were in the later stages of writing this paper when emergency measures were taken to lock down the UK in response to the global pandemic COVID-19. We have completed this paper in highly unusual circumstances which have had an impact on publication and are also likely to impact on consultation.

Tragically, in the United Kingdom alone, tens of thousands of people have lost their lives to the virus. In the UK, the epidemic has had a disproportionate impact on people from black and minority ethnic groups.

In the early stages of the outbreak, which began in the Chinese city of Wuhan, there were reports of several hate incidents relating to the virus. This appears to be linked to the prejudiced assumption that people of Asian appearance were either more likely to have the virus, or were somehow responsible for its spread. Ministers have stated that there was an increase of 21% in hate incidents against South and East Asian victims.[8]

Lockdown has had a substantial impact on the work of the courts. Our court system is adapting to provide virtual justice in some circumstances, and considering how the need to guard against the spread of the virus will affect hearings well into the future. We recognise that this situation will contribute to an inevitable backlog of cases that must await in-person hearings where a virtual hearing would be inappropriate.

We recognise also that these events have had, and will continue to have, an enormous economic impact, and that this will constrain the resources available to government in the years to come. We have therefore paid particular attention to the resource implications of our proposals for the police and the criminal justice system.

Second, the death of a black man – George Floyd – in Minneapolis in May 2020, who suffocated while a white police officer (now charged with murder) knelt on his neck for nine minutes, was followed by a series of worldwide protests linked to the Black Lives Matter movement. These focused attention on the treatment of black people and other minorities by the criminal justice system, and raised awareness of wider racism embedded within society.

While these events have demonstrated the need for a consideration of the way that the law in England and Wales deals with hate crime, we are aware that the continuing impact of COVID-19 may affect the ability of stakeholders to engage with our consultation.

We believe, however, that it is right to present our provisional proposals for consultation in accordance with our terms of reference. Although public consultation will be more challenging, we believe that it can still be effective using the many virtual tools at our disposal to garner consultees' views in order to test and challenge our provisional proposals.

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8 House of Commons Home Affairs Select Committee, "Oral Evidence: Home Office Preparedness for Covid-19", 13 May 2020, Q 508.

Chapter 1: Introduction

1.1 "Hate crime" can encompass a wide variety of behaviour, including violent attacks on people because of, for instance, their race or sexual orientation; criminal damage against businesses or places of worship; or verbal abuse and harassment directed towards minority communities. It can also include "hate speech", such as the dissemination of inflammatory material designed to incite violence, inflame community tensions or instil fear among or of particular groups.

1.2 In this introduction and throughout this consultation paper we provide a number of real-life case examples to illustrate the kinds of offending that fall within the categories of hate crime. Some of these may be quite upsetting, particularly to those who have been victims of hate crimes, or are members of the affected community. For example, at paragraph 1.36 we describe particularly inflammatory examples of antisemitic and Islamophobic hate speech. We do this to illustrate the severity of the language and conduct that can be the subject of hate crime offences. We regret any distress that this or any other description may cause and hope that readers will agree that these examples are necessary to provide the real-life context in which the law operates.

Stephen Lawrence

1.3 One of the most important events driving the development of hate crime legislation in England and Wales over the last thirty years was the murder of Stephen Lawrence in 1993.

1.4 Stephen, and his friend Duwayne Brooks were attacked by a group of five or six white youths while waiting for a bus in South East London. Stephen was stabbed at least twice during the attack, severing arteries and penetrating a lung. Duwayne heard one of Stephen's assailants saying "What, what, n****r?" as they approached to attack him. Five suspects had previous links to attacks on members of racial minorities in the area.

1.5 Sentencing two of Stephen's killers for murder, Mr Justice Treacy said:

> The murder of Stephen Lawrence on the night of 22nd April 1993 was a terrible and evil crime… A totally innocent 18-year-old youth on the threshold of a promising life was brutally cut down in the street in front of eye witnesses by a racist thuggish gang. This crime was committed for no other reason than racial hatred. You did not know Stephen Lawrence or Duwayne Brooks. Neither of them had done anything to harm, threaten or offend you in any way, apart from being black and making their way peaceably to the bus-stop on their way home.[9]

[9] *R v Dobson and Norris,* Central Criminal Court, 4 January 2012.

1.6 The murder of Stephen Lawrence is one of the clearest examples of a hate crime: a crime which appears to have been motivated by nothing but hatred towards a group on account of race – an immutable, unchosen, characteristic.

1.7 It was followed 12 years later by the brutal murder of Anthony Walker, an 18-year-old black British student. Anthony was racially abused whilst waiting at a bus stop with his cousin and his girlfriend. They were then followed and ambushed. Anthony was struck in the head with an ice axe which became lodged in his skull. He later died in hospital. When sentencing the killers – Michael Barton and Paul Taylor – to life imprisonment, Mr Justice Leveson remarked that this was a "racist attack of a type poisonous to any civilised society".[10]

1.8 Crimes involving hostility on the basis of race, and other "protected characteristics"[11] such as religion and sexual orientation are considered to be particularly serious and often have a disproportionate impact on victims.[12] They have also been shown to cause wider "secondary harms" to others who share the targeted characteristic.[13]

1.9 The Crime and Disorder Act 1998 introduced two "limbs" identifying an offence as a hate crime.[14] The first is that the offender was motivated by hostility towards a group based on their membership of the group. The second "limb" of hate crime is where an offender, at the time of committing the offence, demonstrates hostility towards the victim based on their membership of a group. This second limb recognises that an offence demonstrating hostility towards a group will frequently have a similar disproportionate impact on victims and communities as an offence which can be proven to have been motivated by hostility. It also reflects the fact that an offender may not have a single motivation when committing an offence, and that it will often be easier to prove that hostility was demonstrated than that it was the motivation for an offence.

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10 Mark Oliver, "Cousins jailed for racist axe murder", *The Guardian* (1 December 2005), available at https://www.theguardian.com/uk/2005/dec/01/ukcrime.race. All website addresses and links to electronic publications referenced in this consultation paper were last visited in September 2020.

11 In this paper we use this phrase to refer generally to characteristics that are specified in hate crime laws. The term is often also used in respect of characteristics specified for the purposes of equality law in the Equality Act 2010, however while there is some overlap between these characteristics, they are not the same.

12 P Iganski, "Hate hurts more" (2001) 45(4) *American Behavioral Scientist* 626.

13 J Patterson, M A Walters, R Brown and H Fearn (2018) The Sussex Hate Crime Project: Final Report, University of Sussex, p 23. See also *R v Fawthrop* [2017] EWCA 1500 (Crim) at [40], per Simon LJ.

14 The 1998 Act initially both introduced racially aggravated offences and sentencing enhancement for racially aggravated crimes. The former was subsequently extended to religiously aggravated offences, while the latter, moved into the Criminal Justice Act 2003, was extended to cover religion, sexual orientation, transgender status and disability.

Birmingham Grindr robberies

1.10 A recent example of the second "demonstration" limb is provided by a case in December 2019, in which three men aged 18 were jailed for between 15 and 17 years after a series of violent robberies.[15] The offenders had used fake profiles on the gay dating app Grindr to seek out their victims, and had used homophobic slurs while assaulting them. The CPS claimed that the offenders believed that their victims would be unwilling to give evidence. While the offenders had targeted their victims on account of their sexualities, it is not clear that the crimes were primarily *motivated* by homophobia – the prime motivation was robbery.

1.11 Had the homophobic slurs not been used, it would have been difficult to prosecute them as hate crimes, even though it is clear that the victims were deliberately targeted as gay men. In Chapter 15 we consider whether the definition of hate crime should be expanded to include offences where the offender is motivated by prejudice towards a protected characteristic. This is a particular concern in relation to crimes against disabled people, because demonstrations of overt hostility towards those with disabilities appear to be less common than, for example racist or homophobic abuse, but this does not mean that crimes against disabled people are not motivated by prejudice towards their disability.

[15] Crown Prosecution Service, *Three teens jailed for robbery via the use of Grindr* (11 December 2019), available at https://www.cps.gov.uk/west-midlands/news/three-teens-jailed-robbery-use-grindr.

Bijan Ebrahimi

1.12 In 2013, Bijan Ebrahimi, a disabled Iranian man, was found murdered outside his flat in Bristol. An inquiry by the Independent Police Complaints Commission found that he had been the target of harassment by his neighbours for many years, including unfounded rumours that he was a paedophile.

1.13 One of Mr Ebrahimi's neighbours, convinced that he had been filming local children (he had in fact been filming the anti-social behaviour to which he was subject) beat Mr Ebrahimi to death and, with another neighbour, doused his body in white spirit and set it alight.

1.14 Mr Ebrahimi's murder was undoubtedly a product of the hostile environment in which he lived, which in turn seems to have been a product of his race and disability. However, his murderer was not sentenced on the basis that the offence was motivated by hostility towards him on account of his race or disability. "Prejudicial targeting", which often characterises crimes directed at disabled people, is not currently recognised as constituting hate crime.

1.15 A subsequent report into the incident by Safer Bristol found:

> although this review process has uncovered no evidence to indicate that any of Bijan Ebrahimi's victimisation was motivated by his disability, it is important to acknowledge that he was a disabled man wrongly labelled by some local members of the community as a paedophile. There have been a number of recent cases documented in which disabled men have been similarly labelled, targeted and even murdered because of such labels.[16]

1.16 Which characteristics are to be protected is an important question, and we consider this in detail in Chapters 10 to 14. In the UK, race was the first characteristic to be protected. More recently religion, sexual orientation, disability and being transgender[17] have been recognised in law as protected characteristics for the purposes of hate crime. However, at present, the law is inconsistent as to how these characteristics are protected.

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16 Safer Bristol Executive Board, *Multi-Agency Learning Review following the murder of Bijan Ebrahim*, (January 2014, updated November 2017), available at https://www.bristol.gov.uk/documents/20182/35136/Multi-agency+learning+review+following+the+murder+of+Bijan+Ebrahimi.

17 The Criminal Justice Act 2003, as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, defines being transgender as including being transsexual, or undergoing, proposing to undergo or having undergone, gender reassignment surgery. We discuss definitional issues relating to transgender identity further in Chapter 11.

Melania Geymonat and Christine Hannigan

1.17 In a well-known recent case, in May 2019, two bisexual women, Melania Geymonat and Christine Hannigan, were subjected to a homophobic attack and robbery by five young men on a London bus. Their attackers were convicted of theft and using threatening words or behaviour with intent to cause harassment or distress contrary to section 4A of the Public Order Act 1986. This latter offence carries a maximum penalty of six months' imprisonment.

1.18 The homophobic motivation meant that the sentence had to be "enhanced" beyond what would have applied without a homophobic motivation, but the overall sentencing maximum of six months' imprisonment still applied. By contrast, had the couple been targeted because of their race or religion, an aggravated version of the offence would have been charged under the Crime and Disorder Act 1998, which currently carries a maximum sentence of two years.[18]

1.19 In addition, there have been a number of calls in recent years for additional characteristics to be protected by hate crime laws. Our terms of reference require us to consider crimes directed at people on account of their sex or gender, as well as crimes targeted at older people. There have also been recent campaigns or initiatives to have other groups recognised in hate crime laws, including alternative subcultures, sex workers and those who hold non-religious beliefs.

[18] Two of the youths convicted received referral orders, while the third received a four-month community order. This reflected the offenders' youth. The length of the referral orders was increased to reflect the homophobic nature of the attacks. See BBC News, *London bus attack: Boy ordered to complete diversity lessons* (23 December 2019), available at https://www.bbc.co.uk/news/uk-england-london-50892347.

Sophie Lancaster

1.20 In 2007, Sophie Lancaster, a 20-year-old "goth"[19] and her boyfriend were attacked by a group of teenagers. After the attack, the youths boasted about their attack on two "moshers". Sophie never regained consciousness and died thirteen days after the attack. Although alternative subcultures such as goths are not formally recognised under hate crime legislation, when sentencing her killers, the judge, Anthony Russell QC, stated that for the purposes of calculating the minimum term to be served, he would treat the murder as equivalent to a hate crime:

> I am satisfied that the only reason for this wholly unprovoked attack, was that Robert Maltby and Sophie Lancaster were singled out for their appearance alone because they looked and dressed differently from you and your friends. I regard this as a serious aggravating feature of this case, which is to be equated with other hate crimes such as those where people of different races, religions, or sexual orientation are attacked because they are different. This aggravating feature applies to all of you and I add that the courts are perfectly capable of recognising and taking account of such aggravating features without the necessity of Parliament enacting legislation to instruct us to do so.[20]

1.21 On an appeal against sentence the Court of Appeal held that the judge was not only entitled, but fully justified in the view that he took of that feature.[21]

1.22 We recognise, however, that any proposals to reform hate crime laws, and especially to extend their scope, will be controversial and that there are some principled objections to hate crime legislation. We discuss these further in Chapters 3 and 18.

1.23 One is that to designate some crimes as hate crimes unfairly treats comparable crimes differently and, in particular, that it means that victims and offenders are treated differently on account of their race, religion, etc. For some opponents of hate crime laws, this amounts to a breach of the fundamental principle of equality before the law.

1.24 While we understand the genuinely held concerns of those who subscribe to this view, we do not accept this conclusion. The law recognises that the same base offence may be more or less serious in different circumstances. The only crime for which the penalty is fixed by law is murder, and even for murder judges are expected to take into account the particular circumstances when setting the minimum term to be served before the offender is eligible to apply for parole. Moreover, hate crime laws in England and Wales turn on the motivation for the offence, or the demonstration of hostility, not the identity

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19 "Goth" refers to a subculture. The Oxford English Dictionary defines it as a performer or fan of goth music "or anyone who adopts a similar appearance, typically through the use of dark eye make-up and pale skin colouring, dark clothes, and bulky metallic jewellery". Goth music (originally "gothic rock") is a type of rock music characterised by a dark sound, melancholic melodies and lyrics often dealing with themes such as sadness, existentialism, nihilism and morbidity.

20 *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051, para 20.

21 *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051, para 23.

of the victim: the law does not, for instance, treat a black victim differently from a white victim, or a gay offender differently from a heterosexual offender.[22]

1.25 A second argument is that to designate some offences as "hate crimes" amounts to the introduction of a category of thought crime. Again, this is an argument we reject. First, every hate crime involves an action as well as a mental state. The law does not punish a neo-Nazi for his or her beliefs, but if those beliefs lead him or her to attack someone Jewish or desecrate a mosque, then the law rightly steps in.

1.26 Secondly, it is a fundamental mischaracterisation of the law to claim that "ordinary" offences do not turn on the thoughts or beliefs of defendants. This is most obvious in the legal presumption that intent is required for a criminal offence. But many offences incorporate a requirement for a particular motivation. For instance, conviction for theft or fraud requires that the defendant was acting "dishonestly".

1.27 The law also recognises that motivation may be an aggravating factor when deciding on the appropriate penalty for breaking the law. For instance, when setting the starting point for the minimum term to be served as part of a life sentence for murder, Parliament has required courts to consider whether the offence was committed, among other things, for gain; with substantial premeditation; or for the purpose of advancing a political, religious, racial or ideological cause.

1.28 However, a third principled concern, and one to which our terms of reference require us to give particular regard is freedom of expression, and the possibility that hate crime laws would amount to an impermissible interference with freedom of expression.

1.29 Freedom of expression is an important and legitimate consideration: this is an area of law where a balance has to be struck between intervention and freedom of speech; that there are strong views on all sides of the argument; and that it will be an important task of the Law Commission, when considering responses to this consultation, to identify the principles which should guide that balance.

1.30 Because this issue tends to attract a large amount of attention it is important to stress that the overwhelming majority of hate crimes are not primarily about expressive conduct at all: they are acts of violence, or harassment, or criminal damage. However, there are three ways in which a hate crime offence may involve expressive conduct.

1.31 First, a basic offence may become a hate crime when accompanied by expressive conduct demonstrating hostility towards a group, or which suggests that the offence is motivated by hostility towards members of a group. Such cases do not usually give rise to any significant freedom of expression concerns: the act is a crime regardless of what the person may say. The words they use are relevant only insofar that they shine a light on their motivation.

1.32 Secondly, there are some circumstances where it is expressive conduct which constitutes the crime and where without the hostility demonstrated by that expressive

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[22] The situation is slightly complicated in the case of crimes motivated by hostility on grounds of transgender status or disability, in that the enhancement covers only hostility towards a person because they are trans or disabled (and not hostility towards cisgender or non-disabled persons). It remains the case, however, that what matters is the motivation, and not simply that the person is trans or disabled.

conduct, it would not reach the threshold of criminality. An example would be the use of a racial slur directed at someone over the internet where the behaviour constitutes a "grossly offensive" message and hence an offence under section 127 of the Communications Act 2003, but without the racial slur, the behaviour would not reach the threshold of criminality.

1.33 While recognising the free speech considerations, here, it is important not to overstate them. The law already recognises that a person may not use their right to freedom of expression, for example, to abuse someone, or to target insults at a person to cause harassment, alarm or distress,[23] or to send them grossly offensive communications.

1.34 If there is a free speech concern in relation to this category of offence, it is more likely to be with the threshold which must be met to constitute an offence under communications or public order legislation. These communications offences are currently the subject of a separate Law Commission project.[24] We accept that the threshold of criminality for communications offences, especially when applied to the online space, is often unclear, and are concerned that the current offences are so broad that they could in certain circumstances constitute a disproportionate interference with the right to freedom of expression. Our provisional proposals on this matter can be found in our consultation paper "Harmful online communications: the criminal offences", available at https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/.

1.35 The third, and most serious, case where freedom of expression concerns apply is with regard to offences of "stirring up" hatred, discussed in detail in Chapter 18. These offences attract a disproportionate amount of attention and controversy but in practice, there are very few prosecutions for stirring up offences and the threshold for a successful prosecution is high: "hatred" is more than mere hostility, or ridicule, or offence.

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23 In 2013 the Crime and Courts Act removed the reference to "insulting" words and behaviour from the offence of harassment, alarm or distress under section 5 of the Public Order Act 1986. However, the offences under section 4 (fear or provocation of violence) and section 4A (intentional harassment, alarm or distress) retain the reference to insults. The key difference is that the offences in sections 4 and 4A must be targeted at a person with intent to provoke violence or fear that violence will be used, or to cause alarm, harassment or distress; in contrast the section 5 offence merely required that another person within sight or hearing be likely to be caused harassment, alarm or distress.

24 Our terms of reference are available in full on the project webpage: https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/.

Stirring up racial hatred and religious hatred:

please note that these examples contain highly offensive antisemitic and Islamophobic speech

Antisemitic hatred: *R v Bonehill-Paine*

1.36 In November 2015, neo-Nazi Joshua Bonehill-Paine was sentenced to forty months' imprisonment for stirring up racial hatred. Bonehill-Paine had distributed posters calling for "anti-Jewification" of areas of London and calling for a "#SummerofHate" against Jews. Bonehill-Paine tried to organise antisemitic demonstrations in Golders Green, an area of London with a large established Jewish community, displaying posters with an image of Auschwitz and the text "We've become complacent and allowed for weeds to grow in the cracks of London. It's time to clear them up with Round-Up[25] and Liberate Golders Green for future generations of White People."

1.37 Sentencing him, the judge said that the material was about as inflammatory a document as he had ever seen.[26]

1.38 In a separate case, Bonehill-Paine was convicted of pursuing a campaign of harassment against the Jewish Member of Parliament Luciana Berger, a campaign which Bonehill-Paine referred to as "Operation Filthy Jew Bitch".[27]

Hatred towards Muslims: *R v Jennings*

1.39 A more recent case involving extremist hatred towards Muslims was that of Jonathan Jennings, who posted a number of inflammatory messages on a social networking website known as GAB. Many of them targeted Muslims, public figures and one threatened the Jewish community.

1.40 The online posts called for Muslims to be forcibly sterilised and stated that those who tried to convert others to Islam should be sentenced to death. Jennings repeatedly called for the murder of all Muslims and supported "bomb a mosque day" which had been suggested by another extremist who was later jailed for stirring up religious hatred.

1.41 Jennings plead guilty to six counts of publishing or distributing written material intended to stir up religious hatred, contrary to section 29C of the Public Order Act 1986 and four counts of sending a communication with intent to cause distress or anxiety, contrary to section 1 of the Malicious Communications Act 1988. He was sentenced to 16 months' imprisonment.[28]

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25 This appears to refer to the brand name "RoundUp", which is a type of weed killer.

26 *R v Bonehill-Paine*, Sentencing Remarks of Mr Justice Spencer (8 December 2016), available at https://www.judiciary.uk/wp-content/uploads/2016/12/spencer-j-sentencing-remarks-bonehill-paine-as-delivered-08-12-16.pdf.

27 *R v Bonehill-Paine*, Sentencing Remarks of Mr Justice Spencer (8 December 2016).

1.42 We recognise that these offences also require additional scrutiny because they represent an interference with freedom of expression. Unlike the first and second categories they do not involve behaviour which is otherwise criminal, and unlike offences such as inciting or encouraging a crime, what is being incited – hatred – is not something which is in itself unlawful.

1.43 However, there may be a tendency for some observers to take absolutist "free speech" positions in relation to hate crime which do not accord with the way in which freedom of expression, a qualified right, has historically been treated in relation to other offences. There are legitimate reasons why freedom of expression may be qualified: the law does not, for instance, allow a company to make misleading claims in advertisements, or to sell pornographic videos to children. Paid political advertising on radio and television is banned.

1.44 Even countries with constitutionally entrenched protection for freedom of speech, such as the United States, accept that there are some permissible interferences with the right: laws against defamation, for instance, or the US Supreme Court's approach to "fighting words" which get no, or very little, protection under the First Amendment.[29]

1.45 However, we do recognise that even legitimate restrictions on freedom of expression may have a "chilling effect"; people may be deterred from saying what they could, and perhaps even should, say because of fears that what they say might be unlawful, or attract the attention of law enforcement. We acknowledge that where a complainant reports a communication as a possible hate incident, law enforcement authorities may focus on this aspect and fail to give sufficient weight to the importance of freedom of expression.

1.46 We also recognise that extending hate speech laws into areas of intense controversy such as gender identity could lead to the law being used to try to silence one or other side of a legitimate debate. We discuss this issue further in Chapter 18.

CURRENT LAW IN ENGLAND AND WALES

1.47 The law in England and Wales currently offers enhanced criminal protection, in different forms, to individuals and groups on the basis of race, religion, disability, sexual orientation and transgender identity. It does this through three main legal mechanisms:

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28 Crown Prosecution Service, *Racist who called for murder of Muslims and Labour leader jailed* (9 August 2019), available at https://www.cps.gov.uk/cps/news/racist-who-called-murder-muslims-and-labour-leader-jailed.

29 In *Chaplinsky v New Hampshire* (1942) the US Supreme Court held that "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

- 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;[30]

- The requirement for judges and magistrates 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;[31]

- Offences of "stirring up hatred" in respect of race, religion and sexual orientation.[32]

1.48 There is also an offence of taking part in "racialist chanting" at a football match.[33]

1.49 These laws have developed incrementally in recent decades, with the period between 1998 and 2012 being the most active. In this period the regime of "aggravated offences" under the Crime and Disorder Act 1998[34] was established for specified racially (1998) or religiously (2001)[35] aggravated offences, and a parallel statutory regime of enhanced sentencing for all other offences was introduced.[36] In 2003 the characteristics of sexual orientation and disability were added, and the "enhanced sentencing" regime was shifted to the Criminal Justice Act 2003.[37] Transgender identity was added to the enhanced sentencing regime in 2012.[38] Meanwhile the offence of stirring up racial hatred, which originated in 1965,[39] was to some extent replicated for religious hatred in 2006[40] and hatred on the basis of sexual orientation in 2008,[41] though a higher criminal threshold was applied to these later additions.

1.50 This flurry of legislative activity has resulted in a significant volume of hate crime laws. However, many stakeholders argue that the laws we now have are overly complex and draw arbitrary distinctions between the different communities they protect.

Background to this review

1.51 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,

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30 Crime and Disorder Act 1998, ss 28 to 32.

31 Criminal Justice Act 2003, ss 145 and 146.

32 Public Order Act 1986, Pts 3 and 3A.

33 Football (Offences) Act 1991, s 3.

34 Crime and Disorder Act 1998, ss 28 to 32.

35 Anti-terrorism, Crime and Security Act 2001, Pt 5.

36 Section 82 of the Crime and Disorder Act 1998 introduced a statutory requirement for enhanced sentencing in respect of racial aggravation. These provisions were transferred to section 153 of the Powers of Criminal Courts (Sentencing) Act 2000, and then religious aggravation was added by section 39(7) of the Anti-terrorism, Crime and Security Act 2001.

37 Criminal Justice Act 2003, ss 145 and 146.

38 Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 21, pt 1.

39 See Chapter 18 for a more detailed historical account.

40 Public Order Act 1986, pt 3A, as inserted by the Racial and Religious Hatred Act 2006.

41 Public Order Act 1986, pt 3A, as inserted by section 74 of the Criminal Justice and Immigration Act 2008.

sexual orientation, disability and transgender identity. We were asked whether the reach of the criminal law should be extended to cover these communities equally.

1.52 In our 2014 report,[42] we recommended that a broader review of hate crime laws be undertaken, but in the absence of such a review, we recommended extension of the aggravated offences regime to all five of these characteristics. By contrast we found insufficient evidence to justify an equivalent extension of the "stirring up" hatred offences to the characteristics of disability and transgender identity.

1.53 In late 2018, the government asked us to undertake the wider and deeper review we had called for in our 2014 report. 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.[43]

1.54 We began this review in March 2019, publishing a brief background paper,[44] 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.

1.55 In addition to meetings in London, we visited various locations across England and Wales including Birmingham, Cardiff, Durham, Leeds, Leicester, Liverpool, Manchester, Newcastle, Norwich, and Nottingham.

OUR TERMS OF REFERENCE

1.56 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.

1.57 This includes:

- Reviewing the current range of specific offences and aggravating factors in sentencing, and making recommendations on the most appropriate models to ensure that the criminal law provides consistent and effective protection from conduct motivated by hatred of protected groups or characteristics.

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42 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348.

43 Our terms of reference are available in full on the hate crime project webpage https://www.lawcom.gov.uk/project/hate-crime/.

44 Law Commission, *Hate Crime: Background to our review* (March 2019), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/07/6.5286-LC_Hate-Crime_Information-Paper_A4_FINAL_030719_WEB.pdf.

- Reviewing the existing range of protected characteristics, identifying gaps in the scope of the protection currently offered and making recommendations to promote a consistent approach.

1.58 In particular, we have been asked:

- To consider developments in the law since the publication of the Law Commission report "Hate Crime: should the current offences be extended" in 2014;
- To consider whether crimes motivated by, or demonstrating, hatred based on sex and gender characteristics, or hatred of older people or other potential protected characteristics should be hate crimes, with reference to underlying principle and the practical implications of changing the law;
- To consider the incitement of hatred offences under the Public Order Act 1986 and to make recommendations on whether they should be extended or reformed;
- To consider the impact of changing the law relating to hate crime on other aspects of criminal justice, including other offences and sentencing practice;
- To ensure that any recommendations comply with, and are conceptually informed by, human rights obligations, including under articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the European Convention on Human Rights;
- To consider the implications of any recommendations for other areas of law including the Equality Act 2010.

1.59 It is important to recognise, however, that we are conducting this review from a position in which England and Wales already has a well-developed suite of hate crime laws. Our recommendations seek to build on this.

OTHER IMPORTANT REVIEWS

1.60 While conducting this review, we have been closely monitoring developments in other relevant jurisdictions – most notably Scotland and Northern Ireland.

Scotland

1.61 In 2018, Lord Bracadale completed a review into hate crime laws in Scotland.[45] Scotland's laws are different to those in England and Wales, but have many similarities – notably protecting the same five characteristics (though "transgender identity" is defined somewhat differently in Scotland).[46] The offences of stirring up racial hatred under Part 3 of the Public Order Act 1986 also pre-date devolution, and are identical.

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45 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018), available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

46 Section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 defines transgender identity as "(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity."

1.62 The independent review made a series of recommendations for reform of Scotland's laws, including:

- Consolidation of those laws into a single "Hate Crime Act"[47]
- The addition of the characteristics of "age" and "gender" to those protected[48]
- That the Scottish government consider a distinct statutory aggravation (separate from the hate crime regime) for crimes targeting "vulnerable" people.[49]

1.63 We have carefully considered the findings of the independent review.

1.64 The Scottish government subsequently conducted its own consultation,[50] and in May 2020, the Scottish government introduced a Hate Crime Bill into the Scottish Parliament. The key features of this Bill are:

(1) The enhanced sentencing measures (currently covering race, religion, sexual orientation, disability and transgender identity) and stirring up offences (currently covering only racial hatred) are extended to cover age, disability, race, religion, sexual orientation, transgender identity, and "variations in sex characteristics".

(2) The law is not extended to cover hostility based on sex or gender, but Ministers are given a power to extend the law to cover sex later. The Scottish government has explained that

> While Lord Bracadale, in his review of hate crime legislation, recommended that gender should be added to hate crime law, leading women's organisations were strongly opposed to this approach. They proposed a standalone offence on misogynistic harassment be developed, which the Scottish Government is committed to in principle. A working group will be established to take this forward and consider how the criminal justice system deals with misogyny, including whether there are gaps in the law that could be filled with a specific offence on misogynistic harassment. The group will also consider whether a statutory aggravation and/or stirring up of hatred offences in relation to the characteristic of sex should be included within hate crime law.[51]

(3) The stirring up offences are consolidated. The current offences dealing with use of words or behaviour, publication of written material, staging plays, distributing or playing recordings are consolidated in one offence for racial hatred and one offence for other characteristics. Different thresholds apply to racial hatred than other forms of hatred.

(4) The common law offence of blasphemy is abolished in Scotland.

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47 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) Ch 9.

48 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) Ch 4.

49 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) [4.70].

50 Scottish Government, https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/.

51 Scottish Government, https://www.gov.scot/news/hate-crime-bill/.

Northern Ireland

1.65 In 2019, the Northern Ireland executive announced an independent review of hate crime laws, chaired by Judge Marrinan.[52]

1.66 Hate crime laws in Northern Ireland are also broadly similar to those in England and Wales, but one key difference is that the characteristic of transgender identity is not protected.

1.67 The review published a consultation paper in January 2020, seeking views on the characteristics which hate crime laws should protect, and the legal mechanisms which should be used to protect them.[53]

1.68 We will remain in close contact with the Northern Ireland review team while our reviews operate in parallel.

England and Wales

1.69 Since our 2014 review, there have been a number of subsequent developments.

Police and CPS reviews

1.70 The inspectorates for police (HMICFRS, previously HMIC) and for the Crown Prosecution Service (HMCPSI) have conducted a number of reviews into police and prosecution practices with respect to hate crime. The reports have included:

(1) HMIC/HMCPSI/HMIP[54]: Living in a different world: Joint review of disability hate crime (2013)[55] and follow up (2015)[56]

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52 Further general information is available at https://www.hatecrimereviewni.org.uk/.

53 *Hate Crime Legislation in Northern Ireland Independent Review, Consultation Paper* (January 2020), available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020.pdf.

54 HM Inspectorate of Probation.

55 HMIC, HMCPSI, HM Probation, *Living in a different world: joint review of disability hate crime* (2013), available at https://www.justiceinspectorates.gov.uk/hmicfrs/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf.

56 HMIC, HMCPSI, HM Probation, *Living in a different world: joint review of disability hate crime: follow up* (2013), available at https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2015/05/CJJI_DHCFU_May15_rpt.pdf.

(2) HMICFRS: Hate crime scoping study (2017),[57] Inspection: Understanding difference: the police's initial response to hate crime (2018)[58] and independent study: Hate crime: what do victims tell us? (2018)[59]

(3) HMICFRS/HMCPSI joint thematic inspection report in relation to Crimes Against Older People (2019)[60]

1.71 The police and CPS have significantly developed their policies and practices in the intervening period, including substantial updates to operational and policy guidance.

Academic reviews

1.72 There have also been a number of important academic studies into hate crime in England and Wales, mostly notably:

(1) The Leicester hate crime project: a two-year research project conducted between 2012 and 2014, structured around the experience of hate crime victims.[61]

(2) The Sussex hate crime project: a five-year research project conducted between 2013 and 2018,[62] that examined the direct and indirect impacts of hate crime.

(3) The Hate Crime and the Legal Process: Options for Law Reform research project conducted between 2015-2017 that examined the legal framework for hate crime in England and Wales and has been particularly influential in the hate crime sector.[63]

(4) A 2016 research report commissioned by the Equality and Human Rights Commission into the causes and motivations of hate crime.[64]

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57 HMICFRS, *Hate crime scoping study: A review of the police response to inform future inspection activity* (2017), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hate-crime-scoping-study.pdf.

58 HMICFRS, *Understanding the difference: The initial police response to hate crime* (2018), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf .

59 HMICFRS, *Hate crime: what do victims tell us? A summary of independent research into experiences of hate crime victims* (2018), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hate-crime-what-do-victims-tell-us.pdf .

60 HMIC, HMCPSI, *The poor relation: The police and CPS response to crimes against older people* (2019), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf.

61 See https://le.ac.uk/hate-studies/research/the-leicester-hate-crime-project/our-reports.

62 See http://www.sussex.ac.uk/psychology/sussexhatecrimeproject/.

63 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017), available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

64 M A Walters, A Brown, S Wiedlitzka, "Causes and Motivations of Hate Crime", *Equality and Human Rights Commission Research report 102* (2016), available at https://www.equalityhumanrights.com/sites/default/files/research-report-102-causes-and-motivations-of-hate-crime.pdf.

1.73 These reports have been important sources for the development of our proposals for reform in this paper.

1.74 There have also been important independent research studies conducted by charitable organisations such as Citizens UK[65] and Dimensions UK[66] which we consider through this paper.

Related Law Commission Projects: Harmful Online Communications

1.75 In addition to our review of hate crime, we are currently undertaking another important consultation into Harmful Online Communications, following a 2018 Scoping Report.[67] This falls within wider government efforts to tackle online harms.[68] There is overlap between the Harmful Online Communications review and this hate crime review, but the substance of the law that is being considered is different.

1.76 The Harmful Online Communications review is considering the details of the "communications offences" in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. Those who commit these offences sometimes are also committing "hate crimes"; approximately 7% of these prosecutions are recorded as such, and online abuse is a large and growing concern amongst groups who experience hate crime and hate speech.[69] However, unlike the offence of stirring up hatred (that we consider in this review), the communications offences are not exclusively related to hate crime, and have wider application.

1.77 In the Harmful Online Communications consultation paper,[70] we express concern that the threshold of "grossly offensive" in these offences is too vague and criminalises conduct which does not necessarily cause harm or pose a risk of causing harm. At the same time, we note that there are significant gaps where the law does not adequately cover genuinely harmful communications (such as "cyber-flashing" or "pile-on harassment"). We make proposals to improve the protection afforded to victims by the criminal law, while at the same time providing better safeguards for freedom of expression.

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65 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020), available at https://d3n8a8pro7vhmx.cloudfront.net/newcitizens/pages/3760/attachments/original/1599728331/Academic_Report_V.6_-_web_compress_3.pdf?1599728331&fbclid=IwAR1KQPCyfUVA7HSRXC0rxWKyN7fcd8YdAJ5ye6pNLKOPjYBz-m5nff6rhAI.

66 Dimensions UK, *#ImWithSam: People with learning disability and autism's perceptions and experiences of crime and abuse* (2019) available at https://www.dimensions-uk.org/wp-content/uploads/ImWithSam-Perceptions-and-experiences-of-learning-disability-and-autism-law-commission-report.pdf.

67 Abusive and Offensive Online Communications: Scoping Report (2018) Law Com No 381.

68 See https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response#executive-summary

69 Crown Prosecution Service, *Hate Crime Report 2017/*18 (October 2018), p.18-19, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf.

70 Harmful Online Communications: The Criminal Offences (2020) Law Com Consultation Paper 248. The consultation closes on 18 December 2020 and the Consultation Paper is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf.

1.78 We will seek to ensure that final recommendations in each project are informed by the findings of both.

THE STRUCTURE OF THIS CONSULTATION PAPER

1.79 This consultation paper is divided into two parts. The first part considers the historical and theoretical foundations of hate crime and hate speech laws, and describes current law and practice. The second part describes the feedback from stakeholders, our analysis of the issues identified with the current law, and some provisional proposals for reform. The chapter structure is as follows:

Part 1: History and context

- Chapter 2 outlines the historical development of hate crime laws
- Chapter 3 considers the rationales for hate crime and hate speech laws
- Chapter 4 describes the current law
- Chapter 5 outlines data concerning hate crime prevalence, and the profile of victims and perpetrators
- Chapter 6 considers the operational response to hate crime
- Chapter 7 outlines the key findings of research into the experiences of hate crime victims

Part 2: Analysis and options for reform

- Chapter 8 describes our provisional evaluation of current hate crime laws
- Chapter 9 sets out, in broad terms, our provisional proposals for reform
- Chapter 10 considers how hate crime characteristics should be selected
- Chapter 11 considers the current hate crime characteristics and whether the definitions are appropriate
- Chapter 12 considers whether and how gender or sex should be incorporated into hate crime laws
- Chapter 13 considers whether age characteristics should be incorporated into hate crime laws
- Chapter 14 considers other characteristics or groups that have been suggested for inclusion: “sex workers”, “alternative subcultures”, “people experiencing homelessness” and “philosophical beliefs”.
- Chapter 15 considers the legal test that should apply when considering whether an offence is a “hate crime”.

- Chapter 16 considers the current law in relation to “aggravated offences” and how it might be reformed
- Chapter 17 considers the current law in relation to “enhanced sentencing” and how it might be reformed
- Chapter 18 considers the offences of “stirring up hatred”
- Chapter 19 considers football chanting offences
- Chapter 20 looks at whether there is a need for a Hate Crime Commissioner to help coordinate a more consistent national response

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1.80 To better understand the lived experiences of hate crime, and its practical challenges, we have engaged in an extensive pre-consultation process.

1.81 We are grateful to everyone who has contributed to this work, and would like to particularly thank the hate crime policy team in the CPS, and Citizens UK, who have helped facilitate a significant amount of our public engagement.

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1.83 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: Martin Wimpole, and Robert Kaye (team lawyers), F Carey, Katrina Walcott, Rebecca Cohen (research assistants), Dr Elaine Freer (consultant lawyer), and David Connolly (Head of Criminal Law Team).

PART 1: HISTORY AND CONTEXT

Chapter 2: The development of hate crime laws

INTRODUCTION

2.1 Most developed countries have a legislative response to offences committed against individuals related to their personal characteristics. These legislative responses vary between jurisdictions, both in terms of what they criminalise, and how they operate. This chapter explores the approaches taken across several jurisdictions, focussing initially on the legislative evolution in England and Wales. It is intended to provide an overview of how the current legal and operational context has arisen in England and Wales, to inform more detailed policy discussion in later chapters.

GLOBAL DEVELOPMENT OF HATE CRIME LAWS OVER RECENT DECADES

2.2 Broadly speaking, hate crime laws that have developed in recent decades have taken two main forms. Firstly, the creation of specific offences of hate crime or a harsher sentencing regime, where it can be shown that the offence was related to the victim's membership or presumed membership of a particular group. Second, the creation of hate speech offences, criminalising incitement of hatred.

2.3 Some jurisdictions have opted for one or the other of these measures, whilst others – such as England and Wales – have a combination of the two. Below we consider the applicable laws in several jurisdictions that are broadly comparable to England and Wales.

2.4 A key driver of hate crime legislation was the rise of fascism and the aftermath of the Second World War. In 1936, the UK's Public Order Act, intended to deal with fascist organisations, was passed within a few weeks of the "Battle of Cable Street".[1] Section 5, which prohibited the use of threatening, abusive or insulting words or behaviour likely to cause a breach of the peace, was to form the basis of offences of stirring up hatred passed since 1965. It also informed the wording and scope of legislation against incitement to hatred in countries including New Zealand,[2] Malta,[3] and Ireland.[4] Although intended to target antisemitic hatred,[5] it focused specifically on the potential for violent consequences rather than the stirring up of hatred.

2.5 By contrast, in April 1939, the French Government amended the Press Law 1881 by decree, to prohibit "defamation or insults, whether against groups or individuals of

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1 In October 1936, a planned march by the British Union of Fascists through Shadwell, an area of London with a significant Jewish population, had resulted in violent confrontations between anti-fascist demonstrators and police who had been sent to facilitate the march.

2 Human Rights Act 1993, s 131 (inciting racial disharmony).

3 Criminal Code Article 82A.

4 Prohibition of Incitement to Hatred Act 1989, s 2.

5 HC Debs, 16 Nov 1936. Home Secretary Sir John Simon: "Under this provision there may be cases such as some which have taken place within the memory of hon. Members – some which have recently been dealt with by Metropolitan police magistrates – in which the most violently abusive language has been used, say, in a Jewish quarter for the purpose of arousing racial feeling".

certain origin, race or religion, aimed at provoking hatred among citizens or inhabitants". Again, although framed in general terms, this was aimed at antisemitic propaganda.[6]

2.6 Following the war, Germany's Criminal Code introduced new laws banning Nazi rhetoric and symbols and, in 1960, incitement of hatred towards racial or religious groups, and group defamation. [7] Since 1985 this has been extended to holocaust denial.[8]

2.7 A series of other countries made similar changes to their criminal codes. By 1969, twenty-seven countries had signed the UN Convention on Elimination of All Forms of Racial Discrimination (CERD), enabling the Convention to come into effect. This included a requirement to criminalise incitement of racial hatred.[9] By this point, the United Kingdom had already passed legislation outlawing incitement of racial hatred.[10]

2.8 In the United States, however, the First Amendment to the Constitution has effectively prohibited hate speech laws,[11] and the USA derogated from the CERD requirement to criminalise incitement of hatred.

2.9 The Civil Rights Act 1968 therefore adopted a different approach, aimed at preventing the use of violence to undermine the anti-discrimination and desegregation measures in the Civil Rights Act 1964. It initially only covered the use of violence or intimidation, directed at a person on account of their race, colour or religion, when engaging in a "federally protected activity" (such as accessing education or transport), although this was expanded substantially in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act 2009. Breich links the USA's laws on enhanced sentencing directly to the challenges to hate speech laws posed by the First Amendment:

> Between 1960 and 1990, in particular, many countries enacted specific laws against forms of racist speech such as incitement to racial hatred and Holocaust denial… In the domain of incitement, the US has been the exception to this international rule by progressively elevating the value of free speech over protections against racist language.… laws against hate crimes punish the underlying crime (such as vandalism or assault), but then supplement the sentence with an additional penalty for the perpetrator's racist opinion when it serves as a motive for the crime. In this domain,

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6 "Jail Terms, Heavy Fines Set by French Decree Banning Anti-Jewish Agitation" (26 April 1939), *Jewish Telegraphic Agency News*, available at https://www.jta.org/1939/04/26/archive/jail-terms-heavy-fines-set-by-french-decree-banning-anti-jewish-agitation.

The decree was repealed by the Vichy Government in 1940, and reinstated in 1944. 21 avril 1939 : Le décret-loi Marchandeau – L'antiracisme dans la loi. https://archives.licra.org/21-avril-1939-le-decret-loi-marchandeau-lantiracisme-dans-la-loi.

7 German Criminal Code, ch 7, s 130

8 E Bleich, "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies" (2011) 37 *Journal of Ethnic and Migration Studies* 917.

9 Several countries, including the UK, Switzerland, Austria, Belgium, France, Japan, Italy, and Ireland made reservations in respect of this requirement, recognising the requirement as implying only measures compatible with the requirements of freedom of expression and association under the Universal Declaration of Human Rights.

10 Race Relations Act 1965, s 6.

11 G R Stone, "Hate Speech and the US Constitution" (1994) 3 *East European Constitutional Review* 78.

the US has been at the forefront of developing legislation, with European countries more recently following suit.[12]

2.10 Several other countries legislated over this period to treat crimes motivated by racial hostility more severely. Subsequently hostility on other grounds such as sexual orientation and disability were also included. In England and Wales, this was first reflected in the Crime and Disorder Act 1998 for crimes aggravated by racial and religious hostility.

LEGISLATIVE DEVELOPMENT IN ENGLAND AND WALES

2.11 There are currently three types of statutory provision that address hate crime:

(1) Aggravated offences, consisting of the commission of a "base" offence, where either the offence is motivated by, or the offender demonstrates, hostility against specified groups.[13] These are discussed in Chapter 16.

(2) "Enhanced sentencing": provisions that, without creating new offences or altering the sentencing powers for existing offences, require that courts should, when determining sentence, take due account of the offence's motivation by or the offender's demonstration of hostility against a specified group and, must enhance the sentence within those powers.[14] These are discussed in Chapter 17.

(3) Public order offences connected with the stirring up of hatred against specified groups.[15] These are discussed in detail in Chapter 18.

2.12 Some of these provisions replace previous legislation, and other provisions have been amended over time to enlarge their protection to further groups. The timeline for these developments is set out below. Repealed provisions are shown in italics.

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12 E Bleich, "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies" (2011) 37 *Journal of Ethnic and Migration Studies* 917.

13 Crime and Disorder Act 1998, ss 29 to 32.

14 Sections 145 and 146 of the Criminal Justice Act 2003.

15 Sections 18 to 23 and 29A to 29G of the Public Order Act 1986.

Timeline

1965: *Race Relations Act 1965 section 6: incitement to racial hatred*

1976: *Race Relations Act 1976 section 70, inserting new section 5A into Public Order Act 1936: incitement to racial hatred*

1986: Public Order Act 1986 sections 18 and following: stirring up racial hatred

1998: Crime and Disorder Act 1998: racially aggravated forms of certain offences (assault, criminal damage, public order, harassment); *enhanced sentences for racial hostility*

2001: Anti-terrorism, Crime and Security Act 2001: amends Crime and Disorder Act 1998 to include religiously aggravated forms *and enhanced sentences for religious hostility*

2003: Criminal Justice Act 2003: enhanced sentences for racial or religious hostility (replacing existing provisions), disability or sexual orientation (new); enhancement when setting minimum custodial term for murder motivated by or the offender demonstrating hostility on the basis of race, religion or sexual orientation

2006: Racial and Religious Hatred Act 2006: amends Public Order Act 1986 to include stirring up religious hatred

2008: Criminal Justice and Immigration Act 2008: further amends Public Order Act 1986 to include stirring up hatred on ground of sexual orientation

2012: Legal Aid, Sentencing and Punishment of Offenders Act 2012: amends Criminal Justice Act 2003 to include enhanced sentences for offences motivated by or the offender demonstrating hostility towards the victim being transgender, and when setting the minimum term for murder motivated by or the offender demonstrating hostility on the basis of disability or transgender identity.

OFFENCES OF STIRRING UP HATRED

2.13 The offences of stirring up hatred on the grounds of race, religion or sexual orientation are now contained within Parts 3 and 3A of the Public Order Act (POA) 1986. The earliest form of these offences was stirring up racial hatred, criminalised by the Race Relations Act 1965.

Racial hatred

2.14 Although the offence of inciting (later “stirring up”) racial hatred was only created in 1965, its origins lay in the earlier common law offence of sedition and the 1936 Public Order Act.

2.15 Until its abolition in 2009,[16] the common law offence of sedition included promoting hostility between different classes of His Majesty's subjects.[17] Thus, a paper falsely accusing a group of Portuguese Jews of killing a woman and child because the child's father was Christian amounted to sedition.[18]

2.16 In a 1983 case, the Court of Appeal, upholding a sentence for inciting racial hatred held that the conduct was "also contrary to the common law of England because it amounts to sedition, in the sense that it arouses hatred against one section of Her Majesty's subjects, which has always been an offence in this country".[19] However, case law had suggested that the offence must involve a tendency[20] or even an intention[21] to incite violence or public disturbance or disorder.[22]

2.17 In 1936, in the context of rising activity by British fascists (the "Battle of Cable Street" having happened a few weeks earlier), the Government introduced the Public Order Act, which prohibited quasi-military organisations and the wearing of uniforms in connection with political objects, granted police additional powers to control processions, and created an offence of "offensive conduct conducive to breaches of the peace".

2.18 This last measure was based on an existing local provision under the Metropolitan Police Act 1839. Its importance in relation to the later stirring up offences is that it introduced the requirement that "threatening, abusive or insulting" words or behaviour be used, which was subsequently included in the offence of stirring up racial hatred.

Race Relations Act 1965

2.19 The Race Relations Act 1965 was enacted against a background of African-Caribbean immigration in the 1950s and 1960s, the Notting Hill race riots in 1958[23] and the Bristol bus boycott in 1963.[24] Section 6 read:

> (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins —
>
> > (a) he publishes or distributes written matter which is threatening, abusive or insulting; or

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16 Coroners and Justice Act 2009, s 73(a).

17 Stephen's Digest of the Criminal Law, Art 114.

18 *R v Osborne* 25 Eng. Rep. 585 (1732).

19 *R v Edwards* (1983) 5 Cr App R (S) 145.

20 *R v Osborne*, 25 Eng. Rep. 585 (1732).

21 *R v Gaunt*, 64 LQR 203 (1948).

22 See also the Canadian case of *Boucher v R* [1951] 2 DLR 369, pp 382 to 4.

23 A Ashworth (2010) *Sentencing and Criminal Justice* (5th ed) p 80.

24 "Bus Boycott by West Indians: Company's Refusal to Employ Man" (3 May 1963), *The Times*.

(b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

2.20 In other words, the conduct must have been both intended and likely to stir up racial hatred.

Race Relations Act 1976

2.21 The offence was amended in 1976. In his inquiry into the 1974 racial disturbances in Red Lion Square, which culminated in the death of a student, Sir Leslie (later Lord) Scarman described the existing legislation as:

> merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is useless to a policeman on the street.[25]

2.22 The Race Relations Act 1976 repealed section 6 of the Race Relations Act 1965 and inserted a new section into the Public Order Act 1936:

> 5A(1) A person commits an offence if—
>
> (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
>
> (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,
>
> in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

2.23 This differs from the 1965 provision, in that the likelihood of stirring up racial hatred was sufficient: there was no requirement of intention to do so. However, subsection (3) provided that it was a defence if the accused was not aware of the content of the written matter in question and neither did suspect, nor had reason to suspect, it of being threatening, abusive or insulting.

2.24 In the second reading debate, the Home Secretary, Roy Jenkins, explained that the reason for the removal of the requirement of intention was that section 8 of the Criminal Justice Act 1967 abolished the presumption that a person intends the natural and probable consequences of his act. To a large extent, therefore, the change merely restored the position to what it was when the offence was created in 1965.

2.25 The 1976 Act also amended the definition of racial hatred to include nationality and citizenship (reversing the House of Lords' ruling in *Ealing LBC v Race Relations Board*[26] that "national origins" did not encompass nationality).[27]

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25 Sir Leslie Scarman (1974), The Red Lion Square Disorders of June 15 1974.

26 *Ealing London Borough Council v Race Relations Board* (1972) AC 342.

27 Race Relations Act 1976, ss 3(1) and 70(2).

Public Order Act 1986

2.26 The present provisions on stirring up hatred are contained in the POA 1986. This was the product of a comprehensive reconsideration of the Public Order Act 1936, which was not confined to the issue of racial hatred. The main body of the Act followed the recommendations in our public order report,[28] which did not address hatred offences.

2.27 The review started with a Green Paper.[29] This said that the existing provision (section 5A of the Public Order Act 1936, as inserted by the Race Relations Act 1976) was regarded as ineffective, as there was still material circulating which was highly offensive to ethnic minority communities but that fell just within the law.

2.28 The Council for Racial Equality ("CRE") had proposed an offence of "uttering at a public meeting or the publishing of words, which, having regard to all the circumstances, expose any racial group in Great Britain to hatred, ridicule or contempt". The CRE argued that the existing offence was inadequate: acquittals had been secured by arguing that an audience was already so corrupted that hatred could not be stirred up, and also by the production of witnesses to show that the words spoken were so extreme as to be counter-productive and to produce sympathy rather than hatred.[30]

2.29 The White Paper,[31] however, reaffirmed that the law should not punish the expression of offensive views simply as such, and should continue to be based on considerations of public order. It acknowledged the point about the effect of material on different audiences, but pointed out that:

(1) material originally aimed at audiences unlikely to be inflamed, such as clergy and Members of Parliament, could find its way to other audiences; and

(2) even audiences already holding racialist views can be incited to further hatred and acts of violence.

2.30 It was suggested that the section should be drafted to catch conduct which is either likely *or* intended to stir up racial hatred and that the existing exemption for material circulated within an association should be removed.

2.31 During its passage through committee in the House of Commons, the Public Order Bill was extensively amended.[32] New offences which had been created to deal with racially inflammatory material in plays (following the end of theatre censorship in 1968) and broadcasts (introduced in 1984 as part of new measures to encourage cable broadcasting) were moved into the Public Order Act and brought into line with the recast offence. The Government undertook to include provision for sound and video recordings.

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28 Criminal Law: Offences Relating to Public Order (1983) Law Com 123.

29 Review of the Public Order Act 1936 and related legislation (1980) Cmnd 7891 paras 104.

30 The Law Relating to Public Order, Fifth report from the Home Affairs Committee (1979-80), HC 756 para 95.

31 Review of Public Order Law (1985) Cmnd 9510, paras 6.5 to 6.12.

32 A T H Smith, *Offences Against Public Order* (1st ed 1987) para 9-01. The effect of these amendments was summed up in the third reading debate, *Hansard* (HC) 30 Apr 1986, vol 96, col 1064.

2.32 The police were given a power of immediate arrest,[33] and the scope of the words and behaviour offence was extended to private as well as public places.[34] A new offence of possession of racially inflammatory material was introduced.

2.33 The cumulative result of these amendments is that, in the Act as it exists today:

(1) the words or material must be threatening, abusive or insulting;

(2) it is sufficient if *either* the defendant intends to stir up hatred *or* hatred is likely to be stirred up;[35] but in the second case there is a defence if the defendant did not intend the words or material to be, and was not aware that they might be, threatening, abusive or insulting;[36]

(3) the words or behaviour need not be in public, but there is a defence if they were in a private dwelling house and the defendant had no reason to believe that they would be seen or heard from outside.

Religious hatred – added in 2006

2.34 Incitement to religious hatred was added to the POA 1986 by the Racial and Religious Hatred Act 2006. The possibility of such an offence had been canvassed in the debates on earlier Bills relating to racial hatred (the Bills that became Race Relations Act 1965, Race Relations Act 1976, Public Order Act 1986, Crime and Disorder Act 1998, Anti-Terrorism, Crime and Security Act 2001, and Serious Organised Crime and Police Act 2005).

Anti-Terrorism, Crime and Security Act 2001

2.35 Following the attacks of 11 September 2001, the Government tabled measures in the Anti-Terrorism, Crime and Security Bill to extend the offences in sections 17 to 23 to cover religious hatred. This received criticism within Parliament, including from the Home Affairs Committee; and from Muslim groups, which, having lobbied for the extension, were troubled by its inclusion in a Bill concerning terrorism.

2.36 A key issue for opponents was a fear that without a requirement for intent, and with the offence being capable of being committed by the use of merely "insulting" words, (which need not be directed at a person) legitimate criticism of religions could be caught by the new offence.

2.37 An amendment was proposed (but later withdrawn) to extend the offences to "hatred against a group of persons or individuals defined by reference to their age, disability, gender, race, religion or sexuality".[37] Lord Lester, at report stage, argued that the Bill was not the right place to be dealing with religious hatred, and that there should be a

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33 *Hansard* (HC), 30 Apr 1986, vol 96, cols 1054 to 1056.

34 *Hansard* (HC), 30 Apr 1986, vol 96, cols 1053 to 1054.

35 Amendment made 30 Apr 1986: *Hansard* (HC), 30 Apr 1986, vol 96, col 1050.

36 Public Order Act 1986, s 18(5).

37 *Hansard* (HC), 26 Nov 2001, vol 375, cols 673 to 718.

separate Bill, also addressing religious discrimination and the abolition of blasphemy, and preferably hatred against gay and lesbian people.[38]

2.38 When the clauses extending the law in this way were removed by the House of Lords, the Government accepted the amendment.[39]

Racial and Religious Hatred Act 2006

2.39 In 2006, the Government tabled a self-contained Racial and Religious Hatred Bill, having included the proposal in the 2005 Labour manifesto.

2.40 The House of Lords did not block the legislation, but amended it to a higher standard requiring intention to incite hatred and restricted to the use of threatening words or behaviour. Despite Government opposition to the amendment, the House of Commons voted to accept it. The Lords also successfully inserted a "freedom of speech clause", section 29J, which circumscribed the application of the offence, providing

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Hatred on the ground of sexual orientation – added in 2008

2.41 In the debates on the Racial and Religious Hatred Bill, the Government was asked if it would consider extending the provision to take into account hatred against people on the ground of their sexual orientation.[40] Home Secretary Charles Clarke said that that Bill was not the place to consider the issue, as new characteristics should be considered narrowly and one at a time.

Criminal Justice and Immigration Act 2008

2.42 In 2007, the Government brought forward proposals to outlaw stirring up hatred on grounds of sexual orientation. At committee stage for the Criminal Justice and Immigration Bill, then in the House of Commons,[41] the Government proposed an amendment introducing offences of stirring up hatred on the ground of sexual orientation. They were created by inserting "or hatred on the ground of sexual orientation" after "religious hatred" whenever those words occurred in Part 3A of the POA 1986. Accordingly, as with the religious hatred offences, the words or behaviour had to be threatening (not abusive or insulting), and there had to be intent. The principle

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38 *Hansard* (HL), 10 Dec 2001, vol 629, col 1169.

39 A further attempt to extend the law failed in 2005 when the provisions were re-tabled in the Serious Organised Crime and Police Bill. In order to ensure passage of its legislation before the General Election in June 2005, the Government accepted Lords' amendments removing the provisions relating to religious hatred.

40 Second reading, Lynne Jones, *Hansard* (HC), 21 Jun 2005, vol 435, col 669.

41 Public Bill Committee, *Hansard* (HC), 29 Nov 2007, cols 681 to 710.

of the legislation was accepted by all parties. The amendments inserting the section and schedule creating the new offences were agreed to.[42]

The amendment introducing a protection for freedom of expression

2.43 In a later committee debate, an amendment was proposed to incorporate a clause protecting freedom of expression in a similar way to section 29J POA 1986.[43] It was later withdrawn.[44] In committee in the House of Lords, former Home Secretary Lord Waddington moved an amendment similar to that in the Commons,[45] but that was also later withdrawn, and the schedule containing the new offences was agreed to.[46]

2.44 At report stage,[47] Lord Waddington again introduced an amendment inserting a clause protecting freedom of expression.[48] This read:

> For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening.

2.45 Unlike the previous versions, this wording only clarified the meaning of the word "threatening" and would not provide a defence for any instances of words or conduct that had already been found to be threatening.

2.46 On a vote, the amendment was passed. The House of Commons disagreed with the Lords' amendment,[49] but the House of Lords insisted on it.[50] On a vote, the House of Lords maintained their amendment and Lord Waddington's wording is now contained in section 29JA of the POA 1986.

Hatred on the ground of transgender status – proposed in committee but withdrawn

2.47 In the Commons committee debates on the Criminal Justice and Immigration Act 2008, an amendment was proposed adding offences stirring up hatred on the ground of transgender status.[51] This was not debated and was withdrawn.

2.48 At third reading in the Commons,[52] it was argued that it was illogical to introduce the measures about incitement to hatred on the ground of sexual orientation without also including transgender status.

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42 Public Bill Committee, *Hansard* (HC), 29 Nov 2007, col 692.

43 *Hansard* (HC), 9 Jan 2008, vol 470, col 441.

44 *Hansard* (HC), 9 Jan 2008, vol 470, col 455.

45 *Hansard* (HL), 3 Mar 2008, vol 699, col 923.

46 *Hansard* (HL), 3 Mar 2008, vol 699, col 943.

47 *Hansard* (HL), 21 Apr 2008, vol 700, cols 1363 to 1377.

48 *Hansard* (HL), 21 Apr 2008, vol 700, col 1365.

49 *Hansard* (HC), 6 May 2008, vol 475, cols 599 to 625. See col 599.

50 *Hansard* (HL), 7 May 2008, vol 701, cols 594 to 613.

51 *Hansard* (HC), 9 Jan 2008, vol 470, col 437.

52 *Hansard* (HC), 9 Jan 2008, vol 470, cols 484 to 485.

2.49 In the Commons' consideration of Lords amendments, Evan Harris MP expressed concern that the Bill did not cover transphobic hatred, stating:

> the bigots out there who do intend to stir up hatred using threatening language against gay people do not make a distinction between people with transgender or homosexual tendencies, so the mischief could exist in both those regards. The same protection should be given in both such cases, and I regret the fact the Government have not taken the opportunity to do that.[53]

AGGRAVATED OFFENCES

2.50 Although any offence may be "aggravated" in the sense that there may be factors increasing an offender's culpability or leading to a more severe penalty, in this consultation paper we use the term "aggravated offences" to refer to the statutory aggravated forms of assault, criminal damage, public order offences and harassment offences created by the Crime and Disorder Act 1998. This aggravation can be either racial or religious.

2.51 The racially aggravated offences were introduced in the Crime and Disorder Act 1998 ("CDA 1998"). Religious aggravation was added by the Anti-terrorism, Crime and Security Act 2001.

Crime and Disorder Act 1998

2.52 The Labour Party's 1997 manifesto had included commitments to "create a new offence of racial harassment and a new crime of racially motivated violence to protect ethnic minorities from intimidation".[54] Accordingly, the Crime and Disorder Bill included a suite of new racially aggravated offences covering assaults, harassment, criminal damage and public order offences. These are detailed further in Chapter 16.

Anti-terrorism, Crime and Security Act 2001

2.53 The extension of the aggravated offences under the CDA 1998 to religious aggravation was part of a package of measures introduced by the Anti-terrorism, Crime and Security Act 2001.

2.54 The main argument raised was the anomaly that some religious groups, such as Jews and Sikhs, which were also ethnic groups, had the protection of the racially aggravated offences which was not available to multi-ethnic religions, such as Christianity and Islam.[55] In debate in the House of Lords, Lord Harris observed that, since 11 September 2001, many incidents had been motivated by religious, rather than racial hatred.[56]

ENHANCED SENTENCING

2.55 The final legislative framework in relation to hate crime is the sentencing provisions in the Criminal Justice Act 2003 ("CJA 2003"). They are somewhat different to the

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53 *Hansard* (HC), 6 May 2008, vol 475, col 617.

54 Labour Party (1997), "New Labour, because Britain deserves better".

55 *Hansard* (HL), 27 Nov 2001, vol 629, col 150.

56 *Hansard* (HL), 27 Nov 2001, vol 629, col 257.

aggravated and stirring up offences set out above, as they do not create new offences, or increase the maximum sentence available for any offence to reflect aggravation on the ground of hostility. They simply state that hostility against specified groups is an aggravating factor to be taken into account in setting sentences within the normal range applicable for the offence in question. This applies to the sentencing for all offences, with a saving to avoid duplication in the case of the racially and religiously aggravated offences under the CDA 1998.

2.56 Before the CDA 1998, the courts had already acknowledged racial motivation as an aggravating factor in sentencing. In *Attorney General's Reference (Nos 29, 30 and 31 of 1994)*, also known as *Ribbans*, *Duggan and Ridley*,[57] three men who had stabbed and deliberately run over a black man while shouting racial abuse were convicted of causing grievous bodily harm with intent.[58] They were sentenced to five years and three years respectively; the Attorney General successfully applied for review of the sentences, and the sentences were increased to seven years and five years (the maximum sentence for the offence is life imprisonment). The Lord Chief Justice held

> It cannot be too strongly emphasised by this Court that where there is a racial element in an offence of violence, that is a gravely aggravating feature... We take the view that it is perfectly possible for the Court to deal with any offence of violence which has a proven racial element in it, in a way which makes clear that that aspect invests the offence with added gravity and therefore must be regarded as an aggravating feature.

2.57 The CDA 1998 introduced enhanced sentencing for offences where the offender was motivated by or demonstrated hostility on the basis of race at the same time as the specific racially aggravated forms of assault, wounding/grievous bodily harm, criminal damage, harassment and public order offences.

2.58 This became section 82 of the Act. Section 82 was repealed and re-enacted as section 153 of the Powers of Criminal Courts (Sentencing) Act 2000, which was a consolidating statute.

2.59 The Anti-terrorism, Crime and Security Act 2001 added the words "or religious" to section 153 at the same time as making the same amendment to the specific aggravated offences. The CJA 2003 repealed and re-enacted that section as section 145. The 2003 Act also included a new section 146, making similar provision for hostility on the ground of sexual orientation or disability.

2.60 Finally, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended section 146 to include hostility to transgender people. The regime of enhanced sentencing is therefore the widest of the legislative frameworks (aggravated offences, enhanced sentencing and stirring up offences), as it covers hostility on five grounds.

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57 (1995) 16 Cr App R (S) 698. These offences preceded the CDA 1998, but it remains the case that there is no aggravated offence of causing GBH with intent, since the maximum penalty for the non-aggravated offence is already life imprisonment.

58 Contrary to the Offences Against the Person Act 1861, s 18. Note that there is currently no aggravated version of this offence, principally because the maximum penalty is life imprisonment. We discuss this further in Chapter 16.

Special provision for murder

2.61 Schedule 21 to the CJA 2003 also formalised arrangements whereby, when sentencing a person to a mandatory life sentence for murder, a court would set a minimum term to be served. Paragraph 5 of that schedule provided that, where the murder is racially or religiously aggravated or aggravated by sexual orientation, the appropriate starting point for determining the minimum term should be 30 years. This is still in force, and aggravation by disability or transgender identity has now been added to the list.[59]

OTHER JURISDICTIONS WITHIN THE UK

2.62 It is important to recognise that hate crime laws have not developed uniformly across the United Kingdom, especially since devolution to the Scottish Parliament and Northern Ireland Assembly. This enables us to compare the experience of England and Wales not only with overseas jurisdictions, but also with the other jurisdictions within the UK.

Northern Ireland

2.63 The current legislative regime in Northern Ireland is similar to that in England and Wales, though there are key differences, notably the lack of protection for transgender people, and the use of enhanced sentencing only, with no equivalent of the aggravated offences found in the CDA 1998 in England and Wales.

2.64 Northern Ireland has an almost identical equivalent of England and Wales' stirring up offences contained within sections 8 to 17 of Part III of the Public Order (Northern Ireland) Order 1987. However, the scope of the stirring up offences in Northern Ireland is broader, as they include not just race, religion and sexual orientation (as in England and Wales) but also extend to disability.[60]

2.65 There is also a lower threshold test in Northern Ireland, with "threatening, abusive or insulting" behaviour being sufficient for the offence against any of the protected groups.[61]

2.66 In relation to enhanced sentencing, since September 2004, when the Criminal Justice (No 2) (Northern Ireland) Order came into force, section 2 of that Order has allowed for an increase in sentence where the offender demonstrated hostility[62] on the grounds of a protected characteristic at the time of the offence, or the offence was motivated wholly or partly by hostility to that characteristic.[63]

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59 Criminal Justice Act 2003, sch 21, para 5(2)(g). Disability and transgender identity were added by section 65(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 3 Dec 2012. The meaning of aggravation on grounds of sexual orientation, disability or transgender identity is to be taken from s 146 of the CJA 2003: see sch 21, para 3 of the CJA 2003.

60 Section 8 Public Order (Northern Ireland) Act 1987 as amended by the Criminal Justice (Northern Ireland) Order 2004, s 3.

61 Section 9 Public Order (Northern Ireland) Act 1987.

62 Sections 2(3)(a)(i) to (iv).

63 Sections 2(3)(b)(i) to (iv).

2.67 The protected characteristics are race, religion, disability and sexual orientation.

2.68 In June 2019 the Northern Ireland Department of Justice announced a review of hate crime legislation, to be carried out by Deputy County Court Judge Desmond Marrinan.[64] The aims of the review are to examine:

(1) a workable and agreed definition of a hate crime;

(2) whether the current enhanced sentence approach is appropriate for Northern Ireland;

(3) whether new categories of hate crime should be created for characteristics such as gender and any other characteristics (which are not currently covered);

(4) the implementation and operation of the current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987 and make recommendations for improvements;

(5) how any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework ensuring this interacts effectively with other legislation guaranteeing human rights and equality; and

(6) whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

2.69 A consultation paper was published in January this year.[65]

Scotland

2.70 Scotland's hate crime laws are also similar to those in England and Wales. The offences of stirring up racial hatred apply across England, Wales and Scotland. The Crime and Disorder Act 1998, which contains the racially and religiously aggravated offences applicable to England and Wales also contains provision for the racial aggravation of offences in Scotland, in section 96.

2.71 These offences preceded Scottish devolution. Since 1999, criminal justice is a devolved matter and while the Westminster Parliament has the right to legislate, it will not normally do so without the consent of the Scottish Parliament.

2.72 Sentencing enhancement is provided for in Scotland in cases of religious aggravation by section 74 of the Criminal Justice (Scotland) Act 2003.[66] As with the racially aggravated offences in section 96 of the CDA 1998, it is drafted with reference to

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64 *Review of Hate Crime Legislation launched* (June 2019), available at https://www.justice-ni.gov.uk/news/review-hate-crime-legislation-launched.

65 *Hate Crime Legislation in Northern Ireland: an independent review. Consultation Paper* (January 2020), available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020.pdf.

66 J Chalmers and F Leverick (2017) *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review*, University of Glasgow, pp 10 and 56.

groups: in this case, a "religious group", or a "social or cultural group with a perceived religious affiliation". A religious group is:

> a group of persons defined by reference to their
>
> (a) religious belief or lack of religious belief;
>
> (b) membership of or adherence to a church or religious organisation;
>
> (c) support for the culture and traditions of a church or religious organisation; or
>
> (d) participation in activities associated with such a culture or such traditions.

2.73 This provision appears to reflect concerns with a wider issue of sectarianism in Scotland. While its importance may be declining, sectarianism between Catholics and Protestants – especially in the West of Scotland – has been a markedly more significant social divide than in most areas of England and Wales.[67] While the sectarian divide is partly religious, it also reflects nationalist, social and political divides, often between "native" and Ulster Scots on the one hand, and "Irish Scots" on the others; and between supporters of Unionism and Irish Republicanism. (We discuss whether sectarianism should be treated as a distinct protected characteristic from religion in Chapter 11, and the relationship between sectarianism and football in Scotland in Chapter 19.)

2.74 Later, the Offences (Aggravation by Prejudice) (Scotland) Act 2009,[68] was enacted,[69] which provides for sentence enhancement in respect of crimes aggravated by prejudice against disability,[70] sexual orientation[71] and transgender identity.[72]

2.75 Scotland's laws adopt a legal test similar to that in England and Wales, though different terminology is used. It is fulfilled where the offender "evinces... malice and ill-will based on the victim's membership (or presumed membership) [of a protected group, or] the offence is motivated (wholly or partly) by malice and ill-will towards [members of the protected group]".

2.76 Although the offence of stirring up racial hatred applies in Scotland, there is no equivalent for religious hatred or hatred on grounds of sexual orientation. In 2012, the

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67 However, there is a history of sectarianism in some Northern English cities and towns with significant populations of Irish and Northern Irish heritage such as Liverpool and Manchester.

68 Detailed discussion surrounding the principles of the Bill can be found in Justice Committee, Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill (6th Report, 2009).

69 J Chalmers and F Leverick, (2017) *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review*, University of Glasgow, p 11.

70 Defined as a "physical or mental impairment of any kind": s 1(7). Section 1(8) adds that "a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment".

71 Defined as "sexual orientation towards persons of the same sex or of the opposite sex or towards both": s 2(7).

72 Defined as "(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or (b) any other gender identity that is not standard male or female gender identity".

Scottish Parliament passed legislation[73] which, among other things, prohibited communications intended to stir up religious hatred, and behaviour at football matches likely to incite public disorder and stir up hatred on grounds of race, religion, sexual orientation, transgender identity, or disability. (The football provisions are discussed further in Chapter 19.) The communications offence included a similar "free speech" provision as its English equivalent, exempting from the offence discussion or criticism of religions or the beliefs or practices of adherents of religions; expressions of antipathy, dislike, ridicule, insult or abuse towards those matters; proselytising; and urging adherents of religions to cease practising their religions. However, the provisions in the Act related to football proved controversial and the whole Act, including the stirring up provisions, was repealed in 2018.

2.77 Scotland has very recently reviewed its own hate crime laws, in an extensive project announced in January 2017 by the Scottish Government. Its Chair, Lord Bracadale, published his final Report on 31st May 2018.[74]

2.78 This report[75] recommended an enhanced sentencing regime that could in theory apply to any offence and maintaining demonstration of, and motivation by, hostility as the "thresholds".[76]

2.79 Lord Bracadale also recommended enacting "stirring up of hatred" offences extending to all protected characteristics. He also recommended that the elements of the offence be the same regardless of the characteristic, and that if any new protected characteristics were brought in then the stirring up offences should be extended to cover them as well.[77]

2.80 Lord Bracadale recommended adding both gender[78] and age[79] to the protected characteristics. Although he considered the addition of protected characteristics of immigration status, socio-economic status and Gaelic speakers, he did not recommend that any of those groups, or any others, be covered.[80]

2.81 Separate from the hate crime regime, Lord Bracadale also recommended that there be a provision for offences involving exploiting vulnerability to result in an enhanced sentence.[81]

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73 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

74 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018).

75 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) pp vi to x

76 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 17.

77 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) pp 56 to 68.

78 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 43.

79 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) pp 44 to 49.

80 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) pp 50 to 54.

81 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018), pp 20 and 49.

OTHER COMMON LAW JURISDICTIONS

United States of America

2.82 The United States of America is a two-tier federal jurisdiction composed of individual states and the federal law. Each state has its own law-making powers, a degree of autonomy over the form and content of these laws, and its own court system. States have "plenary power" – that is, they have jurisdiction over any matter not granted to the federal Congress by the Constitution (and may make law over areas of federal competence which do not conflict with federal law).

2.83 Federal laws apply equally in all States. Crimes contrary to federal laws are tried in the federal courts – indeed, they can only be tried in the federal courts.

2.84 However, in general criminal law is a matter for the states, and the federal Congress may only make criminal law in relation to a matter within its own competence, for instance where the offence involves a federal official or property, involves crossing state borders, or affects national security or interstate commerce.

Federal hate crime laws

2.85 The first federal hate crime laws came into force in 1968.[82] Prior to that there had been no specific offences relating to targeting due to a personal characteristic. The earliest hate crime laws focused on racially-motivated offences, though they also encompassed discrimination on the basis of skin colour, religion or ethnicity. The protection of these offences only extended to instances where the victim was engaging in a number of specifically federally-protected activities (eg applying to or enrolling in public school, applying for a job, serving on a jury or using public buildings) when they were targeted on the basis of prejudice because they were participating in that federally-protected activity.[83] These federally-protected activities were matters over which Congress could claim jurisdiction, for instance on the basis of its power to regulate interstate commerce.[84] A particularly broad jurisdiction could be claimed on the basis of the Thirteenth to Fifteenth amendments to the Constitution, abolishing slavery, guaranteeing equal protection of the law and prohibiting racial discrimination in the right to vote. Crucially, all three amendments gave Congress a power to pass legislation enforcing these provisions.

2.86 The next federal hate crime legislation was in 1990, when Congress enacted the Hate Crime Statistics Act 1990 (HCSA). The HCSA required the Attorney General to collect relevant statistics on hate crime motivated by certain characteristics (race, ethnicity, religion, sexual orientation). Disability was added in 1994.[85] Four years later, Congress enacted the Hate Crimes Sentencing Enhancement Act 1994 (HCSEA).[86] This legislation required the US Sentencing Commission to provide for enhanced sentencing

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82 18 USC para 245.

83 T A Scotting, "Hate Crimes and the Need for Stronger Federal Legislation" (2001) 34(4) *Akron Law Review* 853, 874.

84 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

85 See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 320926 (1994).

86 28 USC 994.

where a federal crime was motivated by bias against a person's actual or presumed race, religion, colour, national origin, ethnicity, gender, disability or sexual orientation.[87]

2.87 The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 expanded federal hate crime law. The Act was named after the victims of, respectively, a homophobic and a racially-motivated murder. The 2009 Act gave protection to those who were targeted as a result of their actual or perceived sexual orientation, gender, gender identity or disability. The gap had been highlighted by the fact that Wyoming and Texas, where the two men were murdered, had no hate crime laws, meaning the motivation behind the murders could not be reflected in the offenders' sentences. (This remains the case in Wyoming.) The 2009 Act also broadened the reach of federal legislation to protect victims in circumstances other than when they were participating in federally-protected activities.

2.88 Despite a challenge to its constitutionality, the Act has been upheld by the US Court of Appeals Tenth Circuit. In relation to racial violence, the Tenth Circuit held that this fell within Congress's power to pass legislation to enforce the Thirteenth Amendment to the Constitution abolishing slavery.[88]

State hate crime laws

2.89 Apart from anti-lynching laws,[89] it is not clear exactly which was the first US state to pass legislation relating to hate crime. Some claim it was California in 1978,[90] others Washington and Oregon in 1981,[91] others still that by 1980 five states already had hate crime laws.[92] Some states had statutes prohibiting vandalism of religious institutions and interference with religious worship.[93]

2.90 A number of other states followed, and much of the state hate legislation in force today was passed during the 1980s and 1990s. Whilst most states now have hate crime legislation (though not all)[94] the ways in which it is drafted, the characteristics protected, and forms of punishment vary widely from state to state. For example, whilst by May 2013, 44 states and the District of Columbia had laws criminalising offences on the

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87 T A Scotting, "Hate Crimes and the Need for Stronger Federal Legislation" (2001) 34(4) *Akron Law Review* 853, 875.

88 *USA v William Hatch*, 722 F.3d. 1193 (10th Cir.) (2013)

89 M Berg, *Popular justice: A history of lynching in America* (2011).

90 J B Woods, "Hate crime in the United States" in *The Routledge International Handbook on Hate Crime*, by Hall, Corb, Giannasi and Grieve (Eds) (2014).

91 National Institute of Justice, *Overview of Hate Crime,* available at https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx .

92 L A Spillane, "Hate Crimes: Violent Intolerance" (1995) 29(4) *Prosecutor* 20, 21.

93 T A Maroney, "The Struggle Against Hate Crime: Movement at a Crossroads" (1998) 73 *New York University Law Review* 564, 589.

94 M Shively (2005) "Study of Literature and Legislation on Hate Crime in America." Final report submitted to the National Institute of Justice, June 2005, NCJ 210300.

basis of race/ethnicity/colour, religion, national origin/ancestry, only 5 states and the District of Columbia included homelessness within their protected characteristics.[95]

2.91 Although the laws across states are drafted in different terms and may protect different groups, their definitional approaches fall broadly into one of two models – the group animus model (e.g. Florida),[96] or the discriminatory selection model (e.g. Wisconsin),[97] although many of the laws do not fall solely or explicitly into one or the other.[98]

Hate speech laws

2.92 Despite the successful defence of the constitutionality of hate crime laws focusing on sentencing, hate speech laws have proved almost impossible to reconcile with the First Amendment to the Constitution guaranteeing freedom of speech.

2.93 The U.S. Supreme Court has made clear that whilst local laws banning specific expressive acts will contravene the First Amendment, which provides constitutional protection to free speech,[99] a state law which prohibits violence targeted at someone as a result of their personal characteristics will not violate the First Amendment.[100] The key difference between the two is that violent conduct is not expression for the purposes of the First Amendment.

2.94 The Supreme Court has ruled that laws pertaining to hate speech can only outlaw "fighting words"[101] inciting or likely to incite imminent lawless action.[102] Even legislation targeted at such words might be unconstitutional if it involves "viewpoint discrimination". So, a statute prohibiting "fighting words" that insult or provoke violence "on the basis of race, color, creed, religion or gender" was held to be unconstitutional because it only targeted some forms of abuse, but permitted "fighting words" expressing hostility on grounds of political affiliation, union membership or sexual orientation.[103]

Enforcement of hate crime laws

2.95 A report prepared in 2005 for the National Institute of Justice[104] showed that the United States faced many of the same challenges as England and Wales in tackling hate crime. These include low reporting, variability across states and jurisdictions in how hate crimes were recorded and responded to by law enforcement agencies, and differences

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95 J B Woods, "Hate crime in the United States" in *The Routledge International Handbook on Hate Crime*, by Hall, Corb, Giannasi and Grieve (Eds) (2014).

96 FLA STAT ANN para 755.085 (2005).

97 WIS STAT ANN para 939.645(2)(b) (2000).

98 F M Lawrence, "The punishment of hate: toward a normative theory of bias-motivated crimes" (1994) 93 *Michigan Law Review* 320, 340.

99 *R.A.V. v City of St Paul* 505 U.S 377 [1992].

100 *Wisconsin v Mitchell* 508 U.S. 476 [1993].

101 *Chaplinsky v New Hampshire* 315 US 568 (1993).

102 *Brandenburg v Ohio* 395 US 444 (1969).

103 *RAV v City of St Paul* 505 US 377 (1992).

104 M Shively, "Study of Literature and Legislation on Hate Crime in America." (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300.

between federal and state systems.[105] Differences in definitions of hate crime between different jurisdictions also create problems for monitoring and evaluation.[106]

2.96 Responses also differ at municipal, state and federal levels. Some municipal police departments have specialist officers within specialist units, others have no such provisions.[107] At the state level, there is broadly a greater level of collective organisation, with state-wide, government funded initiatives,[108] and at federal level a number of investigations and training exercises for law enforcement have been provided.[109] Evaluations of these efforts, however, are few and far between.[110]

Canada

2.97 Like the United States, Canada is a federal system. However, section 91 of the Constitution reserves criminal law to the federal Parliament. Canada's Criminal Code addresses hate speech in sections 318 (offence of advocating genocide) and 319 (public incitement and wilful promotion of hatred).[111] Criminal damage to property targeted at an identifiable group is also specifically criminalised in section 430(4.1).

2.98 Canada also has a more general system of mandatory sentencing enhancement for hate crimes. Under section 718(2)(a)(i) of the Criminal Code, a sentence may be increased to reflect evidence that the offence was motivated by "bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor". Significantly, it is one of a very small number of jurisdictions that has a "residual category", meaning that the list of protected characteristics is not exhaustive.[112]

2.99 A 2016 review of the legislation[113] noted that

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105 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, p iii, https://nij.ojp.gov/library/publications/study-literature-and-legislation-hate-crime-america-final-report.

106 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, p 82.

107 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, p 76.

108 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, p 77.

109 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, pp 78 to 9.

110 M Shively, *Study of Literature and Legislation on Hate Crime in America* (2005) Final report submitted to the National Institute of Justice, June 2005, NCJ 210300, p 79.

111 A Corb, "Hate and hate crime in Canada", in *The Routledge International Handbook on Hate Crime*, by N Hall, A Corb, P Giannasi and J Grieve (Eds) (2014). Hatred has been defined in case law as meaning "only the most intense forms of dislike" such as "emotion of an intense and extreme nature that is clearly associated with vilification and detestation". See also *Keegstra* [1990] 3 S.C.R. 697 (Can.) by Dickson CJ at 777.

112 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (2017) p 101.

113 G Ferguson, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code* (Ministry of Justice 2016), available at https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/index.html.

The wording of s. 718.2(a)(i) currently requires evidence that the offence "was motivated by" bias, prejudice or hate. The provision is silent on the degree of motivation. Does the crime have to be motivated by hate solely, substantially, significantly, or just a little. Lawrence and Verdun-Jones suggest that to date the judges have used three different adjectives, which represent three different tests, in deciding whether a crime is motivated by hate under s. 718.2(a)(i): (1) offences motivated predominantly or primarily by bias, prejudice of hate;[114] (2) offences in which bias, prejudice or hate was a significant contributing factor; or (3) offences only partly motivated by bias, prejudice or hate.

2.100 Hate speech offences are dealt with under sections 318-319 of the Criminal Code. Section 318(1) prohibits advocacy of genocide, punishable by up to five years' imprisonment. Section 319(1) prohibits incitement of hatred in a public place, likely to lead to a breach of the peace. Section 319(2) prohibits wilful promotion of hatred, other than in private conversation. Both offences under section 319 are punishable with up to two years' imprisonment. The key difference is that a prosecution under section 319(2) requires the consent of the Attorney General, while a prosecution under section 319(1) – a public order offence – does not. Unlike the enhanced sentencing provisions in section 718.2(a), the hatred must be directed at an identifiable group "distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability"; there is no residual category.

2.101 The most high-profile incitement to hatred case in Canada was *Keegstra*,[115] a teacher in the Province of Alberta, who taught that the Holocaust did not happen. Keegstra challenged the compatibility of section 319(2) with the Canadian Charter of Rights and Freedoms, specifically the right to freedom of thought, belief, opinion and expression in section 2(b). Applying the "limitations clause" in section 1 of the Charter, which provides that the rights therein are guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", the Supreme Court of Canada upheld the provision as constitutional.

Australia

2.102 Like the United States and Canada, Australia has a number of different jurisdictions (6 states, 2 territories) which are empowered to enact their own criminal legislation, leading to some variation in legislation concerning hate crime. In general, the Commonwealth (i.e. federal) Parliament only has authority to create offences incidental to matters over which it has power to legislate.

2.103 This jurisdiction – specifically in relation to terrorism – has been used to create federal offences of urging violence against a group or members of a group distinguished by race, religion, nationality, national or ethnic origins, or political opinion.[116]

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114 M S Lawrence and S N Verdun-Jones, "Sentencing Hate: An Examination of the Application of s. 718.2(a)(i) of the Criminal Code on the Sentencing of Hate-Motivated Offences" (2011) 57 Criminal Law Quartley 28.

115 [1990] 3 S.C.R. 697 (Can.).

116 Criminal Code Act 1995, ss 80.2A to 80.2B.

2.104 The federal Parliament also used its jurisdiction in relation to foreign relations to legislate to give effect to CERD.[117] Under the Racial Discrimination Act 1975 it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.[118] However, the provision does not create a criminal offence and enforcement of this section is a civil process.

2.105 In addition, there is a broad exclusion for anything done in good faith

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.[119]

2.106 Asquith suggests that one reason for hate crime not having entered into the national consciousness in Australia is that there has been no headline-grabbing case which has ignited the country's collective awareness by gaining the necessary political traction.[120]

2.107 Most states have their own statutes dealing with hate speech, but with the exception of New South Wales, these are restricted to race, and sometimes religion. In Victoria, the Racial and Religious Tolerance Act 2001 criminalises "serious racial vilification" and "serious religious vilification", where a person intentionally engages in conduct that they know is likely to incite hatred and to threaten, or incite others to threaten, physical harm towards another person. Less serious vilification, where a person engages in conduct that incites hatred, serious contempt or ridicule, is a civil matter. As of May 2019, however, only three people had ever been convicted of an offence under the Act.

2.108 South Australia has a racial vilification offence, prohibiting a public act inciting hatred, serious contempt or ridicule towards a person or group on account of race, by threatening harm, or inciting others to threaten harm to a person or property.[121] No one appears to have been prosecuted for this offence.

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117 *Koowarta v Bjelke-Petersen* [1982] HCA 27.

118 Racial Discrimination Act 1975, s 18C.

119 Racial Discrimination Act 1975, s 18D.

120 N L Asquith, "A governance of denial: Hate crime in Australia and New Zealand" in *The Routledge International Handbook on Hate Crime*, by N Hall, A Corb, P Giannasi and J Grieve (Eds) (2014) p 176.

121 Racial Vilification Act 1996, s 4.

2.109 In New South Wales, it is an offence intentionally or recklessly to threaten or incite violence against a person or group on grounds of race, religion, sexual orientation, gender identity, or intersex or HIV/AIDS status.[122] As of 2019, no one had ever been convicted under this provision, or its earlier form dating back to 1994.[123]

2.110 Western Australia has an offence of racist incitement, harassment and the possession of racist materials.[124]

2.111 In New South Wales, Victoria and the Northern Territory, sentencing legislation has been amended to enable targeting on the basis of prejudice to be reflected at sentencing as an aggravating factor.[125] Similarly, Western Australia has a penalty enhancement regime for racially-aggravated offences.[126]

2.112 In New South Wales (in common with only New Zealand and Canada), the protected characteristics are not an exhaustive list, with those cited preceded by "such as", demonstrating that other personal characteristics can also be included.[127]

2.113 In general, problems of low reporting seen in other jurisdictions are also in evidence in Australia – for example, Wiedlitzka et al found that, in Queensland, hate crimes are less likely to be reported to police in comparison to non-hate crime incidents, and that more positive perceptions of police legitimacy and police cooperation are associated with the victim's decision to report hate crime victimisation.[128]

New Zealand

2.114 New Zealand's approach to hate speech offences is unique in that it draws a distinction between intentional hate speech and expression "likely to" excite hostility or bring a group into contempt. Under section 131 of the Human Rights Act 1993, inciting racial disharmony with intent is punishable with up to three months' imprisonment. The offence extends to written matter, broadcasts, and the use of words in public. The words in question must be, as in the English racial hatred offence, "threatening, abusive or insulting".

2.115 Section 61 makes it unlawful to publish, broadcast or use threatening, abusive or insulting words or behaviour likely to excite hostility against or bring into contempt any group of persons on the ground of colour, race, ethnic or national origins. However, this is a civil matter, and complaints can be taken by the Human Rights Commission. The Human Rights Review Tribunal has a range of remedies, including the ability to make

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122 Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018.

123 ABC News, *Hate crime laws rarely used by Australian authorities, police figures reveal* (2 May 2019), available at https://www.abc.net.au/news/2019-05-03/hate-crimes-rarely-prosecuted-in-australia/11055938.

124 Criminal Code Compilation Act 1913, ss 77 to 80.

125 N L Asquith, "A governance of denial: Hate crime in Australia and New Zealand" in *The Routledge International Handbook on Hate Crime*, by N Hall, A Corb, P Giannasi and J Grieve (Eds) (2014) p 180.

126 Criminal Code Compilation Act 1913, s 313.

127 Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)(h).

128 S Wiedlitzka, L Mazerolle, S Fay-Ramirez, and T Miles-Johnson, "Perceptions of Police Legitimacy and Citizen Decisions to Report Hate Crime Incidents in Australia" (2018) 7(2) *International Journal for Crime, Justice and Social Democracy* 91.

order preventing repetition, to award damages, to make an order to perform acts to redress loss or damage, or order the defendant to undertake training. However, it has no power to exercise penal powers.

2.116 New Zealand has no aggravated offences, but has, in effect, an enhanced sentencing regime. Section 9(1)(h) of the Sentencing Act 2002 provides that the it is an aggravating factor if

> the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability.

Ireland

2.117 Ireland has no aggravated offences or enhanced sentencing provisions.

2.118 Ireland does have a stirring up law, the Prohibition of Incitement to Hatred Act 1989 which creates three offences:

- Actions likely to stir up hatred (covering publication and distribution of written material, use of words or behaviour and display, showing and distribution of recordings);
- Broadcasts likely to stir up hatred; and
- Preparation and possession of material with a view to its being distributed

2.119 The legislation appears to be influenced by the UK offence. However, there are some differences. First, there is a single offence covering hatred on grounds of race, religion, sexual orientation and membership of the travelling community (this last factor being potentially broader than those Travellers considered to constitute a distinct ethnic or racial group). There is a single threshold (threatening, abusive and insulting) applying to all characteristics.

2.120 Second, with the except of broadcasts, all forms of use and dissemination are consolidated in a single offence. Third, prosecutions require the consent of the Director of Public Prosecutions (not the Attorney General).

CONCLUSION

2.121 This chapter has explored the broad background of hate crime. It has examined the approaches of the UK and other Western liberal democracies to seek an understanding of how broadly similar cultural contexts have dealt with the issue. As we have shown, there are various ways of addressing hate crime. Different jurisdictions have put in place different legal frameworks. These vary in the structure of the legislation, the behaviour prohibited, and the characteristics protected.

2.122 Against this backdrop of a broad consideration of how hate crime laws work in various jurisdictions, Chapter 3 now moves on to consider in more detail some of the difficult theoretical questions surrounding hate crime. As has been alluded to in this chapter, there are various challenges in drafting and enacting legislation that is suitable for purpose when it comes to hate crime. There are particularly difficult questions

surrounding the appropriate mental element, and which personal characteristics are protected. These discussions necessarily involve theoretical as well as practical elements. The next chapter approaches them from a theoretical standpoint.

Chapter 3: Rationales for hate crime and hate speech laws

INTRODUCTION

3.1 As we outlined in the previous chapter, hate speech offences were first introduced in England and Wales as early as 1965, and hate crime laws first took effect more than 20 years ago with the enactment of the Crime and Disorder Act 1998. Both these forms of criminal prohibitions are thus well established in the law of England and Wales, and the trend in recent years has broadly been to expand the scope of these protections to additional characteristic groups.

3.2 In this chapter we seek to summarise some of the main arguments that have been used to explain and justify the existence of hate crime and hate speech laws, as well as some of the important criticisms that have been made. In doing so, we do not question the existence of hate crime and hate speech laws. Indeed, our terms of reference do not contemplate revocation of these protections, and almost no one expressed support for such a move in our pre-consultation meetings.

3.3 This chapter is designed primarily for those with an interest in engaging with some of the deeper academic debates surrounding hate crime. It is not essential to understanding the questions and proposals for reform we present in later chapters, but we hope it may be helpful to some readers.

HATE CRIME

3.4 Canadian academic Barbara Perry has been highly influential through her 2001 articulation of hate crime as a display of bigotry and power from a majority group towards a minority group.[1] Perry argues that the underlying purpose of hate crime is to maintain the status quo of the two parties – the majority group keeping the minority group in a subordinate position.

3.5 British academics Neil Chakraborti and Jon Garland agree with Perry's focus on the idea of difference. However, they argue that

> Her framework assumes that hate offences are mechanisms of oppression designed to reinforce the hegemonic and subordinate identities of the perpetrator's and victim's group, are directed towards particular communities only and that perpetrators and victims are strangers to one another. In so doing, it inadvertently marginalizes a range of experiences that could, and should, be considered alongside the more familiar aspects of hate crime discourse.[2]

3.6 Chakraborti and Garland argue that Perry's conception of hate crimes does not satisfactorily deal with those offenders who have no such complex underlying rationale,

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1 B Perry, *In the Name of Hate: Understanding Hate Crimes* (1st ed, 2001); B Perry, "The sociology of hate: Theoretical approaches" in B Perry (ed.) *Hate Crime Volume One: Understanding and Defining Hate Crime.* (1st ed, 2009) pp 55 to 76.

2 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and difference'' (2012) 16 *Theoretical Criminology* 503, 505.

but are simply annoyed or drunk, for example. Their banal motivations, whilst possibly linked to systemic disadvantage and oppression of a particular group, cannot properly be interpreted as "a mechanism of power carefully planned to suppress the 'other'".[3]

3.7 In practice it is likely that both theories contain an element of truth; at a macro level (as we note further below), hate crime can indeed operate as a significant form of oppression for already marginalised and disadvantaged communities. However, this is not to say that all hate crime perpetrators have such intentions when they commit acts of criminal hostility.

Core rationales for treating hate crime more severely

3.8 In England and Wales, as in many other jurisdictions,[4] the defining feature of hate crime laws is sentence aggravation.

3.9 As we will explain in Chapter 4, current hate crime laws in England and Wales[5] conform to two different approaches. The first creates specific aggravated versions of some existing criminal offences,[6] and the second establishes an enhanced sentencing regime[7] which applies to all other offences. In both cases, an increased sentence can be given; aggravated offences allow for a higher maximum sentence for each of the underlying offences, whereas the enhanced sentencing regime requires an increase in penalty within the existing maximum for the base offence.

3.10 It is widely accepted[8] that any punishment of wrongdoers by the state[9] must be justified. This is because legal punishment inflicts deliberate suffering on individuals and infringes a person's liberty and autonomy.[10] Similar logic has been applied to more severe punishment, which amplifies these effects. Professor Michael Cavadino argues that "justification for enhanced punishment needs to be sought within the context of whatever justification there may be for punishment more generally".[11]

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3 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and difference'' (2012) 16 *Theoretical Criminology* 503, 505.

4 For comparative analysis of hate crime laws in other jurisdictions, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017), available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

5 England and Wales does not have a designated statute which contains "hate crime laws", nor are there offences which have a hate crime label. The aggravated offences and enhanced sentencing regime are found in separate pieces of legislation but each form part of "hate crime laws". The stirring up hatred offences under the Public Order Act 1986 are also associated with "hate crime laws" in England and Wales but relate more specifically to hate speech. They will be considered under a separate heading below.

6 Set out in the Crime and Disorder Act 1998.

7 Set out in the Criminal Justice Act 2003.

8 See A Ashworth, *Principles of Criminal Law* (6th ed, 2009) p 22; J Schonsheck, *On Criminalisation* (1994) p 1; J Raz, *The Morality of Freedom* (1st ed, 1986) p 416.

9 Punishment by the state for crimes will be referred to as legal punishment.

10 See D Dolinko, "Punishment" in J Leigh and D Dolinko (eds) *The Oxford Handbook of Philosophy of Criminal Law* (2011) p 403.

11 M Cavadino, "Should Hate Crime Be Sentenced More Severely" (2014) 13 *Contemporary Issues in Law* 1, 5.

3.11 Four key arguments have been associated with punishing hate crimes more severely than differently motivated crimes:

(1) Hate crime causes additional harm, namely to primary victims, but also to groups who share the targeted characteristic and to society more widely.

(2) Hate crime constitutes greater intrinsic wrongdoing.

(3) Hate crime offenders are more culpable than those who commit equivalent offences which are not hate crimes.

(4) More severe punishment sends out a message, denouncing the hatred as wrong.

3.12 Arguments (1) to (3) suggest that hate crimes are more serious than differently motivated crimes. It is only argument (4) that explicitly justifies more severe punishment by explaining why increased punishment is required.

3.13 Therefore, we will also consider how these arguments, particularly (1) to (3), might justify more severe punishment according to general theories of legal punishment. There is extensive and competing literature discussing these theories, and the extent to which each might justify legal punishment.[12] It is beyond the scope of this consultation paper to discuss the respective merits of such theories.

3.14 It is also important to emphasise that our terms of reference for this review do not ask us to question the notion of more severe punishment for hate crimes or determine if it is principled. We simply intend to outline some of the main arguments that have been offered to justify more severe punishment in this context.

The harm justification

Harm caused to primary victims

3.15 Academics have argued that hate crime causes more direct harm to victims than similar, but differently motivated crimes.[13]

3.16 Researchers have attempted to substantiate this argument.[14] Drawing on secondary analysis of Crime Survey England and Wales (CSEW) data, Iganski and Lagou note that although the great majority of victims of all crimes say they had an emotional reaction to the crime they experienced,[15] victims of hate crime[16] are more likely, as a group, to report having an emotional reaction.[17]

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12 See D Dolinko, "Punishment" in J Leigh and D Dolink (eds) *The Oxford Handbook of Philosophy of Criminal Law* (2011) p 404.

13 P Iganski, "Hate hurts more" (2001) 45 *American Behavioral Scientist* 626; F M Lawrence, *Punishing Hate: Bias Crimes under American Law* (1st ed, 1999) p 75.

14 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014).

15 As part of the CSEW interviews, participants are asked whether they had an emotional reaction to the crime they experienced.

16 As part of the CSEW, participants are asked what they perceived the perpetrator's motivation for committing the crime was. One possible option is hatred towards a characteristic. When Iganski and Lagou refer to victims of hate crime here, they are referring to CSEW respondents who perceived the crime they experienced was motivated by one or more of a list of characteristics.

17 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 41, (Figure 3.5).

3.17 Their analysis also demonstrates that hate crime victims were twice as likely as victims of differently motivated crimes to state that they had been affected "very much" by the crime.[18] According to Iganski and Lagou's analysis, this disparity was not owing to the type of criminal offence experienced – in each major offence category, hate crime victims, as a group, are more likely to report having been affected "very much".[19]

3.18 More specifically, Iganski and Lagou's research shows that victims of hate crime were more likely than victims of otherwise motivated crime to report the following symptoms: anger, anxiety/panic attacks, crying/tears, depression, difficulty sleeping, fear, loss of confidence/feeling vulnerable and shock.[20]

3.19 Similar large-scale studies have also found that hate crime causes more psychological harm to the primary victim,[21] as discussed in detail by Chalmers and Leverick in the Scottish Comparative Hate Study.[22]

3.20 Further, it has been argued that hate crime can prompt victims to change their behaviour.[23] Depending on the type and location of crime, this might include moving house or avoiding walking in certain places.[24] However, in Iganski and Lagou's study, the number of victims reporting behavioural responses was small.[25] Research conducted by The Sussex Hate Crime Project observes that victims' behavioural responses might depend on their emotional responses to hate crime.[26] Feelings of anxiety might result in victims practicing avoidance techniques, and having heightened

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18 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 41.

19 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 41, (Figure 3.6).

20 P Iganski, S Lagou, "The personal injuries" of 'hate crime' in *The Routledge International Handbook on Hate crime* (2014) pp 41 to 43, (Figure 3.7).

21 GM Herek, JR Gillis and JC Cogan, EK Glunt, "Hate crime victimization among lesbian, gay, and bisexual adults: prevalence, psychological correlates, and methodological issues" (1997) 12 *Journal of Interpersonal Violence* 195; J McDevitt, J Balboni, L Garcia, J Gu, "Consequences for victims: a comparison of bias- and non-bias-motivated assaults" (2001) 45 *American Behavioral Scientist* 697.

22 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.1.1. p 25, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

23 A Barnes and PH Ephross, "The Impact of Hate Violence of Victims: Emotional and Behavioural Responses to Attacks" (1994) 39 *Social Work* 247; P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 43; K Benier, "The harms of hate: comparing the neighbouring practices and interactions of hate crime victims, non-hate crime victims and non-victims" (2017) 23 *International Review of Victimology* 171. However Benier's research did not control for offence type, for further discussion see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) p 28, available at https://consult.gov.scot/hate-crime/independentreview-of-hate crimelegislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

24 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 43.

25 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 43.

26 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 28 to 31, available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

security concerns. However, feelings of anger are more likely to result in proactive behaviour such as joining community organisations or raising awareness of hate crime on social media.[27]

Harm caused to secondary victims

3.21 It has also been argued that hate crime can cause indirect, secondary harm to those who share the targeted characteristic.[28] A number of studies have demonstrated this.[29] However, Chalmers and Leverick note that while these studies show some limited evidence of a group harm effect, they are restricted for various reasons, not least because they are "relatively small scale".[30]

3.22 Perry focuses on the secondary harm caused by hate crime, arguing that hate crime has the broader effect of leaving communities feeling vulnerable to further victimisation. Individuals or groups who share the targeted characteristic can feel wary of their surroundings and question their safety.[31] Perry notes that this is particularly stark in transgender communities, citing one trans woman who says, "it only has to happen once or twice and that really affects, you know, and I think it has affected the overall community, right?"[32]

3.23 More recent research conducted by Walters and others found that emotions of anger can particularly impact secondary victims in LGBT and Muslim communities.[33] Their research found that one reason for this was the strong empathic connections that arise

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27 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 28 to 31.

28 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 41; B Perry and S Alvi, "We are all vulnerable: The in terrorem effects of hate crime" (2011) 18 *International Review of Victimology* 57; D Brax, "Hate crime concepts and their moral foundations: a universal framework?" in J Schweppe and MA Walters (eds), *The Globalization of Hate: Internationalising Hate Crime?* (2016) p 59; M Noelle, "The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group" (2002) 46 *American Behavioural Scientist* 27.

29 A Guasp, A Gammon and G Ellison, *Homophobic Hate Crime: The Gay British Crime Survey 2013* (Stonewall and Yougov 2013) p 25, available at https://www.stonewall.org.uk/system/files/Homophobic_Hate_Crime__2013_.pdf; JG Bell and B Perry, "Outside looking in: the community impacts of anti-lesbian, gay, and bisexual hate crime" (2015) 62 *Journal of Homosexuality* 98; M Noelle, "The ripple effect of the Matthew Shepard murder: impact on the assumptive worlds of members of the targeted group" (2001) 46 *American Behavioral Scientist* 27. For further discussion of these studies, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) pp 31 to 33, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

30 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) p 31 para 3.1.2, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf. As Chalmers and Leverick also highlight, one study attempted to evidence group harm in relation to hate crime but failed, see KM Craig, "Retaliation, fear, or rage: an investigation of African American and white reactions to racist hate crimes" (1999) 14 *Journal of Interpersonal Violence* 138.

31 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 51.

32 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 51.

33 M A Walters, J Paterson, L McDonnell, R Brown, "Group Identity, empathy and shared suffering: Understanding the Community impact of anti-LGBT and Islamophobic hate crime" (2019) *International Review of Victimology* 1, 17.

out of shared experiences in these respective communities, including shared experiences of victimisation and discrimination.[34]

Harm to wider society

3.24 Lastly, it has been argued that hate crime can have collateral impacts on wider society by contributing to the risk of social unrest and damaging social cohesion.[35] For example, Perry argues that hate crime has the effect of dividing communities and reinforcing barriers between groups because it might lead to the isolation or withdrawal of vulnerable communities and can reinforce outsider status for certain groups. Perry cites a Muslim man, who thinks that hate crime creates "more tension and a reason to more clearly distinguish between dangerous thoughts such as "us" vs "them"."[36]

3.25 Perry also argues that hate crime challenges social values, for example "long and deeply held values of inclusion, equity, and justice".[37] Similarly, Lawrence notes the damage that hate crime can do to "shared values of equality".[38]

How might additional harm justify more severe punishment?

3.26 Even if it is accepted that hate crime does cause additional harm in these three ways, this alone is not enough to explain why extra harm warrants more severe punishment.

3.27 In England and Wales, the Crown Prosecution Service (CPS) has invoked the additional harm that hate crime causes to explain why hate crime requires a serious criminal justice response in the form of more severe punishment:

> The devastating impact of hate crimes on, not only the individual, but also on communities and wider society demands a robust response and the opportunity to apply for a sentence uplift to send the clear message that those who target people because of their race, religion, sexual orientation, transgender identity or disability should expect to receive a higher sentence.[39]

3.28 Therefore, according to the CPS, the additional harm that hate crime causes might justify more severe punishment for two closely connected reasons. Firstly, the extra harm hate crimes cause requires the criminal justice system to send out a clear message to hate crime offenders. Secondly, one way to send out such a message is via more severe punishment in the form of a sentence uplift. We discuss whether

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34 M A Walters, J Paterson, L McDonnell, R Brown, "Group Identity, empathy and shared suffering: Understanding the Community impact of anti-LGBT and Islamophobic hate crime" (2019) *International Review of Victimology* 1, 16.

35 As has been observed by Chalmers and Leverick, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.1.3, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf citing P Iganski, "Why make hate a crime?" (1999) 19 *Critical Social Policy* 386, 389.

36 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 53.

37 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 53.

38 F M Lawrence, *The punishment of hate: toward a normative theory of bias-motivated crimes* (1994) p 347.

39 Crown Prosecution Service, *Conditional Cautioning: Adults- DPP Guidance* (updated 01 November 2019), available at https://www.cps.gov.uk/legal-guidance/conditional-cautioning-adults-dpp-guidance.

sentencing uplifts can have this effect, and how this effect, if proven, can justify additional punishment below.

3.29 We also note that section 143 of the Criminal Justice Act 2003 (CJA 2003) states:

> in considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

3.30 If harm bears upon the seriousness of an offence, as the CJA 2003 requires, then a higher sentence might be justified according to retributivist theories of punishment. Traditional retributivist theories justify proportionate punishment on the basis that this is what an offender deserves because of their criminal act.[40] On this view, the extent or severity of the punishment that an offender deserves can depend on the seriousness of their criminal act. If hate crimes are considered more serious because of the increased harm they cause, retributivist logic would require a more serious punishment.

3.31 Wellman notes that hate crime's additional harm can justify more severe punishment according to other theories of punishment. For example, restitutive theories of legal punishment consider that the purpose of punishment is to restore victims to their rightful, pre-crime position. They argue that state punishment provides this restoration because it publicly undoes the degradation caused by the crime and confirms the victim is worthy of respect.[41] On this view, the increased damage done to primary and secondary victims by hate crime would mean that more is required by way of restoration to repair these hams, which explains why more severe punishment is necessary.[42]

3.32 Wellman also invokes another theory of punishment which he calls the "societal safety-valve theory". According to this theory, the function of legal punishment is to provide a safe and institutionally controlled avenue for those affected by crimes to release their ill-will and/or desire for revenge.[43] Wellman argues that these feelings are amplified in the hate crime context, such that an entire group may "yearn for a hate criminal to receive her just desert", rather than a few affected individuals. As a result, more serious punishment is required to manage this.[44]

3.33 However, these theories of punishment may be subject to challenge – the ability of punishment ever to restore a victim to their pre-crime position by healing some of the harms that victims have suffered has been questioned.[45] Similarly, the "societal safety-valve theory" that Wellman invokes is likely to be challenged; describing legal punishment as "safe" may be contested from other perspectives.[46] Further, its

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40 E Maculan and A Gil Gil, "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts" (2020) 4 *Oxford Journal of Legal Studies* 136.

41 C H Wellman, "A Defense of Stiffer Penalties" (2006) 21 *Hypatia* 62, 65.

42 C H Wellman, "A Defense of Stiffer Penalties" (2006) 21 *Hypatia* 62, 67.

43 C H Wellman, "A Defense of Stiffer Penalties" (2006) 21 *Hypatia* 62, 66.

44 C H Wellman, A Defense of Stiffer Penalties, (2006) 21 *Hypatia* 62, 66.

45 E Maculan and A Gil Gil, "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts" (2020) 4 *Oxford Journal of Legal Studies* 138.

46 For example, offenders experience harm in custody, including death, because of prison-related causes, eg assaults in prison. See Ministry of Justice, *Safety in Custody statistics England and Wales* (January 2019),

application to hate crime is arguably weak – it is not clear that legal punishment is capable or indeed necessary for supressing the anger of hate crime victims. After all, as we will note in Chapter 7, many hate crime victims have expressed a preference for less punitive criminal justice responses such as restorative justice.

Greater intrinsic wrongdoing

3.34 We turn now to the second argument, which focuses on wrongdoing. One way to determine criminal law wrongdoing is the nature and extent of harm that an offence causes. Above we have suggested that hate crime causes additional harm, which would in turn suggest additional wrongdoing on the part of hate crime offenders.[47]

3.35 Beyond this consequentialist interpretation, we might also consider intrinsic wrongdoing. Hurd and Moore note that arguments about greater intrinsic wrongdoing might be raised in the context of hate crime.[48] Just as murder violates a more stringent moral norm than the crime of theft, arguably crime motivated by hatred violates a more stringent moral norm than crime that is not motivated by hate.[49] On this logic, it is a greater wrong to commit any crime owing to hatred or bias.

3.36 Kamm also argues that hate crimes constitute "organic wrongs".[50] Rather than being made up of two parts (offence plus hatred), the underlying crime and the hate motivation interact to make one greater wrong. To make this argument, Kamm uses the example of a person who shoots a victim with the victim's own gun. She argues that this is not two separate wrongs of theft and assault, it constitutes a distinct, greater wrong of its own.[51]

3.37 Hurd and Moore have challenged this. If Kamm's argument is applied to hate crime, it is the defendant's mental state (ie the hate-based motivation) that interacts with the base crime to create a greater wrong. However, Hurd and Moore note that in Kamm's example of a person who shoots the victim with the victim's own gun, it is not the perpetrator's mental state that produces a greater wrong by interacting with the base crime. Rather, "it is some objective circumstance (namely the fact the gun was owned by the victim) in the presence of which the doing of the base crime becomes a greater wrong".[52]

How might greater intrinsic wrongdoing justify more severe punishment?

3.38 If it is accepted that hate crimes constitute greater intrinsic wrongs, then greater punishment might be justified according to traditional retributivist theories of

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available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774880/safety-in-custody-bulletin-2018-Q3.pdf.

47 G Mason, "Victim attributes in hate crime law: difference and the politics of justice" (2014) *54 British Journal of Criminology* 165.

48 H Hurd and MS Moore, Punishing Hatred and Prejudice (2004) 56 *Stanford Law Review* 1081, 1093.

49 H Hurd and MS Moore, Punishing Hatred and Prejudice (2004) 56 *Stanford Law Review* 1081, 1093.

50 F M Kamm, "A Philosophical Inquiry into Punishment Enhancement" (1992/1993) *Annual Survey of American Law* 629.

51 F M Kamm, "A Philosophical Inquiry into Punishment Enhancement" (1992/1993) *Annual Survey of American Law* 629.

52 H Hurd and MS Moore, "Punishing Hatred and Prejudice" (2004) 56 *Stanford Law Review* 1081, 1096

punishment, as above. On this view, the hate crime offender commits a greater wrong and is therefore more deserving of greater punishment.

The culpability justification

3.39 Culpability usually describes the extent to which a defendant's fault makes them morally blameworthy for their criminal conduct and its consequences.[53] The term "fault" (or "mens rea") refers to a defendant's mental state when committing a criminal act.

3.40 The level of a defendant's culpability can therefore depend on their fault – the clearest distinction is between intention and negligence. For example, a person who causes death by dangerous driving[54] is considered more culpable than a person who causes death by careless or inconsiderate driving.[55]

3.41 Applying this to hate crime offenders, it has been argued that a defendant who is motivated to harm their victim because of hatred for the victim's protected characteristic is more culpable than a defendant who is motivated to harm their victim for another reason, for example greed.[56] Hurd and Moore compare this argument to distinctions that have been drawn between a premediated murderer and a negligent killer, the former being more culpable, and in turn more blameworthy than the latter.[57]

3.42 More specifically, some have suggested that hate crime offenders are more culpable because they target vulnerable victims,[58] but this would only apply where victims are indeed vulnerable.[59] Danner has argued hate crime offenders are uniquely culpable because they target groups who have been historically discriminated against.[60]

3.43 However, Hurd has disputed the notion that hate crime offenders are uniquely culpable. She makes three arguments. Firstly, measuring culpability in terms of hate motivation involves a "novel mens rea".[61] Usually fault or mens rea in criminal law focuses on the defendant's intention or foresight of the risk of harm, rather than motive. Secondly, Hurd argues that hatred is an emotional state within which an actor acts, not a future state towards which an actor acts.[62] Finally, Hurd argues that emotional states such as hatred relate to character traits, rather than mental states such as intention, purposes or

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53 M N Berman, "Punishment and Culpability" (2012) 4 *Ohio State Journal of Criminal Law* 441.

54 Road Traffic Act 1988, s 1.

55 Road Traffic Act 1988, s 2B.

56 D M Kahan, "Two liberal fallacies in the hate crimes debate" (2001) 20 *Law and Philosophy* 187; G Mason and A Dyer, "'A negation of Australia's fundamental values': sentencing prejudice-motivated crime" (2012) 36 *Melbourne University Law Review* 882.

57 H Hurd and MS Moore, "Punishing Hatred and Prejudice" (2004) 56 *Stanford Law Review* 1081, 1117.

58 D Brax, "Hate crime concepts and their moral foundations: a universal framework?", in J Schweppe and MA Walters (eds), *The Globalization of Hate: Internationalising Hate Crime?* (2016) p 61.

59 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.2, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

60 A M Danner, "Bias crimes and crimes against humanity: culpability in context" (2002) 6 *Buffalo Criminal Law Review* 389, 392.

61 H Hurd, "Why Liberals Should Hate "Hate Crime Legislation" (2001) 20 *Law and Philosophy* 215, 217.

62 H Hurd, "Why Liberals Should Hate "Hate Crime Legislation" (2001) 20 *Law and Philosophy* 215, 219.

choices.[63] She questions the moral and political legitimacy of punishing defendants because of bad character.[64]

3.44 Also, the culpability justification appears to envisage a defendant motivated by hatred or prejudice when committing the underlying offence. However, in England and Wales, hate crime laws currently require either that the offence was motivated by hostility towards a protected characteristic, or the defendant *demonstrated hostility* towards a protected characteristic.[65] In cases where demonstration is relied upon, perhaps where a defendant uses a prejudicial slur when assaulting a victim, some have questioned whether a hate-based motivation applies to the use of the slur, let alone the decision to assault the victim in the first place.[66]

How might greater culpability justify more severe punishment?

3.45 If the greater culpability argument is accepted, then greater punishment might also be justified according to retributivist theories of punishment. Alexander argues that retributive desert is strongly connected to culpability – if an offender is considered more culpable for the harm they have caused, then on retributivist reasoning, they might be deserving of more serious punishment.[67]

3.46 Also, we observe above that culpability (as well as harm caused) bears on an offence's seriousness in England and Wales, according to section 143 of the Criminal Justice Act 2003. In light of increased seriousness, it could be argued that the defendant deserves a more severe punishment.

More severe punishment sends out a message, denouncing the hatred as wrong.

3.47 Finally, we turn to the fourth argument. This suggests that more severe punishment denounces hate crime as a very serious wrong – expressing society's condemnation of crime that is based on prejudice or hatred towards protected characteristics.

3.48 It has been argued that this denunciation serves two key functions:[68]

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63 H Hurd, "Why Liberals Should Hate "Hate Crime Legislation" (2001) 20 *Law and Philosophy* 215, 222.

64 H Hurd, "Why Liberals Should Hate "Hate Crime Legislation" (2001) 20 *Law and Philosophy* 215, 224; H Hurd and MS Moore, "Punishing hatred and prejudice" (2004) 56 *Stanford Law Review* 1081, 1128. Hurd and Moore's arguments have been criticised. See D M Kahan, "Two liberal fallacies in the hate crimes debate" (2001) 20 *Law and Philosophy* 175; D Brax, *Motives, reasons, and responsibility in hate/bias crime legislation* (2016).

65 We discuss this test in more detail in Chapter 15.

66 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017) pp 126 to 130, available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

67 L Alexander, "Culpability" in J Leigh and D Dolink (eds) *The Oxford Handbook of Philosophy of Criminal Law* (2011) p 218.

68 When explaining this, Chalmers and Leverick refer to two different conceptions of denunciation arguments in the hate crime context – denunciation as a value in its own right and denunciation in terms of its consequentialist value in deterring conduct. See J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.3, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

(1) The first function relates to primary and secondary victims of hate crime. More severe punishment sends a message to these victims that the state values them as equal members of society who are worthy of respect.[69] It may also communicate that the state is committed to tackling the historic disadvantage and prejudice that these groups face.[70]

(2) The second function relates to hate crime offenders and wider society. Arguably, denouncing hate crime via more severe punishment could deter existing hate crime offenders and future offenders.[71] Cavadino notes that the message sent by higher sentences can "morally educate the public conscience".[72]

3.49 On the other hand, as Chalmers and Leverick point out, there is no empirical evidence that higher sentences are capable of deterring offenders.[73] In the context of hate crime, it has even been suggested that the hate crime label can have the opposite effect – acting as "a badge of honour for offenders".[74] However, Chalmers and Leverick add that this does not necessarily negate the educative effects of the hate crime label – arguably more serious treatment reduces the social acceptability of prejudice, although this is difficult to measure.[75] Mason argues that hate crime laws can challenge underlying prejudices and moral norms.[76]

How might the symbolic effects of hate crime justify more severe punishment?

3.50 Arguing for higher sentences because they communicate important messages might be justified by expressivist theories of punishment. According to these theories, one key purpose of punishment is to communicate the wrongfulness of certain conduct.[77] However, Hurd and Moore argue that even Joel Feinberg, who is most frequently cited alongside expressivist theories, did not think expressivism was sufficient to constitute a theory or justification of punishment.[78]

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69 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.3. A Kaupinnen, "Hate and punishment" (2015) 30 *Journal of Interpersonal Violence* 1720.

70 M Al-Hakim and S Dimock, "Hate as an aggravating factor in sentencing" (2012) 15 *New Criminal Law Review* 590, 604; M Blake, "Geeks and monsters: bias crimes and social identity" (2001) 20 *Law and Philosophy* 121, 122.

71 See "Challenging hate and hate crime" in N Hall, *Hate Crime* pp 142 to 163, (2nd ed, 2013) for further discussion of the deterrence value of hate crime laws.

72 M Cavadino, "Should Hate Crime Be Sentenced More Severely" (2014) 13 *Contemporary Issues in Law* 1, 8.

73 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.3.

74 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) para 3.3.

75 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) p 38 at para 3.3.

76 G Mason, "The symbolic purpose of hate crime law: ideal victims and emotion" (2014) 18 *Theoretical Criminology* 76.

77 A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2009) p 81.

78 Rather it could be considered an incidental function of punishment. M Hurd and MS Moore, "Punishing hatred and prejudice" (2004) 56 *Stanford Law Review* 1081, 1128 citing a letter from Prof. J Feinberg, Arizona State University, to Prof. M Moore, University of Illinois (April 1990).

3.51 If arguments about education and deterrence are accepted, a higher sentence might also be justified by utilitarian theories of punishment.[79] According to traditional accounts of utilitarian theories, the pain that punishment causes to the defendant and the cost it requires states to incur is justified on consequentialist grounds – because punishment brings about benefits such as deterrence, and in turn security.[80]

3.52 However, utilitarian theories are contingent upon these benefits being achieved. As we have highlighted above, there is limited evidence that higher sentences deter hate crime offenders and it is very difficult to measure whether the message communicated by higher hate crime sentences provides an educative function

HATE SPEECH LAWS

How hate speech might be understood

3.53 While there is no universally accepted international definition of hate speech, there are generally recognised notions of what constitutes "hate speech". The UN, while acknowledging the disparity between definitions, defines hate speech as,

> any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group based on who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.[81]

3.54 Parekh similarly holds that hate speech "expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality, and sexual orientation".[82] He argues that "hatred" is not the same as "lack of respect or even positive disrespect, dislike, disapproval, or a demeaning view of others".[83] Rather, hate speech implies "hostility, ill will, severe contempt, rejection, a wish to harm or destroy the target group, a silent or vocal and a passive or active declaration of war against it."[84]

3.55 Herz and Molnar question whether hate speech *must* always involve an element of incitement, and what particular behaviour is incited.[85] They also query the degree to which this type of speech should be regulated, the forms of communication that would

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79 C H Wellman, "A Defense of Stiffer Penalties" (2006) 21 *Hypatia* 62, 69.

80 C H Wellman, "A Defense of Stiffer Penalties" (2006) 21 *Hypatia* 62, 64.

81 United Nations Strategy and Plan of Action on Hate Speech (May 2019) p 2, available at https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf.

82 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 40.

83 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 40.

84 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 40.

85 M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 4.

be included, and highlight the context-specific nature of hate speech and how definitions and standards vary across countries.[86]

3.56 Brown states that hate speech has evolved to carry many different meanings, especially in the non-legal academic sphere and that different conceptions of hate speech are not necessarily mutually exclusive.[87] Despite this, he describes hate speech as generally being a tool of oppression and subordination and destructive of social cohesion in diverse societies, which has the effect of undermining victims' position in society.[88]

3.57 Brown further highlights that hate speech derives from older concepts of restricted speech such as group defamation, race hate and hate propaganda.[89] He suggests that hate speech is a "meaningful" way to discuss protected characteristics and types of harmful speech *because* it is a broader term than these past conceptions.[90]

Hate speech and harm

3.58 Many academics, notably Jeremy Waldron, have explored the significance of hate speech in the context of harm. Waldron's understanding of the harm of hate speech is that it undermines the "public good" of the assurance of vulnerable groups in society that they will not be discriminated against, subjected to violence and experience subsequent feelings of anxiety and distress.[91] He also highlights the importance of not undermining the human dignity of targeted groups.[92]

3.59 Barendt is critical of Waldron's approach as he argues it fails properly to define or distinguish between the harms involved in hate speech.[93] Barendt outlines the two main harms involved, which inform how hate speech can be understood.[94] Firstly, he argues that hate speech can be understood as *intrinsically* harmful – the harm is within the speech itself, comparable to an act of violence.[95] Secondly, he states that hate speech can be understood as *causing or tending to cause* or constitute harm, such as a demonstrable harm toward the feelings or dignity of a targeted group and intergroup relations.[96]

3.60 Barendt suggests that it is important to establish which of these harms apply to hate speech because this informs views on how, if at all, hate speech ought to be regulated.[97]

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86 M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 4.

87 A Brown, "What is Hate Speech? Part 1: The Myth of Hate" (2017) 36 *Law and Philosophy* 419, 432.

88 A Brown, "What is Hate Speech? Part 2: Family Resemblances" (2017) 36 *Law and Philosophy* 561.

89 A Brown, "What is Hate Speech? Part 1: The Myth of Hate" (2017) 36 *Law and Philosophy* 419, 426 to 427.

90 A Brown, "What is Hate Speech? Part 1: The Myth of Hate" (2017) 36 *Law and Philosophy* 419, 427 to 428.

91 J Waldron, T*he Harm in Hate Speech* (2012) pp 4 to 5.

92 J Waldron, *The Harm in Hate Speech* (2012) pp 4 to 5.

93 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539.

94 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539, 540.

95 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539, 540.

96 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539, 540.

97 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539.

For instance, if an intrinsic harm approach is taken, there is no need to provide empirical evidence of the harm resulting from hate speech as it is inherently wrong.

3.61 Matsuda's conception draws on aspects of both approaches. He argues that racist hate speech should be limited by law because it *causes* psychological harm to victims.[98] However, he also refers to hate speech in the context of the perpetuation of racism in society, describing hate speech as "violence of the word" – relating to the *intrinsic* aspect of the harm.[99]

3.62 Moreover, Parekh's definition of hate speech seems to combine both elements of the harm of hate speech. Along with the generalised definition provided earlier, Parekh establishes three criteria to define hate speech and distinguish it from other forms of speech, arguing that[100]

- it is directed against "a specified or easily identifiable individual or... a group of individuals based on an arbitrary and normatively irrelevant feature";[101]
- it seeks to stigmatise "the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable";
- "because of its negative qualities, the target group is viewed as an undesirable presence and a legitimate object of hostility."[102]

Criticisms of hate speech laws

3.63 There is a substantial body of criticism of hate speech law by free speech advocates.

3.64 Classic liberal theory informs a traditional critique of the existence of laws restricting hate speech. In *On Liberty,* Mill argues that in a liberal, democratic society, we should all have "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological".[103]

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98 M Matsuda, "Public Responses to Racist Speech: Considering the Victim's Story" (1989*)* 87(8) *Michigan Law Review* 2320, 2333.

99 M Matsuda, "Public Responses to Racist Speech: Considering the Victim's Story" (1989*)* 87(8) *Michigan Law Review* 2320, 2333.

100 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) pp 40 to 42.

101 For instance, Parekh distinguishes hatred on the basis of a person's race, a normatively ascriptive irrelevant feature, to hatred on the basis of an act, such as condemning someone for committing murder. The latter is critique based on what a person has done, as opposed to who they are: B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 40.

102 Parekh explains that the group is seen as a threat to social stability, and the suggestion is often that society would be better off without them. This therefore may lead to calls to "legitimately exterminate* or expel the target group". He argues that where this is not possible, hate speakers may call for society to "rightly discriminate against" a group, who are to be kept on the "margins of society".

B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 41.

103 J S Mill, *On Liberty* (1859, reprint 2001) p 15.

3.65 Dworkin is highly critical of restrictions on free speech in the context of hate speech. He argues that a "genuinely free society" means "the world of ideas and values belongs to no one and everyone".[104] Discussing the infamous "Danish cartoons"[105], Dworkin acknowledged that while the British media were right not to publish them in the interests of public order, free speech is "a condition of legitimate government" and therefore should not be limited even where it causes offence, particularly in a religious context.[106]

3.66 Accordingly, liberal concepts seek to preserve freedom of speech and therefore would generally oppose limitations on it, even in the context of harmful or hateful speech.

3.67 Most liberal conceptions of free expression acknowledge legitimate limitation to "prevent harm to others".[107] The "Harm Principle" narrowly confined to the protection of *direct* violations of individual rights would not, however, extend to justifying laws criminalising the mere stirring up of, or causing of hatred.[108]

3.68 Barendt suggests that some approaches to harm and hate speech, such as Waldron's, are consequentialist. He considers that such approaches seek to justify banning hate speech because of its general harmful impact rather than evidence that it causes substantial harm. He argues that this approach "leaves much to the judgment of government" in terms of appropriate intervention and is therefore "unattractive" to free speech advocates.[109]

3.69 Heinze has made arguments against hate speech law which go beyond the traditional liberal critique. He argues that hate speech law in Western Europe promotes "hypocrisy, discrimination and disrespect for the rule of law" because it applies to selected groups.[110] However, he further argues that the extension of hate speech law to protect other characteristics results in an unjustifiably broad censorship of speech.[111]

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104 R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (2nd 2008) p 89.

105 In 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoons, most depicting the Prophet Muhammad. A number of Danish Muslim organisations objected to the images and petitioned the Danish government to take action. When the Danish government refused to intervene, a number of Danish imans visited the Middle East, presenting a dossier containing the cartoons, along with several other depictions of Muhammad and other material offensive to Muslims. The provenance of at least some of these images is questioned. Protests against the cartoons were held in many countries, in which over 200 people are estimated to have died.

106 R Dworkin, "Even bigots and Holocaust deniers must have their say" (February 2006) *The Guardian,* available at https://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment.

107 J S Mill, *On Liberty* (1859, reprint 2001) p 13.

108 D Mill, "Freedom of Speech" (Stanford Encyclopaedia of Philosophy, 29 Nov 2002), available at https://plato.stanford.edu/entries/freedom-speech/#MilHarPriHatSpe .

109 E Barendt, "What is the Harm of Hate Speech" (2019) *22 Ethical Theory and Moral Practice* 539, 522.

110 E Heinze, "Viewpoint Absolutism and Hate Speech" (2006) 69 *Modern Law Review* 543, 545.

111 E Heinze, "Cumulative Jurisprudence and Human Rights: The Example of Sexual Minorities and Hate Speech" (2009) *The International Journal of Human Rights* 17, 33.

3.70 Iganski has similarly noted that hate speech legislation may exacerbate tensions and division between minority communities where some groups are deemed worthy of protection and others are not.[112]

3.71 Strossen acknowledges that hate speech should not be *absolutely* protected. However, she argues that, like all other forms of free speech we ought to be cautious about censorship of it.[113] One of Strossen's key arguments is that majoritarian views on what is considered hate speech may often target unpopular, minority, dissenting views.[114] Strossen recognises that hate speech can cause harm but argues that this illustrates the significance and importance of free speech and suggests it would be more harmful to limit it.[115]

Rationales for hate speech laws

3.72 Haraszti notes that there is no internationally recognised standard for the appropriate limitations of free speech as it concerns hate speech.[116] We therefore draw from different rationales for hate speech laws to address some of the critiques outlined above and to inform our view on proportionate limitation of hate speech.

3.73 Waldron counters popular absolutist arguments made by free speech advocates about hate speech by arguing that an essential public good is undermined when the consequences and harms of hate speech toward vulnerable groups are not taken seriously.[117] This "public good" is the freedom for every individual to "go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination or exclusion by others."[118] He uses the examples of burning crosses and racist leaflets to illustrate his argument that hate speech undermines the security and the human dignity of a targeted group. This explains in part why we have hate speech laws.[119]

3.74 Waldron further argues that while there should be no protection from offensive ideas, that this is not the same as permitting verbal assault of vulnerable groups, thereby undermining their dignity and the public good.[120] He acknowledges, however, that the distinction between these two types of speech may be hard to draw in certain contexts, particularly in a religious context.[121] He therefore highlights the need for legislators to

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112 P Iganski, "Why Make a 'Hate' Crime?" [1999] *19(3) Critical and Social Policy* 386, 389.

113 N Strossen, "HATE" (2018) pp 3 to 4.

114 N Strossen, "HATE" (2018) p 4.

115 N Strossen, "HATE" (2018) p 4.

116 M Haraszti, "Foreword: Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)" in in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p xiv.

117 J Waldron, *The Harm in Hate Speech* (2012) pp 4 to 5.

118 J Waldron, *The Harm in Hate Speech* (2012) pp 4 to 5.

119 J Waldron, *The Harm in Hate Speech* (2012) pp 2 to 3.

120 J Waldron, *The Harm in Hate Speech* (2012) pp 35, 56 to 59 and 105 to 143.

121 J Waldron, *The Harm in Hate Speech* (2012) pp 114 to 126.

be "vigilant" about the extent of restrictions on speech, stating, "where there are fine lines to be drawn the law should generally stay on the liberal side of them".[122]

3.75 Restrictions on speech are not unique to hate crime. Schauer highlights that law limits freedom of expression through measures such as defamation law, restrictions on reporting matters in pending criminal cases, anti-terrorism legislation, laws against distribution of child abuse images and limits on political advertising.[123]

3.76 In Chapter 18 we further discuss the relationship between the right to freedom of expression and hate speech offences. For the purposes of this section, it should be recognised that any such interference must be necessary and proportionate. It follows that while the rationales for hate speech laws outlined below may provide a principled basis on which to legislate, whether there is a sufficient reason for any particular measure is a matter of judgement.

3.77 The academic literature reveals four main rationales for hate speech law:

(1) protection of groups from violence incited by hate speech and maintenance of public order;

(2) protection of vulnerable groups from the emotional and psychological harms of hate speech;

(3) prevention of the social exclusion and marginalisation of vulnerable groups in society; and

(4) setting parameters for acceptable conduct, thereby fostering social cohesion.

Protection from violence and maintaining public order

3.78 Protection of targeted groups from violence is one of the principal functions of hate speech law. Parekh argues, "if everything becomes speakable then everything becomes doable".[124] Indeed, the link between hate speech and extreme violence to the point of genocide is regrettably well-established.[125]

3.79 In the US context, Greenawalt notes that the constitutional protection of free speech does not extend to "fighting words" which risk inciting immediate violence.[126]

3.80 In the UK context, Goodall suggests that the rationale behind the offences of stirring up hatred (which we discuss in more detail in Chapter 18) has been to tackle "bigotry" as

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122 J Waldron, *The Harm in Hate Speech* (2012) pp 114, 126.

123 See F Schauer, "Categories and the First Amendment: A Play in Three Acts" (1981) 34 *Vandbilt Law Review* 265, 270. Schauer argues, in reference to the First Amendment to the US Constitution, that speech is not absolute. He says there are necessary limitations placed on speech in the context of contract law, antitrust law and criminal law.

124 B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, (1st ed 2000) p 314.

125 M Lower and T Hauschildt, "The Media as a Tool of War: Propaganda and the Rwandan Genocide" (2014) 1(2) *Human Security Centre* 1, 4.

126 K Greenawalt, *Fighting Words* (1996: Princeton University Press) pp 49 to 60.

a cause of disturbance to public order.[127] Incitement to hatred laws go further than the criminalisation of incitement to immediate violence, to tackle the threat hatred poses to public order, whether or not violence is incited by it.[128]

3.81 Furthermore, Parekh also argues that while exclusion and violence underlie the hate speech offences, it is a "common mistake" to suggest that hate speech laws only exist to prevent violent public disorder.[129] He emphasises that people who are intended to be incentivised to violence because of hate speech may not necessarily act on it, and members of the targeted group may decide not to retaliate against hate speakers.[130] Parekh therefore emphasises other purposes of the legal prohibition of hate speech, which we explore below.[131]

Prevention of emotional and psychological harm and self-hatred

3.82 Greenawalt acknowledges the psychological harm of hate speech as "wounding" and humiliating targeted groups with hateful epithets.[132]

3.83 Delgado highlights the mental and emotional distress that results from hate speech. He notes that "psychological responses to stigmatization consist of feelings of humiliation, isolation and self-hatred",[133] adding that the psychological harm resulting from hate speech can impact on victims' relationships with others and result in mental health issues or unhealthy coping mechanisms.[134]

3.84 Brown emphasises the unique "emotional and psychological" harm caused by hate speech to groups which have been "historically oppressed, victimised, persecuted or systematically discriminated against".[135]

3.85 Massaro, distinguishing the harm caused by racial epithets and the weight of their meaning compared to general insults, concludes that the "wound" caused by hate speech towards groups which have been historically disadvantaged is particularly severe because of this background of oppression.[136]

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127 K Goodall, "Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland" (2009) 13(2-3) *The International Journal of Human Rights* 211, 215.

128 K Goodall, "Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland" (2009) 13(2-3) *The International Journal of Human Rights* 211, 214.

129 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 41.

130 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 41.

131 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012).

132 K Greenawalt, *Fighting Words*: *Individuals, Communities and Liberties of Speech* (1st ed 1996) p 49.

133 R Delgado and J Stefancic, *Critical Race Theory: The Cutting Edge* (2nd ed 2000) p 132.

134 R Delgado and J Stefancic, *Critical Race Theory: The Cutting Edge* (2nd ed 2000) p 132.

135 A Brown, "The 'Who' Question in the Hate Speech Debate: Part 2: Functional and Democratic Approaches" (2016) 30 *Canadian Journal of Law & Jurisprudence* 23, 52 to 3.

136 T Massaro, "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991) 32(1) *William and Mary Law Review* 211, 232.

3.86 This unique harm experienced by historically oppressed and disadvantaged groups has been used to justify focused protection of these groups through hate speech laws.[137]

3.87 We discuss the significance of historical oppression and disadvantage in Chapter 10 when considering how the characteristics covered by hate crime legislation should be selected.

Prevention of the social marginalisation of targeted groups

3.88 Hate speech can perpetuate marginalisation and social exclusion of oppressed groups just as hate-motivated violence does.[138] Rumney highlights the psychological stress victims of racist hate speech in the UK experience – citing research that racist abuse and harassment impedes activities such as "shopping, visiting friends, going to school and the ability of minority group members to leave their homes or local communities."[139]

3.89 Brown notes that hate speech directed toward these groups can lead to individual group members feeling disempowered in society and potentially unable to participate in the democratic process.[140]

3.90 Waldron argues that hate speech should be regulated as it demonstrates respect for the human dignity of targeted minority groups and the importance of upholding inclusion of these groups in society.

Symbolism and social cohesion

3.91 As Waldron argues, hate speech legislation can signal the boundaries of acceptable behaviour which helps to create a "well-ordered" society fostering greater social interaction and cohesion.[141] Parekh suggests that hate speech laws exist to uphold "equality and civility" in society.[142]

3.92 Banton argues that the regulation of hate speech can lead to greater consciousness in society about the negative impact of such conduct toward vulnerable groups.[143] Accordingly, hate speech law sets the parameters of morally acceptable speech, and, in turn, has an educative function.

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137 M Matsuda, "Public Responses to Racist Speech: Considering the Victim's Story" (1989) 87(8) *Michigan Law Review* 2320.

138 L Ray et al, "Racist Offenders and the Politics of 'Hate Crime" (2001) 12 *Law and Critique* 203, 205.

139 P Rumney, "The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists" (2003) 32 *Common Law World Review* 117, 133.

140 A Brown, "The 'Who' Question in the Hate Speech Debate: Part 2: Functional and Democratic Approaches", (2016) 30 *Canadian Journal of Law & Jurisprudence* 23, 45 to 6.

141 J Waldron, *The Harm in Hate Speech* (2012) pp 64 to 104.

142 B Parekh, "Is There a Case for Banning Hate Speech" in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st ed 2012) p 55.

143 M Banton, "The Declaratory Value of Laws against Racial Incitement" in K Boyle and Frances D'Souza, *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992) p 351.

3.93 Walters also argues that law can be used to signal to society that hate speech towards particularly vulnerable groups will no longer be tolerated.[144]

3.94 Brown acknowledges the criticisms concerning the use of the criminal law for symbolic purposes alone. However, he argues that the use of criminal law for the "supplementary" purpose of outlining the core values of society and denouncing social evils may indeed be justified.[145]

Conclusion on justification for hate speech laws

3.95 As noted at the outset of this section, precisely how legislation should balance the right to freedom of expression with legitimate restrictions on the exercise of that right is a matter of judgement. However, we start from the premise that, for the reasons outlined above, hate speech laws can represent a permissible interference with freedom of expression. In Chapter 18 we discuss how the balance should be reflected in domestic law.

CONCLUSION

3.96 In this chapter we have outlined the main rationales for hate crime and hate speech laws from a jurisprudential point of view. In the following chapter we describe the current laws in greater detail.

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144 M Walters, "Hate Crimes in Australia: Introducing punishment enhancers" (2005) 29 *Criminal Law Journal* 201, 206.

145 A Brown, *Hate Speech Law: A Philosophical Examination* (1st ed, 2015) pp 241 to 2.

Chapter 4: Current Law

INTRODUCTION

4.1 In our May 2014 Report: "Hate Crime: Should the Current Offences Be Extended?", we provided an overview of the law of hate crime.[1] This chapter draws from the 2014 Report, and incorporates developments in the law and practice since that time.

4.2 Hate crime law in England and Wales comprises three distinct sets of provisions:

(1) Aggravated offences under the Crime and Disorder Act 1998 ("CDA 1998"), which deal with offences involving racial or religious hostility;[2]

(2) Enhanced sentencing provisions under the Criminal Justice Act 2003 ("CJA 2003"), which apply to hostility on the grounds of race, religion, sexual orientation, disability or transgender identity;[3] and

(3) Offences of stirring up hatred under the Public Order Act 1986 ("POA 1986"), which apply to conduct intended, or likely, to stir up hatred based on race, religion and sexual orientation.[4]

4.3 Additionally, a small number of discrete, specific offences form part of the overall hate crime framework. In particular, the offence of "indecent or racialist chanting" under the Football (Offences) Act 1991,[5] prohibits engaging or taking part in chanting of an indecent or racialist nature at a designated football match.

4.4 We outline the current law in relation to each of these legal mechanisms below. In later chapters we consider possible reforms to each of these.

AGGRAVATED OFFENCES

4.5 The CDA 1998 creates separate racially or religiously aggravated versions of existing offences.[6] These aggravated versions have higher maximum sentences.

4.6 Section 28(1) of the CDA 1998 provides that an offence is racially or religiously aggravated if:

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1 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, chapter 2.

2 Crime and Disorder Act 1998, ss 29 to 32.

3 Criminal Justice Act 2003, ss 145 and 146.

4 Public Order Act 1986, ss 18 to 23 and ss 29B to 29G.

5 Football (Offences) Act 1991, s 3.

6 Racially aggravated offences were first introduced by the Crime and Disorder Act 1998, ss 28 to 32. Religiously aggravated offences were subsequently added by the Anti-terrorism, Crime and Security Act 2001, s 39.

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

The offences which can be aggravated

4.7 The offences which have aggravated versions in the CDA 1998 are:

(1) malicious wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861;[7]

(2) assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861;[8]

(3) common assault;[9]

(4) destroying or damaging property contrary to section 1(1) of the Criminal Damage Act 1971;[10]

(5) threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence contrary to section 4 of the POA 1986;[11]

(6) intentionally causing harassment, alarm or distress using threatening, abusive or insulting words or behaviour contrary to section 4A of the POA 1986;[12]

(7) threatening or abusive conduct likely to cause harassment, alarm or distress contrary to section 5 of the POA 1986;[13]

(8) harassment and stalking contrary to sections 2 and 2A of the Protection from Harassment Act 1997;[14] and

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7 Crime and Disorder Act 1998, s 29(1)(a).

8 Crime and Disorder Act 1998, s 29(1)(b).

9 Crime and Disorder Act 1998, s 29(1)(c).

10 Crime and Disorder Act 1998, s 30(1).

11 Crime and Disorder Act 1998, s 31(1)(a).

12 Crime and Disorder Act 1998, s 31(1)(b).

13 Crime and Disorder Act 1998, s 31(1)(c). Previously, conduct could also be "insulting", as under ss 4 and 4A, but this word was removed from s 5 by the Crime and Courts Act 2013, s 57 with effect from 1 February 2014.

14 Crime and Disorder Act 1998, s 32(1)(a).

(9) putting people in fear of violence, and stalking involving fear of violence, serious alarm or distress contrary to sections 4 and 4A of the Protection from Harassment Act 1997.[15]

4.8 These offences were selected because they were regarded as the most likely offences to involve racial hostility.[16] When the aggravated offences were made applicable to religious hostility in 2001,[17] no amendment was made to the list. If racial or religious hostility is established in any offence not on this list, the hostility is dealt with at the sentencing stage using the enhanced sentencing power in section 145 of the Criminal Justice Act 2003 (outlined in greater detail from paragraph 4.43).

4.9 The prosecution must prove not only that the underlying or "base" offence was committed, but also that the defendant demonstrated, or the offence was motivated by, racial or religious hostility. If the prosecution fails to prove the aggravated element, it is open to the Crown Court (but not a magistrates' court)[18] to return an alternative verdict of guilty of the non-aggravated form of the offence.

Hostility

4.10 "Hostility" is not defined in the CDA 1998 and there is no standard legal definition. The ordinary dictionary definition of "hostile" includes being "unfriendly", "adverse" or "antagonistic". It may also include spite, contempt or dislike. Ultimately, it will be a matter for the tribunal of fact to decide whether a defendant has demonstrated, or the offence was motivated by, hostility.

The two limbs of hostility

4.11 An offence is aggravated if it falls within either of the two limbs of the test set out in sub-sections 28(1)(a) and (b) of the CDA 1998. Under limb (a), the prosecution must prove the demonstration of hostility, but no subjective intent or motivation is required: it is an objective test. Limb (b), on the other hand, requires proof of the defendant's subjective motivation for committing the offence.[19] The prosecution should make clear on which of the two limbs it is relying.[20] If evidence is available to support both limbs, the prosecution is free to rely on both.[21]

4.12 This two-pronged hostility test can cause confusion as to which limb is at issue. For example, in *SH*, the Court of Appeal criticised the trial court for focusing on the

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15 Crime and Disorder Act 1998, s 32(1)(b).

16 Lord Williams for the government explained that the offences were chosen because they were the most frequent forms of racist crime. Offences which carry a maximum sentence of life imprisonment were omitted because no higher penalty is possible. Hansard (HL) 12 Feb 1998 vol 585, cols 1280 to 1284.

17 Anti-terrorism, Crime and Security Act 2001, Pt 5.

18 See further paras 4.29 to 4.31.

19 *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] and [20].

20 *Dykes* [2008] EWHC 2775 (Admin), (2009) 173 Justice of the Peace 88 at [20] by Calvert Smith J.

21 *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] by Ouseley J; *G* [2004] EWHC 183 (Admin), (2004) 168 Justice of the Peace 313 at [15] by May LJ.

defendant's motivation for calling a Nigerian a "black monkey", despite this being a clear case of demonstration of hostility.[22]

Limb (a): "Demonstrates hostility"

What constitutes a demonstration of hostility?

4.13 A demonstration of hostility will tend to involve words[23] or gestures, but may be manifested in other ways, for example, by wearing a swastika or singing certain songs.[24]

4.14 Whether hostility was demonstrated is a wholly objective question. The victim's perception of, or reaction to, the incident is not relevant.[25] Also immaterial is the fact that the defendant's frame of mind was such that, while committing the offence, he or she would have used abusive terms towards any person by reference to any other obvious personal characteristics (the argument being that the offender wasn't really motivated by racism as such).[26] The objective nature of section 28(1)(a) means that the motivation for the offence is irrelevant to the question of whether hostility has been demonstrated.

4.15 Whether hostility was demonstrated will be a question of fact for the tribunal to decide in light of all the circumstances. In *Pal*, Simon Brown LJ stated that the use of racially abusive insults will ordinarily be sufficient to prove demonstration of racial hostility.[27]

4.16 Hostility can be demonstrated by the defendant towards someone of the defendant's own racial or religious group.[28]

When must hostility be demonstrated?

4.17 Hostility must be demonstrated either at the time of committing the offence or immediately before or immediately after doing so.[29] In *Babbs*,[30] the Court of Appeal held that immediacy is established by showing a connection between the demonstration of hostility and the substantive offence. In that case, "the words used by the appellant were … capable of colouring the behaviour of the appellant throughout the subsequent

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22 *SH* [2010] EWCA Crim 1931, [2011] 1 Cr App R 14.

23 See *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar); *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

24 *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [13] by Baroness Hale.

25 *DPP v Green* [2004] EWHC 1225 (QB); *The Times* 7 July 2004.

26 *Woods* [2002] EWHC 85 (Admin) at [13]. See also Crime and Disorder Act 1998, s 28(3), which states that "it is immaterial… whether or not the offender's hostility is also based, to any extent, on any other factor".

27 *Pal* [2000] Criminal Law Review 756 at [16].

28 Although doing so is unusual, and hence it may be more difficult to prove that the hostility was racial or religious in nature (and not based on something else, for instance the victim's disagreeable behaviour). See *White* [2001] EWCA Crim 216, [2001] 1 WLR 1352 at [20] by Pill LJ.

29 Crime and Disorder Act 1998, s 28(1)(a); *Parry* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) at [19].

30 [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct).

events" which occurred some 15 minutes later.[31] The question for the jury was whether the words used had so affected the subsequent behaviour.[32]

Limb (b): "Motivated by hostility"

What constitutes motivation?

4.18 Section 28(1)(b) turns on the defendant's subjective motivation. The section requires the defendant to have been "motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group". The hostility does not need to be the sole or even the main motivation for committing the base offence.[33]

How is motivation proved?

4.19 Section 28(1)(b) simply requires that the offence be motivated, in whole or in part, by hostility. Proof of motivation may therefore come from evidence relating to previous conduct or associations,[34] provided that the prosecution can establish relevance and admissibility. The applicable CPS guidance states:[35]

> Motive can be established by evidence relating to what the defendant may have said or done on other occasions or prior to the current incident. In some cases, background evidence could well be important if relevant to establish motive, for example, evidence of membership of, or association with, a racist group, or evidence of expressed racist views in the past might, depending on the facts, be admissible in evidence.

4.20 It is difficult to prove motivation, perhaps more difficult than proving that a defendant intended a certain result or was reckless as to the consequences of particular conduct. In practice, cases are more commonly brought under the "demonstration" limb.[36]

Need a victim experience the hostility which motivated the defendant?

4.21 Section 28(1)(b) is solely concerned with the defendant's subjective motivation for committing the offence. It is irrelevant whether the victim was aware of the defendant's motivation or that any hostility may have been towards a racial or religious group other than the victim's: indeed, in the case of public order offences there may be no specific victim.[37]

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31 *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8]. Contrast *Parry* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec): there was no sufficient connection as the defendant had gone inside after causing criminal damage to a neighbour's home and used the relevant words when the police called to ask whether he was responsible some 20 minutes later.

32 *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8].

33 *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8].

34 *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

35 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance*, last updated 21 October 2019, available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

36 E Burney and G Rose, *Racially Aggravated Offences – how is the law working?* (Home Office Research Study 244, Jul 2002) p 13.

37 *Taylor v DPP* [2006] EWHC 1202 (Admin), (2006) 170 Justice of the Peace 485.

Matters common to limbs (a) and (b)

Presumed membership and membership by association

4.22 Section 28(1)(a) refers explicitly to "hostility based on the victim's membership (or presumed[38] membership)" of a racial or religious group. Thus, a slur based on a mistaken view about the victim's racial or religious group will be caught.[39] Section 28(2) provides that "membership of a racial or religious group includes association with members of that group". "Association" may be interpreted quite broadly. It includes association through marriage, but also association through socialising.[40]

Hostility based on other factors

4.23 Section 28(3) provides that it is immaterial for offences under either limb (a) or (b) that the offender's hostility is also based "to any extent" on any other factor.

4.24 This provision has mainly been used in the context of demonstrations of hostility, to clarify that it is irrelevant if the hostility was not solely based on the victim's race or religion.[41] Often, a factor other than the victim's race or religion will have been the initial trigger for the offence: for example, the victim parking in the defendant's space,[42] the desire to avoid arrest,[43] hostility towards some other group such as parking attendants[44] or a dispute over payment for food.[45] This does not matter if racial or religious hostility was then demonstrated in the course of committing the offence.

Meaning of "racial group"

4.25 "Racial group" is defined in section 28(4) of the CDA 1998 as "a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins".[46] Words are to be construed as generally used in the jurisdiction of England and Wales; in ordinary speech, "African" would be understood to mean black

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38 Presumed by the offender: Crime and Disorder Act 1998, s 28(2).

39 See *Rogers* [2007] UKHL 8, [2007] 2 AC 62. See also *D* [2005] EWCA Crim 889, [2005] 1 WLR 2810; *Kendall v South East Essex Magistrates' Court* [2008] EWHC 1848 (Admin), [2008] All ER (D) 356 (Jun).

40 Eg if one white person were to say to another, having assaulted him, "you n****r lover" upon seeing the victim rejoin a group of black friends at the bar: *DPP v Pal* [2000] Criminal Law Review 756 at [13] by Simon Brown LJ.

41 Note that for the demonstration limb of the offence, the hostility in question must be directed at the victim's race or religion (or presumed race or religion), whereas the motivation limb simply covers hostility towards members of a particular racial or religious group generally.

42 *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar).

43 *Green* [2004] EWHC 1225 (Admin), The Times 7 Jul 2004.

44 *Johnson* [2008] EWHC 509 (Admin), The Times 9 Apr 2008.

45 *M* [2004] EWHC 1453, [2004] 1 WLR 2758.

46 This definition is derived from that used in the Race Relations Act 1976 and is also used for the purposes of the stirring up offences. Jews, Sikhs (*Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 2 WLR 620), Romany gypsies (*Commission for Racial Equality v Dutton* [1989] QB 783, [1989] 2 WLR 17), and Irish Travellers (*O'Leary v Punch Retail* (unreported, 29 Aug 2000) are recognised racial groups based on their ethnic origins.

people.[47] The Court of Appeal has said that it is for the jury to decide whether the use of a particular term demonstrated hostility.[48]

4.26 In *Rogers*,[49] the House of Lords adopted a flexible and non-technical approach to the definition that encompasses terms of exclusion, such as "foreigners". Baroness Hale held that a flexible approach to interpretation was consistent with the underlying policy aims of the statute:

> The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as "other" … This is just as true if the group is defined exclusively as it is if it is defined inclusively.[50]

Meaning of "religious group"

4.27 "Religious group" is defined in section 28(5) of the 1998 Act as a "group of persons defined by reference to religious belief or lack of religious belief". Hostility towards a group defined by non-religious beliefs or philosophies (for example, humanism) would therefore be excluded.[51] Whether a cult or similar group is captured will depend on whether their beliefs are religious in nature; for different purposes, the Supreme Court has defined religion as:

> a spiritual or non-secular belief system… which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives… [it] may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.[52]

4.28 The inclusion of groups defined by a lack of religious belief means that if, for example, the offender assaults the victim because the victim rejects all religious belief (for example, because they are apostate), the offender would be guilty of a religiously aggravated offence. Sectarian hostility (for example, between Catholics and Protestants) is also covered.

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47 *White* [2001] EWCA Crim 216, [2001] 1 WLR 1352.

48 *A-G's Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

49 *Rogers* [2007] UKHL 8, [2007] 2 AC 62. Use of the term "foreigners" had also been held as capable, depending on context, of demonstrating racial hostility by the Divisional Court in *M* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758; likewise with "immigrant", ie non-British, by the Court of Appeal in *A-G's Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

50 *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12] by Baroness Hale.

51 N Addison, Religious Discrimination and Hatred Law (2007) p 126. Contrast the Equality Act 2010 regime, which includes within its protection "religion or belief" (the latter including any religious or philosophical belief) or lack thereof (s 10).

52 *R (Hodkin) v Registrar General of Marriages* [2013] UKSC 77, [2014] 2 WLR 23 at [57] by Lord Toulson. The question was whether Scientology was a religion, and so its churches entitled to be registered as places of worship and used for the holding of marriages. The Court answered in the affirmative, overturning *Registrar General ex parte Segerdal* [1970] 2 QB 697, [1970] 3 WLR 479, which had emphasised the need for religious belief to involve worship of a deity.

Alternative verdicts and alternative charges

4.29 If the racially or religiously aggravated element of the offence is not proved, it is open to the Crown Court to return an alternative verdict for the non-aggravated version of the offence.[53] However there is no such power in the magistrates' courts, with the result that even if the evidence would suggest that the defendant had committed the non-aggravated form of the offence the defendant must be acquitted unless aggravation has also been proved. For this reason, the CPS recommends that, for racial and religious hate crime, prosecutors consider charging both the non-aggravated and the aggravated versions of the offence.[54]

4.30 It has been suggested that the approach of charging both offences may lead to "plea bargains" whereby the aggravated charge is dropped in exchange for a guilty plea to the non-aggravated form of the offence, with the result that the hostility element goes unrecognised.[55] CPS policy is not to accept pleas to lesser offences for reasons of expediency, and only to do so where the seriousness of the offending, and any aggravating features, can adequately be reflected in the sentence.[56] Nevertheless, in our 2014 consultation, some consultees raised concerns about this.[57]

4.31 A defendant, who, on the same set of facts, is charged with an aggravated offence and, alternatively, the non-aggravated form of the offence, cannot be convicted of both offences.[58]

Sentencing

4.32 The maximum custodial penalties for the offences that can be aggravated (and the maximum fine in the case of the aggravated version of the offence under section 5 of the POA 1986) are set out in the following table.

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53 On account of the Criminal Law Act 1967, s 6(3), the Criminal Justice Act 1988, s 40, and the Crime and Disorder Act 1998, ss 31(6) and 32(5).

54 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (last updated 21 October 2019), available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

55 This concern was raised at the time the offences were introduced, and some evidence for it was found: E Burney and G Rose, *Racially Aggravated Offences – how is the law working?* (Home Office Research Study 244, 2002) ch 6.

56 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (last updated 21 October 2019).

57 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 2.27.

58 *R (Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin), (2013) 177 Justice of the Peace 265.

Section No	Offence	Maximum Penalty Non-Aggravated	Maximum Penalty Aggravated
OAPA, s 20	Malicious wounding / grievous bodily harm	5 years	7 years
OAPA, s 47	Actual bodily harm	5 years	7 years
CJA, s 39	Common assault	6 months	2 years
CDG, s 1	Criminal damage	10 years	14 years
POA, s 4	Fear or provocation of violence	6 months	2 years
POA, s 4A	Intentional harassment, alarm or distress	6 months	2 years
POA, s 5	Harassment, alarm or distress	£1,000 fine	£2,500 fine
PHA, s 2	Harassment	6 months	2 years
PHA, s 2A	Stalking	6 months	2 years
PHA, s 4	Putting people in fear of violence	10 years	14 years
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	10 years	14 years

Key:

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

4.33 This table reflects changes that have been made since our 2014 Report: increases to the maximum penalties for sections 4 (putting people in fear of violence) and 4A (stalking involving fear of violence or serious alarm or distress) of the Protection from Harassment Act 1997, and the racially and religiously aggravated forms of these offences. As of 3 April 2017, the base line offences have a maximum of 10 years'

imprisonment, while their racially or religiously aggravated versions have a maximum of 14 years' imprisonment.[59]

4.34 In 2000, the Sentencing Advisory Panel issued guidance on sentencing for the racially aggravated offences, which stated that there should be a two-stage approach.[60] The sentencer should first determine what the sentence would have been for the base offence (and should state this), before adjusting upward to take account of the aggravation. In some cases this could result in the sentence becoming custodial. The guidance sets out a number of factors which indicate either a higher or lower level of racial aggravation in the circumstances.

4.35 These recommendations were largely adopted by the Court of Appeal.[61] However, in *Kelly* the Court of Appeal rejected the Panel's suggestion that the part of the sentence addressing the aggravated element should be expressed as a percentage of the base sentence. Instead it held that the court must "reach the appropriate total sentence, having regard to the circumstances of the particular case".[62] Later cases have suggested that a two-stage approach to sentencing may not be appropriate where the racial or religious aggravation is in reality the essence of the offence.[63] There is case law to the effect that the amount by which the sentence can be increased is limited by reference to the difference between the maximum sentence for the non-aggravated and aggravated offences.[64]

4.36 The Sentencing Council does not have a separate guideline dealing with aggravated offences, or hate crime offending more generally. However, it has recently finalised guidance in relation to public order offences, which includes significant detail in relation to the assessment of racial and religious aggravation. This guidance came into effect on 1 January 2020.

4.37 The Attorney General has the power to refer a Crown Court sentence which appears to be unduly lenient for review by the Court of Appeal,[65] if the offence in question is triable only on indictment, or appears on a limited list of either-way offences. This list includes all of the aggravated offences, which can therefore be reviewed by the Court of Appeal

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59 Crime and Disorder Act 1998, s 32(4)(b); Policing and Crime Act 2017, s 175(2).

60 Sentencing Advisory Panel, Advice to the Court of Appeal – 4: Racially Aggravated Offences (2000) ("SAP guidelines"). See also the more recent Sentencing Council, Assault – Definitive Guideline (2011), which at pp 9, 15 and 25 states that the two-stage approach should be applied to three offences under the Crime and Disorder Act 1998, s 29.

61 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 is the leading case.

62 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [64].

63 *R v Fitzgerald* [2003] EWCA Crim 2875. See also *Bailey* [2011] EWCA Crim 1979: racist comments were spray painted onto a vehicle: this was not criminal damage plus an element of racial aggravation – it was racist abuse committed by way of criminal damage, and a two-stage approach would be inappropriate.

64 *Eg Reil* [2006] EWCA Crim 3141 at [12], in relation to assault occasioning actual bodily harm: since the base maximum is 5 years and the aggravated 7, the increase was limited to 2 years. However, the SAP guidelines say at paras 19 to 23 that the differential increases in the maximum penalties, as set by Parliament, carry no special significance.

65 Criminal Justice Act 1988, ss 35 and 36. The Court of Appeal may substitute a different sentence (higher or lower).

if the sentence was passed in the Crown Court.[66] However, the list does not include any of the non-aggravated offences. Since none of these offences are indictable only, there can be no challenge for undue leniency.

Case example: sentencing for an aggravated offence in *R v Alkidar* [2019] EWCA Crim 330

Facts:

4.38 Police were called when the defendant, an Iraqi national who had applied unsuccessfully for asylum in the UK, had reportedly made bomb threats in the centre of Manchester. When police officers approached and handcuffed the defendant, he became upset and spoke erratically, saying there were bombs everywhere and "You will all die." As officers placed the defendant in a police vehicle, he said words to the effect of "You will all get bombed. Your government will pay."

4.39 The defendant entered a plea of guilty to racially aggravated fear or provocation of violence contrary to section 31(1)(a) of the Crime and Disorder Act 1998. The section 31(1)(a) charge indicated that the defendant had, amongst other actions, demonstrated hostility based on a police officer's membership or presumed membership of a particular racial group, namely British.

On appeal:

4.40 In relation to the appropriate sentence for the offence, the Court of Appeal held that:

> the presence of racial aggravation is an important feature which will always increase the seriousness of an offence. Conventionally, and so that the process is transparent, the judge is required to identify the sentence which would have been appropriate in the absence of racial aggravation and to indicate by what appropriate amount the sentence is being increased to reflect the racial aggravation, thereby indicating by how much the sentence has been enhanced for that significant feature [at 25].

4.41 The Court of Appeal held that the defendant's offending "is certainly by no means at the highest end of the spectrum of circumstances in which a section 31(1)(a) offence could be committed" [at 30].

4.42 The defendant's sentence was quashed and a sentence of six months' imprisonment imposed. This was based on a provisional sentence of six months' imprisonment for the threatening words and behaviour offence, with an uplift of three months for the aggravation element, and a one-third discount for an early guilty plea.

ENHANCED SENTENCING

4.43 Enhanced sentencing under the CJA 2003 applies much more broadly than the aggravated offences scheme discussed above.

[66] Criminal Justice Act 1988 (Review of Sentencing) Order 2006, sch 1.

4.44 Section 145 of the CJA 2003 requires racial and religious hostility to be taken into account at the sentencing stage for all criminal offences other than those charged as aggravated offences (as in this case the offence itself is already aggravated). Section 146 requires the sentencing court to take into account hostility based on disability, sexual orientation, and transgender identity in sentencing for any offence. A section 146 uplift can be applied in respect of a conviction for a racially or religiously aggravated offence – for example, if a gay Muslim person is attacked in a context where the perpetrator has demonstrated both homophobic and Islamophobic hostility. The prosecution would typically charge the CDA 1998 aggravated offence and additionally present the evidence of homophobia. In practice, a sentencer will typically announce a single sentence uplift to represent the totality of the aggravation, but recognise that both forms of hostility were present in their sentencing remarks.

4.45 The key differences between this regime and the aggravated offences regime under the CDA 1998 are that:

(1) the CDA 1998 allows for a higher maximum sentence for each offence if aggravated, whereas the CJA 2003 increases the sentence within the existing maximum for the base offence;

(2) under the CDA 1998, the aggravation is part of the offence, and will be assessed by a jury at the liability stage, whereas under the CJA 2003, the hostility element will be determined by a judge at the sentencing stage;

(3) the CDA 1998 applies only to a specified list of offences, whereas the CJA 2003 can apply to all offences;[67]

(4) the fact of the racial or religious aggravation under the CDA 1998 will appear on an offender's criminal record. While the court is obliged to state aggravation under the CJA 2003 in open court, it will not appear on the offender's criminal record (though at the time of writing this Consultation Paper, we understand that recording of an enhanced sentence is to be introduced onto the Police National Computer – see Chapter 16 for further details).

4.46 The enhanced sentencing rules contained in sections 145 and 146 of the CJA 2003 form part of the general sentencing regime in Part 12 of that Act. The CJA 2003 provides that when sentencing, the courts must have regard to the five fundamental purposes of sentencing:[68]

(1) the punishment of offenders;

(2) the reduction of crime (including its reduction by deterrence);

(3) the reform and rehabilitation of offenders;

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67 However, where the offence is one that could be racially or religiously aggravated, the Court will not apply section 145 if the defendant has been charged with the racially or religiously aggravated form of the offence and acquitted.

68 Criminal Justice Act 2003, s 142(1).

(4) the protection of the public; and

(5) the making of reparation by offenders to persons affected by their offence.

4.47 In assessing the seriousness of offences, the court must have regard to the culpability of the offender and to the harm caused by (as well as harm intended or foreseeable as following from) the offence.[69] Courts are assisted in this task by sentencing guidelines, which since 2010 have been issued by the Sentencing Council, and which all courts are required to follow.[70] Some offences have specific guidelines tailored to them; for other offences, there is a general seriousness guideline.

4.48 The CJA 2003 specifically requires certain aggravating factors, if present, to be taken into account in assessing seriousness. These include hostility on the basis of race or religion (section 145) and on the basis of sexual orientation, disability, or transgender identity (section 146). Sentencing guidelines set out these "statutory aggravating factors", as well as "general aggravating factors", to which the court must have regard in considering all the circumstances of the offence.[71]

4.49 The CJA 2003 aggravating factors (whether statutory or general) operate to guide sentencers as to where a sentence should fall within the range for the relevant offence. The court has a duty to "state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence".[72]

Section 145: Race and religion

4.50 Section 145 of the CJA 2003 provides that:

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

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69 Criminal Justice Act 2003, s 143(1).

70 Unless it is contrary to the interests of justice to do so: Coroners and Justice Act 2009, s 125(1).

71 Criminal Justice Act 2003, s 156(1) provides that courts must consider all mitigating and aggravating factors when imposing community sentences and discretionary custodial sentences.

72 Criminal Justice Act 2003, s 174(2). In 2014, we recommended that the use of enhanced sentencing provisions in section 145 or 146 of the Criminal Justice Act 2003 should always be recorded on the Police National Computer (PNC) and reflected on the offender's record. The reasons for this recommendation were that it would: provide improved safeguarding for future potential victims; ensure accurate labelling of the wrongdoing; aid with detection, investigation, character evidence and sentencing; improve the effectiveness of rehabilitation and re-education; and create better data and improved inter-agency cooperation (See Hate Crime: Should the Current Offences Extended? (2014) Law Com No 348, paras 3.59 to 3.77). At the time of writing this Consultation Paper, we were advised that while the CPS has worked with Her Majesty's Courts and Tribunals Service (HMCTS) to ensure that sentence uplifts are included on court record sheets, there were still discussions undergoing with the Home Office to determine whether this is recorded on the PNC.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

4.51 This provision cannot be used to increase a sentence where the offender was acquitted of an aggravated offence but convicted of the corresponding non-aggravated offence.[73] However, there may be circumstances where section 145 aggravation can apply at sentencing where the prosecution has not pursued an aggravated version of the offence.[74]

Section 146: Disability, sexual orientation and transgender identity

4.52 Unlike section 145, section 146 does not make express reference to the aggravated offences in the CDA 1998, but it creates an almost identical scheme. It provides:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) a disability (or presumed disability) of the victim, or

(iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

(i) by hostility towards persons who are of a particular sexual orientation, or

(ii) by hostility towards persons who have a disability or a particular disability, or

(iii) by hostility towards persons who are transgender.[75]

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

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73 *R v McGillivray* [2005] EWCA Crim 604.

74 See *R v O'Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11.

75 Section 146(2)(a) and (b) mirror the hostility test set out in the aggravated offences regime, so the case law on these elements of the aggravated offences is also relevant in interpreting section 146.

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

Evidence of hostility for the purposes of enhanced sentencing

4.53 Whereas hostility must be proved as part of the offence for the aggravated offences under the CDA 1998, under sections 145 and 146 of the CJA 2003 it is a question of fact for the judge in sentencing.

4.54 If the offender wishes to challenge the allegation that hostility was present and that the sentence should be enhanced in accordance with section 145 or 146, the prosecution will have to provide evidence. If the defendant has pleaded guilty on a limited basis (for example, they do not accept that they demonstrated or that the offence was motivated by hostility) then a Newton hearing may take place to decide on the facts that remain in dispute between the defence and the prosecution that are relevant to sentencing.[76] In a Newton hearing the judge acts as the tribunal of fact, applying the criminal burden and standard of proof. It will only be necessary where there is likely to be a significant impact on the sentence.[77]

Meaning of disability in this context

4.55 Disability is defined broadly as "any physical or mental impairment".[78] The CPS has developed a detailed policy on disability hate crime and other crimes against disabled people, which defines "crimes against disabled people" as:

> Any crime in which disability is a factor, including the impact on the victim and where the perpetrator's perception that the victim was disabled was a determining factor in his or her decision to offend against the specific victim.

4.56 CPS policy is "to put before the court any evidence that a disabled person is targeted for this reason, so that the sentence reflects the gravity of such offending".[79]

Meaning of sexual orientation in this context

4.57 Section 146 does not define sexual orientation. However, in *B,* the Court of Appeal considered that "sexual orientation" refers to orientation towards people of the same

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76 See *R v Newton* (1983) 77 Cr App R 13.

77 Detailed guidance is set out in *R v Underwood* [2004] EWCA Crim 2256; [2005] 1 Cr App R 13. However, the Attorney General's guidance states that "the basis of a guilty plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests". See Attorney General's Office, *The Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2012), available at https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercisecthe-basis-of-plea.

78 Criminal Justice Act 2003, s 146(5).

79 Crown Prosecution Service, *Hate Crime: Public statement on prosecuting disability hate crime and other crimes against disabled people (August 2017)*, available at https://www.cps.gov.uk/sites/default/files/documents/publications/disability-hate-crimepublic%2520statement-2017.pdf.

sex, the opposite sex, or both; it will not encompass preferences for particular acts, or asexual people.[80]

Meaning of transgender identity in this context

4.58 Section 146(6) of the CJA 2003 provides that "references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment". This definition is intended to be inclusive, not exhaustive.[81]

Presumed membership and membership by association

4.59 Section 146 provides that it is sufficient for hostility to be demonstrated towards the victim based on their "presumed membership" of one of the listed groups. Conversely, if an offender is unaware of the person's status, but uses abusive language related to it (for instance a term relating to sexual orientation), it will be difficult to establish that there was hostility based on the person's presumed status.

4.60 Section 145 of the CJA 2003 expressly incorporates the definitions of racial and religious hostility used for the racially and religiously aggravated offences, which are contained in section 28(2) of the CDA 1998. Section 28(2) provides that "membership" of a group includes membership by association. Section 145 must therefore be seen as similarly defining "membership" as including membership by association. By contrast, section 146 defines hostility afresh (albeit in almost identical terms to the CDA 1998), and does not expressly state that "membership" includes membership by association. The scope of the protections under section 146 therefore arguably may not apply to "association" with LGBT or disabled persons, although we are not aware of this issue being tested in court.

The approach to sentencing under sections 145 and 146

4.61 The level of increase in sentence where hostility is proved will depend on the circumstances of the case. Guidance from the CPS, and explanatory material in the Magistrates' Court Sentencing Guidelines, suggest that the approach adopted by the Court of Appeal in *Kelly*, partially endorsing the Sentencing Advisory Panel's guidance on racially aggravated offences,[82] also applies for the purposes of sections 145 and 146 of the CJA 2003.

4.62 The general approach for sentencing derived from *Kelly* is that the court should first decide on the appropriate sentence without the hostility aggravation, but including any other aggravating or mitigating features. The sentence should then be enhanced to take

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80 [2013] EWCA Crim 291. We consider the option of inclusion of asexual people in Chapter 11.

81 In the Committee of the Whole House on the Bill for the Legal Aid, Sentencing and Punishment of Offenders Act 2012 – which inserted section 146(6) of the Criminal Justice Act 2003 – the Minister of State, Ministry of Justice, Lord McNally said "… I should be clear that 'transgender' is an umbrella term that includes, but is not restricted to, being transsexual", see *Hansard* (HL), 7 February 2012, vol 735, col 153. We consider the option of revision to this definition in Chapter 11.

82 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73. The guidance related to the aggravated offences and also to Crime and Disorder Act 1998, s 82 (which provided for racial aggravation to increase sentences for offences other than the aggravated offences, and was repealed and re-enacted in the Criminal Justice Act 2003, s 145).

account of the aggravation, and the judge should say publicly what the appropriate sentence would have been without the aggravation.

4.63 The key exceptions to this approach are cases in which the aggravating feature of the offence is so inherent and integral to the offence itself that it is not possible sensibly to assess the overall criminality involved in such a discrete way. For example, in some public order cases, racially or homophobically charged abusive statements might amount to the entirety of the conduct such that it would be almost impossible to assess the criminality separately from their hostile content. In such cases, the Court must assess the seriousness of the conduct involved and its criminality as a whole.[83]

4.64 Following *Kelly* and the Sentencing Council Guidance, the extent to which the sentence is increased under sections 145 and 146 will depend on the seriousness of the aggravation, to which in turn the offender's intention and the impact of the conduct are relevant.

4.65 With regard to the offender's intention, factors increasing aggravation may include: the hostility element was planned; the offence was part of a pattern of offending; the offender was a member of, or associated with, a group promoting hostility based on the protected characteristic in question; or the incident was deliberately set up to be offensive or humiliating to the victim or to the group of which the victim is or was perceived to be a member.[84]

4.66 With regard to the impact of the conduct, factors indicating a high level of aggravation could include: the offence was committed in the victim's home; the victim was providing a service to the public; the timing or location of the offence was calculated to maximise the harm or distress it caused; the expressions of hostility were repeated or prolonged; the offence caused fear and distress throughout a local community or more widely;[85] or the offence caused particular distress to the victim and/or the victim's family.[86]

4.67 The aggravation may be regarded as less serious if: the hostility element was limited in scope or duration; the offence was not motivated by hostility; or the element of hostility or abuse was minor or incidental.[87]

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83 *R v Fitzgerald* [2003] EWCA Crim 2875.

84 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. See also *Re A-G's Reference (No 92 of 2003)* [2004] EWCA Crim 924, The Times 21 Apr 2004 at [17] and following.

85 See also *Saunders* [2000] 1 Cr App R 458, 2 Cr App R (S) 71 at [18]: "the same offensive remark is likely to attract a heavier penalty if uttered in a crowded church, mosque or synagogue than if uttered in an empty public house" by Rose LJ.

86 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. Many of these factors are set out in the earlier Court of Appeal decision in *Saunders* [2000] 1 Cr App R 458 at [18].

87 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [66].

Case example: *R v Cooke* [2015] EWCA Crim 1414 – religious aggravation

Facts:

4.68 The defendant was one of 200 to 300 people involved in a serious episode of public disorder in Birmingham City centre, arising from a demonstration by the English Defence League and a counter-demonstration by a group called United Against Fascism (UAF).

4.69 The defendant pleaded guilty to violent disorder. The sentencing judge was satisfied that the offence was aggravated by religious hostility pursuant to section 145 of the CJA 2003, and increased the defendant's sentence before credit for plea by six months[88] (to three years, reduced to two years with full credit). The defendant appealed on the basis that there was no justification for this finding, and that the judge's starting point before guilty plea was in any event too high.

On appeal:

4.70 The Court of Appeal held:

> "it seems to us that in principle it was open to the judge in the present case to infer, if the evidence was there, that the appellant was motivated by religious hostility from his willingness to join in this violent disorder when it was plain to him, in the case of many of the participants at least, that the offence was motivated by hostility towards members of a racial or religious group" at [25].

4.71 In finding that the judge was justified in applying the uplift of six months for religious aggravation, the Court noted that the defendant:

> "persisted in his involvement in violent disorder going from site to site over a considerable period of time. The whole thrust of the violence and abuse was religiously motivated. The admission by the appellant in interview that he was wanting to fight with the UAF, whose membership was substantially Asian, in our view provided sufficient material from which the judge could infer that the appellant's involvement was, in part at least, religiously motivated" at [27].

4.72 However, the Court was persuaded that the judge had punished the defendant too harshly in comparison with other participants in the incident, who had records for violence. The Court held that instead of three years, the starting point should have been two years' imprisonment, and that following credit for guilty plea this should be reduced to 16 months' imprisonment.

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88 Section 144 of the Criminal Justice Act 2003 requires the court to take into account a guilty plea by the defendant. Further guidance on how this should be put into practice is provided by the Sentencing Council. See Sentencing Council, "Reduction in sentence for a guilty plea – first hearing on or after 1 June 2017", available at https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/.

Murders in the context of hate crime

4.73 A separate sentencing scheme exists in respect of murder, which carries a mandatory life sentence. Below we explain how it deals with murders committed in circumstances of hostility.

4.74 Except in cases where the offender is to receive a "whole life order", the court must specify the minimum term (or "tariff") that the offender must serve before being considered for release on licence. The approach is similar to that under sections 145 and 146. The court first selects a starting point, based on the overall seriousness of the offence. It then adjusts the tariff up or down from that point, based on other aggravating or mitigating factors.[89] The starting points are a whole life order, 30 years, 25 years, and 15 years. The court has a duty to state in open court and in ordinary language its reasons for arriving at the minimum term,[90] including which starting point it selected and why.[91] However, the court is not bound to follow the statutory guidance and may depart from it if appropriate,[92] although it must state its reasons for doing so.[93]

Starting points

4.75 For offenders aged 18 years or over, where the offence is not so serious as to warrant a whole life order but the seriousness of the offence is "particularly high", the appropriate starting point is 30 years. The schedule provides that the fact that a murder is racially or religiously aggravated, or aggravated on the basis of sexual orientation, disability or transgender identity, normally indicates "particularly high" seriousness. In deciding whether these factors are present, the court must apply the criminal standard of proof.[94]

Aggravating factors

4.76 After choosing a starting point, the court should take into account any aggravating factors, including hostility based on race, religion, sexual orientation, disability or transgender identity, to the extent that it has not already allowed for them in its choice of starting point.[95]

4.77 Accordingly, depending on the circumstances, hostility against a protected group may either determine the starting point, or be an aggravating factor increasing the tariff from the starting point. The Court of Appeal in *Blue*[96] held that the trial judge was entitled to

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89 As well as the effects of the defendant's previous convictions, any plea of guilty and whether the offence was committed on bail.

90 Criminal Justice Act 2003, s 174.

91 Criminal Justice Act 2003, s 270.

92 *Sullivan* [2004] EWCA Crim 1762, [2005] 1 Cr App R 3 at [11]. See also *Last* [2005] EWCA Crim 106, [2005] 2 Cr App R (S) 64 at [16].

93 Criminal Justice Act 2003, s 270(2)(b).

94 *Davies* [2008] EWCA Crim 1055, [2009] 1 Cr App R (S) 15 at [14] by Lord Phillips CJ: "The distinction between the factors that call for a 30 year starting point and those that call for a 15 year starting point is no less significant than that which has to be considered by a jury when distinguishing between alternative offences … It would be anomalous if the same standard of proof did not apply in each case."

95 Criminal Justice Act 2003, Sch 21, paras 8, 10 and 5(2)(g).

96 [2008] EWCA Crim 769, [2009] 1 Cr App R (S) 2.

find a racial element to an offence despite stating that he would not rely on racial aggravation so as to justify a "huge leap" from a 15-year to a 30-year starting point.

General aggravating factors under the CJA 2003

4.78 We noted above that, in addition to the statutory requirement in sections 145 and 146 that hostility be treated as an aggravating factor, the courts are required to take other general aggravating factors into account. Sentencing guidelines, which the court must follow unless it is contrary to the interests of justice to do so, include several general aggravating factors that may be of relevance in the hate crime context.

4.79 The sentencing guideline *General guideline: overarching principles*[97] sets out a non-exhaustive list of the most important general aggravating features. These are split into factors which indicate higher culpability and those which indicate a more than usually serious degree of harm.

4.80 Factors indicating higher culpability which may be of potential relevance to hate crime include:

(1) that the offence was motivated by or demonstrated hostility towards one of the protected characteristics;

(2) that a vulnerable victim was deliberately targeted;

(3) that there was an abuse of trust or dominant position;

(4) that there is evidence of community/wider impact.

4.81 The caveat for each of these factors is that "care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence".[98]

STIRRING UP HATRED OFFENCES

4.82 The stirring up offences were introduced by the POA 1986 replacing the offences of inciting racial hatred under the Race Relations Acts 1965 and 1976.

4.83 Similar offences covering religious hatred and hatred on the grounds of sexual orientation were added to the POA 1986 more recently, taking effect from 2007 and 2010 respectively.[99]

4.84 The stirring up offences represent an entirely separate regime from the aggravated offences. The aggravated offences provide for a set of pre-existing criminal offences to be treated more severely if committed in circumstances of racial or religious hostility.

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97 Sentencing Council, *General guideline: overarching principles* (effective from 1 October 2019), available at https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/.

98 Sentencing Council, *General guideline: overarching principles* (effective from 1 October 2019).

99 The religious offences were added by the Racial and Religious Hatred Act 2006 and the sexual orientation offences by the Criminal Justice and Immigration Act 2008. They were commenced in October 2007 (SI 2007 No 2490) and March 2010 (SI 2010 No 712) respectively.

By contrast, the stirring up offences are a new set of offences criminalising conduct intended or likely to stir up hatred that may not otherwise be unlawful.

4.85 In relation to all three characteristics, six types of conduct are covered. These range from using words and behaviour in person to displaying and publishing images and written material, as well as covering recordings, broadcasts and theatrical productions.

4.86 The various offences are quite complex in structure. We examine them in greater detail in Chapter 18.

Conduct covered by the offences

4.87 The offences based on stirring up racial hatred apply where a person engages in certain forms of threatening, abusive or insulting conduct and either their intention was to stir up racial hatred or, having regard to all the circumstances, racial hatred was likely to be stirred up. The offences do not criminalise conduct expressing or inciting hostility or hatred towards specific individuals. Rather, they address conduct intended or likely to cause others to hate entire national or ethnic groups. They do not require proof that hatred has in fact been stirred up, merely that it was either intended or likely to be stirred up.

4.88 The forms of conduct caught by the offences are:

(1) using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting;[100]

(2) publishing or distributing written material which is threatening, abusive or insulting;[101]

(3) presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour;[102]

(4) distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting;[103]

(5) providing a programme service, or producing or directing a programme, where the programme involves threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein;[104] or

(6) possessing written material, or a recording of visual images or sounds, which is threatening, abusive or insulting, with a view to it being displayed, published, distributed, shown, played or included in a cable programme service.[105]

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100 Public Order Act 1986, s 18. The equivalent offence for religion or sexual orientation is at s 29B.

101 Public Order Act 1986, s 19. The equivalent offence for religion or sexual orientation is at s 29C.

102 Public Order Act 1986, s 20. The equivalent offence for religion or sexual orientation is at s 29D.

103 Public Order Act 1986, s 21. The equivalent offence for religion or sexual orientation is at s 29E.

104 Public Order Act 1986, s 22. The equivalent offence for religion or sexual orientation is at s 29F.

105 Public Order Act 1986, s 23. The equivalent offence for religion or sexual orientation is at s 29G.

4.89 For the racial hatred offence the prosecution must prove that the defendant either intended to stir up racial hatred, or that in the circumstances, racial hatred was likely to be stirred up. However, it is a defence for a person who is not shown to have intended to stir up hatred that they did not know that the words, material or behaviour were threatening, abusive or insulting (although not that they did not know that racial hatred was likely to be stirred up).

4.90 This inclusion of a lower threshold was in response to concern expressed by Sir Leonard Scarman (later Lord Scarman), in his inquiry into the Red Lion Square disturbances of 1974, that the requirement to show intent made the offence "useless to a policeman on the street".[106]

4.91 The offences added in 2007 and 2010 to address the stirring up of hatred on the basis of religion and sexual orientation cover similar forms of conduct. However, in response to concerns about freedom of expression, which hampered early attempts to create an offence of stirring up religious hatred, they contain some key differences from the offences relating to racial hatred, making the later offences narrower in scope:

(1) the words or conduct must be threatening (not merely abusive or insulting);

(2) there must have been an intention to stir up hatred (a likelihood that it might be stirred up is not enough);[107] and

(3) there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct. We outline these further at paragraphs 4.10 to 4.103.

4.92 Most prosecutions are brought under the "words or behaviour" provisions in sections 18 and 29B. The importance of the remaining provisions is that they enable action to be taken against those who facilitate the distribution of inflammatory material, in particular racially inflammatory material, where the lower threshold for prosecution means that a broadcaster, publisher or distributor may be criminal liable if he had reason to believe that material might be inflammatory.

4.93 In *R v Sheppard*,[108] the Court of Appeal held that publication on the internet meets the requirement of the offence under section 19 POA 1986 that publication be to the public or a section of the public if through such placement it is generally accessible or available to, placed before, or offered to the public. While the offences are not intended to be extra-territorial, it is sufficient that the actions of the defendant in publishing the material took place in the jurisdiction: it is not necessary that hatred be intended or likely to be stirred up in the jurisdiction.[109]

4.94 However, it is likely that a social media provider accused of publishing or distributing racially inflammatory material would be able to take advantage of the protections in sections 19 and 21 if it was unaware of the content of the material. How this would apply

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106 Scarman Inquiry into Red Lion Square Disorders: Minutes, Evidence and Papers, HO 233 (1974-1975).

107 We discuss the meaning of "likely to" in more detail in Chapter 18.

108 *R v Sheppard* [2010] EWCA Crim 65.

109 *R v Lawrence Burns* [2017] EWCA Crim 1466.

to ongoing availability once a provider had been notified that material was inflammatory has not been tested. (In the case of religious hatred or hatred on grounds of sexual orientation, the provider would have a defence to any offence if it could not be shown to have itself intended to stir up hatred.)

Definitions

Meaning of "hatred"

4.95 Hatred is not defined in the POA 1986, and can be taken to bear its ordinary meaning. It is generally thought that "hatred" is a stronger term than "hostility".[110] As a term which appears very rarely in criminal statutes, there is limited further definition in case law, and it is ultimately a question for the jury whether this standard has been met.

4.96 The hatred must be directed at a group, not merely an individual.

Meaning of "racial hatred"

4.97 Racial hatred is defined for the purposes of the stirring up offences to mean hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.[111] This is the same definition used for the aggravated offences, albeit that "hostility" is in place of "hatred". We discussed the courts' broad interpretation of what language is racial in nature at paragraph 4.26.

Meaning of "religious hatred"

4.98 "Religious hatred" is likewise defined in the same way for the stirring up as for the aggravated offences:[112] hatred against a group of persons defined by reference to religious belief or lack of religious belief.[113]

Meaning of "hatred on the grounds of sexual orientation"

4.99 Unlike the enhanced sentencing provisions in section 146 of the CJA 2003, where sexual orientation is not defined, here "hatred on the grounds of sexual orientation" is defined as "hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)".[114]

Protection of freedom of expression

Religious belief

4.100 The POA 1986 contains a wide protection for comment, criticism and debate on religious beliefs and practices, including comic treatment amounting to ridicule. The wording of this provision is as follows:

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110 See, for example, R Card, *Public Order Law* (2000) p 186, pointing out that the offences would have been easier to prove if only hostility or ill-will had been intended, that hatred, at a minimum, connotes "intense dislike, enmity or animosity" and that the act of stirring up hatred is "a much stronger thing than simply bringing into ridicule or contempt, or causing ill-will or bringing into distaste."

111 Public Order Act 1986, s 17.

112 Again, substituting the word "hatred" for the word "hostility".

113 Public Order Act 1986, s 29A.

114 Public Order Act 1986, s 29AB.

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[115]

4.101 It is difficult to assess the practical effect of this provision. There are no reported cases interpreting it, and prosecutions under the religious hatred provisions are rare. It may be difficult, for example, to draw the line between criticism of a belief system and attacks on its adherents. There are also arguments that the religious offences are unworkable due to this provision (in combination with the requirement that material be "threatening" rather than "threatening, abusive or insulting").[116]

Sexual conduct or practice

4.102 There is similarly wide protection for the criticism of sexual conduct or practice, and of same sex marriage, in section 29JA:

> In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.
>
> In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.[117]

4.103 As with religious hatred, in the absence of appellate judicial interpretation it is hard to assess the scope of this free speech provision. However, there have been successful prosecutions for this offence.[118]

Procedural matters

Attorney General's consent

4.104 For all the stirring up offences, the consent of the Attorney General is needed to bring a prosecution.[119] The Attorney General applies the ordinary principles of sufficiency of evidence and public interest (which will already have been considered by the CPS) and acts independently of Government. A former Attorney General has described the consent requirement as "an important filter" against vexatious and unmeritorious cases and has said that in considering whether to consent, the Attorney General is "required as a public authority to act in accordance with the Human Rights Act and with Convention rights".[120] However, some critics, notably Sir Geoffrey Bindman QC, have

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115 Public Order Act 1986, s 29J.

116 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 2.47.

117 Public Order Act 1986, s 29JA.

118 See *R v Ali, Javed, and Ahmed* (2012) 720110109 (Derby Crown Court, Feb 10).

119 Public Order Act 1986, ss 27(1) and 29L.

120 Evidence given by the then Attorney General, Lord Goldsmith QC, to the Select Committee on Religious Offences on 16 January 2003, at paras 641 and 651.

argued that the requirement for consent has limited the number of prosecutions brought.[121]

Penalties and sentencing guidelines

4.105 The penalties are the same for all six forms of the stirring up hatred offences, and across the three forms of hatred. Upon conviction on indictment, the maximum is seven years' imprisonment or a fine, or both; upon summary conviction, imprisonment for a term not exceeding six months, a fine not exceeding the statutory maximum, or both.[122]

4.106 The Sentencing Council guidelines are based on three levels of culpability for racial hatred and two for religion or sexual orientation. High culpability reflects a person using a position of trust, authority or influence; intention to incite serious violence; or persistent activity. Lesser culpability is reserved for cases under the racial hatred offence lacking intention to stir up hatred (such cases fall outside the scope of the offences relating to religious hatred and hatred on grounds of sexual orientation). The medium culpability category is for all other cases. The higher level of harm is for material which directly encourages activity which threatens or endangers life, or has widespread dissemination. Other material constitutes a lesser level of harm.

4.107 The sentencing guidelines give a range from a low-level community order or one year's custody for a lesser harm / lesser culpability offence to three years' custody for a high culpability / higher harm offence. Aggravating and mitigating factors can then lead to a higher or lower sentence. In *R v Bitton*,[123] the Court of Appeal held that a sentence of four years' imprisonment would have been appropriate given that the course of offending involved repeated exhortations to kill black people and Muslims, but reduced it to two years and eight months to reflect an early guilty plea.

Jurisdiction

4.108 Cases involving activity over the internet may cause jurisdictional difficulties, with the stirring up offences as with other criminal offences. The principle adopted by the Court of Appeal is that where a substantial measure of the conduct constituting a crime takes place in England and Wales, the English and Welsh courts have jurisdiction (unless comity requires otherwise).[124] Following the decision in *R v Burns*, it appears clear that it is not necessary that the intended or likely target of the stirring up of hatred be located within the jurisdiction of England and Wales.[125] It is clear that mere use of a foreign web server to upload content prepared in England and Wales, and intended for a domestic audience, is not enough to prevent prosecution here.[126] However, the case law does

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121 Geoffrey Bindman, "Bringing race bigots to book" (20 October 1993) *The Guardian*.

122 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 2.56; Public Order Act 1986, ss 27 (race) and 29L(3) (religion/sexual orientation). Note that the Criminal Justice Act 2003, s 282 extends the power of magistrates' courts to sentence for some offences from six months to 12 months, but it is not yet in force.

123 *R v Bitton* [2019] EWCA Crim 1372.

124 *R v Smith (Wallace Duncan) (No. 4)* [2004] EWCA Crim 631.

125 Abusive and Offensive Online Communications: Scoping Report (2018) Law Com No 381, para 9.29.

126 *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [32] by Scott Baker LJ.

not resolve the position regarding material intended or likely to incite racial hatred in England and Wales but created elsewhere.[127]

[127] Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 2.51.

Case example: *R v Burns* [2017] EWCA Crim 1466

Facts:

4.109 At the age of 20, the defendant, a member of a far-right white supremacist group and avowed racist, posted a series of virulently racist items to a Facebook account he operated under an alias. The material was posted while the defendant was in the UK, but some of his 98 Facebook "friends" were located overseas. Subsequently, at the age of 21, the defendant made a racist speech outside the United States embassy; the speech was filmed and posted on YouTube.

4.110 At trial, the judge ruled that for the purposes of sections 18 and 19 of the POA 1986, it was not necessary that the intended or likely stirring up of racial hatred be in England and Wales. The defendant's defence was that his Facebook posts were intended to be "private banter", and that his speech was not intended to stir up racial hatred and was unlikely to do so. Notwithstanding this, the defendant was convicted of stirring up racial hatred by publishing written material (s 19(1), POA 1986) and through words or behaviour (s 18(1), POA 1986). The defendant was sentenced to a total of four years' imprisonment. The defendant appealed against his conviction and sentence.

On appeal:

4.111 The Court of Appeal upheld the trial judge's ruling that the stirring up of racial hatred did not need to be in England and Wales:

> "The question is: what was the intention or likelihood of the person making the publication or using the relevant words or behaviour? If that person was in the jurisdiction at the time when he carried out such actions, then there is no difficulty with territoriality. The fact that the hatred in question may be stirred up overseas does not, in our judgment, give rise to any arguable point" at [11].

4.112 In addition, the Court rejected the defendant's argument that the trial judge had erred by allowing the jury to consider the subsequent posting of the speech on YouTube because it permitted the taking into account of subsequent matters that were not relevant in considering the defendant's intention or likelihood of stirring up racial hatred. Indeed, the Court emphasised that:

> "The question of what was a defendant's intention, or otherwise the likelihood of a matter occurring, must be judged at the relevant time; but there is no reason why it must be considered only in relation to matters which had occurred at that time. There is no reason why subsequent events cannot be considered in forming a view as to what was the intention or likelihood at that time. The judge's direction was entirely conventional and correct" at [15].

4.113 However, in relation to sentence, the Court held that it was manifestly excessive on the basis that the trial judge did not take sufficient account of the defendant's young age at the relevant time, as well as comparable cases. The total sentence of four years was reduced to two years and six months' imprisonment.

RACIALIST CHANTING AT FOOTBALL MATCHES

4.114 It is also an offence, under the Football (Offences) Act 1991, section 3(1), to "engage or take part in chanting of an indecent or racialist nature at a designated football match".

4.115 A designated football match currently means one involving a club that is a member of the Football League, the FA Premier League, the National League, the Welsh Premier League, or the Scottish Professional Football League.

4.116 "Chanting" is defined as "the repeated uttering of any words or sounds (whether alone or in concert with one more others)."[128]

4.117 "Of a racialist nature" is defined as "consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins." [129]

4.118 For this offence, the act must take place at the football match. By contrast, banning orders made under the Football Spectators Act 1989 may be made in respect of a variety of offences committed in the vicinity of a match.[130]

4.119 The maximum available penalty for this offence is a £1000 fine,[131] but conviction may also allow for a football banning order to be made against the offender.[132]

4.120 The number of arrests for racialist chanting has declined from 44 in 2010/11 to 14 in 2018/19. However, the Home Office also records that the number of matches marked by one or more "hate crime" reports increased from 131 matches in 2017/18 to 193 in 2018/19.

4.121 While this is the main offence specifically tailored to the context of football matches, the conduct may overlap significantly with other offences in sections 4, 4A and 5 of the POA 1986. These offences all carry equivalent (in the case of section 5) or higher penalties (sections 4 and 4A) than the Football (Offences) Act 1991, and this is increased further where the racially or religiously aggravated versions can be satisfied under section 31 of the CDA 1998. They also may be applied in circumstances which are not limited to race; for example, to homophobic or disablist abuse.

4.122 In our pre-consultation meetings, the CPS advised that for these reasons they may prefer to pursue POA 1986 charges, rather than the offence in the Football (Offences) Act 1991. This is likely one of the reasons behind its comparatively low usage.

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128 Football (Offences) Act 1991, s 3(2)(a). See Chapter 19 for further discussion.

129 Football (Offences) Act 1991, s 3(2)(b).

130 Football Spectators Act 1989, Sch 1.

131 Football (Offences) Act 1991, s 5(2).

132 Football Spectators Act 1989, Sch 1, para m.

Chapter 5: Hate crime prevalence, and the profile of victims and perpetrators

INTRODUCTION

5.1 England and Wales has one of the most comprehensive hate crime reporting and recording systems in the world.[1]

5.2 This chapter considers the available data as to the prevalence of hate crime in England and Wales, as well as research into the profile of hate crime victims and perpetrators.

5.3 The two primary sources of data relied on to gauge the incidence and extent of hate crime in England and Wales are the Crime Survey of England and Wales (CSEW) and Police Recorded Crime data. While the methodology and time periods covered by CSEW and Police Recorded Crime are different,[2] they each provide insight into the relative prevalence of hate crime offence types and strands (characteristics such as race, sexual orientation etc) – an important consideration in both prevention and enforcement efforts.

5.4 Hate crime criminal justice outcomes data (prosecution and conviction figures) is available through official statistics published by the Ministry of Justice, and prosecution data collected by the Crown Prosecution Service.

5.5 Supplementary information, which provides further insight into the prevalence of hate crime and the extent of enforcement efforts, i also collected by other organisations – both governmental and non-governmental. For example, hate crime reporting organisations such as Stop Hate UK (all forms of hate crime), Galop (LGBT hate crime), Tell MAMA (Islamophobia), Community Security Trust (antisemitism) and many others.

THE CRIME SURVEY OF ENGLAND AND WALES ("CSEW")

5.6 The CSEW is used by the government to evaluate and develop crime reduction policies, and has been used to measure crime since 1981. Each survey involves tens of thousands of households across England and Wales, and queries residents' experience of crime over the past 12 months. A large proportion of crimes are not reported to police,

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1 J Perry, *Facing all the Facts: Connecting on hate crime data in England & Wales* (2020) p 12, available at https://www.facingfacts.eu/wp-content/uploads/sites/4/2019/11/Facing-Facts-Country-Report-England-and-Wales-with-Self-Assessment-271119.pdf.

2 For example, the Home Office has observed "a number of differences in the coverage of the CSEW and Police Recorded Crime which present challenges in comparing across the sources to assess levels and trends in hate crime": Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 10. Moreover, a briefing paper published by the House of Commons Library has contended that "there is no single reliable source of hate crime statistics in England and Wales": G Allen, Y Zayed, *Hate Crime Statistics – Briefing Paper Number 08537* (House of Commons Library, 28 March 2019) p 5.

so the CSEW results – which do not depend on a report being made – support a better understanding of the true incidence of crime.[3]

5.7 To make "robust" hate crime estimates from the survey, multiple annual CSEW datasets (for example, 2015/16, 2016/17, and 2017/18) must be combined, with an average estimate for the time period produced.[4] As a result, while the CSEW is considered to be a relatively reliable indicator of long-term crime trends,[5] it can only give a very broad estimate of the level of hate crime in individual years and does not reveal short term fluctuations in hate crime offending.[6] It is also important to note that the data is based on the victim's perception of the motivation of the perpetrator (an approach broadly comparable to that adopted by the police – see further paragraphs 5.16 to 5.18).[7]

5.8 According to the combined 2015/16 to 2017/18 CSEW, there were around 184,000 (perceived) hate crimes per year. This represents around 3% of all crime recorded by the CSEW (6,096,000 incidents), comparable to the proportion of hate crime in the police recorded crime series (2%).[8]

5.9 There was a statistically significant fall in the number of hate crime incidents from a yearly average of 307,000 in 2007 to 2009, to an average of 184,000 in 2015 to 2018. This represents a fall of 40% between these combined surveys, which is comparable to the 39% fall in crime overall recorded by the CSEW over this period.

5.10 The survey distinguishes between "personal crime" and "household crime". Personal crimes are crimes against the individual and only relate to the respondent's own personal experience (not that of other people in the household). An example of a personal crime would be an assault. Household crimes include all vehicle and property-related crimes; respondents are asked whether anyone currently residing in the household has experienced any incidents within the reference period. An example of a household crime would be criminal damage to a car (owned by anyone in the household).

5.11 The CSEW hate crime data is broken down by characteristic. Table 1 below shows the average annual numbers of incidents estimated by characteristic. A combined overall figure is not included in the table as survey respondents were able to report being targeted on the basis of more than one characteristic. The CSEW data does not include

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3 See Kantar Public (Office for National Statistics), available at https://www.crimesurvey.co.uk/en/AboutTheSurvey.html.

4 Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 10.

5 G Allen, Y Zayed, *Hate Crime Statistics – Briefing Paper Number 08537* (House of Commons Library, 28 March 2019) p 6.

6 Home Office, *Hate Crime, England and Wales, 2017/18* (Statistical Bulletin 20/18, 16 October 2018) p 10.

7 This is the same methodology used by the CPS and the Police. Their agreed definition of hate crime is "any criminal offence perceived by the victim or any other person, to be motivated by hostility or prejudice" based on certain characteristics.

Crown Prosecution Service, *Hate Crime – What is it and how to support victims and witnesses* (October 2016) p 2, available at https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-what-it-is-and-how-to-support-victims-and-witnesses.pdf.

8 Home Office, "Hate Crime, England and Wales, 2017/18" (Statistical Bulletin 20/18, 16 October 2018) p 21.

an estimate of the number of transgender identity motivated offences, as the number captured in the survey was too small to provide a reliable estimate.

Table 1: Estimated annual incidence of hate crime each year from 2015 to 2018 by characteristic

Characteristic	Personal Crime	Household Crime	Total
Race	66,000	35,000	101,000
Religion	23,000	16,000	39,000
Sexual Orientation	19,000	10,000	29,000
Disability	23,000	28,000	51,000
Gender Identity	Insufficient data	Insufficient data	Insufficient data

5.12 The 2015 to 2018 CSEW statistics also included information in relation to gender and age, two characteristics that are not currently protected by hate crime laws. The relevant figures recorded were as follows:

Table 2: Estimated annual incidence of crimes targeted by gender and age – 2015 to 2018

Characteristic	Personal Crime	Household Crime	Total
Age	81,000	35,000	116,000
Gender (female)	57,000	18,000	75,000
Gender (male)	10,000	3,000	13,000

5.13 The CSEW data highlights the relatively high proportion of violent personal offences within hate crime. For example, crimes involving personal violence without injury constitute a significantly higher proportion of hate crimes (27%) than that of all crimes included in the survey (11%) (see Table 3, below). Similarly, crimes involving personal violence with injury are more prevalent amongst hate crimes (19%) than amongst all crimes included (10%).

Table 3: CSEW 2015/16 to 2017/18: The proportion of different types of offending – hate crime compared with all CSEW crime incidents[9]

Type of incident	All hate crime	All CSEW crime[10]
Violence without injury	27%	11%
Violence with injury	19%	10%
Robbery	7%	2%
Theft from person	4%	6%
Other theft of personal property	2%	11%
All personal crime	**58%**	**41%**
Criminal damage	18%	19%
Burglary	13%	11%
Vehicle-related theft	5%	14%
Bicycle theft	1%	5%
Other household theft	7%	10%
All household crime	**42%**	**59%**

5.14 Importantly, the picture provided by the CSEW's estimates is both over- and under-inclusive. The format of the survey means CSEW data includes hate crimes which never come to the attention of police.[11] Some of these might also have been classified as non-crime hate incidents.[12] In addition, the CSEW does not include crimes against businesses or people who are not residents in households (such as short-term visitors, people experiencing homelessness or people living in institutions such as care homes).[13] Moreover, the CSEW excludes: homicides; crimes considered "victimless" (for example, some public order offences such as "stirring up hatred"); and crimes perpetrated against children under the age of 16.[14]

9 Adapted from: Home Office, *Hate Crime, England and Wales, 2017 to 2018: data tables* (16 October 2018), Table 3.1, available at https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2017-to-2018.

10 All CSEW crime excludes fraud and computer misuse.

11 We discuss some of the reasons for this in greater detail in Chapter 7.

12 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) p 3.

13 G Allen, Y Zayed, *Hate Crime Statistics – Briefing Paper Number 08537* (House of Commons Library, 28 March 2019) p 7.

14 Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 9; G Allen, Y Zayed, "Hate Crime Statistics – Briefing Paper Number 08537" (House of Commons Library, 28 March 2019) p 6.

POLICE RECORDED CRIME

5.15 The Home Office publishes annual figures showing the extent of hate crime that has been recorded by police.[15] From 2009/10 to 2010/11, police only recorded racist incidents.[16] However, since 2011/12, Police Recorded Crime data have been available for hate crime incidents relating to any of the five protected characteristics.

The definition used by police and the CPS

5.16 Police recorded crime data relies on the definition of hate crime that was agreed in 2007 by the police, Crown Prosecution Service, Prison Service (now the National Offender Management Service) and other agencies that make up the criminal justice system for the purposes of flagging and monitoring hate crime:

> Any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by hostility or prejudice against a person who is transgender or perceived to be transgender.

5.17 Its origins lie in recommendations made in respect of police treatment of racist hate crime and hate incidents in the MacPherson Report, which was the result of an inquiry into matters arising from the racially motivated murder of Stephen Lawrence. Recommendation 12 of this report was that a racist incident be defined as "any incident which is perceived to be racist by the victim or any other person".[17]

5.18 The agreed police/CPS hate crime definition is designed for recording and case handling purposes. It is distinct from, and significantly wider than the legal tests that apply to offences and sentencing under the relevant hate crime legislation, which require proof that the offence was motivated by or the offender demonstrated hostility based on the characteristic (or presumed characteristic). Notwithstanding this, the breadth of this definition may be because it is designed for recording and case handling purposes.

Hate incidents

5.19 In addition to recording hate crimes, police forces also record "hate incidents." The label "hate incident" is used by the police where the defendant's actions do not amount to an existing crime, but the actions are perceived by the victim to have demonstrated, or been motivated by, hostility towards a protected hate crime characteristic. This is done primarily to allow police to monitor social tensions, and prevent disorder and the escalation of incidents into hate crimes. As we note in Chapter 6, this practice has been challenged in the courts, but was upheld as lawful and compliant with Article 10 of the European Convention on Human Rights (freedom of expression) in the case of *Miller v*

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15 eg Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018).

16 G Allen, Y Zayed, *Hate Crime Statistics – Briefing Paper Number 08537* (House of Commons Library, 28 March 2019) p 7.

17 *The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny* (1999) Cm 4262-I, Chapter 47, Recommendation 12.

College of Policing.[18] In this chapter, the police statistics we outline relate to recorded hate crimes only, not hate incidents.

Trends in police recorded crime

5.20 In contrast with the CSEW data, Police Recorded Crime figures have demonstrated an upward trend in recorded hate crime offences since 2011/12 (see Table 4, below). Since 2012/13, police recorded hate crimes have more than doubled, from 42,255 to 103,379 offences.[19]

5.21 There is some debate as to how these figures should be interpreted. The rise in the number of hate crimes recorded by police – which stands in contrast to the downward trend in estimated incidence recorded in the CSEW[20] – may in part reflect heightened public awareness of the importance of reporting, and improvements in the quality of recording hate crime by police[21] – "rather than a genuine increase".[22]

5.22 The All Party Parliamentary Group ("APPG") on Hate Crime recently acknowledged that "improved policing practices and the recording and identification of hate crime are factors in this rise" of police recorded crime.[23] However, the APPG also observed that "there has been a genuine rise in hate crime over this period", noting that events such as the EU referendum of 2016 and terrorist attacks have invariably been "followed by sharp increases in reported hate crimes".[24]

5.23 The 2018/19 Home Office police recorded crime statistics report interpreted the increase as follows:

> The increases seen over the last five years are thought to have been driven by improvements in crime recording by the police following a review by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) in 2014 and the removal of the designation of police recorded crime as National Statistics. It also thought that growing awareness of hate crime is likely to have led to improved identification of such offences. Although these improvements are thought to be the

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18 [2020] EWHC 225 (Admin), [156], [176], [186] to [210].

19 Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019) Table 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

20 Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 13.

21 G Allen, Y Zayed, *Hate Crime Statistics – Briefing Paper Number 08537* (House of Commons Library, 28 March 2019) p 7; Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 13.

22 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) pp 8 to 9; Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 14.

23 APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise?* (5 February 2019) p 8, available at http://www.appghatecrime.org/wp-content/uploads/2019/02/APPG%20on%20Hate%20Crime%20Report%20Hate%20Crime%20and%20Community%20Cohesion.pdf.

24 APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise*? (5 February 2019) p 8.

main drivers for the increases seen, there have been short-term genuine rises in hate crime following certain events such as the EU Referendum in June2016 and the terrorist attacks in 2017. Part of the increase over the last year may reflect a real rise in hate crimes recorded by the police.[25]

5.24 It has been argued that as Police Recorded Crime data is available on an annual basis (and monthly for racially or religiously aggravated offences), it is more suitable than the CSEW for assessing spikes in hate crime associated with specific events – such as the EU referendum – rather than long-term trends.[26]

Police recording practice

5.25 Following a 2014 report by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services ("HMICFRS"), improvements were made in police practices in recording hate crime.[27] Nevertheless, in a July 2019 report, HMICFRS again emphasised that "accurate flagging of hate crime is essential so that forces and the government can understand and respond appropriately".[28] The 2019 inspection also identified ongoing confusion over whether the perception of the victim or the police officer as to the motivation of the offender is recorded. Other significant problems with the flagging of hate crimes included: flags not being used when they should have been; the wrong flags being used; and flags being used without any apparent justification.[29] HMICFRS added:

> Most forces are doing too little to put this right. This means we have concerns about the accuracy of the hate crime data forces give the Home Office.[30]

Characteristic and crime type data

5.26 Like the CSEW data, and as demonstrated in Table 4, below, Police Recorded Crime data consistently indicates that race is the most targeted characteristic. However, the relative prevalence of the other characteristics is inconsistent with the CSEW data; since 2011/12, the second most targeted characteristic in Police Recorded Crime data has been sexual orientation, rather than religion.[31] Moreover, unlike the CSEW, the

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25 Home Office, *Hate Crime, England and Wales, 2018/19* (20 October 2019) pp 5 to 6.

26 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) p 3; Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) pp 7, 10, 12.

27 See Her Majesty's Inspectorate of Constabulary and Fire Services, *Crime-recording: making the victim count* (November 2014), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crime-recording-making-the-victim-count.pdf; APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise?* (February 2019) p 12.

28 Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, *Understanding the difference: The initial police response to hate crime* (July 2018) p 13, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

29 Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, *Understanding the difference: The initial police response to hate crime* (July 2018) pp 13 to 14.

30 Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, *Understanding the difference: The initial police response to hate crime* (July 2018) p 14.

31 This disparity may be partially accounted for by a tendency to equate race and religion in recording incidents of hate crime.

Police Recorded Crime figures include hate crime based on transgender identity – at increasing levels – since 2011/12. While 103,379 separate hate crime offences were recorded in 2019/19, Table 4 shows that 112,637 motivating factors were recorded (again, an incident of hate crime can involve more than one protected characteristic).[32] Of these, 78,991 (76%) related to race, 8566 (8%) to religion, 14,491 (14%) to sexual orientation, 8,256 (8%) to disability and 2,333 (2%) to transgender.[33]

Table 4: Hate crimes recorded by the police in England and Wales, by monitored strand, 2011/12 to 2018/19[34]

Hate crime strand	**2011/ 2012**	**2012/ 2013**	**2013/ 2014**	**2014/ 2015**	**2015/ 2016**	**2016/ 2017**	**2017/ 2018**	**2018/ 2019**
Race	35,944	35,845	37,575	42,862	49,419	62,685	71,251	78,991
Religion	1,618	1,572	2,264	3,293	4,400	5,949	8,336	8,566
Sexual orientation	4,345	4,241	4,588	5,591	7,194	9,157	11,638	14,491
Disability	1,748	1,911	2,020	2,515	3,629	5,558	7,226	8,256
Transgender	313	364	559	607	858	1,248	1,651	2,333
Total number of motivating factors	43,968	43,933	47,006	54,868	65,500	84,597	100,102	112,637
Total number of offences	**N/A**	**42,255**	**44,577**	**52,465**	**62,518**	**80,393**	**94,098**	**103,379**

5.27 Unlike the CSEW, Police Recorded Crime covers crimes against people of all ages, as well as crimes against businesses and public order offences. As observed in Table 5, below, public order offences comprised 54% of all police recorded hate crimes in 2018/19. This compared with 8% of overall recorded crimes. Offences involving violence against the person remained a significant proportion of hate crimes (36%), as was also observed by the CSEW (46%).

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32 Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019), Table 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

33 Note that the combined total of these percentage figures exceeds 100% due to the ability to record more than one characteristic. See Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019), Table 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

34 Adapted from Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019), Table 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

Table 5: Distribution of all offences flagged as hate crimes in England and Wales by police in 2018/19[35]

Offence type	Proportion of police recorded hate crime offences	Proportion of overall police recorded crime
Public order	54%	8%
Violence against the person	36%	28%
Criminal damage and arson	5%	10%
Other notifiable offences[36]	4%	55%

5.28 Table 6 indicates that the proportion of different types of offending varies between strands of hate crime. Whereas public order offences constituted 54% of total police recorded hate crime in 2018/19, they ranged from comprising 58% of race-based hate crimes, to 36% of recorded disability-based offences. Moreover, whereas criminal damage and arson constituted 5% of total police recorded hate crime, it made up 10% of religion-based hate crime offences.

Table 6: Percentage breakdown of police recorded hate crime in England and Wales by selected offence types and monitored strand, 2018/19[37]

Offence type	Race	Religion	Sexual orientation	Disability	Transgender	Total hate crime
Public order offences	58%	50%	47%	36%	39%	54%
Violence against the person with injury	5%	3%	7%	6%	6%	5%
Violence against the person without injury	19%	20%	22%	21%	21%	20%
Stalking and harassment	9%	13%	16%	24%	24%	12%
Criminal damage and arson	5%	10%	4%	5%	5%	5%
Other notifiable offences	3%	4%	4%	5%	5%	4%

35 Adapted from Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019), Figure 4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

36 Other notifiable offences included crimes such as theft, burglary and sexual offences.

37 Adapted from Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019), Figure 5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

PROSECUTION STATISTICS

5.29 Since 2008, alongside work to measure the incidence of hate crime through the CSEW and Police Recorded Crime, the Crown Prosecution Service ("CPS") has provided an analysis of key prosecutions and assessment of hate crime prosecution performance.[38] The CPS' analysis draws on its own prosecution statistics and Ministry of Justice conviction statistics. It broadly groups the data in terms of racial and religious hate crime; homophobic, biphobic and transphobic hate crime; and disability hate crime. It also reports data in relation to crimes against older people.

5.30 Despite the significant rise in police recording of hate crime, there has been a reduction in CPS pre-charge decisions (previously referred to as police referrals) and total hate crime prosecution numbers in recent years. The most recent 2018-19 CPS hate crime report showed a fall of 12.5% in pre-charge decisions compared to the previous year, from 13,518 to 11,826. In the corresponding period there was a slight increase in the proportion of cases charged, from 78.9% the previous year to 80.0%, resulting in 9,459 suspects being charged.[39]

5.31 The volume of convictions fell from 11,987 in 2017-18 to 10,817 in 2018-19 (a 9.8% fall), and the conviction rate remained steady at 84.3%. This is consistent with the overall average CPS conviction rate of 83.7% in 2018-19.[40] 76.1% of all hate crime prosecution outcomes in 2018-19 were due to guilty pleas, which is also comparable with the rate of guilty pleas across all offences of 76.7%.[41]

5.32 The trend in prosecutions and convictions in recent years can be observed from the table below:

Table 7: CPS completed hate crime prosecutions by outcome

Year	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**	**2018-19**
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%)
Non-convictions[42]	2,159 (15.3%)	2,518 (17.1%)	2,596 (16.8%)	2,408 (16.6%)	2,164 (15.3%)	2,011 (15.7%)
Total prosecutions	**14,074**	**14,738**	**15,442**	**14,480**	**14,151**	**12,828**

38 See Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019), available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF; HM Government, *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (March 2012) p 23.

39 See Crown Prosecution Service, *Hate Crime Annual Report* 2018-19 (2019) p 29, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

40 See Crown Prosecution Service, *Hate Crime Annual Report* 2018-19 (2019) p 30.

41 See Crown Prosecution Service, *Hate Crime Annual Report* 2018-19 (2019) p 30.

42 Non-convictions refers to a variety of outcomes where a prosecution has begun but does not result in a conviction. This can include acquittal after trial (449 in 2018-19 – or 22.3% of non-convictions) but also other outcomes such as discontinued prosecutions (8.8% of non-convictions in 2018-19). See Crown Prosecution Service, See Crown Prosecution Service, *Hate Crime Annual Report* 2018-19 (2019) pp 30 to 31.

5.33 It is noteworthy that the 9.3% decrease in prosecutions in 2018/19 coincided with the 9% increase in the total number of hate crimes recorded by police in the same year (see Table 4).

5.34 Of the 12,828 completed hate crime prosecutions in 2018/19, 9931 (77.4%) were recorded as based on race, 605 (4.7%) were based on religion; 1653 (12.9%) were based on sexual orientation, 60 (0.5%) were transphobic, and 579 (4.5%) were disability hate crimes.[43]

Enhanced sentencing uplift statistics

5.35 As part of its March 2018 "Hate Crime Strategy 2017-2020", the CPS has placed particular emphasis on improving the proportion of convictions in cases flagged as hate crime[44] which result in announced and recorded sentence uplifts.[45] In this regard, it is important to note that the fact that a case is initially flagged by the CPS as a hate crime does not necessarily mean that it will ultimately be prosecuted as one. The prosecutor can apply to the Court for an announced and recorded statutory uplift under section 145 of the Criminal Justice Act 2003 for racial or religious aggravation, or section 146 for disability, sexual orientation or transgender identity based aggravation.[46] 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.[47]

Stirring up hatred statistics

5.36 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.[48] While these numbers are low, they are higher than the figures for the previous year (nine prosecutions and eight convictions), which at the time represented the highest ever

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43 See Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019).

44 In the CPS' Case Management System. It should be noted that cases which are flagged as a hate crime under Section 145 and Section 146 are marginally less likely to be charged as one compared to religious and racially aggravated offences. For instance, research reveals that in 2015/16, the CPS decided to bring proceedings against suspects in 73.11% of homophobic and transphobic hate crime cases, in comparison with 76.24% of disability hate crime and 78.18% of religious hate crime and 78.95% of race hate crime. See M A Walters, S Wiedlitzka and A Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (2017) p 59, available at https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539.

45 Crown Prosecution Service, *Hate Crime Strategy 2017-2020* (2018) p 3, available at https://www.cps.gov.uk/sites/default/files/documents/ publications/CPS-Hate-Crime-Strategy-2020-Feb-2018.pdf.

46 Crown Prosecution Service, *Hate Crime Annual Report 2017-18* (2018) p 16, available at https://www.cps.gov.uk/ sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf. The report notes that

> the counting rules for the presentation of hate crime sentence uplift volumes and proportions were amended with effect from April 2018. Cases where defendants have been committed for sentence to the Crown Court following conviction in magistrates' courts are now excluded from the dataset. The convictions data collated by the CPS does not capture sentence uplifts recorded on cases where the sentence has been deferred by committing for sentence at the Crown Court.

47 See Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) pp 40 to 41.

48 See Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) p 47.

number of such prosecutions.[49] All of these prosecutions related either to race or religion (not to sexual orientation, the third characteristic protected by these offences).[50]

ADDITIONAL ASSESSMENTS OF THE PREVALENCE OF HATE CRIME

5.37 In February 2019, the APPG on Hate Crime published a report entitled "How do we build community cohesion when hate crime is on the rise?" which observed that "the overall trend in the UK is one of increasing rates of hate crime across all categories".[51] In reaching this assessment, the APPG referred to the impact of online communications and social media platforms on the proliferation of hate-based offending. In line with the APPG's assessment regarding online hate crime, the CPS has noted that "the internet, and social media in particular, have provided new platforms and opportunities for hate crimes to occur".[52] In contrast, in its recent thematic review, the Home Office was more reserved in its conclusions about online offending, finding that

> evidence gaps … remain, and true rates of victimisation are difficult to establish … our understanding of the circumstances in which hate crime is most likely to take place is incomplete, as is our knowledge of the nature and extent of online offending.[53]

5.38 A more general concern was also expressed in the thematic review that:

> … current data limitations mean that understanding the true prevalence of all forms of hate crime, particularly at a sub-strand level, remains a challenge.[54]

5.39 Other sources of data about the prevalence of hate crime have stemmed from a variety of organisations, local and national, and governmental and non-governmental. For example, in its report the APPG observed that every submission to the inquiry containing data about local or national trends had agreed that:

> the situation is getting worse and that, due to large numbers of hate crimes not being reported to third-party services or the police, the true profile of hate crime in the UK is akin to an iceberg, with the majority hidden from view.[55]

5.40 Submissions to the APPG's inquiry were made by bodies including Community Security Trust (CST), which was said to show "consistently high levels" of antisemitism over a three-year period, and Tell MAMA – which recorded 3005 anti-Muslim / Islamophobic

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49 Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) p 13.

50 See Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) p 47.

51 APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise?* (5 February 2019) p 11.

52 See Crown Prosecution Service, *Hate Crime Annual Report 2017-18* (2018) p 6.

53 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) p 5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748140/hate-crime-a-thematic-review-of-the-current-evidence-oct2018-horr102.pdf.

54 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) p 3.

55 APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise?* (5 February 2019) p 11.

incidents over a three-year period.[56] Indeed, in 2019 CST recorded 1,805 antisemitic incidents, the highest ever annual total.[57]

5.41 Overall, we can conclude that hate crime is a significant problem in England and Wales as numerous reports suggest. It seems that awareness of this problem is increasing and that reporting to the police and other support services has increased also. In consideration of this, it is clear that there is a growing need for effective support services and high-quality investigation into hate crimes.

WHO ARE THE VICTIMS AND THE PERPETRATORS OF HATE CRIME?

5.42 Prevention and intervention efforts may be assisted by an improved understanding of who is most likely to be a victim or perpetrator of hate crime.

The victims

5.43 An oft-cited concern with the current approach to combatting hate crime is the lack of acknowledgment of the intersectional nature of victims' characteristics. By "intersectional" we mean the fact that some people experience multiple and overlapping forms of discrimination and abuse – for example, lesbian women may experience both misogyny and homophobia, and sometimes both at the same time. Mason-Bish has suggested that, to date, hate crime policy has been "accompanied by rather simplistic notions of victimhood", which involves "separating victims via crude titles – race, religion or disability, for example".[58]

5.44 The Leicester Hate Crime Project – which surveyed 1421 victims over a two-year period from 2012-2014 – found that victims are targeted on the basis of hostility which extends beyond the five currently protected characteristics, and that offenders often target individual victims based on more than one characteristic. The survey undertaken as part of the project set no boundaries on the range of identity characteristics which could conceivably form the basis of a hate crime, and respondents were able to select whichever characteristics they felt were relevant in their circumstances. For 21% of participants, dress and appearance was considered to be a significant contributory factor, and 14% cited their gender.[59] Of note, 50% of respondents to the Leicester Hate Crime Project survey identified more than one aspect of their identity or "difference" which they felt had motivated the offender to target them.[60] Socio-economic status was a recurring theme; large numbers of survey respondents received very low or no yearly

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56 APPG on Hate Crime, *How do we Build Community Cohesion when Hate Crime in on the Rise?* (5 February 2019) p 12.

57 Community Security Trust, *Annual Review 2019*, p 14, available at https://cst.org.uk/data/file/a/c/Annual%20Review%202019-web.1583750042.pdf

58 H Mason-Bish, "Future challenges for hate crime policy: lessons from the past", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 64.

59 N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 21 to 22.

60 N Chakraborti, J Garland and SJ Hardy, The Leicester Hate Crime Project: Findings and Conclusions (2014) p 24.

income. Indeed, 23% said they did not receive any income and 19% received £15,000 or less annually – just 2% earned more than £40,000 per year.[61]

5.45 Notwithstanding the heavily intersectional nature of hate crime, there is longstanding evidence that the most frequent motivation underpinning incidents of hate crime relates to race or ethnicity.[62] The Mayor of London's Office for Policing and Crime ("MOPAC") published figures on the characteristics of victims of racist hate crimes in London in the 12 months to 31 March 2019: 56% of victims were male, and 57% of victims were aged 25 to 44. Of all victims to have suffered racist hate crime, 30% were of Black ethnicity, followed by those of White (26%) and Asian (23%) ethnicity.[63]

5.46 Data from the 2018/19 CPS hate crime report indicates that amongst cases that were prosecuted, 33% of victims were women, 53% were men, and in 13% of cases, the victim's sex or gender was not recorded.[64]

The perpetrators

5.47 The evidence suggests that the group of perpetrators is much more expansive and diverse than might be expected.[65]

5.48 While less research exists into the characteristics and motivations of hate crime perpetrators, a number of hallmarks have been identified. A 2002 US study by McDevitt and others categorised four types of hate crime offenders:[66]

(1) "thrill seekers" – who commit crimes for excitement;

(2) "area or territory defenders" – who see themselves as defending their "turf";

(3) "retaliatory offenders" – who believe they are serving a victim's "just desserts"; and

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61 However, the authors did note that 23% of respondents chose not to respond to questions about their income. N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 28 to 29.

62 See also N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 21; K Benier, R Wickes and A Higginson, "Ethnic Hate Crime in Australia: Diversity and Change in the Neighbourhood Context" (2016) 56 *British Journal of Criminology* 479, 479.

63 MOPAC also produces statistics on hate crimes in London motivated by hostility based on race, disability, sexual orientation, transgender identity, Islamophobia, antisemitism, and faith, see MOPAC, *Hate Crime Dashboard*, available at https://www.london.gov.uk/what-we-do/mayors-office-policing-and-crime-mopac/data-and-statistics/hate-crime-dashboard.

64 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 32.

65 eg, see N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 103.

66 It is important to note that McDevitt's research has a US focus. As such, the characteristics of hate crime perpetrators and their motivations may differ from domestic hate crime perpetrators. This is mainly because the construction and understanding of hate crime in the US is much narrower, especially in terms of the concept of "hostility" when compared to the England and Wales definition. Nonetheless, we think McDevitt's research is important to include in this section as parallels can be drawn with domestic hate crime perpetrators.

(4) "mission offenders" – who seek to rid the world of groups they consider evil or inferior.[67]

5.49 In more recent academic work, Chakraborti and Garland have argued that "in the majority of instances hate crimes are enacted for the excitement and thrill involved" – with the bias element and "hate" emotion not forming the prime motivation.[68]

5.50 In a separate study, McDevitt and colleagues acknowledged the limitations imposed by the "paucity of information on those individuals who commit hate crimes".[69] However, they also noted that hate crime perpetrators may be somewhat distinct from other criminals, referring to the difference in their potential to be deterred from future hate-motivated violence (particularly if mission offenders).[70] The authors also distinguished hate crime perpetrators by the community's perception of their increased culpability,[71] noting that offenders play different roles when acting in groups. These roles included "leaders, fellow travellers, unwilling participants and heroes".[72]

5.51 A literature review by the Welsh government found that the demographics of hate crime offenders tended to match the demographic proportions of the population of the relevant area;[73] the majority of hate crime offenders in the UK are white, male and under 25;[74] and contrary to classic portrayals of hate crimes, they are seldom committed by strangers.[75] In 2014, the Leicester Hate Crime Project elicited similar results, finding that seven out of 10 victims' most recent experiences of hate crime had been perpetrated by a male offender(s) and a similar proportion had been perpetrated by offender(s) aged 30 or under.[76] In addition, in a third of cases the perpetrators had been known to victims either as acquaintances, neighbours, friends, work colleagues, family members or carers.[77] Indeed, Chakraborti and Garland have argued that the

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67 J McDevitt, J Levin and S Bennett, "Hate crime offenders: an expanded typology" (2002) 58(2) *Journal of Social Issues* 303, cited in C Roberts et al, "Understanding who commits hate crime and why they do it" (Welsh Government Social Research, no. 38/2013) p 20.

68 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 115.

69 J McDevitt, J Levin, J Nolan and S Bennett, "Hate crime offenders", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 124.

70 J McDevitt, J Levin, J Nolan and S Bennett, "Hate crime offenders", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 134.

71 J McDevitt, J Levin, J Nolan and S Bennett, "Hate crime offenders", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 132.

72 J McDevitt, J Levin, J Nolan and S Bennett, "Hate crime offenders", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 135.

73 See M Stacey, K Carbone-Lopez and R Rosenfield, "Demographic Change and Ethnically Motivated Crime: The Impact of Immigration on Anti-Hispanic Hate Crime in the United States" (2011) 27(3) *Journal of Contemporary Criminal Justice* 278.

74 See Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report 2010-2011* (2012).

75 See G Mason, "Hate crime and the image of the stranger" (2005) 45 *British Journal of Criminology* 837; C Roberts et al, "Understanding who commits hate crime and why they do it" (Welsh Government Social Research, no. 38/2013) p 25.

76 N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 54.

77 N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 54.

relationship between offender and victim "may be more complex than initially thought", citing multiple studies in which they were often familiar with each other, at least to a degree.[78]

5.52 However, Chakraborti and Garland have contended that a focus on power and subordination – as a dichotomy always at play in hate crime – ignores the possibility of minorities directing hate-based crimes at other minorities, and abuse that stems from banal ignorance, as opposed to a commitment to systemic oppression.[79] Separate research by the Leicester Hate Crime Project identified that perpetrators of hate crime do not just emerge from traditional majority groups; a significant number of its respondents reported victimisation from new and emerging minority groups.[80] It was suggested that the "findings from this study illustrate that the profile of hate crime perpetrators is much more diverse than is commonly assumed …".

5.53 The Welsh government's report also pointed to studies which indicate that a complex web of inter-community tensions can be associated with hate crime offending,[81] and that a proportion of hate crimes are committed by perpetrators drawn from BAME backgrounds.[82] The report also examined data from the CPS' "Hate Crime and Crimes Against Older People Report 2010-2011",[83] relating to those hate crime offenders who had been charged and prosecuted. This data indicated that 83.3% of all hate crime defendants across all monitored strands were men; 73.7% were categorised as "white British"; and 26.3% identified as a category other than white.[84]

5.54 The CPS' key findings indicate that in 2018/19, 81.6% of defendants in hate crime flagged cases were men.[85] During this period, 57.9% of defendants in hate crime flagged cases were categorised as White (a fall from 64.5% in 2017-18), a substantial majority of whom were White British (52.6% of all defendants). In addition, 6.4% of defendants were identified as Black, and 4.5% were identified as Asian, a slight fall from

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78 eg, see L Moran, "'Invisible minorities': challenging community and neighbourhood models of policing" (2007) 7(4) *Criminology and Criminal Justice* 417; G Mason, "Hate crime and the image of the stranger" (2005) 45(6) *British Journal of Criminology* 837; and N Jarman and A Tennant, "An Acceptable Prejudice? Homophobic Violence and Harassment in Northern Ireland" (2003), cited in N Chakraborti and J Garland, "Hate Crime: Impact, Causes and Responses" (2nd ed, 2015) p 107.

79 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology* 499, 503 and 505.

80 eg "Three fifths of survey respondents stated that their last experience of hate crime had involved a white offender (61%). One in six said that their most recent experience had involved an Asian offender (16%) and 12% referred to a Black offender": N Chakraborti, J Garland and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 54, 56.

81 See Joseph Rowntree Foundation, *Young People and Territoriality in British Cities* (2008), available at https://www.jrf.org.uk/report/young-people-and-territoriality-british-cities.

82 P Iganski and D Smith, "Rehabilitation of Hate Crime Offenders" (2011), cited in C Roberts et al, "Understanding who commits hate crime and why they do it" (Welsh Government Social Research, no. 38/2013) p 21.

83 Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report 2010-2011* (2012).

84 C Roberts et al, "Understanding who commits hate crime and why they do it" (Welsh Government Social Research, no. 38/2013) p 21.

85 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 32.

5.3% the previous year.[86] Where age was recorded, the majority of defendants were aged 25 to 59 (72.2%). 24.2% of defendants were aged 24 and under, with 16.7% aged 18 to 24, 6.5% aged 14 to 17 and 1.0% aged 10 to 13.[87]

5.55 Chakraborti and Garland have observed that multiple studies suggest perpetrators are commonly part of families with a lack of formal education, and typically have "life stories characterised by deprivation, mental health problems, domestic violence, drug and alcohol issues, and patterns of criminal behaviour".[88]

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86 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 32, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF. The CPS noted that 17.7% of defendants did not state an ethnicity on arrest (a rise since 2017–18 of 6.3%) and 10.4% of defendants' ethnicity was not provided to the CPS by the police (a rise since 2017–8 of 1.5%).

87 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 32.

88 eg, see L Ray, D Smith and L Wastell, "Shame, rage and racist violence" (2004) 44(3) *British Journal of Criminology* 350; E Dunbar and D Crevecoeur, "Assessment of hate crime offenders: the role of bias intent in examining violence risk" (2005) 5(1) *Journal of Forensic Psychology Practice* 1; R Sibbitt, "The Perpetrators of Racial Harassment and Racial Violence (Home Office Research Study No 176, 1997); and D Gadd, B Dixon and T Jefferson, "Why do they do it? Racial harassment in North Staffordshire: Key findings" (2005), cited in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 106. However, Chakraborti and Garland also noted that the US research tends to contradict this evidence by revealing that perpetrators are commonly middle-class, with no criminal record – at p 106.

Chapter 6: The operational response to hate crime

INTRODUCTION

6.1 In the previous chapter we considered data on the prevalence of hate crime in England and Wales, and research into the profile of victims and perpetrators. In this chapter we consider the operational response to hate crime across the criminal justice system. We start by considering the cross-government strategy to tackle offending of this sort, as well as specific policies and practices in hate crime policing and prosecution. We include discussion of the special measures available to help victims of hate crime give evidence during a trial.

6.2 We then consider some of the alternatives to a purely prosecution response, including restorative justice, out of court disposals and offender management programmes.

THE GOVERNMENT RESPONSE TO HATE CRIME

6.3 The value of a holistic approach to combatting hate crime was emphasised in the government's 2012 action plan – "Challenge It, Report It, Stop It" – which highlighted the importance of locally administered, joint responses by criminal justice agencies, professionals, voluntary organisations and communities.[1] This strategy was underpinned by three core principles:

(1) preventing hate crime – by challenging the attitudes that underpin it, and using early intervention to prevent it escalating;

(2) increasing reporting and access to support – by building victim confidence and supporting local partnerships; and

(3) improving the operational response to hate crimes – by better identifying and managing cases, and dealing effectively with offenders.[2]

The current cross-government strategy

6.4 The government's current approach to hate crime is largely coordinated between the Home Office and the Ministry of Housing, Communities and Local Government.[3] In July 2016, the Home Office published "Action Against Hate: The UK Government's plan for tackling hate crime", which was developed in partnership with communities and

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1 HM Government, *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (March 2012) p 3; N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) pp 126 to 127.

2 HM Government, *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (March 2012) p 9.

3 HMICFRS, *Understanding the difference: The initial police response to hate crime* (2018) p 10, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

departments across government, and set out the government's programme of actions to tackle hate crime until May 2020.[4] This action plan contains five areas of focus:

(1) Preventing hate crime by challenging the beliefs and attitudes that can underlie such crimes;

(2) Responding to hate crime in our communities with the aim of reducing the number of hate crime incidents;

(3) Increasing the reporting of hate crime, through improving the reporting process, encouraging the use of third party reporting and working with groups who may under-report;

(4) Improving support for the victims of hate crime; and

(5) Building our understanding of hate crime through improved data, including the disaggregation of hate crime records by religion.

6.5 The government's action plan is underpinned by two key themes: working in partnership with communities; and joining up work across the hate crime strands to ensure that best practice in tackling hate crime is "understood and drawn upon in all our work".[5]

2018 update

6.6 In October 2018, the government published "Action Against Hate: The UK Government's plan for tackling hate crime – 'two years on'"[6] and "Update on the actions from the UK Government's 2016 'Action Against Hate' action plan".[7]

6.7 Some of the highlights of the 2018 update include: the provision of nearly 90 grants for protective security measures at places of worship; working with the CPS to produce guides for victims of hate crime; requiring police forces to disaggregate hate crime data by faith; and commissioning the police inspectorate to undertake a thematic report into police effectiveness in responding to hate crime.[8]

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4 The plan was developed in partnership between the Government, the criminal justice agencies (the Police Service, the CPS, the courts and the then National Offender Management Service) and community groups representing those affected by hate crime. It was developed with the support of the Independent Advisory Group on hate crime.

5 Home Office, *Action Against Hate: The UK Government's plan for tackling hate crime* (July 2016) para 5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf.

6 HM Government, *Action Against Hate: The UK Government's plan for tackling hate crime – 'two years on'* (October 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748175/Hate_crime_refresh_2018_FINAL_WEB.PDF.

7 HM Government, *Update on the actions from the UK Government's 2016 'Action against Hate' action plan* (October 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748138/Hate_crime_refresh_2018_Actions_updates_FINAL_WEB.PDF.

8 HM Government, *Action Against Hate: The UK Government's plan for tackling hate crime – 'two years on'* (October 2018) p 2.

6.8 The update listed 34 completed actions, with 37 items listed as actions in progress. Relating to the theme of prevention, completed actions included: promoting engagement with young people to reduce hostility; promoting human rights; and sharing best practice across strands of hate crime. In responding to hate crime, completed actions included launching a £2.4 million scheme to fund protective security measures at vulnerable faith institutions. Actions in progress included: supporting research into offender motivation; and working with academics to build our understanding of perpetrators and their reasons for engaging in hate activity.[9]

Victim support

6.9 The government's 2016 strategy incorporated several proposed steps aimed at improving support for victims of hate crime. One element involved the Home Office working with Fire and Rescue Services to understand the role they play in identifying victims and perpetrators of hate crime, and what practical actions can be taken to ensure that issues do not go unaddressed.[10]

6.10 The 2016 strategy was released following the CPS Victim and Witness Satisfaction Survey, published in 2015. This survey indicated that victims of hate crime were slightly less likely to be satisfied with the final charges brought in their cases than average (64% compared with 66%) and more likely to say that they were not referred to victim support services but would have liked to have been (21% compared with 11%). However, the survey also indicated that victims of hate crime were more likely to be satisfied that the CPS took their needs into account (71% compared with 61%).[11]

6.11 The CPS reports annually on the key reasons for unsuccessful hate crime prosecutions. One of these is "complainant issues", defined as where the victim retracts, unexpectedly fails to attend court, or their evidence does not support the case. This data indicates that since 2010/11, the highest proportion of unsuccessful prosecutions attributed to complainant issues, occurred in 2014/15 (31.33% of unsuccessful prosecutions). However, since 2014/15, the proportion of complainant issues leading to unsuccessful convictions has dropped each year, to 26.7% in 2018/19.[12]

6.12 Special provision is also available in certain circumstances to assist victims of hate crime to give their "best evidence" at trial. We discuss these special measures in more detail in the section on prosecution and trial below.

POLICING

6.13 The racially motivated murder of Stephen Lawrence in 1993, and the subsequent Inquiry, is often cited as the catalyst for the increased focus upon the policing of hate

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9 HM Government, *Update on the actions from the UK Government's 2016 'Action against Hate' action plan* (October 2018) p 24.

10 Home Office, *Action Against Hate: The UK Government's plan for tackling hate crime* (July 2016) para 104.

11 Home Office, *Action Against Hate: The UK Government's plan for tackling hate crime* (July 2016) para 106,

12 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 31, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

crime in England and Wales.[13] Other factors, including an increased focus on diversity and sensitivity to prejudice, the influence of identity politics, and the extent and nature of hate crimes have also contributed to this shift.[14]

6.14 The importance of police officers' decision-making, and identifying the perpetrators' motive, has been emphasised in relation to hate crime.[15] Chakraborti and Garland have detailed the "increased levels of strategic prioritisation" from the late 1990s onwards, including the Association of Chief Police Officers' ("ACPO") 2005 hate crime manual,[16] which became a key reference document for police in England, Wales and Northern Ireland.[17] The ACPO manual required that police record all hate incidents[18] – even if they did not amount to a hate crime. The result was that a broader range of incidents were included in local police force assessments of prevalence.[19] The 2005 ACPO manual was subsequently reinforced by the 2012 UK Government Action Plan[20] which sought to promote greater consistency in the recording of incidents relating to each of the five protected characteristics.

6.15 In 2010, the police launched the "True Vision" website, which provides information for individuals affected by hate crime, and the facility to report hate crimes and hate incidents to the police without needing to visit a police station.[21] In 2017/18, True Vision recorded a total of 7849 hate crime and incident reports to police areas – this was an increase of 65 percent from 2015/16. [22]

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13 eg, see HM Government. *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (March 2012) p 5; N Chakraborti and J Garland, "Hate Crime: Impact, Causes and Responses" (2nd ed, 2015) p 119.

14 N Hall, "Law enforcement and hate crime: theoretical perspectives on the complexities of policing 'hatred'", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 150.

15 Association of Chief Police Officers, *Hate Crime Manual* (2005). See N Hall, "Law enforcement and hate crime: theoretical perspectives on the complexities of policing 'hatred'", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 155.

16 This document was commissioned jointly by ACPO's Race and Diversity Working Group and the Home Office Police Standards Unit: N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 119.

17 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 119.

18 At that time, the focus was on racist incidents.

19 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 120.

20 HM Government, *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (March 2012).

21 To report a hate crime, an individual can select the county or area in which the incident took place, after which they will be directed to the relevant police form to fill out. This is available at https://www.report-it.org.uk/home.

22 True Vision state that: "The data for 2017/18 excludes 4,729 'fake' reports made as part of a coordinated cyber-attack on 10/11th October 2017. The data does not equate to actual recorded crimes as some may be duplicates, non-crime hate incidents or could be transferred to another force where the complainant chooses the wrong area etc. The latter is particularly common relating to London and the Home Counties." See True Vision, *Hate Crime and Incident Reports to Police Areas through True Vision – 2017/18*, available at https://www.report-it.org.uk/files/reports_made_to_true_vision_2017-18_2.pdf.

6.16 In 2014, the College of Policing published both a National Policing Hate Crime Strategy[23] and fresh Hate Crime Operational Guidance,[24] which revised the 2005 guidance, though maintained an emphasis on perception-based[25] recording of the hostility element of an incident[26]. It also stipulated that hate incidents – and thus policy responses – may involve characteristics beyond the five protected strands.[27] However, in its July 2018 report of its 2017/18 inspection into the police response to hate incidents and crimes, HMICFRS noted that: the College of Policing has not published any authorised professional practice specific to hate crime; there is currently no specific hate crime national training package; and "not all forces have operational guidance specific to hate crime which is available to officers".[28]

6.17 The College of Policing's Hate Crime Operational Guidance was recently given detailed consideration by the High Court in the case of *Miller v College of Policing*.[29] This case considered the source of the police power to record non-crime "hate incidents", and whether this practice complied with Article 10 (freedom of expression) of the European Convention on Human Rights. In upholding the guidance, the Court found that the police have the power at common law to record and retain a wide variety of data and information, and non-crime hate incident recording fell within this legal power.[30] Further, the Court found that the mere recording of an incident did not amount to an interference with the subject's Article 10 rights.[31] Even if it did, the Court found that the guidance complied with Article 10 because it was prescribed by law,[32] served the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others, and was a proportionate and necessary interference with the right to freedom of expression.[33] However, on the facts of the particular case, the court found that the police officer's actions – visiting the workplace of someone who had tweeted a number of "gender critical" statements – was a disproportionate response, and was in violation of Mr Miller's Article 10 right to freedom of expression.[34]

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23 College of Policing, *National Policing Hate Crime Strategy* (2014), available at http://library.college.police.uk/docs/college-of-policing/National-Policing-Hate-Crimestrategy.pdf.

24 College of Policing, *Hate crime operational guidance* (2014), available at http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf.

25 This refers to the victims' or any other person's (including the police officer's) perception of the hostility element of the incident.

26 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 120.

27 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 120.

28 HMICFRS, *Understanding the difference: The initial police response to hate crime* (2018) p 11, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

29 [2020] EWHC 225 (Admin).

30 *Miller v College of Policing* [2020] EWHC 225 (Admin), [156].

31 *Miller v College of Policing* [2020] EWHC 225 (Admin), [176].

32 *Miller v College of Policing* [2020] EWHC 225 (Admin), [186] to [210].

33 *Miller v College of Policing* [2020] EWHC 225 (Admin), [286].

34 *Miller v College of Policing* [2020] EWHC 225 (Admin), [211] to [236].

PROSECUTION AND TRIAL

6.18 In March 2018, the CPS published its "Hate Crime Strategy 2017-2020", to be read in conjunction with the cross-government action plan, which sets out how the CPS "aims to secure justice and support those affected by these crimes".[35] As part of this strategy, the CPS:

> … aims to improve its work in this area through reviewing … guidance, training, best practice and performance across hate crime strands and engaging with stakeholders.[36]

6.19 The CPS' strategy includes: ensuring that best practice in hate crime cases is shared across the CPS; treating every case fairly and equally, bringing the correct charges and applying for sentence uplifts across hate crime strands according to the evidence and the Code for Crown Prosecutors; and reviewing policies, legal guidance, training and best practice across hate crime strands.[37]

6.20 The CPS publishes extensive legal guidance for prosecutors in relation to all forms of hate crime, which is divided between:

- Racist and Religious Hate Crime[38]
- Homophobic, Biphobic and Transphobic Hate Crime[39]
- Disability Hate Crime and other crimes against disabled people[40]

6.21 In parallel, the CPS also publishes policy and prosecution guidance in relation to "Crimes against older people," which it considers have much in common with hate crime.[41]

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35 Crown Prosecution Service, *Hate Crime Strategy 2017-2020* (2018) p 2, available at https://www.cps.gov.uk/sites/default/files/documents/ publications/CPS-Hate-Crime-Strategy-2020-Feb-2018.pdf.

36 Crown Prosecution Service, *Hate Crime Strategy 2017-2020* (2018) p 2.

37 Crown Prosecution Service, *Hate Crime Strategy 2017-2020* (2018) pp 3 to 4.

38 Crown Prosecution Service, *Racist and Religious Hate Crime: Prosecution Guidance*, available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

39 Crown Prosecution Service, *Homophobic, Biphobic and Transphobic Hate Crime – Prosecution Guidance*, available at https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance.

40 Crown Prosecution Service, *Disability Hate Crime and other crimes against Disabled people – prosecution guidance*, available at https://www.cps.gov.uk/legal-guidance/disability-hate-crime-and-other-crimes-against-disabled-people-prosecution-guidance.

41 Crown Prosecution Service, *Policy guidance on the prosecution of crimes against older people*, available at https://www.cps.gov.uk/publication/policy-guidance-prosecution-crimes-against-older-people-0; Crown Prosecution Service, *Older people: prosecuting crimes against*, available at https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against.

Special measures at trial

6.22 Witnesses can experience a high level of stress, fear or intimidation during the pre-trial investigation stage and when attending court, which therefore impacts on the quality of their evidence.[42] Consequently, in certain circumstances, the court is permitted to employ measures to assist a witness in providing their "best evidence" at trial.[43]

6.23 The Youth Justice and Criminal Evidence Act 1999 ("YJCEA") outlines the special measures available to "vulnerable" and "intimidated" witnesses when giving evidence, which include:

- Screens (to shield the witness from the defendant);[44]
- Live link (to facilitate the giving of evidence from outside of the courtroom, either within the building or a building nearby);[45]
- Evidence given in private (to exclude members of the public and press in cases involving sexual offences or intimidation by a person other than the defendant);[46]
- Pre-trial visual recorded interview (this may be admitted by the court as the witness's evidence-in-chief for adult complainants in Crown Court sexual offence trials);[47]
- Pre-trial visual recorded cross-examination or re-examination (this is recorded examination of a witness at an earlier point in the process, outside of the trial. It may be admitted as the witness's cross-examination and re-examination evidence in the Crown Court).[48]

6.24 A person is eligible for special measures where they meet the criteria established in the YJCEA. A "vulnerable" witness is defined as a child witness (under 18) and any witness whose "quality of evidence" will likely be diminished due to their mental or physical disability or condition.[49]

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42 Crown Prosecution Service Legal Guidance on Special Measures (March 2020), available at https://www.cps.gov.uk/legal-guidance/special-measures.

43 Crown Prosecution Service Legal Guidance on Special Measures (March 2020).

44 Youth Justice and Criminal Evidence Act 1999, s 23.

45 Youth Justice and Criminal Evidence Act 1999, s 24.

46 Youth Justice and Criminal Evidence Act 1999, s 5.

47 A visually recorded interview is automatically admissible where an application is made, unless it would not be in the interests of justice or would not maximise the quality of the evidence given by the complainant. See Youth Justice and Criminal Evidence Act 1999, s 27.

48 An application for this measure can only be made where there has been a s 27 direction for a visual recorded interview to be admitted as evidence and where a victim or witness meets one of the vulnerable criteria. A visual recorded examination is automatically admissible where an application is made, unless it would not be in the interests of justice or would not maximise the quality of the complainant's evidence.

Youth Justice and Criminal Evidence Act 1999, s 28.

49 Defined as those suffering from a mental disorder (as defined by section 1(2) of the Mental Health Act 1983 and amended into a single definition by section 1(2) of the Mental Health Act 2007); with a significant

6.25 An "intimidated" witness is defined as a person suffering from fear or distress to the extent that the quality of their evidence will be likely diminished. Sexual offence complainants and modern slavery offence complainants are automatically considered to fall within this category.[50] When determining whether other witnesses fall within this category, the factors considered are:

- the nature and alleged circumstances of the offence;[51]
- the age of the witness;[52]
- where relevant, social and cultural background and ethnicity;[53] domestic and employment circumstances;[54] and religious beliefs or political opinions of the witness;[55]
- any behaviour towards the witness on the part of the accused, members of the accused's family or associates or any other person who is likely to be accused or a witness in the proceedings.[56]

6.26 To ensure hate crime victims receive the necessary protection under special measures, CPS guidance states these victims may fall within the "intimidated" category under YJCEA.[57] The Victims' Code further specifies that access to special measures is within the "enhanced entitlements" afforded to hate crime victims.[58] At the time of writing, the Victims' Code is the subject of a further government consultation.[59]

6.27 The Code requires that relevant service providers[60] discuss with victims of hate crime which measures are available to them and are best suited to assisting them when giving

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impairment of intelligence and social functioning; or who have a physical disability or are suffering from a physical disorder.

50 Youth Justice and Criminal Evidence Act 1999, s 17(4).

51 Youth Justice and Criminal Evidence Act 1999, s 17(2)(a).

52 Youth Justice and Criminal Evidence Act 1999, s 17(2)(b).

53 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(i).

54 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(ii).

55 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(iii).

56 Youth Justice and Criminal Evidence Act 1999, ss 17(2)(d)(i) to (iii).

57 Crown Prosecution Service, *Legal Guidance on Special Measures* (March 2020), available at https://www.cps.gov.uk/legal-guidance/special-measures.

58 "Enhanced Entitlements" are provided to victims who are likely to require enhanced support and services in the criminal justice system. The three categories of victims are: victims of the most serious crime; persistently targeted victims; and vulnerable or intimidated victims. Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) paras 1.1, 1.4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF.

59 Ministry of Justice, *Government Response to the Consultation: Proposals for Revising the Code of Practice for Victims of Crime* (March 2020) p 26, available at https://consult.justice.gov.uk/victim-policy/consultation-on-improving-the-victims-code/supporting_documents/improvingthevictimscode.pdf.

60 This may be either the police or a Witness Care Unit. Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) para, 1.13.

evidence.[61] Hate crime victims are also entitled to ask their service provider for the use of special measures – the CPS will take these views into account when deciding whether to make an application on their behalf.[62] CPS prosecutors should always have early discussions with police about special measures for hate crime victims where the case will likely be contested.[63] The court makes the final decision about whether special measures will be applied and the victim is entitled to be informed about the outcome of an application.[64]

6.28 Aside from special measures, under section 46 of the YJCEA the court can make a reporting direction to prohibit the publication of any matter related to the witness during their lifetime if it is likely this information will identify them.[65] This is particularly relevant for LGBT victims who may fear being "outed" through the criminal justice process.[66]

ALTERNATIVES TO PROSECUTION

Restorative justice

6.29 There is significant literature which highlights the inadequacy of a purely punitive response to addressing hate crime – particularly with regards to addressing the needs of victims.[67] Walters and Hoyle have argued that retributive justice, with enhanced punishment for offenders, "offers little to victims beyond the satisfaction that the penalty is tough"; "fails to address the aetiology of hate"; and is unlikely to – alone – "repair the harms caused by hate crime provide for an effective challenge to prejudice".[68] They argue that:

> hate crime legislation, in the absence of other measures, cannot deliver on its promise of justice for victims and their communities … an alternative or additional approach is called for to reduce the heightened levels of emotional harms experienced by victims, and to address the underlying causes of prejudice and hatred …[69]

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61 Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) para 1.3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF.

62 Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) para 1.13

63 Crown Prosecution Service, *Legal Guidance on Special Measures* (March 2020), available at https://www.cps.gov.uk/legal-guidance/special-measures.

64 Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015), para 1.13.

65 Crown Prosecution Service, *Legal Guidance on Special Measures* (March 2020), available at https://www.cps.gov.uk/legal-guidance/special-measures.

66 Crown Prosecution Service, *Legal Guidance on Special Measures* (March 2020).

67 eg, see M Williams and J Tregida, *All Wales Hate Crime Research Project: Research Overview and Executive Summary* (2013); and N Chakraborti, J Garland and S Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014).

68 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 229.

69 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) pp 230, 231.

6.30 Restorative justice[70] is an alternative or supplement to the retributive model of sentencing, with a focus on repairing the harms caused by hate crime; the two most frequent examples being victim-offender mediations and family group conferences.[71] In either direct or indirect meetings, Walters describes the aim of restorative justice as:

> to explore the reasons behind why the offence was committed, the harms that it has caused to the victim and other stakeholders, the means by which the offender will repair the harms he or she has caused, and the reintegration of the offender into the community.[72]

6.31 While restorative justice can take place at any stage of the criminal justice process, including after conviction, at present it is more commonly used before a case comes to court, for example as part of a diversionary process.[73] Restorative justice processes rely on the victim's consent, and tend to be more widely used with youth offenders, through Referral Orders to attend a panel meeting to discuss their offence and the factors contributing to their offending. The government considers restorative justice to be an important part of the criminal justice system and has variously produced an action plan to develop its use; introduced pre-sentence restorative justice through the Crime and Courts Act 2013; and included restorative justice in the revised Victims' Code from 2013, under which victims are entitled to receive related information from the police.[74] As noted above, the Victims' Code is currently the subject of a further government consultation. This includes "making information about Restorative Justice (RJ), including a duty on the police to explain how to access RJ services, more accessible and clearer for victims."[75]

6.32 Citing various case studies, Walters and Hoyle have suggested that, if effectively facilitated, restorative justice has the potential to "challenge prejudice and heal

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70 "Restorative justice" does not have a universally agreed definition, but is "often said to embody a set of established values and principles that are now commonly applied to various criminal and noncriminal justice practices": M A Walters, "Restorative approaches to working with hate crime offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research*, p 244; see also T Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (2007). The CPS uses this definition: "a process through which parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future", see Crown Prosecution Service, *Restorative Justice: Legal Guidance* (September 2019), available at https://www.cps.gov.uk/legal-guidance/restorative-justice.

71 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 231.

72 M A Walters, "Restorative approaches to working with hate crime offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 245.

73 Crown Prosecution Service, *Restorative Justice: Legal Guidance* (September 2019), available at https://www.cps.gov.uk/legal-guidance/restorative-justice.

74 Note that the code emphasises that restorative justice is voluntary and that appropriate measures will be put in place to ensure the safety of the victim. Crown Prosecution Service, "Restorative Justice: Legal Guidance" (September 2019), available at https://www.cps.gov.uk/legal-guidance/restorative-justice.

75 Ministry of Justice, *Government Response to the Consultation: Proposals for Revising the Code of Practice for Victims of Crime* (March 2020) p 26, available at https://consult.justice.gov.uk/victim-policy/consultation-on-improving-the-victims-code/supporting_documents/improvingthevictimscode.pdf.

victims".[76] However, they also acknowledge that facilitators require extensive training regarding prejudice, in order to "negotiate the minefield of restorative conferencing for hate crime" and create a safe environment for both victims and offenders.[77] Separately, Walters has emphasised that for all its potential, restorative justice is "by no means a panacea"[78] and has referred to the "possibility of revictimisation during restorative encounters" and the need to ensure "parties are willing to participate with the right motives".[79] Indeed, Walters and Hoyle argue that if ineffectively facilitated, restorative justice "will never realise its potential to reduce social distance, to challenge prejudice and hatred and to heal the harms caused to victims".[80]

"Out of Court Disposals"

6.33 Out of court disposals ("OOCDs") are generally issued for minor offences admitted by a defendant before a case comes to court.[81] They include reprimands, cautions and warnings and are usually issued in the case of low level, first time offending.[82] They operate as an alternative to formal charges.[83]

6.34 OOCDs include a range of different penalty notices such as youth restorative disposals,[84] penalty notices for disorder ("PNDs") community resolution programmes, simple and conditional cautions ("SCs" and "CCs").[85] OOCDs in any form always require an admission of guilt.[86]

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76 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 236.

77 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 241.

78 M A Walters, "Restorative approaches to working with hate crime offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 254.

79 M A Walters, "Restorative approaches to working with hate crime offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 253.

80 M Walters and C Hoyle, "Healing harms and engendering tolerance: the promise of restorative justice for hate crime", in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 232.

81 National Police Chiefs' Council (NPCC*), Charging and Out of Court Disposals 2017-2021 – A National Strategy*, p 24, available at https://www.npcc.police.uk/Publication/Charging%20and%20Out%20of%20Court%20Disposals%20A%20National%20Strategy.pdf.

82 National Police Chiefs' Council (NPCC*), Charging and Out of Court Disposals 2017-2021 – A National Strategy*, pp 24 and 28.

83 National Police Chiefs' Council (NPCC*), Charging and Out of Court Disposals 2017-2021 – A National Strategy*, p 24.

84 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

85 Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (September 2019), available at https://www.cps.gov.uk/legal-guidance/cautioning-and-diversion.

86 Crown Prosecution Service, *Out of Court Disposals in Hate Crime and Domestic Abuse Cases – Legal Guidance* (August 2018), available at https://www.cps.gov.uk/legal-guidance/out-court-disposals-hate-crime-and-domestic-abuse-cases.

6.35 SCs can be given for any offence, though they are intended to be used for low-level and first-time offending.[87] There are statutory restrictions on the use of SCs for indictable-only offences and certain either-way offences.[88] For indictable-only offences, a SC cannot be given unless a police officer of the rank of at least Superintendent believes there to be "exceptional circumstances" and the CPS agree that such a caution is appropriate.[89]

6.36 Before a CC can be given, "the decision maker"[90] must follow the Code of Practice for Adult Conditional Cautions 2013 and CPS guidance.[91] Guidance on the use of CCs outlines that they provide an opportunity:[92]

- to offer a proportionate response to low level offending;
- for offenders to make swift reparation to victims and communities;
- for offenders to be diverted at an early opportunity into rehabilitative services thereby reducing the likelihood of re-offending; and
- to punish an offender by means of a financial penalty.[93]

6.37 Moreover, prior to a CC being given, it is considered whether it is appropriate and possible considering what the victim's view about the offence and proposed disposal of

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87 Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (September 2019).

88 The either-way offences consist of the following:

Offensive weapon and bladed article offences; Carrying a firearm in a public place; Child cruelty; Sexual offences against children (including those relating to child prostitution and pornography); Sex trafficking offences; Indecent and pornographic images of children; Importing, exporting, producing, supplying and possessing with intent to supply to another Class A drugs.

See Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (September 2019).

89 Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (September 2019).

90 This means either the authorised person (usually a police officer) or the relevant prosecutor (usually the CPS) who is required to make the decision. See Ministry of Justice, *Code of Practice for Adult Conditional Cautions: Part 3 of the Criminal Justice Act 2003* (January 2013) p 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243436/9780108512162.pdf.

91 Crown Prosecution Service, *Conditional Cautioning: Adults – DPP Guidance* (updated November 2019), available at https://www.cps.gov.uk/legal-guidance/conditional-cautioning-adults-dpp-guidance.This includes complying with various legal requirements under Section 23 of the Criminal Justice 2003 Act and applying the CPS Full Code Test prior to charging. See Ministry of Justice, *Code of Practice for Adult Conditional Cautions: Part 3 of the Criminal Justice Act 2003* (January 2013) pp 6 to 7.

92 Ministry of Justice, *Code of Practice for Adult Conditional Cautions* (2013), para 1.4.

93 Note that when issuing a CC, the decision maker will take into account considerations such as the seriousness of the offence; willingness of offender to comply with conditions and likely outcome of the case if pursued in court. The guidance states that a CC is unlikely to be appropriate where the offence is part of a pattern of offending and a second CC should generally not be given for the same or similar offences unless exceptional circumstances apply. See Ministry of Justice, *Code of Practice for Adult Conditional Cautions: Part 3 of the Criminal Justice Act 2003* (January 2013) pp 6 to 7, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243436/9780108512162.pdf.

it is.[94] The nature and extent of harm caused by the offence is considered as well as if compensation can be paid – in such a case a CC is preferable to a SC.[95]

6.38 The general purpose of OOCDs is to "divert" minor and undisputed incidents away from the formal court process, thereby reducing the matters that courts must deal with.[96] In 2010, the (now closed) Office for Criminal Justice Reform stated that:[97]

> Out-of-court disposals are designed to provide simple, swift and proportionate ways of responding to antisocial behaviour and low-risk offending and to save courts the time of listening to minor and undisputed matters. In the case of conditional cautions and restorative justice, they also support rehabilitation and reparation, especially by young people, and provide prompt resolution to victims. Finally, these disposals give police officers a quick and effective means of dealing with less serious offences, allowing them to spend more time on frontline duties and on tackling serious offending.

6.39 Restorative Justice can be used as part of OOCDs, particularly CCs.[98] CPS guidance states that this provides an opportunity for "reparation or compensation for victims", the neighbourhood and wider community.[99] The guidance emphasises that this process must remain voluntary for both victims and offenders and requires an admission of guilt.[100]

6.40 A Community Impact Statement ("CIS") can also accompany a CC, and can specify its conditions.[101] CISs are provided to offenders to ensure they recognise the wider impact of the harm their behaviour has caused.

6.41 Educational and rehabilitation programmes can also form part of OOCDs, specifically CCs. One example is the offender program for hate crime perpetrators, "Think Again". This was a ten-session intervention programme which was implemented in West Yorkshire in 2010.[102] Attendance at the sessions formed the conditional requirements of community orders or licences that hate crime offenders were given as part of an

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94 Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (updated September 2019), available at https://www.cps.gov.uk/legal-guidance/cautioning-and-diversion.

95 Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (updated September 2019).

96 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

97 Office for Criminal Justice Reform, *Initial findings from a review of the use of out-of-court disposals* (February 2010) p 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217353/out-of-court-disposals-june2011.pdf.

98 Restorative Justice: The Parliamentary Report (2016) 180 *Criminal Law & Justice Weekly*, p 775.

99 Crown Prosecution Service, *Restorative Justice: Legal Guidance* (September 2019), available at https://www.cps.gov.uk/legal-guidance/restorative-justice.

100 Crown Prosecution Service, *Restorative Justice: Legal Guidance* (September 2019).

101 Crown Prosecution Service, *Restorative Justice: Legal Guidance* (September 2019).

102 P Iganski, *Hate Crime: Taking Stock – Programmes for Offenders of Hate,* Report 07 (November 2012) p 18, available at https://eprints.lancs.ac.uk/id/eprint/65875/1/07_Programmes_for_Offenders_of_Hate.pdf.

OOCD.[103] This programme and other rehabilitation programmes that can form part of OOCDs are discussed in detail later in this chapter in the section entitled "Offender Management".[104]

6.42 OOCDs and accompanying penalties also have value as a deterrent from hate crime offending. Whilst OOCDs do not amount to criminal convictions, they nonetheless have serious implications for individuals.[105] For instance, a SC or CC is placed on the recipient's criminal record because it amounts to an admission of guilt.[106] The existence of a SC or CC on the offender's record impacts how the individual is dealt with if they come to the attention of the police again.[107] Section 17(4) of the Criminal Justice and Courts Act 2015 restricts the use of cautions for repeat offending.[108]

6.43 Additionally, reference can be made to a record of cautions in subsequent criminal proceedings involving the offender.[109] Whilst the Rehabilitation of Offenders Act 1974 enables cautions to become "immediately spent", they can be quoted on Standard and Enhanced Disclosure and Barring Service (DBS) checks and made known to future employers.[110]

Restrictions on conditional cautions in hate crime cases

6.44 The use of a CC is usually decided by a Sergeant, unless the offence is an indictable-only or either-way offence (usually dealt with in the Crown Court) or is likely to result in a high-level community order or prison sentence.

6.45 While SCs are available to the police in hate crime cases without any requirement to refer cases to the CPS for approval, there are restrictions on the use of CCs.[111] Because

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103 P Iganski, *Hate Crime: Taking Stock – Programmes for Offenders of Hate,* Report 07 (November 2012) p 18.

104 See paras 6.47 to 6.53.

105 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

106 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

107 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

108 An offender must not be given a simple caution for a summary offence (an offence which, if committed by an adult, is triable only summarily) or an either-way offence that has not been specified by the Secretary of State if in the two years before the offence was committed the offender has been convicted of, or cautioned for, a similar offence, unless a police officer of at least the rank of Inspector determines that there are exceptional circumstances relating to the offender, the present offence or the previous offence. See Crown Prosecution Service, *Cautioning and Diversion – Legal Guidance* (September 2019).

109 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947.

110 J C Donoghue, "Reforming the role of the magistrates: implications for summary justice in England and Wales" (2014) 77(6) *Modern Law Review* 928, 947 to 948. In 2017 the Law Commission published a separate report into criminal records disclosure in 2017 – see Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371.

111 Crown Prosecution Service, *Out of Court Disposals in Hate Crime and Domestic Abuse Cases – Legal Guidance* (August 2018), available at https://www.cps.gov.uk/legal-guidance/out-court-disposals-hate-crime-and-domestic-abuse-cases.

of the seriousness of hate crime offending and the direct and indirect harm it causes,[112] CCs are considered "generally inappropriate" and can only be given in "rare cases" with the authority of a CPS prosecutor.[113]

6.46 At the time of preparing this Consultation Paper, the CPS has provided permission for three police force areas – Avon and Somerset, West Midlands and Hampshire – to begin issuing conditional cautions without CPS approval on a trial basis, and subject to ongoing review.

OFFENDER MANAGEMENT

6.47 It has been suggested that prisons not only have limited deterrent value, but can be sites of prejudice, intolerance and hate group activity and recruitment.[114] In 2018, HM Prison and Probation Service ("HMPPS", formerly the National Offender Management Service or "NOMS") committed to refreshing the agency's work with hate crime perpetrators and became a contributing member of the Home Office multi-agency strategy board. The expressed aim of HMPPS was to strengthen its approach to

> identifying, assessing and managing perpetrators; develop and capitalise on CJS partners and the third sector partnerships and continue to develop the understanding of our practitioners in both custody and the community.[115]

6.48 HMPPS has more recently developed an action plan, which will involve reviewing and developing group work and one to one interventions, raising awareness amongst staff of hate crime, introducing up to date training for practitioners and working with HM Courts & Tribunals Service and the CPS to improve its identification of perpetrators at the sentencing stage.[116] It was suggested this will help them to provide better advice to sentencers and ensure the correct interventions to manage risk and reduce re-offending can be proposed consistently across England and Wales.[117]

6.49 In the academic context, Iganski and colleagues have observed that some practitioners working with programmes to rehabilitate hate crime offenders explicitly seek to foster victim empathy. This focus is based on the recognition that many offenders are not fully cognisant of the consequences of their actions, and that such interventions may help

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112 HM Government, *Consultation on out of court disposals* (College of Policing, November 2013) p 16, available at https://consult.justice.gov.uk/digital-communications/out-of-court-disposals/supporting_documents/outofcourtdisposalsconsultation.pdf.

113 Crown Prosecution Service, *Out of Court Disposals in Hate Crime and Domestic Abuse Cases – Legal Guidance* (August 2018).

114 N Hall, *Hate Crime* (2nd ed, 2013), in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 129.

115 M Key, "Hate Crime – a strategy update from Her Majesty's Prison & Probation Service", in Crown Prosecution Service, *Hate Crime Newsletter* (May 2019, Issue No 21) p 10, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Newsletter-issue-21-May-2019.pdf.

116 M Key, "Hate Crime – a strategy update from Her Majesty's Prison & Probation Service", in Crown Prosecution Service, *Hate Crime Newsletter* (May 2019, Issue No 21) p 10.

117 In May 2019, HMPPS envisaged the implementation of this work to be completed by Q4 2019. See M Key, "Hate Crime – a strategy update from Her Majesty's Prison & Probation Service", in Crown Prosecution Service, *Hate Crime Newsletter* (May 2019, Issue No 21) p 10.

them to develop insight into the harms inflicted, and "potentially inhibit future offending".[118] Specifically, Iganski and colleagues refer to the Hate Crime Awareness Programme initiated by Lancashire Constabulary in 2007, and designed and delivered by Smile Mediation Ltd, a limited company and charity.[119] The programme is available for offenders – typically those who have committed offences under section 5 of the Public Order Act 1986 involving verbal abuse – to attend as a condition of a community sentence, or as a requirement of post-custody supervision.[120] Its key principle is the "fostering of victim empathy" and the programme works on the premise that most referred offenders are not committed "haters", motivated by deeply racist views.[121] As such, the focus of this programme is not on combating racist ideas and prejudice, but rather equipping offenders to empathise with victims, and manage their emotions so they might be less likely to lash out.[122]

6.50 Diversity Awareness Prejudice Pack ("DAPP") (England) is a prison programme which began in 2001 to deal with racist hate offending.[123] It developed to tackle disablist and homophobic hate offending due to the introduction of enhanced sentencing provisions.[124] DAPP is delivered by the London Probation Trust through one-to-one interviews with offenders on community and custodial sentences and can be used for "risk assessment" or as a post-custody supervision requirement.[125] DAPP aims to reduce hate crime reoffending by addressing deeply entrenched prejudices. It asks offenders to reflect on this and how their beliefs formed, and has had positive outcomes.[126]

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118 P Iganski and others, "Understanding how 'hate' hurts: a case study of working with offenders and potential offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 234.

119 See Smile Mediation, *Restorative Justice and Hate Crime* (2019), available at http://www.smilemediation.co.uk/restorative-justice-hate-crime/.

120 P Iganski and others, "Understanding how 'hate' hurts: a case study of working with offenders and potential offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 235.

121 P Iganski and others, "Understanding how 'hate' hurts: a case study of working with offenders and potential offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 236.

122 P Iganski and others, "Understanding how 'hate' hurts: a case study of working with offenders and potential offenders", in N Chakraborti and J Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (2015) p 236.

123 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 28, available at https://www.niacro.co.uk/sites/default/files/publications/Rehabilitation%20of%20Hate%20Crime%20Offenders-Equality%20&%20Human%20Rights%20Commission%20Scotland-Spring%202011.pdf.

124 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) pp 28 to 29.

125 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) pp 28 to 29.

126 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) pp 29 to 30.

6.51 Another programme which had positive outcomes is Promoting Human Dignity ("PHD") (England), introduced in 2008 to tackle racist hate reoffending.[127] It is delivered as part of a condition of a community sentence or post-custody requirement. PHD has developed to deal with hatred toward refugees and migrants as forms of racism.[128] 14 two-hour weekly sessions are provided to a group of participants which cover: labelling discrimination; the impact of racist offending on victims and developing alternative attitudes and behaviours.[129]

6.52 Other programmes include Race Equality in our Communities (England), specifically developed for people convicted of racially aggravated offences, which is voluntary.[130] The programme was established in 2010 and was funded by NOMS.[131] Think Again (England) is a community sentence programme which was delivered by West Yorkshire Probation Trust.[132] Instead of directly addressing perpetrators' prejudicial attitudes and misconceptions, Think Again helps offenders to establish their identity and place in society.[133]

6.53 In addition to hate crime specific rehabilitative programmes, there are numerous accredited programmes which tackle related offending such as Resolve, which deals with violent offending, and Healthy Identity Intervention, which tackles extremism.[134]

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127 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) pp 32 to 33.

128 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 32.

129 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 32.

130 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 35.

131 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 35.

132 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) p 23.

133 P Iganski, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, 2011) pp 35 to 36.

134 Ministry of Justice*, Correctional Services Accreditation and Advice Panel: Currently Accredited Programmes* (March 2020) pp 1 to 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870183/descriptions-accredited-programmes.pdf.

Chapter 7: Research into the experiences of hate crime victims

INTRODUCTION

7.1 There is a large body of academic research into the experiences of hate crime victims and, notably, hate crime perpetration. While we cite numerous studies,[1] we have drawn mainly on the findings of the Leicester and Sussex Hate Crime Projects for the purposes of our review.

7.2 The Leicester and Sussex projects are two of the most significant pieces of empirical research into the experiences of victims of hate crime in recent years. They are distinct in their scale which is why we have chosen to focus on them. Some of the data from these projects is set out below, complemented by insights we have gained through direct engagement with victims. They provide valuable insights into how victims of hate crime understand what has happened to them, and their subsequent interactions with the criminal justice system. They provide essential context for our provisional proposals for reform of hate crime legislation.

THE SUSSEX HATE CRIME PROJECT

7.3 The Sussex Hate Crime Project[2] specifically examined the experiences of the LGBT and Muslim communities. It was a five-year (2013 to 2018) research study examining the direct (experienced personally by the respondent) and indirect (experienced by someone known personally to the respondent) impacts of hate crime on those communities throughout England and Wales, through large-scale quantitative surveys (over 1400 respondents), experiments, and qualitative interviews. The aim was to examine the emotional, behavioural and attitudinal impacts that hate crimes have had on those communities, and the factors that influence LGBT and Muslim people's perceptions of policing and their reporting intentions in relation to hate crime. The final report summarises the findings of 20 smaller studies.[3]

7.4 The researchers conducted 20 different studies with over two thousand LGBT respondents and over a thousand Muslim respondents (with around a thousand

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1 Examples include: M Williams and J Tregidga (October 2013) *All Wales Hate Crime Research Project: Research Overview & Executive Summary* and F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020), available at https://d3n8a8pro7vhmx.cloudfront.net/newcitizens/pages/3760/attachments/original/1599728331/Academic_Report_V.6_-_web_compress_3.pdf?1599728331&fbclid=IwAR1KQPCyfUVA7HSRXC0rxWKyN7fcd8YdAJ5ye6pNLKOPjYBz-m5nff6rhAI.

2 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018), available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

3 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 4.

additional respondents who identified as neither LGBT nor Muslim).[4] They used a variety of techniques including surveys, experiments and interviews.[5] Not all respondents participated in every aspect of the study; the final report was formed from aggregating the data in 20 smaller studies.

7.5 The study provided empirical evidence of the experiences of those communities: the wider community impacts of hate crimes; LGBT and Muslim people's perceptions of the police and their reporting intentions. The results showed that 72% of LGBT respondents and 71% of Muslim respondents had been victims of a hate crime or hate incident.[6] 87% of LGBT respondents and 83% of Muslim respondents knew another victim.[7]

7.6 Experiences of hate crime via the media and online were also extremely common. 83% of LGBT respondents and 86% of Muslim respondents had been directly targeted online. 86% of LGBT respondents and 88% of Muslim respondents knew someone who had been targeted online.[8] 90% of LGBT respondents had seen at least one hate crime reported in the media in the past 3 years.[9]

7.7 The effects of hate crimes, whether experienced directly, indirectly, through the media, in person or online were similar: increased feelings of vulnerability, anxiety, anger, and sometimes shame, and being more security conscious, avoidant, and more active within the community.[10]

7.8 The research discovered that indirect effects of hate crimes can be described as a process with the following stages:[11]

(1) Hate crimes increase feelings of vulnerability and empathy amongst members of the targeted group.

(2) Feelings of vulnerability and empathy then increase emotional reactions (anger, anxiety, shame).

(3) These emotional reactions motivate specific behavioural responses:

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4 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 10.

5 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 10 to 14.

6 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 15 to 17.

7 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 17 to 20.

8 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 21 to 23.

9 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 2.

10 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 23.

11 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 27 to 30.

(a) Anger leads to pro-active behaviours such as joining community organisations or raising awareness of hate crime on social media, and less avoidance.

(b) Anxiety leads to avoidance and security concerns.

(c) Shame, although not always felt strongly, is linked to avoidance, pro-active behaviours, security concerns, and uniquely to retaliation.

7.9 Meanwhile, perceptions of the criminal justice system were generally negative – especially when people had indirect experiences of hate crimes.[12] Whilst around 25% of respondents had had contact with the police about a hate crime, only 10% had had any contact with the CPS. This may have contributed to the finding that contact with the police caused more negative perceptions of the police (for Muslim respondents) whereas contact with the CPS did not significantly affect respondents' perceptions of it.[13] There were still low reporting rates for some behaviours though, with verbal or online abuse unlikely to be reported, whilst vandalism and assault were very likely to be reported.[14] The likelihood of reporting varied with age and community ties – younger participants and those with weaker community ties were less likely to report hate crimes to the police. Reasons for not reporting included feeling that it would not help, and fears of secondary victimisation.[15]

7.10 Overall, interview participants felt greater levels of anger and anxiety about hate crimes committed in their local neighbourhood; whilst they felt angry about hate crimes against other groups, they felt less vulnerable and anxious about these compared with hate crimes against their own community (for example, their own race or faith community).[16]

7.11 The offences committed against those from the LGBT and Muslim communities were different – each community was targeted in a different way. Indeed, the two groups were chosen for the research because whilst both experience high levels of hate crime, they have distinct characteristics which allowed the researchers to compare and contrast experiences between differently-protected groups.[17]

7.12 For both groups, verbal abuse was the most common form of hate crime – 63% of Muslim respondents, and 65% of LGBT respondents said that they had been victims of

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12 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 31 to 32.

13 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 33.

14 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 33.

15 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 34 to 35.

16 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 3.

17 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 9.

such behaviour.[18] The next most common form for both groups was online abuse, though this had been experienced by a greater proportion of Muslim respondents (45%) than LGBT respondents (30%). The third most common behaviour reported was physical assault (16% of Muslim respondents and 13% of LGBT respondents), followed by vandalism (15% of Muslim respondents and 9% of LGBT respondents), and finally, physical assault with a weapon (10% of Muslim respondents and 6% of LGBT respondents).[19]

7.13 Many respondents – half (219) of Muslim respondents and a third (381) of LGBT respondents – who had suffered verbal abuse, had been targeted more than once in the preceding three years.[20]

THE LEICESTER HATE CRIME PROJECT

7.14 The other significant large scale empirical study of hate crime was conducted by Professor Neil Chakraborti, in Leicester and Leicestershire, a particularly diverse part of the country. From 2012 to 2014, he led The Leicester Hate Crime Project, a two-year study funded by the Economic and Social Research Council (ESRC), which examined the experiences of people victimised on the basis of their identity or perceived "difference". At that time, it was the largest and most diverse study of hate crime victimisation ever undertaken.

7.15 Using the data from the Leicester Hate Crime Project, combined with further data from three other studies, Chakraborti makes observations about the perceived failings of existing hate crime responses to meet the needs and expectations of victims.[21] These additional studies included, first, a four-month study in 2015 funded by the Equality and Human Rights Commission which focused specifically on the experiences of LGBT victims of hate crime based in Leicester and Leicestershire. Secondly, a study commissioned by the Office for the Police and Crime Commissioner (OPCC) in Hertfordshire over four months in 2016, in which the OPCC and Hertfordshire County Council facilitated access to key gatekeepers, points of access and service providers and users within the county to collect the experiences of victims and those at risk of hate crime. The same methodology was used for the third study, which was conducted over six months in 2017 on behalf of the OPCC in the West Midlands.

7.16 From the data collected through these studies, Chakraborti identified three key themes emerging from respondents about how they had been, or felt they had been, failed by current hate crime responses.[22] These include:

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18 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 15.

19 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 15.

20 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 16.

21 N Chakraborti, "Responding to hate crime: escalating problems, continued failings" (2018) 18(4) *Criminology & Criminal Justice* 387.

22 N Chakraborti, "Responding to hate crime: escalating problems, continued failings" (2018) 18(4) *Criminology & Criminal Justice* 387, 392.

(1) a failure to dismantle barriers to reporting;[23]

(2) a failure to prioritise meaningful engagement with diverse communities;[24] and

(3) a failure to provide meaningful criminal justice interventions for victims.[25]

7.17 The Leicester Hate Crime Project produced individual briefing papers on disablist hate crime; gendered hostility; homophobic hate crime; racist hate crime, and religiously motivated hate crime. The final report brought all of these strands together. All were published in September 2014. The key findings from those five briefing reports are outlined below.

Disablist hate crime

7.18 The survey was completed by 134 people who identified as disabled while an additional 137 disabled people took part in individual or group interviews, giving a total sample of those who had one or more disabilities of 271.[26] Of this sample, 123 felt that they had been targeted because of their physical disabilities, 137 because of their learning disabilities and 92 because of their mental ill-health.[27] Some participants had had physical and learning disabilities from birth, for others they were the result of disease, age or accidents.[28] The majority were aged from 35 to 54.[29] The majority were also White British.[30] The sample was almost equal proportions of men (48%) and women (51%).[31] Of the 70 participants who said they actively practised a religion, 44% were Christian and 37% Hindu. 87% were heterosexual.[32] Many respondents felt that their intersectionality had contributed to their being targeted.[33] 90% of survey respondents had been a victim of verbal abuse, with 31% experiencing this regularly. 92% had experienced harassment (such as bullying or threatening behaviour), with six out of ten

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23 N Chakraborti, "Responding to hate crime: escalating problems, continued failings" (2018) 18(4) *Criminology & Criminal Justice* 387, 392 to 395.

24 N Chakraborti, "Responding to hate crime: escalating problems, continued failings" (2018) 18(4) *Criminology & Criminal Justice* 387, 395 to 397.

25 N Chakraborti, "Responding to hate crime: escalating problems, continued failings" (2018) 18(4) *Criminology & Criminal Justice* 387, 397 to 399.

26 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 4.

27 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 7.

28 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 4.

29 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 4.

30 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 5.

31 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 5.

32 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 6.

33 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) pp 24 to 27.

victims being targeted in this way frequently (63%). 50% had been the victim of violent crime.[34]

7.19 All respondents said that being a victim of hate crime had had some effect on them, and for 78% that impact had been significant.[35] Hate crimes led respondents to feel anxious, vulnerable and fearful, whether the offending was verbal, harassment, or physical violence. Nearly all respondents were concerned to some degree about being the victim of verbal abuse and harassment in the future (97% and 95%, respectively).[36]

7.20 Of the most recent incidents experienced by the participants, these tended to be committed by groups of or including young males aged 13 to 30. 13% of the most recent incidents involved people known to the victim.[37]

Gender hostility

7.21 Surveys and interviews were completed with 204 people who had been targeted because of hostility towards their gender, and with 24 people who had been targeted because of hostility towards their transgender status.[38] 32% were aged 18 to 24 and 30% were 25 to 44.[39] 83% were female, and 43% White British.[40] Of the 99 participants who practised a religion, 39% were Christian and 37% were Muslim.[41] 63% were heterosexual.[42]

7.22 Of those who had experienced gendered abuse, 86% of survey respondents had been a victim of verbal abuse. 77% had experienced a form of harassment such as bullying or threatening behaviour, whilst 41% had been the victim of violent crime, and over a third had experienced some form of sexual violence (36%). 30% of offences had occurred in public places.[43] 92% were concerned about being harassed because of their gender in the future and 62% felt that their quality of life was significantly affected

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34 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 8.

35 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) pp 9 and 11.

36 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) pp 9 and 11.

37 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 1: Disablist Hate Crime* (2014) p 10.

38 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 4.

39 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 4.

40 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 5.

41 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 6.

42 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 7.

43 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 7.

by the fear of hate crime. Only 1% said that being a victim had not had an impact on them, whilst 83% reported being upset by being victimised.[44]

7.23 Of the most recent incidents of gender hostility experienced by participants, 64% had involved more than one offender; 76% involved a male offender, 65% of offenders were thought to be aged 13-30 and 55% were White.[45] 33% of those who had experienced gender hostility knew the offender in some way.[46]

7.24 Of those who had experienced transphobic crime, 86% had been a victim of verbal abuse, 36% of them regularly. 77% had experienced a form of harassment such as bullying or threatening behaviour, and 59% had been the victim of violent crime. 36% of hate crimes had occurred in public.[47] 91% were concerned about being harassed because of their transgender status in the future and 64% felt that their quality of life was significantly affected by the fear of hate crime. All the respondents said that being a victim had had an impact upon them, and 95% said their experiences had upset them.[48]

7.25 Of the most recent incidents of transphobic hostility experienced by the participants, these tended to be committed by multiple offenders (64%), unknown to the victim (55%), of or including young males (77%) aged 13 to 30 (90%).[49]

Homophobic hate crime

7.26 The survey was completed by 130 people who had been targeted because of hostility towards their sexual orientation, while an additional 24 victims of homophobic hate crime took part in individual interviews.[50] 66% were 18 to 34 and were split almost evenly male (51%) and female (49%).[51] 73% were White British, and of the 35 who

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44 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 8.

45 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 9.

46 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 9.

47 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 8.

48 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 9.

49 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 2: Gendered Hostility* (2014) p 10.

50 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 4.

51 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 4.

practised a religion, 40% were Christian, and 20% Muslim.[52] 44% were gay, 27% lesbian and 16% bisexual.[53]

7.27 Almost all survey respondents had been a victim of verbal abuse (95%).[54] 78% had been a victim of harassment (bullying or threatening behaviour). 25% of respondents had experienced sexual violence.[55] Gay and bisexual men were far more likely to have been targeted online (70% and 53% respectively), than lesbian women (20%).[56] 55% of all respondents had been victimised in public places.[57]

7.28 97% of respondents were concerned about being verbally abused and 95% about being harassed on the basis of their sexual orientation in the future. 95% were concerned about being the victim of violent homophobia in the future. 85% were concerned about being a future victim of targeted sexual violence. 95% said that their quality of life had been affected by the fear of hate crime.[58]

7.29 86% of incidents involved at least one male perpetrator. 36% of the most recent incidents had involved a perpetrator known to the victim. 93% of incidents involved at least one perpetrator who was aged between 13 and 30, and 69% involved at least one White perpetrator.[59]

7.30 96% of respondents reported that verbal victimisation had had some impact on them, compared to 99% where the victimisation was sexual or violent. 54% said that their experience(s) had made them feel anxious (58% where the victimisation had been sexual or violent), while 45% described feeling vulnerable as a result of their verbal victimisation, rising to 61% where the victimisation had been sexual or violent.[60]

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52 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 6.

53 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 6.

54 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 7.

55 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 7.

56 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 7.

57 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 7.

58 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 8.

59 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 8.

60 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) pp 9 to 10.

Racist hate crime

7.31 363 people who had been targeted for hostility as a result of their ethnicity completed the surveys, and a further 107 participated in interviews.[61] 64% were aged 18-44, and 58% of the sample were female.[62] A wide range of racial identities were represented. The two largest groups were Black African and Asian/Asian British, respondents from those backgrounds each comprising 18% of the total sample.[63] 86% of the participants were heterosexual.[64]

7.32 Most of the respondents had experienced verbal abuse (91%); 72% had experienced harassment and 29% had been victims of violent crime. There was a greater incidence of violent crime reported towards Asian British (34%) and Indian (33%) respondents. 46% of offences had occurred in public places away from the home, with 24% occurring "outside, near or in" the home.[65]

7.33 Experiencing hostility on the basis of ethnicity caused 67% of respondents to say that they were at least fairly concerned about being harassed again. The highest levels of concern were amongst Black African respondents (64%), and Chinese respondents (42%).[66] 91% of respondents felt that their quality of life had been affected by fear of being a victim of hate crime.[67]

7.34 Perpetrators of hate crime were more likely to be groups than individuals, with 54% of the most recent incidents experienced by respondents involving more than one offender. 24% of the most recent incidents had involved people who were known to the victim but who were not family members. 66% of the most recent incidents were committed by one or more men, but Black African respondents were more likely to have experienced female perpetrators (30% of respondents).[68] 69% of incidents were committed by those thought to be under 30, and 58% involved White perpetrators.[69]

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61 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 4.

62 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 4.

63 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) pp 5 to 6.

64 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 7.

65 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 8.

66 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 9.

67 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 9.

68 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 10.

69 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 10.

Religiously motivated hate crime

7.35 215 respondents who felt they had been targeted due to their religion were surveyed, with a further 33 taking part in interviews, giving a total of 248 victims of religiously motivated crime.[70]

7.36 35% of the sample were aged 18 to 24 – suggesting that being targeted as a result of religion was more frequently experienced by a younger age group than other prejudice-motivated offences.[71] 63% of the respondents were female. 29% were Asian British, and 16% Indian. A variety of other ethnicities were represented in smaller proportions.[72] 62% of respondents were Muslim.[73] 83% were heterosexual.[74]

7.37 While 88% of respondents had experienced verbal abuse, this was most prevalent amongst Christian respondents, 38% of whom had experienced it regularly, as compared to 19% of Muslim and 4% of Hindu respondents.[75] Violent crime was more likely to have been experienced by Hindu (46%) and Muslim respondents (42%).[76]

7.38 Public places were the most common location for religiously-motivated hate crime (37%), followed by outside, near or in the home of the respondent (24%). 40% of the sample had been alone when victimised.[77]

7.39 91% of respondents were concerned about experiencing religiously-motivated hate crime again, and 57% felt that their quality of life had been significantly affected by fear of hate crime.[78]

7.40 The most recent religiously-motivated hate crime that respondents had experienced was more likely than not to involve more than one offender (56%), with 8% involving more than five offenders.[79] In 61% of cases the victim did not know at least one of the offenders. 71% of cases involved one or more male offenders, and 78% involved

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70 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 4.

71 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 4.

72 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 5.

73 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 6.

74 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 7.

75 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 8.

76 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 8.

77 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 8.

78 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 9.

79 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 10.

perpetrators thought to be under the age of 30. 60% involved perpetrators who were White.[80]

Conclusions of the Leicester Hate Crime Project

7.41 The authors noted that during the process of conducting this study they heard from sizeable numbers of participants from "hidden", less familiar or emerging communities including, for instance, people victimised because of their "different" modes of dress, appearance or lifestyle (376); people with learning disabilities and/or mental ill-health (229); members of recently arrived migrant groups such as the Roma, Polish, Somalian, Congolese and Iranian communities (197); members of the trans community (44); and homeless people (15).[81]

7.42 87% of respondents (over four thousand in total)[82] had experienced victimisation as a result of their appearance or identity. Men were more likely than women to have experienced verbal abuse; were more likely than women to say they experience harassment regularly; and were more likely than women to have experienced violent crime. This was also true of specific groups, with the homeless, Gypsies and Travellers and transgender respondents experiencing verbal abuse and harassment more frequently than others.[83]

7.43 Overall, disabled respondents had been subjected to some of the highest levels of verbal abuse, harassment, violent crime and sexual violence when compared to other groups of respondents. For example, 92% of disabled respondents had experienced harassment, 90% verbal abuse, 50% violent crime and 22% sexual violence.[84] They also (perhaps unsurprisingly) experienced some of the highest levels of fear of being victimised.[85]

7.44 Only 13% of most recent incidents had occurred at the home of the victim or someone else, and 7% online. A further 10% had occurred at an educational establishment. This illustrates the much higher prevalence of victimisation in public spaces as compared to private, or student/staff-restricted spaces.[86] Those who had been victimised in their homes generally felt higher levels of vulnerability.[87] However, for those who had been

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80 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 10.

81 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 8.

82 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 10 to 14.

83 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 18.

84 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 18.

85 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 37.

86 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 31.

87 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 32 to 33.

targeted in public spaces there was often a consequent self-restriction on liberty out of fear, for example avoiding certain places at certain times of day or night,[88] with 61% of all respondents taking this action.[89]

7.45 71% of all respondents said that being victimised by verbal insults and harassment had made them feel upset. Only 5% reported that they had experienced no impact as a result of being victimised.[90] For many who were targeted, there was an indirect impact on their families as well.[91]

7.46 It was not only people from traditionally majority groups who perpetrated hate crime – many respondents reported victimisation from other minority groups as well.[92]

7.47 One of the challenges to tackling hate crime effectively, however, is that despite the high prevalence illustrated in these figures from Leicester and Sussex, there remain barriers to reporting, and significant variation in the ways in which the police receive and record reports of hate crimes.

THE BARRIERS TO VICTIMS REPORTING HATE CRIME

7.48 As mentioned previously, empirical studies into hate crime victimisation have identified key challenges as relates to the issue of under-reporting of hate crime incidents. We have used the research findings from the Leicester and Sussex projects, as well as other studies to evaluate the reasons why hate crime victims are reluctant to report.

Concerns about criminal justice agencies and processes

7.49 Without question, despite the increased focus upon combatting hate crime, an ongoing concern in the policing of all strands of hate crime has been victims' reluctance to report to the police, and the need for trust to be built between police and minority or marginalised communities. Hall has suggested that police services remain "white, male-dominated organisations with attitudes that largely reflect those held by mainstream society" and that police are often reluctant to enforce hate crime legislation, as enforcement "effectively reverses long-documented stereotypical police perceptions about minority groups …".[93] Chakraborti and Garland have observed that eliciting the support and trust of the public:

> … has proved to be especially problematic in the context of hate crime where negative attitudes towards the police may have become entrenched through media reports,

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88 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 33.

89 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 52.

90 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 39.

91 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 46 to 50.

92 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 57 to 62.

93 N Hall, "Law enforcement and hate crime: theoretical perspectives on the complexities of policing 'hatred'", in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 158.

indirect knowledge and personal experience of discriminatory practice. Such attitudes are often rooted in the historical tensions and oppressive policing that have blighted police-minority relations over the past fifty years or so.[94]

7.50 Indeed, while there has no doubt been significant progress culturally and strategically, concerns continue to exist regarding the relationship between police and marginalised communities. For example, the Ellison Review's revelations about the role of undercover policing in the Stephen Lawrence case prompted Janet Hills, Chair of the Metropolitan Police Service's Black Police Association, to say in 2014, 15 years after the Macpherson Report: "we believe the Met is still institutionally racist", pointing to disproportionate rates of stop and search against black people and the low levels of representation of ethnic minorities within the organisation.[95]

7.51 Moreover, years after the 2007 death of Fiona Pilkington – who killed herself and her severely disabled daughter Frankie following a decade of harassment and abuse – campaigners have continued to highlight failings in the policing of disability-related hate crime.[96] For example, in 2014, concerns were raised by the Disability News Service that two police officers had allegedly assaulted a disabled man in Luton and chased him into his home, as he had been returning bins to his own and neighbours' homes.[97] The two police officers were found not guilty of misconduct in public office and other charges,[98] but following an inquiry by Leicestershire Police and a week-long hearing, they were both found to have breached standards of professional conduct and were dismissed from the police force.[99]

7.52 Victims of homophobic incidents can fear experiencing "secondary victimisation" by police, which discourages reporting. McGhee has referred to the improving relationship

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94 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 123. See also: B Bowling, *Violent Racism: Victimisation, Policing and Social Context* (1999); Stonewall, *Homophobic Hate Crime: The Gay British Crime Survey* (2014); R Dittman, "Policing hate crime from victim to challenger: a transgendered perspective" (2003) 50(3) *Probation Journal* 282; and CH Sin, "Making disablist hate crime visible: addressing the challenges of improving reporting", in A Roulstone and H Mason-Bish (eds), *Disability, Hate Crime and Violence* (2012) p 147.

95 V Dodd and R Evans, "Lawrence revelations: admit institutional racism, Met chief told" (7 March 2014) *The Guardian*, available at https://www.theguardian.com/uk-news/2014/mar/07/lawrence-revelations-institutional-racism-met-police; N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 125.

96 See K Davies, "Ten years after the death of Fiona Pilkington, have the police got better at tackling hate crime?" (18 October 2017), available at https://www.independent.co.uk/news/long_reads/fiona-pilkington-frankie-pilkington-suicide-learning-disabilities-bullying-hate-crime-a8004526.html; N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 126.

97 J Pring, "Faruk Ali: Public anger after force refuses to suspend officers over 'assault'" (8 March 2014), available at https://www.disabilitynewsservice.com/faruk-ali-public-anger-after-force-refuses-to-suspend-officers-over-assault/.

98 BBC, "Faruk Ali: Bedfordshire PCs Christopher Thomas and Christopher Pitts cleared" (10 December 2014), available at https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-30411557.

99 BBC, "Faruk Ali case: Bedfordshire Police officers sacked for gross misconduct" (7 April 2016), available at https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-35987385.

of police forces with the LGBT community, describing methods used to "break down barriers" and build trust.[100]

7.53 Separately, Chakraborti, Garland and Hardy have pointed to a range of other factors which influence victims' reluctance to report hate crimes to police. These include: the time required to report a hate crime – particularly for victims with work and caring commitments; the degree of courage and resilience needed to share one's traumatic experience with a stranger; along with cultural and communication barriers.[101] Moreover, Bowling has contended that a contradiction exists between victims' perspective of hate crime as an ongoing social process occurring in a broader context, and the police view of hate crime as comprised of "tightly-defined incidents" – sometimes resulting in victims' experiences not being treated with "the gravity they deserve".[102]

7.54 The police inspectorate body – Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) observed in 2018 that "there is considerable inconsistency between forces in their approach to hate crime", and added that the "challenge for police leaders is to make sure victims of hate crime get a consistently high standard of service no matter where they live or what their personal circumstances are".[103]

7.55 Both the Sussex University and Leicester Hate Crime projects considered the reasons why victims infrequently report incidents both to the police and peers.[104] A more recent piece of research into the views and perspectives of hate crime victims has also been commissioned by Citizens UK, examining data collected in 2019.[105]

7.56 The Leicester Hate Crime Project identified the most common barriers to reporting hate incidents:

- a belief that the police would not take the incident seriously;[106]

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100 Association of Chief Police Officers, *Hate Crime: Delivering a Quality Service* (2005) p 30; D McGhee, "From hate to 'Prevent': community safety and counter-terrorism" in in N Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (2010) p 172.

101 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014), cited in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 123.

102 B Bowling, *Violent Racism: Victimisation, Policing and Social Context* (1999), cited in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 124.

103 HMICFRS, *Understanding the difference: The initial police response to hate crime* (2018) p 4, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

104 The Sussex Hate Crime Project aimed to examine the emotional, behavioural and attitudinal impacts that hate crimes have on those communities, and the factors influencing LGBT and Muslim peoples' perceptions of policing and their reporting intentions in relation to hate crime.

105 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020).

106 The project found 30% of participants who had not reported incidents to the police said it was because they did not think the police would take it seriously. A further 10% said they did not think the police would understand. N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70.

- a belief that the police would not record the incident;[107]
- an overall dissatisfaction with police handling of offences among those who had reported incidents in the past;[108] and

- a perception by the victim that they could deal with the incident themselves or with the help of others[109] and that the police could not have done anything about it.[110]

7.57 The project found that for many participants, concerns surrounding being taken seriously were a direct result of the very characteristic(s) that had led to them being victimised in the first place.[111] Very few respondents saw their offenders brought to court, and just over half of the cases brought resulted in guilty verdicts.[112]

7.58 The Leicester Hate Crime Project found that of those participants who had not reported incidents to the police, 30% said it was because they did not think the police would take it seriously.[113]

7.59 In meetings with Citizens UK and Stop Hate UK, we frequently heard that victims were reluctant to report because they simply did not want to go through the criminal justice process. The Leicester Hate Crime Project found that 34% of participants who had recently experienced a violent hate crime would not encourage other victims to report incidents to the police.[114] The project observed that negative experiences with the police had "heavily outweighed" positive experiences.[115]

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107 The project found 28% of participants who had reported their most recent experience of hate crime to the police, did not feel the police had recorded it as such. N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 68.

108 The project found that 35% of respondents were dissatisfied with the response and support they had received from the police, with 21% being "very dissatisfied". Furthermore, it found that 5% of participants who had not reported incidents to the police, said it was because they had had a previously negative response from the police. See N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 68 and 70.

109 The project found 27% of participants who had not reported incidents to the police said it was because they could deal with the incident themselves or with the help of others. N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70.

110 The project found 20% of participants who had not reported incidents to the police because they did not think the police would be able to do anything about it. N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70.

111 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 63 to 65.

112 4% of participants' most recent experiences of hate crime had gone to court. Of these, 54% resulted in a guilty verdict. 5% of these cases had been dismissed/discontinued and a further 5% had resulted in a not guilty verdict.

113 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70.

114 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70.

115 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 68.

Underreporting from specific groups

7.60 The Leicester Hate Crime Project found that only 21% of victims of racist hate crime reported their experiences to the police.[116] The project also found that overall, when considering reporting rates by those from specific ethnic backgrounds, Black British respondents were least likely to have reported their experiences, with only 14% reporting to the police.[117]

7.61 Additionally, the project found that only 23% of survey respondents who were targeted because of hostility towards their religion had reported their experiences to the police.[118] Of this group, Muslim respondents were most likely to say that they had not reported – 63% of this group of respondents chose not to report hate crime incidents.[119] Reporting rates were slightly higher, though still low amongst other characteristic groups:

- 40% of victims with disabilities had reported hate crime offences to the police.[120]
- 31% of respondents who had experienced homophobic incidents had reported their most recent victimisation to the police.[121]
- 27% of transgender victims had reported these incidents to the police.[122]
- 29% of participants who had been targeted because of their gender had reported these incidents to the police.[123]

7.62 Concerns about underreporting have also been frequently raised in meetings we have had with victim stakeholder groups.[124] These were particularly apparent within Muslim communities. Indeed, the Sussex Hate Crime project found that members of the Muslim community had developed a more negative perception of the police when having

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116 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 12.

117 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 12.

118 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 4: Racist Hate Crime* (2014) p 13.

119 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 5: Religiously Motivated Hate Crime* (2014) p 13.

120 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) pp 66 to 68.

121 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 12

122 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 13.

123 N Chakraborti, J Garland and S J Hardy, *The Leicester Hate Crime Project – Briefing Paper 3: Homophobic Hate Crime* (2014) p 13.

124 For instance, this was discussed in meetings with Citizens UK in London, Newcastle, Manchester and Cardiff.

contact with them.[125] They found that reasons for not reporting among participants included feeling that it would not help and fears of secondary victimisation.[126]

7.63 In a Citizens UK community meeting in Cardiff, participants highlighted specific barriers to reporting for those who had emigrated to the UK. For instance, we were told it is often difficult for non-English speakers to report hate crime. The Leicester Hate Crime Project similarly found that some victims did not report where English was not their first language, because the process was complicated and they needed more support and clearer communication.[127]

7.64 In Citizens UK community meetings in Newcastle, Manchester and London, we heard from participants about the barriers women, particularly minority women, face. Participants highlighted the issue of criminal targeting of women not being taken seriously and therefore not feeling empowered to report hate incidents. BAME women participants expressed the lack of incentive to report because they experienced hate so frequently, in some instances, daily. Participants also highlighted the problem of "normalisation" of hate crime within communities and a lack of awareness about how to report and what would happen thereafter. The Citizens UK victim research described the "everyday" occurrence of Islamophobia and noted that roughly half of Muslim women who had experienced hate incidents "which would constitute hate crime under the current law…[stated] that they had not experienced hate crime, or that they were uncertain."[128] The research also noted the barrier of intersectional hate crime and the restriction upon victims selecting one characteristic to report,[129] which we discuss in Chapter 16, at paragraphs 16.108 to 16.131.

Emotional and psychological barriers

7.65 As well as identifying the concerns victims have about the justice system presenting barriers to reporting, it is important to consider the emotional and psychological experiences of victims and their effects on reporting.

7.66 The Leicester Hate Crime Project described the "normalisation" of hate crime among victims and highlighted the "lived reality of victimisation" for many people.[130] It found that the consequence of this normalisation was that victims did not recognise their experiences as amounting to hate crime and did not perceive themselves as victims.[131]

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125 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 33.

126 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 34 to 35.

127 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 82.

128 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) p 53.

129 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) p 65.

130 N Chakraborti and S J Hardy, *Healing the Harms: Identifying How Best to Support Hate Crime Victims* (2016) pp 8 to 9.

131 N Chakraborti, J Garland, and S J Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 46.

7.67 The Citizens UK report also found that the internalisation of forms of hatred and subsequent normalisation of abuse, especially when experienced repeatedly, can lead to victims not recognising their own victimisation.[132] The report suggested the true figure of hate crime underreporting is much greater than research shows, partly because of the normalisation of these incidents and the fact that studies often depend on victims' own recognition of abuse as a hate crime.[133] In our stakeholder meetings we have heard from victims who experience hate crime so frequently that they lack the time or energy to report such incidents to the police.[134]

7.68 Citizens UK's research also highlighted the prevalence of fear, anxiety and distrust among hate crime victims.[135] The Leicester Hate Crime Project similarly found that respondents who had experienced hate crime were especially fearful of being subject to retaliatory violence[136] or making a situation worse by reporting incidents.[137]

WHAT RESPONSE TO HATE CRIME DO VICTIMS WANT?

7.69 Of course, there is no "one-size-fits-all" approach for victims of hate crime. They are diverse, and their needs, feelings and responses to hate crime will all differ. As has been set out above, however, research has shown that many suffer more as a result of being the victim of a hate crime than those victims who are targeted for reasons other than their identity.

7.70 The general trends in recent years have been for increased imprisonment, and harsher sentences for offenders. The maximum sentence available for a particular hate crime, and whether that maximum sentence is imprisonment, will depend on the exact offence charged – particularly, whether it is an aggravated offence, a stirring up offence, or a base offence to which enhanced sentencing has been applied.[138]

7.71 Where offences were reported, the Sussex Hate Crime Project study showed that both the Muslim and LGBT communities expressed a preference for restorative justice ("RJ") as opposed to an enhanced sentence (61%).[139] RJ was felt by the LGBT community to be more beneficial to both victim and offender than an enhanced sentence: more likely

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132 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) pp 14 to 18.

133 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) p 14 to 16.

134 This was expressed by participants at a Citizens UK meeting in Cardiff.

135 F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) p 26.

136 The project found that 9% of participants had not reported incidents to the police because they feared retaliatory violence or that it could make matters worse. J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 36 and 70.

137 N Chakraborti and S J Hardy, *Healing the Harms: Identifying How Best to Support Hate Crime Victims* (2016) pp 8 to 9.

138 The maximum sentences for each of the different offences are set out in Chapter 4, which details the current law.

139 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 36.

to reduce re-offending; more helpful for the offender in understanding the offence; better for helping victims to recover and giving them a greater say.[140]

7.72 It is unclear quite how this question was phrased to respondents as part of the Sussex Hate Crime project; not all aggravated offences carry a prison sentence in any event, and for many lower-level offences the enhanced sentence would be likely to be a harsher community order as opposed to a prison sentence. It is not clear if this distinction was known and understood by participants. However, when asked about the potential effects on both offenders and victims of prison versus restorative justice, LGBT victims felt that restorative justice would be of greater benefit as regards future behaviour than prison.[141]

7.73 Many respondents in the Leicester Hate Crime Project also supported educational and community interventions for those convicted of hate crimes, as opposed to simply punitive measures.[142]

7.74 Dixon and Gadd[143] have suggested that traditional punitive responses to crime may do little to address the deeper motivations and problems of hate crime. They argue that they are not forward-looking, providing little in the way of a prospect for healing for victims. Whilst they may satisfy an immediate desire for the offender to "get what they deserve", they also fail to challenge the prejudiced views that led to the offender committing the offence in the first place.

CONCLUSION

7.75 In this chapter we have tried to summarise some of the key research on victims' experiences of hate crime and of the criminal justice system. In the following chapters we consider proposals for reform of the law drawing on the material in this and earlier foundational chapters.

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140 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) p 37.

141 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 38 to 39.

142 N Chakraborti, J Garland, and SJ Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 63 to 65.

143 B Dixon and D Gadd, "Getting the message? 'New' Labour and the criminalization of 'hate'" (2006) 6(3) *Criminology and Criminal Justice* 309.

PART 2: ANALYSIS AND OPTIONS FOR REFORM

Chapter 8: Evaluating the current law

INTRODUCTION

8.1 In the first part of this consultation paper we surveyed the history of the development of hate crime laws and the theoretical arguments that justify (and critique) their use. We also summarised the current law and provided some context for how it operates in practice.

8.2 In this chapter we make some provisional evaluations of the current law and practice, based on various academic and other research reports that have been conducted in recent years, and on the considerable input we have already received from individuals and organisations with experience in the area.

8.3 We begin by outlining what are broadly considered the more effective aspects of the laws. We then consider areas of criticism, where the evidence and community views suggest the objectives of the laws are not being met.

8.4 In subsequent chapters we consider the principled and practical issues that should inform the further development of hate crime laws. We ask questions of consultees and in some cases outline provisional proposals for reform for further consideration.

EFFECTIVENESS OF HATE CRIME LAWS IN ENGLAND AND WALES

8.5 It has been apparent in the Commission's initial research and consultations that there is significant unhappiness among many groups affected by hate crime. This is consistent with the conclusions of various research reports[1] and government studies[2] that we referred to in earlier chapters of this paper.

8.6 Amongst groups protected under the "racial" and "religious" categories, who are at least theoretically the most robustly protected in law, there is concern that the laws are not being enforced robustly enough, and that policy and practice is inconsistent across the country. There is a strong view that hate crime remains a pervasive problem for these communities, and many perceive that the problem is actually getting worse. We heard many direct accounts of horrendous abuse experienced by the Muslim and Jewish communities, with women who are, or appear to be, Muslim singled out in particular. Similarly, race organisations described concerns about a lack of focus, and de-

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1 For example, the Sussex and Leicester hate crime research projects: J Patterson, M A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (2018), N Chakraborti, J Garland, S Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014). These are discussed in more detail in Chapter 7.

2 HMIC, HMCPSI, HM Probation, *Living in a different world: joint review of disability hate crime* (2013), available at https://www.justiceinspectorates.gov.uk/hmicfrs/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf.

prioritisation of anti-racism efforts, despite statistics showing that race-based hate crime remains the most pervasive of all the different strands currently monitored.[3]

8.7 We also heard from LGBT groups, whose members' protected characteristics (sexual orientation and transgender identity) are recognised and protected in some of the hate crime laws, but to a lesser extent than race and religion. They argued that this legal disparity treats them as second-class citizens. They told us that this has significant negative practical impacts in attempting to seek justice when they are victims of hate crime, as well as sending the wrong message to these communities, would-be perpetrators, and the wider public. They also noted that for some LGBT hate crime victims, the public nature of prosecution for hate crimes (as with most prosecutions) can be a huge barrier to individuals seeking justice due to the risk of being "outed" (for example, to their families, colleagues, or local community) if they report the crime or support the prosecution. As a result, perpetrators are able to escape justice.

8.8 Disability groups shared the concerns of LGBT groups about unequal treatment in law compared with race and religion, and the practical and symbolic implications of this. Additionally, they argued that the current model of hate crime laws is poorly adapted for the kinds of abuse they experience. This is because a significant proportion of crimes that are targeted at disabled people do not involve overt "hostility", and the current law's heavy reliance on demonstration of hostility means that it fails to recognise the significant harm that disabled people experience.

8.9 Finally, we met representatives of groups which are targeted for certain crime types, but are not currently recognised as protected characteristics for the purposes of hate crime – for example, women, older people, homeless people, sex workers, members of alternative subcultures,[4] and those who adhere to non-religious philosophical beliefs.[5] They argued that there is considerable unfairness in the fact that they are excluded altogether from the protection offered by hate crime laws.

8.10 We have listened to these concerns, and expand on them later in this chapter.

8.11 However, without discounting this evident community concern and dissatisfaction, it is also important to recognise the progress that has been made in tackling hate crime in recent decades.

8.12 Since the regimes of racially aggravated offences and enhanced sentencing were first introduced in 1998, the range of characteristics protected, and the police and community infrastructure available to tackle hate crime, has significantly expanded. England and Wales now has one of the most comprehensive sets of anti-hate crime legislation of any comparable jurisdiction. This "comprehensiveness" has also resulted

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3 As we noted in Chapter 5, the characteristic of "race" accounts for more than three quarters of all hate crime reports and prosecutions.

4 Such as "punks", "goths" and "metallers". We discuss the category of "alternative subcultures" further in Chapter 14.

5 For example, "humanism". We discuss the category of philosophical beliefs further in Chapter 14.

in increased legal complexity – one of the key concerns with current laws that we will discuss below.

8.13 As we outlined in Chapter 5, the legislative response to criminalising various forms of hate crime has also been backed with support from government and law enforcement agencies. Various government strategies in recent years have sought to direct funding, resources and energy towards preventing, tackling and punishing hate crime. These initiatives may not be perfect, but they show real efforts to address this problem, and are stronger than those in many other comparable parts of the world.[6]

8.14 Further, as we also noted in Chapter 5, the figures available from the Crime Survey for England and Wales suggest that the broad long-term trend seems to be an overall reduction in the incidence of hate crime in England and Wales.[7] This stands in contrast with many of the prevailing narratives in relation to hate crime, which suggest it is increasing.[8] Some of this concern has been fuelled by a significant increase in the number of crimes reported to and recorded by police, and, until recently, in the number of prosecutions and convictions secured (though as we noted in Chapter 5 the trend in police referrals and prosecutions has begun to reverse in recent years). There have also been observable spikes in online and offline hate crime connected to key events such as Brexit, and local and international terrorist incidents.[9]

8.15 The increasing reporting numbers may be cause for alarm. However, rather than indicating a rise in the *incidence* of hate crime, they might also be interpreted as uncovering the extent of previously hidden crime. This could be due to increasing confidence in reporting, both directly with the law enforcement agencies, and through third party agencies such as Stop Hate UK.

8.16 These figures should be treated with considerable caution; and indeed, many of the groups we spoke with would challenge the assertion that the incidence of hate crime is stable or falling.

8.17 However, compared with other jurisdictions, the extent to which hate crime is being reported and prosecuted in England and Wales is notable. For example, in Canada, which has a population of approximately 37 million, the number of hate crimes reported to police in 2018 was 1,798. In England and Wales, which has a population of nearly 59 million (about 50% larger), the police recorded hate crime figure was 94,098. As a proportion of the population, this was around 35 times the Canadian figure. While it is possible that the incidence of hate crime is indeed lower in Canada than in the United

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6 A recent EU-funded research report concluded that "The UK has one of the most comprehensive hate crime reporting, recording and data collection systems in the world." See J Perry, *Facing all the Facts: Connecting on hate crime data in England and Wales* (2019) p 12, available at https://www.facingfacts.eu/wp-content/uploads/sites/4/2019/11/Facing-Facts-Country-Report-England-and-Wales-with-Self-Assessment-271119.pdf.

7 See Chapter 5 at paragraph 5.9.

8 See, eg "Hate crimes double in five years in England Wales" (15 Oct 2019) *The Guardian*, available at https://www.theguardian.com/society/2019/oct/15/hate-crimes-double-england-wales.

9 D Lu, "UK police are using AI to spot spikes in Brexit-related hate crimes" (28 August 2019) *New Scientist*, available at https://www.newscientist.com/article/mg24332453-500-uk-police-are-using-ai-to-spot-spikes-in-brexit-related-hate-crimes/.

Kingdom, it is doubtful that this comes close to accounting for such a huge disparity. A more likely explanation is the differing legal tests for hate crime in these jurisdictions. The "demonstration of hostility" approach in the jurisdictions of the United Kingdom allows for a significantly broader array of conduct to be treated as hate crime.

8.18 Other jurisdictions have similarly proportionately lower reporting of hate crime: in the United States, which has a population of 327 million (more than 5 times larger than England and Wales) the 2018 figure of reported hate crimes was 8496.[10] In the Australian State of New South Wales (current population approximately 8 million) over a nearly 10 year period to January 2017 there were 2,467 reports to police which were determined by police to fit the criteria of a bias crime, suspected bias crime or bias incident (so roughly an average of 250 per year).[11]

8.19 Again, very significant caution needs to be used in drawing conclusions from this data. The legislative responses and cultural contexts of each jurisdiction are quite different. But it is also not entirely unreasonable to conclude, as Gianassi has, that the "legislation and policy framework places the UK at the international forefront of state responses to hate crime".[12]

8.20 The current, imperfect hate crime framework and policy response is the result of decades of hard work and refinement. It has embedded tackling hate crime as a key plank of the criminal justice system, and for all its flaws, has proved a powerful rallying force for communities who experience systemic hatred and abuse.

KEY CONCERNS WITH CURRENT LAWS

8.21 Though the current approach to hate crime laws provides a useful starting point for any future regime, we have also heard a significant degree of criticism with the present state of affairs. In summary these criticisms are as follows:

(1) The **disparity** in the way that the existing five characteristics are protected in law. Groups who are protected to a lesser degree – notably LGBT and disabled people, argue that this is wrong in principle, and has a damaging effect in practice.

(2) The **lack of clarity** in the current laws, which are spread across several different statutes, and do not operate consistently across the characteristics which are protected.

(3) The particularly **low level of prosecution of disability hate crime**, relative both to the number of disabled people in the community, and the extent to which they are targeted for criminal conduct.

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10 OSCE Office for Democratic Institutions and Human Rights (ODIHR) *ODIHR Hate Crime Reporting: United States of America* (2018), available at https://hatecrime.osce.org/united-states-america.

11 G Mason, "A Picture of Bias Crime in New South Wales" (2019) 11(1) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 47.

12 P Giannasi, "Hate crime in the United Kingdom" in N Hall, A Corb, P Giannasi and J Grieve, *The Routledge International Handbook on Hate Crime* (2015) p 114.

(4) Arguments that the law should expand to include **new categories** to counter various other forms of hatred and prejudice in society – notably misogyny and ageism, and hostility towards other targeted groups such as homeless people, sex workers and alternative subcultures. The language used for some of the existing categories – notably the current legal definition of "transgender" – was also criticised.

(5) Concerns around the **enforcement** of hate crime laws, with inconsistent practices amongst police, prosecutors and the judiciary the cause of some concern.

(6) **Barriers to reporting** faced by certain groups. These can include the sheer scale and normalisation of the abuse, a lack of trust in law enforcement agencies, and specific fears – such as the fear of "outing" faced by some members of the LGBT community.

(7) The **limitations of a purely criminal justice response**, and the need to tackle the causes of hate crime and provide adequate support for victims.

8.22 We consider each of these concerns in more detail below, and expand on some of these issues in later chapters.

Disparity between characteristics

8.23 In almost all pre-consultation meetings and events that we conducted, the differential treatment of different hate crime characteristics under current laws was criticised. This perspective was expressed not just by groups who directly represented those less protected – disabled and LGBT people – but also by other protected groups and law enforcement agencies. Community Security Trust, for example – a charity which works towards the protection of the Jewish community and countering antisemitism – were strongly supportive of the principle of parity of protection for all five characteristics, not just racial and religious hate crime. Tell MAMA[13] – an anti-islamophobia charity – echoed these views.

8.24 Of particular concern were the arbitrary results that the differential treatment of "race" and "religion" could have in respect of the offences of stirring up hatred. It was noted that ethno-religious groups such as Sikhs and Jews were better protected by the category of "race" than groups that are legally considered to be "religious" groups only – for example Christians and Muslims. We consider this issue in more detail in Chapter 18.

8.25 In our 2014 Hate Crime review, we found that there was no principled reason why the existing five characteristics should be treated differently in law. However, we identified a number of reasons why, in practice, simply extending the existing regime equally across the characteristics without further reform would be problematic.

8.26 In later chapters we explore different ways that the principled arguments in favour of parity of treatment might be given effect.

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13 "MAMA" stands for "Measuring Anti-Muslim Attacks".

Lack of clarity of hate crime laws

8.27 Another consistent concern in our pre-consultation meetings was the confusing state of hate crime laws as they currently stand. There were three main criticisms in this regard:

(1) The fact that the criminal law provisions relating to hate crime are found in three different statutes;

(2) The fact that these statutes contain different, but overlapping legislative responses – most notably the Crime and Disorder Act 1998 and the Criminal Justice Act 2003; and

(3) The different forms of protection afforded to each of the characteristics protected makes it more difficult to understand the scheme as a whole.

8.28 It was suggested that the complexity of the current law makes it unnecessarily difficult to communicate to the public generally, and harder for police to implement in practice. For example, Galop – an anti-LGBT hate charity – referred to several cases where charging time limits had been exceeded. They explained that police had wrongly assumed that the prosecution would proceed in the Crown Court (as would be the case for the racially or religiously aggravated versions of the same offence) and would not be subject to the six-month statutory time limit that applies to magistrates' court proceedings.

8.29 While it is the responsibility of law enforcement agencies to know and apply the law correctly, for front line police officers, hate crime is just one of the many different forms of crime they encounter in their daily work. If the laws are complicated, it is more likely that mistakes will be made, and justice will not be delivered effectively. It is therefore imperative that the laws are made as clear and accessible as possible to those who apply them.

8.30 Later in this report we consider options for clarifying and simplifying hate crime laws, including bringing together the applicable law into a single "Hate Crime Act".

Low levels of prosecution of disability hate crime

8.31 In 2017-18 there were 7,226 cases recorded by the police of disability hate crime, 988 police referrals and 752 prosecutions for disability hate crime. In a comparable period, the Crime Survey for England and Wales ("CSEW") suggests that there were approximately 51,000 disability hate crime incidents.[14] This would suggest that the rate of prosecution is only 1.4% of the incidents of perceived disability hate crime.

8.32 By contrast in the same period there were 11,061 prosecutions of racially and motivated hate crimes against a CSEW estimated volume of 101,000 incidents (a proportion of 11%), and 1436 prosecutions based on sexual orientation hate against an estimated incidence of 29,000 (a proportion of 5%).[15] The comparatively low proportion of prosecutions of disability hate crime accords with the significant concerns expressed by

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[14] See Table 1 in Chapter 5 at paragraph 5.11.

[15] See Table 1 in Chapter 5 at paragraph 5.11.

disability representatives in our pre-consultation meetings. They told us that the law does not recognise as hate crime a significant amount of criminal activity that is targeted at disabled people.

8.33 The principal concern of disabled people, their advocates, and some law enforcement agencies was that the current legal requirement to prove that the offence was motivated by or the offender demonstrated "hostility" towards disabled people, was not well adapted to deal with the forms of abuse experienced by disabled people. They argued that while "hostility" can be proved in some cases, disabled people were targeted for a significantly greater amount of criminal activity than could be proven using this test. They argued that this targeted criminal behaviour was hate crime, and should be recognised and punished as such.

8.34 There were two main forms of targeting that the law was not capturing:

- Behaviour motivated by or demonstrating more subtle forms of "hostility" – such as derision and contempt for disabled people, rather than outright hostility; and

- Behaviour directed at disabled people out of a belief (whether true or not) that the victim's disability makes them an easier target – for example for financial or sexual exploitation.

8.35 It was argued that these two categories are not mutually exclusive, and often coexist. For example, a perpetrator may sexually assault a person with a disability both because they consider them to be a "soft" target for such an assault, and because, as a result of that person's disability, they see them as undeserving of respect for or entitlement to their bodily integrity.

8.36 Many advocates for reform of disability hate crime provisions argued that the law should adopt a broader test, focusing on the perpetrator's targeting of disabled people for criminal behaviour. The approach proposed in a 2017 University of Sussex report[16] suggested replacing the "motivated by hostility" test (but not the demonstration of hostility test) with a requirement that the offence was committed "by reason of" the victim's membership of a protected group.

8.37 Such a test would widen the circumstances in which hate crime could be pursued to cases of "prejudicial targeting". This approach has been adopted in some North American jurisdictions (though significantly, these jurisdictions do not have an equivalent of the "demonstration of hostility" test which applies in England and Wales).

8.38 However, against this, there are also voices that have urged caution in expanding the ambit of hate crime in this way. In the recent independent review of hate crime laws in

[16] M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017), available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

Scotland, Lord Bracadale found that such a change "risks mischaracterising exploitation as a hate crime" and "ultimately decided not to recommend it".[17]

8.39 We consider whether reform of the current test of hostility is necessary in Chapter 15.

New characteristics

8.40 A variety of different groups were proposed for inclusion in reformed hate crime laws.

8.41 The most prominent call was to recognise misogynistic criminal behaviour as a form of hate crime, in order to recognise the extent and unacceptability of this behaviour, to provide adequate legal mechanisms to address it, and to improve community confidence in reporting such crimes, and enforcement measures against perpetrators.

8.42 Age was also proposed by some groups. There was particular concern expressed about crime directed at older people. The Older Person's Commissioner for Wales, for example, emphasised the corrosive impact of everyday ageism in contemporary society, and the exploitation and abuse that older people too often experience.

8.43 Groups that hold philosophical beliefs that are not religious in nature – for example, humanists – argued that these should also be recognised as a protected characteristic for the purposes of hate crime. This would be consistent with their current status as a protected characteristic under the Equality Act 2010, alongside the protection that is afforded to religious belief.[18]

8.44 For many years there has also been a campaign – spearheaded by The Sophie Lancaster Foundation – to recognise membership of "alternative subcultures" such as goths and punks as a protected characteristic for the purposes of hate crime. There are concerns that people who are, or appear to be, members of these subcultures are disproportionately targeted for criminal behaviour.[19] Greater Manchester Police have since 2013 recorded offences against members of alternative subcultures as "hate crimes".

8.45 Membership of other groups that are highly disproportionately victims of crime – notably homeless people and sex workers – were also proposed as characteristics for inclusion. In Merseyside, crimes against sex workers have been recorded as hate crimes since 2006,[20] and the Mayor of Liverpool has also called for crimes against homeless people to be recognised as hate crimes.[21]

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17 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018), paras 3.24 and 3.27, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

18 Equality Act 2010, s 10(2).

19 See J Garland, N Chakraborti, and S Hardy, '"It Felt Like a Little War': Reflections on Violence against Alternative Subcultures" (2015) 49(6) *Sociology* 1065, 1080.

20 A Hayes and J Schweppe, "You Can't Have One Without the Other One: "Gender" in Hate Crime Legislation" (2020) 2 *Criminal Law Review* 148, 156.

21 S Marsh and P Greenfield, "Recognise attacks on rough sleepers as hate crimes, say experts" (19 December 2018) *The Guardian*, available at https://www.theguardian.com/society/2018/dec/19/homeless-attacks-rough-sleepers-hate-crimes.

8.46 However, some of those we spoke to urged caution in expanding the ambit of hate crime laws beyond the current five groups. One of the major concerns they expressed was the risk of diluting ongoing efforts to tackle hate crimes against those existing five groups.

8.47 Some argued that hate crime law was primarily designed to protect minority groups – which women, for example, are not. Others argued that the laws should focus on intrinsic characteristics, which would exclude circumstantial characteristics such as homelessness.

8.48 Crisis – a homelessness charity – took a particularly nuanced view on the issue of homelessness and hate crime. On the one hand, they recognised the terrible extent of abuse and crime that homeless people experience, and the need for action to prevent and deter this. On the other hand, they were also wary about the reinforcement and normalisation of homelessness in society – to which hate crime protection might contribute – when their broader ambition is to see the phenomenon of homelessness end through positive action.

8.49 Action on Elder Abuse (England and Wales) took a similar position with regard to expanding hate crime law to cover the characteristic of age. They are determined to see stronger efforts to prevent and deter crimes against older people, but did not consider that adding age as a hate crime characteristic was necessarily the best way to achieve this. In particular, they did not consider "hatred towards older people" to be the right way to characterise the motivations for much of the crime specifically targeted at older people. They were concerned that inclusion of this characteristic might prove confusing and ineffectual.

8.50 It should be emphasised than no one we spoke with argued that criminal offending against these or any other groups should not be taken seriously. Rather, they questioned whether hate crime law was the right mechanism to effect meaningful change, and cautioned against the risk of unintended consequences.

8.51 In Chapter 10 of this paper we consider whether a principled basis can be established for inclusion and exclusion of characteristics in hate crime laws. In Chapters 12, 13 and 14 we consider the arguments in respect of certain characteristic groups in more detail.

Concerns about the enforcement of hate crime laws

8.52 We spoke to a number of highly dedicated police officers and prosecutors in our initial meetings, all of whom were committed to tackling hate crime and supporting its victims.

8.53 However, inspectorate reports for the police and CPS in recent years have provided a more mixed picture of the response of law enforcement agencies in relation to hate crime across England and Wales.[22] A 2018 joint review of disability hate crime by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) and Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) (following on

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22 See, eg, HMICFRS, *Hate crime: what do victims tell us? A summary of independent research into experiences of hate crime victims* (2018), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hate-crime-what-do-victims-tell-us.pdf; HMICFRS, *Understanding the difference: The initial police response to hate crime* (2018), available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

from two previous reviews), found that there had been "significant and welcome improvement in some aspects of casework" since previous reviews, but also that "more than half of the police files examined were assessed as requiring improvement or as inadequate."[23]

8.54 Victims and community groups also expressed concern to us about inconsistent practices and a lack of understanding of hate crime amongst police forces across the country. This was particularly apparent at Citizens UK community events we attended where we heard directly from victims of racist, Islamophobic, and antisemitic hate crimes, as well as the intersection of these experiences with misogynistic abuse.

8.55 Amongst some police and prosecutors, there was also frustration about the level of understanding among the judiciary – and a concern that some judges were either unaware of or unwilling to apply the enhanced sentencing provisions under the Criminal Justice Act 2003 in particular. Some of these concerns have been echoed in academic research.[24]

8.56 These are difficult issues, which require careful consideration. In Chapter 20 we consider whether a Hate Crime Commissioner may be able to drive forward improvements in enforcement and the experiences of hate crime victims. However, as the focus of this project is primarily on the legal basis for hate crime, we do not consider operation and enforcement issues in the same level of detail. We also acknowledge that inspectorate agencies, such as HMCPSI and HMICFRS, together with training bodies such as the College of Policing, the CPS, and the Judicial College are often better placed to provide detailed operational guidance and recommendations for those that apply and enforce hate crime laws.

Barriers to reporting

8.57 A number of groups we spoke to noted that there are significant barriers which prevent victims of hate crime coming forward to report it in the first place. These included:

- A lack of awareness of what constituted a hate crime, and that they could and should be reported to police.
- The sheer volume or regularity of abuse received by some targeted groups, and the impracticality of reporting every incident. Transgender people and visibly Muslim women reported this in particular.
- A lack of trust in authorities, and a lack of cultural sensitivity by these authorities when incidents were reported. This was noted as a particular concern amongst Gypsy, Roma and Traveller communities.
- Direct or indirect experience of prior disappointment – where an earlier report did not lead to a satisfactory outcome. A number of victims who spoke at Citizen UK

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23 HMIC, HMCPSI, *Joint Inspection of the Handling of Cases Involving Disability Hate Crime* (2018) pp 1 to 2, available at https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18._rpt.pdf.

24 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017) p 124.

hate crime public hearings told us that this would deter them from reporting in the future.

- Fear of reprisal or other consequences from reporting the incident. This was a particular concern for some LGBT people, who did not want to proceed with prosecution due to the likelihood that this might "out" them.

8.58 In Chapter 7 we set out some of the victim research which has been conducted in relation to hate crime, including barriers to reporting. The Leicester Hate Crime Research project for example found that amongst respondents to their survey who had not reported hate incidents to the police, 30% said it was because they did not think the police would take it seriously.[25]

Limitations of a purely criminal justice response

8.59 Finally, it has been evident throughout our initial consultations that a purely criminal justice focus in tackling hate crime is insufficient. Education, leadership, community empowerment and countering of hateful narratives were some of the key activities emphasised by those we spoke with. Indeed, "[p]reventing hate crime by challenging the beliefs and attitudes that can underlie such crimes" is one of the core planks of the government's "Action Against Hate" plan.[26]

8.60 In responding to hate crimes and incidents, there was also acknowledgement – by some academics, law enforcement professionals and stakeholder groups – that criminal prosecution of perpetrators was not always the most appropriate response in the circumstances of the case. For example, in cases of lower level public order offending, it may be that education would be more effective at reducing the likelihood of reoffending. We spoke to a number of criminal justice groups that were piloting such approaches.[27]

8.61 In some cases, criminal justice outcomes are not the main priority for victims; many simply want the behaviour to be acknowledged and to stop. This may be particularly so where the behaviour involves ongoing low-level harassment in a residential context, and it is likely the victim and perpetrator will continue to live in the same community. Of course, this view was not universally held; many also considered that a robust and punitive response was the best way to signal the unacceptability of hostile behaviour.

8.62 In some less serious cases, there may be a role for restorative justice; a process that involves bringing together victims and perpetrator to find a way of repairing some of the harm. It is a specialised process that is only appropriate in certain cases, and with the consent of all involved. However, where it is done well, it can be a powerful form of

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25 N Chakraborti, J Garland, S Hardy, *The Leicester Hate Crime Project: Findings and Conclusions* (2014) p 70, available at https://www2.le.ac.uk/departments/criminology/hate/documents/fc-executive-summary.

26 Home Office, *Action Against Hate: The UK Government's plan for tackling hate crime* (July 2016) p 21, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf.

27 See for example Lancashire, Avon and Somerset and Cambridgeshire police force area restorative justice work with *Why Me?*, available at https://why-me.org/campaigns/hate-crime-restorative-justice/; https://www.equallyours.org.uk/why-me-report-making-restorative-justice-happen-for-hate-crime-across-the-country/.

redress and healing for victims, and provide an opportunity for perpetrators to understand the harm they have done, and deter them from future criminality.

8.63 Research conducted by the Sussex Hate Crime Research project indicated support amongst victims for the use of restorative justice in appropriate cases.[28]

8.64 We discuss alternatives to prosecution – including restorative justice, in more detail in Chapter 6.

BALANCING CONSIDERATIONS

8.65 Most groups the Commission spoke to called for more active enforcement of hate crime laws, and many also advocated the expansion of their remit.

8.66 However, there were also some cautionary voices. In particular, concerns focused on the risk of overcriminalisation if hate crime laws were applied too widely or punitively, and in respect of hate speech in particular, the risk that extended laws might operate to chill legitimate forms of debate, and infringe on freedom of expression.

Risk of overcriminalisation

8.67 The main concern expressed by those we spoke to was that if too much criminal behaviour could be considered a hate crime – either through extension of the protected characteristics or a widening of the legal test – it could have a generally inflationary effect on sentences, without necessarily targeting the worst forms of offending, or the most dangerous perpetrators.[29]

8.68 Certainly, there is academic research showing that not all perpetrators of hate crime are motivated by deeply entrenched hatred. Chakraborti and Garland have argued that "in the majority of instances hate crimes are enacted for the excitement and thrill involved" – with the bias element and "hate" emotion not forming the prime motivation.[30] This is acknowledged in applicable sentencing guidelines, which distinguishes between different severities of hate crime.[31]

8.69 Some of the limited studies available on hate crime perpetrators suggest that they often come from families with a lack of formal education, and typically have "life stories characterised by deprivation, mental health problems, domestic violence, drug and

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28 J Patterson, M A Walters, R Brown and H Fearn, *The Sussex Hate Crime Project: Final Report* (2018) p 37, available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

29 This was a particular concern expressed by participants in our meeting with the criminal law committee of the Law Society.

30 N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 115.

31 See, eg, Sentencing Council, "Disorderly behaviour with intent to cause harassment, alarm or distress/ Racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress" (effective 1 January 2020), available at https://www.sentencingcouncil.org.uk/offences/crown-court/item/disorderly-behaviour-with-intent-to-cause-harassment-alarm-or-distress-racially-or-religiously-aggravated-disorderly-behaviour-with-intent-to-cause-harassment-alarm-or-distress/.

alcohol issues, and patterns of criminal behaviour".[32] While these difficult backgrounds do not excuse the wrongfulness of their conduct, nor undo the harm caused, they do call into question the value of a purely punitive response in addressing their behaviour.

8.70 It has also been suggested that the significantly higher maximum penalties under the regime of aggravated offences[33] can lead to an inappropriate elevation of the forum for dealing with the case. For example, in cases of common assault and lower level public order offences – which were routinely dealt with by Magistrates' Courts – the aggravated offences were elevated to jury trials in the Crown Court, which entailed a disproportionate cost and took significantly longer to reach resolution.

Freedom of thought and expression

8.71 Another significant concern – which has been expressed about the "stirring up" offences in particular – is the potential danger to freedom of expression that they present.

8.72 The European Convention on Human Rights ("ECHR"), given effect in the United Kingdom through the Human Rights Act 1998, is the primary legal limitation on laws limiting freedom of expression in England and Wales.

8.73 Article 10(1) of the ECHR provides that:

> Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

8.74 However, it is a qualified right, as set out in Article 10(2):

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

8.75 The European Court of Human Rights has found that each implementing state has a "margin of appreciation" as to how such restrictions may be implemented, as they "are in principle in a better position than the international judge to give an opinion on the

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[32] eg, see L Ray, D Smith and L Wastell, "Shame, rage and racist violence" (2004) 44(3) *British Journal of Criminology* 350; E Dunbar and D Crevecoeur, "Assessment of hate crime offenders: the role of bias intent in examining violence risk" (2005) 5(1) *Journal of Forensic Psychology Practice* 1; R Sibbitt, The Perpetrators of Racial Harassment and Racial Violence (Home Office Research Study No 176, 1997); and D Gadd, B Dixon and T Jefferson, "Why do they do it? Racial harassment in North Staffordshire: Key findings" (2005), cited in N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses* (2nd ed, 2015) p 106. However, Chakraborti and Garland also noted that the US research tends to contradict this evidence by revealing that perpetrators are commonly middle-class, with no criminal record – at p 106.

[33] See Table in Chapter 16, at paragraph 16.8.

exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them."[34]

8.76 These qualifications, together with the prohibition of abuse of rights in Article 17,[35] are the main bases under which existing hate speech laws are found to be compliant with Article 10. Article 17 of the ECHR provides:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

8.77 Despite this, the stirring up offences – and in particular those relating to religion and sexual orientation – have been the subject of discussion and controversy.[36] Although they may be compliant with human rights laws, a concern remains regarding the potentially "chilling effect" these laws might have on the exercise of legitimate expression, for instance because of legal uncertainty or the costs of defending any prosecution in court.

8.78 Unlike the other legal provisions we consider in this paper, these offences also criminalise forms of conduct that might not otherwise amount to a criminal offence. They thereby extend the reach of the criminal law.

8.79 As we note in Chapter 18, the passage through Parliament of the offences of stirring up religious hatred was difficult, and resulted in a higher threshold than that which existed in respect of racial hatred. The approach was then replicated for the offences of stirring up hatred on the basis of sexual orientation that were introduced in 2008.[37]

8.80 There is considerable debate, both within England and Wales and internationally, about the appropriate role and limits for the application of the criminal law in relation to hate speech. We deal with these arguments in more detail in Chapter 18.

CONCLUSION

8.81 In this chapter we have sought to summarise the main strengths and critiques of current hate crime law and practice. In the next chapter we provisionally outline how the law

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34 *Handyside v UK* (1976) 1 EHRR 737 at [48].

35 See, eg, *Norwood v UK* (2004) App No 23131/03. Norwood was convicted of an aggravated offence under section 5(1)(b) of the Public Order Act 1986 for circulating a poster shortly after the 9/11 attacks which depicted the burning Twin Towers, with the text "Islam out of Britain – protect the British People". Norwood applied to the European Court of Human Rights (ECtHR), claiming his Article 10 rights were infringed. However, the case was found to be inadmissible, on the grounds of Article 17, which prohibits the abuse of rights in the ECHR. The ECtHR concluded that to entertain the case would amount to an abuse of the rights in the ECHR. It stated that "such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination".

36 There was a notable campaign against the original drafting of the religious hatred laws in the mid-2000s – see BBC News Channel, "Atkinson attacks 'draconian' law" (20 June 2005, available at http://news.bbc.co.uk/1/hi/uk_politics/4112118.stm.

37 By the Criminal Justice and Immigration Act 2008, sch 16.

might be reformed to respond to these, and expand on these reform proposals further in the chapters that follow.

Chapter 9: A proposed model for reform

INTRODUCTION

9.1 In Chapter 8 we identified some of the core concerns with the current legal and policy framework for hate crime laws in England and Wales. In this chapter we begin to consider reform options, setting out our proposals for the broad framework for future hate crime laws. We expand on these proposals, and ask more detailed questions, in subsequent chapters.

9.2 As we noted in Chapter 8, our provisional view is that the current law has provided a solid starting point for the tackling of hate crime in recent decades. However, the laws have developed in an inconsistent, piecemeal way. They have not been significantly reformed in recent years, despite clear shifts in social attitudes and a growing awareness of the need to address hatred and extremism in our communities.

9.3 The provisional model we set out in this chapter seeks to build on the progress already made, drawing on aspects of the laws that have worked well thus far, while providing greater consistency, clarity, and fairness.

THE CORE CONCERNS AND OUR RESPONSES TO THEM

9.4 In Chapter 8 at paragraph 8.21 we summarised the main concerns with the current law and practice.

9.5 The proposals for the reform of hate crime laws outlined in this chapter and the following chapters are primarily addressed at the first four of these issues: parity of treatment amongst characteristics, clarity of laws, potential extension of characteristics, and the particular concerns about the effectiveness of the laws in relation to disability hate crime.

9.6 While we consider that enforcement, reporting, and non-criminal justice responses are largely beyond the scope of our terms of reference, in Chapter 20 we consider whether a new "Hate Crime Commissioner" role may be able to drive forward improvements in these areas.

Disparity in law

9.7 Differential treatment of the characteristics currently protected under hate crime laws has been a persistent criticism in our consultation meetings. Indeed, in our 2014 report we found that "it is undesirable for the current law to give the impression of a "hierarchy" of victims" and that unless there is some good reason to limit the protection of aggravated offences to race and religion "it is unacceptable for the same system not to apply to all five characteristics."[1]

9.8 LGBT and disabled people we spoke to considered that by providing greater protection to racial and religious groups (through "aggravated offences"), the law at present treats

[1] Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 95.

them as second-class citizens. There was widespread support for equality of treatment of the existing protected characteristics amongst almost all individuals and groups with whom we spoke. Most of those who supported change were not directly affected members of less-protected groups, but objected in principle to inequality of treatment.

9.9 It is certainly true that amongst the existing characteristics, there are very different causes and experiences of hostility among victims. For example, some visibly Muslim women we spoke with had cause to be fearful of abuse and hostility almost every time they left their home.[2] This experience is likely to be quite different from someone whose protected characteristic is less immediately obvious – for example, a white gay man who may pass as heterosexual. In this case, the person may only feel at risk of homophobic hatred in certain contexts – such as when together with a partner or near an LGBT venue.

9.10 Despite these differences, however, our provisional view is that there are enough common features among the existing protected characteristics such that the law should seek to provide equal protection to all of them. This would represent a departure from the current approach, which is inconsistent, and creates a "hierarchy of hate" amongst protected groups. We believe a consistent approach would make hate crime laws both clearer and fairer.

9.11 We also recognise, however, that formal equality in law does not always translate to equality in practice.

9.12 As we noted above, different groups in society experience hate crime in very different ways. For example, compared with other characteristics, there is evidence that disabled victims are more likely to be the targets of property and sexual offences.[3]

9.13 This means that even if the law states that all specified characteristic groups should be treated equally, the effect may be that in practice certain groups may be less protected than others.

9.14 For example, the eleven offences that currently may be racially or religiously aggravated – various forms of assault and wounding, property damage, harassment and public order offences – conform to some extent to the kinds of offences that racial and religious minority groups have traditionally experienced as hate crimes.[4]

9.15 However, as we noted in our 2014 report, if these same offences were simply extended to cover a characteristic such as disability, it is likely they would not be well adapted for the purpose. This is because, while disabled people are certainly victims of these

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2 Citizens UK consultations in Newcastle (29 August 2019) and Cardiff (16 September 2019).

3 Walters, Brown, Wiedlitzka, *Causes and Motivations of Hate Crime* (Equality and Human Rights Commission Research report 102, 2016) pp 45 to 48, available at https://www.equalityhumanrights.com/sites/default/files/research-report-102-causes-and-motivations-of-hate-crime.pdf.

4 One notable omission, however, are offences committed in online contexts such as section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. We consider this further in Chapter 16.

crimes, other types of crime are still (or even more) relevant to this group. These include sexual offences and offences relating to financial exploitation.

9.16 As we will explore further below, the key legal test for the application of hate crime laws – whether the offence was motivated by or the defendant demonstrated hostility towards the characteristic – has also been developed to capture specific forms of hatred. Disability groups in particular consider this approach to be ill-equipped to address the forms of crime they experience as hate crime, and should be recognised as such.[5]

Lack of clarity and usability

9.17 Another significant criticism that we have heard repeatedly is that the current laws are unnecessarily complicated, which makes them difficult to understand and apply. The main criticisms are:

(1) There are different forms of protection afforded to different characteristics, which makes it more difficult to understand the scheme as a whole;

(2) The main criminal law provisions relating to hate crime are found in three different statutes; and

(3) There are two separate, at times overlapping, mechanisms for increasing the applicable sentence for hate crimes: aggravated offences and enhanced sentencing.

Differential treatment of characteristics

9.18 The first of these criticisms, differential treatment of characteristics, we have already considered above. Reforms to the law that treat characteristics more consistently would have the likely effect of making the laws clearer and easier for law enforcement agencies to apply. Our primary motivation for equalising protection in law is that it would be a more just and fair approach, but improved clarity of laws would be a secondary benefit.

Fragmentation of hate crime laws across different statutes

9.19 The applicable hate crime legislation is found variously in the Crime and Disorder Act 1998 ("CDA 1998"), Criminal Justice Act 2003 ("CJA 2003"), Public Order Act 1986 ("POA 1986") and the Football (Offences) Act 1991. This has been highlighted as a cause of confusion, and as contributing to the difficulty in understanding the applicable law.

9.20 One proposal that has been has been made has been to consolidate the various legislative provisions into one single "Hate Crime Act". A recommendation for a consolidated hate crime act was also made in the Bracadale report,[6] and the Scottish

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5 We explore the nature of disability hate crime in more detail in Chapter 15.

6 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018), Ch 9.

government recently tabled the Hate Crime and Public Order (Scotland) Bill, which would consolidate the relevant provisions in Scottish law.[7]

9.21 While there is an attractiveness to this proposal, we do not consider this to be appropriate for the enhanced sentencing provisions contained in sections 145 and 146 of the CJA 2003. These provisions form part of the general sentencing regime in Part 12 of that Act and will be largely transposed into chapter 3 of the Sentencing Code if the Sentencing Bill[8] currently before Parliament is passed into law. This is part of a wider set of reforms designed to simplify sentencing law and make it easier to use, thereby increasing public confidence and reducing costly errors.[9] The section 145 and 146 provisions will be consolidated into a single "hostility" provision, currently found in clause 66 of the Bill. While we make provisional proposals further to amend the substantive effect of these provisions in Chapters 15 and 17, we consider that in the wider interests of the consolidation and simplification of sentencing law, the final location of these enhanced sentencing provisions should remain the consolidated sentencing code. A "Hate Crime Act" could still serve as the amending legislation for these changes.

9.22 The substantive aggravated offence provisions of CDA 1998, and the stirring up hatred offences under Parts 3 and 3A of the POA 1986, could more readily be consolidated together into a single "Hate Crime Act". There is a logic to the current placement of the stirring up offences within the "public order" framework, as they exist in part to maintain peace, order and community harmony. However, unlike other public order offences of more general application, stirring up hatred offences are specifically targeted towards the damaging effects of hate speech and conduct. In this respect, their purpose overlaps considerably with the aggravated offence provisions in the Crime and Disorder Act 1998. Further, whereas other public order offences are primarily concerned with physical, public spaces, the stirring up hatred offences can equally be committed in an online context, and in this respect are of an appreciably different character.

9.23 In Chapter 19 we consider the future of the offence of racialist chanting contrary to section 3 of the Football Offences Act 1991. Reformed versions of this offence might also be consolidated into a single Hate Crime Act. However, given the specific context of these offences, and their connection to a wider array of civil mechanisms such as football banning orders,[10] these may more appropriately continue within the wider football offences framework. Again, however, any amendments to these offences could occur in the context of a Hate Crime Act.

9.24 Finally, in Chapter 20 we consider the option of establishing a Hate Crime Commissioner to drive forward best practice in preventing and prosecuting hate crime, and ensuring appropriate support for victims. If this proposal is adopted, the legal

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7 Scottish Government, *Protecting Scotland's Future: the Government's Programme for Scotland 2019-2020*, p 137, available at https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/.

8 Sentencing Bill [HL] 2019-21.

9 See The Sentencing Code Volume I: Report (2018) Law Com No 382.

10 See Football Spectators Act 1989, Sch 1, para m.

establishment of the Commissioner role could also occur within the context of a Hate Crime Act.

9.25 The approach of using a single Act to counter a particular form of social harm is consistent with that adopted by government in recent years in respect of modern slavery[11] and domestic abuse.[12] In both cases, the key aims of drawing together the relevant provisions included the raising of public awareness, and signalling of the government's intention to tackle offending and support victims. We consider that similar goals in respect of hate crime could also be usefully achieved through a reformed and consolidated Hate Crime Act.

Consultation Question 1.

9.26 We provisionally propose that a single "Hate Crime Act" be used to bring together the various reforms to hate crime laws proposed in this paper. This could include:

- shifting the substantive aggravated offences currently in the CDA 1998 and the stirring up hatred offences in parts 3 and 3A of the POA 1986 to the new Hate Crime Act;
- making amendments to the enhanced sentencing provisions (currently in the CJA 2003 but planned to move to the Sentencing Code) and the Football (Offences) Act 1991; and
- if a Hate Crime Commissioner is to be introduced, the establishment of this office and its powers.

9.27 Do consultees agree that hate crime laws should, as far as practicable, be brought together in the form of a single "Hate Crime Act"?

Overlapping mechanisms

9.28 Another source of complication in the law is the fact that there are two separate legal mechanisms that recognise hate crimes in the context of existing criminal offences – the aggravated offences regime under the CDA 1998, which creates new and separate offences with higher maximum penalties, and the enhanced sentencing regime under the CJA 2003 which requires courts to increase the sentence within the existing criminal offence. It is often not immediately clear to police and victims when and why one should be applied and not the other.

9.29 We have considered the option of eliminating this distinction; for example, by adopting only one of these mechanisms in law, and revoking the other. A single approach would

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[11] Modern Slavery Act 2015. This Act consolidated a range of existing slavery and trafficking offences, and also introduced new civil and regulatory means of countering these practices, better support for victims, and the establishment of an independent Anti-Slavery Commissioner.

[12] The Domestic Abuse Bill currently before Parliament seeks to consolidate a range of civil and criminal provisions to raise awareness, improve the justice system response and provide better support for victims. See Domestic Abuse Bill 2019-2021.

undoubtedly make the law easier to understand and apply. It is also the approach of most other comparable jurisdictions.

9.30 Academics at Sussex University have proposed a single "hybrid" approach be adopted in England and Wales, drawing on aspects of both the CDA 1998 (the requirement to prove aggravation as part of the offence) and the CJA 2003 (application across all offences, with no increase in the maximum penalty). This would be somewhat similar to the approach to hate crime laws in Scotland. We have given serious consideration to this important work, and outline this model in more detail in Chapter 16.[13]

9.31 We are concerned that to adopt this hybrid approach would inevitably involve reducing or removing some of the protections already in place.

9.32 To adopt only aggravated offences, with enhanced maximum penalties, would limit the application of the law to a select group of specified offences. While the range of offences could be expanded significantly, it would still fall short of the many thousands of offences currently on the statute book, and in practice would therefore be likely to miss some. Further, if aggravated versions of perhaps hundreds or even thousands of offences were to be created, this would greatly expand the size of the criminal statute book. We consider this to be an undesirable outcome, as it would increase the complexity and unintelligibility of the criminal law more generally.

9.33 To adopt only enhanced sentencing would remove the increased maximum sentence that applies in the case of aggravated offences. This would involve rolling back the additional maximum penalties that currently apply in respect of various forms of racially and religiously aggravated hate crime. It has been argued that the practical effect of this may be minimal, as sentences passed for aggravated offences very rarely exceed the maximum sentence available for the non-aggravated version of the same offence.[14] Our concern nonetheless is that this is likely to send the wrong message to these and other communities, and undermine the overall deterrent effect of hate crime laws.

9.34 Overall, we consider that there is a risk that certain forms of recognition of hate crime will be diminished if only one mechanism is maintained.

9.35 Instead, as we outline further below and in subsequent chapters, we consider there may be a role for retaining both legal mechanisms.

Extension of characteristics

9.36 Hate crime laws currently do not apply to crimes targeted against a number of groups, many members of which might legitimately feel they should. These include women, older people, homeless people, alternative subcultures, sex workers, people who hold non-religious philosophical beliefs and others. There are also individuals who may technically fall within one of the existing categories, but do not identify strongly with the group. For example, people with facial disfigurements or autistic spectrum condition

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13 Walters, Wiedlitzka, Owusu-Bempah and Goodall, *Hate Crime and the Legal Process – Options for Law Reform* (University of Sussex, 2017) , available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

14 Walters, Wiedlitzka, Owusu-Bempah and Goodall, *Hate Crime and the Legal Process – Options for Law Reform* (University of Sussex, 2017) p 200.

who are victims of hate crime may not feel comfortable with the category of disability. We spoke to representatives of all of these groups during our pre-consultation meetings.

9.37 As we outline in more detail in Chapter 10, there is no academic consensus on how to decide which additional characteristics to include; nor was there a clear consensus amongst our stakeholders.

9.38 The five characteristics adopted in England and Wales are the ones most consistently found in other comparable jurisdictions. There are models in certain states of Australia and in Canada where a much wider approach is taken to the specification of characteristics. The Australian State of Victoria, for example, provides protection to members of an "identifiable social group",[15] without further qualification.

9.39 However, as we explain in more detail in Chapter 10, we provisionally consider that for the purposes of hate crime offences (aggravated offences and stirring up offences), the law should continue to specify the characteristic groups that are protected by these laws. We consider this important to provide the certainty and clarity that the criminal law requires. It is also consistent with the approach taken in equality law, where a specified group of characteristics are identified and protected. In Chapter 10 we therefore consider the available academic literature, comparative international approaches, and pre-consultation feedback we have heard, and suggest three criteria against which the decision to include a characteristic should be made. We then consider the arguments of various characteristic groups against these criteria in the chapters that follow.

9.40 In Chapter 17 we ask whether a broader approach may be appropriate for the purposes of enhanced sentencing provisions. This might give sentencers the ability to recognise particular instances of hate crime against smaller or less widely recognised groups. However, there are also potential disadvantages of such an approach – including less certainty about when the law should apply.

Low level of prosecution of disability hate crime

9.41 As we noted in the previous chapter, it was apparent in our consultation meetings that disabled people are amongst the most dissatisfied with current hate crime law and practice.

9.42 One major source of concern is the formal legal distinction between disability and the characteristics of race and religion (a concern shared by LGBT stakeholders), which was widely perceived as arbitrary, unfair, and as sending a very negative message to the community. Our provisional proposals seek to resolve this concern by strengthening the legal protections for disabled people so that they are have equal status with all other protected groups.

9.43 More fundamentally, there is a strong view that the current requirement to prove "hostility" is ineffective in the context of disability hate crime. It is argued that disabled people experience disproportionate levels of abuse and exploitation that arise *because* they have a disability. While they often experience this criminal targeting as founded on "hostility" towards them, experience has shown that this behaviour does not easily meet

[15] Sentencing Act 1991 (Vic), s 5(2).

the current legal test of "hostility" under the CJA 2003, and is therefore not recognised and sentenced as a hate crime.

9.44 There may be a variety of perpetrator motivations that underlie targeting of disabled people. These may include, for example, a belief that the person's disability makes them an easier target, or a general lack of respect for, or dehumanising attitudes towards, disabled people. These motivations may not be easily characterised or proven as "hostility" towards disabled people, even though they may be experienced as such by victims, and wider members of the community.

9.45 There are other means for the law to recognise such conduct in sentencing; most notably the Sentencing Council General Guideline.[16] This includes the aggravating factor of a "vulnerable victim" and states:

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence)

  ...

- Culpability will be increased if the offender targeted a victim because of an actual or perceived vulnerability.

9.46 However, many disabled victims we spoke with do not consider this to be an adequate remedy. This is because it does not formally recognise and record the perpetrator's behaviour as a "hate crime". Many disabled people also strongly reject the label of "vulnerable", arguing that this is not something inherent in them or their disability, but arises due to the way that society perceives and treats disabled people.

9.47 Concerns around the limitations of the "hostility" test are not limited to the characteristic of disability,[17] but they are clearly most acutely felt in this context.

9.48 A strong case has been made to us for change to the law, so that the current "motivation" limb does not require evidence at the high threshold of "hostility".

9.49 We can see both advantages and disadvantages of such a change. It would represent a significant shift in the way hate crime is conceived of and dealt with in England and Wales. It could potentially result in the prosecution of hate crimes in circumstances where the perpetrator neither holds nor demonstrates any particular animosity towards the characteristic.

9.50 We explore this issue in more detail in Chapter 15, where we suggest that a reform to the motivation limb of the hostility test – to allow for both hostility and *prejudice*, may be a proportionate way of addressing this concern.

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16 Sentencing Council, *General Guideline: Overarching Principles*, (effective from 1 October 2019), available at https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/.

17 Walters, Wiedlitzka, Owusu-Bempah and Goodall, *Hate Crime and the Legal Process – Options for Law Reform* (University of Sussex, 2017) p 201.

SUMMARY OUTLINE OF OUR PROVISIONAL PROPOSALS

9.51 In this chapter we have sought to outline a proposed policy response to the core concerns we have identified with the current law.

9.52 In summary this response is to:

(1) Set out a principled basis for identifying the characteristics that should be given explicit recognition in hate crime laws.

(2) Extend the protections of aggravated offences, enhanced sentencing and stirring up hatred offences to all the current characteristics, and any other characteristics that fall within the principled basis we have proposed.

(3) Consider whether it may also be appropriate to extend application of enhanced sentencing to a wider range of characteristics beyond this defined group, so that harms to other individuals and communities are also recognised.

(4) Consider revising the test for the application of hate crime laws so that it is better adapted for crimes that are targeted towards disabled people.

(5) Combine the specific hate crime offences into a single "Hate Crime Act" together with other proposed reforms such as the establishment of a Hate Crime Commissioner.

9.53 We expand on these proposals further in subsequent chapters.

Chapter 10: How should characteristics be selected?

INTRODUCTION

10.1 In this chapter we consider one of the core questions that we have been asked to address in this review: which characteristics should be specified for inclusion in hate crime laws? This is an important and difficult task. As Schweppe has argued:

> By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection – legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.[1]

10.2 To undertake this task properly, we must first establish a reasoned, principled basis on which such determinations can be made.[2]

10.3 We begin the chapter by outlining the different theoretical bases that have been used in academic writing to justify inclusion or exclusion of certain characteristics for protection – many of these link back to the broader rationales for hate crime laws we outlined in Chapter 3. We then consider what approaches have been taken in practice in comparable jurisdictions. Finally, we outline the views expressed to us in initial meetings that have been held with stakeholders as part of the pre-consultation phase of the review.

10.4 Based on these various sources, we conclude that while there are several common issues which connect the selected characteristics, there is no single criterion which provides a completely satisfactory basis for identifying appropriate groups for recognition in hate crime laws. Instead, we provisionally propose that three criteria be considered in making this assessment. In subsequent chapters we consider the application of these criteria to potential additional characteristics.

10.5 Our starting point is to acknowledge that the five currently protected characteristics are well embedded in hate crime law and practice in England and Wales, and are the most commonly protected in comparable jurisdictions. In Chapter 11 we consider options for refining the scope and the language used for these characteristics, but we do not consider there is a case to roll back these protections, and in any event our terms of reference do not contemplate such a course.

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1 J Schweppe "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173, 178.

2 This was one of the key concerns we outlined in our 2014 report – see Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, paras 5.60 to 5.72.

10.6 We also wish to highlight that in this Chapter the arguments are primarily concerned with the characteristics that should be specified for the purposes of specified aggravated offences with higher maximum penalties (a model that we propose retaining in Chapter 16). We also draw on these arguments for the purposes of enhanced sentencing (Chapter 17), offences of stirring up hatred (Chapter 18) and football offences (Chapter 19), though we acknowledge that somewhat different considerations may apply for each of these contexts.

POSSIBLE RATIONALES FOR CHARACTERISTIC SELECTION

10.7 A relatively wide variety of different characteristics are protected by hate crime regimes in different jurisdictions. While theoretical justifications play an important part in the choices made, the reality is that historical and political considerations are also highly influential. For example, in England and Wales, provisions increasing sentences on the basis of racial and religious hostility pre-date those relating to LGB, disability and transgender hostility. This roughly reflects the differential timing in political and social consciousness regarding the need to protect and promote the rights of these groups; racism and forms of religious hatred have been recognised as serious social ills for somewhat longer than LGBT hatred and disablism. Yet the reality is that all of these characteristics were the targets of hatred and hostility well before the Crime and Disorder Act 1998 was introduced.

10.8 Academics have attempted to provide overarching rationales for the inclusion of certain characteristics. Below we outline some of the key arguments that have been made.

A group that shares common characteristics

10.9 One of the most basic elements of almost all hate crime schemes is reliance on the categorisation of groups of people who share common characteristics. This is fundamental to one of the core rationales for hate crime laws that we outlined in Chapter 3 – that the harm caused by the crime is not limited to the affected individual, but impacts more broadly on people who share the characteristic to which the offender's hostility was directed, and the wider community to which the victims belong.

10.10 In some jurisdictions, such as Victoria and the Northern Territory in Australia, membership of an identifiable group is the criterion applied. In Victoria the relevant legislation refers to "a group of people with common characteristics",[3] whilst the Northern Territory refers simply to "hate against a group of people".[4] Such a broad definition is attractive on one level. It is flexible enough to adapt to a wide array of prejudice-based hostility and avoids creating "hierarchies of hate" amongst different groups.

10.11 However, there are also concerns about the implications of such a broad approach, and its potential to dilute the symbolic power of hate crime laws. Many would agree that the experience of a victim attacked because of his allegiance to a particular sporting club should not be equated with that of someone who is subjected to hostility on the basis that they are Asian. Both forms of hostility are unacceptable, but many of those we spoke to in our initial meetings argued that the race-based hostility is more harmful, as

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3 Sentencing Act 1991 (Vic), s 5(2).

4 Sentencing Act 1995 (NT), s 6A.

it targets a more fundamental component of the person's identity, and compounds the impact of other manifestations of discrimination and disadvantage that affect racial minorities.

10.12 The issue has been confronted by courts in the Australian state of New South Wales ("NSW"). That state has an open-ended list of characteristics in its relevant sentencing aggravation provision. The provision refers to: "hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)".[5] In two cases,[6] NSW Courts have found that this extends to "paedophiles". Mason argues that this extends the remit of hate crime laws too far:

> Undoubtedly, the community and the state have a responsibility to appropriately address the vulnerability of child sex offenders, or adults who are assumed to have sexually assaulted children, to intimidation and violence. The question we need to ask here, however, is whether hate crime statutes are the appropriate mechanism for doing this.
>
> …
>
> [T]he problem with applying hate crime sentencing laws to child sex offenders as a protected victim group is that it sends a message of acceptance, equality and state affirmation for a form of conduct that is illegal, harmful and unacceptable according to community standards. The claim that hate crime laws should apply to adults who are victimized because they are believed to have sex with children assumes that there is no meaningful distinction between this form of difference and other forms of difference that are commonly recognized as rendering people vulnerable to prejudice-related crime (as if the similarities outweigh the differences).[7]

10.13 We broadly agree with Mason's perspective – while all crime is to be condemned, there is something distinctive about the categories of individuals protected by hate crime laws, which we consider further below.

Determination by a jury

10.14 Schweppe advocates an approach that rejects the selection of specific characteristics, arguing that "[b]y creating hierarchies of victims in hate crimes statutes, the criminal justice system discriminates arbitrarily between social groups."[8]

10.15 She proposes a flexible approach, where the presence or otherwise of a hate element in a criminal offence is determined by a jury. In doing so she draws on the experience of the development of the law of provocation, proposing that the applicable test be:

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5 Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h).

6 *R v Robinson* [2004] NSWSC 465 (Supreme Court of NSW); *Dunn v The Queen* [2007] NSWCCA 312 (Court of Criminal Appeal of NSW).

7 G Mason, "Victim attributes in hate crime law: difference and the politics of justice" (2014) 54 *British Journal of Criminology* 161, 169 to 171.

8 J Schweppe, "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173, 191.

> whether the jury believe that the motivation behind the criminal offence was based on hostility towards the victim, hostility which was directed at the victim because of their personal characteristics (or presumed characteristics), characteristics of which he or she shares with an identifiable social group.[9]

10.16 She argues that this would be a more proportionate, case-specific approach which would

> allow courts broad discretion in determining whether a bias crime occurred in a particular instance, thus allowing crimes against the homeless, Goths, and the elderly to be considered hate crime, while simultaneously avoiding the problem whereby a 'hate crime' is said to occur where prejudicial language is used in the course of an attack, where that attack was not in any way motivated by bias.[10]

10.17 While there is merit in the flexibility of Schweppe's proposal, it raises a number of concerns.

10.18 Firstly, as Schweppe acknowledges, it retains the risk that it would lead to additional protection of "victims who are not morally or socially entitled to such protection."[11] Against this, the direct involvement of the jury may provide a "common sense" guard against the legal recognition of characteristics that are morally repugnant.

10.19 Second, and perhaps more concerningly, by treating all forms of bias in the same way, it does not lend itself easily to the identification of particular strands of concern, such as racism and homophobia, and specific action to counter these.

10.20 Walters raises two further concerns with Schweppe's proposal. He argues that the question of which characteristics are to be included is for Parliament, not individual juries. He emphasises that while juries are appropriately tasked with applying the law to an existing set of facts (such as the defence of provocation cited by Schweppe), "it does not necessarily follow that jurors, as finders of fact, should be left with an open-ended remit to decide when a basic criminal offence should become a 'hate crime'".[12]

10.21 He also notes that individual juries may be susceptible to the same prejudices which can give rise to hate crimes in the first place. This could prove particularly problematic where there are very significant community tensions that exist within a local community – for example, the tensions between Gypsy / Traveller groups and other sections of the community in parts of England and Wales. This could unfairly influence juror decision making in relation to characteristics if these prejudices arose within a jury. While we have suggested that the current distinctions between the protection afforded to characteristics in England and Wales are arbitrary, this is not to say that principled distinctions cannot usefully be drawn. In our view, Schweppe's approach leaves too

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9 J Schweppe, "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173, 187.

10 J Schweppe, "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173, 187.

11 J Schweppe, "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173, 187.

12 MA Walters, *Criminalising Hate: Law as Social Justice Liberalism*, Palgrave (forthcoming), Ch 3, p 18.

much of this difficult task to juror discretion, without sufficient guidance. We consider that such a task is more appropriately a role for Parliament, informed by detailed analysis and community input.

Immutable characteristics

10.22 One possible way to distinguish characteristics is to focus on those that are difficult or impossible to change. The argument is that the fact that the victim has no control over having the characteristic makes the harm they suffer through exposure to the hostility more severe.

10.23 A characteristic is immutable if it is "unchanging over time or unable to be changed."[13] As a criterion for selecting protected characteristics, it is both over- and under-inclusive. While some immutable characteristics – for example, race – are fundamental to group identity, others – for example, eye colour – are not. As the OSCE Office for Democratic Institutions and Human Rights notes:

> … there are a few characteristics which are changeable but are nevertheless fundamental to a person's sense of self. For example, even though it is possible to change one's religion, it is a widely-recognized marker of group identity that a person should not be forced to surrender or conceal.[14]

Characteristics that are core to identity

10.24 A more nuanced approach than "immutability" might be to focus on characteristics that are considered fundamental to personal identity. Protection of religious belief fits much more neatly within this framework, alongside race, gender identity and sexual orientation. This approach also gets to the heart of the harm that hate crimes cause; an attack on the identity of the victim, and on the wider group of people who share these common characteristics.[15]

10.25 However, on its own, this criterion also risks casting the net too broadly. A person may, for example, assert that their wealth and title, or their choice of a particular consumer product, are core to their identity. This risks trivialising the experience of others – such as racial and religious minorities – who experience systemic abuse and discrimination.

10.26 Whether or not a characteristic is core to someone's identity may also be quite context dependent. For example, a disabled person may not identify very strongly with being disabled in their everyday life, but where they face discrimination or abuse on the basis of this disability, they may experience this as an attack on their personhood. Indeed, part of the discrimination faced by disabled people – and other characteristic groups – arises from the very fact that others choose to define them by this characteristic.

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13 See Oxford English Dictionary.

14 OSCE Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (2009) p 38, available at https://www.osce.org/files/f/documents/3/e/36426.pdf.

15 We discuss this further at paragraphs 10.117 to 10.118.

10.27 For these reasons, later in this chapter we consider how the concept of "identity" might be most useful when considered in the context of the harms caused by these crimes, rather than as a standalone concept.

Suppressed minorities

10.28 Hate crime laws might also be understood as a mechanism for protecting minority groups in society from hostility directed at them. This is certainly consistent with the way the laws are used, with racial, religious and sexual minority groups among the most likely to be the subject of hostility based on one of these identity characteristics. However, only two of the current characteristics – disability and transgender status – have been drafted solely with respect to minority characteristics (ie excluding non-disabled people and cisgender people). The categories of race, religion and sexual orientation are broadly cast, and, where relevant can also be used to protect "majority" or relatively more privileged groups in England and Wales such as "white", or "heterosexual" individuals.[16]

10.29 Canadian academic Barbara Perry has conceptualised hate crime as a display of bigotry and power from a majority group towards a minority group – the majority group keeping the minority group in a subordinate position.[17] Her highly influential thesis is that:

> Hate crime … involves acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group. It is a means of marking both the Self and the Other in such a way as to re-establish their 'proper' relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.[18]

10.30 Walters agrees with this approach, arguing that:

> Hate crimes are about subordination and power that relates to group identity, whether the conduct involves intentional violence against black or gay people or opportunistic abuse of disabled people because they are seen as an easy target. Any violence or intimidation where someone is abused *because* of their identity reinforces structural processes that serve to marginalise and disempower people because of who they are.[19]

10.31 As an overarching explanation of the social forces that underpin and reinforce the commission of hate crime, we find Perry's formulation helpful.

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16 We discuss these different forms of drafting further in Chapter 12, where we consider options for a characteristic related to either "women" or "sex or gender".

17 B Perry, *In the Name of Hate: Understanding Hate Crimes* (2001); B Perry, "The sociology of hate: Theoretical approaches" in B Perry (ed.) *Hate Crime Volume One: Understanding and Defining Hate Crime* (2009) pp 55 to 76.

18 B Perry, *In the Name of Hate: Understanding Hate Crimes* (2001) p 10.

19 MA Walters, *Criminalising Hate: Law as Social Justice Liberalism* (forthcoming) Ch 3, p12.

10.32 However, Chakraborti and Garland have suggested that at a more practical level, this conceptualisation is stretched considerably in the context of offenders who have more "banal" drivers for their behaviour – for example, where their behaviour can mostly be explained by the fact that they are annoyed or drunk.[20] Yet Walters suggests this is not necessarily fatal to Perry's framework:

> All of the seemingly extraneous factors that Chakraborti and Garland highlight as frequently being causal to hate incidents do not derogate from what Perry explains hate crime is really about. It is unsurprising that many of these incidents frequently arise during messy complex interpersonal conflicts that involve multiple causal factors (both personal and situational).[21]

10.33 Another criticism that might be made of Perry's framework is that it is less clearly applicable in circumstances where hostility occurs *between* marginalised groups. For example, in recent years significant tension has emerged between some trans activists and some radical feminist groups; both of whom represent groups (transgender people and women) who experience discrimination and hostility more widely in England and Wales. Yet the fact that both these groups may experience wider discrimination and abuse does not negate the possibility that there are dynamics of subordination and power that exist between them.

The role of "vulnerability" and "difference"

10.34 Chakraborti and Garland have argued broadly against an identity-based approach to characteristic selection, emphasising instead the issue of whether a particular group is vulnerable to violence because of their perceived difference. They argue that:

> Such an approach would acknowledge that all vulnerable communities and social groups, irrespective of minority or majority status, can be the subject of hate crime, and that this violence can have a devastating impact.[22]

10.35 They argue further that "this would extend recognition to the more 'hidden' victims of hate crime and would enable them to receive access to a more extensive range of support services".[23]

10.36 In particular they note vulnerable groups such as people with drug dependency issues, homeless people, members of alternative sub cultures and sex workers are:

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20 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'' (2012) 16(4) *Theoretical Criminology* 499, 505.

21 MA Walters, *Criminalising Hate: Law as Social Justice Liberalism* (forthcoming) Ch 3, p 11.

22 J Garland and N Chakraborti, "Divided by a common concept: assessing the implications of different conceptualizations of hate crime in the European Union" (2012) 9 *European Journal of Criminology* 38, p 49.

23 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology* 499, 501.

> Lacking either the support of lobby groups or political representation, and typically seen as 'undesirables', criminogenic or less worthy than other more 'legitimate' or credible victim groups.[24]

10.37 Further they argue that the lens of vulnerability also better accounts for a more nuanced understanding of hate crime, where members of minority groups may in some cases be perpetrators as well as victims of hate crime.[25]

10.38 Chakraborti and Garland acknowledge that there is resistance amongst certain targeted groups – most notably disabled people – to the term vulnerability, and its patronising overtones.[26] Their response is to emphasise that the term "encapsulates the way in which many hate crime perpetrators view their target: as weak, defenceless, powerless or with a limited capacity to resist".[27]

10.39 More widely, the approach proposed by Chakraborti and Garland might be criticised as being overly broad – perhaps confronting some of the same challenges noted at paragraphs 10.10 to 10.12 where we discussed the approach in some Australian jurisdictions that adopt very wide definitions based solely on group membership.

"Disadvantage"

10.40 In rejecting the use of "vulnerability" and "difference", Al Hakim has argued that instead "disadvantage provides the strongest, most consistent, and coherent account for explaining the choice of the groups selected for protection under hate crime laws".[28] He argues that other approaches, such as "hostility" and "vulnerability" prove to be both over and under inclusive, whereas disadvantage "offers a means by which to explain why some groups, and not others, may be adopted under hate crime provisions".[29] However, consistent with a vulnerability approach, "disadvantage" should not be understood as protecting identity groups per se, but rather in terms of the disadvantage such identification highlights.[30] Al Hakim also argues that disadvantage should not be

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24 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology* 499, 503.

25 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology* 499, 504.

26 Al Hakim, for example, has argued that the term "carries a deeply troubling connotation of helplessness or weakness that is often viewed as an undesirable term for describing those who are disabled, belong to ethnic minorities, LGBTQ members, and so on." See M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30(10) *Journal of Interpersonal Violence* 1755, 1770.

27 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology* 499, 514, 507.

28 M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30(10) *Journal of Interpersonal Violence* 1755, 1758.

29 M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30(10) *Journal of Interpersonal Violence* 1755, 1778.

30 M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30(10) *Journal of Interpersonal Violence* 1755, 1776.

understood purely in historical terms, as to do so "fails to take into consideration attacks on newly formed minorities who may not be historically disadvantaged."[31]

10.41 As we outline further later in this chapter, our provisional view is that we prefer the formulation of "disadvantage" to that of "vulnerability", because it locates the source of the concern in the context of wider society, rather than solely in members of the characteristic group. However, as with our consideration of identity above, we believe that disadvantage is a useful indicator for inclusion of a characteristic group only insofar as it is linked to the additional, specific harm that hate crime causes to victims and the wider community. In other words, the compounding effect that pre-existing disadvantage has on the harm experienced by the targeted group, and their ability to participate in society on an equal basis with others. As a standalone criterion, we consider an assessment of "disadvantage" alone to be too imprecise and nebulous, but where it is can be directly linked to the harms of hate crime it can be a powerful indicator for inclusion of a characteristic.

Groups that are "deserving" of protection

10.42 Mason has developed a view of hate crime laws as protecting against unjustified marginalisation and stigmatisation. However, as we noted earlier in this chapter, she argues that difference alone is not enough:

> we need to tether difference, as a criterion for victim protection, to a politics of justice that limits protected attributes to forms of difference that have a justifiable claim to affirmation, equality and respect for the attribute that makes them different.[32]

10.43 Through this filter, hate crime laws might exclude certain groups, which while certainly deserving of the general protection of the criminal law, do not warrant the enhanced status and legitimacy that attaches to hate crime. Otherwise, laws could be seen to legitimise groups who engage in socially damaging behaviour, such as paedophiles or extremist groups.

10.44 We broadly agree with Mason's concern here, and consider how we might incorporate this as part of our criteria at paragraphs 10.149 to 10.152. However, this approach simply provides an outer limit for characteristic recognition under hate crime laws when characteristics such as paedophilia or extremist political views are under consideration. For the most part the groups that are seeking protection under hate crime laws will have little difficulty in arguing they have "a justifiable claim to affirmation, equality and respect for the attribute that makes them different."

Consistency with equality law protection

10.45 Another common suggestion is that the characteristics protected by hate crime laws should be consistent with those protected in anti-discrimination law. Under the Equality Act 2010 there are nine protected characteristics in England and Wales. These include the five hate crime characteristics specified in the Criminal Justice Act 2003. The category of "religion or belief" is significantly broader than its equivalent in hate crime

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31 M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30(10) *Journal of Interpersonal Violence* 1755, 1771.

32 G Mason, "Victim attributes in hate crime law: difference and the politics of justice" (2014) 54 *British Journal of Criminology* 161, 175.

law because it includes non-religious "belief".[33] The term "gender reassignment"[34] is used rather than "transgender identity".[35] The Equality Act also provides protection against discrimination on the basis of sex, age, marriage or civil partnership status, and being pregnant or on maternity leave.

10.46 Bakalis has argued explicitly for a consistent approach between equality law and hate crime, stating:

> the inextricable link between the underlying justification for hate crime and the broader equality agenda means that the parameters of hate crime victims should mirror the characteristics covered by equality legislation, and any extension beyond this will throw into doubt the legitimacy of hate crimes.[36]

10.47 Bakalis argues that traditional doctrinal criminal explanations centred around either the mental element of offending (the added wrongfulness of hate offending) or the physical element (the additional harm suffered by the victim and the community) do not adequately explain the need for the additional criminal offences found in the Crime and Disorder Act 1998. Instead she posits the wider equality movement in society as the source of the justification for hate crime laws:

> as well as being of historical significance, an explanation based on equality has the additional advantage of being able to explain at a doctrinal level how hate crime law can be justified. For scholars who prefer to explain hate crimes on the basis of the more blameworthy mens rea, equality is able to explain why hatred of certain groups is punished more severely than other motives: the hostility demonstrated towards certain groups is more blameworthy because it undermines the equality enterprise. From an actus reus point of view, an explanation based on equality is able to show why hatred of specified groups causes a different type of harm to society than that of the underlying offence: the harm is the damage to equality that results from hateful behaviour. In this way, equality as the underlying rationale for hate crimes can serve as a doctrinal justification for the criminalisation of hatred.[37]

10.48 Adopting this approach, Bakalis argues that if a characteristic is subject to civil law protection under the Equality Act 2010, then it is justifiable in principle to extend this protection through the criminal law, though it may not be appropriate or necessary in practice.[38]

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33 Equality Act 2010, s 10.

34 Equality Act 2010, s 7.

35 Criminal Justice Act 2003, ss 146(2)(b)(ii) and (6).

36 C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) 37(4) *Legal Studies* 718, 722.

37 C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) 37(4) *Legal Studies* 718, 734.

38 C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) 37(4) *Legal Studies* 718, 735.

10.49 While we consider the Equality Act 2010 a useful reference point for hate crime laws, it does not in itself provide a principled rationale for the inclusion or exclusion of certain characteristics. Bakalis acknowledges as much:

> The principle of minimum criminalisation demands that a new criminal offence must only be created if necessary, and where non-legal methods cannot achieve the same purpose. The principle of equality is able to express the additional harm or wrong involved in hate crimes, and can, therefore, provide a reason for criminal sanctions and can account for the extra punishment inflicted on offenders. However, it does not tell us whether criminalisation is necessary. In the civil law, the decision whether or not to include certain characteristics may be based on evidence that there is discrimination in the workplace or in the provision of services on those grounds. In the criminal law, the assessment of the need for extra protection will depend on any evidence that these groups are indeed targeted by criminals on the basis of their particular characteristic, so it is still important to ask this further question in order to safeguard the integrity of the principle of minimum criminalisation.[39]

10.50 While there are clear parallels – notably the protection of disadvantaged groups – equality laws and hate crime laws serve somewhat different purposes. Equality laws are primarily designed to prevent discrimination in civil law contexts such as employment, education, health care and other forms of service provision. Therefore, characteristics such as pregnancy and maternity status are particularly prominent in equality laws, while they are virtually unheard of as hate crime characteristics. Hate crime, by contrast, is designed for the criminal law, where the role of the state is greater, and the implications for offenders are more severe.

10.51 Walters is critical of Bakalis' approach on precisely this basis, arguing that equality law should not be the starting point for inclusion of hate crime characteristics:

> It will likely be that many of the characteristics protected under a jurisdiction's anti-discrimination (i.e. civil) laws will go arm in arm with their criminal law counterparts (e.g. race, religion, sexual orientation amongst others). However, legislatures must resist basing legislation *solely* on whether such crimes appear to be an affront to principles of equality and respect. For the purposes of criminalisation there must also be cogent evidence to show that any civil law protected characteristic, such as marriage status or pregnancy, is subject to the distinct harms as outlined in Chapter Two (i.e. disproportionate levels of violence (individual, community); social marginalisation, individual disempowerment, and cultural harms) – such that it has become a significant social problem that must be countered by the criminal law.
>
> It is for these reasons that the criminal law cannot start from the position of inclusivity and work backwards to justify additional criminalisation and punishment.[40]

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39 C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) 37(4) *Legal Studies* 718, 735.

40 MA Walters, *Criminalising Hate: Law as Social Justice Liberalism* (forthcoming) Ch 3, p 8.

10.52 Ultimately, while we consider many useful comparisons can be drawn between equality law and hate crime law, we are concerned that the differences between the civil and criminal contexts are too great to justify the adoption of this approach.

Minimal criminalisation and evidence of need

10.53 Another way of considering the characteristics that should and should not be included is through the principle of minimal criminalisation;[41] an approach which seeks to avoid criminalising conduct more than is necessary in contemporary society.

10.54 With the exception of hate speech offences, hate crime laws in England and Wales do not criminalise new forms of conduct – rather they increase the severity of the sentencing, and carry the additional stigma of "hate offending". Nonetheless, a need-based approach should also apply to hate aggravations given they function to increase the punishment the state applies.

10.55 In this context, the principle of minimal criminalisation would suggest that we look at the evidence indicating which groups are the victims of hostility in practice, and limit the scope of protected characteristics on this basis. For example, while "marriage or civil partnership status" might be an appropriate category for inclusion under the Equality Act 2010, we are not aware of any concern about criminal hostility being directed on this basis (other than to the extent it relates to sexual orientation, which is separately covered). Under a minimal criminalisation approach then, extension to marriage and civil partnership status – particularly in the context of separate "aggravated offences" and "stirring up offences" – might be seen as an unnecessary addition to the criminal law.

10.56 In the discussion paper "What other characteristics should be included under hate crime laws", the authors proposed that legislators should look for evidence of hate:

(1) that affects an identifiable group of individuals; which

(2) risks enhancing the levels of harm experienced by those individuals and others like them; and

(3) that undermines societal commitments to the principles of equality, dignity and respect of others; and

(4) that requires re-criminalisation as a necessary means of aiding the prevention of conduct.[42]

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41 See D Husak, *Overcriminalization: The Limits of the Criminal Law* (2008). The principle of "minimal criminalisation" is not unanimously accepted by commentators. See J Horder, "Bribery as a form of criminal wrongdoing" (2011) 127 *Law Quarterly Review* 37.

42 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017) p 210, available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

10.57 The authors argued strongly that "any new characteristic that is added to hate crime laws should reflect specific harms and wrongs that have been evidenced as requiring criminalisation" and rejected a "forward-looking" approach:

> The criminal law should not be used to proscribe conduct that we predict will become problematic – thereby preventing it before it becomes harmful.[43]

10.58 However, others have argued that the law should be flexible enough to address emerging trends and dangers as well as existing threats. For example, in our initial meetings, Age UK noted rising concern around ageism and elder abuse in contemporary society. While the evidence of criminal *hostility* towards older people (as opposed to targeting of the elderly due to other factors such as perceived wealth or vulnerability) may not yet be as apparent as other characteristics such as race, religion and LGBT status, Age UK argued that there was a real risk of this worsening in the years ahead.

APPROACHES IN OTHER JURISDICTIONS

10.59 Having considered some of the underlying theoretical arguments for recognising hate crime characteristics, below we outline the approaches taken in various comparable common law jurisdictions – Australia, Canada, New Zealand, United States and other nations of the United Kingdom.[44] This provides some context for how some of the theoretical arguments have manifested in practice – though it must be acknowledged that there is a significant political dimension to characteristic recognition, which has also been influential. It is also important to be aware that although there are similarities between the hate crime laws adopted in these jurisdictions, there are also important differences in approach: the Australian jurisdictions and Canada place the hate crime provisions in sentencing legislation, whilst in England and Wales there are both substantive offences and sentencing provisions. As we explore further in Chapter 15, the legal tests also differ significantly between jurisdictions, which may have had some bearing on the characteristics that have been selected.

Open ended lists

10.60 We noted above that both Victoria and Northern Territory do not provide any clear limits on characteristics that might be protected under the applicable laws.

10.61 Of those jurisdictions that specify characteristics, the broadest approaches are taken by Canada and NSW.

10.62 In Canada, a sentence should be increased to account for

> evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical

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43 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017) p 210.

44 The Republic of Ireland does not have equivalent sentence aggravation provisions, though it does have hate speech laws.

disability, sexual orientation, or gender identity or expression, or on any other similar factor.[45]

10.63 This mirrors the similarly broad approach taken in anti-discrimination legislation in Canada, and also section 15 of the Canadian Charter of Rights and Freedoms, which provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

10.64 NSW requires the sentencing judge to take into account, as an aggravating factor, the fact that:

> the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).[46]

10.65 In New Zealand, the relevant sentencing provision states that an offence may be aggravated on the basis that:

> the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability…[47]

10.66 Each of these jurisdictions adopt an open-ended approach to hate crime characteristics, allowing for additional recognition beyond the specified groups. However, as Schweppe has noted, the evidence in Canada would suggest that in practice this has operated in quite a limited way,[48] while as we noted above, in NSW it has led to Courts recognising the characteristic of "paedophilia", generating significant controversy.

Most commonly protected characteristics

10.67 Looking across comparable common law jurisdictions, the most commonly protected characteristics are race, religion, sexual orientation and disability – all of which are protected in England and Wales. Common, although less widely adopted, are transgender status, age[49] and either gender or sex.[50] Homelessness has been adopted in some US jurisdictions,[51] while other less common but sometimes used categories

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45 Criminal Code (RSC 1985 c-46), s 718.2(a)(i).

46 Crimes (Sentencing, Procedure) Act 1999 (NSW), s 21A(2)(h).

47 Sentencing Act 2002 (NZ), s 9(1)(h) (emphasis added).

48 Schweppe. J. "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studie*s 173, 188 to 191.

49 NSW, Canada, New Zealand, District of Columbia, Florida ("advanced age"), Iowa, Louisiana, Vermont.

50 Sex: Canada, District of Columbia, Iowa, Maine, Vermont, West Virginia. Gender: Louisiana, Maryland. Gender expression: District of Columbia, Hawaii, Nevada.

51 District of Columbia, Florida, Maine, Maryland.

include political affiliation,[52] language,[53] HIV/AIDS status,[54] and personal appearance.[55] As we discuss further in Chapter 11, language and HIV/AIDS status are protected in England and Wales under the very broad categories of "race" and "disability", though not explicitly.

United Kingdom

10.68 As noted above, the five characteristics protected in England and Wales are amongst the most commonly adopted in other jurisdictions.

10.69 Scotland currently incorporates the same five characteristics in its laws, though if passed into law, the recently introduced Hate Crime and Public Order (Scotland) Bill will add the characteristic of "age", and also provides for the government to add "sex" at a later stage should it wish to do so. This follows the Bracadale Independent Review of hate crime laws in Scotland which recommended that "age" and "gender" be added to the existing five characteristics,[56] and subsequent further consultation by the Scottish government.

10.70 Northern Ireland protects four of the five characteristics protected in England and Wales – transgender status is currently not included. A separate review of hate crime laws in Northern Ireland, chaired by Judge Marrinan, is currently under way, and is similarly considering whether there is a need to expand the range of protected groups.[57]

STAKEHOLDER AND EXPERT VIEWS

10.71 Consistent with the differing perspectives in the academic literature, there were diverse perspectives amongst the stakeholders and experts we spoke to in our initial meetings. Many groups had strong views about the inclusion of certain groups – for example we spoke to many advocates for the recognition of "misogyny" in hate crime laws.

10.72 Several groups we spoke to advocated a move away from limiting hate crime laws to specified characteristics altogether, arguing that all forms of hatred were worthy of condemnation and additional punishment. Broad-based anti-hate charities such as Stop Hate UK and Protection Approaches argued that this was necessary to capture adequately the wide range of hatred and prejudice in contemporary society, and address worrying trends towards extremism and polarisation. The current "strand" based approach was in their view limiting, and failed to account adequately for emerging future trends in hatred.

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52 District of Columbia, Iowa, West Virginia.

53 New South Wales, Canada.

54 Australian Capital Territory, New South Wales.

55 District of Columbia.

56 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) Ch 3.

57 Hate Crime Legislation in Northern Ireland Independent Review, *Consultation Paper* (January 2020), available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper.pdf.

10.73 Against this, other groups drew a clear distinction between hatred rooted in deep social prejudice, historical disadvantage, and immutable characteristics (such as racism and homophobia) and hatred that was more superficial and ephemeral.

10.74 For some individuals we spoke to, immutability was key. For example, a black woman at a community roundtable session emphasised that she could not simply "step out of" her visible difference and minority status. She argued that this made the race-based hatred and discrimination she experienced significantly more harmful than that experienced by someone who had chosen, for example, to join a particular subcultural group. She was not arguing that the crimes targeted at subcultural groups are not harmful, but that not all hate crimes are equal. Some are more damaging than others, particularly where connected to wider forms of discrimination and oppression experienced by a community.

10.75 It is important to emphasise that in most cases, those who advocated limiting the law to certain groups were not dismissive of the claims of others, but argued that it was important that the law focus on the most serious form of hatred, rather than trying to capture every possible form.

PROPOSED CRITERIA

10.76 Having considered the various theories, arguments and statutory models available, we have concluded that no singular criterion or approach is likely to provide a wholly satisfactory basis on which to determine which characteristics should be included.

10.77 On a traditional doctrinal interpretation of criminal law, the added criminalisation that attaches to hate crime should reflect the additional harm the offending causes to the victim, and other members of the community to which they belong, together with the additional wrongfulness of the conduct.

10.78 However, hate crime laws also serve an important symbolic function in tackling bigotry, prejudice and inequality, and affirming the identity and personhood of those who are subjected to it. As Bakalis has noted, this links with a broader equality movement in contemporary society, which seeks to redress traditional sources of discrimination.

10.79 Related to this, there is significant practical benefit that recognition of hate crime brings to policing and social policy. As many stakeholders have told us, recognition of the nature of the problem, and the particular harms caused by hate, has led to police taking these incidents more seriously. This in turn often leads to better experiences for victims. The experiences of police recognising hate crime against sex workers in Merseyside, and more recently misogyny in Nottingham, were cited as particularly good examples of this.

10.80 More broadly, as a result of recognition of hate crime, there is now a solid (if imperfect) data source from which trends can be monitored, and appropriate policy action taken.

Should only some characteristics be specified?

10.81 We have considered the option of significantly widening the application of hate crime, to include crimes motivated by or offenders demonstrating hostility towards almost any personal characteristic.

10.82 This approach would be more flexible and would recognise many different manifestations of hatred. As noted at paragraph 10.72, this was supported by some broad anti-hate organisations in pre-consultation meetings. However, we have provisionally formed the view that for the purposes of aggravated offences at least, there are certain characteristics where hate crime is particularly damaging, and it is these characteristics that are in particular need of recognition in law. This is due to a variety of factors, on which we expand further below.

10.83 We consider the continued specification of characteristics in law for the purposes of aggravated offences is a preferable approach for the following reasons:

- It recognises that certain groups in society experience more severe harms as a result of being targeted for criminal behaviour than others;
- It provides a legal basis for responding to these forms of harm;
- It makes the law more certain and comprehensible; and
- It reduces the risk of perverse outcomes, whereby the law provides enhanced legal protection to groups whose actions have been recognised as harmful in other contexts: for example, terrorist organisations and sex offenders.

10.84 This is not dissimilar to the approach taken in equality law, where the law recognises that certain forms of characteristic-based discrimination are particularly prevalent and damaging, and singles these out for special protection.

Consultation Question 2.

10.85 We provisionally propose that the law should continue to specify protected characteristics for the purposes of hate crime laws.

10.86 Do consultees agree?

Provisional views on criteria

10.87 Given the overlapping aims and rationales for hate crime laws, it is not surprising that different explanations for characteristic selection have been posited. We have provisionally concluded that no single approach provides an ideal way of deciding on further extension. However, in combination, several of the principled rationales that have been articulated form a strong set of criteria against which extension should be assessed.

10.88 We have been particularly concerned that our criteria incorporate a minimal criminalisation approach to the development of the law, and also reflect the theoretical bases on which hate crime laws are founded – which we outlined in more detail in Chapter 3.

10.89 Drawing on the various approaches that we have considered above, we provisionally propose that the three key criteria for selecting characteristics for inclusion should be:

(1) **Demonstrable need**: based on evidence of the prevalence of criminal targeting of the characteristic group. This criterion is based primarily on a minimal criminalisation approach – the idea that law should not criminalise conduct and fault beyond that which is necessary to achieve legitimate societal objectives. Essentially this criterion would rule out inclusion of a characteristic if there was insufficient evidence that the protected group was experiencing targeted crime in any significant way.

(2) **Additional Harm:** there is evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely. This criterion links to one of the core rationales for hate crime laws that we discussed in Chapter 3 – the evidence that these crimes can cause specific additional harm to the direct victim, and secondary harm to the wider community.

(3) **Suitability**: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others. This criterion considers whether there are policy considerations – either practical or symbolic, which might weigh against the use of the mechanism of hate crime laws, even where some of the other more theoretical justifications have been satisfied.

10.90 Through these criteria we seek to combine both practical and theoretical considerations in forming a view as to any expansion of the law.

10.91 Below we elaborate on why we have proposed these criteria, and how they might be applied in practice.

Demonstrable need: as evidenced by prevalence

10.92 We consider that evidence of a relatively high prevalence of criminal targeting of a group on the basis of hostility or prejudice should be the first consideration for inclusion of a characteristic within hate crime laws. This assessment is distinct from an assessment of whether the legal test for the application of hate crime laws (discussed further in Chapter 15) is in fact satisfied in every case that arises. Rather it assesses whether there is a strong trend towards violence or abuse of a particular segment of the community.

10.93 Evidence of targeting is relevant to the principle of minimal criminalisation. The criminal law should not criminalise conduct and fault beyond that which is necessary to achieve legitimate societal objectives. Therefore, characteristics should not be included without a solid evidence base for doing so.

10.94 This also accords with the views of the Sussex University report which argued that for the purposes of the creation of, or inclusion of a further characteristic group for the purposes of, aggravated offences:

> there need not be a long or deep history of hate and hostility against a group of individuals, but it will be important that there is evidence to show that certain groups are being subjected to sustained and pervasive forms of targeted victimisation…

We re-emphasise that any new characteristic that is added to hate crime law should reflect specific harms and wrongs that have been *evidenced* as requiring criminalisation.[58]

10.95 As we emphasised in our 2014 Report, evidence of need for criminal intervention is particularly important where otherwise legal conduct is being criminalised, and where fundamental rights are engaged – both of which are highly relevant to the context of the stirring up hatred offences that we discuss in Chapter 18. It also has added importance where additional, more serious versions of existing criminal offences are created – such as the aggravated offences regime in the CDA 1998 (see further Chapter 16), even though the conduct is already potentially criminal under existing "base" offences.

10.96 In the absence of demonstrable need, the reach of the criminal law into recognising new forms of hostility risks becoming oppressive. It also potentially weakens the symbolic value of laws in respect of those characteristics and communities that the evidence suggests are in most need of protection.

10.97 However, as a measure of the need for laws, we are not considering prevalence solely in absolute numerical terms – the intensity and severity of the targeting of a group are also relevant considerations.

10.98 Three components might therefore be considered as part of an assessment of prevalence:

(1) Absolute prevalence: the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.

(2) Relative prevalence: the amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic, as compared with the size of the group who share the characteristic. This would represent a relative estimate of prevalence and would capture the proportionate frequency of criminal targeting.

(3) Severity: the nature of the criminal behaviour that is targeted based on hostility or prejudice towards the characteristic. This would represent a substantive estimate of prevalence and would capture the severity of criminal targeting. For example, offences against the person or sexual offences might be considered more serious than public order offences.

10.99 We propose that an assessment of prevalence should balance all three of these factors.

Additional harm

10.100 Walters notes that "a growing body of victimological research now provides persuasive empirical evidence that hate crimes are more severe both in terms of the physical brutality of violent attacks and the emotional traumas that such incidents cause".[59]

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58 M A Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (2017) p 210.

59 M Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 48.

10.101 The Supreme Court has also acknowledged the additional harm caused by racist hate crime:

> The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as somehow other. This is more deeply hurtful, damaging and disrespectful to the victims than the simple version of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about.[60]

10.102 It has been suggested that two prominent reasons for hate crime's propensity to cause additional harm are the fact that hate crime is an attack upon a core part of the victim's identity,[61] and the compounding effect where the crime targets a characteristic which is already a source of disadvantage[62] for the victim.

10.103 Craig-Henderson and Sloan have invoked identity and disadvantage in this way, to explain the distinct harm that hate crime causes. In relation to identity, they argue that hate crime's distinct harm stems from the victim's perception of their experience as an attack upon the core of their identity.[63] Iganski and Lagou have expanded on this. When explaining his research in this area he noted that "in essence, it is the values of the attacker striking at the core of the victim's identity, which hurt more".[64]

10.104 In relation to disadvantage, Craig-Henderson and Sloan have argued that hate crimes can cause more harm because they invoke past and ongoing discrimination.[65] Iganski discusses this argument, using the example of black victims of racist hate crime, noting that

> black minority victims of racist crime will experience the crime more acutely than white majority group victims because the crime serves as a painful reminder of the cultural heritage of past and ongoing discrimination, stereotyping and stigmatization of their identity group.[66]

10.105 Craig-Henderson and Sloan note that:

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60 *R v Rogers* [2007] UKHL 8, [2007] 2 AC 62, [12] to [13].

61 P Iganski, "Hate hurts more" (2001) 45(4) *American Behavioral Scientist* 626.

62 M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2014) 30 *Journal of Interpersonal Violence* 1755.

63 C K Henderson, R L Sloan, "After the hate: Helping psychologists help victims of racist hate crime" (2003) 10 *Clinical Psychology: Science and Practice* 481, 484.

64 P Iganski, S Lagou, "Hate crimes hurt some more than others: implications for the just sentencing of offenders" (2015) 30 Journal of Interpersonal Violence 1696, 1709.

65 C K Henderson, R L Sloan, "After the hate: Helping psychologists help victims of racist hate crime" (2003) 10 *Clinical Psychology: Science and Practice* 481, 486.

66 P Iganski, S Lagou, "Hate crimes hurt some more than others: implications for the just sentencing of offenders" (2015) 30 Journal of Interpersonal Violence 1696, 1709.

> When an anti-black racist hate crime occurs it brings all of the dormant feelings of anger, fear and pain to the collective psychological forefront of the victim. This is not the case when whites are the target of racist hate crime.[67]

The three forms of harm associated with hate crime

10.106 The additional harm associated with hate crime is often broken down into three categories:

(1) increased harm to the primary victim;[68]

(2) secondary harm to others who share the characteristic;[69] and

(3) wider harm to society.[70]

10.107 The first of these elements – additional harm to the victim – requires direct comparison between the harms caused to victims of hate crime and the harm caused to victims of differently motivated crimes.

10.108 This is also true to some extent for secondary harms, as both hate crimes and differently motivated crimes may have a ripple effect on those who were not primary victims. However, harm to secondary victims is generally considered more pronounced in respect of hate crimes.

10.109 For example, if a person is mugged and the victim's personal characteristics played no role in the offender's motive or conduct, the crime might still make others in the area

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67 C K Henderson, R L Sloan, "After the hate: Helping psychologists help victims of racist hate crime" (2003) 10 *Clinical Psychology: Science and Practice* 481, 485.

68 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (2017) para 3.1.1. p 25, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf; P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014) p 41; F Samanani and S Pope (on behalf of Citizens UK), *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (2020) p 24, available at https://d3n8a8pro7vhmx.cloudfront.net/newcitizens/pages/3760/attachments/original/1599728331/Academic_Report_V.6_-_web_compress_3.pdf?1599728331&fbclid=IwAR1KQPCyfUVA7HSRXC0rxWKyN7fcd8YdAJ5ye6pNLKOPjYBz-m5nff6rhAI; GM Herek, JR Gillis and JC Cogan, EK Glunt, "Hate crime victimization among lesbian, gay, and bisexual adults: prevalence, psychological correlates, and methodological issues" (1997) 12 *Journal of Interpersonal Violence* 195; J McDevitt, J Balboni, L Garcia, J Gu, "Consequences for victims: a comparison of bias- and non-bias-motivated assaults" (2001) 45 *American Behavioral Scientist* 697.

69 A Guasp, A Gammon and G Ellison, *Homophobic Hate Crime: The Gay British Crime Survey 2013* (Stonewall and Yougov 2013) p 25, available at https://www.stonewall.org.uk/system/files/Homophobic_Hate_Crime__2013_.pdf; JG Bell and B Perry, "Outside looking in: the community impacts of anti-lesbian, gay, and bisexual hate crime" (2015) 62 *Journal of Homosexuality* 98; M Noelle, "The ripple effect of the Matthew Shepard murder: impact on the assumptive worlds of members of the targeted group" (2001) 46 *American Behavioral Scientist* 27. For further discussion of these studies, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) pp 31 to 33, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

70 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) p 32 para 3.1.3, citing P Iganski, "Why make hate a crime?" (1999) 19 *Critical Social Policy* 389; MA Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (2014) p 86.

worried about being mugged. However, if a black person is mugged because of the offender's hostility towards the fact the victim is black – which the offender perhaps makes clear via racist language – then the subsequent fear and anxiety this creates will likely be particularly acute for other black people. It may also extend beyond the immediate area, to cause secondary harm to black people living elsewhere, who may hear about it on social media etc.

10.110 Muslim women we spoke to – particularly those who were visibly so due to wearing a headscarf or veil, described the tremendous anxiety and fear they experienced as a result not just of the direct abuse and hostility they experienced in public places, but also an awareness of that experienced by other Muslim women in their local community and across the country.

10.111 We acknowledge that all crimes have a cost. This cost is often expressed in economic terms, for instance the increased financial burden that violent crime places on the NHS.[71] However the social harm that is associated with hate crime is of a different, and more fundamental nature. As Chalmers and Leverick note,[72] social harm in the context of hate crime has often been expressed in terms of undermining social cohesion and exacerbating existing divisions within society.[73] It has also been articulated in terms of the harm that hate crime causes to equality and social harmony.[74] In the US context, Lawrence has suggested that hate crimes

> violate not only society's general concern for the security of its members and their property but also the shared values of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the antidiscrimination principle that have become fundamental not only to the American legal system but to American culture as well.[75]

10.112 We consider that the distinct harm that hate crime causes is most powerfully captured when all three forms of harm are considered together. We provisionally propose that all three forms of harm ought to be evidenced to satisfy the additional harm criterion. This sets a high standard, but we favour a robust approach given the symbolic importance of affording a characteristic or group hate crime protection.

Evidencing these three types of additional harm

10.113 We now turn to address how the three aspects of additional harm might be evidenced.

Evidence that primary victims experience increased harm

10.114 As we have noted above, this understanding of harm invokes direct comparison between the harm that primary victims of crimes experience when they are targeted

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71 The Home Office, *The economic and social costs of crime*, second edition, Research Report 99 (July 2018) p 43.

72 J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (2017) p 32.

73 P Iganski, "Why make hate a crime?" (1999) 19 *Critical Social Policy* 389; MA Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (2014) p 86.

74 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 53.

75 FM Lawrence, *The punishment of hate: toward a normative theory of bias-motivated crimes* (1994) p 347.

based on prejudice or hostility towards a characteristic, and the harm caused to primary victims by differently motivated crimes.

10.115 Comparative research of this nature has been carried out in relation to some existing protected characteristics. Iganski and Lagou's study showed that in general, victims of hate crime are more likely than victims of differently motivated crime to report that they have been affected "very much". Primary victims of hate crime might also be more likely to feel scared or unsafe. They may have a longer period of recovery after the crime. Further, hate crime victims might report higher incidences of symptoms associated with post-traumatic stress disorder or stress symptoms such as anxiety, depression, loss of confidence, sleep difficulties, concentration difficulties, and anger.[76]

10.116 Where research exists in respect of a particular characteristic, it may be possible to use this as a basis for considering its inclusion as a characteristic. However, comparative research of this kind is far less likely to have been conducted in respect of new proposed characteristics/groups, particularly some of the smaller groups that we consider in Chapter 14 such as alternative subcultures, homeless people and sex workers. As a result, groups that are not yet recognised in hate crime laws, or smaller groups, might find it very difficult to evidence objectively a greater level of harm. In the absence of relevant comparative research, it becomes difficult to articulate how victims of crime experience different or greater harm. Without empirical evidence, or an established alternative basis upon which to articulate additional harm, there is a danger that groups may engage in speculative value-judgements about who experiences more harm as a result of being victims of crime.

10.117 In order to mitigate this, we think it is important to consider alternative ways for such groups to evidence additional harm. These might include the subordination of identity characteristics[77] and compounding the effects of pre-existing disadvantage.[78] Both of these factors are causally linked to additional harm and might be used by victims to articulate the significant level of harm that they experience as a result of crime that is linked to prejudice or hostility towards their characteristic.

10.118 This accords with some of the testimony that we heard from victims as part of our pre-consultation meetings. We heard victims discuss the significant impact that hate crime had upon their lives because it was an attack upon who they were, and it compounded existing disadvantage that they had experienced based on the targeted characteristic. At a Citizens UK meeting in Birmingham, one participant, a black Muslim woman, recalled how her own experiences of hate crime have made her even more acutely aware of "the way the world views people like her". She linked this to conversations she has had to have with her son, aged 11, about how he must work twice as hard as his white classmates to achieve the same things in life.

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76 P Iganski, S Lagou, "The personal injuries of 'hate crime'" in *The Routledge International Handbook on Hate crime* (2014).

77 See Walters, M, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 69.

78 See M Al-Hakim 'Making a home for the homeless in hate crime legislation' (2014) 30(10) *Journal of Interpersonal Violence* 1755.

10.119 In the absence of empirical research, identity and disadvantage are an important means by which victims of hate crime articulate the distinct harm caused by what has happened to them.

10.120 As a result, we propose that where consultees cannot use empirical research to demonstrate increased harm to primary victims, they might argue that they experience greater harm as a result of the criminal behaviour because it targets;

(1) A characteristic that was an important aspect of their identity or,

(2) A characteristic on the basis of which they experience disadvantage.

10.121 A person might show that the characteristic was central to their identity in various non-exhaustive ways. For example, they might point to the fact that:

- The characteristic is immutable, or they have little or no control over the fact they have the characteristic.
- The characteristic significantly influences their lived experience of the world.
- Society places significant emphasis on the characteristic. (This might include socially constituted identities based on the characteristic, or the fact that certain groups can have their overall identity reduced to the characteristic).
- Sharing this characteristic gives rise to a strong sense of collective identity.[79]

10.122 Disadvantage could be defined with reference to systemic conditions that negatively impact, or have historically negatively impacted, certain groups because of a characteristic they share. The reference to "systemic" disadvantage is important here – it is the fact that hate crime can replicate or invoke aspects of wider, systemic disadvantage on a micro level that arguably contributes to the additional harm caused to victims in individual cases. Some examples of relevant systemic conditions might be:

- violence or abuse towards the characteristic group which is commonplace or normalised;
- discrimination that is ingrained in prominent institutions, or in widespread social norms;
- social exclusion or marginalisation of members of the characteristic group;
- widely held stigma related to the characteristic.

10.123 We consider that an analysis of the impact of "group identity" and "disadvantage" is particularly important where there is otherwise a lack of available comparative studies contrasting respective harm. These considerations also provide an alternative way for

[79] Professor Mark Walters proposes collective identity as an independent criterion for determining hate crime characteristics in his forthcoming book, see M A Walters, "Redrawing the boundaries of hate crime: What characteristics should be protected in the criminal law?" in *Criminalising Hate: Law as Social Justice Liberalism* (forthcoming).

victims and community groups to explain their experiences of additional harm by way of testimony.

Evidence that other people, who share the targeted characteristic, also experience harm:

10.124 In the context of hate crime, secondary victims are those who are indirectly affected by the crime because they share the targeted characteristic. This secondary harm might occur as a result of knowing the primary victim, or hearing about the crime indirectly, perhaps in the community or from the news or social media.

10.125 In order to evidence secondary harm, groups might point to higher levels of fear, anger, anxiety in the community, or feelings of individual and group vulnerability.[80] More practically, they might point to changes in their behaviour,[81] usually to minimise the risk of being targeted, such as forgoing religious clothing to minimise visibility or refraining from visiting places of worship.

Evidence of wider harm to society

10.126 Harm of this nature might be evidenced practically, for example via evidence of increased social division as a result of the crime. Perry argues that hate crime has the effect of dividing communities and reinforcing barriers between groups because it might lead to the isolation or withdrawal of vulnerable communities and can reinforce outsider status for certain groups. Perry cites a Muslim man, who thinks that hate crime creates "more tension and a reason to more clearly distinguish between dangerous thoughts such as 'us' vs. 'them'."[82]

10.127 It might also be shown that the ability of a group to participate in society on an equal basis with others[83] is undermined because of criminal targeting that is linked to prejudice or hostility towards a person's characteristic. More specifically, the criminal behaviour hinders the full participation of the group in economic, social, political and cultural life.

10.128 There are perhaps two ways that we might interpret this:

(1) A consequential interpretation: equality might be undermined *as a consequence of* the criminal targeting. For example, in the UK context, it has been argued that violence against women and girls can force women to drop out of workplaces or

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80 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 41; B Perry and S Alvi, "We are all vulnerable: The in terrorem effects of hate crime (2011) 18(1) *International Review of Victimology* 57. See also J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018), available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

81 Described as "avoidance". J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 28 to 31.

82 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 53.

83 B Perry, "Exploring the community impacts of hate crime" in *The Routledge International Handbook on Hate Crime* (2014) p 53; FM Lawrence, *The punishment of hate: toward a normative theory of bias-motivated crimes* (1994) p 347.

educational settings.[84] In this example, criminal targeting can prevent the relevant group (women and girls) from participating on an equal basis with others in areas of economic, social, political, cultural or civil life. Rights of equal participation are an important part of principles such as "equality".[85]

(2) An inherent interpretation: equality might be undermined *because of the decision* to target a person based on prejudice or hostility towards a specific characteristic. This is a simpler explanation – direct discrimination is inherent in the mere fact that the characteristic has been singled out for criminal behaviour in this way. Non-discrimination is also an important part of principles such as "equality". [86]

10.129 However, the "inherent interpretation" of harm to social values is arguably circular – if there is evidence that a person has been criminally targeted because of prejudice or hostility towards a relevant characteristic then discrimination is inherent. In this way, a harms-based analysis would be difficult to distinguish from a question about the existence of criminal targeting. For that reason, we prefer the "consequential interpretation".

10.130 Applying this approach, there are two key ways that social harm might be evidenced. Firstly, the criminal targeting might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Secondly, the criminal targeting might undermine a group's equal participation in society in the ways we have set out above.

Suitability

10.131 The third criterion we propose considers whether the addition of the characteristic to hate crime laws is the right policy response to the harm that is caused through criminal targeting of the characteristic groups. This acknowledges that while there may be principled reasons to recognise a characteristic or context as a hate crime, hate crime laws are a particular kind of legal mechanism, and they may not be suited to every such circumstance.

10.132 As we note in Chapter 2, the hate crime laws that have developed in England and Wales were originally designed for racist hate crime, and in particular the contexts of racist abuse and assault. This approach has been adapted over time to deal with other contexts such as religious, homophobic, disablist and transphobic hostility (with varying degrees of success – as we have noted in Chapters 8 and 9, disability hate crime is considered a weak spot). However, there is no guarantee that these laws will prove an effective response in all cases.

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84 Revolt Sexual Assault and The Student Room, *Sexual violence at universities statistical report* (2018), available at https://revoltsexualassault.com/wp-content/uploads/2018/03/Report-Sexual-Violence-at-University-Revolt-Sexual-Assault-The-Student-Room-March-2018.pdf. Using a sample of 4491 students and recent graduates, research by Revolt Sexual Assault and the Student Room found that 25% of students had skipped lectures, classes or changed modules to avoid perpetrators of sexual assault, 16% had suspended their studies or dropped out completely.

85 Equal Rights Trust, *Declaration of Principles on Equality* (2008).

86 Equal Rights Trust, *Declaration of Principles on Equality* (2008).

10.133 Below we enumerate the types of issues that we might usefully consider as part of an assessment of whether a characteristic is suitable for inclusion. Not all of these will arise in respect of a proposed characteristic, but in later chapters we draw on those that do where relevant.

Whether hate crime is the most appropriate way of characterising the harm in the offending against the targeted group

10.134 A particular issue that arises with hate crime laws is its use in circumstances where there are multiple, complex motives for the offending. Characteristic-based hostility may be one aspect of the offending, but the concern may be that to label the offending as a "hate crime" potentially oversimplifies and obscures a much more complex picture. In Chapter 12 we consider how this issue arises in the context of domestic abuse and sex/gender based aggravation, and in Chapter 13 we consider similar issues in the context of the characteristic of age and phenomenon of elder abuse.

The potential for double counting in light of other aggravating factors

10.135 A separate but related consideration is the risk of double counting between different sentencing considerations that arises in respect of some characteristics.

10.136 For example, elder abuse sometimes involves the exploitation of a particular circumstance of the older person that is connected to their age, such as isolation, or an age-related disability. Exploitation of a vulnerable victim is itself an aggravating feature for the purposes of sentencing, so if some crimes of this nature were also aggravated on the basis of hostility towards the victim's age (see further Chapter 13), a sentencing judge would need to weigh both factors carefully, and ensure that any overlap between these considerations is not "double counted" in reaching a final sentence. Similar considerations may bear on the characteristic of homelessness that we consider in Chapter 14 – targeting of a homeless person is likely to involve exploitation of the vulnerable circumstances of the victim in a high proportion of cases.

10.137 This is not necessarily an insurmountable hurdle, and indeed such considerations may already arise for sentencing judges in the context of other characteristics – notably some forms of disability hate crime.

The relative difficulty of proving the aggravation.

10.138 The particular challenges of proving disability hate crime are well documented,[87] and it is an issue that we revisit in further detail in Chapter 15. This has led to very considerable disappointment and anger amongst some disability stakeholders.

10.139 In his independent review of hate crime laws in Scotland, Lord Bracadale suggested that it was unlikely that many instances of elder abuse would meet the legal test there of being motived by or demonstrating "malice or ill-will" towards the victim's age – which could also lead to similarly disappointed expectations if the current Bill before the Scottish Parliament is enacted with respect to age-based hate crime.

10.140 This potentially exposes a wider concern – if the nature of the hate crime offending experienced by a particular group is such that it consistently fails to be proven in court,

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87 See Chapter 15 for a more detailed discussion.

it could prove more harmful than helpful in symbolic terms for the characteristic to be added.

Whether the application of a hate crime aggravation could prove harmful

10.141 Although victims of hate crime generally view the labelling of the offence as such to be an important component of recognising the harm caused to them and their community, there may be some circumstances where these labels may be unhelpful.

10.142 In Chapter 12 we consider this specifically in the context of Violence Against Women and Girls ("VAWG") offences. We ask whether hate crime laws, by requiring specific proof of the hostility present, could distinguish between different victims of VAWG offences (those who were able to prove the additional hostility and those who were not) in a way that could ultimately prove unhelpful.

The proportion of offending that is likely to meet the test

10.143 Where the proportion of relevant offending is very low,[88] such that the hate crime option would scarcely be used, we might question whether it is meaningful to add the characteristic.

10.144 This issue potentially arises in relation to the characteristic of age, as there is some evidence to suggest the volume of offending that is likely to meet the legal test may be low (based on comparative research from jurisdictions such as Florida and Canada).[89]

Resourcing implications

10.145 It is also relevant to consider resourcing considerations, and specifically the additional cost associated with recording and prosecuting crimes related to a new hate crime characteristic, and any associated increase in costs relating to sentence uplifts.

10.146 In particular, we might ask whether in some circumstances – for example VAWG and elder abuse – whether the additional cost that might be associated with prosecution of these offences as "hate crimes" is the most effective use of the limited resources that are available to recognise the harm of these crimes and support victims.

10.147 Finally, there are concerns relating to the already stretched resources for hate crime support services and preventative/educational programmes for hate crime offenders. There is some anxiety among existing protected groups that without a significant additional allocation of funds, these funding issues may be compounded by the increased strain that new protected characteristics could place on the hate crime framework.

The coherence, intelligibility and symbolic value of the law

10.148 This issue again arises in Chapter 12, where we consider proposals that have been made to limit the application of sex or gender based aggravation to certain contexts

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88 "Low" would be measured on the basis of reported offending, so that low numbers are not conflated with difficulties satisfying the legal test (which would arise at prosecution).

89 We consider this further in Chapter 13, which looks at the characteristic of age specifically.

such as sexual offences and domestic abuse. If this option were to be pursued, it might create further complexity, and send confusing messages to victims.

Whether protection is consistent with the rights of others

10.149 We also consider that, drawing on Mason's concerns about the use of hate crime laws to affirm potentially harmful characteristics such as paedophilia (see paragraphs 10.42 to 10.44), an important consideration for the inclusion of a characteristics is to ask whether a characteristic causes harm to others. This is unlikely to arise in most cases, but we consider that our criteria need to allow for the exclusion of socially damaging characteristics – such as paedophilia – which might otherwise satisfy the harm and prevalence criteria discussed above.

10.150 Where the concern arises, a useful test can that can be adapted for these purposes is one which is currently applied to the assessment of whether a non-religious philosophical belief should be protected for the purposes of equality law. This test asks whether the belief is:

> worthy of respect in a democratic society, and compatible with human dignity and the fundamental rights of others[90]

10.151 For the purposes of hate crime laws we may ask whether *protection of the characteristic is consistent with the rights of others*, in that it does not provide additional legal recognition and protection (over and above that which is provided to all citizens) to a characteristic or group that is harmful to other members of society.

10.152 As we have noted, it is only likely to be in a few rare cases where such considerations arise, and we therefore do not utilise this test extensively in the Chapters that follow.

CONCLUSION

10.153 Based on the above analysis, we invite views from consultees on whether the three criteria we have identified for deciding on the inclusion of hate crime characteristics in law are appropriate.

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90 *Grainger Plc & Ors v Nicholson* [2009] UKEAT 0219/09/0311 (3 November 2009), at [24].

Consultation Question 3.

10.154 We provisionally propose that the criteria to determine whether a characteristic is included in hate crime laws should be:

(1) **Demonstrable need**: evidence that crime based on hostility or prejudice towards the group is prevalent.

(2) **Additional Harm:** there is evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

(3) **Suitability**: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others.

10.155 Do consultees agree?

Chapter 11: The existing protected characteristics

INTRODUCTION

11.1 In the previous chapter we considered the criteria by which any possible additional hate crime characteristics should be assessed. We also noted that the existing five characteristics had been firmly established within the hate crime framework, and it is not in any event contemplated within our terms of reference that we would consider the removal of any current characteristic from the scope of protection.

11.2 In this chapter we proceed on the basis that the existing five characteristics will remain protected by hate crime laws, though we do briefly note how the selection criteria we proposed in the previous chapter would apply to each. We then consider the definition and scope of each characteristic in more detail, and ask whether there is a need for reform.

THE EXISTING FIVE CHARACTERISTICS

11.3 The five characteristics currently recognised in England and Wales developed in phases, beginning with the enactment of racially aggravated offences and enhanced sentencing in the Crime and Disorder Act 1998 ("CDA 1998").[1] The term "or religious group" was added to the CDA 1998 in 2001.[2] The Parliamentary debate focussed on the disparity of treatment between certain ethno-religious groups which were already protected under race, and multi-ethnic religions such as Islam which were not.[3] Disability and sexual orientation were added to the enhanced sentencing regime in 2003.[4] Transgender identity was added to the enhanced sentencing regime in 2012,[5] following an amendment moved by Lord McNally in the House of Lords in committee.[6]

11.4 The same five characteristics are recognised in Scotland, though transgender is differently defined.[7] A Bill currently before the Scottish Parliament[8] makes changes to the definition of several of the characteristics, and adds the characteristics of "variations in sex characteristics" (which relates to people who are intersex) and the characteristic

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1 The offences of stirring up hatred had a somewhat different timeline, with racial hatred first adopted earlier in 1965, and religion and sexual orientation added later in 2006 and 2008 respectively. We discuss this in greater detail in Chapter 18.

2 Anti-terrorism, Crime and Security Act 2001, Pt 5.

3 *Hansard* (HL), 27 Nov 2001, vol 629, col 150.

4 The Bill did not originally contain this provision, which was added by way of amendment at report stage in the House of Lords: *Hansard* (HL), 5 Nov 2003, vol 654, cols 800 to 864.

5 Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 21, pt 1.

6 *Hansard* (HL), 7 Feb 2012, vol 735, col 152.

7 Section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 defines transgender identity as (a) "transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity."

8 Hate Crime and Public Order (Scotland) Bill.

of "age".[9] It all also makes provision for the characteristic of "sex" to be added at a later stage.[10]

11.5 In Northern Ireland, only four characteristics are recognised; transgender identity is not protected. At the time of the preparation of this Consultation Paper a separate review in Northern Ireland is considering the addition of this characteristic, amongst others.[11]

Justifications for protection of the existing five characteristics

11.6 Though our terms of reference do not contemplate rolling back hate crime laws in respect of any of the existing five protected characteristics, it is worth briefly considering how the inclusion of these characteristic groups accord within the selection criteria we provisionally proposed in Chapter 10.

11.7 Race is the clearest case for inclusion given the overwhelming evidence of the ongoing prevalence of race-based hate crime, and the harm that it causes to black and minority ethnic communities. Indeed, as we noted in Chapter 5, approximately three quarters of all police recorded hate crime, and hate crime prosecutions, are race-based. It is therefore not surprising that race was the first characteristic recognised under both hate speech and hate crime laws in England and Wales, and is almost universally recognised in countries where hate crime laws exist.

11.8 The recording and prosecution numbers for religious hate crime are comparatively lower, but there is also little doubt as to the prevalence of and harm caused by religious hatred. This is particularly so for the Muslim and Jewish communities. In our pre-consultation meetings we heard numerous testimonies of the abuse and violence experienced by the Muslim and Jewish people in England and Wales, a point reinforced by both Community Security Trust and Tell MAMA in our meetings with them. Statistics produced by the Home Office reinforce the view that the most targeted religious groups are Muslims (47% of police recorded religious hate crime) and Jews (17% of recorded religious hate crime), followed by Christians (7%), Sikhs (3%) and Hindus (2%).[12] The targeting of Muslims and Jews is highly disproportionate to their proportion of the population of England and Wales (which is just 4.8% and 0.5% respectively). This is also true for Sikhs and Hindus (who comprise 0.8% and 1.5% of the population respectively), though less dramatically so. By contrast those identifying as Christian comprise 59.3% of the population, so the prevalence of targeting of this group on a per capita basis is significantly lower.[13] In pre-consultation meetings Humanists UK also

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9 Discussed further at paras 11.77 to 11.80.

10 We discuss the possible addition of "sex" or "gender" to hate crime laws in England and Wales in further detail in Chapter 12.

11 Hate Crime Legislation in Northern Ireland Independent Review, Consultation Paper (January 2020) pp 100 to 102, available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020.pdf.

12 Home Office, *Hate Crime, England and Wales, 2018 to 2019* (15 October 2019) p 16, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

13 Office of National Statistics, *Key Statistics for England and Wales, March 2011* (December 2012) p 8, available at https://webarchive.nationalarchives.gov.uk/20160108131206/http://www.ons.gov.uk/ons/dcp171778_290685.pdf.

emphasised the victimisation experienced by apostates – people who choose to leave a faith – which is also protected as the characteristic includes "lack of religious belief".[14] "No religion" was recorded in respect of 3% of religious hate crime (25.1% of the population recorded no religion in the 2011 census).

11.9 Hostility based on sexual orientation is the second most prevalent form of hate crime in England and Wales, based on police recording figures.[15] This is particularly significant given that sexual orientation hate crime is almost exclusively experienced by LGB individuals (heterosexuals are also protected in law, but we are not aware of any prosecutions on this basis), and most estimates suggest that the LGB community forms 5% or less of the general population.[16] This compares with approximately 14% of the population who identify as non-white in England and Wales[17] (and thereby are more likely to be the victim of racial hate crime), and 8% who identify as one of the main minority religious groups of Muslim (4.8%), Hindu (1.5%), Sikh (0.8%) Jewish (0.5%) and Buddhist (0.4%),[18] who as noted at paragraph 11.8 are disproportionately the victims of religious hate crime.

11.10 By contrast, police reports and prosecutions of disability hate crime are relatively lower as a proportion of the number of people with a disability in the community (estimated to be 20% of the population).[19] However, though more sexual orientation-based hate crime (14,491) than disability-based hate crime (8,256) was reported to police in 2018-19, Crime Survey for England and Wales ("CSEW)[20] data shows a different picture, with the estimated (perception based) incidence of disability hate crime second only to race based hate crime over the 2015-2018 period.

11.11 The overall numbers for reported transgender hate crime are the lowest amongst the protected characteristics, which is unsurprising given that trans people make up quite a small proportion of the population. There are no completely reliable estimates of the number of trans people in the UK, but the Government Equalities Office estimates the number at between 200,000-500,000 people,[21] while Stonewall estimates that there are

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14 Crime and Disorder Act 1998, s 28(5). We note, however, that Humanists UK argued that the current protection was insufficient.

15 See Chapter 5 at para 5.26.

16 Figures from the Office of National Statistics indicate that 1.2 million people, or 2.2% of the population in the UK, or identify as lesbian, gay or bisexual. See https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2018.

17 Office of National Statistics, *Key Statistics for England and Wales, March 2011* (December 2012) p 10, available at https://webarchive.nationalarchives.gov.uk/20160108131206/http://www.ons.gov.uk/ons/dcp171778_290685.pdf.

18 Office of National Statistics, *Key Statistics for England and Wales, March 2011* (December 2012) p 8.

19 Leonard Cheshire, *Facts and Figures*, available at https://www.leonardcheshire.org/about-us/facts-and-figures?gclid=EAIaIQobChMItoHzsYqq6gIVrIBQBh2A5wANEAAYASAAEgImo_D_BwE.

20 The CSEW is a sample-based survey which estimates the incidence of crime in the community based on victim perception, regardless of whether it has been reported to the police.

21 Government Equalities Office, *Trans People in the UK* (2018) p 1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf.

approximately 600,000 trans and non-binary people in the UK.[22] Both these estimates place the proportion of trans people at less than 1% of the UK population. Viewed in this context, the 2,333 trans hate crime reports in 2018-19 indicates quite a high prevalence on a per-capita basis – broadly comparable to the per-capita recording of hate crime by LGB identifying people.[23] Reports of trans hate crime have also increased very substantially in the past five years – more than quadrupling over that period. This is consistent with other data sources that show a very high incidence of hate crime victimisation in the trans community. For example, research recently conducted by Stonewall found that 41 per cent of trans people and 31 per cent of non-binary people have experienced a hate crime or incident because of their gender identity in the last 12 months.[24] It is also consistent with the testimony we heard from trans individuals, several of whom stated that they report only a fraction of the abuse they receive to the police. In pre-consultations a trans woman told us that if she reported abuse to the police each time she experienced it, she would be at the station almost constantly.

11.12 The figures above relate primarily to the first of the three criteria we identified in Chapter 10 – namely, prevalence, but there have also been a number of significant studies into the effects of hate crime on these groups which detail the additional harm it causes to individuals from these groups and to other members of the same community. We describe these studies in more detail in Chapter 7, but it is clear on the available evidence that all five of the currently protected groups experience additional harm – both individually and collectively, as a result of being targeted for hate crimes. This was further reinforced in our pre-consultation meetings, where we heard powerful testimonies from victims from all the protected characteristic groups.

Different models of protection – broad and specific characteristics

11.13 Before considering the currently protected characteristics in detail, it is worth briefly considering the two models of characteristic protection in hate crime laws (and equality laws). These are:

- Broad characteristics such as race, religion and sexual orientation, where the protection is afforded to all, regardless of whether the characteristic holder is a member of a minority or targeted subset of the characteristic; and

- Specific characteristics such as disability and transgender identity, where protection is afforded to only a subset of a wider category (in these cases the wider groups might be framed as “ability” and “gender identity”) and there is a clear distinction with those who are not protected: ie non-disabled and cisgender people.

11.14 There is a logic behind these two different approaches. In the case of race and religion, the diversity within these groups would make any attempt to single out sub-groups for added protection impractical and almost impossible. For example, while we are not

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22 Stonewall, *LGBT in Britain: Trans Report* (2019) p 8, available at https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf.

23 This is a rough estimate based on the suggestion that the LGB identifying community is between 5 and 10 times the size of the trans community, and the fact there were 6.2 times as many LGB hate crime reports as transphobic hate crime reports in the most recent Home Office data (14,491 compared with 2,333).

24 Stonewall, *LGBT in Britain: Trans Report* (2019) p 8, available at https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf.

aware of evidence that white British people experience hate crime to any significant degree, there are other white ethnic groups such as Gypsy Travellers, Jewish people and Eastern European migrants who sadly do experience significant levels of hostility and criminal targeting. Similarly, while antisemitism and Islamophobia appear to be the most significant manifestations of religious hostility, other minority religions, including Sikhs and Hindus, and even larger groups such as Christians and the non-religious, are also impacted by religious hate crime.

11.15 The need for a broad approach is somewhat less apparent in respect of sexual orientation, where it might be possible to exclude "heterosexual" people from protection on the basis that there is little evidence that this group is targeted for hate crime. However, the increasing recognition of the complexity of human sexuality, and the emergence of new identities such as pansexuality would likely render a stark binary distinction somewhat difficult in practice.

11.16 For disability and transgender identity, it is easier for the law to specify the targeted group for the purposes of hate crime laws. The same approach is also taken in civil equality laws.

11.17 While these two models of protection are fairly well established in respect of the current characteristics, it is less clear which model might be adopted in respect of some of the characteristics we consider for inclusion in later chapters. For example, should a broad characteristic such as "sex" or "gender" be used, or should protection be limited to "misogyny" or "women"? Similarly, if "age" is included in hate crime laws should this be limited to "older age", or cast more widely?

The definition of "race"

11.18 For the purposes of current hate crime laws, the term "racial group" means "a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins."[25]

11.19 It is a broad definition. In the case of *Rogers*,[26] the House of Lords considered whether an expression of xenophobia – the use of the words "bloody foreigners" and "go back to your own country" – could amount to racial hostility for the purposes of section 28(4) of the CDA 1998. In finding that it could, the House of Lords found that a broad, flexible, non-technical approach should be adopted, and this

> makes sense, not only as a matter of language, but also in policy terms. The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as "other". This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake

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25 Crime and Disorder Act 1998, s 28(4); Criminal Justice Act 2003, s 145(3). See also the definition of "racial hatred" in section 17 of the Public Order Act 1986, which applies for the purposes of the offences of stirring up racial hatred under Part 3 of this Act. We discuss these in greater detail in Chapter 18.

26 *R v Rogers* [2007] UKHL 8, [2007] 2 AC 62.

but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.[27]

Ethno-religious groups

11.20 Certain ethno-religious groups such as Jews and Sikhs,[28] have been recognised as racial groups in law in addition to being religious groups. Other multi-ethnic religious groups such as Muslims and Christians are recognised as religions only.

11.21 Though race and religion enjoy equivalent legal protection under the CDA 1998 and the CJA 2003, they are treated differently in the context of the offences of stirring up hatred in the Public Order Act 1986 (which we consider in detail in Chapter 18); the stirring up religious hatred offences are more limited in scope. This has been the cause of concern amongst many Muslim individuals and organisations to whom we have spoken. They are unhappy that the legal response to stirring up hatred against Muslims is not as robust as the response to stirring up hatred against Jews or Sikhs. There is also no religious equivalent of the offence of "racialist chanting" at a football match.[29]

11.22 For the purposes of hate crime laws, we do not consider it to be helpful for the Law Commission to seek to resolve questions about whether a particular ethno-religious group is better understood as a race or a religion. These are complex philosophical and historical questions, and have implications well beyond this project. Rather, the approach we propose in this Paper (and in particular, in Chapter 18) is to remove the disparity between each of the protected characteristics, so that Muslims, Jews, Sikhs, Christians and other religious groups enjoy equivalent protection, regardless of whether they are classified as a racial group, religious group, or both.

Roma, Romani Gypsies, and Irish Travellers

11.23 Roma, Romani Gypsies,[30] and Irish Travellers[31] ("GRT") are also recognised racial groups based on their ethnic origins. However, there is evidence that these communities are particularly poorly understood, and may in practice face even greater barriers to seeking justice than other ethnic minorities.[32] This is acknowledged by College of Policing Operational Guidance:

> Gypsies and Travellers can experience difficulties in reporting hate crime, contributing to significant levels of under-reporting. This can be attributed, in part, to a historically

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27 *Rogers* [2007] UKHL 8, [2007] 2 AC 62, [12] by Baroness Hale.

28 *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 2 WLR 620.

29 Football (Offences) Act 1991, s 3. We discuss this further in Chapter 19.

30 *Commission for Racial Equality v Dutton* [1989] QB 783, [1989] 2 WLR 17.

31 *O'Leary v Punch Retail* (29 Aug 2000) (unreported) as cited in Blackstone's para B11.150.

32 See House of Commons Women and Equalities Committee, Tackling inequalities faced by Gypsy, Roma and Traveller communities; Seventh Report of Session 2017–19 (HC 360, 5 April 2019); The Traveller Movement, *Policing by consent: Understanding and improving relations between Gypsies, Roma, Irish Travellers and the police* (June 2018).

poor level of positive, cooperative engagement with the police. Inadequate or insensitive police responses when such a crime is reported may also be a factor.[33]

11.24 The Equality and Human Rights Commission's 2018 report "Developing a national barometer of prejudice and discrimination in Britain" found that the proportion of those surveyed holding negative attitudes towards GRT people in 2018 was the highest of all the characteristics surveyed (at 44% in England and 42% in Wales), and significantly higher than other groups such as "immigrants" (27% in England, 31% in Wales) and Muslims (22% in England and 29% in Wales).[34]

11.25 "New Travellers" – broadly defined as non-permanently based communities who have been active since the 1970s – are not a legally recognised ethnic group, and mostly derive from the White British population. Travelling show people similarly do not fall within this definition, though some may have GRT heritage.

11.26 In consultation meetings, GRT support charities – Friends, Family and Travellers and Gate Herts – expressed concern about a lack of understanding of the distinct ethnicity of GRT communities and their experiences, including amongst police. One option to address this would be to specify these groups in hate crime laws – as is currently the case for the Traveller community in Ireland with respect to anti-discrimination and incitement to hatred laws.[35] However, it is not clear that a mere change in the wording of the legislation would do much to shift attitudes. Our provisional view is that community education and outreach are likely to be far more effective.

Migration status

11.27 Unlike "nationality (including citizenship)" and "national origins", migration or refugee/asylum status is not specifically listed in the statutory definition. However, in *Attorney General's Reference No 4 of 2004*,[36] the Court of Appeal held that the phrase "an immigrant doctor" was capable of amounting to racial hostility.

11.28 In Scotland, the Bracadale Independent Review of hate crime laws found that "immigration status" should be protected by hate crime laws, but that following the reasoning of the English decision in *Rogers*, the equivalent Scottish provision already did so:

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33 College of Policing, *Hate crime operational guidance* (2014) p 31, available at http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf.

34 Abrams, D, Swift, H, and Houston D, *Developing a National Barometer of Prejudice and Discrimination in Britain: Equality and Human Rights Commission Research Report 119* (2018) p 30, available at https://www.equalityhumanrights.com/sites/default/files/national-barometer-of-prejudice-and-discrimination-in-britain.pdf

35 See Equal Status Act 2000 (Ireland), s 3(2)(i) and Prohibition of Incitement to Hatred Act 1989 (Ireland), s 1(1).

36 [2005] EWCA Crim 889.

> A person's immigration status is inevitably related to their nationality or national origins, and so hostility based on immigration status amounts to hostility towards a racial group.[37]

11.29 While this interpretation is likely correct, for the avoidance of doubt, migration and asylum status could be specified as falling within the broader definition of "racial group".

11.30 The recently introduced Hate Crime and Public Order (Scotland) Bill specifies the characteristic of "race, colour, nationality (including citizenship), or ethnic or national origins",[38] which is essentially the same as the definition used in England and Wales.

Language

11.31 "Language" is also not specified in the current definition of racial group. Most of our initial consultation meetings involved visibly non-white minority groups, who typically spoke English as a first language. These groups tended to perceive much of the hostility they experienced as being connected to their appearance in some way. However, there is clear evidence that many white European foreign language speakers – especially those from Central, Eastern and Southern European backgrounds – have experienced abuse because they speak a foreign language, or speak English with an accent.

11.32 While we consider it likely that hostility based on language would in almost all cases be covered by the broader category of "ethnic origins" that is defined in the current law, for the avoidance of doubt, language could be specified as part of the wider definition of racial group.

Consultation Question 4.

11.33 We invite consultees' views on whether the definition of race in hate crime laws should be amended to include migration and asylum status; and/or language.

Caste

11.34 The term "caste" refers broadly to hereditary communities that are endogamous (marry within their own community) and are differentiated according to different functions of life.

11.35 There is no universally accepted definition of "caste", though one attempt made in the Explanatory Notes to the Equality Act 2010 is as follows:

> The term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes

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37 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.76, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

38 Hate Crime and Public Order (Scotland) Bill, cl 1(2)(c).

(varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit.[39]

11.36 There is some uncertainty as to how clearly the concept of "caste" falls within the definition of "racial group" for the purposes of hate crime laws. There has been more detailed consideration of the complex issue of caste and race in the context of civil law.[40]

11.37 One attempt to resolve the question was implemented by Parliament through a 2013 amendment to the Equality Act, which imposes a duty on the Government to prohibit caste discrimination by way of secondary legislation at some point in the future.[41]

11.38 Following this amendment, the Employment Tribunal decided the case of *Chandhok & Anor v Tirkey*.[42] The Tribunal found that for the purposes of the Equality Act 2010, depending on the particular facts of the case, "caste" may be capable of falling within the definition of "race", specifically the notion of "ethnic origins":

> there may be factual circumstances in which the application of the label "caste" is appropriate, many of which are capable – depending on their facts – of falling within the scope of section 9(1), particularly coming within "ethnic origins", as portraying a group with characteristics determined in part by descent, and of a sufficient quality to be described as "ethnic".[43]

11.39 In the wake of this decision, the government decided to conduct a further public consultation on how caste should best be recognised in the context of equality law,[44] offering two options:

(1) rely on emerging case-law under the Act as developed by courts and tribunals; or

(2) use the legislative duty to insert caste into the Act as an aspect of race.

11.40 After receiving over 16000 responses, the 2018 government response to this consultation concluded that emerging case law should be the basis for recognition of "caste", explaining its reasoning as follows:

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39 Equality Act 2010, Explanatory Notes, EN 49.

40 See, eg, *Chandhok & Anor v Tirkey* [2014] UKEAT 0190_14_1912, referred to in more detail below.

41 See Equality Act 2010, s 9(5), as amended by section 97 of the Enterprise and Regulatory Reform Act 2013.

42 *Chandhok & Anor v Tirkey* [2014] UKEAT 0190_14_1912.

43 *Chandhok & Anor v Tirkey* [2014] UKEAT 0190_14_1912, at [51].

44 Government Equalities Office, *Caste in Great Britain and equality law: a public consultation* (2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727790/Caste_in_Great_Britain_and_equality_law-consultation_response.pdf.

In particular, we feel this is the more proportionate approach given the extremely low numbers of cases involved and the clearly controversial nature of introducing "caste", as a self-standing element, into British domestic law.

Legislating for caste is an exceptionally controversial issue, deeply divisive within certain groups, as the last few years have shown: it is as divisive as legislating for "class" to become a protected characteristic would be across British society more widely. Reliance on case-law, and the scope for individuals to bring claims of caste discrimination under "ethnic origins" rather than "caste" itself, is likely to create less friction between different groups and help community cohesion.[45]

11.41 Given the recent, detailed consideration government has given to this issue, and the utility of a consistent approach to defining "race" across equality and hate crime laws, we are not currently persuaded that a different approach should be taken for the purposes of hate crime laws.

Religion

11.42 A "religious group" is defined as "a group of persons defined by reference to religious belief or lack of religious belief."[46] The definition can therefore be used in cases of hostility on the basis of lack of belief – for example agnosticism and atheism. However, the definition is narrower than the definition of "religion or belief" used in the Equality Act 2010[47] and Article 9 of the ECHR;[48] notably because non-religious beliefs such as humanism are not covered.

11.43 As noted above, some groups such as Jews and Sikhs fall within the definition of "racial group" in addition to "religious group".

11.44 While the definition of religion is wide, there is some ambiguity in the case of cults and belief in the supernatural. Indeed, the difficulty in precisely defining the meaning of religion was observed by the Supreme Court in *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* ("*Hodkin*"):[49]

There has never been a universal legal definition of religion in English law, and experience across the common law world over many years has shown the pitfalls of attempting to attach a narrowly circumscribed meaning to the word. There are several reasons for this – the different contexts in which the issue may arise, the variety of world religions, developments of new religions and religious practices, and

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45 Government Equalities Office, *Caste in Great Britain and equality law: a public consultation* (2018) p 14, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727790/Caste_in_Great_Britain_and_equality_law-consultation_response.pdf.

46 Crime and Disorder Act 1998, s 28(5); Criminal Justice Act 2003, s 145(3). See also the equivalent definition of "racial hatred" in section 17 of the Public Order Act 1986.

47 Under section 10 of the Equality Act 2010, religion means any religion and a reference to religion includes a reference to a lack of religion; belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

48 The right to freedom of thought, conscience and religion includes the right to change religion or belief and the right to manifest religion or belief.

49 [2013] UKSC 77, [34].

developments in the common understanding of the concept of religion due to cultural changes in society.

11.45 In *Hodkin*, the Supreme Court found that Scientology was a religious belief for the purposes of the Places of Worship Registration Act 1855, with Lord Toulson (with whom the court agreed) describing the meaning of religion for the purposes of that Act in the following terms:[50]

> I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word "supernatural" to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.

Philosophical beliefs that are not religious

11.46 An issue that arises in this context is whether – consistent with equality and human rights law – hate crime law should extend to groups who share common beliefs which are not religious. British Naturism, for example, told us that they have recently begun to experience abuse and hostility online and at events they run. As a secular belief, British Naturism were concerned that the law did not currently treat hostility directed at naturists as a hate crime.

11.47 Humanists UK similarly argued that they and their members have been victims of hate crime:

> Humanists UK as an organisation has received threats due to its activities promoting humanism in the UK. Most recently, in August 2018, a serrated metal tin lid was posted to Humanists UK in a handwritten unstamped envelope. We reported this to the Metropolitan Police as a hate crime, who subsequently visited our offices and assessed the security we have in place. We believe it was linked to our increased profile around apostasy[51] work, as our work with Faith to Faithless had received a much higher public profile at that time. Additionally, twice in the past decade we have been sent in the post envelopes containing white powder (intended to be mistaken for anthrax). We believe that these envelopes were threats of violence linked to our work as an organisation promoting humanism. We also frequently receive threats of supernatural violence over email targeting the humanist belief system.[52]

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50 [2013] UKSC 77, [57].

51 The term "apostate" refers to a person who renounces a religious or political belief or principle.

52 Humanist UK, *Review of Hate Crime Legislation in England and Wales, Briefing from Humanists UK* (November 2019).

11.48 While Humanists UK acknowledged that lack of religious belief is included within the scope of current hate crime laws, they argued that in practice apostates did not feel confident in coming forward as victims of religious hate crime. They suggested that part of the reason for this was limited awareness that current laws covered "lack of" religious belief – something which might be remedied if the wider Equality Act 2010 definition were adopted. They also noted that there is little evidence of prosecutions of hate crimes relating to apostacy, despite clear evidence from their members that these are occurring.

11.49 The Employment Tribunal has provided further criteria to assess whether a belief constitutes a "philosophical belief" within the meaning of the Equality Act 2010:[53]

(1) The belief must be genuinely held.

(2) It must be a belief and not an opinion or viewpoint based on the present state of information available.

(3) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

(4) It must attain a certain level of cogency, seriousness, cohesion and importance.

(5) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

11.50 In Chapter 14, we consider arguments for and against including philosophical belief in hate crime law in more detail.

Beliefs that are individual, not shared

11.51 Another issue that arose in the context of the Scottish review of hate crime laws is the question of religious beliefs that are individual, and not more widely held. The particular concern focused on the murder of Asad Shah in Glasgow. The perpetrator – Tanveer Ahmed – issued a statement explaining that he had committed the murder because he felt Mr Shah had disrespected the Prophet Muhammad and had claimed to be a prophet himself. As the victim's purported religious views were not consistent with that of any recognisable religious group, the Crown took the view that the case could not be prosecuted on the basis of hostility against a religious group.

11.52 While a majority of consultees in Scotland supported a widening of the scope of the law to include individual religious belief, the review ultimately recommended against such an approach, noting that the "concept of a *shared* protected characteristic" was a core aspect of hate crime laws.[54] It was further argued that the Asad Shah circumstances were extremely unusual, and the sentencing judge had sufficient scope to deal with the religious motivation as part of her common law sentencing discretion.

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53 *Grainger Plc & Ors v Nicholson* [2009] UKEAT 0219/09/0311 (3 November 2009), at [24].

54 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 3.54.

11.53 The Bill before the Scottish Parliament at present defines the characteristic of religion as follows[55]:

> A group defined by reference to religion is a group of persons defined by reference to—
>
> (a) religious belief or lack of religious belief,
>
> (b) membership of or adherence to a church or religious organisation,
>
> (c) support for the culture or traditions of a church or religious organisation,
>
> (d) participation in activities associated with such a culture or such traditions.

11.54 For the purposes of hate crime laws in England and Wales, we are not currently persuaded that there is a need to alter the definition of religious belief. Our provisional view is that the precise boundaries of what constitutes a religious belief is a question that is better left for the courts to interpret. As most hate crime is directed at established religions such as Islam and Judaism, it is only likely to be in rare cases that this definition should present any difficulty.

Consultation Question 5.

11.55 We provisionally propose to retain the current definition of religion for the purposes of hate crime laws (we consider the question of non-religious beliefs separately in Chapter 14).

11.56 Do consultees agree?

Sectarianism

11.57 Sectarianism in its broadest sense refers to prejudice, discrimination, or hatred arising from attaching relations of inferiority and superiority to differences between subsections of a group. It is most commonly used in the context of religious subdivisions, and in the UK and Ireland the most serious historical concerns have related to sectarian conflict between Catholic and Protestant Christians.

11.58 Sectarian hatred and conflict remains a significant cause of concern in the United Kingdom (though it is less apparent in England and Wales than it is in Scotland and Northern Ireland). Hate crimes committed on the basis of sectarian hostility already fall within the existing definition of "religious group".

11.59 No universally agreed legal definition of "sectarianism" exists, which could also complicate attempts to incorporate it as a separate category.

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55 Hate Crime and Public Order (Scotland) Bill, cl 14(5).

11.60 Our provisional view is therefore that there is no need to specify sectarian groups as separately protected by hate crime laws, as they are adequately captured by existing protection for "religious groups".

Consultation Question 6.

11.61 We do not propose to add sectarian groups to the groups protected by hate crime laws (given that they are already covered by existing protection for "religious groups").

11.62 Do consultees agree?

Sexual orientation

11.63 The protection offered by hate crime law on the basis of sexual orientation is to a "group of persons defined by reference to sexual orientation, whether towards persons of the same sex, the opposite sex or both."[56] An equivalent definition is also used in the Equality Act 2010.[57]

11.64 The law does not extend to cover other forms of sexual preference – for example, sexual fetishes.

Asexuality

11.65 Asexual orientation refers to the experience of not being sexually attracted to others. In recent years, awareness of asexual orientation has grown, with estimates suggesting perhaps 1% of the population has this orientation.[58] Asexuality is part of a broader grouping of people who identify as "ace" – an umbrella term that describes a variation in levels of romantic and/or sexual attraction.

11.66 Asexual orientation does not currently fall within the current legal definition of sexual orientation.[59] This was raised as a concern by Galop, and these concerns were echoed by Stonewall in our pre-consultation meetings.

11.67 In our 2014 report we stated that we "had not been provided with evidence to show that individuals suffer hate crime due to being asexual", and declined to recommend a change to the definition to include this group.[60] However, since this time, awareness of asexuality, and the challenges asexual people face, has grown.

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56 Public Order Act 1986, s 29B.

57 Equality Act 2010, s 12(1).

58 See J Decker, *The Invisible Orientation: An Introduction to Asexuality* (Skyhorse Publishing, New York, 2014).

59 *B* [2013] EWCA Crim 291.

60 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 163.

11.68 There is growing evidence that asexual people experience forms of discrimination in contemporary society,[61] and some evidence that they experience violence and abuse on this basis.[62]

11.69 Having reviewed our 2014 recommendation in the light of this evidence, we consider that there is now a stronger case for asexuality to have the same level of protection as other forms of orientation – attraction to the same sex, opposite sex or both. For example, a revised definition could refer to:

> a group of persons defined by reference to sexual orientation, whether towards persons of the same sex, the opposite sex, both or *neither*.

11.70 This would be consistent with the approach currently taken in respect of religion, where "lack of religious belief" is included in the definition.

Consultation Question 7.

11.71 We invite consultees' views on whether "asexuality" should be included within the definition of sexual orientation.

Transgender identity, and other forms of gender and sex identity

11.72 Transgender identity is currently defined in hate crime laws as follows:

> references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.[63]

11.73 This definition, when introduced, was intended to be inclusive, not exhaustive.[64]

11.74 We considered this definition in the context of our 2014 review, and stated that we were "in broad agreement with the consultees who argued that transgender identity is wider than simply undergoing physical aspects of gender transition" and that "the focus of [CJA 2003] section 146(6) on this particular aspect of transgender identity is thus perhaps unfortunate."[65] However, as we were only considering the context of

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61 See C MacInnis and G Hodson, "Intergroup bias toward "Group X": Evidence of prejudice, dehumanization, avoidance, and discrimination against asexuals" (2012) 15(6) *Group Processes & Intergroup Relations* 725.

62 Olivia Blair, "I've never felt Romantic Attraction: What it is like to identify as asexual" (16 February 2017) *The Independent,* available at https://www.independent.co.uk/life-style/love-sex/asexuality-what-is-it-like-explained-by-asexual-people-a7582351.html.

63 Criminal Justice Act 2003, s 146(6).

64 In the Committee of the Whole House on the Bill for the Legal Aid, Sentencing and Punishment of Offenders Act 2012 – which inserted section 146(6) of the Criminal Justice Act 2003 – the Minister of State, Ministry of Justice, Lord McNally said "… I should be clear that "transgender" is an umbrella term that includes, but is not restricted to, being transsexual", see *Hansard* (HL), 7 February 2012, vol 735, col 153.

65 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 168.

aggravated offences, we ultimately found it would be preferable to maintain a definition consistent with that already in place in the CJA 2003.

11.75 In our consultation meetings, LGBT groups, notably Galop and Stonewall, as well as trans and non-binary individuals we met at consultation events, expressed concern that the definition no longer accorded with contemporary understandings of transgender identity. Indeed, Schweppe and Haynes have argued it requires "immediate amendment."[66]

11.76 Now that we have an opportunity to consider reform of both definitions, we reiterate our concern that the current definition places significant emphasis on the process of gender reassignment, rather than on the identity and personhood of the individual.

11.77 In Scotland, which already has a somewhat different definition of transgender in hate crime laws, the Scottish Government has recently proposed the following revised definition in the Hate Crime and Public Order (Scotland) Bill:

> A person is a member of a group defined by reference to transgender identity if the person is—
>
> (a) a female-to-male transgender person,
>
> (b) a male-to-female transgender person,
>
> (c) a non-binary person,
>
> (d) a person who cross-dresses.

11.78 In addition to people who positively identify as a different gender to the one they were assigned: transgender men and women, the Scottish Bill also explicitly includes people who are non-binary – which refers to people whose gender identity does not fit easily into the categories of "male" or "female". Some people who identify as under the umbrella term "trans" do not entirely identify as "male" or "female", and there is some overlap between these categories. The Scottish Bill also includes a "person who cross-dresses". This is distinct again from being transgender, as a person who cross-dresses may still identify with the gender they were assigned at birth.

11.79 The Hate Crime and Public Order (Scotland) Bill also creates a separate characteristic of "variations in sex characteristics" which provides hate crime protection to people who are intersex. The term intersex refers to a person who is born with a reproductive or sexual anatomy that does not fit standard definitions of female or male. It is distinct from being transgender or non-binary. Intersex characteristics are part of the natural variation in chromosomes within the human population.[67]

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66 Schweppe, J. and Haynes A, "You can't have one without the other: "Gender" in hate crime legislation" (2020) 2 *Criminal Law Review* 148, 162.

67 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019), available at https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21.

11.80 The term "variations in sex characteristics" is further defined in the Scottish Bill as follows:

> A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither—
>
> (a) those typically associated with males, nor
>
> (b) those typically associated with females.

11.81 Similarly, in Australia, since 2013, "intersex status" has received explicit recognition as a prohibited ground of discrimination in the Sex Discrimination Act 1984 (Cth).[68]

11.82 Recognition of sex and gender variation has evolved significantly in recent years,[69] and we consider it important that the law is updated to ensure that these variations are adequately and appropriately described and protected in hate crime laws. We do acknowledge the very limited data that exists in relation to the prevalence of crime targeted towards people who are intersex specifically. However, we consider there to be sufficient similarity in the hostility that intersex people are likely to experience that it is appropriate that the law includes this group in addition to people who are transgender and non-binary.

11.83 Consistent with the approach proposed in the Scottish Bill, we therefore consider the law should provide explicit recognition to:

- People who are or are presumed to be transgender
- People who are or are presumed to be non-binary
- People who cross-dress (or are presumed to cross-dress); and
- People who are or are presumed to be intersex

11.84 We recognise that as understandings of gender identity and sex characteristics evolve, so does terminology. We therefore welcome input from consultees on language which is inclusive, appropriate, and likely to remain so into the future.

11.85 We also welcome views on whether the law should create a distinct characteristic for variation in sex characteristics – as has occurred in Scotland – or if a single category incorporating all these different groups is sufficient.

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68 Sex Discrimination Act 1984 (Cth), s 5C, as inserted by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth).

69 Indeed, in England and Wales the Employment Tribunal has recently recognised a gender-fluid/non-binary person as falling within the protection of the category of "gender reassignment" for the purposes of section 7 of the Equality Act 2010. See Owen Bowcott, "Gender-fluid engineer wins landmark UK discrimination case" (17 September 2020) *The Guardian*, available at https://www.theguardian.com/world/2020/sep/17/gender-fluid-engineer-wins-landmark-uk-discrimination-case.

11.86 In this regard, we recognise that the experiences of individuals within this broadly defined group are different: the experience of being intersex is very distinct from being transgender or non-binary, which is in turn different again from cross-dressing. People within each of these groups may find the conflation of these identities in some contexts to be a source of frustration.

11.87 Acknowledging these differences, for the purposes of hate crime laws (and not necessarily other contexts), we provisionally consider that these characteristics should be grouped together, in order to reflect their common experience of hostility and prejudice towards non-conformity with normative sex and gender expectations. In this sense, comparisons may be drawn with other widely cast groups such as "disability" and "race", which each encompass a huge range of diversity. However, we understand that individuals who identify with these characteristic groups may feel differently, and we welcome further input on this question.

11.88 If this approach is taken we also consider that the use of the label "transgender" alone is potentially misleading, and a wider category description of "transgender, non-binary or intersex" may be more appropriate.

Consultation Question 8.

11.89 We provisionally propose that the current definition of "transgender" in hate crime laws be revised to include:

- People who are or are presumed to be transgender
- People who are or are presumed to be non-binary
- People who cross dress (or are presumed to cross dress); and
- People who are or are presumed to be intersex

11.90 We further propose that this category should be given a broader title than simply "transgender", and suggest "transgender, non-binary or intersex" as a possible alternative.

11.91 Do consultees agree?

11.92 We welcome further input from consultees on the form such a revised definition should take.

Disability

11.93 Disability is currently defined very broadly in hate crime law as "any physical or mental impairment".[70]

[70] Criminal Justice Act 2003, s 146(5).

11.94 This definition encompasses:

- Physical disability, whether present from birth or acquired at some late point in life; and

- Mental disability, including learning disability, acquired brain injury and mental illness.

11.95 The definition does not have the additional qualification found in the corresponding definition in the Equality Act 2010 that "the impairment has a substantial and long-term adverse effect on [a person's] ability to carry out normal day-to-day activities".[71]

11.96 While no further definition of disability is provided in the CJA 2003, further guidance for the purpose of equality law can be found in the Equality Act 2010 (Disability) Regulations 2010, which specifies that an addiction to substances is not considered to be a disability[72] and neither is a tendency to set fires, to steal, to physical or sexual abuse of other persons, exhibitionism and voyeurism.[73]

11.97 An issue that arises in relation to the definition of disability in hate crime laws is whether this very broad category should be sub-divided. For example, it has been suggested that the experience of people with learning disabilities is quite distinct from that of people with other disabilities, and that this is obscured by grouping all forms of disability together.

11.98 There are also groups who currently fall within the definition of "disability" who do not identify strongly with the term. For example, the charity "Changing Faces" – which supports people with a scar, mark or condition on their face or body that makes them look different – advised that many of their client group do not consider themselves to be disabled, but this is currently the only category under which they may be protected by hate crime laws.

11.99 Many other groups and individuals also do not identify comfortably with the term "disability". For example:

- Many deaf people do not consider deafness to be a disability, but rather a unique language and culture.

- Many people on the autism spectrum similarly do not consider themselves to be disabled; rather they consider that they have a different way of perceiving the world.

- Most people living with HIV who have access to treatment are able to live healthy lives, and are largely unaffected by physical or mental impairment. Indeed, the stigma associated with HIV is often far more impactful than any symptoms.

11.100 We acknowledge the very different experiences of people who fall within the broad category of "disability", and that it has connotations with which many groups do not

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71 Equality Act 2010, s 6(1).

72 Equality Act 2010 (Disability) Regulations 2010, r 3.

73 Equality Act 2010 (Disability) Regulations 2010, r 4.

identify. The difficulty we perceive is that whether or not each of these groups identify as disabled, the perception that they are is likely to inform hostility that is directed at them in one way or another.[74] We note that the inclusion of "presumed disability" within the protected characteristic goes some way to accommodating this concern.

11.101 Further, we are concerned that trying to disaggregate all the various physical and mental conditions that may be subject to disability-like hate crime may cause more confusion and division than is currently the case.

11.102 When we considered this question in our 2014 review, we also noted that "to add specific conditions or impairments to the flexible and inclusive definition … would risk inviting defence arguments that other conditions not specifically referred to should be interpreted as excluded."[75]

11.103 The current definition is imperfect, but it is flexible enough to ensure that a wide array of disabilities and conditions are protected. It also benefits from more detailed legal consideration in the context of equality law.

11.104 As we have noted, there are wider problems with the recognition and prosecution of disability hate crime. We have not yet seen evidence that the definition of disability itself is creating further difficulties in this regard.

11.105 We are therefore not currently minded to propose altering the definition of "disability", but we understand that there are strong views on this subject, and welcome further stakeholder input.

11.106 In Chapter 15 we consider other aspects of existing laws – notably the requirement to prove "hostility" – which many consider unfairly excludes the forms of hate crime most commonly experienced by disabled people.

Consultation Question 9.

11.107 We invite consultees' views on whether the current definition of disability used in the Criminal Justice Act 2003 should be retained.

Perceived lack of disability

11.108 A specific concern identified by the Crown Prosecution Service is in respect of criminal conduct that is directed towards those who are mistakenly believed *not* to have a disability, and who are making use of disability accessible facilities such as blue badge car parking. This may be in relation to people with invisible disabilities, or where the perpetrator believes that the target is faking disability or is not "disabled enough". It may also target carers.

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74 See further Chapter 4, where we outline the law in relation to presumed identity at para 4.22.

75 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 157.

11.109 The Football Supporters' Association (FSA) outlined similar concerns in respect of disabled fans at football matches, who at times experience abuse related to the accessibility provision that is made for them. For example, we were told of incidents where a disabled football spectator had stood up from their wheelchair to cheer and others around them began to abuse them on the (wrongly held) basis that they were faking their disability.

11.110 In these circumstances the enhanced sentencing provisions of section 146 of the Criminal Justice Act 2003 do not apply because the hostility is based upon the offender's perception that the victim is *not* disabled. This type of offending against people with disability is therefore not categorised as disability hate crime under the current legislation.

11.111 On the one hand, it might be argued that, far from acting out of hatred or hostility towards disabled people, such conduct is motivated by a erroneous perception that the victim is taking space away from a person with a disability. It is a situational error, which arguably lacks the requisite "hatred".

11.112 On the other hand, the experience of the target of such hostility might be that they have been attacked "because of" their disability. Had they not been disabled, and in need of this service, they would not have been targeted in this way. The attack may also be based on false assumptions about disability, and the presumption of some able-bodied persons that they are entitled to police who is "disabled enough". This may well heighten the harm to the victim of the attack, and to other disabled people who feel an increased threat when using such services. For example, the FSA told us that the abuse described at paragraph 11.109 can make disabled people reluctant to go to football matches.

11.113 Given the concern that has been expressed about this conduct, we seek views as to whether it should be included in hate crime protection. One way to achieve this would be to extend the protected characteristic to "a disability (or presumed disability, *or presumed lack of disability*)". The intention would not be to provide protection to able-bodied persons, but rather to ensure the inclusion of disabled persons who are perceived by the perpetrator either not to be disabled, or not "disabled enough".

Consultation Question 10.

11.114 We invite consultees' views on whether criminal conduct based on a wrongly presumed lack of disability on the part of the victim should fall within the scope of protection afforded by hate crime laws.

Chapter 12: Gender or sex

INTRODUCTION

12.1 In addition to the existing five characteristics, academics, politicians and members of the public have proposed that further characteristics should be protected within hate crime laws.

12.2 As part of our review of hate crime laws, we have been specifically asked to consider:

> whether crimes motivated by, or demonstrating**, hatred based on sex and gender characteristics**… should be hate crimes, with reference to underlying principle and the practical implications of changing the law.[1]

12.3 While in some countries – for example Canada[2] – "sex" is specified as a characteristic protected under hate crime laws, this is not the case in the jurisdictions of the United Kingdom.

12.4 However, the possible use of hate crime laws to respond to violence and hostility against women has gained traction in recent years.

12.5 In 2018, the Independent review of hate crime legislation in Scotland ("the Bracadale review") also considered this question and recommended that there should be a new statutory aggravation based on "gender" hostility in Scottish criminal law.[3]

12.6 The Scottish Hate Crime Bill was subsequently introduced to the Scottish Parliament in April 2020, but it does not include protection for gender or sex. However, clause 15 of the Bill gives Scottish Ministers the power to add the characteristic of sex.

12.7 A similar question regarding aggravation based on "gender hostility" has been asked recently in respect of hate crime laws in Northern Ireland.[4]

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1 Law Commission website, Hate Crime, available at https://www.lawcom.gov.uk/project/hate-crime/ (emphasis added).

2 Canadian Criminal Code s 718.2(a)(i). Other jurisdictions recognising sex include the US jurisdictions of Iowa, Maine, Vermont, West Virginia, and the District of Columbia, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation, A report to the Hate Crime Legislation Review* (July 2017) Table 2, p 54, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

3 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) Recommendation 9, p 43, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

4 Hate Crime Legislation in Northern Ireland Independent Review, *Consultation Paper* (January 2020) p 116, available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020_0.pdf.

12.8 A number of organisations – notably Citizens UK[5] and the Fawcett Society[6] – as well as politicians such as Stella Creasy MP,[7] have called for gender-based hate crime to be recognised in England and Wales. More specifically, their campaigns have advocated that "misogyny" – the hatred or dislike of women – be captured by hate crime laws.

12.9 Nottinghamshire Police Force was the first in the UK to record misogyny as a hate crime strand in 2016.[8] Between April 2016 and March 2018, 174 women reported a wide-range of misogyny hate crimes, from verbal abuse to sexual assault.[9] 73 of these have been classified as hate crimes and 101 have been classified as hate incidents.[10] Other police forces have subsequently started to record gender-based hate crime – Northamptonshire,[11] North Yorkshire,[12] and Avon and Somerset.[13]

12.10 In March 2020, Wera Hobhouse MP introduced the Hate Crime (Misogyny) Bill to Parliament. The bill seeks to make "motivation by misogyny an aggravating factor in criminal sentencing and to require police forces to record hate crimes motivated by

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5 Daphne Giachero, "MisogynyIShate: A summer of campaigning across Greater Manchester" (5 September 2018), available at https://www.citizensuk.org/misogyny_gmc.

6 Sam Smethers, "We have to start calling out misogyny for what it is: a hate crime" (23 January 2018), available at https://www.fawcettsociety.org.uk/blog/start-calling-out-misogyny-hate-crime.

7 *BBC News website*, "Make misogyny a hate crime Stella Creasy urges" (5 September 2018), available at https://www.bbc.co.uk/news/uk-politics-45408492.

8 In addition to the five protected characteristics that are recognised by hate crime laws in England and Wales, local police forces also record crimes accompanied by hostility towards victims' other personal characteristics as hate crime, see Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Understanding the difference, The initial police response to hate crime* (July 2018) p 91, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

9 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre, June 2018) p 3, available at https://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf. As outlined in Chapter 5, the label "hate crime" is used by the police where the defendant's actions amount to an existing criminal offence, and the offence is perceived by the victim to have demonstrated, or been motivated by, hostility towards a protected hate crime characteristic. The label "hate incident" is used by the police where the defendant's actions do not amount to an existing crime, but the actions are perceived by the victim to have demonstrated, or been motivated by, hostility towards a protected hate crime characteristic.

10 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre, June 2018) p 3, available at https://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf.

11 Northamptonshire Community Safety, *Hate crime or hate incidents*, available at https://www.northamptonshire.gov.uk/councilservices/fire-safety-and-emergencies/community-safety/Pages/hate-crime-or-hate-incidents.aspx.

12 North Yorkshire Police, *Misogyny to be recognised as a hate crime from Wednesday 10 May 2017* (10 May 2017), available at https://northyorkshire.police.uk/news/misogyny-recognised-hate-crime-wednesday-10-may-2017/.

13 Avon and Somerset Police, *Gender hate crime now recognised in Avon and Somerset* (16 October 2017), available at https://www.avonandsomerset-pcc.gov.uk/News-and-Events/News-Archive/2017/Oct/Gender-hate-crime-now-recognised-in-Avon-and-Somerset.aspx.

misogyny".[14] Its second reading in the House of Commons is scheduled for November 2020.

12.11 This chapter will consider the potential recognition of gender or sex-based hate crime. It will assess the case for recognition, engaging with principled arguments as well as the practical consequences that might flow from a reform of this nature. We will develop our discussion by considering the following issues:

- Violence Against Women and Girls (VAWG), and the current legal response to it.
- The case for capturing sex/gender-based hatred within hate crime laws, according to the three criteria that we propose in Chapter 10.
- The language that might be used in hate crime legislation to capture a sex/gender-based aggravation. Whilst campaigns in England and Wales have used the language of "misogyny", several other terms might be used in relevant legislation, including "women", "gender" and/or "sex".

Preliminary note on sex and gender

12.12 Before proceeding, we think it is important briefly to define the terms "sex" and "gender" used by the UK Government. We also explain why this chapter focuses on binary gender/sex.

12.13 The UK government notes that sex is assigned at birth[15] and refers to "the biological aspects of an individual as determined by their anatomy, which is produced by their chromosomes, hormones and their interactions".[16]

12.14 The UK government's description of gender notes that "a person's gender may not match the sex they were assigned at birth"[17] and refers to "a social construction relating to behaviours and attributes based on labels of masculinity and femininity".[18]

12.15 We recognise that attempts to define the terms sex and gender or speculate on the extent to which they correspond are highly contentious. We also acknowledge that the UK government's definition of gender and sex as two distinct concepts is not universally shared.[19] It is beyond the scope of this consultation paper to explore these extensive debates.

12.16 For the purposes of hate crime categories, we have decided to distinguish between binary gender and genders that exist beyond the "male" and "female" binary, in order to

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14 Hate Crime (Misogyny) Bill 2019-21.

15 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019), available at https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21.

16 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019).

17 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019).

18 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019).

19 See for example those who dispute the utility of distinguishing between sex and gender: R Prokhovnik, *Rational Woman* (1st ed 1999); E Grosz, *Volatile bodies: Toward a corporeal feminism* (1st ed 1994).

capture two different forms of hatred. To use a non-binary[20] person as an example, where they are targeted because of hostility towards their non-binary gender, we think this is more appropriately characterised as hatred based on a person's transgender or non-binary identity,[21] than misogynistic hatred. Conversely, where a non-binary person is perceived by an offender to be a woman and targeted based on hostility towards their (perceived) female gender, this could be characterised as misogynistic hatred.[22]

12.17 LGBT stakeholders also expressed some concern that subsuming the transgender category within an all-encompassing category of "gender"[23] may mean that distinctive forms of hatred which affect trans people would be obscured in a much larger category.

12.18 We therefore consider hate crime against binary sex and gender in this chapter.

VIOLENCE AGAINST WOMEN AND GIRLS

Definition and nature

12.19 The UN Declaration on the Elimination of Violence against Women defines VAWG as:

> Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[24]

12.20 The Department for International Development notes that "VAWG is the most widespread form of abuse worldwide, affecting one third of all women in their lifetime".[25] It can take a range of forms including (but not limited to): intimate partner violence ("domestic violence"); sexual violence (including sexual violence as a tactic of war); acid

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20 The use of non-binary in this instance is intended to mean those whose gender does not sit comfortably with "man" or "woman". We also discuss this term in more detail in Chapter 11 whereby we consider hatred targeted at "transgender, non-binary or intersex" people.

21 This would therefore be covered by the "transgender, non-binary or intersex" category that we propose should be included in hate crime laws in Chapter 11.

22 We also appreciate that transphobia (including prejudice against non-binary people) may overlap with misogyny, particularly in the context of trans women, gender non-conforming women, or people of other genders who are perceived to be women by offenders. We discuss the ability of hate crime laws to capture intersectional forms of hatred in Chapter 16.

23 An all-encompassing category of "gender" might incorporate targeting based on gender or sex and gender identity more widely.

24 Article 1, Declaration on the Elimination of Violence against Women, (proclaimed by General Assembly resolution 48/104 on 20 December 1993), available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

25 Department for International Development, Conflict, Humanitarian and Security Department (CHASE), *Violence Against Women and Girls, CHASE Guidance Note Series: Guidance Note 4, Addressing Violence Against Women and Girls through Security and Justice (S & J) programming,* (November 2013) p 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/267720/AVAW-security-justice-progA.pdf.

throwing; honour killings; sexual trafficking; female genital cutting/mutilation (FGC/M); forced and child marriage.[26]

12.21 There is a wealth of evidence that women and girls are disproportionately impacted by these types of crimes.[27] More recently, the targeting of women for online harassment and abuse has emerged as a significant concern;[28] an issue we noted in our 2018 Scoping Report on Abusive and Offensive Online Communications.[29]

12.22 UN Women observe the impact of VAWG on the lives of women and girls:

> Violence against women and girls is a grave violation of human rights. Its impact ranges from immediate to long-term multiple physical, sexual and mental consequences for women and girls, including death. It negatively affects women's general well-being and prevents women from fully participating in society.[30]

Responses to VAWG

12.23 The Government set out its strategy to end VAWG in 2016,[31] along with a refreshed action plan in March 2019.[32]

12.24 The Government's strategy established several aims to be achieved by 2020, including: "significantly reducing" the number of VAWG victims; challenging behaviours and attitudes that normalise violence against women and girls; improving access to support services for women, girls and their children; ensuring specialist support for victims with complex needs and additional barriers to access;[33] and improving the criminal justice response to VAWG crimes.[34]

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26 Department for International Development, Conflict, Humanitarian and Security Department (CHASE), *Violence Against Women and Girls, CHASE Guidance Note Series: Guidance note 4, Addressing Violence Against Women and Girls through Security and Justice (S & J) programming,* (November 2013) p 3.

27 This evidence will be considered in more detail below.

28 Amnesty International, Chapter 1, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/.

29 Abusive and Offensive Online Communications: A Scoping Report, (November 2018) Law Com No 381, p 9; Harmful Online Communications: The Criminal Offences (2020) Law Com Consultation Paper 248. The consultation closes on 18 December 2020 and the consultation paper is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf.

30 UN Women, *Ending violence against women*, available at https://www.unwomen.org/en/what-we-do/ending-violence-against-women.

31 Home Office, *Ending Violence Against Women and Girls Strategy 2016-2020* (March 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF.

32 Home Office, *Ending Violence Against Women and Girls, 2016-2020 Strategy Refresh* (March 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783596/VAWG_Strategy_Refresh_Web_Accessible.pdf.

33 Home Office, *Ending Violence Against Women and Girls Strategy 2016-2020* (March 2016) p 10.

34 Home Office, *Ending Violence Against Women and Girls Strategy 2016-2020* (March 2016) p 43.

12.25 Although the UK signed the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the "Istanbul Convention") [35] on 8 June 2012, it is yet to ratify the treaty. The latest report on the progress of ratifying the Istanbul Convention[36] notes that the "Government takes its international commitments very seriously and will only ratify when we are satisfied that the UK has met all our obligations under the Convention".[37]

12.26 A number of specific crimes have been introduced in England and Wales which seek to tackle various forms of VAWG. These have included:

- The offence of forced marriage contrary to section 121 of the Anti-Social Behaviour, Crime and Policing Act 2014 (and the criminal offence of breaching a civil forced marriage protection order – contrary to section 63CA of the Family Law Act 1996).

- Several offences relating to the performance and assisted performance of FGM are included in the Female Genital Mutilation Act 2003. Section 4 of the Act extends this criminality extra-territorially. Female Genital Mutilation Protection Orders can also be obtained from the civil courts to protect girls from being subjected to FGM.

- The offence of stalking and stalking involving fear of violence or serious alarm or distress, which was added to the Protection from Harassment Act 1997 in 2012.[38]

- The offence of coercive and controlling behaviour in section 76 of the Serious Crime Act 2015, which allows for the prosecution of a pattern of abusive behaviour in an intimate relationship that does not necessarily involve physical violence.

- The offence of disclosing private sexual photographs and films with intent to cause distress, contrary to section 33 of the Criminal Justice and Courts Act 2015.[39]

- The additional offences of voyeurism under section 67A of the Sexual Offences Act 2003 that were introduced by section 1 of the Voyeurism (Offences) Act 2019 and were designed to address "upskirting" behaviour.

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35 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent DisplayDCTMContent?documentId=090000168008482e.

36 Section 2(2) of the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 requires the Secretary of State to lay a report before each House of Parliament setting out the steps to be taken to enable the UK to ratify the Convention and any timescale within which the Secretary of State would expect to be able to ratify the convention.

37 Home Office, *Ratification of the Council of Europe Convention on Combating on Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – 2019 Report on Progress* (October 2019) p 27, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843509/CCS0919132732-001_Istanbul_Convention_2019_Report_Option_A_Web_Accessible.pdf.

38 Protection of Freedoms Act 2012, s 111.

39 This offence is also currently under review in the Law Commission's separate review of offences related to the taking, making and sharing of intimate images without consent, see https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/.

12.27 In March 2020, the Government announced that an enhanced version of the Domestic Abuse Bill would be introduced to Parliament.[40] The Bill is currently awaiting its second reading in the House of Lords. Some of the Bill's key components are:

- Defining domestic abuse in law.
- The establishment of a Domestic Abuse Commissioner.
- The introduction of new Domestic Abuse Protection Notices Orders.
- Prohibiting perpetrators of abuse from cross-examining their victims in person in the family courts.
- Creating a statutory presumption that victims of domestic abuse are eligible for special measures in the criminal courts.

Male victims of crimes associated with VAWG.

12.28 As we will evidence below, women and girls are disproportionately victims of the crimes associated with VAWG. However, the Crown Prosecution Service (CPS) notes that:

> The CPS applies policies fairly and equally to all victims, both male and female, and we are committed to securing justice for all victims. Prevalence studies of these crimes evidence the disproportionate experience of females however the CPS recognises the experience of male victims and its distressing impact on them.[41]

12.29 We recognise that men and boys can be victims of crimes associated with VAWG and can face various barriers to reporting created by gender myths and stereotypes.

THE CASE FOR INCLUDING A SEX OR GENDER-BASED CATEGORY IN HATE CRIME LAWS

12.30 In Chapter 10 we established three criteria that we think ought to be satisfied by a group or characteristic before they can achieve protection in hate crime laws:

(1) **Demonstrable need**: evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.

(2) **Additional Harm:** evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the primary victim, members of the targeted group, and society more widely.

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40 GOV.UK website, *Enhanced Domestic Abuse Bill introduced to Parliament*, https://www.gov.uk/government/news/enhanced-domestic-abuse-bill-introduced-to-parliament?utm_source=e4e1a1f9-7a2f-46f5-8322-8be14a06b002&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily. The text of the Bill can be accessed at https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124_en_1.html.

41 Crown Prosecution Service, *Public statement on male victims covered by the CPS VAWG strategy*, available at https://www.cps.gov.uk/sites/default/files/documents/publications/public-statement-male-victims-crimes-covered-by-CPS-VAWG-strategy.pdf.

(3) **Suitability**: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, and represent an efficient use of resources. Where relevant, we will also consider any harmful practical consequences that protection of the characteristics might cause and whether the characteristic is consistent with the rights of others.

12.31 Below we assess each of these criteria, primarily as they apply to women. This is because, as we explore below, the available evidence – including VAWG statistics, academic studies and our own stakeholder engagement – strongly indicates that women would form the majority of sex or gender-based hate crime victims.

DEMONSTRABLE NEED

12.32 The demonstrable need criterion requires us to consider the following elements. Firstly, we will consider evidence of criminal behaviour against the relevant group, (for example, women). Secondly, we will consider whether this criminal behaviour is linked to prejudice or hostility towards the unifying characteristic, (for example female sex or gender). Finally, we will consider whether criminal behaviour that is based on hostility or prejudice towards the characteristic is prevalent. In Chapter 10 we set out what we mean by "prevalent".

12.33 We will apply the demonstrable need criterion below, firstly to women and secondly to men.

Applying the demonstrable need criterion to women

Evidence of crime against women

12.34 Women are disproportionately the victims of certain crimes and criminal contexts; for example – sexual offences, FGM, forced marriage, domestic abuse, honour-based violence, sexual harassment, sex trafficking and sexual exploitation. This is borne out globally, and in the United Kingdom more specifically.

Sexual offences

12.35 In the UK, it is estimated that 1 in 5 (20%) women will experience sexual assault during their lifetime. This compares with 4% of men.[42]

12.36 In the year ending March 2017, figures from the Home Office Data Hub show that women were victims in 88% of rape offences recorded by the police.[43] Similarly, in other sexual offences, women were victims in 80% of offences recorded by the police.[44]

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42 Sexual Offences in England and Wales: year ending March 2017 (8 February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017; Home Office in the media, Violence against Women and Girls Strategy Refresh fact sheet (7 March 2019), available at https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/.

43 Sexual Offences in England and Wales: year ending March 2017 (8 February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017

44 Sexual Offences in England and Wales: year ending March 2017 (8 February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017

Where the sex of complainants was recorded in 2018-19 rape prosecutions, 83.9% were female.[45]

12.37 For the most part, perpetrators of sexual violence are male. Where the sex of the defendant was recorded in rape-flagged prosecutions in 2018-19, 98.2% were male.[46] In prosecutions for sexual offences other than rape, 97.2% of defendants were also male.[47]

12.38 We acknowledge that figures relating to police recording and prosecution underestimate the prevalence of sexual violence against women (and men); with reporting estimates for crimes such as sexual assault and rape representing a minority of incidents in any given year. Research conducted in 2013 observed that only 15% of those who had been victims of the most serious sexual offences reported this to the police.[48]

Domestic Abuse

12.39 In the UK, it is estimated that 1 in 4 women will experience domestic abuse in their lifetime.[49] Research by Women's Aid has observed the extent to which the COVID-19 pandemic has intensified existing domestic abuse and reduced options for escape.[50]

12.40 In the year ending March 2018, figures from the Crime Survey England and Wales estimated that 1.3 million women aged 16 to 59 years[51] experienced domestic abuse

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45 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A25, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

46 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A25. Women were defendants in 1.8% of rape prosecutions (female defendants are prosecuted for aiding, abetting or conspiring).

47 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A29.

48 Ministry of Justice, Home Office & the Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (2013) p 6, available at https://webarchive.nationalarchives.gov.uk/20140712155209/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf.

49 Home Office in the media, *Violence against Women and Girls and Strategy Refresh fact sheet* (2019), available at https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/.

50 Women's Aid, *A Perfect Storm, the impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them* (August 2020), available at https://www.womensaid.org.uk/wp-content/uploads/2020/08/A-Perfect-Storm-August-2020-1.pdf.

51 Dr Hannah Bows and Professor Nicole Westmarland observe that the CSEW fails to capture older women's experiences of sexual violence and domestic violence. We discuss this in more detail in Chapter 13, when we discuss age, but it is important at this stage to note that older women also experience gender-based violence, see H Bows and N Westmarland, "Rape of Older People in the UK, Challenging the 'real rape' stereotype" (2017) 57 *British Journal of Criminology* 2.

(compared with 695,000 men).[52] Where the sex of complainants in 2018-19 CPS domestic abuse-flagged prosecutions was recorded, 82.5% were female.[53]

12.41 95% of those accessing Independent Domestic Violence Advocacy (IDVA) services in 2017 were female.[54]

12.42 Women's Aid note that women are more likely to be seriously hurt in the domestic abuse context than men are.[55] Between 2009 and 2017, a woman was killed by her male partner or former partner every four days in the UK.[56]

12.43 The Femicide Census counted 149 women and girls who were killed at the hands of men in the UK in 2018.[57] In 2018, as in previous years, women were far more likely than men to be killed by partners or ex-partners (33% of female victims of homicide compared with 1% of male victims of homicide).[58] In 2017, 50% of female victims aged 16 and over were killed by a partner or ex-partner, compared with 3% of male victims aged 16 and over. By contrast, in the same year, men were more likely to be killed by friends or acquaintances (32% of male victims aged 16 and over compared with 10% of female victims aged 16 and over).[59]

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52 Office for National Statistics, *Domestic Abuse in England and Wales*, year ending March 2018 (2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018.

53 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A13, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

54 Safelives, *Insights Idva England and Wales dataset 2016-17 Adult independent domestic violence advisor (Idva) services* (2017) p 4, available at http://safelives.org.uk/sites/default/files/resources/Insights%20national%20dataset%20-%20Idva%202016-17%20-%20Final.pdf.

55 Women's Aid, *Domestic Abuse is a gendered crime*, available at https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/.

56 J Long, K Harper, H Harvey, K I Smith, *The Femicide Consensus, 2017 Findings, Annual Report on UK Femicides* (2018), available at https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/12/Femicide-Census-of-2017.pdf. The Femicide Consensus has been highlighted as evidence of good data collection by the UN Special Rapporteur for Violence Against Women. The 'counting dead women' project which produces The Femicide Consensus also identified an increase in domestic killings amid the Covid-19 lockdown, see J Grierson, "Domestic abuse killings 'more than double' amid Covid-19 lockdown" (15 April 2020) *The Guardian*, available at https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown.

57 J Long, H Harvey, K Harper, K I Smith, C O'Callaghan, *The Femicide Consensus, 2018 Findings, Annual Report on UK Femicides* (2020), available at https://femicidescensus.org/wp-content/uploads/2020/02/Femicide-Census-Report-on-2018-Femicides-.pdf.

58 Office for National Statistics, *Homicide in England and Wales: Year ending March 2018* (February 2019), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2018.

59 Office for National Statistics, *Homicide in England and Wales: Year ending March 2017* (February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2017.

FGM

12.44 In the period April 2018 to March 2019, 6,415 individual women and girls had an NHS attendance where FGM was identified.[60]

Forced marriage

12.45 In 2018, the Forced Marriage Unit gave advice or support relating to a possible forced marriage in 1,507 cases via its public helpline and email inbox.[61] Where the gender of the victim was known, 1,129 cases (75%) involved female victims and 287 (17%) involved male victims.[62]

Online Abuse

12.46 The extent of violent and sexualised abuse directed at women on social media platforms such as twitter has been widely documented.[63] This includes threats of physical and sexual violence against women.

12.47 In 2018, Jess Phillips MP said she received 600 online "rape threats" in one evening.[64] This followed comments made by Carl Benjamin who stood as a Member of the European Parliament (MEP) candidate for the UK Independence Party (UKIP) that he "wouldn't even bother" to rape Jess Phillips. In our 2015 report on Offences Against the Person, we recommended that the offence of threats to kill under the Offences Against the Person Act 1861 should be extended to cover threats to cause serious injury and threats to rape.[65] This reform has not yet been implemented.

12.48 Amnesty International's "Toxic Twitter" research also highlighted the intersectional[66] nature of online abuse against women, observing that:

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60 Clinical Audit and Registries Management Service, NHS Digital, *Female Genital Mutilation (FGM) Enhanced Dataset April 2018 to March 2019, England, experimental statistics, Annual Report* (25 July 2019) p 1, available at https://digital.nhs.uk/data-and-information/publications/statistical/female-genital-mutilation/april-2018---march-2019.

61 Home Office, *Forced Marriage Unit Statistics 2018* (April 2020) p 7, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869764/Forced_Marriage_Unit_Statistics.pdf.

62 Home Office, *Forced Marriage Unit Statistics 2018* (April 2020) p 9.

63 Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381 p 9; Amnesty International, Chapter 1, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women,* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/.

64 Maya Oppenheim, "Labour MP Jess Phillips receives 600 rape threats in one night" (31 May 2016) *The Independent,* available at https://www.independent.co.uk/news/people/labour-mp-jess-phillips-receives-600-rape-threats-in-one-night-a7058041.html.

65 Reform of Offences Against the Person, Final Report (November 2015) Law Com No 361 at paras 8.11-8.12, available at http://lawcom.gov.uk/app/uploads/2015/11/51950-LC-HC555_Web.pdf.

66 The phrase intersectionality was originally used by Professor Kimberlé Crenshaw to refer to the concept of blended forms of discrimination and disadvantage. Crenshaw applied the concept in the context of race and gender to describe racist forms of sexism, and sexist forms of racism. See "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *The Chicago Legal Forum* 139; K Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241.

in the case of online violence and abuse, women of colour, religious or ethnic minority women, lesbian, bisexual, transgender or intersex (LBTI) women, women with disabilities, or non-binary individuals who do not conform to traditional gender norms of male and female, will often experience abuse that targets them in unique or compounded way.[67]

12.49 In the six weeks before the 2017 UK general election, 45% of all abusive tweets sent to female MPs were directed at Diane Abbott MP – the UK's first black female MP.[68]

Harassment

12.50 Women also experience abuse in public places. This might range from verbal and non-verbal street remarks to incidents of stalking and physical assaults.[69] Such conduct may amount to either the offence of "harassment, alarm or distress" under section 5 of the Public Order Act 1986, or the more serious offence of "intentional harassment, alarm or distress" under section 4A of the same Act. If it occurs on more than one occasion, harassment or stalking offences under the Protection of Harassment Act 1997 may also apply. The sexual harassment that women experience in public places was the subject of an inquiry by the Women and Equalities Committee of the House of Commons in 2018. It concluded that "sexual harassment affects the lives of nearly every woman in the UK".[70]

12.51 We heard in pre-consultation meetings that the harassment black women experience in public places is often racialised.[71] Women of colour have described being asked "where they are from?" or being referred to as "exotic" by men on the streets – which can descend into explicitly hostile gendered and racist abuse when they do not engage.[72]

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67 Amnesty International, Chapter 2, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-2/#topanchor.

68 Amnesty International, Chapter 2, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018)..See also Amnesty International UK, *UK: online abuse against black women MPs 'chilling'* (9 June 2020), available at https://www.amnesty.org.uk/press-releases/uk-online-abuse-against-black-women-mps-chilling.

69 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 547.

70 Sexual Harassment of women and girls in public places, Report of the Womens and Equalities Committee (2017-19) HC 701, p 14 at para 28, available at https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/701/701.pdf.

71 The hyper-sexualisation that black women often experience as a daily reality has also been observed. See V Ntinu, "Hyper-sexualisation: the realities of my black, female body" *Gal – dem* (2017), available at https://gal-dem.com/hyper-sexualisation-black-female-body/.

72 K Evangelou, M Shearlaw, L Musa, K Lamborn, "He said I'd break the law for you, I was 13; calling time on street harassment – video" (2019) *The Guardian*, available at https://www.theguardian.com/global/video/2019/oct/10/he-said-id-break-the-law-for-you-i-was-13-calling-time-on-street-harassment.

12.52 A 2018 report produced by the Equality and Human Rights Commission (EHRC) also notes the prevalence of sexual harassment in UK workplaces.[73] In November 2017, research by ComRes on behalf of the BBC estimated that 40% of women have experienced some form of unwanted sexual behaviour in the workplace.[74] This was acknowledged in a report that followed an Inquiry by the Women and Equalities Committee of the House of Commons into Sexual Harassment in the Workplace.[75] Women who possess minority characteristics may experience workplace harassment differently[76] and more commonly[77] – for example Trade Union Congress (TUC) research shows that lesbian, bisexual and transgender women in the UK were more likely to experience unwanted touching, as well as rape and sexual assault, at work.[78]

Intersectional experiences of hate crime

12.53 Finally, women may be more likely to experience hate crime based on characteristics, additional to their gender. Research by Tell MAMA[79] found that more than half of those who reported Islamophobic incidents in 2016 were female.[80] This reflects some of the testimonies we heard at Citizens UK meetings, where BAME Muslim women told us that the Islamophobic and racist hate crime they experienced was inextricably linked to the fact they were female.[81]

Is this criminal targeting linked to hostility or prejudice towards female gender?

12.54 It is generally agreed that disproportionate violence against women and girls is not random. Violence against women and girls is closely connected to prejudicial ideas

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73 Equality and Human Rights Commission, *Pressing for progress: women's rights and gender equality in 2018* (July 2018) pp 83 to 85, available at https://www.equalityhumanrights.com/sites/default/files/pressing-for-progress-womens-rights-and-gender-equality-in-2018-pdf.pdf.

74 BBC, *Sexual harassment in the workplace* (December 2017), available at http://www.comresglobal.com/polls/bbc-sexual-harassment-in-the-work-place-2017/. This compares with 18% of men.

75 Sexual harassment in the workplace, Report of the Womens and Equalities Committee (2017-19) HC 725 p 7, available at https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf.

76 H Settles, S Pratt-Hyatt, N T Buchanan "Through the lens of race: Black and White Women's perceptions of womanhood" (2008) 32 *Psychology of Women Quarterly* 454.

77 J L Berdahl, C Moore, "Workplace harassment: Double jeopardy for minority women" (2006*)* 91 *Journal of Applied Psychology* 426.

78 Trade Union Congress, Sexual harassment of LGBT people in the workplace (April 2019) pp 16 to 17, available at https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf.

79 Tell MAMA are an independent, non-governmental organisation working on tackling anti-Muslim hatred. The MAMA Project provides a means for Islamophobic incidents to be reported, recorded and analysed.

80 TellMAMA, *Constructed threat: Identity, prejudice and the impact of anti-Muslim hatred* (2017) p 7, available at https://tellmamauk.org/wp-content/uploads/2017/11/A-Constructed-Threat-Identity-Intolerance-and-the-Impact-of-Anti-Muslim-Hatred-Web.pdf.

81 See also discussion of this intersection in H-Mason Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540.

about women and their place in society, or in many cases, overt hostility towards women.[82]

12.55 The Fawcett Society points to evidence which suggests that women perceive the violence they face as being targeted towards their gender. Crime Survey for England and Wales ("CSEW") data estimated the average annual incidence of hate crime over a two-year period from March 2016 to March 2018, based on people's perceptions of why they were targeted for crime. The data indicated that 57,000 people were criminally targeted based on their female gender, compared with 10,000 men targeted based on their male gender.[83] However, we note that being targeted "based on" gender is more inclusive than being targeted "based on hostility or prejudice" towards gender.

12.56 This connection between criminal targeting and gender-based prejudice is reflected in international law – the preamble to the Istanbul Convention notes that member states to the Council of Europe and other signatories to the Istanbul Convention recognise: [84]

> that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.[85]

12.57 The Committee on the Elimination of Discrimination Against Women[86] is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women.[87] They have also linked gender-based violence to systemic prejudice against women. In 2019 they stated that:

> The Committee regards gender-based violence against women as being rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour. Those factors also contribute to the explicit or

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82 As we explain in Chapter 10, the demonstrable need criterion seeks to establish a link between criminal targeting and prejudice or hostility towards the relevant characteristic. This link does not mean that every instance of the criminal targeting considered would satisfy the legal test for hate crime.

83 The Fawcett Society, *New data reveals gender is most common cause of hate crime for women* (January 2019), available at https://www.fawcettsociety.org.uk/news/new-fawcett-data-reveals-gender-is-most-common-cause-of-hate-crime-for-women.

84 Signatories to the Istanbul Convention includes the United Kingdom.

85 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent DisplayDCTMContent?documentId=090000168008482e.

86 United Nations Human Rights Office of the High Commissioner, Committee on the Elimination of Discrimination Against Women, see https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx.

87 The Convention on the Elimination of All Forms of Discrimination against Women was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and entered into force 3 September 1981.

> implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard.[88]

12.58 Ideas about men's entitlement are further reflected in the way women perceive their victimisation. Mason-Bish and Duggan recently conducted an online survey of people who perceived that they had experienced gender-related victimisation. Their analysis explores how participants related their experiences to the concept of hate crime. When asked what they thought made their experience one related to their gender, the most frequent answer cited the concept of "male entitlement" (18% of 85 respondents).[89]

12.59 Violence against women and girls is also viewed as a mechanism of control. Drawing on research by Kloss, Mason-Bish and Duggan argue:

> it remains the case that the majority of gender-based interpersonal violence is directly experienced by women and committed by men, often men with whom they are familiar, and is rooted in misogynistic notions of power, dominance and control.[90]

12.60 Walters and Tumath describe the exclusion of gender-based violence from hate crime as "notable" given its often "targeted and bias nature."[91] Using rape as an example, they argue that this crime is often "a clear demonstration of male dominance over women",[92] and that feminist scholars have for a long time conceptualised sexual offences and domestic violence as "conducts which are intended to subjugate and subordinate women, while simultaneously enforcing a male-dominated social hierarchy".[93]

12.61 The offence of rape has been located within intersecting systems of oppression.[94] For example, Davis observes that "rape bears a direct relationship to all of the existing power structures in a given society". [95]

12.62 Also, in the context of rape, Arruzza, Bhattacharya and Fraser have reflected on the "instrumentalization of gendered assault as a technique of control"; recalling the co-

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88 Committee on the Elimination of Discrimination Against Women, General Recommendation No 35 on gender-based violence against Women, updating general recommendation No.19, at [19], available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

89 H Mason-Bish and M Duggan, "Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime" (2020) 26 *International Review of Victimology* 112, 122 to 123.

90 H Mason-Bish and M Duggan, "Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime" (2020) 26 *International Review of Victimology* 112, 116.

91 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 565.

92 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 565.

93 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 565.

94 C Arruzza, T Bhattacharya, N Fraser, *Feminism for the 99%* (1st ed, 2019) p 28.

95 A Y Davis, *Violence against Women and the Ongoing Challenge to Racism* (1st ed, 1985) pp 9 to 10.

ordinated mass rape of "enemy" women as a weapon of war and the rape of colonialised and enslaved women.[96]

12.63 In the context of intimate partner violence perpetrated by men against women, motivations have been linked to women's inferior position in society on a micro level. Research on gender related killings conducted by the United Nations Office on Drugs and Crime noted that male and female perpetrators of intimate partner homicide seem to belong to distinct groups. Motivations typically reported by men tended to include possessiveness, jealousy and fear of abandonment, while motivations reported by women related to extended periods of suffering physical violence.[97] It has been argued that a consistent list of incident "trigger factors" (for men's violence) can be identified globally,[98] for example: a woman disobeying or arguing, a woman questioning a man about money or girlfriends, a woman not having food ready on time or in the right way, a woman being perceived to have inadequately cared for the children or the home, a woman refusing to have sex, a woman doing something without the man's permission, or a woman being suspected of infidelity.[99]

12.64 Discussing the street harassment that veiled Muslim women face, Zempi and Mason-Bish emphasise its connection to misogyny (as well as Islamophobia). They cite Fogg-Davis, who observes that street harassment, like rape, is about "asserting male dominance over women in situations where women appear vulnerable"[100] and that it indicates an imbalance of power, which is "connected to systems of patriarchy, racism and homophobia".[101]

12.65 Zempi and Mason-Bish note that for the women who participated in their study, the forced removal of the niqab was often tied to male entitlement, and the perpetrator's frustration at the inability to visualize the female body.[102] They explain that the "visibility of the niqab confounds public norms partly because of its message of sexual unavailability".[103] Insofar as the niqab might symbolise the sexual "non-availability" of

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96 C Arruzza, T Bhattacharya, N Fraser, *Feminism for the 99%* (1st ed, 2019) p 27.

97 United Nations Office on Drugs and Crime (UNDOC) *Global Study on Homicide, Gender related killings of women* (2019) p 37, available at https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf.

98 World Health Organization, *World report on violence and health* (2002) p 95, available at https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf;jsessionid=33A6FB6FC294A9079C48C6AE78D71A50?sequence=1.

99 World Health Organization, *World report on violence and health* (2002) p 95.

100 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 552 citing H Fogg-Davis, "Theorizing Black lesbians with Black feminism: A critique of same-race street harassment" (2006) 2 *Politics & Gender* 57, 65.

101 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 552 citing H Fogg-Davis, "Theorizing Black lesbians with Black feminism: A critique of same-race street harassment" (2006) 2 *Politics & Gender* 57, 74.

102 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 553.

103 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 547 citing I Zempi and N Chakraborti, Islamophobia, Victimisation and the Veil (1st ed 2014).

Muslim women in the public sphere, men may find it difficult to forgive those who disrupt the "pattern of the masculine gaze".[104]

12.66 Some of the examples of street harassment provided by veiled Muslim women in Zempi and Mason-Bish's research were also overtly hostile towards gender – invoking gendered and Islamophobic slurs such as "Muslim bitch," and "Muslim whore."[105]

12.67 More generally, this reflects what we heard from women at our meetings organised by Citizens UK. We heard accounts of women being shouted at in public places using language that objectified their bodies and appearance. We also heard that gendered slurs such as "slut", "bitch" or "slag" were directed towards them – particularly where they did not engage with the harasser.

12.68 Overt hostility and prejudice toward women's gender can also be identified in the context of online abuse of women. Amnesty International noted that;

> Sexist and misogynistic abuse against women on Twitter was highlighted by almost every woman interviewed by Amnesty International. Such abuse includes offensive, insulting or abusive language or images directed at women on the basis of their gender and is intended to shame, intimidate or degrade women. Sexist or misogynistic abuse often includes references to negative and harmful stereotypes against women and can include gendered profanity.[106]

12.69 Black women have spoken about the role that misogyny plays in the racist abuse they experience – with this blend of racism and sexism being termed "misogynoir" by Bailey and Trudy.[107] Talking about the volume of online abuse she has experienced as an MP, Diane Abbott notes:

> It's highly racialised and it's also gendered because people talk about rape and they talk about my physical appearance in a way they wouldn't talk about a man. I'm abused as a female politician and I'm abused as a black politician.[108]

12.70 This echoes comments made by UK writer Danielle Dash, as part of Amnesty International's online abuse research, noting that:

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104 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 547 citing M Franks, "Crossing the borders of Whiteness? White Muslim women who wear the hijab in Britain today" (2000) 23 *Ethnic and Racial Studies* 917.

105 H Mason-Bish and I Zempi, "Misogyny, racism and Islamophobia: Street Harassment at the Margins" (2019) 14 *Feminist Criminology* 540, 549.

106 Amnesty International, Chapter 3, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018).

107 M Bailey & Trudy, "On misogynoir: citation, erasure and plagiarism" (2018) 18 *Feminist Media Studies* 762.

108 Jessica Elgot, "Diane Abbott more abused than any other MPs during election" (September 2017) *The Guardian,* available at https://www.theguardian.com/politics/2017/sep/05/diane-abbott-more-abused-than-any-other-mps-during-election.

the violence is at the intersection of everything that I am – for example – 'I'm going to rape you, you black b*tch'. You have the misogyny, and you have the racism and you have the sexual violence all mixed up into one delicious stew of cesspit shit.[109]

Overall prevalence of crimes that are linked to prejudice or hostility towards women

12.71 In Chapter 10 we noted that prevalence has three aspects which ought to be balanced against one another. The first is "absolute prevalence", ie the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic. The second is "relative prevalence", ie the amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic, as compared with the size of the group who share the characteristic. The third is "severity" which considers the nature of the criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.

12.72 Above, we cited overwhelming evidence that women are disproportionately targeted for certain crimes. We also observed evidence, testimony and some theoretical arguments to suggest that women are victimised in these ways because of prejudice and/or hostility towards their sex or gender.

12.73 To the extent that the link between VAWG and prejudice/hostility towards women is accepted, the evidence discussed above indicates a high degree of absolute prevalence. For example, if women represent around 51%[110] of the population and 20% of women in the UK experience sexual assault in their lifetime,[111] this would currently constitute around 6.8 million women. Clearly this is a very high overall number. CSEW data also estimates that 3.1% of women (510,000) aged 16 to 59 experienced sexual assault in the year ending March 2017.[112] This is higher than the average annual incidence of hate crime (333,000) estimated by the CSEW over a two-year period – March 2016 to March 2018.[113] It is also important to note that sexual assault is only one

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109 Amnesty International, Chapter 3, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018).

110 Gov.UK, *Male and female populations* (Last updated 28 August 2020), available at https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/demographics/male-and-female-populations/latest.

111 Office for National Statistics, *Sexual Offences in England and Wales: year ending March 2017* (8 February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017; Home Office in the media, *Violence against Women and Girls Strategy Refresh fact sheet* (7 March 2019), available at https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/.

112 Office for National Statistics, *Sexual Offences in England and Wales: year ending March 2017* (8 February 2018).

113 Crime Survey for England and Wales, *Number of CSEW incidents of hate crime per twelve months, years ending March 2016 and March 2018* (2018), Appendix Table 2, available at https://www.ons.gov.uk/file?uri=/peoplepopulationandcommunity/crimeandjustice/adhocs/009335numberofcsewincidentsofhatecrimesper12monthsenglandandwales2015to2018/csewestimatesofhatecrimeyemarch201620 18..xls. This includes personal and household crime across all hate crime strands measured by the CSEW: race, religion, disability, gender identity, gender and age. This Crime Survey England and Wales figure does include specific estimates of gender-based hate crime, ie how many crimes were perceived by victims to be based on their gender. However, for the purposes of our prevalence assessment, we are considering violence against women and girls more widely, which has been linked to gender-based prejudice in the ways described above.

form of VAWG, used here by way of example. The collective prevalence of the other forms of VAWG considered above would be much higher.

12.74 We also noted that 1 in 4 (25%) women will experience some form of domestic abuse in their lifetime.[114] This statistic accounts for the size of women as a group – and indicates a notable degree of relative prevalence when it comes to domestic abuse.

12.75 The crimes and criminal contexts discussed above, for example sexual offences, FGM and domestic abuse – including domestic homicide – are also regarded as very serious offences within the criminal law of England and Wales. Therefore, the severity of VAWG is high.

Applying the demonstrable need criterion to men

12.76 We now consider the extent to which men are targeted for crime, and whether this is linked to hostility and prejudice towards their male sex or gender.

Evidence of crime against men

12.77 As well as being perpetrators in three-quarters of violent crime, men are very commonly the victims of violent crimes.[115] In the year ending March 2018, 69% of homicide victims were male.[116]

12.78 We also acknowledge that men are victims of sexual offences and domestic abuse in a minority but nonetheless substantial number of cases. 16.1% of CPS prosecutions for rape in 2018-19 involved male complainants.[117] In 2018-19, where the sex of the complainant was recorded, men constituted 17.5% of complainants in domestic abuse flagged prosecutions.[118] For the most part, sexual offences or domestic abuse cases which involve a male victim also involve a male perpetrator. We outline this in paragraph 12.80.

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114 Home Office in the media, *Violence against Women and Girls and Strategy Refresh fact sheet* (2019), available at https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/.

115 Office for National Statistics, *A summary of violent crime from the year ending March 2018, Crime Survey for England and Wales and police recorded crime* (February 2019), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/thenatureofviolentcrimeinenglandandwales/yearendingmarch2018.

116 See Office for National Statistics, *Homicide in England and Wales: Year ending March 2018* (2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2018. See also Appendix Table 4, Office for National Statistics, Appendix tables: homicide in England and Wales, 13 February 2020, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales.

117 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A25, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf. The CPS does not record the sex of complainants for sexual offences other than rape.

118 Crown Prosecution Service, *Violence Against Women and Girls Report* 2018-2019 (September 2019) A13, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

Is this criminal targeting linked to prejudice or hostility towards men's gender?

12.79 It is far less clear that these crimes are targeted because of prejudice and/or hostility towards the characteristic of men's sex or gender.

12.80 One way this is demonstrated is that perpetrators of violent crime are also likely to be male:[119]

(1) In the year beginning April 2017 and ending March 2018, 364 people were convicted of homicide; 92% were male, 8% were female.[120] In the following year ending March 2019, 250 people were convicted of homicide in England and Wales. Again, 92% were male and 8% were female.[121]

(2) Whilst men made up 17.5% of victims in domestic abuse flagged prosecutions, they were defendants in 92.1% of domestic abuse-related prosecutions in 2018-2019.[122] Women were defendants in 7.9% of prosecutions; a much smaller proportion.

(3) As we note at paragraph 12.37, where the sex of the defendant was recorded in 2018-19 rape-flagged prosecutions, 98.2% were male.[123] In relation to prosecution for sexual offences other than rape, 97.2% of defendants were male.[124]

12.81 When we applied the demonstrable need criterion to women above, we noted the wealth of research and scholarship that connects sexual offences and domestic abuse perpetrated by men against women on a micro level, to the fact that social norms and practices accept and sustain male domination and female subordination at a macro level.[125] There is no equivalent dynamic that subordinates the broad category of "men" and sustains the domination of the broad category of "women" at a macro level.[126]

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119 J Hodge, *Gendered Hate, Exploring Gender in hate crime law* (1st ed, 2011) p 10.

120 Appendix Table 26, Office for National Statistics, Appendix tables: homicide in England and Wales, (13 February 2020), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales.

121 Appendix Table 26, Office for National Statistics, Appendix tables: homicide in England and Wales, (13 February 2020), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales.

122 Crown Prosecution Service, *Violence Against Women and Girls Report 2018-2019* (September 2019) A13, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

123 Crown Prosecution Service, *Violence Against Women and Girls Report 2018-2019* (September 2019) A25. Women were defendants in 1.8% of rape prosecutions (female defendants are prosecuted for aiding, abetting or conspiring).

124 Crown Prosecution Service, *Violence Against Women and Girls Report 2018-2019* (September 2019) A29.

125 United Nations, Division for advancement of women, *The Role of Men and Boys in Achieving Gender Equality* (December 2008) p 4, available at https://www.un.org/womenwatch/daw/public/w2000/W2000%20Men%20and%20Boys%20E%20web.pdf.

126 We acknowledge that on a micro level, in the context of specific relationships, power dynamics can favour women or men.

12.82 While men are more likely to be the target of certain violent crimes in England and Wales, we are not aware of arguments to suggest they are routinely targeted because of hostility and/or prejudice towards the fact that they are men.

Overall prevalence of crimes that are linked to prejudice or hostility towards men

12.83 Above we have observed that men are disproportionately victims of violent crimes such as homicide. However, we also note that most perpetrators of these crimes are men, and that unlike with violence against women, we do not have research or testimony to support the fact that these patterns of criminal behaviour are linked to prejudice or hostility towards men's sex or gender.

12.84 Therefore, the available evidence implies a very low absolute and relative prevalence of crimes which are based on prejudice or hostility towards male gender.

Conclusion in relation to the demonstrable need criterion

12.85 There is overwhelming evidence that women and girls are targeted for certain crimes, and arguments which link this targeting to prejudice or hostility towards women's gender. We therefore consider that the demonstrable need criterion is very convincingly satisfied in relation to women, and by extension, to the characteristic sex or gender. We note, however, that there is some debate as to whether the law should limit protection solely to the female sex or gender. We consider this further at paragraphs 12.200 to 12.211.

ADDITIONAL HARM

12.86 We now turn to consider our second criterion, which requires evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the primary victim, members of the targeted group, and society more widely.

12.87 Above we have established that there is evidence to suggest women, unlike men, tend to be targeted because of hostility or prejudice towards their gender. Therefore, when considering the extent to which this gender-based targeting can cause additional harm, we will refer to women.[127]

12.88 We will consider three aspects of harm, in accordance with the way "additional harm" has been explained in Chapter 10. These aspects are:

- Increased harm to the primary victim.
- Secondary harm to members of the targeted group.
- Harm to society more widely.

[127] This is not to suggest that men do not experience harm as a result of criminal targeting. Under this heading we are considering the harm caused by targeting linked to hostility or prejudice towards gender and are therefore led by the conclusions we draw in relation to the demonstrable need criterion above. When considering the harm that crimes such as rape can cause to primary victims, we note that this could also apply to male victims.

Additional harm caused to primary victims of VAWG crimes

12.89 Here we are considering the harm caused to those who are directly victimised by gender-based criminal targeting.

12.90 When exploring the prospect of gender-based hate crime in the context of rape, Walters and Tumath cite research conducted by Iganski and Herek et al which shows that victims of racist and homophobic hate crime were more likely to report feelings of anxiety and depression for extended periods of time than differently motivated crimes. Building on this, they observe "striking similarity" in the psychological harms that primary victims of rape experience, noting that:

> both types of victimisation have far-reaching individual and social implications which can have long lasting impacts. For instance, researchers have highlighted high levels of what has been termed 'rape trauma syndrome' amongst survivors of sexual violence. This is where victims experience symptoms of emotional trauma, such as anxiety, depression or post-traumatic stress disorder (PTSD) as they relive their experience over and over again in their mind. Post-traumatic stress disorder is also common amongst victims of domestic violence.[128]

12.91 This enhanced level of harm in the context of sexual violence reflects guidance from PTSD UK, who also observe that;

> survivors of rape and other types of sexual assault are at a higher conditional risk of developing PTSD relative to survivors of other trauma types. It's estimated that up to 94% of survivors of rape or sexual assault develop symptoms of PTSD in the first two weeks after the event, leading to around 50% of victims suffering long-term symptoms.[129]

12.92 In June 2018, the NHS recognised the lifetime impact of sexual violence, announcing that victims will be entitled to a lifetime of care to help them cope with all associated trauma, observing that the damage and devastation caused by sexual violence was enormous, extremely varied and often lifelong.[130] In line with the impact of hate crimes outlined by Iganski and Herek et al, the NHS noted that:

> feelings of profound fear, terror and anxiety have been described by victims and survivors, with safety and trust being significant factors in the recovery process.[131]

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128 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 573.

129 PTSD UK, *PTSD following sexual assault or rape*, available at https://www.ptsduk.org/what-is-ptsd/who-is-affected-by-ptsd/sexual-assault/.

130 National Health Service England, *Strategic direction for sexual assault and abuse services, Lifelong care for victims and survivors 2018 – 2023* (2018) p 7, available at https://www.england.nhs.uk/wp-content/uploads/2018/04/strategic-direction-sexual-assault-and-abuse-services.pdf.

131 National Health Service England, *Strategic direction for sexual assault and abuse services, Lifelong care for victims and survivors 2018 – 2023* (2018) p 7.

12.93 Mason-Bish and Duggan also refer to research on "rape trauma" – symptoms of which include anxiety, depression, withdrawal, self-blaming and guilt,[132] with similar effects found in the context of female domestic abuse victims.[133] Although parallels between the harm caused by hate crime and gender-related victimisation haven't been explicitly studied, they observe that research into the harms of hate crime has indicated similar experiences of trauma, self-blame and enhanced fear.[134]

12.94 A 2019 study published in the British Journal of Psychiatry found that women who have been victims of intimate partner violence are at a three times higher risk of depression, anxiety and serious mental illness, such as schizophrenia or bipolar disorder.[135]

12.95 The long-lasting and serious psychological impact of other instances of violence against women and girls such as forced marriage,[136] street harassment, and online abuse has also been recognised.

12.96 An American study published in 2020 presented street harassment as a public health issue in light of its connection with anxiety, depression and disrupted sleep quality in women.[137] Amnesty International observe that almost every woman interviewed as part of their "Toxic Twitter" project spoke of the negative impact that violence and abuse on Twitter had on their mental health. This was also borne out in the online polls conducted by Amnesty, showing that the majority of women polled across 8 countries who experienced abuse or harassment on social media reported stress, anxiety, panic attacks, powerlessness and loss of confidence as a result. [138]

12.97 Therefore, there is substantial evidence that VAWG associated crimes have the capacity to cause enhanced levels of harm to victims, the majority of whom are women and girls. This coincides with the increased levels of harm associated with hate crime.

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132 H Mason-Bish and M Duggan, "Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime" (2020) 26 *International Review of Victimology* 112, 116.

133 H Mason-Bish and M Duggan, "Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime" (2020) 26 *International Review of Victimology* 112, 116.

134 H Mason-Bish and M Duggan, "Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime" (2020) 26 *International Review of Victimology* 112, 116.

135 J Chandan, T Thomas, C Bradbury-Jones, R Russell, S Bandyopadhyay, K Nirantharakumar and J Taylor, "Female survivors of intimate partner violence and risk of depression, anxiety and serious mental illness" (2019) *The British Journal of Psychiatry* 1.

136 Testimony by Khalida Salimi, *BBC News* (2013), available at https://www.bbc.co.uk/news/av/world-asia-24383856/forced-marriage-effects-very-very-long-lasting.

137 J Chandan, T Thomas, C Bradbury-Jones, R Russell, S Bandyopadhyay, K Nirantharakumar and J Taylor, "Female survivors of intimate partner violence and risk of depression, anxiety and serious mental illness" (2019) *The British Journal of Psychiatry* 1.

138 Amnesty International, *Chapter 6, Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-6/#topanchor.

Harm caused to secondary victims who share the characteristic

12.98 As we have outlined in Chapter 10, hate crime can have a collective impact on others who share the targeted characteristic – beyond harm caused to the primary victim.

12.99 Women's experiences are not homogenous and can differ markedly depending on race, gender identity, religion, sexual orientation, disability status and class.[139] However, at a broader level, it has been argued that almost all women are collectively affected by the prevalence and normalised nature of VAWG in society, even if they themselves are not primary victims.

12.100 Walters and Tumath refer to the secondary harm that hate crime can cause when they assess the case for recognising gender-based hate crime. They note that:

> The symbolic nature of hate crime means that other members of the victim's group are likely to fear that they too will be targeted… The constant fear of targeted victimisation leads to many minority group members changing the way they act in order to fit in, thus avoiding victimisation. For many, this also means avoiding certain locations and even staying at home during certain times when they feel at greatest risk.[140]

They go on to add that:

> It is unsurprising then that violence targeted specifically towards women is also likely to have the effect of instilling fear in other women that they too will be victimised.[141]

12.101 This is echoed by other hate crime academics who have considered the secondary harm that violence against women and girls can cause to women more widely. Hodge argues that:

> The consequences of gendered violence are extensive and damaging, not only to the millions of women experiencing such violence, but also to the millions of women who fear victimization.[142]
>
> Gender-bias crimes affect women collectively, similar to the way that burning a cross or vandalizing a synagogue affects an entire racial or religious community. The act does not just affect one individual; rather, it affects an entire group, making the targeted community feel fear and, sometimes, a sense of inferiority.[143]

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139 E Spelman *Inessential Woman* (1st ed 1988); K Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241, K Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *The Chicago Legal Forum* 139; A Y Davis, *Women, Race & Class* (1st ed, 1981).

140 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 574.

141 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 563, 575.

142 J Hodge, *Gendered Hate, Exploring Gender in hate crime law* (1st ed 2011) p 10.

143 J Hodge, *Gendered Hate, Exploring Gender in hate crime law* (1st ed 2011) p 13.

12.102 More recently, studies have considered the impact that fear of street harassment has on the lives of women and girls. The Hollaback! and Cornell University study on the impact of street harassment observed that over half of UK respondents reported that they had changed their clothing, taken a different route or transportation, avoided an area completely, changed the time they left an event or avoided socialising because of street harassment or the fear of street harassment occurring.[144]

12.103 This reflects what stakeholders have told us about the way in which the prevalence of violence against women and girls impacts their lives and alters their behaviour.

12.104 In addition to fear, anxiety, and feelings of vulnerability; anger, which in turn can prompt proactive behaviour, is another secondary impact that has been observed in response to hate crime.[145] This might be identified in women's collective responses to the prevalence of VAWG and society's acceptance of it.

12.105 It has manifested in women "speaking out", primarily about their experiences of sexual violence, demanding change and locating violence against women and girls in the context of intersecting systems of oppression.[146] Black women in America have been at the forefront of sexual violence activism[147] – using their testimony to bring attention to the issue of sexual violence.[148] Most recently, sexual violence activism has moved into the mainstream, with many women "speaking out" as part of the global #MeToo movement.[149]

12.106 Therefore, we consider that there is strong evidence that women are collectively impacted by the disproportionate levels of violence against women and girls, and that this group experiences secondary harm as a result.

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144 Cornell International Survey on Street Harassment, available at https://www.ihollaback.org/cornell-international-survey-on-street-harassment/#uk.

145 J Patterson, M A Walters, R Brown, H Fearn *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018). This report has also observed how anger might prompt involvement in the community pp 29 to 30. It is available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

146 D McGuire, *At the dark end of the street: black women, rape and resistance – a new history of the civil rights movements from Rosa Parks to the rise of black power* (1st ed, 2010) p 47.

147 T Lindsey, "Black Women Have Consistently Been Trailblazers for Social Change. Why Are They So Often Relegated to the Margins?" (22 July 2020) *TIME magazine*, available at https://time.com/5869662/black-women-social-change/; D McGuire, *Recy Taylor, Oprah Winfrey and the long history of black women saying #MeToo,* (8 January 2018) *The Washington Post,* available at https://www.washingtonpost.com/gdpr-consent/?next_url=https%3a%2f%2fwww.washingtonpost.com%2fnews%2fpost-nation%2fwp%2f2018%2f01%2f09%2frecy-taylor-oprah-winfrey-and-the-long-history-of-black-women-saying-metoo%2f.

148 As well as bringing attention to other issues relating to racism and civil rights, see D McGuire, *At the dark end of the street: black women, rape and resistance – a new history of the civil rights movements from Rosa Parks to the rise of black power* (1st ed, 2010) pp 35 to 36.

149 The phrase "Me too" was originally coined by Tarana Burke in 2006. For further detail on the #MeToo movement, see N Khomami, #MeToo: how a hashtag became a rallying cry against sexual harassment (20 October 2017) *The Guardian,* available at https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment.

Wider harm to society

12.107 Finally, we consider whether criminal targeting based on prejudice and hostility towards women's gender causes wider social harm. In Chapter 10, we note that hate crime can cause harm to wider society – for example by damaging the principle of equality. For the purposes of measuring this, we establish two ways that this damage might occur. Firstly, criminal targeting might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Secondly, this criminal targeting might undermine a group's equal participation in economic, social, political and cultural life. We outline ways that participation might be undermined in Chapter 10.

12.108 The extent to which VAWG violates women and girls' human rights and prevents their equal participation in society has been observed by various international organisations and instruments.

12.109 In 1993, the UN Declaration on the elimination of violence against women expressed concern that "violence against women is an obstacle to the achievement of equality, development and peace", and affirmed that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms".[150] As we noted above, the Istanbul Convention further states that violence against women has led to the prevention of the full advancement of women.[151] The Director of the United Nations Department Report Office has described violence against women "as both a cause and consequence of gender inequality".[152]

12.110 More recent empirical studies have also illustrated the impact that violence and abuse against women can have on women's equal participation. Amnesty International's "Toxic Twitter" report notes that online abuse against women, and the failure of platforms such as Twitter to respond adequately to it, "is leading women to self-censor what they post, limit or change their interactions online, or is driving women off the platform altogether"[153] and that "at times, the threat of violence and abuse against women on Twitter, alone, leads to a chilling effect on women speaking out online".[154] Diane Abbott MP notes that "there are many women, and many women of colour, who

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150 Declaration on the Elimination of Violence against Women, (proclaimed by General Assembly resolution 48/104 on 20 December 1993), available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

151 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent DisplayDCTMContent?documentId=090000168008482e.

152 S Jahan, Violence against women, a cause and consequence of inequality, *United Nations Development Programme* (November 2018), available at https://www.undp.org/content/undp/en/home/blog/2018/violence-against-women-cause-consequence-inequality.html.

153 Amnesty International, *Chapter 5, Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#topanchor.

154 Amnesty International, *Chapter 5, Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#topanchor.

don't participate online in the way that they would want to".[155] The effect of this, as Amnesty notes, is to infringe the right that women have to use Twitter equally, freely and without fear.[156] Observing the wider impact that has upon gender equality in society, Glitch[157] note that:

> Online abuse ends up preventing women and girls from accessing relevant information, expressing their opinions and participating in public debates which in turn negatively impacts on both progress towards gender equality and our democracy.[158]

12.111 In the UK context, women's equal access to education and housing is limited by violence against women and girls – with women often having to leave their accommodation because of domestic abuse,[159] or dropping out of workplaces and educational settings because of sexual violence.[160] This has also been observed in the context of sexual harassment in public places – a small number of respondents in the Hollaback! and Cornell research reported that they had resigned a job, skipped work or even moved cities because of street harassment.[161]

12.112 We therefore consider there is very convincing evidence to suggest that criminal targeting based on hostility or prejudice towards women and girls can cause significant harm to the social value of equality and can prevent women's equal participation in society.

Conclusion in relation to the additional harm criterion

12.113 Above we have outlined convincing evidence that criminal targeting linked to gender-based prejudice and hostility can cause additional harm to primary victims of the

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155 Amnesty International, *Chapter 5, Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#topanchor.

156 Quote included in Amnesty International, Chapter 5, *Toxic Twitter – a Toxic Place for Women in Online Violence Against Women* (March 2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#topanchor.

157 Glitch is an organisation that works towards ending online abuse through hosting workshops on Digital Citizenship and Digital Self-Care, working with other organisations to highlight the impact of online gender based violence, as well as being involved in campaigning, see https://fixtheglitch.org/about/.

158 Glitch, *Impact of Online Abuse*, available at https://fixtheglitch.org/impactofonlineabuse/.

159 Safe Lives, *Safe at Home, Homelessness and domestic abuse* (May 2018) p 18 http://safelives.org.uk/sites/default/files/resources/Safe_at_home_Spotlight_web.pdf; St Mungo's, *Rebuilding Shattered Lives* (2014) p 11. https://www.mungos.org/app/uploads/2017/12/Rebuilding_Shattered_Lives_2014.pdf; K Reeve, R Casey, R Goudi, *Homeless Women: Still being failed yet striving to survive* (2006) p 40 http://www4.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/homeless-women-striving-survive.pdf.

160 Revolt Sexual Assault and The Student Room, *Sexual violence at universities statistical report* (2018), available at https://revoltsexualassault.com/wp-content/uploads/2018/03/Report-Sexual-Violence-at-University-Revolt-Sexual-Assault-The-Student-Room-March-2018.pdf. This research uses a sample of 4491 students and recent graduates. It found that 25% of students had skipped lectures, classes or changed modules to avoid perpetrators of sexual assault, 16% had suspended their studies or dropped out completely.

161 Cornell International Survey on Street Harassment, available at https://www.ihollaback.org/cornell-international-survey-on-street-harassment/#uk.

targeting, to others who share the characteristic – namely women and girls, as well as to wider society.

SUITABILITY

12.114 We now turn to consider the suitability criterion. As we set out in Chapter 10, the aim of this criterion is to consider whether hate crime based on the relevant characteristic would fit logically within the broader offences and sentencing framework and prove workable in practice. This criterion also assesses whether hate crime might produce harmful consequences, whether it would represent an efficient use of relevant resources and whether the characteristic or group is consistent with the rights of others. We will only raise suitability concerns where they are relevant to the characteristic being considered. For example, the question of whether gender/sex is consistent with the rights of others is not engaged.

12.115 In the specific context of gender/sex, assessment of the suitability criterion will be broken down into three parts:

(1) Suitability concerns relating to the introduction of gender or sex-based hate crime protection.

(2) Ways these suitability concerns might be mitigated.

(3) Further suitability concerns which arise from the attempts made in (2).

1. Suitability concerns relating to the introduction of gender-based hate crime protection

Potentially harmful consequences

12.116 We have identified two potentially harmful consequences that might flow from recognising sex or gender-based hate crime, both of which might damage progress that has been made in relation to society's understanding of VAWG and cause harm to survivors of VAWG more directly. Both are considered directly below.

Disrupting understandings of VAWG as inherently misogynistic

12.117 Firstly, in a stakeholder meeting, the Fawcett Society argued that all sexual and domestic abuse offences committed by men against women should be understood as inherently misogynistic. However, there is a risk that sex or gender-based hate crime laws might disrupt this understanding. This is because they would require juries to seek express evidence of misogyny in these contexts – potentially casting some offences as "non-misogynistic" where there is insufficient evidence of this.

12.118 Therefore, the Fawcett Society argued, it would be inappropriate and potentially damaging to apply a gender-based hate crime aggravation in the context of sexual offences and domestic abuse. To do so may forge an artificial distinction between "misogynistic" and "non-misogynistic" sexual offences or domestic abuse against women.

Creating hierarchies of sexual violence

12.119 The second potentially harmful consequence relates to hierarchies of sexual violence, which may be structured around rape myths. Rape myths are "widely held but false beliefs about rape, the nature of it, and the circumstances".[162] Research has explored the notable influence that rape myths have in the legal context,[163] including 21st century English trials for rape and sexual assault.[164] Rape myths often have the effect of minimising the violence women experience, as well as undermining victims' credibility.[165] One prominent rape myth is that there is a "real"[166] version of rape against which other rapes should be measured and compared.[167] If a rape lacks certain features, for example, additional physical violence, weapons, or a perpetrator who is unknown to the victim, then the "real rape" myth can mean it is less likely to be accepted as genuine.[168] This contributes to a hierarchy of rape and sexual offences. Academics have spent many years[169] attempting to expose and deconstruct these ideas. Specialist VAWG support providers also spend a significant amount of time unpicking rape myths such as these with service-users – especially victim-survivors – and the wider community.[170]

12.120 There is a risk that implementing laws concerning sex or gender-based hate crime in the context of sexual offences might have the unintended consequence of contributing to damaging myths about "real rape". The reason for this is twofold:

(1) The test that is currently used as part of the legal hate crime framework would require proof that the offence was motivated by or the defendant demonstrated hostility towards (in this context) the victim's sex or gender.[171] Legal tests which

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162 J Temkin, J M Gray, J Barrett, "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study" (2018) 13 *Feminist Criminology* 205.

163 J Temkin and B Krahé, *Sexual Assault and the Justice Gap-A Question of Attitude* (1st ed 2008).

164 J Temkin, J M Gray, J Barrett, Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study (2018) 13 *Feminist Criminology* 205.

165 J Temkin, J M Gray, J Barrett, Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study (2018) 13 *Feminist Criminology* 205.

166 S Estrich, *Real Rape* (1st ed, 1987).

167 Rape Crisis England and Wales website, available at https://rapecrisis.org.uk/get-informed/about-sexual-violence/myths-vs-realities/.

168 L Ellison and V Munroe, "Better the Devil You Know? Real Rape Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations" (2013) 17 *International Journal of Evidence of Proof* 299, 301.

169 The term "real rape" was used by Susan Estrich in 1987, see S Estrich, *Real Rape* (1st ed 1987). More widely, Brownmiller and Burt acknowledged the influence of rape myths in society in 1975 and 1980 respectively, see S Brownmiller, *Against our will: Men, women and rape* (1st eds 1975) and M Burt, Cultural myths and support for rape, 38 *Journal of Personality and Social Psychology* 217.

170 See for example, Rape Crisis South London, *Give and Get Consent, A resource for teaching sexual consent to Key Stages 3 and 4*, available at http://www.rasasc.org.uk/wp/wp-content/uploads/2013/11/Give-n-Get-Consent-A-resource-for-teaching-sexual-consent-to-key-stages-3-and-4.pdf.

171 Proving a defendant's motivation is often very difficult, see M Walters, S Wiedlitzka, A Owusu-Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 117, available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20-%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf. In practice, prosecutors are more likely to focus on the "demonstrated hostility" provision, see E Burney and G Rose, *Racist Offences – how is*

require "hostility" are said to conform to what has been described as the "animus" model for hate crime laws.[172]

(2) It has been observed that if the animus test were to be applied to sexual offences such as rape, it is most likely to be satisfied in "high profile" cases,[173] involving a high degree of physical violence in addition to the rape, serial offenders, or perpetrators who are unknown to victims.[174] This has led some to canvass the use of gender-based hate crime in a "small set of unusual cases"[175] which have these features. However, it is precisely these features that have traditionally been elevated as part of the "real rape" myth referred to above.

12.121 On the topic of hierarchies, we also note that some stakeholders representing LGBT victims also raised the concern that elevating "misogynistic sexual offences" or "misogynistic domestic abuse", might give the impression that sexual offences or domestic abuse committed by opposite sex perpetrators are more serious than those committed by same sex perpetrators.

Difficulties related to proving the aggravation

12.122 Difficulties of proof are well-documented in the context of sexual offences – in the year ending March 2019 there were 58,657 rapes reported in the UK but there were only 1,925 successful prosecutions.[176] Attempting to also prove a gender-based aggravation may compound the prosecution's difficulties and further complicate rape trials, which can already have a re-traumatising impact on VAWG survivors.[177]

12.123 Even if explicit gender-based hostility is present in a specific case, for example if the defendant has used a gendered slur in the course of committing a sexual offence – it may be difficult to prove this to the criminal standard of proof because sexual offences often take place in private without witnesses.

12.124 Beyond this, we have also considered arguments which locate sexual and domestic violence in deep-rooted and widely-held prejudices about women. We discuss this at paragraphs 12.54 to 12.63. For example, the Committee for the Elimination of

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the law working (Home Office Research Study 244, July 2002) p 13, available at https://lemosandcrane.co.uk/resources/HO%20-%20racist%20incidents%20how%20is%20the%20law%20working.pdf.

172 See Chapter 15 at paras 15.19 to 15.21.

173 J M Maher, J McCulloch and G Mason, "Punishing Gendered Violence as Hate Crime: Aggravated Sentences as a Means of Recognising Hate as Motivation for Violent Crimes against Women" (2015) 41 *Australian Feminist Law Journal* 177, 182.

174 J Maher, J McCulloch and G Mason, "Punishing Gendered Violence as Hate Crime: Aggravated Sentences as a Means of Recognising Hate as Motivation for Violent Crimes against Women" (2015) 41 *Australian Feminist Law Journal* 177, 182.

175 J Maher, J McCulloch and G Mason, "Punishing Gendered Violence as Hate Crime: Aggravated Sentences as a Means of Recognising Hate as Motivation for Violent Crimes against Women" (2015) 41 *Australian Feminist Law Journal* 177, 192.

176 Her Majesty's Crown Prosecution Service Inspectorate, *Rape Inspection 2019* (December 2019) p 7, available at https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2019/12/Rape-inspection-2019-1.pdf.

177 C Waxman, *The London Rape Review* (July 2019) p 14, available at https://www.london.gov.uk/sites/default/files/vcl_rape_review_-_final_-_31st_july_2019.pdf.

Discrimination Against Women argued that gender-based violence is rooted in factors "such as the ideology of men's entitlement and privilege over women" and "the need to … assert male control or power".[178] However, the current test for hate crime – which focuses on hostility – does not capture wider prejudice.

12.125 Even if the test for hate crime were reformed to include "motivated by prejudice" – a prospect we consider in Chapter 15 – it is not clear how conceptual ideas about gender-based prejudice would translate in the context of a criminal trial. These ideas might require that juries be given wider explanations of inequality and the power imbalances that exist in society. Whilst this might provide space to discuss and in turn tackle the gender-based prejudice that arguably underpins many VAWG-associated offences, it is not clear to what extent juries are likely to accept these arguments.[179] Perry notes:

> For lay people, for law enforcement, they don't really understand what ideology is. They don't understand that patriarchy and misogyny are ideologies, are world views. They think they're individual attitudes, and that's very different.[180]

12.126 Even if arguments about the prejudicial underpinning of VAWG were to be accepted, the prosecution would still have to prove the presence of these prejudices in specific cases – every instance of sexual or domestic violence would not be presumed to be a gender-based hate crime.[181] Proving that these prejudices were present might be very difficult, unless the defendant expressly articulated them, which might be unlikely given their ingrained and normalised nature. As a result, even if the legal test for hate crime were reformed to include prejudice, similar issues of proof may apply in this context. Walters and Tumath also point out that there may often be a variety of factors at play when sexual offences are committed which makes it difficult to prove specific motivations.[182]

12.127 Finally, potentially arbitrary and harmful distinctions might be created when it comes to proving that the offence was motivated by prejudice of this nature. For example, if the prosecution argues that a male defendant targeted a woman for a sexual offence because of gender-based prejudice, and there is evidence the perpetrator has targeted both men and women in the past, it might be harder to prove prejudice towards the woman's gender on that occasion, than it would be if the defendant had exclusively targeted women in the past.

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178 Committee on the Elimination of Discrimination Against Women, General Recommendation No 35 on Gender-based violence against Women, 7/19 at para 19.

179 On the admissibility of such expert counterintuitive evidence, see, for example L Ellison, Closing the credibility gap: "The prosecutorial use of expert witness testimony in sexual assault cases" 9 *International Journal of Evidence and Proof* (2005) 239; P Lewis, "Expert evidence of delay in complaint in childhood sexual abuse prosecutions" 10 *International Journal of Evidence and Proof* (2006) 157.

180 E Renzetti, "Violent misogyny is a threat to half our population. We need to call it what it is: Terrorism" (November 2019) *The Globe and Mail*, available at https://www.theglobeandmail.com/opinion/article-violent-misogyny-is-a-threat-to-half-our-population-we-need-to-call/.

181 By contrast, Gaffney has argued that rape cases against women should contain a rebuttable presumption of gender animus, see J Gaffney, "Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases" (1997) 6 *Journal of Law and Policy* 247, 264.

182 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm", (2014) 77 *Modern Law Review* (2014) 563, 586.

Issues relating to resources

Existing funding limits in the context of hate crime

12.128 Recognising gender as a protected characteristic has the potential to increase the scope of hate crime in England and Wales. Data explored above, from sources such as the Crime Survey England and Wales and the CPS VAWG report, demonstrate the scale of crimes which disproportionately affect female victims. However, it is not clear how much of this offending would be captured by gender-based hate crime. This might depend in part on whether the test for hate crime retains its exclusive focus on hostility. We discuss the test in Chapter 15.

12.129 Data from the Nottingham Misogyny Hate Crime Evaluation Report suggests that recording misogyny hate crime did not result in a surge of reporting. As we outlined above, between April 2016 and March 2018, 174 women reported misogyny hate crimes. 73 of these were classified as crimes and 101 as incidents.[183] However, this evidence only applies to one police force. It is difficult to predict national reporting from this limited data.

12.130 In any case, recognising gender-based hate crime is likely to have a notable cost attached to it. Throughout our pre-consultation process, various stakeholders have told us that hate crime resources are already limited, in terms of victim support, law enforcement and prosecution capacity. The number of hate crime cases sent to the CPS by the police fell in 2018-19, as did the number of prosecutions.[184] Stakeholders were therefore concerned that extending hate crime laws to such a potentially large group would need to be matched by adequate additional funding.

12.131 Further, some participants in Gill and Mason-Bish's qualitative study about gender-based hate crime expressed concern that the problems hate crime has encountered might also affect VAWG if the two sectors were mixed. One participant noted that the "VAW label" [185] can secure specialist funding for services such as Sexual Assault Referral Centres, rape crisis centres, and refuges[186] but the hate crime label "has not led to any benefits for those victimised".[187]

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183 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report*, (Nottingham's Women's Centre 2018) p 3, available at https://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf.

184 Crown Prosecution Service, *Hate Crime Annual Report 2018-2019*, p 8, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

185 A Gill and H Mason-Bish, "Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities" (2013) 105 *Feminist Review* 1, 12.

186 A Gill and H Mason-Bish, "Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities" (2013) 105 *Feminist Review* 1, 12.

187 A Gill and H Mason-Bish, "Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities" (2013) 105 *Feminist Review* 1, 12. Gill and Mason-Bish did however note that participants who opposed recognising gender in hate crime laws were in the minority. Those who opposed tended to focus on practical issues rather than suggesting that gender was somehow different to any other hate crime category.

The most efficient use of VAWG resources?

12.132 More fundamentally, we might question whether the increased cost attached to gender-based hate crime is the most efficient use of VAWG resources in order to achieve aims such as reducing and preventing VAWG, as well as protecting women and girls and supporting VAWG survivors.[188] VAWG resources, whilst exceeding allocated hate crime resources, are also limited.

12.133 For example, support services for survivors of sexual and domestic violence are under enormous strain with the result that women and girls are turned away from services daily. In the UK, it is estimated that 1 in 6 refuges have closed since 2010.[189] A 2017 investigation by the Bureau of Investigative Journalism also found that out of the 40 UK refuge managers they surveyed, 38 said that they had to turn away victims of domestic abuse in the past six months.[190] In 2018, Women's Aid surveyed the cases of 404 women working with No Woman Turned Away (NWTA) caseworkers.[191] Of the 404 women supported by the NWTA caseworkers, only 103 (26%) were accommodated in a suitable refuge space.

12.134 This strain has been particularly felt by smaller, specialist services over the last decade.[192] The head of policy, research and fundraising at Southall Black Sisters[193] recently expressed fear that following the COVID-19 crisis:

> we're worried councils aren't going to have money to commission charities like us which specialise in helping black, Asian and minority ethnic women who've experienced violence.[194]

12.135 In this light, one argument might be that resources for tackling violence against women and girls would be more efficiently spent on increasing access to support services for

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188 These aims formed part of the Government's Ending Violence Against Women and Girls Strategy 2016-2020, see Home Office, *Ending Violence Against Women and Girls Strategy 2016-2020* (March 2016).

189 M Oppenheim, Government criticised for failing to provide sustainable funding solution to domestic abuse refuges (22 October 2019) *The Independent*, available at https://www.independent.co.uk/news/uk/home-news/domestic-abuse-refuges-government-funding-announcement-a9166691.html.

190 M McClenaghan and J Andersson, "Domestic violence, Revealed: Thousands of vulnerable women turned away as refuge funding is cut" (October 2017) *The Bureau of Investigative Journalism*, available at https://www.thebureauinvestigates.com/stories/2017-10-16/a-system-at-breaking-point.

191 Women's Aid, *Nowhere to turn, Findings from the first year of the no woman turned away project* (2017), available at https://www.womensaid.org.uk/research-and-publications/nowomanturnedaway//.

192 For concerns surrounding the sustainability of smaller, black and minority ethnic (BME) ending violence against women and girls organisations see Imkaan, *The State of the Sector: Contextualising the current experiences of BME ending violence against women and girls organisations* (2015), available at https://www.sistersforchange.org.uk/wp-content/uploads/2019/03/100-State-of-the-sector.pdf. See also, Imkaan, *Capital losses, the state of the specialist BME ending violence against women and girls sector in London* (2016), available at https://trustforlondon.fra1.digitaloceanspaces.com/media/documents/Capital-Losses-Imkaan-April-2016.pdf.

193 Southall Black Sisters is an advice, advocacy and resource centre for black and minority ethnic women.

194 "Southall Black Sisters 'worried about funding after Covid-19'", *Eastern Eye* (7 May 2020), available at https://www.easterneye.biz/southall-black-sisters-worried-about-funding-after-covid-19/. We note that Southall Black Sisters have reportedly backed calls to recognise "misogyny hate crime", see M Oppenheim, "Police forces should immediately record misogyny as hate crime, says campaigner as Labour mayors back plan" (7 July 2020) *The Independent.*

all survivors, particularly survivors who encounter additional barriers to access such as BAME survivors or migrant survivors.[195]

12.136 Given that the deterrence value of longer sentences has been questioned,[196] resources to tackle VAWG might also be more efficiently spent on perpetrator programmes aimed at preventing VAWG, or educational programmes aimed at tackling the prejudicial social norms that arguably underpin VAWG.

Whether hate crime is an appropriate way to characterise the offending

12.137 We might also question whether gender-based hate crime is an appropriate way to characterise the nature of the offending in the domestic abuse context.

12.138 We have heard suggestions that it is perhaps too reductive to apply the hate crime framework to the complex nature of motivations that occur in the domestic abuse context. This view suggests that domestic abuse involves control and coercion within the dynamics of a specific relationship, and frames abuse as intimate partner violence rather than gendered violence perpetrated by men against women. This is reflected by the fact that men can be victims of domestic abuse perpetrated by other men or by women, as well as the fact that women can experience domestic abuse perpetrated by other women.[197] Giving evidence to a Scottish working group on hate crime, a representative from the Scottish Executive's Violence Against Women Unit is reported to have said:

> The Unit's view is that domestic violence is abuse of power within a relationship, whereby a man seeks to exert his power over a female partner but does not generally abuse other women. Therefore, the Unit does not view domestic violence as a hate crime.[198]

12.139 Expanding on this view, the victim's gender might be considered incidental in situations of domestic abuse. It might be argued that on a micro level, the perpetrator has chosen to exploit power dynamics within their specific relationship and abuse their partner, who may happen to be a woman, but that this does not necessarily reflect the perpetrator's attitudes about, or behaviour towards, women in general.

12.140 However, at a stakeholder event, a representative from Women's Aid argued that society's increased understanding of domestic abuse as an overwhelmingly gendered

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195 For example, migrant survivors might face additional practical barriers where they have No Recourse to Public Funds (NRPF).

196 This point applies generally, and in the specific context of hate crime, see J Chalmers and F Leverick, *A Comparative Analysis of Hate Crime Legislation* (University of Glasgow, 2017) pp 36 to 38, available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf.

197 As we outline at paras 12.39 to 12.43 above, domestic abuse is overwhelmingly perpetrated by men against women.

198 Scottish Executive, *Working Group on Hate Crime Report* (2004) p 27 at para 5.35, available at https://www2.gov.scot/Resource/Doc/26350/0025008.pdf. For further discussion of this view, see H Mason-Bish, "We need to talk about women: Examining the place of gender in hate crime policy" in *Responding to Hate Crime: The Case for Connecting Policy and Research* (2014) p 169.

crime had represented a sign of progress. Attempts to individualise domestic abuse in the way described directly above might threaten such progress.

Double counting

12.141 We also acknowledge that sentences for sexual offences are already long in England and Wales, which reflects the seriousness of these offences. It might be argued that the length of these sentences implicitly accounts for the fact that in many cases they are targeted towards women. If this is the case, then there is a risk that by also using a gender-based aggravation to increase a defendant's sentence, we could be "double counting" insofar as the defendant's culpability is concerned.

2. Attempting to mitigate these suitability concerns

12.142 We take the concerns raised above very seriously and would not want to propose something that could prove more harmful than beneficial to efforts to tackle violence against women and girls, or indeed the existing hate crime framework.

12.143 Many of the issues discussed above are closely linked to sexual offences[199] and domestic abuse. This raises questions as to whether these crimes and criminal contexts should be excluded from gender-based aggravation, if sex or gender is to be recognised as a hate crime category. These questions also apply to other offences that are overwhelmingly gendered, for example offences of FGM and Forced Marriage.

12.144 Importantly, there is precedent for carving sexual offences out of sentencing aggravations for gender-based hate crime. The United States Sentencing Commission Guidelines provide for sentencing adjustments where a defendant selected a victim or property because of: "the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person."[200] However, the application notes that accompany this sentencing adjustment state that this adjustment must not be applied:

> on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the … offense guideline.[201]

12.145 This seems to suggest that the gendered nature of sexual offences is already reflected in the (federal) sentencing provisions which apply to them.

12.146 We also identified a similar carve out in New Jersey's bias intimidation provisions which are found in section 16-1, subsection a. of the Code of Criminal Justice. These

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199 Here we are referring to substantive sexual offences as opposed to threatened sexual offences. As we have highlighted at footnote 115 above, our 2015 report on Offences Against the Person recommended that the offence of threats to kill under the Offences Against the Person Act 1861 should be extended to cover threats to rape. If this reform were to be implemented, it would be necessary to consider whether the concerns highlighted in the context of rape and gender-based hate crime also apply to rape threats.

200 United States Sentencing Commission Guidelines, Chapter 3 – Adjustments, Part A – Victim-related adjustments, §3A1.1(a), (2018), available at https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-3#NaN. These guidelines apply only to federal crimes. In the terms explained in Chapter 15 at para 15.83 to 15.88, this is a "by reason of" test.

201 United States Sentencing Commission Guidelines, Chapter 3 – Adjustments, Part A – Victim-related adjustments, §3A1.1, Application Notes, 1. (2018), available at https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-3#NaN.

provisions create a separate crime of bias intimidation if a defendant commits one of a specified list of statutory offences with

> (1) a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity; or
>
> (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.[202]

12.147 Subsection d. then goes on to establish a:

> Gender exemption in sexual offense prosecutions. It shall not be a violation of subsection a. if the underlying criminal offense is a violation of chapter 14 of [the Code of Criminal Justice] of the New Jersey Statutes and the circumstance specified in paragraph (1), (2) or (3) of subsection a. of this section is based solely upon the gender of the victim.

Chapter 14 of the Code of Criminal Justice contains sexual offences.

12.148 Hodge has conducted research which seeks to explore the reasons for a carve out of this nature. The majority of those who were interviewed by Hodge as part of the research – including investigators, prosecutors, and interest group members – suggested that gender-motivated sexual assaults were exempted from the bias statute for pragmatic reasons.[203]

12.149 For example, Hodge reported the view of one interviewee – "Maybe [the legislators are] saying, it looks like it would be a gender crime most of the time, so we're going to eliminate that".[204] Another interviewee noted that recognising gender-motivated sexual offences could be akin to a "run-away train" [205] owing to its size and scope.

12.150 Half of those interviewed by Hodge also argued that gender-motivated sexual assaults were exempted because there were already laws to address those crimes, and the

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202 New Jersey Revised Statutes § 2C:16-1 (2013).

203 J Hodge*, Gendered hate, Exploring Gender in hate crime* (1st ed, 2011) p 57.

204 J Hodge, *Gendered hate, Exploring Gender in hate crime* (1st ed, 2011) p 55.

205 J Hodge, *Gendered hate, Exploring Gender in hate crime* (1st ed, 2011) p 56.

penalties associated with the offences were already severe. Again, this feeds into some of the concerns we have explained above concerning "double counting".

12.151 Even if sexual offences and the other specific crimes/contexts referred to in paragraph 12.143 were to be excluded from gender-based aggravation, a gender-based hate crime category might still carry wider benefits. A significant focus of some stakeholders and members of the public has been the gendered harassment that women face on the street,[206] as well as the considerable amount of online abuse that is disproportionately targeted against women.[207] Another benefit that would arguably be retained is the symbolic, declaratory impact of recognising gender-based hostility and prejudice in law.

12.152 At the same time, we acknowledge that excluding sexual offences and domestic abuse from the ambit of gender-based hate crime would not be without problems. Carving these offences and contexts out of gender-based hate crime's scope may in turn create further suitability issues. We discuss these under Section 3 of the suitability heading below.

12.153 Before moving on to consider any suitability issues that might be raised by a carve out of this nature, we think it is useful to outline how a carve out might work, using sexual offences and the domestic abuse context as primary examples. We also acknowledge that the aggravated offences and enhanced sentencing regimes may require different approaches.

Carving sexual offences out of gender-based hate crime

12.154 It is necessary to consider aggravated offences and enhanced sentencing separately when contemplating how a carve-out of sex or gender-aggravated sexual offences might work.

Aggravated offences

12.155 The existing aggravated offences regime is set out in sections 28 to 32 of the Crime and Disorder Act 1998 ("CDA 1998"). The CDA 1998 only currently allows for aggravation on the basis of hostility towards race or religion and it applies to specified offences. None of these is a sexual offence.

12.156 In Chapter 16 we propose that the aggravated offences regime should be extended to apply to all protected characteristics.[208] This includes the characteristics currently protected by the enhanced sentencing regime: sexual orientation, transgender status and disability, as well as any other characteristics that we propose ought to be given explicit hate crime protection, which may now include sex or gender. We also consider the possibility of adding sexual offences to the list of offences that could be aggravated

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206 At a stakeholder event we heard from the founders of Our Streets Now, who are separately campaigning for street harassment to be made a distinct crime.

207 Abusive and Offensive Online Communications: A Scoping Report (November 2018) Law Com No 381.

208 See Chapter 16, para 16.38.

– though we provisionally suggest that these offences are not among the best candidates.[209]

12.157 However, if both reforms are pursued, new offences – for example sexual assault aggravated on the basis of sex or gender – would be created, unless steps were taken to explicitly exclude this possibility.

12.158 In order to consider how to achieve this, it is useful to consider the structure of the aggravated offences currently set out in the CDA 1998. One example is the section 29 offence of [Racially or religiously aggravated] assaults:

> A person is guilty of an offence under this section if he commits—
>
> > an offence under section 20 of the Offences Against the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
> >
> > an offence under section 47 of that Act (actual bodily harm); or
> >
> > common assault
>
> which is [racially or religiously aggravated] for the purposes of this section.

12.159 To exclude sexual offences from gender-based aggravation, it would be necessary for the statutory section that addresses sexual offences to adopt a more restrictive title. For example, Sexual Offences [aggravated on the basis of race, religion, sexual orientation, disability, or transgender status].[210] A person would be guilty of this aggravated offence if he or she commits one of the listed offences under the Sexual Offences Act 2003, aggravated by race, religion, sexual orientation, disability, or transgender status. As a result, there would be no provision for sexual offences aggravated on the basis of gender.

Enhanced sentencing

12.160 Enhanced sentencing under sections 145 and 146 of the Criminal Justice Act 2003 ("CJA 2003") is the second legal mechanism by which hate crime sentence aggravations operate. These provisions may be applied to all criminal offences, except those that have aggravated versions under the Crime and Disorder Act 1998.[211] If sex

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209 This option of adding sexual offences to the list of offences capable of being aggravated was proposed by the 2017 Sussex University's 'Options for Law Reform' report, if the law's current regime of separate aggravated offences and enhanced sentencing were retained. See MA Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 198, available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20-%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

210 In the event that other offences relating to Forced Marriage or FGM were added to the list of offences that could be aggravated, the same mechanism would have to be employed.

211 However, as we note in Chapter 17, following the case of *R v O'Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11, even for offences that have aggravated versions under the Crime and Disorder Act 1998, there may be circumstances where a sentence enhancement can be applied to the base version of the offence if the prosecution has not charged the aggravated offence.

or gender was recognised as a hate crime characteristic, it would be captured by the enhanced sentencing regime.[212]

12.161 The CJA 2003 deals with racial or religious aggravation separately to aggravation based on sexual orientation, disability and transgender status. Racial or religious aggravation is dealt with in section 145 of the CJA 2003, and the remaining characteristics are dealt with in section 146 of the CJA 2003.

12.162 Section 145 is entitled "increases in sentences for racial or religious aggravation". Section 145(1) states that "where a court is considering the seriousness of an offence *other than one under sections 29 to 32 of the Crime and Disorder Act 1998* and that offence is racially or religiously aggravated, it must treat this as an aggravating factor, and the aggravation must be stated in open court".

12.163 The effect of section 145(1) is therefore to exclude several offences from the application of the enhanced sentencing regime, with this exclusion applying only to racially and religiously aggravated offences. The reason for this is that the excluded offences are already aggravated in the CDA 1998, which only applies to race or religion, not sexual orientation, transgender status or disability. If the aggravated offences regime were extended to all existing characteristics,[213] this exclusion would apply to all characteristics, not just race and religion.

12.164 Section 145(1) therefore contains a carve-out that applies to specific characteristics and offences. This could be mirrored to address a different issue – preventing the application of enhanced sentences to sexual offences, or offences relating to FGM and forced marriage where these involve hostility towards gender (or where they are motivated by prejudice, if the test is changed).[214]

12.165 The enhanced sentencing regime for sex or gender could therefore be addressed in a separate statutory section; with race, religion, sexual orientation, transgender status and disability addressed together in another statutory section.

12.166 As well as excluding offences already aggravated by gender, the separate statutory section addressing "increased sentences based on sex or gender-based aggravation" could make it clear that the section applies to offences other than those under the Sexual Offences Act 2003, offences under the Female Genital Mutilation Act 2003 ("the 2003 Act"), as amended by the Serious Crime Act 2015, and the offence of forced marriage contrary to section 121 of the Anti-Social Behaviour, Crime and Policing Act 2014 (as well as the criminal offence of breaching a civil forced marriage protection order – contrary to section 63CA of the Family Law Act 1996).

Carving the Domestic abuse context out of gender-based hate crime

12.167 Domestic abuse is not a singular crime or a set of crimes. Rather, it constitutes a criminal context. Many offences can be committed in this context, for example, stalking, harassment, assault, communications offences, offences that involve inflicting bodily harm, murder, rape or sexual assault – this list is not exhaustive. Crucially, these

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212 See Chapter 17 for further discussion in relation to the enhanced sentencing regime.

213 As we propose in Chapter 16 at para 16.39.

214 This is something we consider in Chapter 15.

offences can also be committed outside the context of domestic abuse. Owing to the high number of offences that might be committed in this context, and the fact they are not exclusively tied to the domestic abuse context, a specific statutory carve out is more complicated.

12.168 The only criminal offence that is exclusively tied to the domestic abuse context is the offence of "controlling or coercive behaviour in an intimate or family relationship", found in section 76 of the Serious Crime Act 2015. In 2018, 308 prosecutions[215] were brought for this offence. This is much lower than the 78,624 domestic abuse-flagged prosecutions brought by the CPS in 2018-2019.[216] The criminal offence of breaching a non-molestation order found in section 42A of the Family Law Act 1996 is also closely connected to the domestic violence context. It would be possible to exclude both offences from the aggravated offences and enhanced sentencing regime in one of the ways described directly above in the context of sexual offences.

12.169 At the time of writing there is no specific statutory definition of domestic abuse. However, the Domestic Abuse Bill 2019-21 will introduce a definition of domestic abuse. This is set out in Part 1, Clause 1 of the Bill[217] as follows:

Definition of "domestic abuse"

(1) This section defines "domestic abuse" for the purposes of this Act.

(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—

(a) A and B are each aged 16 or over and are personally connected to each other, and

(b) the behaviour is abusive.

(3) Behaviour is "abusive" if it consists of any of the following—

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse (see subsection (4));

(e) psychological, emotional or other abuse;

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215 Ministry of Justice, Criminal Justice System Statistics: *Outcomes by Offence 2008 to 2018: Pivot Table Analytical Test for England and Wales. Time Period 12 months ending December 2008 to 12 months ending December 2018,* (2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802314/outcomes-by-offence-tool-2018.xlsx

216 Crown Prosecution Service, Violence Against Women and Girls Report 2018-19 (September 2019) p 9, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

217 Domestic Abuse Bill, available at https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124.pdf.

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to—

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services

12.170 Clause 2 of the Domestic Abuse Bill goes on to establish what is meant by "personally connected" in clause 1(2)(a).

12.171 Hate crime law might therefore make use of this definition, for the purposes of employing a gender-based carve out. We explain this in relation to aggravated offences and enhanced sentences below.

Aggravated offences

12.172 As we have noted above, the aggravated offences regime creates new statutory offences – at present, racially and religiously aggravated versions of specific base offences.

12.173 In order to create a domestic abuse carve out, the law might include a section stating that the relevant base offence "cannot be aggravated on the basis of gender if the offence has been committed in the context of domestic abuse". Domestic abuse would then be further defined with reference to the definition set out in the Domestic Abuse Act (assuming the Domestic Abuse Bill will receive royal assent).

Carving domestic abuse out of enhanced sentencing

12.174 We note at paragraph 12.165 that the enhanced sentencing regime for sex or gender could be addressed in a separate statutory section; with race, religion, sexual orientation, transgender status and disability addressed together in another statutory section.

12.175 We also note above that the separate statutory section addressing "increased sentences based on sex or gendered aggravation" could make it clear that the section applies to offences other than those under the Sexual Offences Act 2003,[218] for example:

> This section applies where the court is considering the seriousness of an offence other than one under the Sexual Offences Act 2003.

12.176 In order to carve out the context of domestic abuse, we would add "or one committed in the domestic abuse context". Domestic abuse would then be further defined with reference to the definition set out in the Domestic Abuse Act (assuming the Domestic Abuse Bill will receive royal assent).

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[218] As well as other overwhelmingly gendered offences such as offences under the Female Genital Mutilation Act 2003, and the offence of forced marriage contrary to section 121 of the Anti-Social Behaviour, Crime and Policing Act 2014.

3. Suitability issues raised as a result of the carve out

12.177 As we have suggested above, although a gender-specific carve out for sexual offences and domestic abuse might address the suitability concerns identified in Section 1, the carve out would, in turn, create additional suitability concerns. We consider these below.

The symbolic value of the law

12.178 If aggravation on the basis of gender or sex is not available in these contexts, this might send a message to sexual offence or domestic abuse complainants denying the frequently misogynistic nature of the offending against them. Although one could argue that the serious penalties for sexual offences already reflect their gendered nature, such recognition is implicit rather than explicit. There is no alternative provision in the criminal justice system which explicitly recognises the misogynistic nature of many of these complainants' experiences.

The educative value of the law

12.179 Above we refer to Hodge's research concerning New Jersey's gender exemption in relation to sexual offences. Hodge notes the views of two participants, who observed that sexual offences against women were about "sexual release" [219] and "men's physical urges"[220] rather than power or control or explicit gender hate crime. For these participants, this explained the gender exemption in relation to sexual offences.[221]

12.180 These views have been described by practitioners as "rape myths".[222] As a result, Hodge notes that a gender exemption in relation to sexual offences is a missed opportunity to educate people about the nature of sexual violence and address rape myths such as these, arguing that:

> violence against women remains a second-tier crime, not worthy of the same legal consequences as crimes committed primarily against men…After a bias incident, there is often discussion about the crime that serves to educate the public. If sexual assaults were appropriately labelled as hate crimes, a similar discussion could occur in regard to rape and other forms of gender-motivated violence that would educate the public about the actual nature of rape and discredit common rape myths.[223]

12.181 Walters and Tumath also observe the possible educative value of applying a gender aggravation to the offence of rape. They argue that expressly stating the gendered hate element of violent crimes against women might help reframe these crimes as acts of prejudice used to control and subordinate women. This could shift the focus onto the

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219 J Hodge, *Gendered Hate, Exploring Gender in hate crime* (1st ed, 2011) p 55.

220 J Hodge, *Gendered Hate, Exploring Gender in hate crime* (1st ed, 2011) p 55.

221 J Hodge, *Gendered Hate, Exploring Gender in hate crime* (1st ed, 2011) p 56.

222 Crown Prosecution Service, Rape and Sexual Offences – Chapter 21: Societal myths, available at https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths. Rape Crisis England and Wales website, *Myths v Realities*, available at https://rapecrisis.org.uk/get-informed/about-sexual-violence/myths-vs-realities/.

223 J Hodge, *Gendered Hate, Exploring Gender in hate crime* (1st ed, 2011) p 58.

offender and their motivation, which might help unpick the victim-blaming and rape myths that underpin low reporting and conviction rates in this area.[224]

The coherence of the law

12.182 It might also appear inconsistent to exclude offences that were such a significant point of reference when applying the first two criteria above, where we observe that these crimes often feature heavily in the lives of many women and girls. As a result, hate crime laws would be excluding the most serious and harmful forms of the gendered abuse that women and girls face. It might be considered tokenistic for the law only to recognise the gendered nature of a small portion of VAWG in order to make gender-based hate crime workable. This raises much wider questions as to whether hate crime is the right framework for the criminal justice system to deal with gender-based crimes.

12.183 Further, it might be artificial to separate the harassment that women face online or in public places from the more serious forms of violence they face such as sexual offences and domestic abuse. At a stakeholder event we attended, Nadia Whittome MP argued that these offending behaviours are linked and operate along a spectrum.

12.184 We also note that the carve out we consider above would entail treating hate crime characteristics differently. The characteristic of gender or sex would not cover the range of offences and criminal contexts that other characteristics cover. In pre-consultation meetings, we have already heard strong concerns regarding the lack of parity in hate crime laws, which would be exacerbated by such a carve out.

The intelligibility of the law

12.185 Above we have set out how a sex/gender carve out might appear in relation to sexual offences and domestic abuse. It seems clear that this carve out would further complicate hate crime laws. A variety of consultees have already told us that hate crime laws are difficult to follow, understand and apply.

Conclusion regarding the suitability criterion

12.186 The suitability criterion is more difficult to satisfy in the context of gender/sex than the previous two criteria. Under heading 1 of the suitability criterion, we identify a range of concerns that might arise as a result of recognising gender or sex-based hate crime protection. Most of these concerns relate to sexual offences, or the context of domestic abuse.

12.187 Under heading 2, we identify ways that these concerns might be mitigated, for example, by making use of a carve out for sexual offences, and the domestic abuse context, as well as other deeply gendered offences such as forced marriage and FGM.

12.188 Under heading 3, we have considered further suitability concerns, which might arise because of the carve out – for example, impacting the coherence and intelligibility of the law.

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[224] M Walters and J Tumath, "Gender Hostility, Rape, and the Hate Crime Paradigm" (2014) 77 *Modern Law Review* 563.

OVERALL CONCLUSION ON THE CASE FOR SEX OR GENDER-BASED PROTECTON

12.189 Above we have considered whether there is a case to provide gender or sex-based protection in hate crime law.

12.190 The arguments in relation to the first two criteria – demonstrable need and additional harm – were very strong – particularly insofar as they applied to women and girls.

12.191 The suitability criterion was more complicated – we identified a range of suitability concerns which make this criterion more difficult to satisfy.

12.192 That is not to say that the suitability criteria cannot be satisfied – consultees might disagree with the strength of the suitability concerns outlined above. In any case, we have suggested a possible way to mitigate these concerns – in the form of a carve out for specific offences. We identified precedent for this (at least in the context of sexual offences), in the US federal sentencing commission guidelines, and in New Jersey's bias intimidation provisions. Nevertheless, we do acknowledge that the use of a gender-specific carve out may give rise to further suitability concerns.

12.193 Considering all this, we provisionally propose that there is a case for sex or gender-based protection according to our three criteria, particularly given the strength of the arguments in relation to the first two criteria.

Consultation Question 11.

12.194 We provisionally propose that gender or sex should be a protected characteristic for the purposes of hate crime law.

12.195 Do consultees agree?

12.196 We invite consultees' views on whether gender-specific carve outs for sexual offences, forced marriage, FGM and crimes committed in the domestic abuse context are needed, if gender or sex is protected for the purposes of hate crime law.

FRAMING SEX OR GENDER-BASED HATE CRIME PROTECTION

12.197 Now that we have analysed the case for recognising sex or gender-based hate crime protection in law, we turn to consider how sex or gender-based hate crime might be framed.

12.198 The main point of contention is whether protection should be limited to women *or* apply to sex or gender more widely. Three questions become relevant:

(1) Should protection be limited to women only or should it be gender-neutral?

(2) If protection is limited to women, how should it be framed?

(3) If protection is gender-neutral, how should it be framed?

12.199 Below we consider questions (1) to (3) in turn.

Question One: Should protection be limited to women only or be gender neutral?

12.200 Current and former MPs including Stella Creasy,[225] Dawn Butler,[226] and Melanie Onn[227] have called for the focus to be on women, either by using the word misogyny or other specific terms. Recently, Mayor of London Sadiq Khan stated that he would like to see "female gender" added to the list of protected characteristics.[228]

12.201 It has been argued that misogyny hate crime has declaratory importance; it would put down "a marker to say that culturally endemic negative attitudes towards women are not acceptable".[229] In this light, gender-specific protection is arguably important.

12.202 In a stakeholder meeting, Women's Aid argued that "women" should be specifically recognised because a wider term such as "gender" fails to acknowledge that women are disproportionately the victims of abuse. Indeed, Women's Aid suggested that the inclusion of a gender-neutral term in hate crime laws may be more harmful than helpful.

12.203 As we have outlined in detail above, there is one group, namely women, who clearly satisfy the first two criteria for hate crime recognition on the basis of sex or gender. Men do not – there was little evidence to suggest that criminal targeting against men based on hostility or prejudice towards their gender is prevalent or causes additional harm. This supports the view that women should be given specific gender-based hate crime protection.

12.204 Some stakeholders have noted that specific protection would be inconsistent with other hate crime characteristics – such as race, religion or sexual orientation – which are generally framed, without singling out the most commonly targeted groups. However, the use of a general term in these three cases is arguably influenced by practical considerations. For example, the diversity of race and religious groups would make it very difficult to single out sub-groups for hate crime protection. We discuss this in more detail in Chapter 11 at paragraphs 11.13 to 11.17. In the context of gender/sex, there are also practical considerations to bear in mind which might favour use of a general term.

12.205 Concerns about the exclusion of men have been expressed by MP Phillip Davies in the House of Commons. Davies asked why an MP who was advocating that misogyny

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225 BBC News, "'Make misogyny a hate crime, Stella Creasy urges'" (September 2018), available at https://www.bbc.co.uk/news/uk-politics-45408492.

226 Dawn Butler, "Making misogyny a hate crime is the only way to end violence against women" (November 2018) *The Huffington Post,* available at https://www.huffingtonpost.co.uk/entry/dawn-butler-misogyny_uk_5ddcf0b4e4b00149f7231b65.

227 Melanie Onn MP, *Hansard* (HL), 7 March 2018, vol 637, col 132.

228 Andrew Woodcock, "Sadiq Khan calls for misogyny to be a hate crime" (March 2020) *The Independent*, available at https://www.independent.co.uk/news/uk/politics/sadiq-khan-misogyny-sexism-hate-crime-london-mayoral-election-a9382811.html.

229 Melanie Onn MP, *Hansard* (HL), 7 March 2018, vol 637, col 133.

be made a hate crime thought that "it was one rule for one and another rule for the other?"[230]

12.206 A male respondent in the Nottinghamshire Evaluation suggested that gender-based hate crime reform would fail if it didn't conform to formal equality:[231]

> I think it should include misandry as well. 100%. Absolutely… I don't think it could ever succeed unless it was inclusive. It will absolutely fail if it only gives women protection and men not because that's not equality before the law.[232]

12.207 The Bracadale review also argued this point, about a neutral term such as gender/sex being in line with formal equality.[233]

12.208 We also note that the Equality Act 2010 does not single out women, protecting "sex", ie a generally defined characteristic.

12.209 Similarly, amendment 84, to the Domestic Abuse Bill, which sought to require all police forces in England and Wales to record crimes which demonstrated hostility or were motivated by prejudice towards a person's "sex",[234] used a general term.

12.210 Considering these arguments, we seek consultees' views on whether protection should be limited to women or more widely applied to gender or sex.

Consultation Question 12.

12.211 We invite consultees' view as to whether sex or gender-based hate crime protection should be limited to women or include both women and men.

Question Two: If protection is limited to women, which term is preferable?

12.212 Nottinghamshire police force records *misogynistic* crimes and incidents as hate crime.[235]

12.213 Use of the term misogyny in hate crime laws would create two key problems:

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230 Phillip Davies MP, *Hansard* (HL), 7 March 2018, vol 637, col 133.

231 Formal equality requires that similar cases be treated similarly see D Lyons "The Weakness of Formal Equality" (1966) 76 *Ethics* 146.

232 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report*, (Nottingham's Women's Centre, 2018) p 48, available at https://www.nottinghamwomenscentre.com/wp-content/uploads/2018/07/Misogyny-Hate-Crime-Evaluation-Report-June-2018.pdf; See also D DiNitto and B McPhail, "Prosecutorial Perspectives on Gender-Bias Hate Crime" (2005) 11 *Violence Against Women* 1171.

233 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 41 at para 4.43.

234 House of Commons, Thursday 11 June, Public Bill Committee, Domestic Abuse Bill, p 9, available at https://publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic_day_pbc_0610.pdf.

235 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre 2018).

(1) The Nottingham Misogyny Hate Crime Evaluation Report expressed some concern that the term "misogyny" might be too academic and inaccessible to gain broad acceptance.[236] The Fawcett Society echoed these concerns in our meeting with them.

(2) Hate crime laws in England and Wales protect identity characteristics (race, religion or sexual orientation) or groups (transgender or disabled people). Misogyny is neither an identity characteristic nor a group; it is an example of prejudice, like homophobia. Recognising specific prejudice rather than groups or characteristics would constitute a significant shift in legal approach and create inconsistency within hate crime laws.

12.214 The term "women" avoids these problems, mainly because it relates to a group, not a form of prejudice. If hate crime law were to single out female gender, we provisionally consider the term "women" to be most appropriate.

Consultation Question 13.

12.215 We provisionally propose that a protected category of "women" is more suitable than "misogyny", if sex or gender-based hate crime protection were to be limited to the female sex or gender.

12.216 Do consultees agree?

Question Three: If protection is gender-neutral, which term is preferable?

12.217 In order to extend gender-based hate crime protection beyond women, general terms such as "gender" or "sex" or both might be used.

12.218 During our pre-consultation period, we have been told by members of the public that "sex" not "gender" should be protected under hate crime laws because it is consistent with the approach taken in the Equality Act 2010. It has also been argued that violence against women and girls is strongly connected to female biology and physicality.

12.219 However, it is not clear that this is exclusively the case. In addition to facing unique transphobic discrimination, violence and barriers – research indicates that trans women face similarly high levels of VAWG-associated crimes. SafeLives' 2018 Guidance for Multi-Agency Forums states that trans survivors are one of the most hidden groups of domestic abuse survivors.[237]

12.220 The term sex is more restrictive than gender – sex does not also incorporate gender. If a trans woman were targeted for misogynistic criminal conduct, she might not be captured by sex-based protection but would be by gender-based protection. Gender is

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236 L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre 2018).

237 Safelives, *Guidance for Multi-Agency Forums, LGBT+ people*, p 7, available at https://safelives.org.uk/sites/default/files/resources/LGBT+%20NSP%20Report_0.pdf; Stonewall, *Supporting trans women in sexual and domestic violence services, interviews with professionals in the sector* (2018), available at https://www.stonewall.org.uk/system/files/stonewall_and_nfpsynergy_report.pdf.

more inclusive than sex, indeed it encompasses sex; a person's biological sex is one means by which they might define their gender.

12.221 If we were to decide between gender or sex, our provisional view is that the more inclusive term of gender, as opposed to sex, would better capture a wider range of victim experience. This is consistent with the Bracadale review in Scotland, which recommended a statutory aggravation in Scotland on the basis of "gender" rather than "sex".[238]

12.222 However, it might not be necessary to decide between gender or sex – for example, the law could use "sex or gender". This would accommodate victims who feel they have been targeted based on their sex characteristics, whilst also including those whose gender identity is not necessarily tied to their biological sex.

Consultation Question 14.

12.223 We provisionally propose a protected category of "sex or gender" rather than choosing between either "gender" or "sex" if hate crime protection were to adopt a general approach.

12.224 Do consultees agree?

[238] Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 43, para 4.50.

Chapter 13: Age

INTRODUCTION

13.1 Age has also been proposed for inclusion in hate crime laws. Indeed, our terms of reference ask us to consider specifically whether "hatred of older people" should form part of hate crime.[1]

13.2 Although age is not currently recognised as a hate crime characteristic in England and Wales, the criminal justice system does acknowledge the relationship between age and victimisation in other ways:

(1) The Sentencing Guidelines Council note that targeting a vulnerable victim because of their old age or youth makes the offender more culpable, and the offence more serious.[2] This connection between "vulnerability" and "old age" has been observed recently in *R v Gaskin (Arthur)* [2019],[3] whereby the defendant had carried out roofing work for the victims and used this opportunity to steal large amounts of cash. Mr Justice Spencer applied a significant sentence uplift for each offence because the offences committed were:

> very serious examples of their kind…elderly vulnerable victims had been targeted in their own home, the offences were planned and a substantial amount of money had been taken.[4]

(2) Beyond vulnerability, sentencing guidelines for some offences such as common assault state that it is an aggravating factor where the offence "is motivated by, or demonstrating, hostility based on the victim's age".[5]

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1 Law Commission, Hate Crime, available at https://www.lawcom.gov.uk/project/hate-crime/.

2 Sentencing Guidelines Council, *Overarching principles guidelines: Seriousness,* (December 2004) p 5 at para 1.17, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf. More specifically, see the sentencing guidelines for fraud, Sentencing Council, Common law, Fraud Act 2006, s.1, Theft Act 1968, s.17, available at https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/.

3 *R v Gaskin (Arthur)* [2019] EWCA Crim 1048; 6 WLUK 371.

4 *R v Gaskin (Arthur)* [2019] EWCA Crim 1048; 6 WLUK 371 at [16].

5 Sentencing Council, *Common assault / Racially or religiously aggravated common assault, Crime and Disorder Act 1998, s.29, Criminal Justice Act 1988, s.39* (2011), available at https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-religiously-aggravated-common-assault/.

(3) The Crown Prosecution Service (CPS) records the incidence of crimes against older people and publishes legal[6] and policy[7] guidance for prosecuting these crimes.

(4) Criminal law in England and Wales also includes offences relating to children. Many instances of child abuse are criminal offences. The CPS's legal guidance for prosecuting (non-sexual) child abuse[8] refers to offences such as causing or allowing the death of (or serious harm to) a child,[9] offences relating to child cruelty, neglect, and violence,[10] and offences relating to child abduction[11] amongst others.[12] The Sexual Offences Act 2003 contains various sexual offences that specifically relate to children.[13]

13.3 Age is sometimes, but not routinely, given hate crime protection in other jurisdictions. The US state of Florida protects "advanced age"[14] as part of its hate crime provisions, along with nine[15] other US jurisdictions which protect the wider term of "age". Beyond the US, jurisdictions such as Canada[16] and New Zealand,[17] also recognise the wider term "age" for the purposes of hate crime laws.

13.4 In 2018, the Independent review of hate crime legislation in Scotland ("the Bracadale review") recommended that there should be a new statutory aggravation based on hostility towards age.[18] The Hate Crime and Public Order (Scotland) Bill 2020 has

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6 Crown Prosecution Service, *Older people: Prosecuting Crimes against* (updated 30 April 2020), available at https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against.

7 Crown Prosecution Service, *Policy guidance on the prosecution of crimes against older people* (updated 15 July 2019), available at https://www.cps.gov.uk/publication/policy-guidance-prosecution-crimes-against-older-people-0.

8 Crown Prosecution Service, *Child Abuse (non-sexual) – prosecution guidance* (updated 14 February 2020), available at https://www.cps.gov.uk/legal-guidance/child-abuse-non-sexual-prosecution-guidance.

9 Section 5 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004).

10 Section 1 of the Children and Young Persons Act 1933.

11 Sections 1 and 2 of the Child Abduction Act 1984.

12 There is also a specific offence of infanticide applying to a mother who kills her baby. This is contained within the amended section 1 of the Infanticide Act 1938. See also *R v Tunstill* [2018] EWCA Crim 1696; [2019] 1 WLR 416.

13 *Rape and other offences against children under 13* (sections 5 to 8). Child sexual offences (sections 9 to 15A) Abuse of trust offences relating to children, (sections 16 to 19), Familial sexual offences relating to children, (sections 15 and 26) Indecent images of children (section 45), Child Sexual Exploitation, (sections 47 to 50). In a related, but separate context, section 1(1) of the Protection of Children Act 1978 creates offences as to the taking, distribution, possession and publication of indecent images of children. Section 160 of the Criminal Justice Act 1988 also addresses the possession of such images. Further related offences are set out in the CPS guidance, Indecent and Prohibited Images of Children, available at https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children.

14 Florida Statute 775.085 (1)(a). Under this statute, advanced age means that a victim is 65 years or older.

15 District of Columbia, Iowa, Louisiana, Minnesota, Nebraska, Texas, Oregon, Vermont and New York.

16 Canadian Criminal Code s 718.2.a.i.

17 Sentencing Act 2002, s 9(1)(h).

18 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49, Recommendation 10, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

included “age” in the list of hate crime characteristics,[19] such that an offence can be aggravated where an offender evinces malice and ill-will towards a person’s age whilst[20] committing the offence.

13.5 In this chapter we use the three criteria that we have proposed in Chapter 10 to assess the principled and practical case for including age as a hate crime characteristic in England and Wales.

THE CASE FOR RECOGNISING AGE IN HATE CRIME LAWS

13.6 In Chapter 10 we established three criteria that we propose be applied when considering whether a group or characteristic should acquire hate crime protection:

(1) **Demonstrable need**: evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.

(2) **Additional Harm:** evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

(3) **Suitability**: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, and represent an efficient use of resources. Where relevant, we will also consider any harmful practical consequences that protection of the characteristics might cause and consider that the characteristic is consistent with the rights of others.

13.7 We will consider each of the three criteria that we have set out above in turn.

DEMONSTRABLE NEED

13.8 The demonstrable need criterion requires us to consider the following elements. Firstly, we will consider evidence of criminal behaviour against the relevant group. Secondly, we will consider whether this criminal behaviour is linked to prejudice or hostility towards the relevant characteristic. Finally, we will consider whether criminal behaviour that is based on hostility or prejudice towards the characteristic is prevalent. In Chapter 10 we set out what we mean by “prevalent”.

13.9 We apply the demonstrable need criterion below, firstly to older people and secondly to younger age groups.

Applying the demonstrable need criterion to older people

Crimes against older people

13.10 We start by considering definitions of “older person”. The World Health Organization (“WHO”) has acknowledged that whilst definitions vary according to context, many Westernised countries have accepted age 65 as a definition of “elderly” or older

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19 Hate Crime and Public Order (Scotland) Bill, cl 2(a).

20 In the Bill, this is defined as being at the time the offence is committed, or immediately before or after it is committed, see Hate Crime and Public Order (Scotland) Bill, cl 1(a)(i).

person.[21] In England and Wales, the CPS currently records crimes against older people where the victim is 65 years old and above.[22]

13.11 We also note that the UK's population is ageing.[23] The 85+ age group is the fastest growing in the UK and is predicted to double to 3.2 million by mid-2041 and treble to 5.1 million by 2066.[24] Therefore, just as social structures continue to mirror the "now old-fashioned model of a life of work, followed by a short retirement characterised by ill health and then death"[25] – traditional ideas about what constitutes "old age" may be outdated. The CPS has recently consulted on whether their 65+ age threshold for recording crimes against older people should be raised to 68+.[26]

13.12 Unless otherwise stated, use of the term "older" in this chapter will refer to people aged 65 or above.

The context of elder abuse

13.13 The WHO uses the following definition of elder abuse:

> a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. Elder abuse can take various forms such as financial, physical, psychological and sexual. It can also be the result of intentional or unintentional neglect.[27]

13.14 Some of these may amount to crimes against older people, for example where this takes the form of sexual abuse, physical abuse, or financial abuse, or wilful neglect if the older person lacks capacity.[28]

13.15 In 2004, a report by the House of Commons Health Committee observed that the prevalence of elder abuse is difficult to quantify[29] because it is often hidden, it might not be apparent to the victim, and is likely to be under reported. At the time of writing (2004),

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21 World Health Organisation, *Proposed working definition of an older person in Africa for the MDS Project*, available at https://www.who.int/healthinfo/survey/ageingdefnolder/en/.

22 Crown Prosecution Service, *Older people: Prosecuting Crimes against* (updated 30 April 2020), available at https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against.

23 Age UK, *Later Life in the United Kingdom 2019* (May 2019) p 3, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/later_life_uk_factsheet.pdf.

24 Office for National Statistics, *Living longer: how our population is changing and why it matters* (2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2018-08-13.

25 J Herring, *Older people in law and society* (1st ed, 2009) p 2.

26 Crown Prosecution Service, *Consultation on Crimes Against Older People Policy Guidance – Summary of Responses* (July, 2019), available at https://www.cps.gov.uk/publication/consultation-crimes-against-older-people-policy-guidance-summary-responses.

27 World Health Organisation, *Ageing and life-course*, available at https://www.who.int/ageing/projects/elder_abuse/en/.

28 Mental Capacity Act 2005, s 44.

29 Elder Abuse, Report of the House of Commons Health Committee, (2003-04) HC 111-I, p 3.

the Committee also noted that academic research examining the extent of elder abuse within England was limited.[30]

13.16 In 2006, the Department of Health and Social Care, along with Comic Relief, funded the first UK National Prevalence Study of Elder Mistreatment ("the Prevalence Report"). Researchers interviewed 2100 adults over the age of 66 who were living in personal households in the United Kingdom. The interview sample was intended to mirror the national population. Based on this representative sample, researchers estimated that 1.1% of adults over the age of 66 and living in personal households were facing neglect, 0.7% were facing financial abuse, 0.4% were facing physical abuse, and 0.2% were facing sexual abuse,[31] by a family member, close friend or care worker.

13.17 A 2017 study which combined the results of multiple studies estimated that globally, 1 in 6 older people[32] living in private residences were facing some form of sexual, psychological or physical abuse each year.[33]

13.18 These studies do not account for institutional abuse, for example that which takes place in care homes.[34]

Criminal targeting in other contexts

13.19 The latest Crime Survey England and Wales (CSEW) data indicates that the 75+ age group are the least likely, out of all age groups, to experience crime,[35] estimating that 9.2% of people over the age of 75 experienced crime in the year ending March 2020.[36] The 65-74 age group were the second least likely to experience crime, with 13.8% of

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30 Elder Abuse, Report of the House of Commons Health Committee, (2003-04) HC 111-I, p 9.

31 M O'Keefe, A Hills, M Doyle, C McCreadie, S Scholes, R Constantine, A Tinker, J Manthorpe, S Biggs, B Erens, *UK Study of Abuse and Neglect of Older People, Prevalence Study Report* (2007), available at https://www.cornwall.gov.uk/media/3633937/UK-study-prevalance-of-elder-abuse-Comic-Relief-2007.pdf.

32 The participants were 60 years or older.

33 Y Yon, C Mikton, Z Gassoumis and K Wilber: "Elder abuse prevalence in community settings: A systematic review and meta-analysis" (2017) 5 *The Lancet Global Health* 147.

34 Age UK note that 400,000 older people are in care homes in the UK, citing LaingBuisson, *Care homes for older people – Market Report* (2018), see Age UK, Later Life in the United Kingdom 2019, (May 2019) p 16, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/later_life_uk_factsheet.pdf. In 2017, the Competition and Markets Authority noted that there were approximately 418,000 care home residents in the UK in total (this figure is based on applying occupancy rates from LaingBuisson to an estimate of total occupancy from Competition and Market Authority analysis), see Competition and Market Authority, *Care homes market study: summary of final report* (30 November 2017). This indicates that most care home residents are elderly.

35 This includes "all CSEW crime types (including fraud and computer misuse)."

36 Office for National Statistics, Crime in England and Wales: Annual Trend and Demographic Tables (July 2020) Table D1, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesannualtrendanddemographictables.

adults in this age group estimated to have experienced crime in the same year.[37] This compares with 23.7% of adults aged 16-24.[38]

13.20 In 2018-19, the CPS prosecuted 2958 crimes against older people – 2412 of these resulted in conviction.[39] The CPS defines crimes against older people as:

> Where the victim is 65 or over, any criminal offence which is perceived by the victim or any other person, to be committed by reason of the victim's vulnerability through age or presumed vulnerability through age.[40]

13.21 Offences against the person were the most common type of crime directed at older people, making up 35.5% of those prosecuted.[41] Other common offence types were burglary, theft and handling, as well as fraud and forgery respectively making up 14.8%, 12.2% and 19% of the crimes against older people that were prosecuted.[42]

13.22 Whilst the available data indicates that older people experience less crime, doorstep crimes[43] provide a slight exception to this pattern. Research by Age UK has found that doorstep crimes are disproportionately committed against older people, with a 2015 report noting that 85% of those who experienced doorstep crimes were aged 65+, 59% were 75+, and 18% were aged 80 to 84.[44]

Violence against older women

13.23 Older women[45] also face distinct targeting in the form of sexual and domestic violence, although prevalence data is limited.[46] Bows has conducted extensive research in this

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37 Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2020), Table D1.

38 Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2020), Table D1.

39 Crown Prosecution Service, *Annual Hate Crime Report 2018-2019* (2019) p 48, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

40 Crown Prosecution Service, *Policy guidance on the prosecution of crimes against older people* (updated 15 July 2019), available at https://www.cps.gov.uk/publication/policy-guidance-prosecution-crimes-against-older-people-0.

41 Crown Prosecution Service, *Annual Hate Crime Report 2018-2019* (2019) p 48.

42 Crown Prosecution Service, *Annual Hate Crime Report 2018-2019* (2019) p 48.

43 Doorstep crime covers a range of fraudulent activities such as charging extortionate prices and/or charging for unnecessary goods or services. In some cases, the visit to the person's home may be preceded by a telephone cold call or the person may have responded to a flyer received at their home; see Age UK, *Only the tip of the iceberg: Fraud against older people* (April 2015) p 14, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_april15_only_the_tip_of_the_iceberg.pdf.

44 Age UK, *Only the tip of the iceberg: Fraud against older people* (April 2015) p 14, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_april15_only_the_tip_of_the_iceberg.pdf.

45 Older men may also experience domestic abuse and sexual violence, however as outlined in Chapter 12, this is a context that overwhelmingly impacts women.

46 H Bows, "Violence against older women", in N Lombard, (Ed.) *The Routledge Handbook of Gender and Violence Research Companion to Gender and Violence* (1st ed, 2018).

area and has estimated that 1 in 4 domestic homicides that take place in England and Wales involve a victim aged 60 and over.[47] Bows found that women constitute around 67% of older domestic homicide victims and men make up 81% of perpetrators.[48] Older women also experience notable rates of sexual violence, usually by younger perpetrators.[49]

Is this criminal targeting linked to hostility or prejudice towards old age?

13.24 We now turn to address the second question, considering whether the criminal targeting described above is linked to hostility or prejudice towards old age.

13.25 There is some support for the view that criminal targeting against older people is linked to prejudice or hostility towards old age.

13.26 In Scotland, Lord Bracadale found that there is "sufficient evidence of hostility-based offences against the elderly".[50] In the Bracadale report, Lord Bracadale draws upon information provided by Action for Elder Abuse:[51]

> while crimes against older people which are committed due to the victim's perceived vulnerability comprise a much bigger problem than crimes motivated by hatred or prejudice due to the person's age, they (Action on Elder Abuse) were nevertheless aware that the latter type of crime can also be an issue for many older people. This might be due to perceptions that older people receive more state support (including financial support) than younger people, generational hostility or disrespect towards older people. They often received calls to their Helpline regarding verbal abuse, harassment or general anti-social behaviour from younger people, with many older people telling the charity that they believe they are being targeted because of their age.[52]

13.27 In England, a very high-profile murder case has been linked to deliberate targeting based on hostility towards old age. In 2008, former nurse Colin Norris was sentenced to life imprisonment and ordered to serve a minimum term of 30 years in prison after being found guilty of killing four elderly women and attempting to murder a fifth by injecting them with insulin at Leeds General Infirmary and St James's Hospital in 2002. The judge at Norris' trial is reported to have linked these murders to the deliberate

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47 H Bows, *Durham Law School Research Briefing 2018-12, Domestic Homicide of Older People in the UK (2010-2015)* (2018) p 1, available at https://aafda.org.uk/wp-content/uploads/2019/04/Hannah-Bows-Homicide-Briefing-Note.pdf.

48 H Bows, *Durham Law School Research Briefing 2018-12, Domestic Homicide of Older People in the UK (2010-2015)* (2018) p 2.

49 H Bows and N Westmarland, "Rape of Older People in the UK, Challenging the 'real rape' stereotype" (2017) 57 *British Journal of Criminology* 1.

50 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.66.

51 The Bracadale Review engages with Action on Elder Abuse in the context of Scotland. When we met with Action on Elder Abuse in the context of England and Wales, they expressed different views to those expressed by Action on Elder Abuse in the context of the Scottish review of hate crime laws. The representative that we met with informed us that their policy views sometimes differ from those expressed by Action on Elder Abuse's Scotland office.

52 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.56.

targeting of older people and to have said, "you are an arrogant and manipulative man with a real dislike of elderly patients".[53]

13.28 In Chapter 12, we referred to CSEW data which records victims' perceptions of why they were targeted for personal and household crime, estimating the average annual incidence of hate crime over a two-year period from March 2016 to March 2018. 81,000 people felt they had been targeted for personal crime based upon their age, with a roughly equal division between the sexes.[54] This was higher than any other characteristic in the survey and was particularly concentrated at either end of the age spectrum. For example, an estimated 50% of the personal hate crime committed against victims in the 16-24 age range was perceived to be targeted at the victim's age.[55] This rose to 85% in the 65-74 age range and 97% in the 75+ age group.[56] This survey therefore provides some support for the view that offenders are motivated to target a victim because of their age.

13.29 In Chapter 12, we also make a connection between the prevalence and nature of violence against women and girls, and broader motivations of misogyny. Herring has drawn analogies between this contextual understanding of violence against women and girls, and elder abuse, arguing that abuse of older people also "reflects wider societal attitudes towards elderly people"[57]:

> Domestic violence is seen as both a reflection, and a reinforcement, of wider social attitudes about the domination of women by men. A similar point can be said about violence against older people. Elder abuse reflects and reinforces attitudes about older people in a way which interacts with the attitudes about them. Many of the victims are women, and then we see the interaction of both ageism and sexism in creating and reinforcing the structures that enable abuse to take place.[58]

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53 R Jenkins, "Killer nurse Colin Norris must serve at least 30 years" *The Times* (5 March 2008). However, it is important to note that Norris' murder conviction has been subject to significant doubt in light of new of evidence.[53] In May 2013, the Criminal Cases Review Commission (CCRC) reportedly confirmed that it was undertaking an active re-examination of the case see D Campbell, "Fresh evidence challenges 'Angel of Death' nurse Colin Norris's conviction" (20 May 2013) *The Guardian*; BBC News, "Colin Norris case: Nurse's murder convictions 'unsafe'" (4 October 2011) *BBC News*.

54 Office for National Statistics, *Number of CSEW incidents of hate crime per twelve months, England and Wales Crime Survey England and Wales: years ending March 2016 and March 2018*, Appendix Table 2, available at https://www.ons.gov.uk/file?uri=/peoplepopulationandcommunity/crimeandjustice/adhocs/009335numberofcsewincidentsofhatecrimesper12monthsenglandandwales2015to2018/csewestimatesofhatecrimeyemarch201620182..xls.

55 Office for National Statistics, *Number of CSEW incidents of hate crime per twelve months, England and Wales Crime Survey England and Wales: years ending March 2016 and March 2018*, Appendix Table 2.

56 Office for National Statistics, *Number of CSEW incidents of hate crime per twelve months, England and Wales Crime Survey England and Wales: years ending March 2016 and March 2018*, Appendix Table 2.

57 J Herring, *Older people in law and society* (1st ed 2009) p 113.

58 J Herring, *Older people in law and society* (1st ed 2009) p 136.

> In the context of elder abuse, we have the additional factor of ageism, whereby older people are stigmatized and marginalized in society in a way which enables abuse to take place and hinders an effective challenge to it.[59]

13.30 Whilst the arguments and evidence considered above provide support for the view that crimes against older people are linked to prejudice or hostility towards age, contrary arguments have also been raised. We consider these below.

Lack of clear data

13.31 Firstly, whilst the CSEW data is useful, we note that perceiving a crime to have been "motivated by age" is more inclusive than perceiving it to have been motivated by "hostility or prejudice towards age". The former is wider than the latter, accounting for situations where the victim's age may have merely featured in the offender's decision to commit the crime. This would incorporate exploitation of perceived or actual vulnerability – something we consider in more detail below.

13.32 Secondly, in Florida, a jurisdiction which specifically allows for a more serious penalty based on prejudice towards older age, the provisions are rarely used. For example, the latest data from the state of Florida shows that in 2018 there were no reports of crime based on prejudice towards "advanced age".[60] However, we note that there are very few hate crimes are reported in Florida. In 2018, there were only 168 reports of hate crime in total, across all monitored stands. By contrast, in England and Wales, the police recorded 94,121 hate crimes in 2017-18,[61] with the population of England and Wales only 2.7 times the size of Florida's. We also acknowledge that reporting figures do not always mirror the prevalence of crime, owing to a range of reporting barriers.[62]

Link between elder abuse and other interpersonal abuse

13.33 Some have questioned whether hostility or prejudice towards age is present when it comes to the abuse of an older person. When we met with Action on Elder Abuse as part of our review of hate crime laws in England and Wales, they expressed the view that elder abuse was seldom about a perpetrator hating older people. They noted that the problem is much wider than this, involving complex interpersonal and interfamilial relations, and crucially, exploitation of vulnerability. We unpack notions of "exploiting vulnerability" in paragraphs 13.39 to 13.46.

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59 J Herring, *Older people in law and society* (1st ed 2009) p 155.

60 Florida Attorney General Ashley Moody, *Hate Crimes in Florida, January 1, 2018 – December 31, 2018* (2018), available at http://myfloridalegal.com/webfiles.nsf/WF/TDGTBKCR2R/$file/2018+Florida+Hate+Crimes+Report.pdf.

61 Home Office, "Hate Crime, England and Wales, 2018 to 2019: data tables" (15 October 2019), Table 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

62 Older people may face specific reporting barriers, see for example, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *The poor relation: The Police and Crown Prosecution Service's response to crimes against older people* (July 2019) p 28, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf.

13.34 This links to arguments made by Bows – who draws parallels between the definition(s) of elder abuse and domestic abuse.[63] Bows has argued that the vast majority of interpersonal violence/abuse against older people is caused by the same issues as violence/abuse towards people of other ages,[64] and that there is:

> absolutely no evidence that violence/abuse against older people is usually, often, or even sometimes committed by offenders who have a hatred of, or hostility towards, older people.[65]

13.35 Following on from this, in communication that we have had with Dr Hannah Bows, she pointed out that elder abuse cannot be easily separated from domestic abuse and that most abuse of older people begins earlier in life. Whilst there are some exceptions, she argued that in most cases, abuse by partners and family members is longstanding. In this light, age is perhaps less relevant as a cause of elder abuse (although old age might make it easier to perpetrate the abuse and increase its impact, which we consider below). Research also shows that older victims of domestic abuse are likely to have lived with the abuse for prolonged periods before getting help. A 2015 report by SafeLives estimated that of the older adults that are visible to domestic abuse services, a quarter have lived with abuse for more than 20 years.[66]

13.36 Herring makes a similar link between elder abuse and domestic abuse, but he emphasises that this link should not be used to conclude that:

> elder abuse is no more than a version of domestic violence, because that would be to ignore the significance of the age of the parties and particularly the power of ageism. Ageism creates preconceptions and norms of what behaviour and attitudes are expected of older people.[67]

Exploitation of actual or perceived vulnerability

13.37 It has been argued that elder abuse and other crimes against older people exploit the actual or perceived vulnerability of older people.[68]

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63 H Bows and P Bridget, "Editorial: Elder Abuse and Social Work: Research, Theory and Practice" (2018) 48 *British Journal of Social Work* 873, 879.

64 H Bows, Durham Law School, *written submission to the Justice Committee, Prosecution of Elder Abuse* (February 2019), available at https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-Bows.pdf.

65 H Bows, Durham Law School, *written submission to the Justice Committee, Prosecution of Elder Abuse* (February 2019).

66 SafeLives, Safe Later Lives, Domestic Abuse and older people, (2015) p 13, available at https://safelives.org.uk/sites/default/files/resources/Safe%20Later%20Lives%20-%20Older%20people%20and%20domestic%20abuse.pdf citing SafeLives' National Insights Dataset 2015–2016 (unpublished) findings for clients aged 61+ and under 60.

67 J Herring, *Older people in law and society* (1st ed, 2009) p 159.

68 Age UK, Only the tip of the iceberg: Fraud against older people (April 2015) p 14, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_april15_only_the_tip_of_the_iceberg.pdf.This point was also made by Action on Elder Abuse when we met with them. We also discuss the fact that this connection has been made in sentencing law; at paragraph 13.2 above.

13.38 The possible connection between crimes against older people and the exploitation of vulnerability presents two issues when considering whether it meets the marker of "hostility or prejudice towards old age", both of which are linked. The first is whether exploitation of age-based vulnerability might amount to hostility or prejudice. The second is whether the actual or perceived vulnerability of older victims is age-based, ie whether it is caused or informed by the characteristic of age, rather than other characteristics or situational factors.

13.39 In relation to the first issue, exploiting a person's age-based vulnerability may fall short of "hostility" towards old age. This is an issue that has been extensively discussed in the context of disability and is something we consider in more detail in Chapter 15. It was also acknowledged by Lord Bracadale. Discussing the addition of an aggravated factor based on hostility towards age, Lord Bracadale said:

> I recognise, however, that this approach is likely to capture a relatively small proportion of the offences committed against elderly persons. I am conscious of the strength of feeling supporting the introduction of a statutory aggravation which would capture the bulk of the offences committed against the elderly on the basis of perceived vulnerability. [69]

13.40 Turning to prejudice, the assumption that somebody is vulnerable, solely because of their age, may be characterised as an example of prejudice – in the sense that it involves stereotyping of an entire group. Therefore, where a victim is targeted because of the perpetrator's age-based assumption of their vulnerability, this might constitute criminal targeting based on prejudice towards age.

13.41 However, this leads to the second issue. As we note above, some have questioned whether an older person's vulnerability occurs as a result of their age rather than some other factor. The same point can be applied to perceived vulnerability, questioning whether this perception is informed by old age or some other factor.

13.42 The Crown Prosecution Service's guidelines for prosecuting crimes against older people suggest that the vulnerability of older people does not derive from the characteristic of older age in itself:

> Older people may sometimes be more vulnerable; not because they are older, but because of the circumstances in which they find themselves. Some may experience age-related illness or disability; some may be hard of hearing or have difficulties with their sight; for some, their speed of thought, mobility or movement may be slower. [70]

13.43 Expanding on this, there are some common reasons that might underpin older people's perceived or actual vulnerability. These are independent of the characteristic of age, because they may affect people of any age:

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69 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49 at para 4.70.

70 Crown Prosecution Service, *Older people: Prosecuting Crimes against* (updated 15 July 2019), available at https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against.

(1) Mobility or movement may be reduced or slower in older people than in younger people.[71] This might make a person appear vulnerable to a perpetrator, particularly in the context of crimes such as burglary.[72] However, this factor is more directly linked to disability than it is to age.[73]

(2) In 2014 it was estimated that in the UK, 7.1% of people over the age of 65 have dementia,[74] a rate which is significantly higher than among the rest of the population.[75] The Social Care Institute for Excellence notes that "people with dementia can be extremely vulnerable due to the nature of their condition".[76] However, in relation to dementia, the source of vulnerability is not exclusively tied to age and is more directly linked to the characteristic of disability. Moreover, it is worth noting that conditions such as dementia are not necessarily limited to those in the older age bracket. Whilst dementia is much more prevalent amongst older people, Alzheimer's Research UK note that "it is a common misconception that dementia is a condition of older age, over 42,000 people under 65 years old have dementia in the UK".[77]

(3) As we alluded to above, situational or relationship[78] factors such as an older person's dependence on a carer or the fact they are living in a care home,[79] or are socially isolated can increase vulnerability. Whilst these factors might be more prevalent at certain ages, they arguably constitute circumstances of a person's life, rather than an inevitable feature of older age. There are many different people, of different ages, who depend on carers, live in care homes or who are socially isolated.[80] The CPS has emphasised that whilst their policy guidance for prosecuting crimes against older people continues to use the words vulnerable

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71 Crown Prosecution Service, *Older people: Prosecuting Crimes against* (updated 15 July 2019).

72 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, The poor relation: The Police and Crown Prosecution Service's response to crimes against older people (July 2019) p 52, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf.

73 D O'Neil, B O'Shea, R Lawlor, C McGee, J Walsh, D Coakley, "The effects of burglary on elderly people" (1989) 298 *The British Medical Journal* 260, 260.

74 M Prince et al, *Dementia UK: Update* (King's College London and the London School of Economics, 2014), available at https://www.alzheimers.org.uk/sites/default/files/migrate/downloads/dementia_uk_update.pdf.

75 M Prince et al, *Dementia UK: Update* (King's College London and the London School of Economics, 2014).

76 Social Care Institute for Excellence, *Dementia, Safeguarding people with dementia* (last updated May 2015), available at https://www.scie.org.uk/dementia/after-diagnosis/support/safeguarding.asp.

77 Alzheimer's Research UK, *Dementia Statistics Hub*, available at https://www.dementiastatistics.org/statistics/prevalence-by-age-in-the-uk/.

78 J. Manthorpe, J, N. Perkins B. Penhale, L. Pinkney. and P. Kingston, "Select questions: considering the issues raised by a Parliamentary Select Committee Inquiry into elder abuse" (2005) 7 *Journal of Adult Protection* 19.

79 C Cooper, L Marston, J Barber, D Livingston, P Rapaport, P Higgs et al, "Do care homes deliver person-centred care? A cross sectional survey of staff reported abusive and positive behaviours towards residents from MARQUE (Managing Agitation and Raising Quality of Life) English national care home survey" (2018) *PLoS ONE*, 1

80 Institute of Health Equity, *Local Action on health inequality, Reducing social isolation across the life course*, (September 2015) p 5, available at http://www.instituteofhealthequity.org/resources-reports/local-action-on-health-inequalities-reducing-social-isolation-across-the-lifecourse/local-action-on-health-inequalities-reducing-social-isolation-across-the-lifecourse-full.pdf.

and vulnerability, they have made amendments to limit their use of this word, and added in a list of examples which show more clearly how vulnerability is related to the "situation, not to the individual."[81] Other sources of vulnerability in older people that they list include recent bereavement or separation, or level of literacy (including financial and computer literacy).[82] Again, these are circumstances that might apply irrespective of (old) age.

13.44 Therefore, even if the exploitation of vulnerability is considered a form of hostility or prejudice, there is arguably a disconnection between vulnerability and age. This perhaps indicates that when a person is targeted because of actual or perceived vulnerability, they are not necessarily being targeted because of prejudice or hostility towards age, or even by reason of their age.

Violence against older women

13.45 Finally, we have noted above that older women are targeted in the context of sexual offences and domestic abuse. Although targeting in this context might be disproportionate when compared with similar targeting against older men, it is not disproportionate when compared with women of other ages – in Chapter 12, we outlined the ways in which women and girls are disproportionately targeted for sexual and domestic violence throughout their life course, and we considered gender-based prejudices that arguably underpin this violence. It is therefore difficult to argue that the same crimes are perpetrated against older women for different reasons, ie because of prejudice or hostility towards their age.[83] When discussing the fact that some have tried to subsume sexual violence against older women into the area of elder abuse, Bows and Westmarland note that this is:

> problematic as it removes the gendered element of sexual violence that has been at the core of the developments in understanding, preventing and responding to sexual violence.[84]

13.46 Overall then, the arguments explored above indicate mixed support for the view that crimes against older people are linked to prejudice or hostility towards their old age.

Prevalence of crimes based on hostility or prejudice towards older people

13.47 In Chapter 10 we noted that prevalence has three aspects which ought to be balanced against one another. The first is "absolute prevalence", ie the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic. The second is "relative prevalence", ie the amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic, as compared with the size of

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81 Crown Prosecution Service, *Consultation on Crimes Against Older People Policy Guidance – Summary of Responses* (July, 2019), available at https://www.cps.gov.uk/publication/consultation-crimes-against-older-people-policy-guidance-summary-responses.

82 Crown Prosecution Service, *Policy guidance on the prosecution of crimes against older people* (updated 15 July 2019).

83 However, this is not to deny that age does not play a part in violence against older women. Herring discusses the sexism *and* ageism that might underpin this, see J Herring, *Older people in law and society*, (1st ed, 2009) p 161.

84 H Bows and N Westmarland, "Rape of Older People in the UK, Challenging the 'real rape' stereotype", 57 (2017) *British Journal of Criminology* 1, 13.

the group who share the characteristic. The third is "severity" which considers the nature of the criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.

13.48 Above we outline arguments which suggest that crimes against older people are rarely linked to hostility or prejudice towards age. On this view, it is difficult to assess the prevalence of crimes which are linked to hostility or prejudice towards age. However, we also observe Herring's theoretical argument, which connects crimes against older people, particularly elder abuse, to ingrained, prejudicial ideas about age in society.

13.49 Further, whilst we have cast some doubt on the link between old age itself (as opposed to factors such as disability and isolation) and perceived or actual vulnerability, we also acknowledge that some consultees might disagree – and instead argue that exploitation of vulnerability constitutes criminal targeting that is based upon a prejudice towards old age.

13.50 It is therefore useful to assess the prevalence of crimes against older people more widely, given that some may argue they are based upon prejudice towards age.

Absolute prevalence

13.51 In relation to absolute prevalence it is useful to consider elder abuse. The figures from the UK's first prevalence study estimate that 2.6% of people over the age of 66, living in private households have experienced some form of elder abuse.[85] If older people represent around 18% of the current UK population,[86] this would roughly amount to around 333,250 people who have experienced elder abuse in private households. This figure is significantly lower than the prevalence of VAWG which we discuss in Chapter 12 at paragraphs 12.71 to 12.75. However, it is higher than the average annual incidence of hate crime (333,000)[87] estimated by the CSEW over a two-year period – March 2016 to March 2018.[88]

13.52 We also observe above that older people are at a notably lower risk of experiencing crime than other age groups.

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85 M O'Keefe, A Hills, M Doyle, C McCreadie, S Scholes, R Constantine, A Tinker, J Manthorpe, S Biggs, B Erens, *UK Study of Abuse and Neglect of Older People, Prevalence Study Report* (2007), available at https://www.cornwall.gov.uk/media/3633937/UK-study-prevalance-of-elder-abuse-Comic-Relief-2007.pdf.

86 Office for National Statistics, *Living longer: how our population is changing and why it matters* (2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2018-08-13.

87 Number of CSEW incidents of hate crime per twelve months, England and Wales Crime Survey England and Wales: years ending March 2016 and March 2018, Appendix Table 1, available at https://www.ons.gov.uk/file?uri=/peoplepopulationandcommunity/crimeandjustice/adhocs/009335numberofcsewincidentsofhatecrimesper12monthsenglandandwales2015to2018/csewestimatesofhatecrimeyemarch201620182..xls. This includes personal and household crime across all hate crime strands measured by the CSEW: race, religion, disability, gender identity, gender and age.

88 This Crime Survey England and Wales figure does include estimates of age-based hate crime, ie how many crimes were perceived by victims to be based on their age. However, for the purposes of our prevalence assessment, we are considering elder abuse more widely, which some have argued is linked to age-based prejudice.

Relative prevalence

13.53 Turning to the relative prevalence of crimes against older people, we note that 2958 crimes against older people were prosecuted by the CPS in 2018/19.[89] Whilst this constitutes a substantial number, older people are a large group in the UK – in 2016 it was estimated that almost 12 million people are aged 65 or over.[90]

13.54 By contrast, in 2018/19 there were 2,333 police recorded hate crime and incidents against transgender people,[91] who make up a much smaller group (whilst no robust data on the UK trans population exists, in 2018 the Government tentatively estimated that there were approximately 200,000-500,000 trans people in the UK).[92]

13.55 However, we also recognise observations made in a 2018/19 report by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), outlining the barriers older people may face when it comes to reporting crimes.[93] As we acknowledged in the context of violence against women and girls (VAWG)[94] – police reporting, prosecution, and conviction statistics do not always give an accurate indication of prevalence owing to a range of reporting barriers.

13.56 Turning to consider the relative prevalence of elder abuse, the UK's first prevalence study indicates that the collective prevalence of elder abuse within the relevant group (ie older people) is 2.6%.[95] This accounts for all forms of elder abuse.

13.57 By way of contrast, we noted the collective prevalence of all forms of VAWG is likely to be much higher. As we outline in Chapter 12, it is estimated that one of the most serious forms of VAWG alone (sexual assault) is experienced by around 20% of women and girls throughout their lifetime.[96] In the next chapter, we also consider the prospect of recognising sex workers in hate crime law and observe one study which suggests that

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89 Crown Prosecution Service, *Annual Hate Crime Report 2018-2019* (2019) p 48, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

90 Living longer – Office for National Statistics (2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2018-08-13.

91 Home Office, *Hate Crime, England and Wales, 2018 to 2019: data tables* (15 October 2019) Table 2.

92 Government Equalities Office, "Trans People in the UK" (2018) p 1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf.

93 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *The poor relation: The Police and Crown Prosecution Service's response to crimes against older people* (July 2019) p 28, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf.

94 See Chapter 12 at paragraph 12.38.

95 M O'Keefe, A Hills, M Doyle, C McCreadie, S Scholes, R Constantine, A Tinker, J Manthorpe, S Biggs, B Erens, *UK Study of Abuse and Neglect of Older People, Prevalence Study Report* (2007), available at https://www.cornwall.gov.uk/media/3633937/UK-study-prevalance-of-elder-abuse-Comic-Relief-2007.pdf.

96 Home Office in the media, *Violence against Women and Girls Strategy Refresh Factsheet* (7 March 2019), available at https://homeofficemedia.blog.gov.uk/2019/03/07/violence-against-women-and-girls-and-male-position-factsheets/.

around 75% of sex workers have experienced violence at work.[97] High rates of relative prevalence are also found when it comes to existing hate crime categories, for example, research recently conducted by Stonewall found that 41% of trans people and 31% of non-binary people have experienced a hate crime or incident because of their gender identity in the last 12 months.[98]

13.58 In this light, the collective prevalence of elder abuse amongst older people (2.6%)[99] is a lower relative prevalence when compared with the proportion of violence and abuse that is perpetrated against other groups that are considered for hate crime recognition.

13.59 However, the relative prevalence of elder abuse is much higher if we consider the 2017 global study – according to which 1 in 6 (roughly 17% of older people) experience some form of elder abuse[100] – although we recognise this is not UK specific.

13.60 We also acknowledge that the UK's first prevalence study and the global study conducted in 2017 are limited, in the sense that they do not include abuse occurring in institutional settings such as hospitals or care homes.

Severity

13.61 Severity of the crimes facing older people would most likely be mixed. The severity of crimes committed in the context of elder abuse is likely to be high, including for example sexual, physical and psychological abuse. Whilst offences against the person such as sexual offences against older people might be considered very serious, other offences such as scams might be considered less serious in comparison. This is not intended to minimise the impact that these crimes can have on the lives of those they affect, particularly older people – something we consider below.

Applying the demonstrable need criterion to young people

Crimes against young people

13.62 In addition to crimes against older people, child abuse is a recognised criminal context in the UK. Child abuse can take various forms, for example, neglect, emotional abuse, physical abuse, or sexual abuse. The Crime Survey for England and Wales (CSEW) estimated that one in five adults aged 18 to 74 years experience at least one form of child abuse, whether emotional abuse, physical abuse, sexual abuse, or witnessing domestic violence or abuse, before the age of 16 years (8.5 million people).[101] We note at paragraph 13.3 that many instances of child abuse constitute criminal offences. In

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97 M Hester, N Westmarland, *Tackling Street Prostitution: Towards an Holistic Approach* (Home Office Research Study 279, 2004) p 82, available at http://dro.dur.ac.uk/2557/1/2557.pdf.

98 C Bachmann, B Gooch, *LGBT in Britain – Trans Report* (Stonewall, 2018) p 6, available at https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf.

99 M O'Keefe, A Hills, M Doyle, C McCreadie, S Scholes, R Constantine, A Tinker, J Manthorpe, S Biggs, B Erens, *UK Study of Abuse and Neglect of Older People, Prevalence Study Report* (2007), available at https://www.cornwall.gov.uk/media/3633937/UK-study-prevalance-of-elder-abuse-Comic-Relief-2007.pdf.

100 Included participants were 60 years or older.

101 Office for National Statistics, *Child abuse, extent and nature, England and Wales year ending March 2019* (2020), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/childabuseextentandnatureenglandandwales/yearendingmarch2019.

the year ending March 2019, Childline delivered 19,847 counselling sessions to children in the UK where abuse was the primary concern.[102]

13.63 Beyond the child abuse context, Victim Support notes that children and young people disproportionately experience more crime than adults and are significantly over-represented in the most serious crime statistics.[103]

13.64 CSEW data also indicates that younger people were more likely to say they were victims of crime than older people (on average for the 3 years from April 2014 to March 2017).[104] This is supported by the most recent CSEW data for the year ending March 2020 which indicates that the 16-24 age group is most likely to experience crime, followed by the 25-34 age group.[105]

13.65 CSEW data also indicates that younger adults are more likely to be victims of violent crimes. For example, in the year ending March 2019, the 16-24 category was the most likely age group to experience violent crime.[106] This has been especially apparent in the case of knife crime, which, notably affects young people,[107] particularly young black men.[108] In 2018/19, of those admitted to hospital for assault by sharp object, 16.5% were aged 18 or younger.[109]

Is this crime linked to prejudice or hostility towards young age?

13.66 We now turn to consider whether young people are targeted for crime because of age-based prejudice and hostility. We have noted above that child abuse is a wide term and can take a variety of forms. The causes of child maltreatment in this wide sense are

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102 Office for National Statistics, *Child abuse, extent and nature, England and Wales year ending March 2019* (2020), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/childabuseextentandnatureenglandandwales/yearendingmarch2019.

103 Victim Support, *Policy Statement, Children and young people affected by crime* (April 2017), available at https://www.victimsupport.org.uk/sites/default/files/u3709/Victim%20Support%20Policy%20Statement%20-%20Children%20and%20young%20people.pdf.

104 Gov.UK, *Victims of Crime* (March 2020), available at https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/crime-and-reoffending/victims-of-crime/latest

105 Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2020), Table D1, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesannualtrendanddemographictables.

106 Office for National Statistics, *The nature of violent crimes: Appendix tables* (February 2020), Table 1, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/thenatureofviolentcrimeappendixtables.

107 Caelainn Barr, "Child knife deaths in England and Wales set for nine year peak" (November 2017) *The Guardian*, available at https://www.theguardian.com/membership/2017/nov/28/child-knife-deaths-in-england-and-wales-set-for-nine-year-peak.

108 Mayor of London, *The London Knife Crime Strategy* (2017) p 11 https://www.london.gov.uk/sites/default/files/mopac_knife_crime_strategy_june_2017.pdf.

109 G Allen, L Audickas, P Loft, A Bellis, *Knife crime in England and Wales*, (House of Commons Briefing Paper Number SN4304, September 2019) p 17, available at https://researchbriefings.files.parliament.uk/documents/SN04304/SN04304.pdf.

complex.[110] We are not aware of arguments which attribute these causes to age-based prejudice or hatred.

13.67 This may be disputed in more specific contexts, for example it might be argued that victims of child sexual abuse (CSA) and child sexual exploitation (CSE) are specifically targeted, partly by reason of their age. However, criminal targeting on the basis of young age is not the same as criminal targeting arising out of prejudice or hostility towards the characteristic of young age. Further, it is not clear that in a practical sense, hate crime is the right framework to deal with these contexts. We discuss this in more detail at paragraph 13.109 when we apply the suitability criterion.

13.68 We noted above that younger age groups are more likely to be victims of violent crimes. However, there is no evidence that this victimisation is linked to age-based hostility or prejudice. This is illustrated by the fact that as well as being the most likely victim group, in the year ending March 2018, 16 to 24-year olds were the second-most likely to be perpetrators of violent crime (34% of perpetrators), behind the 25 to 39 age range (38% of perpetrators).[111]

13.69 Finally, in the Bracadale Report, a consultation response from Together (Scottish Alliance for Children's Rights) was cited suggesting that young people's experiences of hate crime tend to be based on characteristics other than age – for example race, sexual orientation, transgender status, or disability.[112]

13.70 However, Lord Bracadale did concede that it is conceivable that young people could be targeted because of prejudice or hostility towards their younger age.[113]

Prevalence of crime that is based on hostility or prejudice towards young age

13.71 Whilst crimes against children or young people frequently occur, there is very little support for the view that crime against younger people is based on prejudice or hostility towards young age. As a result, our assessment of prevalence is not really engaged – there is nothing of note to measure.

ADDITIONAL HARM

13.72 We now turn to consider our second criterion, which requires evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

13.73 We acknowledge that this assessment is difficult, because the arguments considered above indicate mixed support for the idea that crime faced by older people is linked to

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110 World Health Organization, *Child maltreatment* (8 June 2020), available at https://www.who.int/news-room/fact-sheets/detail/child-maltreatment.

111 Office For National Statistics, *Nature of crimes tables: violence, Year ending March 2018* (2018) Table 9, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/natureofcrimetablesviolence.

112 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 47, para 4.61.

113 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 48, para 4.68.

prejudice or hostility towards their age, and very limited support for the idea that crimes against younger age groups are motivated in this way.

13.74 However, we have not drawn any conclusions in this regard and acknowledge that consultees' views on this issue may differ, particularly in relation to older people. We will therefore apply the additional harm criterion on the grounds that consultees may consider some of the crimes directed towards older people (and perhaps younger people) to be based on prejudice or hostility towards their age.

13.75 As we establish in Chapter 10, we consider three aspects of harm to be relevant in the context of hate crime. These are:

- Increased harm to the primary victim.
- Secondary harm to members of the targeted group.
- Harm to society more widely.

13.76 We will consider each in turn, primarily in reference to older people.

Additional harm to the primary victim

13.77 In Chapters 3, 7 and 10, we cited research which illustrates that hate crime has a more serious impact on primary victims than differently motivated crime. For example, primary victims of hate crime might experience symptoms such as anxiety or depression after the crime for a longer period.

13.78 With this in mind, we note that a recent report published by the Commissioner for Older People for Northern Ireland argued that whilst being a victim of crime can be traumatic for anyone:

> there are particular factors that make older people more vulnerable to the effects of crime. These include: a higher rate of fear of crime; a higher rate of physical and mental impairment and disability; a greater likelihood of living alone; a greater likelihood of the absence of support networks; and higher rates of feelings of insecurity.[114]

13.79 At the same time, the report emphasised the importance of not categorising all older victims as vulnerable, observing that:

> some of the older people involved in this research were clear that being a victim did not define them as a person and they were keen to get on with their lives. For others, the impact can be longer lasting.[115]

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[114] Commissioner for Older People for Northern Ireland, Crime and Justice, *The Experience of Older People in Northern Ireland, Commissioners Report* (May 2019) p 6, available at https://cnpea.ca/images/online-olderadults-crime-report-northireland_2019may.pdf.

[115] Commissioner for Older People for Northern Ireland, *Crime and Justice, The Experience of Older People in Northern Ireland, Commissioners Report* (May 2019) p 6, available at https://cnpea.ca/images/online-olderadults-crime-report-northireland_2019may.pdf.

13.80 Research by Age UK indicates that people defrauded in their own homes are 2.5 times more likely to die or go into residential care within a year.[116] This situation (living alone) disproportionately impacts people above the age of 75, with over half of people 75+ years old living alone.[117] Clearly death and a decline in health necessitating residential care are very severe forms of harm.

13.81 Research by the Centre for Counter Fraud Studies notes that older people can experience "anger, stress, upset, ridicule and embarrassment"[118] from their experiences of fraud, leaving them isolated and afraid. These emotional reactions, particularly anger and shame, are commonly associated with the reaction that primary victims have to hate crime.[119]

13.82 Research commissioned by HMICFRS indicates that the impact of crime can increase with age. They noted that younger victims typically reported their crime having less of an impact on them and their daily life compared to those aged 80 and over.

> This younger group were often still very active, with many in full-time employment. Throwing themselves into their daily lives was a coping mechanism described by many of these participants, helping them move on from the emotional impact of being a victim of crime.
>
> By contrast, those typically aged 80 and over did not have the same opportunities to distract themselves. These participants described constantly reflecting on the crime, leading them to feel upset and more nervous about future incidents.[120]

13.83 The World Health Organization notes that elder abuse can result in serious, sometimes long-lasting psychological consequences, including depression and anxiety. They also observe the significance of physical harm in the context of elder abuse. For older people, the consequences of abuse can be especially serious, and the recovery time can be longer.

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116 Age UK, *Older People, Fraud and Scams* (October 2017) p 1, available at https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_oct17_scams_party_conference_paper_nocrops.pdf.

117 Age UK, *Older People, Fraud and Scams* (October 2017) p 1, citing Office for National Studies, Labour Force Survey, 2015.

118 S Coughlan, "Hidden 'shame' of elderly scam victims" (October 2018) *BBC News*, available at https://www.bbc.co.uk/news/education-44629881.

119 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018) pp 28 to 31, available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

120 Britainthinks, *Crimes against older people: research commissioned by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Service* (July 2019) p 48, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people-research.pdf.

Even relatively minor injuries can cause serious and permanent damage, or even death. A 13-year follow-up study found that victims of elder abuse are twice more likely to die prematurely than people who are not victims of elder abuse.[121]

13.84 This long-lasting impact has also been observed in the context of child abuse. There is evidence of a significant association between childhood maltreatment and poor mental health in childhood as well as later life, for example behavioural and conduct disorders, depression, anxiety and eating disorders.[122] More specifically, this long-lasting impact has also been observed in the context of child sexual abuse, with research by the Independent Inquiry into Child Sexual Abuse noting that for victims and survivors, the serious and wide-ranging consequences of child sexual abuse can endure throughout adult life.[123]

13.85 In relation to young people, Victim Support note that young people's experience of crime can be distinct from that of adults due to their maturity levels and vulnerability.[124] They further note that crime can have long term repercussions on the emotional well-being of children and young people; and can affect family relationships, friendships, confidence and self-esteem, their behaviours, school, life chances and cause health issues such as depression, anxiety, difficulties with sleeping, self-harm and eating disorders.[125]

13.86 In Chapter 10, we also explained that one possible reason for hate crime's capacity to cause greater harm is because it can compound disadvantage that the victim or wider group already experiences based on the targeted characteristic. For these purposes, we define disadvantage with reference to systemic conditions that negatively impact, or have historically negatively impacted, certain groups because of a characteristic they share.

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121 Word Health Organisation, *Elder abuse* (June 2020), available at https://www.who.int/en/news-room/fact-sheets/detail/elder-abuse#:~:text=Elder%20abuse%20can%20lead%20to%20physical%20injuries%20%E2%80%93,abuse%20can%20be%20especially%20serious%20and%20convalescence%20longer.

122 J Wilkinson, S Bowyer, *The impacts of abuse and neglect on children; and comparison of different placement options, Evidence review* (Department of Education, March 2017) p 36, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602148/Childhood_neglect_and_abuse_comparing_placement_options.pdf

123 C Fisher, A Goldsmith, R Hurcombe, C Soares, *The impacts of child sexual abuse: A rapid evidence assessment* (July 2017) p 11, available at https://www.iicsa.org.uk/key-documents/1534/view/iicsa-impacts-child-sexual-abuse-rapid-evidence-assessment-full-report-english.pdf.

124 Victim Support, *Policy Statement, Children and young people affected by crime* (April 2017), available at https://www.victimsupport.org.uk/sites/default/files/u3709/Victim%20Support%20Policy%20Statement%20-%20Children%20and%20young%20people.pdf.

125 Victim Support, *Getting it right for children and young people. What children and young people say they need from support services* (June 2015), available at https://www.victimsupport.org.uk/sites/default/files/You%20%26%20Co%20-%20Getting%20it%20right%20for%20young%20victims%20and%20witnesses.pdf.

13.87 Given this, we observe how some have argued that policy and media reactions to the ongoing COVID-19 crisis have revealed the lower value placed upon older people in society.[126] Human Rights Watch note that:

> in addition to the greater risk of severe illness and death from the virus, discriminatory attitudes and actions threaten older people's rights. A United Kingdom newspaper opinion piece about the economic impact of the coronavirus said that the death of older people might actually be beneficial by "culling elderly dependents (sic)."[127]

13.88 The notion that older people have been regarded as less valuable throughout the pandemic has also been raised in the context of care homes. A report published by the National Audit Office[128] found that between 17 March and 15 April, around 25,000[129] people were discharged from the NHS to care homes and that "not all patients were tested for COVID-19 before discharge".[130]

13.89 In April 2020 a joint letter to the Secretary of State for Health and Social Care, was signed by senior representatives from the Alzheimer's Society, Age UK, Marie Curie, Care England and Independent Age. They expressed that they were "appalled by the devastation which coronavirus is causing in the care system"[131] and had "all been inundated with desperate calls from the people we support".[132] They ultimately emphasised that "older people's lives are not worth less".[133]

13.90 It is therefore plausible that additional harm might result if an older person were to be targeted for crime because of prejudice or hostility towards their old age. This targeting might replicate, and in turn compound, ingrained discriminatory attitudes which imply that the lives of older people are somehow less valuable to society.

13.91 The arguments we have considered in this section indicate that crimes committed against older or young people – as well as criminal contexts such as elder abuse or child abuse, might cause increased harm to primary victims that is commensurate with

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126 J Costa-Font, "The Covid-19 crisis reveals how much we value old age" (April 2020) *London School of Economics Business Review*, available at https://blogs.lse.ac.uk/businessreview/2020/04/15/the-covid-19-crisis-reveals-how-much-we-value-old-age/; Shir Shimoni, "How coronavirus exposes the way we regard ageing and old people" (March 2020) *The Conversation*, available at https://theconversation.com/how-coronavirus-exposes-the-way-we-regard-ageing-and-old-people-135134.

127 Human Rights Watch, *Rights risks to older people in COVID-19 response* (April 2020), available at https://www.hrw.org/news/2020/04/07/rights-risks-older-people-covid-19-response.

harm caused by hate crime, for example, experiencing anxiety and depression for a substantial period of time.

Secondary harm to members of the targeted group

13.92 As we have outlined in Chapter 10, hate crime can have a collective impact on others who share the targeted characteristic – beyond harm caused to the primary victim. In Chapter 12, we described how women and girls live under the near-constant threat of sexual violence (owing to its sheer prevalence) which can significantly impact the behaviour and choices of women and girls, even if they have not personally been victims of VAWG.

13.93 It has also been shown that fear of being a victim of crime collectively applies to older people. According to a recent report published by the Commissioner for Older People for Northern Ireland, the reality that an older person is less likely to be a victim of crime is not reflected in how fearful older people can feel:

> Findings from the Northern Ireland Perceptions of Crime Survey suggest that almost one in six adults aged 65-74 in Northern Ireland reported high levels of concern about being a victim of crime in their own home. This was particularly the case with burglary, with almost one in ten adults aged 60+ believing that they would be a victim of burglary in the next 12 months.[134]

13.94 This fear of crime related to the threat of personal violence and to property. Older people who were spoken to as part of the research reported a reluctance to leave the house to attend community groups or other events because of a fear of leaving property unattended.[135] As we note in Chapter 10, changes of behaviour amongst those who share the targeted characteristic, in an attempt to avoid victimisation, have also been observed in relation to existing hate crime groups.

13.95 However, this collective fear of crime amongst older people is not obviously connected to the actual prevalence of crimes directed towards older people. The disparity between a higher fear of crime despite a much lower risk of criminal victimisation has been referred to as the "victimization-fear-paradox".[136]

13.96 Rather than prevalence of crime against older people, or criminal targeting linked to prejudice or hostility towards age, this fear of crime amongst older people might be linked to other situational factors – such as loneliness and reduced social

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134 Commissioner for Older People for Northern Ireland, *Crime and Justice: The Experience of Older People in Northern Ireland, Commissioners Report* (May 2019) p 9, available at https://cnpea.ca/images/online-olderadults-crime-report-northireland_2019may.pdf.

135 Commissioner for Older People for Northern Ireland, *Crime and Justice: The Experience of Older People in Northern Ireland, Commissioners Report* (May 2019) p 9.

136 W Greve, "Fear of crime among the elderly: foresight not fright" (1998) 5 *International Review of Victimology* 277.

participation.[137] Whilst these situational factors might be more likely to impact older people,[138] they are not necessarily features of old age.

13.97 Therefore, evidence of increased fear amongst older people does not necessarily show that older people experience collective harm as a result of criminal targeting based on prejudice or hostility towards age. In order to establish that this is the case, we will need evidence of a link between harmful consequences such as fear of crime which causes older people as a group to change their behaviour, and crime that is based on prejudice or hostility towards the characteristic of age.

Harm to society more widely

13.98 In Chapter 10, we note that hate crime can cause harm to wider society – for example by damaging the principle of equality. For the purposes of measuring this, we establish two ways that this damage might occur. Firstly, criminal targeting might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Secondly, this criminal targeting might undermine a group's equal participation in economic, social, political and cultural life. We outline ways that participation might be undermined in Chapter 10.

13.99 The research considered above indicates that older people experience elevated fear of crime, which in turn causes them to avoid certain spaces.[139] We might point to this as an example of older people's equal participation in society being undermined. However, as we also note above, we are not aware that this increased fear of crime, and subsequent avoidance behaviour, occurs as a result of crimes which are linked to prejudice or hostility towards older people. As a result, it is more difficult to point to evidence which satisfies the harm to wider society aspect of the additional harm criterion in relation to older people. However, we acknowledge that consultees may submit arguments and evidence to the contrary.

SUITABILITY

13.100 As we set out in Chapter 10, the aim of the suitability criterion is to consider whether hate crime based on the relevant characteristic would fit logically within the broader offences and sentencing framework and prove workable in practice. We will also assess whether hate crime might produce harmful consequences, whether it would represent an efficient use of relevant resources and whether the characteristic or group is compatible with the fundamental rights of others.

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137 L De Donder, D Verte and E Messelis, "Fear of Crime and Elderly People: Key Factors That Determine Fear of Crime Among Elderly People in West Flanders" (2005) 30 *Ageing International* 363.

138 F Landeiro, P Barrows, E Musson Nuttall and others, "Reducing social isolation and loneliness in older people: a systematic review protocol" (2017) 7 *British Medical Journal Open,* citing R Ibrahim, Y Abolfathi Momtaz, TA Hamid, Social isolation in older Malaysians: prevalence and risk factors (2013) *Psychogeriatrics* 13, 71; L Grenade, D Boldy, "Social isolation and loneliness among older people: issues and future challenges in community and residential settings" (2008) 32 *Australian Health Review* 468.

139 Commissioner for Older People for Northern Ireland, Crime and Justice, *The Experience of Older People in Northern Ireland, Commissioners Report* (May 2019) pp 6 and 9 available at https://cnpea.ca/images/online-olderadults-crime-report-northireland_2019may.pdf.

13.101 We will only raise suitability concerns below where they are relevant to the characteristic of age. For example, the question of whether the characteristic of age is consistent with the rights of others is not engaged.

Difficulties of proving the aggravation

13.102 It is likely that the vast majority of crimes targeted towards older people would struggle to fit within the existing "hostility" test used for the application of hate crimes laws. This concern was acknowledged by Lord Bracadale in Scotland, who while recommending the inclusion of "age" as a category, also stated that "this approach is likely to capture a relatively small proportion of the offences committed against elderly persons."[140]

13.103 In Chapter 15, we provisionally propose a wider legal test which would also capture a defendant who was "motivated by prejudice" towards the protected characteristic. This may also be difficult to satisfy in relation to crimes against older people. When we met with Action on Elder Abuse in the context of England and Wales, they argued that targeting the elderly usually involves the exploitation of actual vulnerability rather than hatred of older people. As we explain above, it is not clear that exploitation of vulnerability would constitute a prejudice, nor is it clear that actual or perceived vulnerability arises as a result of old age itself (rather than situational factors such as dependency on a carer, or chronic conditions that result in poor mobility).

13.104 As a result, satisfying the legal test for hate crime is likely to be very difficult in the context of crimes against older people.

13.105 In light of these difficulties, the focus on exploitation of vulnerability is arguably better captured by existing sentencing guidelines, rather than a statutory aggravation based on hostility (or prejudice) towards age,[141] with existing sentencing guidelines recognising "deliberate targeting of vulnerable victim(s)"[142] as an aggravating factor in the sentencing of almost all criminal offences. In this way, the concept of vulnerability is introduced only when relevant, and is not inherently attached to the characteristic of old age.

The potential for double counting

13.106 As indicated above, sentencing guidelines in England and Wales often include the "deliberate targeting of vulnerable victim(s)"[143] as an aggravating factor which indicates a higher degree of offender culpability.

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140 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49 at para 4.70.

141 H Bows, *Is more law the answer? A review of proposed reforms to address the victimisation of older adults* (2020) p 26, available at https://www.parliament.scot/S5_JusticeCommittee/Inquiries/H_Bows_SPICe_ReportAddressing_older_victimisation.pdf.

142 Sentencing Council, *Aggravating and mitigating factors*, available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/.

143 Sentencing Council, *Aggravating and mitigating factors*, available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/.

13.107 At the start of this chapter, at paragraph 13.2, we observed that this sentencing aggravation has been used in relation to older people.[144] If a statutory aggravating factor based on hostility towards older people were also created, there is a small risk of double counting, if the sentencer were to take both aggravating factors into account, and fail to properly acknowledge the overlap in reaching a final sentence.

Potentially harmful consequences

13.108 We acknowledge the risk of the following potentially harmful consequences that might result from the recognition of age-based hate crime.

Disrupting existing child abuse frameworks

13.109 Above we observe that child abuse is a criminal context which exclusively impacts people of a certain age, ie children. We do not envisage age-based hate crime laws being applied in this context. However, if they were to be used, hate crime might prove unhelpful. Criminal areas such as child abuse, child sexual abuse or child sexual exploitation are incredibly sensitive, and victim-survivors require specialist, dedicated support. Children are always approached from a safeguarding perspective in law and policy. When crimes are reported in these contexts, agencies from the public sector,[145] third sector,[146] and the criminal justice system[147] provide specialised involvement. We would not want to propose the introduction of an additional hate crime element which might potentially disrupt or complicate what is already a multi-agency response.

Stereotyping based on vulnerability

13.110 As we note above, it has been argued that older people are criminally targeted based on their actual or perceived vulnerability. Some might seek to use this vulnerability argument to satisfy the legal test for hate crime, although as we explain at paragraph 13.103, this would be difficult.

13.111 Vulnerability can be associated with weakness.[148] Making a blanket connection between vulnerability and a specific group, for example older people or disabled people, has been viewed as paternalistic and potentially damaging.[149] Bows argues that:

> in addition to oversimplifying vulnerability and victimisation by categorising older people as inherently vulnerable, perceiving all older people to be vulnerable based on chronological age demonstrates prejudicial conceptualisations of older age, the very thing (prejudice) that hate crime legislation has been introduced to address. It

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144 *R v Gaskin (Arthur)* [2019] EWCA Crim 1048; 6 WLUK 371.

145 For example, schools, social services, Local Authorities.

146 See for example, the work of The Lighthouse, London, available at https://www.thelighthouse-london.org.uk/.

147 The Metropolitan Police, *London Child Sexual Exploitation Operating Protocol* (June 2017), available at https://www.met.police.uk/SysSiteAssets/media/downloads/central/advice/met/child-abuse/the-london-child-sexual-exploitation-operating-protocol.pdf.

148 A Roulstone, P Thomas, S Balderston, "Between hate and vulnerability: unpacking the British criminal justice system's construction of disablist hate crime" (2011) 26 *Disability & Society* 351, 358.

149 H Bows, *Is more law the answer? A review of proposed reforms to address the victimisation of older adults* (2020) pp 25 to 26; M.A. Walters and J. Tumath, "Gender 'hostility', rape, and the hate crime paradigm" (2014) 77 *The Modern Law Review* 563, 577.

homogenises older people into a single group characterised by their inherent vulnerability.[150]

13.112 Similarly, Herring disputes the connection between the maltreatment of an older person and their vulnerability; arguing it minimises the fact that abuse of older people can be "a reflection of the attitudes of an individual, organization, or society towards older people in general."[151]

Whether hate crime is an appropriate way to characterise the offending

13.113 In Chapter 12 at paragraph 12.137 we note that hate crime might not appropriately characterise the nature of the offending in the context of domestic abuse. We heard suggestions that it is too reductive to apply the hate crime framework to the complex nature of motivations that occur in the domestic abuse context. This view suggests that domestic abuse involves control and coercion within the dynamics of a specific relationship, and frames abuse as intimate partner violence rather than interchangeable gendered violence.

13.114 At paragraph 13.35, we observed that parallels have been drawn between elder abuse and domestic abuse. In light of this observation, we might apply similar criticisms in the context of age and elder abuse – that it is potentially too reductive to characterise elder abuse as crime which targets older people based on prejudice or hostility towards old age.

13.115 When we met with Action on Elder Abuse in the context of England and Wales, they also told us that hate crime laws may fail to capture the nuances surrounding elder abuse and its causes. As we note above, they argued that elder abuse is rarely about hatred. Action on Elder Abuse were clear that they want to see elder abuse given greater priority, both in terms of policy and enforcement, but they were not convinced that hate crime laws were the right mechanism to achieve this.

FRAMING AGE-BASED PROTECTION

13.116 We now consider how age-based protection should be framed if it were to be included in hate crime provisions: in general terms – ie "age", or in a more limited way – for example "older age".

13.117 Organisations who support or advocate on behalf of older people did not indicate a preference for singling out older people in age-based protection when we met with them. Similarly, the Bracadale review of hate crime legislation in Scotland recently recommended that a general category of age be added, and the Hate Crime and Public Order (Scotland) Bill uses the wider term "age". Clause 14(2) of the Bill notes that a "reference to age includes a reference to an age falling within a range of ages". This would also be consistent with the way age is framed in section 5 of the Equality Act 2010.

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150 H Bows, *Is more law the answer? A review of proposed reforms to address the victimisation of older adults* (2020) pp 25 to 26.

151 J Herring, *Older people in law and society* (1st ed 2009) p 137.

13.118 Nonetheless, by way of introduction we note that our terms of reference specifically ask whether "older age" ought to be protected. We also note that the jurisdiction of Florida specifically protects "advanced age".

13.119 Limiting hate crime protection to older people might make a particularly strong statement about the discrimination faced by older people. For example, in a stakeholder meeting, Helen Herklots, the Older Persons' Commissioner for Wales argued that recognising age as a protected category for hate crime purposes might help to change this hidden nature of elder abuse.[152] This symbolic impact might be enhanced if older people were specifically included in legislation (however, we note that the Commissioner indicated that she was content for "age" more generally to be the characteristic).

13.120 Arguably, only "older people" are likely to satisfy our three criteria above, such that they should be singled out for protection in hate crime laws. This would be similar to the characteristics of "transgender" and "disability", which, as we note in Chapter 11, are limited to the group that is considered in need of hate crime protection (excluding cisgender and non-disabled people who are not).

13.121 However, in the context of age, there are also practical considerations to bear in mind which might favour the use of a general term like race, religion and sexual orientation.

13.122 If the term "old age" or "older people" is used, it would require definition. In the context of an ageing population, the goal posts for "older person" are constantly shifting – above we have noted that the CPS recently consulted on whether to increase their threshold for "older people" from 65 years old to 68 years old. Defining age with specific reference to older people might force us to make arbitrary, changeable and unreflective age demarcations.

13.123 Arguably, a focus on fixed categories such as "young" and "old" does not accurately reflect the nature of age and ageing. In the context of research methods,[153] a literature review published by the Centre for Better Ageing suggests that:

> focus on age categories of 'young' and 'old' may over-simplify representations of ageing and only present part of the picture. Researching age using continuous measures that better reflect ageing as a continuous process, may encourage a richer, less oppositional, and less negative perspective of ageing.[154]

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[152] A House of Commons report also emphasises the hidden nature of elder abuse, see Elder Abuse, Report of the House of Commons Health Committee, (2003-04) HC 111-I.

[153] We emphasise that the Centre for Better Ageing report was expressing this point in an entirely different context (research methods) and was not considering the way in which hate crime categories ought to be framed.

[154] H J Swift and B Steeden, *Exploring representations of old age and ageing, Literature Review* (Centre for Better Ageing, March 2020) p 39, available at https://www.ageing-better.org.uk/sites/default/files/2020-03/Exploring-representations-of-old-age.pdf.

OVERALL CONCLUSIONS RELATING TO THE PROTECTION OF AGE IN HATE CRIME LAWS

13.124 We have not drawn provisional conclusions in relation to any of the three criteria. As a result, we are not drawing a provisional conclusion as to whether age should be recognised as a characteristic in hate crime laws.

13.125 Instead, considering the three criteria that we have applied above, we invite consultees' views on whether age should be recognised as protected characteristic in hate crime laws.

13.126 We have also considered whether hate crime protection should be limited to older people, by using a specific term such as "older people", or extended to protect people of all ages, by using a general term such as "age". There are competing arguments in this regard. As a result, we also invite consultees' views on this matter.

Consultation Question 15.

13.127 We invite consultees' views on whether age should be recognised as a protected characteristic for the purposes of hate crime law.

Consultation Question 16.

13.128 We invite consultees' views as to whether any age-based hate crime protection should be limited to "older people" or include people of all ages.

Chapter 14: Other additional characteristics

INTRODUCTION

14.1 In addition to misogyny, some police forces recognise and record other characteristics that are not currently protected by hate crime laws; namely sex workers[1] and alternative subcultures.[2] Further groups or characteristics have also been considered for hate crime protection, including people experiencing homelessness and those who hold non-religious philosophical beliefs (for example, humanism).

14.2 In this chapter we will consider whether there is a principled case for recognising any of these four characteristics or groups in hate crime laws. We will do so using the three criteria that we outlined in Chapter 10. These are:

(1) **Demonstrable need**: evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.

(2) **Additional Harm:** evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

(3) **Suitability**: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, and represent an efficient use of resources. Where relevant, we will also consider any harmful practical consequences that protection of the characteristics might cause and consider that the characteristic is consistent with the rights of others.

14.3 Below we assess the case for each characteristic or group in turn.

SEX WORKERS

14.4 Before discussing the case for recognising sex workers, it is useful to set out what we mean by this term.

14.5 In Spring 2018, the University of Bristol were commissioned by the Home Office and South Wales Police to consider the extent and changing nature of prostitution in England and Wales. For the purposes of their research, they used the following working definition of prostitution and/or sex work:

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1 Merseyside Police were the first force to record crimes against sex workers as hate crime in 2006, see Merseyside Police Hate Crime Policy, (April 2019) p 2, available at https://www.merseyside.police.uk/SysSiteAssets/foi-media/merseyside/policies/hate-crime-policy-only.pdf.

2 Greater Manchester Police were the first force to record crimes against alternative subcultures as hate crime in 2013, see R Mills, Hate Crime: Goths, Punks and Emos Recognised *Sky News* (3 April 2013), available at https://news.sky.com/story/hate-crime-goths-punks-and-emos-recognised-10449737.

> Prostitution and/or sex work constitutes the provision of sexual or erotic acts or sexual intimacy in exchange for payment or other benefit or need.[3]

14.6 The researchers described this definition as adopting a "broad view" of the sex industry.[4]

14.7 For the purposes of this consultation paper, we adopt this broad view of sex work.

14.8 The importance of language when discussing sex work has been emphasised – it has been argued that the term sex work constitutes "liberation from the deep-rooted negative and legalistic term prostitute".[5]

14.9 Whilst we recognise that the language used to describe sex workers may vary according to different contexts, as well as the preferences of individual sex workers, we will use the term "sex worker" for the purposes of this consultation paper.

14.10 We also note that whilst most sex workers are women;[6] men,[7] and people of other gender identities are also involved in sex work.

14.11 In 2006, Merseyside police began recording crimes against sex workers as hate crimes,[8] in response to the disproportionate levels of violent crime that this group experiences. Merseyside police have emphasised that the hate crime approach provides a framework which directs police away from treating sex workers as offenders, and flags crimes against sex workers as a police priority.[9]

14.12 In 2019, North Yorkshire Police also began to record crimes against sex workers as hate crimes.[10]

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3 M Hester, N Mulvihill, A Matolcsi, A L Sanchez, SJ Walker: *The nature and prevalence of prostitution and sex work in England and Wales today* (University of Bristol, 2019) p 7, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842920/Prostitution_and_Sex_Work_Report.pdf.

4 M Hester, N Mulvihill, A Matolcsi, A L Sanchez, SJ Walker: *The nature and prevalence of prostitution and sex work in England and Wales today* (University of Bristol, 2019) p 7.

5 Stella, *Language Matters: Talking About Sex Work*, (April 2013) p 3, available at https://www.nswp.org/sites/nswp.org/files/StellaInfoSheetLanguageMatters.pdf.

6 This includes transgender women.

7 This includes transgender men.

8 Merseyside Police's definition of hate crime is that victims are targeted for crime because of a certain characteristic or perceived difference, see Merseyside Police, *Hate crime*, available at https://www.merseyside.police.uk/advice/advice-and-information/hco/hate-crime/what-is-hate-crime/.

9 This was highlighted to us by Dr Rosie Campbell and was communicated at a National Police Chiefs Council (NPCC) event in February 2020.

10 North Yorkshire Police, *Crimes against sex workers added to Hate Crime policy* (2019), available at https://northyorkshire.police.uk/staying-safe/hate-crime/crimes-against-sex-workers-added-to-hate-crime-policy/.

14.13 The hate crime approach has been linked to an increase in reporting and conviction rates for crimes against sex workers in Merseyside,[11] as well as higher levels of intelligence coming to the police from sex workers in relation to dangerous offenders.[12]

14.14 As we set out in Chapter 10, our provisional view is that we should assess whether characteristics ought to be given explicit hate crime protection according to the three criteria outlined at paragraph 14.2. We consider the application of these criteria below.

DEMONSTRABLE NEED CRITERION

14.15 The demonstrable need criterion requires us to consider three aspects. Firstly, we will consider evidence of crime experienced by sex workers. Secondly, we will consider whether the crime faced by this group is linked to prejudice or hostility towards the relevant characteristic (ie sex worker status). Finally, we will assess whether crime against this group is prevalent. In Chapter 10 we set out what we mean by "prevalent".

Crime experienced by sex workers

14.16 As Phipps notes, sex workers frequently experience crime "ranging from harassment to robbery, physical assault, rape and murder".[13]

14.17 In the UK, 184 sex workers have been murdered since 1990.[14] Of the 180 sex workers who were killed between 1990 and 2016, research by Cunningham and Sanders identified 110 of these homicides as being directly work-related, because the sex worker was killed either by a client, in a sex working workplace or last seen alive in a known street sex area.[15] Cisgender women represented the vast majority of victims (105) of occupational homicide, with two cisgender men and three trans women also victims of murder.[16]

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11 At a sex worker hate crime conference we attended in Merseyside in September 2019, representatives from Merseyside police and the Red Umbrella project told us that reporting and conviction rates of crimes against sex workers in Merseyside had been notably higher than the national average following the introduction of the hate crime approach.

12 Prostitution, Report of the House of Commons Home Affairs Committee (2016-17) HC 26 para 45.

13 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) p 91.

14 National Ugly Mugs, *CEO statement, International day to end violence against sex workers 2019* (December 2019), available at https://uglymugs.org/um/press-room/num-statement-international-day-to-end-violence-against-sex-workers-2019/. National Ugly Mugs note that this number reflects those murdered, who are in the public domain and who have been identified as sex workers.

15 T Sanders, J Cunningham, L Platt, P Grenfell, PG Macioti, *Reviewing the occupational risks of sex workers compared to other "risky" professions* (July 2017) p 1, available at https://www2.le.ac.uk/departments/criminology/people/teela-sanders/sex-work-and-homicide.

16 T Sanders, J Cunningham, L Platt, P Grenfell, PG Macioti, *Reviewing the occupational risks of sex workers compared to other "risky" professions* (July 2017) p 1.

14.18 Studies have revealed a long-standing pattern of violence perpetrated against sex workers in the UK.[17] For example, a 2004 study of 125 sex workers working across five UK cities showed that three-quarters of them had experienced physical violence.[18]

14.19 More recently, research conducted in 2017 used secondary quantitative data analysis of 2,056 crime reports submitted to the UK National Ugly Mugs (NUM) scheme between 2012 and 2016. [19] It found that for street sex workers, 19.6% of the 2,056 reports included rape or attempted rape, and 57.1% involved physical violence.[20] Independent sex workers were most likely to report stalking and harassment – 31.3% of the 2056 reports.[21] Escort workers were most likely to report fraud – 12.7% of their reports to the NUM database involved fraud.[22]

14.20 The 2018 Beyond the Gaze research project[23] involved a study of the working practices, regulation and safety of internet-based sex work in the UK. It found "high levels of digitally facilitated crime experienced by people in this online sector". [24]

14.21 The Beyond the Gaze online sex worker survey produced 641 valid responses.[25] Of those surveyed, 45.1% had experienced persistent or repeated/unwanted contact or attempts to contact through email, text or social media in the last year, which rose to 65.1% of those surveyed in the last five years.[26] This was followed by threatening or harassing texts, calls or emails, with 36.3% of those surveyed experiencing this in the

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17 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) pp 91 to 92.

18 M Hester, N Westmarland, *Tackling Street Prostitution: Towards an Holistic Approach,* Home Office Research Study 279, (2004) p 82, available at http://dro.dur.ac.uk/2557/1/2557.pdf.

19 National Ugly Mugs (NUM) are a non-profit organisation, initially funded by the Home Office for a one-year pilot. Members who sign up to the NUM scheme can share information about potentially dangerous clients which can then be distributed across the NUM membership. See the National Ugly Mugs website for more information about what they do, available at https://uglymugs.org/um/about/.

20 L Connelly, D Kamerade, T Sanders, "Violent and nonviolent crimes against sex workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom" (2018) 11 *Journal of Interpersonal Violence* 1, 27 (Table 2).

21 L Connelly, D Kamerade, T Sanders, "Violent and nonviolent crimes against sex workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom" (2018) 11 *Journal of Interpersonal Violence* 27 (Table 2). Across all sex markets, NUM reported a 188% increase in reports of stalking and harassment between 2014 and 2015, from 48 reports in 2014 to 135 reports in 2015, see National Ugly Mugs, *National Ugly Mugs, submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry* (2016) p 6, available at https://uknswp.org/um/uploads/National-Ugly-Mugs-HASC-response.pdf.

22 L Connelly, D Kamerade, T Sanders, "Violent and nonviolent crimes against sex workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom" (2018) 11 *Journal of Interpersonal Violence* 1.

23 T Sanders, J Scoular, R Campbell, J Pitcher and S Cunningham, *Internet Sex Work, Beyond the Gaze* (1st ed, 2017).

24 T Sanders, J Scoular, R Campbell, J Pitcher and S Cunningham, "Risking safety and rights: online sex work, crimes and 'blended safety repertoires'" (2018) 70 *British Journal of Sociology* 1539, 1545.

25 T Sanders, J Scoular, R Campbell, J Pitcher and S Cunningham, "Risking safety and rights: online sex work, crimes and 'blended safety repertoires'" (2018) 70 *British Journal of Sociology* 1539, 1541.

26 T Sanders, J Scoular, R Campbell, J Pitcher and S Cunningham, "Risking safety and rights: online sex work, crimes and 'blended safety repertoires'" (2018) 70 *British Journal of Sociology* 1539, 1545.

last year, and 56.2% in the last five years. Both crime types can form part of harassment and stalking patterns.[27]

Are these crimes linked to prejudice and hostility towards sex workers?

14.22 It has also been argued that sex workers are targeted for crime because of prejudice or hostility towards their status as sex workers. Indeed, for Merseyside police, including sex workers in their hate crime policy recognises "the fact that violent and other crimes against sex workers are often shaped by discrimination, attitudes of hostility and prejudice".[28]

14.23 A key aspect of this prejudice is the stigma that sex workers face as a group in society. Roberts has used the term "whore stigma"[29] which, as Campbell explains, is invoked to "describe historically shaped cultural attitudes which demonise, denigrate and objectify sex workers and deny them full legal and social rights".[30]

14.24 This stigma has been causally linked to violence against sex workers. As Campbell's work emphasises, global research literature has argued that the othering[31] and stigmatisation of sex workers generates hostility against this group and can ultimately lead to violence against sex workers.[32]

14.25 More specifically, Campbell draws upon the work of Lowman, who has identified a "discourse of disposability"[33] in media and public opinion which drives stigma against street sex workers by focusing on their eradication, particularly from residential areas.[34] According to Lowman, this rhetoric is linked to violence against sex workers; he argues that it "contributed to a sharp increase in murders of street prostitutes after 1980".[35]

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27 T Sanders, J Scoular, R Campbell, J Pitcher and S Cunningham, "Risking safety and rights: online sex work, crimes and 'blended safety repertoires'" (2018) 70 *British Journal of Sociology* 1539, 1546.

28 Merseyside Police, *Hate Crime Policy* (April 2019) p 2, available at https://www.merseyside.police.uk/SysSiteAssets/foi-media/merseyside/policies/hate-crime-policy-only.pdf.

29 N Roberts "The whore, her stigma, the punter and his wife" *New Internationalist* (February 1994), available at https://newint.org/features/1994/02/05/whore/.

30 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside* (PhD thesis, University of Durham, 2016) p 69.

31 Othering refers to the placing of a person or a group outside and/or in opposition to what is considered to be the norm, see J Harris and V White, *A Dictionary of Social Work and Social Care* (1st ed, 2014).

32 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside* (PhD thesis, University of Durham, 2016) p 62.

33 J Lowman "Violence and outlaw status of (street) prostitution in Canada" (2000) 6 *Violence Against Women* 987, 988. See further discussion of this in R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside* (PhD thesis, University of Durham, 2016) pp 64 to 65.

34 J Lowman, "Violence and outlaw status of (street) prostitution in Canada" (2000) 6 *Violence Against Women* 987, 988.

35 J Lowman, "Violence and outlaw status of (street) prostitution in Canada" (2000) 6 *Violence Against Women* 987, 988.

14.26 More recently, NUM have also argued that stigma is an important factor in cases of violent assault and murder of sex workers, with offenders who have targeted sex workers often making comments demonstrating this in interviews after the crime.[36]

14.27 Stigma against sex workers negatively affects their credibility and has resulted in sex workers being taken less seriously when they report violence.[37] Research indicates that this factor can play a part in a perpetrator's decision to target sex workers – analysis of reports made to NUM found that perpetrators referred to the fact that sex workers would not report crimes or the fact that they would be taken less seriously by the police if they did report.[38]

14.28 As a result of this stigma, sex workers endure unique myths; for example, the idea that sex workers are so sexually experienced that they do not experience harm from rape,[39] the idea that accepting money for sex implies irrevocable consent such that sex workers cannot be raped,[40] or the idea that sex workers are to blame for crimes such as rape because they are out working alone.[41] Miller and Schwartz argue that these rape myths, which constitute a form of prejudice, actively fuel the sexual violence that sex workers face.[42]

14.29 It has also been observed that offenders who commit crimes against sex workers are often serial predators, [43] who may have a history of targeting sex workers. This might indicate that the perpetrator's decision to offend is strongly linked to the victim's status as a sex worker. There are various high-profile examples of serial killers targeting sex workers. At the trial of Steven Wright, who murdered 5 sex workers in Ipswich in 2006,

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36 National Ugly Mugs, *National Ugly Mugs submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry* (2016) p 6, available at https://uknswp.org/um/uploads/National-Ugly-Mugs-HASC-response.pdf.

37 National Ugly Mugs, *National Ugly Mugs submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry* (2016) p 4.

38 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 60 citing A Feis-Bryce, "National Ugly Mugs: fighting stigma, saving lives" presented at: *Best Practice and Shared Learning Event, National Policing Sex Work Guidance*, Merseyside Police Headquarters, 31st March 2016. See also H Kinnell, *Violence and Sex Work in Britain*, (1st ed, 2008).

39 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 63 citing J Miller and M D Schwartz "Rape myths and violence against street prostitutes" (1995) 16 *Deviant Behaviour: an interdisciplinary journal* 1.

40 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 63 citing J Miller and M D Schwartz "Rape myths and violence against street prostitutes" (1995) 16 *Deviant Behaviour: an interdisciplinary journal* 1.

41 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 63 citing J Miller and M D Schwartz "Rape myths and violence against street prostitutes" (1995) 16 *Deviant Behaviour: an interdisciplinary journal* 1.

42 J Miller and M D Schwartz "Rape myths and violence against street prostitutes" (1995) 16 *Deviant Behaviour: an interdisciplinary journal* 1; R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 63.

43 National Ugly Mugs, *National Ugly Mugs submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry* (2016) p 1.

Mr Justice Wright noted that "this was a targeted campaign of murder".[44] Peter Sutcliffe murdered 13 women between 1975 and 1980, several of whom were thought to be sex workers. His defence at trial focused on the fact he had heard a voice from God sending him on a divine mission to "rid the streets of prostitutes".[45]

14.30 It has also been argued that wider forms of misogyny featured in Sutcliffe's murders,[46] and features in violence against sex workers more generally.[47] However, this does not necessarily displace more specific hostility or prejudice towards sex workers. Wattis argues that "in the case of sex workers, structural marginality intersects with ideologies relating to feminine sexuality and respectability to produce an especially potent misogyny".[48] The idea that sex workers are at the "bottom of the hierarchy of femininity"[49] has played out in the response to sex workers being murdered, a response which has often treated them as lesser due to their marginality and low status.[50]

14.31 Finally, the idea that hostility and prejudice against sex workers plays a part in the crime they face is reflected in the lived experiences of sex workers who were interviewed as part of Campbell's work:

> The key reasons for majority support for the hate crime policy emergent from women's comments was that defining crimes against sex workers as hate crime connected to their understanding of the motivations for crimes against sex workers generally and particularly their own experiences of violent and other crime.[51]

14.32 In light of the above, it appears there is strong support for the idea that the crime experienced by sex workers is connected to prejudice or hostility towards their status as sex workers.

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44 E Addley, K McVeigh and D Batty, "Suffolk serial killer Steve Wright jailed for life" (February 2008) *The Guardian*, available at https://www.theguardian.com/uk/2008/feb/22/wright.sentenced.

45 L Wattis, "Revisiting the Yorkshire Ripper murders: Interrogating Gender Violence, Sex Work and Justice" (2015) 12 *Feminist Criminology* 3, 7.

46 L Wattis, "Revisiting the Yorkshire Ripper murders: Interrogating Gender Violence, Sex Work and Justice" (2015) 12 *Feminist Criminology* 3.

47 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 267. Whilst a high proportion of those involved in sex work identify as women, we acknowledge that non-binary people and men are also represented in sex work. In this light, Campbell notes that understanding violence against sex workers as only a product of misogyny ignores the experience of male sex workers, see R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 268.

48 L Wattis, "Revisiting the Yorkshire Ripper murders: Interrogating Gender Violence, Sex Work and Justice" (2015) 12 *Feminist Criminology* 3, 15.

49 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) p 92; A Phipps, "Rape and Respectability: ideas about sexual violence and social class" (2009) 43 *Sociology* 667.

50 L Wattis, "Revisiting the Yorkshire Ripper murders: Interrogating Gender Violence, Sex Work and Justice" (2015) 12 *Feminist Criminology* 3, 14.

51 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 256.

Prevalence of crimes based on prejudice and hostility towards sex workers

14.33 Above we have observed that much of the crime faced by sex workers has been linked to prejudice and hostility towards their status. Therefore, the data we have discussed above, under the heading "crimes against sex workers", provides a useful indication of the prevalence of crimes that are based on prejudice and hostility towards sex workers.

14.34 In Chapter 10 we noted that prevalence has three parts which ought to be balanced against one another. The first is "absolute prevalence", ie the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic. The second is "relative prevalence", ie the amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic, as compared with the size of the group who share the characteristic. The third is "severity" which considers the nature of the criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.

14.35 The absolute prevalence of crimes against sex workers is low compared with other groups. Whilst more than 2000 reports of crimes against sex workers have been submitted to the NUM database since 16 July 2012,[52] this is lower than crimes linked to other characteristics, for example gender. As we note in Chapter 12, CSEW data estimates that 510,000 women aged 16 to 59 experienced sexual assault in the year ending March 2017.[53]

14.36 However, we note that sex workers constitute a small group in society, compared to other, larger, groups that we consider in the hate crime context. The UK government recently estimated that sex workers make up around 0.001% to 0.0012% of the UK population,[54] whereas women and girls make up 51% of the UK population. By contrast then, the relative prevalence of crime against sex workers is very high. This is borne out in the studies and research considered above. For example, a 2004 study of 125 sex workers working across five UK cities showed that three-quarters of them had experienced physical violence.[55] As Phipps notes, the risk or experience of violence is

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52 National Ugly Mugs, *National Ugly Mugs, submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry* (2016) p 4.

53 Office for National Statistics, *Sexual Offences in England and Wales: year ending March 2017* (8 February 2018), available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017.

54 Prostitution, Report of the House of Commons Home Affairs Committee (2016-17) HC 26, p 4. However, we acknowledge that the actual number of those involved in sex work might be higher than this.

55 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) p 91 citing M Hester, N Westmarland, *Tackling Street Prostitution: Towards an Holistic Approach* (Home Office Research Study 279, 2004) p 7, available at http://dro.dur.ac.uk/2557/1/2557.pdf.

a "central feature"[56] of sex work, observing that "in general, it is highly likely that sex workers will experience violence".[57]

14.37 The proportion of sex workers who experience crime may also be higher than the statistics indicate. As noted above, sex workers are deeply stigmatised in society and face significant barriers when it comes to reporting crimes. NUM's 2015 survey with Leeds University found that 49% of sex workers surveyed were either "unconfident" or "very unconfident" that the police would take their crime reports seriously.[58]

14.38 The severity of crimes against sex workers is also very high, with research suggesting that many of the reports to NUM involved physical violence.[59] The statistics we outline above also indicate a high proportion of sexual offences against sex workers, with secondary quantitative data analysis of 2,056 crime reports submitted to the NUM scheme between 2012 and 2016[60] revealing that for street sex workers, 19.6% of the reports included rape or attempted rape.

14.39 Therefore, the available evidence indicates that crime based on prejudice or hostility towards sex workers is prevalent.

ADDITIONAL HARM CRITERION

14.40 We now turn to consider our second criterion, which requires evidence that criminal targeting based on hostility or prejudice towards the characteristic causes significant additional harm to the victim, members of the targeted group, and society more widely.

14.41 We will consider three aspects of harm, in accordance with the way "additional harm" has been explained in Chapter 10. These aspects are:

- Increased harm to the primary victim.
- Secondary harm to members of the targeted group.
- Harm to society more widely.

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56 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) p 89.

57 A Phipps "Violence against sex workers" in L McMillan and N Lombard (eds) *Violence Against Women: Current theory and practice in domestic abuse, sexual violence and exploitation – Research Highlights in Social Work* (1st ed 2013) p 91.

58 National Ugly Mugs submission of written evidence to the Home Affairs Select Committee's Prostitution inquiry. (2016) p 4, available at https://uknswp.org/um/uploads/National-Ugly-Mugs-HASC-response.pdf.

59 L Connelly, D Kamerade, T Sanders, "Violent and nonviolent crimes against sex workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom" (2018) 11 *Journal of Interpersonal Violence* 1, 27 (Table 2).

60 L Connelly, D Kamerade, T Sanders, "Violent and nonviolent crimes against sex workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom" (2018) 11 *Journal of Interpersonal Violence* 1.

Additional harm to the primary victim

14.42 In Chapter 10 we observed that hate crime can cause more significant harm to those who are directly victimised by it, over and above the harm caused by differently-motivated crime.

14.43 Whilst some researchers have pointed to the high-levels of post-traumatic stress disorder within the sex worker community, this has sometimes been used to argue that participation in sex work automatically subjects sex workers to violence,[61] ie that sex work in itself is a form of sexual violence. This argument is widely contested and is something we discuss under the suitability heading below.

14.44 By contrast, for the purposes of the additional harm criterion, we are seeking to discern the existence of additional harm caused by crime that is based on hostility or prejudice towards the victim's status as a sex worker, as opposed to harm caused by participation in sex work. Research is more limited when it comes to this question.

14.45 However, in Chapter 10 we observed that where direct research was not available, it is useful to step back and consider why additional harm is likely to occur in the context of hate crime.

14.46 One such reason is the fact that hate crime may compound the existing disadvantage that a victim already faces as a result of a specific characteristic. In Chapter 10, we defined disadvantage with reference to systemic conditions that negatively impact, or have historically negatively impacted, certain groups because of a characteristic they share. Some examples of these conditions were social exclusion or marginalisation of members of the characteristic group and widely held stigma related to the characteristic.

14.47 Both of these conditions apply to sex workers. Amnesty International describe sex workers as "one of the world's most marginalised, vulnerable and stigmatised groups of people".[62] They note that human rights violations are a daily reality or risk for this group in many countries worldwide and that globally:

> Sex workers face attacks, discrimination and injustice – at the hands of police, clients, exploitative third parties involved in sex work, landlords, family, community and healthcare providers. Much of this violence and abuse goes unreported, under-investigated and unpunished.[63]

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61 M Farley, A Cotton, J Lynne, S Zumbeck, F Spiwak, M E Reyes, D Alvarez , U Sezgin, "Prostitution and trafficking in 9 countries: update on violence and Posttraumatic Stress Disorder" in: M. Farley (ed.) *Prostitution, Trafficking, and Traumatic Stress*, (1st ed 2003) pp 33 to 74; see discussion of this in R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) p 70.

62 Amnesty International, Sex workers at risk*: A research summary on human rights abuses against sex workers* (May 2016) p 4, available at https://www.amnesty.org/download/Documents/POL4040612016ENGLISH.PDF.

63 Amnesty International, Sex workers at risk: *A research summary on human rights abuses against sex workers* (May 2016) p 9.

14.48 In the UK context, the disadvantage that sex workers experience has been compounded by the COVID-19 pandemic.[64] The English Collective of Prostitutes (ECP) observe that many sex workers have been left without an income by the coronavirus crisis and lockdown measures, and are facing "destitution, debt and homelessness" [65] – with support and protection limited by the fact that aspects of sex work are criminalised under the laws of England and Wales. It has also been argued that stigma against sex workers has increased during the COVID-19 pandemic.[66] In relation to stigma the ECP note that:

> Media coverage in the UK over this period ranged from the many articles which reported on the ECP demands for emergency payments and worker status to other articles which targeted sex workers, naming and shaming women who are still having to work and justifying police crackdowns.[67]

14.49 This increased stigma has been connected to long-standing prejudice which depicts sex workers as "vectors of disease".[68]

14.50 We therefore provisionally consider that targeted crimes against sex workers have the propensity to cause additional harm to primary victims of such crime, by compounding existing disadvantage that can occur as a result of sex worker status.

Secondary harm to members of the targeted group

14.51 As we have outlined in Chapter 10, hate crime can have a collective impact on others who share the targeted characteristic – beyond harm caused to the primary victim.

14.52 Research is somewhat limited on this issue. However, we note that in communication with Dr Rosie Campbell – who has conducted extensive research at the intersection of violence against sex workers and hate crime – she pointed out that violence against sex workers can create fear amongst sex workers, and cause harm to the wider group. Campbell said this was something that came up when conducting her research; when there are murders of street sex workers or online sex workers there is much fear, anxiety, distress and anger amongst the sex work community.

14.53 Research published in 2019 has also identified high levels of fear of physical or sexual violence amongst female sex workers interviewed as part of the research:

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64 A Topping, "UK sex workers in 'dire and desperate' need amid Coronavirus lockdown" (April 2020) *The Guardian*, available at https://www.theguardian.com/society/2020/apr/13/uk-sex-workers-in-dire-and-desperate-state-amid-coronavirus-lockdown.

65 English Collective of Prostitutes, *Bulletin, Sex work and COVID-19, Media coverage sent in by our network*, (June 2020), available at https://prostitutescollective.net/bulletin-sex-workers-covid-19-media-coverage/.

66 F Miren, "Stigma towards sex workers is growing because of Coronavirus pandemic" (April 2020) *iNews*, available at https://inews.co.uk/opinion/stigma-towards-sex-workers-is-growing-because-of-the-coronavirus-pandemic-414091.

67 English Collective of Prostitutes, *Bulletin, Sex work and COVID-19, Media coverage sent in by our network,* (June 2020), available at https://prostitutescollective.net/bulletin-sex-workers-covid-19-media-coverage/.

68 F Miren, "Stigma towards sex workers is growing because of Coronavirus pandemic" (April 2020) *iNews*, available at https://inews.co.uk/opinion/stigma-towards-sex-workers-is-growing-because-of-the-coronavirus-pandemic-414091.

Many female respondents mentioned the fear of, and experience of, physical or sexual violence. The majority linked this fear and experience with the legal environment[69] as well as violence against women and girls in society more broadly. Potential perpetrators were identified as clients, police and 'civilians'.[70]

Wider harm to society

14.54 Finally, we consider whether criminal targeting based on prejudice and hostility towards sex workers causes wider social harm.

14.55 In Chapter 10, we note that hate crime can cause harm to wider society – for example by damaging the principle of equality. For the purposes of measuring this, we establish two ways that this damage might occur. Firstly, criminal targeting might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Secondly, this criminal targeting might undermine a group's equal participation in economic, social, political and cultural life. We outline ways that participation might be undermined in Chapter 10.

14.56 We have observed above that stigma results in the isolation and outsider status of sex workers, and that motivations for crimes against sex workers have been strongly linked to this stigma. As a result, we acknowledge that targeted violence against sex workers might further entrench this stigma in society and in turn, reinforce sex workers' outsider status and marginalisation, ultimately undermining their equal status.

SUITABILITY CRITERION

14.57 As we set out in Chapter 10, one aim of the suitability criterion is to ensure, where relevant, that protection of a characteristic or group is consistent with the rights of others. This suitability concern is arguably engaged in the context of sex work for reasons we explain below.

14.58 In Chapter 10, we note that protection of a characteristic or group would not be consistent with the rights of others if it would provide additional legal protection[71] to a characteristic or group that is harmful to other members of society. Therefore, in order to determine whether the protection of sex workers in hate crime laws is consistent with the rights of others, it is necessary to consider whether sex workers, as a group, cause harm to other members of society as a result of their participation in sex work.

Consistent with the rights of others

14.59 Some feminists have argued that sex work itself constitutes violence against women.[72] In light of this, it has been argued that participation in sex work causes direct

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69 This refers to the criminalisation of aspects of sex work.

70 M Hester, N Mulvihill, A Matolcsi, A L Sanchez, S J Walker: *The nature and prevalence of prostitution and sex work in England and Wales today* (University of Bristol, 2019) p 18.

71 Over and above that which is provided to all citizens.

72 See for example J Raymond, "Perspective on human rights: Prostitution is rape that's paid for" (11 December 1995) *Los Angeles Times*, available at https://www.latimes.com/archives/la-xpm-1995-12-11-me-12813-story.html; J Raymond, "Prostitution as violence against women: NGO stonewalling in Beijing and

psychological and physical harm to those involved.[73] For example, research by Farley and others points to high-levels of post-traumatic stress disorder (PTSD) among sex workers.[74] However, as we outline above, we are considering whether the characteristic or group would cause harm to *other* members of society.

14.60 It has also been argued that sex work indirectly causes harm to *all* women, by entrenching the objectification of women's bodies.[75] As Phipps explains, radical feminists have "posited a direct causal link between prostitution and sexual violence, situating the sex industry as the pinnacle of gendered objectification and men's entitlement to women's bodies".[76]

14.61 However, we emphasise that the inherent link between sex work and sexual violence is widely contested.[77] Further, we note that feminists who adopt the view that sex work is a form of sexual violence, usually posit those who buy sex as exploitative individuals who cause harm.[78] As Campbell observes, where sex work is deemed a form of sexual violence, "men who use prostitutes are defined as exploitative abusers and have been equated with sex offenders".[79] By contrast, the sex worker is often viewed as a victim, a person who is being subjected to harm – rather than an agent who is freely causing harm to others.

14.62 Therefore, whilst for some, the practice of purchasing sex has been deemed harmful, sex workers themselves are not usually posited as the cause of this alleged harm. As a result, it can still be argued that the protection of sex workers, as a group, is consistent with the rights of others.

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elsewhere" 21 *Women's Studies International Forum* 1; S Jeffreys, *The idea of prostitution* (1st ed 1997); K Barry, *Female Sexual Slavery* (1st ed, 1979); K Barry, *The Prostitution of Sexuality* (1st ed, 1995).

73 M Farley, A Cotton, J Lynee, S Zumbeck, F Spiwak, M E Reyes, D Alvarez, U Sezgin, "Prostitution and trafficking in 9 countries: update on violence and Posttraumatic Stress Disorder in M. Farley (ed.) *Prostitution, Trafficking, and Traumatic Stress* (1st ed, 2003) p 33. See also, B Chudakov, K Ilan, R Belmaker, and J Cwikel, The motivation and mental health of sex workers, (2003) 28 *Journal of Sex & Marital Therapy* 305.

74 M Farley, A Cotton, J Lynee, S Zumbeck, F Spiwak, M E Reyes, D Alvarez, U Sezgin, "Prostitution and trafficking in 9 countries: update on violence and Posttraumatic Stress Disorder in M. Farley (ed.) *Prostitution, Trafficking, and Traumatic Stress* (1st ed, 2003) p 33.

75 As we have noted elsewhere in this chapter, we acknowledge that participation in sex work is not limited to women.

76 A Phipps, "Sex Wars Revisited: A Rhetorical Economy of Sex Industry Opposition" (2017) 18 *Journal of International Women's Studies* 306.

77 See discussion of those who oppose this view in R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside,* (PhD thesis, University of Durham, 2016) pp 71 to 76.

78 See discussion of K Barry *Female Sexual Slavery* (1st ed, 1979) and S Jeffreys *The Industrial Vagina: the political economy of the global sex trade* (1st ed, 2008) in R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside* (PhD thesis, University of Durham, 2016) p 70.

79 R Campbell, *Not getting away with it: addressing violence against sex workers as hate crimes in Merseyside* (PhD thesis, University of Durham, 2016) p 70.

CONCLUSION IN RELATION TO SEX WORK

14.63 Above we have considered whether the experiences of sex workers accord with the criteria we set out in Chapter 10.

14.64 Each criterion raises detailed questions, and we invite consultees to submit evidence in response to the issues raised as part of each criterion, as well as the ultimate question of whether sex workers ought to be protected in hate crime laws.

Consultation Question 17.

14.65 We invite consultees' views on whether "sex workers" should be recognised as a hate crime category.

ALTERNATIVE SUBCULTURES

14.66 Since 2013, Greater Manchester Police (GMP) have recorded hate crimes against members of alternative subcultures, namely goths, emos, punks and metallers. The decision followed campaigning by the Sophie Lancaster Foundation, a charity established in memory of Sophie Lancaster, who was murdered at a park in Lancashire in 2007 for being perceived to be a goth. When sentencing Sophie's killers, the judge stated that for the purposes of calculating the minimum term to be served, he would treat the murder as equivalent to a hate crime.[80]

14.67 The Sophie Lancaster Foundation reports that 11 UK police forces have now followed GMP in recording hate crime against members of alternative subcultures.[81] The Foundation continues to campaign for the law in England and Wales to recognise alternative subcultures as a hate crime category.

14.68 The Sophie Lancaster Foundation defines "alternative subculture" as follows:

> Alternative Subculture means a discernible group that is characterized by a strong sense of collective identity and a set of group-specific values and tastes that typically centre on distinctive style/clothing, make-up, body art and music preferences. Those involved usually stand out in the sense their distinctiveness is discernible both to fellow participants and to those outside the group. Groups that typically place themselves under the umbrella of "alternative" include Goths, emos, punks, metallers and some variants of hippie and dance culture (although this list is not exhaustive).[82]

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80 *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051 at [20] where the judge's remarks are quoted. For further discussion of the case see Chapter 1, para 1.20 of this consultation paper.

81 The Sophie Lancaster Foundation website, Latest News, available at https://www.sophielancasterfoundation.com/index.php/news/129-11-police-authorities-now-recording-alternative-subculture-hate-crime.

82 The Sophie Lancaster Foundation website, *Hate Crime*, available at https://www.sophielancasterfoundation.com/index.php/hate-crimes.

14.69 Below we consider the case for extending hate crime protection to alternative subcultures. We will again consider the three criteria that we proposed in Chapter 10.

DEMONSTRABLE NEED CRITERION

Crime experienced by members of alternative subcultures

14.70 Writing about alternative subcultures in the context of hate crime recognition, Garland acknowledges that:

> Concrete evidence of the precise nature and frequency of the victimisation of goths is hard to come by, and, as it is such an under-researched topic, much of the evidence is impressionistic.[83]

14.71 There are high profile examples of members of alternative subcultures being criminally targeted. The murder of Sophie Lancaster and the assault of Robert Maltby was a shocking and widely reported case that involved two people clearly being targeted for violent crime because of their goth appearance.[84]

14.72 Garland also refers to other targeted and violent attacks against members of alternative subcultures; for example, a violent attack upon two emo teenagers in Folkestone, Kent in 2009.[85] He also cites a brutal gang attack launched against Paul Gibbs, a 26-year-old goth in Leeds, who had his ear sliced off as part of the attack.[86]

14.73 Some research has suggested that those who belong to alternative subcultures experience harassment and abuse which has the effect of othering them.[87] Drawing on qualitative interviews with 21 respondents, mostly affiliated to the goth scene, Garland and Hodkinson observe that abuse took the form of insults such as "freak!", derogatory forms of humour, direct accusatory questions, demands, threats[88] and one incident where a goth was told to go "slit their wrists and die".[89]

14.74 Garland also draws upon the work of Brill,[90] who observes that goths are regularly harassed for their style of dress and cultural preferences, having verbal insults such as

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83 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 168.

84 *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051 at [20].

85 "Don't abuse us because of how we look" (April 2009) *Kent Online*, available at https://www.kentonline.co.uk/folkestone/news/dont-abuse-us-because-of-how-we-a52491/.

86 J Garland, "It's a mosher just been banged for no reason" Assessing targeted violence against goths and the parameters of hate crime (2010) 17 *International Review of Victimology* 159, 169.

87 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 227.

88 J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 *British Journal of Criminology* 613, 618.

89 J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 *British Journal of Criminology* 613, 619.

90 D Brill, *Goth Culture: Gender, Sexuality and Style* (1st ed 2008).

"Satan", "corpse" or "witch" directed at them.[91] Harassment of this kind might, in certain circumstances, amount to a criminal offence under the Public Order Act 1986, or the Protection from Harassment Act 1997. Barker also found that the young goths she spoke to as part of her research said they received verbal abuse, and this frequently became physical.[92]

14.75 Research conducted by Savage in 1991 highlights the frequency with which punks were assaulted by members of the public in the mid-1970s. [93] Lauraine Leblanc's ethnography of female punks also notes that most of the interactions she observed between punks and non-punks in public spaces took the form of punks being harassed.[94]

14.76 As noted above, Greater Manchester Police records crimes against members of alternative subcultures as hate crime. From July 2018 to June 2019, GMP recorded 104 hate crimes and incidents directed towards members of alternative subcultures.[95] This data does not include a breakdown of the type of crime or incidents recorded.

Are these crimes linked to prejudice and hostility towards membership of an alternative subculture?

14.77 Commenting on the attack that was launched upon Sophie Lancaster and Robert Maltby, Judge Russell said:

> I am satisfied that the only reason for this wholly unprovoked attack, was that Robert Maltby and Sophie Lancaster were singled out for their appearance alone because they looked and dressed differently from you and your friends.[96]

14.78 In relation to the attack launched against Paul Gibbs in Leeds, it was reported that, before the attack, one of the perpetrators told his friends: "I'm a chav and I'm going to get some moshers" and other witnesses heard the three perpetrators screaming "dirty moshers and goths".[97]

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91 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 168.

92 M Barker, "Satanic Subcultures? A Discourse Analysis of the Self-Perceptions of Young Goths and Pagans", in *Cultural Expressions of Evil and Wickedness: Wrath, Sex, Crime* (1st ed 2003) pp 37 to 57.

93 J Savage, *England's dreaming: Sex Pistols and Punk Rock* (1st eds 1991). For further discussion see J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 171.

94 L Leblanc, *Pretty in Punk: Girls' gender resistance in a boys' subculture*, (1st eds 2008). For further discussion, see J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 *British Journal of Criminology* 613, 616.

95 Greater Manchester Police, Greater Manchester Police Crime and incident data for April 2019 to June 2019 p 9 (July 2019), available at https://www.gmp.police.uk/SysSiteAssets/media/downloads/greater-manchester/stats-and-data/hate-crime/hate-crime-and-incident-data-for-april-2019-to-june-2019.pdf.

96 Quoted in *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051 at [20].

97 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 169.

14.79 In relation to the two "emo" teenagers attacked in Kent in 2009, it has been reported that before the attack the perpetrators asked the victims "are you emo?"[98]

14.80 Garland and Hodkinson also point to the outsider status of alternative subculture participants, which they argue can provoke hostile feelings among perpetrators "who may see their difference as a threat to dominant cultural and sexual norms". [99]

14.81 In addition to hostility towards alternative subculture participation, some of the abuse and harassment faced is also homophobic, transphobic or gendered. Male goths who use make-up as part of their subculture participation have recalled receiving homophobic slurs[100] and questions such as "are you a boy or a girl?"[101] It has been noted that abuse of female goths can be more commonly sexualised with their subcultural appearance perceived as indicating "an exciting or easy approach to sex". [102]

14.82 There is therefore support for the view that crime experienced by alternative subcultures can involve prejudice or hostility towards membership of the alternative subculture.

The prevalence of crimes based on hostility or prejudice towards alternative subcultures

14.83 In the context of goths, Garland notes that precise evidence of the frequency of their victimisation is hard to come by[103] and that most evidence is impressionistic.

14.84 More widely, the data we have cited above does not indicate a high level of absolute prevalence. Whilst 104 hate crimes or incidents recorded in a year by one police force (GMP) is notable, during the same period, GMP recorded an overall total of 7483 racist hate crimes and incidents.[104]

14.85 However, we acknowledge that alternative subcultures are a relatively small group, and the number of recorded incidents and crimes is broadly comparable to another small group – transgender – for which 150 crimes and incidents were recorded by GMP over the same period.[105] Therefore, the relative prevalence of crimes based on prejudice or

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98 "Don't abuse us because of how we look" (April 2009) *Kent Online*, available at https://www.kentonline.co.uk/folkestone/news/dont-abuse-us-because-of-how-we-a52491/.

99 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 227.

100 D Brill, *Goth Culture: Gender, Sexuality and Style* (1st ed 2008).

101 J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 *British Journal of Criminology* 618.

102 J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 British Journal of Criminology 618.

103 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159,168.

104 Greater Manchester Police, *Greater Manchester Police Crime and incident data for April 2019 to June 2019* (July 2019) p 9, available at https://www.gmp.police.uk/SysSiteAssets/media/downloads/greater-manchester/stats-and-data/hate-crime/hate-crime-and-incident-data-for-april-2019-to-june-2019.pdf.

105 Greater Manchester Police, *Greater Manchester Police Crime and incident data for April 2019 to June 2019* (July 2019) p 9.

hostility towards alternative subcultures may be significantly higher than the absolute prevalence. It is not possible to calculate relative prevalence in precise terms because we do not have data on the overall number of offences against alternative subcultures, or the size of this group.

14.86 We also note that the severity of crimes against this group can be high, as has been illustrated by high profile cases in this area, such as the murder of Sophie Lancaster.

ADDITIONAL HARM

14.87 As we set out in Chapter 10, we consider three aspects of harm to be relevant in the context of hate crime. We will consider each below.

Additional harm to the primary victim

14.88 Garland and Hodkinson argue that attacks upon members of alternative subcultures are liable to:

> affect their sense of self-worth, self-confidence, security and psychological wellbeing in a manner comparable to the victimisation processes and experiences of recognised forms of hate crime.[106]

14.89 Garland further argues that attacks against subculture participants such as goths hurt more than other comparable crimes, commensurate with the increased harm caused by hate crime. According to Garland, one possible reason for this is that targeted crimes against alternative subcultures can constitute "an attack upon the victim's core identity".[107]

14.90 Garland's observation about identity is important. As we set out in Chapter 10, empirical studies which compare the harm caused by hate crime and the harm caused by differently motivated crime might not be available in relation to new characteristics. As a result, it is useful to step back and consider why additional harm is likely to occur in the context of hate crime. In Chapter 10 we note that one possible reason for hate crime's capacity to cause greater harm is because the targeted characteristic is central to the victim's identity.[108]

14.91 The idea that membership of a subculture is central to a person's identity has also been supported by other academics.

14.92 Hodkinson notes that goth culture has evolved to become a way of life for many goths, demanding a significant portion of their selfhood. He also notes that being a goth entails high levels of commitment to the subculture such that it can reflect and dominate

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106 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 228.

107 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 170.

108 See Chapter 10, paras 10.102 to 10.103.

participants' identities.[109] Hodkinson notes that these identities are strengthened through perceptions of a hostile outside society.[110]

14.93 Writing about straight edge, a subculture of punk, author Francis Stewart also notes that a significant number of straight edge adherents "remain so entwined, and, in a real sense, reliant on the subculture for their sense of identity", that extracting themselves would be "unthinkable" and "analogous to a death of the self".[111]

14.94 As outlined in Chapter 10, it has also been argued that hate crime can cause additional harm where the victim already experiences disadvantage based on the targeted characteristic.[112] It is unlikely that this source of additional harm would apply to alternative subcultures. Garland and Hodkinson acknowledge that it is difficult to justify that alternative subcultures are subject to "systematic or historic deprivation or marginalisation".[113]

14.95 In light of the arguments about identity, it is plausible that crimes based on prejudice or hostility towards alternative subcultures have the capacity to cause increased harm to primary victims.

Secondary harm to others who share the characteristic

14.96 As we have outlined in Chapter 10, hate crime can have a collective impact on others who share the targeted characteristic – beyond harm caused to the primary victim.

14.97 This collective impact has also been observed in the context of alternative subcultures. Garland notes that:

> violent assaults upon goths… act as 'signal' events to create the impression among sections of the 'alternative' community that such attacks are frequent and may even be growing in number, increasing the fear of becoming a victim and enhancing feelings of insecurity.[114]

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109 P Hodkinson, *Goth: Identity, Style and Subculture* (1st ed 2002); G Baddeley, *Goth Chic, A Connoisseur's Guide to Dark Culture* (2nd ed 2006). For discussion, see J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 163.

110 P Hodkinson, *Goth: Identity, Style and Subculture* (1st ed 2002).

111 F Stewart, *Punk Rock is My Religion: Straight Edge Punk and 'Religious' Identity* (1st ed 2017) p 115.

112 See Chapter 10, paras 10.104 to 1.105.

113 J Garland, P Hodkinson, "'F**king freak! What the hell do you think you look like, Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime'" (2014) 54 *British Journal of Criminology* 627.

114 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 171, citing C Denham, "Don't abuse us because of the way we look", *Kentish Express* (7 April 2009) p 3.

> Paul Hodkinson, for example, reports that many goths and 'alternatives' choose to avoid certain venues or areas of town and city centres where they feel they might be at a higher risk of harassment.[115]

14.98 In relation to the murder of Sophie Lancaster, Garland observes that:

> the incident impacted significantly upon the feelings of safety and security of the victims' wider community (in this case, goths).[116]

14.99 The impact on the wider community, and the collective changes in behaviour that are observed above, appear consistent with the secondary impacts of hate crime detailed in Chapters 3 and 10.

Harm to society more widely

14.100 Hate crime can cause harm to wider society by damaging the principle of equality, for example it might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Hate crime might also undermine a group's equal participation in economic, social, political and cultural life. We outline this in more detail in Chapter 10.

14.101 In this light, it has been argued that alternative subculture participants may "develop avoidance strategies, such as steering clear of certain routes, spaces, venues or groups of people" [117] to minimise the risk of being criminally targeted.

14.102 Depending upon the nature of the spaces that alternative subculture participants avoid,[118] it could be argued that criminal targeting based on hostility or prejudice towards alternative subcultures undermines their equal participation in economic, social, political and cultural life. For example, these spaces might be workplaces, in which case it might be argued that targeting undermines this group's economic participation in society.

SUITABILITY CRITERION

14.103 In Chapter 10 we set out a series of issues that might be considered as part of this criterion. One of these questions whether the proposed reform is workable in practice. Arguably, this is engaged in the context of alternative subcultures, as practical issues might arise in connection with the definition of "alternative subculture".

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115 J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 171.

116 J Garland, J Garland, "'It's a mosher just been banged for no reason', Assessing targeted violence against goths and the parameters of hate crime" (2010) 17 *International Review of Victimology* 159, 167, citing C Purdy, "The Darker Side of Life as a Goth" (27 April 2008) *BBC News website*.

117 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) pp 228 to 229.

118 We are not aware of evidence on this point.

Workable in practice (definitional concerns)

14.104 The Sophie Lancaster Foundation uses a broad definition of "alternative subcultures" which focuses on factors such as a strong sense of collective identity, distinctive style, clothing, make up or body art, and a set of group-specific values and tastes. The definition is outlined at paragraph 14.68. A list of alternative subcultures is provided by way of example, but this is non-exhaustive.[119] When GMP recognised alternative subcultures as a hate crime category, they adopted a similar definition.[120]

14.105 In light of the broad nature of this definition, Garland and Hodkinson argue "it is unclear which groups or individuals would in practice be included, which would not, and why".[121] They point out that there is variation in the connection that different individuals have to their relevant subculture, and it is not clear what level of connection a person might have to show to acquire protection under an "alternative subculture" label. It is also unclear how this connection would be measured. Finally, they argue there are further questions about which groups count as "alternative".[122]

14.106 We acknowledge the importance of these concerns. Whilst they may also apply to other characteristics, for example "philosophical beliefs", in the case of beliefs there is an established body of equality and human rights case law which can be drawn upon to decide whether a belief would be protected.

14.107 The non-exhaustive nature of the definition of alternative subcultures may also create future issues when it comes to determining whether protection of the relevant subculture is consistent with the rights of others. We are not currently aware of any issues which suggest that the practices of existing subcultures are harmful to others in society. However, it is not possible to conclusively say whether the beliefs or practices of a new alternative subculture will be consistent with the rights of others.

CONCLUSION IN RELATION TO ALTERNATIVE SUBCULTURES

14.108 Above we have considered whether the experiences of alternative subculture participants accord with the criteria we set out in Chapter 10.

14.109 Each criterion raises detailed questions, and we invite consultees to submit evidence in response to the issues raised as part of each criterion, as well as the ultimate question of whether alternative subcultures ought to be protected in hate crime laws.

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119 The Sophie Lancaster Foundation website, available at https://www.sophielancasterfoundation.com/index.php/hate-crimes.

120 R Mills, "Hate Crime: Goths, Punks and Emos Recognised" (3 April 2013) *Sky News*, available at https://news.sky.com/story/hate-crime-goths-punks-and-emos-recognised-10449737. See also, J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 232.

121 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 232.

122 J Garland and P Hodkinson, "Alternative Subcultures and hate crime" in N Hall, A Corb, P Giannassi, J Greive, N Lawrence *Routledge International Handbook on Hate Crime* (2014) p 232.

Consultation Question 18.

14.110 We invite consultees' views on whether "alternative subcultures" should be recognised as a hate crime category.

PEOPLE EXPERIENCING HOMELESSNESS

14.111 Before we consider whether there is a case for capturing homelessness in hate crime laws, it is useful to establish the meaning of this term.

14.112 The UK homelessness charity Crisis describes three different types of homelessness – rough sleeping, statutory homelessness and hidden homelessness.[123] Rough sleeping is the most visible form of homelessness, describing those who predominantly live on the streets. Statutory homelessness refers to those who lack a secure place in which they are entitled to live or reasonably able to stay. Hidden homelessness refers to those who are not entitled to housing assistance, or those who do not have assistance from the council, instead staying in hostels, squats, or using sofas of friends and families.

14.113 Much of the evidence we consider below will relate to rough sleeping, but it is also important to bear in mind that homelessness can take these wider forms.

14.114 Unlike with sex workers and alternative subcultures, no police force in England and Wales currently records crimes against people experiencing homelessness as hate crimes. However, there have been calls for such recognition. Stephen Robertson, CEO of The Big Issue, has argued that attacks against the homeless need to be "recognised as 'hate crimes' to see them for what they really are and to engender a more strategic response to an increasingly alarming trend".[124]

14.115 Some US jurisdictions treat homelessness as a protected characteristic for the purposes of hate crime laws, including the District of Columbia,[125] Maine,[126] Maryland[127] and Florida.[128]

14.116 Below we consider whether people experiencing homelessness should be explicitly recognised in hate crime laws, having reference to the three criteria that we set out in Chapter 10.

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123 Crisis UK website, *about homelessness*, available at https://www.crisis.org.uk/ending-homelessness/about-homelessness/.

124 S Marsh and P Greenfield, "Recognise attacks on rough sleepers as hate crime, experts say" (December 2018) *The Guardian*, available at https://www.theguardian.com/society/2018/dec/19/homeless-attacks-rough-sleepers-hate-crimes#img-1.

125 Code of the District of Colombia § 22-3701(1).

126 Maine Revised Statutes Title 17A § 1151(8).

127 Maryland Code, Criminal Law § 10-304.

128 Florida Statutes, § 775.085.

DEMONSTRABLE NEED CRITERION

Crime experienced by homeless people

14.117 In 2016, Crisis published the results of their study which focused on rough sleepers' experience of criminal targeting in England and Wales. 458 homeless people were included in the survey and three quarters had experienced anti-social and criminal behaviour on the streets.[129] More specifically it was found that:

- 30% of rough sleepers reported being deliberately hit or kicked in the past 12 months.[130]
- 45% had been threatened or intimidated with (potential) violence in the last year.[131]
- 31% of respondents had experienced things being thrown at them.[132]
- 6% disclosed that they had been sexually assaulted, interfered with or attacked in the last 12 months.[133]
- 7% of respondents said they had been urinated on in the past year.[134]
- More than half of rough sleepers, 51%, reported having had things stolen from them when sleeping out. 20% of respondents had their belongings deliberately damaged or vandalised.[135]
- More than half (56%) of respondents had experienced some form of verbal abuse or harassment in the past 12 months. Female rough sleepers were more likely to experience this than men; 65% of women compared to 53% of male rough sleepers.[136]

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129 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6, available at https://www.crisis.org.uk/media/20502/crisis_its_no_life_at_all2016.pdf.

130 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

131 As opposed to other homeless people. B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis 2016) p 6.

132 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

133 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

134 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

135 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

136 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

- Members of the public, who the survey respondents did not know, were the leading perpetrators of incidences of violence and abuse.[137]

14.118 Additional research conducted by homelessness charity St Mungo's showed that of the 97 people who died while sleeping rough in England in 2011-2016, almost a quarter experienced a violent death.[138]

14.119 A 2019 study conducted by the Revolving Doors Agency brought together the experiences of 26 people who moved from the streets into supported accommodation in London. 25 out of the 26 participants indicated they had been a victim of crime since they began sleeping rough. They found that victimisation was not only more frequent but also far more serious among people sleeping rough; 15 people spoke of being physically assaulted, including being deliberately hit, kicked, or strangled on the streets; and 8 spoke of being held at gun or knife point.[139]

14.120 As part of an investigation into hate crime against rough sleepers, the Guardian asked all 45 territorial police forces in the UK how many attacks against the homeless they had recorded in the past five years. They report that:

> Most did not record the information, but data from nine forces in the UK found there were 4,940 attacks recorded against people described in police records as homeless, having no fixed abode or rough sleeping in the past five years, increasing from 493 in 2014 to 1,259 in 2018. Cases include murder, modern slavery and serious assault.[140]

14.121 Research indicates that high levels of victimisation are long-standing amongst homeless people in the UK. A survey of homeless people carried out in the centres of three English cities in 2004 revealed very high levels of victimisation and offending. As part of this survey, 336 people experiencing homelessness were interviewed, and 305 of these interviews were subject to quantitative analysis.[141] This analysis found that:

> just over half of the sample (157 or 52%) had experienced violence in the past year and a significant proportion of these had clearly been subject to serious levels of violence. In all, 68 of those having experienced violence in the past year (or 43% of

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137 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

138 St Mungos, *Nowhere safe to stay: the dangers of sleeping rough* (2017) p 4, available at https://www.mungos.org/app/uploads/2017/12/Nowhere_safe_to_stay.pdf.

139 B Borysik, *We are Victims too: A peer study into repeat victimisation among people who moved from the streets into supported accommodation in London* (Revolving Doors Agency, London Trust, July 2019) p 8, available at http://www.revolving-doors.org.uk/file/2396/download?token=NDNgvDO0.

140 S Marsh and P Greenfield, "Recognise attacks on rough sleepers as hate crime, experts say" (December 2018) *The Guardian*, available at https://www.theguardian.com/society/2018/dec/19/homeless-attacks-rough-sleepers-hate-crimes#img-1.

141 Almost half (45%) of those interviewed in the survey were sleeping rough, over a quarter (27.5%) said they were living in a hostel. Only 26 respondents (8.5%) said they were living in their own home. See T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" (2006) 13 *International Review of Victimology* 121, 123.

those experiencing violence- 23% of the total sample) received injuries that required hospital treatment.[142]

Are these crimes linked to prejudice and hostility towards the victim's homelessness status?

14.122 There is also evidence to suggest that these crimes are targeted at homeless people because of prejudice or hostility towards their homelessness status.

14.123 Some of the case studies explored as part of the 2016 Crisis report demonstrate an explicit link between instances of criminal targeting and the fact that the victim is homeless. On their experience of criminal targeting, participants Simon and Dan said:

> It was some guy. He said, 'Are you homeless?' I said, 'Yeah,' and he just kicked me in the head. I was sat on the floor reading my book. (Simon).[143]

> Kind of treatment you get off the public sometimes, you know, calling you a tramp or calling a smack head and things like that and they don't know you at all, you know? But yeah, you know, you very much feel on your own. (Dan).[144]

14.124 The research conducted by the Revolving Doors Agency in 2019 indicated that 50% of those surveyed who had been victims of crime felt that the crime was motivated by the offender's attitude towards their "rough sleeper" status, as well as visible signs of mental-ill health, financial difficulties, and drug and alcohol problems.[145] One participant said: "They chose me, instead of someone else, someone normal. They pick on me [because I am] homeless."[146]

14.125 This report also discusses the location of the crimes, finding that half of the incidents occur outside in the immediate neighbourhood of supported accommodation, which it was felt marked victims out to perpetrators as homeless.[147]

14.126 Newburn and Rock's research, discussed in paragraph 14.121, also found that the general public were most commonly perpetrators of crimes against homeless people.

> In most major categories of criminal victimization – burglary, violence, threats, sexual assault, and criminal damage – respondents reported that the perpetrator had been a

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142 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" (2006) 13 *International Review of Victimology* 121, 128.

143 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 11.

144 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 12.

145 B Borysik, *We are Victims too: A peer study into repeat victimisation among people who moved from the streets into supported accommodation in London* (Revolving Doors Agency, London Trust, 2019) p 12, available at http://www.revolving-doors.org.uk/file/2396/download?token=NDNgvDO0.

146 B Borysik, *We are Victims too: A peer study into repeat victimisation among people who moved from the streets into supported accommodation in London* (Revolving Doors Agency, London Trust, 2019) p 12.

147 B Borysik, *We are Victims too: A peer study into repeat victimisation among people who moved from the streets into supported accommodation in London* (Revolving Doors Agency, London Trust, 2019) p 12.

member of the public. The exception was theft where other homeless people appear slightly more likely to have been the perpetrators than were members of the public.[148]

14.127 These factors appear to provide some support for the view that criminal targeting against people experiencing homelessness can be linked to prejudice or hostility towards homelessness status.

Prevalence of crime based on prejudice or hostility towards homelessness status

14.128 The data on the overall numbers of crimes against homeless people is limited – as observed at paragraph 14.114, most police forces do not specifically record crimes against homeless people. The absolute prevalence of crimes based on prejudice or hostility towards people experiencing homelessness is likely to be low, because the homeless population, particularly rough sleepers, constitute a small group, when compared with larger hate crime categories such as race. It is estimated that there were 4266 people sleeping rough on single night in England in Autumn 2019.[149] More widely, 2019 figures by Shelter estimated that on any given night in 2019, 280,000 people were recorded as homeless in England.[150]

14.129 However, the relative prevalence is likely to be very high – the Crisis research that we have cited above indicates that a significant proportion of rough sleepers frequently experience a wide range of crimes. For example, 30% of the rough sleepers surveyed as part of Crisis's research reported being deliberately hit or kicked in the past 12 months.[151]

14.130 The severity of this criminal behaviour is also high, including for example, physical violence.

14.131 Therefore, it appears that crime based on prejudice or hostility towards people experiencing homelessness is prevalent.

ADDITIONAL HARM

Additional harm to the primary victim

14.132 As we note in Chapter 10, research has suggested that hate crime causes increased harm to primary victims, over and above harm caused by comparable crime that is differently motivated.

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148 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" (2006) 13 *International Review of Victimology* 121, 148.

149 Ministry of Housing, Communities & Local Government, *Rough Sleeping, Rough Sleeping Snapshot in England: autumn 2019* (February 2019), available at https://www.gov.uk/government/publications/rough-sleeping-snapshot-in-england-autumn-2019/rough-sleeping-snapshot-in-england-autumn-2019.

150 Shelter, *This is England: a picture of homelessness in 2019* (2019), available at https://england.shelter.org.uk/__data/assets/pdf_file/0009/1883817/This_is_England_A_picture_of_homelessness_in_2019.pdf

151 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6, available at https://www.crisis.org.uk/media/20502/crisis_its_no_life_at_all2016.pdf.

14.133 When considering the demonstrable need criterion above, we have drawn heavily upon a research report commissioned by Crisis UK. This report also provides insight into the impact that violence and abuse can have on people experiencing homelessness.

14.134 The report notes that:

> The cumulative impact of being on the street – the violence, the abuse, the fear, the isolation, the ill-health – can take its toll on the mental wellbeing of rough sleepers;
>
> > "Well it has changed my personality, for a start. My self-confidence has gone to nothing, because there has been no change for so long, you just give up like and you just accept it." (Jeremy)[152]
>
> In some cases, it can push individuals to contemplate suicide;
>
> > "I used to feel, you know, to kill myself, a lot of times. I used to feel a lot. I used to feel to do something a lot of times. But a lot of times, I'd think to drink a lot, and then to take some poison and drink it, and that's it. Something tells me, I stop it, 'Don't do that'. Yeah. But I used to feel like killing myself, a lot of times." (Cem)[153]

14.135 The impacts described – namely fear, isolation, suicidal feelings, undermining self-worth and confidence – are commensurate with the additional harm that is associated with hate crime, as set out in Chapters 3 and 10.

14.136 The reference to the "cumulative" impact of being on the street and experiences of violence and abuse is also consistent with the additional harm that is associated with hate crime. In Chapter 10, we observed how some academics have connected additional harm in hate crime cases to underlying disadvantage. Where a person already experiences disadvantage as a result of living on the street, being criminally targeted based on this fact might compound the harm caused by the crime.

14.137 The Crisis report also notes how fear and isolation, which may occur as a result of homeless people being targeted for violence and abuse, can cause further harm:

> Fear and isolation affected rough sleepers' health and wellbeing. Those who shared their experiences with us often linked the incidences that took place with negative patterns of behaviour such as alcohol and drug abuse.[154]

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152 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 17.

153 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 17.

154 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6.

14.138 Newburn and Rock's research observes the everyday nature of the harassment and abuse that homeless people experience,[155] further noting that:

> insult and incivility may be construed as yet further attacks on whatever conception of dignity and worth the homeless may retain.[156]
>
> The homeless persons' marginality… their shameful exposure to the gaze of bystanders; and continual abuse (which Respondent 23 called the 'verbal diarrhoea') underscored a pervasive feeling of moral, physical and social degradation.[157]

14.139 This is consistent with the increased harm that is associated with hate crime, in the context of primary victims.

Secondary harm to others who share the characteristic

14.140 As we have outlined in Chapter 10, hate crime can have a collective impact on others who share the targeted characteristic – beyond harm caused to the primary victim. For example, hate crime might put others who share the characteristic on alert, causing them to fear being criminally targeted themselves.

14.141 This fear has been explored in the context of homelessness, particularly rough sleepers. A report by Crisis highlights that "rough sleepers reported how living on the streets meant living in fear and having to navigate constant risk and uncertainty about their safety".[158] This is supported by Newburn and Rock:

> a central theme of our analysis is the fact that the homeless in hostels and on the street experience the world as an insecure, unpredictable and troubled place where they are obliged continually to be guarded and suspicious.[159]

14.142 Recognising the secondary nature of harm caused by crimes against homeless people, Levin argues that "targeted violence against the homeless further isolates and degrades them individually and communally while diminishing their collective sense of security".[160]

14.143 Again, this is supported by Newburn and Rock's research, which indicates that feelings of safety and security amongst people experiencing homelessness are reduced

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155 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 148.

156 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 135.

157 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 135 to 136.

158 B Sanders, F Albanese, *It's no life at all, Rough Sleepers' experience of violence and abuse on the streets of England and Wales* (Crisis, 2016) p 6, available at https://www.crisis.org.uk/media/20502/crisis_its_no_life_at_all2016.pdf.

159 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 149.

160 B Levin, "Reassessing laws on hate violence against the homeless" (2015) 59 *American Behavioural Scientist* 1715, 1726.

because the disproportionate level of crime against the homeless results in collective awareness of the risk of victimisation:

> Respondent 18, a woman, reported 'I just get frightened, I suppose, 'cause you see the gangs hanging around, you know, the young children hanging around the streets and some of the stories that you hear from the past of that sort of area, you start thinking and seeing issues yourself, seeing other people being victimised. I've seen a lot of that.'[161]

Another Respondent also noted;

> You can't even sleep sometimes. Sometimes you got to make sure that you don't fall in deep sleep because some people can come and put the fire on you. I've never seen but I heard someone saying that.[162]

14.144 People experiencing homelessness also take practical steps to avoid criminal targeting. As Newburn and Rock highlight, "the homeless must be particularly mindful of how physical space affects risk".[163] This might include trying to avoid sleeping on the streets, for example by staying in a hostel[164] or a derelict building.[165] It might involve sleeping somewhere busy, where lots of people are around, or sleeping somewhere that is secluded in light of the risk to safety from the general public.[166]

14.145 The research considered above highlights the collective harm that might be caused to people experiencing homelessness, by individual criminal targeting against members of this group.

Wider harm to society

14.146 As we note above, hate crime can cause harm to wider society – for example by damaging the principle of equality. For the purposes of measuring this, we establish two ways that this damage might occur. Firstly, criminal targeting might decrease social cohesion – leading to the isolation or withdrawal of vulnerable communities, reinforcing outsider status for certain groups or deepening tensions and divisions between different groups. Secondly, this criminal targeting might undermine a group's equal participation in economic, social, political and cultural life.

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161 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 133.

162 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 134 to 135.

163 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 142.

164 Newburn and Rock's research also recognised that sleeping in a hostel also posed specific risks, see T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 140.

165 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 142.

166 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" 13 (2006) *International Review of Victimology* 121, 144.

14.147 Research by Crisis has noted that the verbal and physical abuse which homeless service users reported, "served to further reinforce the stigma they felt".[167]

14.148 We acknowledge therefore, that crime based on prejudice or hostility towards people experiencing homelessness might entrench the stigma that this group already experiences. As with sex workers above, this might serve to reinforce the outsider status of this group and cause further isolation and withdrawal – undermining their equality in society.

SUITABILITY CONCERNS

14.149 In Chapter 10, we list a series of suitability concerns that might arise when it comes to protecting characteristics in hate crime law. One of these related to inadvertent harmful consequences. Another questioned whether a statutory aggravating factor based on the relevant characteristic would create the risk of double counting. Arguably these two suitability concerns are engaged in the context of people experiencing homelessness.

Potentially harmful consequences

14.150 When we met with Crisis, they expressed reservations about creating a protected category centred around homelessness. Whilst Crisis emphasised that they want people experiencing homelessness to be better protected from violence, they also believe that homelessness should not exist in society at all, nor should it be considered inevitable. Indeed, Crisis's long-term aim is to secure legal and policy change that ends homelessness. As a result, they were concerned that including homelessness in law as a protected characteristic alongside immutable characteristics such as race, could affirm its position as a permanent feature of society.

14.151 At the same time, Crisis recognised that homelessness does not appear to be going away in the short to medium term in England and Wales, and it has in fact worsened in recent years.[168] Crisis therefore recognised that there is a difficult balance to be struck between protecting those who are currently at risk of violence and building towards a future beyond homelessness.

14.152 Another potentially harmful consequence might be inadvertently drawing crime between homeless people into the hate crime framework. Newburn and Rock's research shows that the second largest group of perpetrators of offences against the

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167 B Sanders and B Brown, *'I was all on my own': experiences of loneliness and isolation amongst homeless* people (Crisis, 2015) p 12, available at https://www.crisis.org.uk/media/20504/crisis_i_was_all_on_my_own_2016.pdf.

168 Levels of rough sleeping during the COVID-19 pandemic have significantly reduced. On the 3 June 2020 it was reported that Local Authorities have accommodated 14,610 people since the start of the pandemic. This includes people coming in directly from the streets, people previously housed in shared night shelters and people who have become vulnerable to rough sleeping during the pandemic, see Ministry of Housing, Communities and Local Government, *Rough Sleeping: COVID-19 Response Statement UIN HLWS259*, available at https://questions-statements.parliament.uk/written-statements/detail/2020-06-03/HLWS259. Crisis have since called on the Government to take further measures to help rough sleepers, see Crisis, *Open letter to the Prime Minister calling for emergency homelessness legislation* (7 July 2019), available at https://www.crisis.org.uk/about-us/latest-news/open-letter-to-the-prime-minister-calling-for-emergency-homelessness-legislation/.

homeless are the homeless themselves.[169] Beyond the fact that crime between homeless people is unlikely to reflect hate crime against people experiencing homelessness, we also acknowledge that homeless people are already criminalised as a group. Indeed, the Vagrancy Act, enacted in 1824, makes it a crime simply to sleep rough or beg in England and Wales. A report by Crisis found that 7 out of 10 local authorities use some sort of enforcement activity against people who are street homeless.[170]

Double counting

14.153 Sentencing guidelines in England and Wales often include the deliberate targeting of vulnerable victim(s)[171] as an aggravating factor which indicates a higher degree of offender culpability.

14.154 Arguably this aggravating factor might also capture the targeted nature of offending in the context of homelessness,[172] particularly in the case of rough sleepers whereby exposure and lack of physical safety can render victims more vulnerable to experiencing crime.[173] Therefore, if a statutory aggravating factor based on hostility towards people experiencing homelessness were created, there is a small risk of double counting, if the sentencer were to take both aggravating factors into account.

CONCLUSION IN RELATION TO PEOPLE EXPERIENCING HOMELESSNESS

14.155 Above we have considered whether the experiences of homeless communities accord with the criteria we set out in Chapter 10.

14.156 Each criterion raises detailed questions, and we invite consultees to submit evidence in response to the issues raised as part of each criterion, as well as the ultimate question of whether people experiencing homelessness ought to be protected in hate crime laws.

Consultation Question 19.

14.157 We invite consultees' views on whether "people experiencing homelessness" should be recognised as a hate crime category.

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169 T Newburn and P Rock, "Urban homelessness, crime and victimisation in England" (2006) 13 *International Review of Victimology* 121, 143, 145.

170 N Morris, *Scrap the Act, the case for repealing the Vagrancy Act 1824* (Crisis) p 2, available at https://www.crisis.org.uk/media/240604/cri0220_vagrancyact_report_aw_web.pdf.

171 Sentencing Council, *Aggravating and mitigating factors*, available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/.

172 K B O'Keefe, "Protecting the homeless under vulnerable victim sentencing guidelines: An alternative to inclusion in hate crime laws" (2010) 52 *William and Mary Law Review* 301.

173 We also acknowledge that in some cases, crimes against people experiencing homelessness might involve both targeting based on vulnerability *and* motivation or demonstration of hostility or prejudice towards homelessness status, in which case taking both into account would not involve double counting.

PHILOSOPHICAL BELIEFS

14.158 Finally, we will consider the extent to which the characteristic of non-religious "philosophical beliefs" accord with the three criteria that we outline in Chapter 10.

14.159 Hate crime laws in England and Wales currently protect members of a "religious group"[174] and this definition includes those defined by a lack of religious belief.[175] This protection therefore includes converts and apostates (those who have left their religion),[176] but does not include non-religious beliefs such as humanism.

14.160 Humanists UK have stated their dissatisfaction with this position. In a stakeholder meeting, they told us that protection of "belief" in addition to religion (the approach adopted in the Equality Act 2010) better reflected their *positively held* beliefs, as opposed to mere "lack of" religious belief. They argued that in practice many people are unaware that hate crime protection extends to those who *lack* religious belief. This leads to targeted crimes being under-reported.

14.161 Before considering the extent to which "philosophical beliefs" accords with the criteria we outlined in Chapter 10, it is necessary to establish the meaning of this term.

14.162 "Philosophical belief" has a particular meaning[177] under equality and human rights law. "Religion or belief" is a protected characteristic under the Equality Act 2010, and belief is defined as "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."[178] The explanatory note to this Act further defines "philosophical belief". It states that philosophical beliefs fall within the broad definition of Article 9 of the European Convention on Human Rights ("ECHR"),[179] which protects "freedom of thought, conscience and religion" as follows:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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174 Crime and Disorder Act 1998, s 28(1).

175 Crime and Disorder Act 1998, s 28(5).

176 Crown Prosecution Service, *Racist and Religious Hate Crime, Prosecution Guidance* (October 2019), available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

177 We note that our recent consultation paper on weddings laws also considers the definition of non-religious belief, and adopts a definition that is based on the definition of religion in *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; [2014] A.C. 610, see Getting Married: A Consultation Paper of Weddings Laws (2020) Law Commission Consultation Paper No 247, paras 5.122 to 5.129.

178 Equality Act 2010, s 10(2).

179 Equality Act 2010, Explanatory Notes, para 51.

14.163 The employment law case of *Grainger v Nicholson*[180] established a test for identifying a philosophical belief protected by the Equality Act 2010. It requires:

- A genuinely held belief;
- A belief and not an opinion or viewpoint based on the present state of information available;
- A belief as to a weighty and substantial aspect of human life and behaviour;
- A belief of a certain level of cogency, seriousness, coherence and importance;
- A belief worthy of respect in a democratic society and not incompatible with human dignity or in conflict with the fundamental rights of others.

14.164 The explanatory notes to the Equality Act 2010 go further in expressly excluding "any cult involved in illegal activities" and also support of a football team.[181]

14.165 Since *Grainger*,[182] a significant body of civil case law has further defined "philosophical belief". The following categories have been recognised as protected philosophical beliefs:

- Humanism and Atheism[183]
- Ethical veganism[184] but not vegetarianism[185]
- A belief that the use of carbon emissions must be cut to avoid climate change[186]

14.166 While there is currently no civil case law to determine whether "naturism"[187] falls within the definition of a philosophical belief under the Equality Act 2010, British Naturism have strongly argued that naturism is so protected.[188] In the absence of case law, we consider

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180 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311.

181 Equality Act 2010, Explanatory Notes, paras 52 to 53.

182 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311.

183 Equality Act 2010. Explanatory Notes, para 53. Humanism and Atheism are protected as beliefs under the Equality Act though they are also protected under "lack of religion".

184 *Casamitjana Costa v The League Against Cruel Sports* [2020] ET 3331129/2018.

185 *Conisbee v Crossley Farms Ltd & Others* [2019] ET 3335357/2018. The ET found that vegetarianism was a lifestyle choice. The tribunal suggested that veganism, as opposed to vegetarianism, may qualify as a philosophical belief because unlike the latter, the reasons for being a vegan are more consistent.

186 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311. The EAT held that climate change beliefs were capable of being protected, however in this instance the appellant needed to demonstrate that this belief was "genuinely held" via further evidence.

187 British Naturism describe naturism as the practice of going without clothes – whether that is just occasionally for example, at a beach or in your garden, or more frequently and as part of everyday life. They emphasise the mental, physical and emotional benefits of naturism, available at https://www.bn.org.uk/aboutnaturism/.

188 I Frodsham, "Nudists should be protected from abuse under hate crime law, says British Naturism" (January 2020) *Sky News*, available at https://news.sky.com/story/nudists-should-be-protected-from-abuse-under-hate-crime-law-says-british-naturism-11948106.

that if the *Grainger* test were to be applied to naturism it may fall within the definition of a "philosophical belief" under the Equality Act 2010, though the position remains uncertain.[189]

Political beliefs

14.167 The Employment Appeal Tribunal ("EAT") in *Grainger* provided guidance on whether political beliefs could be protected under philosophical beliefs. The EAT stated that membership of a political party or a political opinion does not itself amount to a philosophical belief. However, a belief in a "political philosophy or doctrine" *may* qualify where it satisfies the *Grainger* test. Examples of political philosophy provided were "Socialism, Marxism or free-market capitalism."[190]

14.168 In practice, the Employment Tribunal ("ET") and EAT have found that political beliefs in democratic socialism,[191] Scottish independence,[192] republicanism and anti-monarchism,[193] were protected under the Equality Act 2010. By contrast, political, or quasi-political beliefs not protected have included: a belief in wearing poppies on Remembrance Sunday;[194] objection to same sex couples' adoption of children;[195] and a belief that public service is an improper waste of money.[196]

14.169 Importantly, *Grainger* held that the requirement that a protected belief be "worthy of respect in a democratic society and not incompatible with human dignity or in conflict with the fundamental rights of others",[197] necessarily excludes "objectionable" political philosophies.[198] The ET stated this criterion would exclude protection of "racist or homophobic political philosophy" and more recently, "absolutist" views of sex.[199]

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189 Naturism is recognised and protected as a group in other contexts. CPS prosecution guidance states that where naturists are involved: "In the absence of any sexual context and in relation to nudity where the person has no intention to cause alarm or distress it will normally be appropriate to take no action unless members of the public were actually caused harassment, alarm or distress (as opposed to considering the likelihood of this)."

See Crown Prosecution Service, *Nudity in Public – Guidance on handling cases of Naturism* (September 2019), available at https://www.cps.gov.uk/legal-guidance/nudity-public-guidance-handling-cases-naturism.

190 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311, para 28.

191 *Olivier v Department for Work and Pensions* (DWP) [2013] ET 1701407/2013.

192 *McEleny v Ministry of Defence* [2017] ET (Scotland) 4105347/2017.

193 *Gibbins v British Council* [2017] ET 2200088/2017.

194 *Lisk v Shield Guardian Co Ltd and others* [2011] ET 3300873/112011.

195 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

196 *Harron v Chief Constable of Dorset Police* [2016] UKEAT 0234/15/DA.

197 See last bullet point of the Grainger test outlined earlier – "A belief worthy of respect in a democratic society and not incompatible with human dignity or in conflict with the fundamental rights of others."

198 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219 09 0311, para 28.

199 *Forstater v CGD Europe and others* [2019] ET 2200909/2019.

DEMONSTRABLE NEED CRITERION

14.170 As above, demonstrable need requires us to look at crime faced by philosophical groups before assessing whether this crime is linked to hostility toward this characteristic. We will thereafter consider the prevalence of crime toward this group.

Crimes against philosophical believers

14.171 There is some evidence of crimes targeted towards individuals on the basis of non-religious philosophical beliefs, however, the frequency of criminal targeting is likely to vary considerably between different philosophical groups.

14.172 When we met with British Naturism, they informed us that they had experienced criminal targeting in the past year including social media harassment and threats. They said the abuse received has grown in the last year because of an increase in the number and visibility of their Naturist events, which led to an increase in online abuse and the hijacking of several events. Dr Mark Bass of British Naturism highlighted that there is at least one case a month of naturists being abused, including a case where a member had been purposely set on by a dog.[200]

14.173 Humanists UK told us that they regularly face threats of violence – for example, a serrated metal tin lid and white powder (intended to be mistaken for anthrax) was sent to their offices.[201] They also highlighted to us the wider global threat of violence Humanists face.[202] They provided examples of honour-based violence[203] and anti-apostasy criminal targeting involving violent exorcisms, assaults, kidnapping and death threats.[204]

14.174 There are also some international and domestic examples of online abuse and death threats received by vegans[205] and attacks on them at animal rights demonstrations.[206]

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200 I Frodsham, "Nudists should be protected from abuse under hate crime law, says British Naturism" (January 2020) *Sky News*, available at https://news.sky.com/story/nudists-should-be-protected-from-abuse-under-hate-crime-law-says-british-naturism-11948106.

201 Humanists UK *Review of Hate Crime Legislation in England and Wales: Briefing from Humanists UK* (November 2019), pp 4 to 5.

202 The International Humanist and Ethical Union Report, cited by Humanists UK allocates ratings to the worst levels of discrimination faced by non-religious believers, available at https://humanism.org.uk/2018/10/29/discrimination-faced-by-non-religious-worldwide-at-alarming-levels-new-report-shows/.

203 Humanists UK *Review of Hate Crime Legislation in England and Wales: Briefing from Humanists UK* (November 2019).

204 Humanists UK *Review of Hate Crime Legislation in England and Wales: Briefing from Humanists UK* (November 2019), pp 4 to 5.

205 Rourker Walsh, "Vegan activist Tash Peterson claims she's received death threats after Optus Stadium, Coles and Woolworths protests" (29 June 2020) *PerthNow,* available at https://www.perthnow.com.au/news/perth/vegan-activist-tash-peterson-claims-shes-received-death-threats-after-optus-stadium-coles-and-woolworths-protests-ng-b881593376z

206 Jo Wadsworth, "Vegans attacked during anti-fur protest" (3 February 2020) *Brighton and Hove News*, available at https://www.brightonandhovenews.org/2020/02/03/vegans-attacked-during-anti-fur-protest/.

14.175 However, most of the evidence of criminal targeting on the basis of philosophical beliefs that we have found in England and Wales has been sporadic and largely anecdotal.

14.176 We acknowledge that there is a significant amount of abuse, particularly online, directed toward people's political beliefs.

14.177 Increasing political divisiveness in recent years has led to the bullying and harassment of politicians,[207] which increases ahead of General Elections.[208] David Lammy MP has frequently spoken out about the scale of abuse he receives as a politician – both online and offline – which is often racist in nature.[209] Following the recurrence of threats being sent to a Conservative councillor in West Sussex, fellow councillors of this county called for political beliefs to be included within the protection of hate crime.[210]

14.178 In Chapters 12 and 18 of this paper and in our previous Scoping Report on Abusive and Offensive online communications,[211] we detail the large-scale abuse received mainly by women in politics, including Jess Phillips MP and Diane Abbott MP.

14.179 There is also increasing evidence of politically-motivated violence. True Vision and Stop Hate UK identified tensions following Brexit as the catalyst for the increased scale of hate crime and abuse.[212] A Cardiff University and University of Edinburgh survey found that a majority of both Leave and Remain voter participants would condone violence directed toward MPs to defend their views.[213]

14.180 In August 2019, Owen Jones was attacked by far-right extremists due to his left-wing beliefs and his sexuality.[214] Following the attack, Jones stated that he had been subject

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207 BBC News, "Abuse of politicians is 'definitely getting worse" (11 February 2018), available at https://www.bbc.co.uk/news/uk-wales-politics-43022850.

208 The University of Sheffield, "Online abuse towards politicians rises ahead of General Election, study finds", (11 December 2019), available at https://www.sheffield.ac.uk/news/nr/online-abuse-politicians-general-election-1.876175.

209 "David Lammy: 'Hate mail won't scare or silence me'", *BBC News* (22 May 2018), available at https://www.bbc.co.uk/news/uk-44218233.

210 Karen Dunn, "Widening hate crime to include attack on political beliefs debated" (23 June 2020) *Worthing Herald*, available at https://www.worthingherald.co.uk/news/politics/widening-hate-crime-include-attack-political-beliefs-debated-2892825.

211 See Abusive and Offensive Online Communications: A Scoping Report, (November 2018), Law Com No 381, paras [3.59] and [3.71]. This report details gendered abuse online experienced by women.

212 Caleb Lewis, "UK police say hate crime reports are up 57 percent after Brexit vote" (29 June 2016) *Vox*, available at https://www.vox.com/2016/6/29/12053488/uk-police-hate-crimes-57-percent-brexit-vote; Stop Hate UK, *Report on post-referendum Hate Crime* (22 August 2016), available at http://www.stophateuk.org/wp-content/uploads/2016/08/Stop-Hate-UK_EU-Referendum-Report_V2a_Email.pdf.

213 The survey was based on polling by YouGov which found 71% of Leave voters in England, 60% in Scotland and 70% in Wales thought violence against MPs was a "price worth paying" for Brexit. Of Remain voters, 58% in England, 53% in Scotland and 56% in Wales thought it was worth it to stay in the EU; Rebecca Taylor, "Violence against MPs 'worth it' to get way on Brexit, say majority of voters in poll" *Sky News* (25 October 2019), available at https://news.sky.com/story/violence-against-mps-worth-it-to-get-way-on-brexit-say-majority-of-voters-in-poll-11843952.

214 "Owen Jones: Man jailed for attacking journalist", *BBC News* (24 July 2020), available at https://www.bbc.co.uk/news/uk-england-london-53532559.

to a campaign of abuse from the far right.[215] Indeed, at its most extreme, hatred based on political beliefs has led to tragedies such as the murder of Jo Cox.[216]

Are these crimes linked to prejudice and hostility towards membership of a philosophical belief group?

14.181 There is some evidence that the criminal targeting referenced above is motivated by prejudice or hostility towards the victim's philosophical beliefs.

14.182 In a stakeholder meeting, Humanism UK argued that apostates were targeted on the basis of hostility or prejudice toward their secular beliefs and in some cases, the decision to leave their former religion. Humanists UK have also noted that "crimes against apostates may stem from the victim being perceived as sinful or because they openly question religious beliefs or practices".[217] This makes it difficult to determine whether it is the secular, humanist belief itself or the fact of leaving a former religion which has been targeted based on prejudice or hostility.

14.183 Dr Bass, President of British Naturism, has highlighted that naturists are abused because of their philosophical belief, evidenced by the abuse they receive when they are seen naked or where people know they are naturist.[218]

14.184 British Naturism also told us that this targeting often stems from misunderstanding of their practices. They explained that naturists are often socially stigmatised as being child sex offenders because of the inclusion of children in their practices. Therefore, some of the abuse they experienced was motivated by a misguided assumption that their activities harmed and were not in the best interests of children involved.

14.185 In terms of political beliefs, the abuse received by politicians is not always solely based on hostility toward their affiliations. As noted above, the abuse received by black politicians such as Diane Abbott MP and David Lammy MP is often racist in nature. Similarly, the court found that the motivation for the attack on Owen Jones was due to the homophobic beliefs *and* opposition to left wing views held by the perpetrators.[219]

14.186 The political tensions post-Brexit have been linked to an increase in hate crime toward various protected, minority groups as opposed to those who voted Leave or Remain.[220]

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215 "Owen Jones: Man jailed for attacking journalist", *BBC News* (24 July 2020), available at https://www.bbc.co.uk/news/uk-england-london-53532559.

216 D Sabbagh, "MPs advised to travel in groups to avoid abuse amid Brexit" (March 2019) *The Guardian*, available at https://www.theguardian.com/politics/2019/mar/21/mps-told-to-take-simple-steps-to-avoid-abuse-amid-brexit-tensions#maincontent.

217 Humanist UK, *Review of Hate Crime Legislation in England and Wales, Briefing from Humanists UK* (November 2019) p 5.

218 I Frodsham, *Nudists should be protected from abuse under hate crime law, says British Naturism* (January 2020) *Sky News*, available at https://news.sky.com/story/nudists-should-be-protected-from-abuse-under-hate-crime-law-says-british-naturism-11948106.

219 Dan Sabbagh, "Far-right Chelsea fan jailed for attack on Guardian's Owen Jones" (24 July 2020) *The Guardian*, available at https://www.theguardian.com/uk-news/2020/jul/24/chelsea-fan-jailed-for-attack-on-guardian-journalist-owen-jones.

220 Matthew Weaver, "Hate crime surge linked to Brexit and 2017 terrorist attacks" (16 October 2018) *The Guardian*, available at https://www.theguardian.com/society/2018/oct/16/hate-crime-brexit-terrorist-attacks-

Amnesty International highlight that such targeting following Brexit is motivated by racism which has been fuelled by "toxic" political campaigns.[221] The online abuse received by women MPs is similarly rooted in hostility toward their gender as well as their political beliefs.

The prevalence of crimes based on hostility or prejudice towards philosophical beliefs

14.187 The assessment of prevalence of criminal targeting of philosophical beliefs will vary between groups. It is also difficult to assess prevalence with accuracy because of the lack of recording of hate crime toward these groups or overlapping of some groups with existing protected groups such as Humanists and religious beliefs.

14.188 Humanists UK told us that they were not aware of research investigating the scale of hate crimes targeted at humanists. They argue this is because of the lack of central police recording of hate crimes committed on the basis of humanism individually or any other non-religious belief systems.[222]

14.189 A study at Sheffield Hallam University found that 81 percent of the 77 participants had experienced a hate crime due to being an apostate.[223] This is in slight contrast to Humanists International report[224] which found predominantly systematic discrimination toward apostates in the UK as opposed to grave violations such as violence and harassment.[225]

14.190 It should be noted that it is not clear whether such groups were targeted because of their humanist or atheist beliefs in addition to their decision to leave a religion.

14.191 There are similar difficulties with assessing prevalence for other philosophical beliefs. British Naturism have highlighted the extent of the various forms of discrimination they have faced,[226] and provided us with some examples of targeting.

14.192 Similarly, with veganism and climate change activists, while we are aware of incidents of crime against them, we lack the data to accurately assess its prevalence.

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england-wales; "Brexit 'major influence' in racism and hate crime rise", *BBC News* (20 June 2019), available at https://www.bbc.co.uk/news/uk-wales-48692863.

221 Amnesty International, *Tackling Hate Crime in the UK: A Background Briefing Paper by Amnesty International UK* (June 2017) p 15, available at https://www.amnesty.org.uk/files/Against-Hate-Briefing-2.pdf.

222 Humanist UK, *Review of Hate Crime Legislation in England and* Wales, Briefing from Humanists UK (November 2019) p 1.

223 E Johnson, *Apostasy, Human Rights and Hate Crime in England and Wales: A Mixed Methods Study* (2019) p 34, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475161.

224 This report provided rankings to indicate the treatment of non-religious believers across the world. The ranking system ranged from "grave violations" which covers harassment and violence, to "free and equal" available at https://fot.humanists.international/ratings-system/.

225 Humanists International, *The Freedom of Thought Report* (12 November 2019) available at https://fot.humanists.international/countries/europe-northern-europe/united-kingdom/.

226 Memorandum submitted by British Naturism for Equality Bill – Human Rights Joint Committee (January 2009), available at https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/169we15.htm.

14.193 The same is true of political beliefs, as incidents of violent crime toward members of various groups occur sporadically, though as noted above post-Brexit tensions have been linked to an increase in hate crime.

ADDITIONAL HARM

14.194 As we set out in Chapter 10, we consider three aspects of harm to be relevant in the context of hate crime.

Additional harm to the primary victim

14.195 It can be argued that criminal targeting on the basis of one's philosophical belief carries additional harm because it is a core aspect of one's identity.

14.196 Comparisons can be drawn between religion and philosophical beliefs in this regard. Both religious and philosophical beliefs can have a spiritual and, or moral component.[227]

14.197 Soifer has stated that ethical veganism is "a belief, a moral code, a guiding principle, and to some, a religion".[228] Morris has argued that Naturism is a "spiritual" practice, derived from the belief that exposure of a person's body improves "character, spiritually and morally".[229] British Naturism similarly have argued that naturism is part of their "faith" or "belief system and philosophy of life".[230] They told us that their beliefs are as "legitimate" as religious beliefs, because people become committed to naturism – it is not a choice as such and is not easy to give up.

14.198 Brown, however, argues that suggesting philosophical beliefs are *as* difficult to change as religion potentially underplays the hardship people face when leaving their faith.[231] Pinto has also highlighted the unique, intrinsic link between religion and cultural identity and practice, such as in Judaism and Islam, and therefore the added difficulty with making the decision to leave a religion.[232]

14.199 The impact of philosophical beliefs on various aspects of a person's life provides further evidence of their centrality to identity. In a recent unfair dismissal case, the appellant, Casamitjana adhered to strict ethical vegan practices which had a profound influence on the decisions he made in his day to day life (including the food and clothes

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227 A Brown, "The 'Who' Question in the Hate Speech Debate: Part 1: Consistency, Practical and Formal Approaches" (2016) 29 *Canadian Journal of Law & Jurisprudence* 275, 306.

228 S Soifer, "Vegan Discrimination: An Emerging and Difficult Dilemma" (2003) 36 *Loyola of Los Angeles Law Review* 1709, 1712 to 3.

229 N J Morris, "Naked in nature: naturism, nature and the senses in early 20th century Britain" (2009) 16 *Cultural Geographies* 283, 287.

230 Human Rights Joint Committee on the Equality Bill, *Memorandum submitted by British Naturism* (11 January 2009) para 3, available at https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/169we15.htm.

231 A Brown, "The 'Who' Question in the Hate Speech Debate: Part 1: Consistency, Practical and Formal Approaches" (2016) 29 *Canadian Journal of Law & Jurisprudence* 275, 305.

232 M Pinto, "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era" (2010) 30(4) *Oxford Journal of Legal Studies* 695, 716, 719 to 20.

he consumed, his social and romantic life, and the activities in which he participated).[233] Similarly in *Grainger,* the appellant stated that his position on climate change substantially impacted his life – he went to extreme lengths to ensure he lived an eco-friendly lifestyle.[234]

14.200 The above reasoning may also extend to political beliefs. For instance, Brown has argued that people are also socialised into political beliefs,[235] which then form a central part of their identity. Indeed, the Employment Tribunal in *McEleny* concluded that the claimant had "a fundamental belief in the right of Scotland to national sovereignty", which occupied a major part of his life and was unlikely to change even where challenged.[236] They reached a similar conclusion in *Olivier*, where the claimant's democratic socialism was a key part of his life and therefore went beyond a mere choice to support a party.[237]

14.201 These arguments suggest that crimes based on prejudice or hostility toward philosophical believers could cause increased harm to primary victims.

Secondary harm to others who share the characteristic

14.202 There is some evidence to suggest there is a collective impact on those who share the targeted characteristic of philosophical beliefs. The nature and degree of secondary impact will likely vary depending on the relevant group.

14.203 Humanists UK told us about the social exclusion faced by members of their group in conjunction with the criminal targeting they faced. It is plausible that the threat of criminal targeting may exacerbate the social exclusion they feel and therefore their ability to be open about their humanist beliefs.

14.204 The same could be argued for philosophical beliefs. At paragraph 14.163, we note that British Naturism have strongly argued that naturism falls within the definition of a philosophical belief under the Equality Act 2010.[238] If this position is correct, then the threat of online abuse and hijacking, highlighted to us by British Naturism, could have the secondary impact of preventing naturists from holding public events. A similar argument could be made in the context of veganism.

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233 *Casamitjana Costa v The League Against Cruel Sports* [2020] 3331129/2018, paras 20 to 22. This included only wearing vegan clothing; avoiding using cash as new versions of bank notes were made with animal products and avoiding the use of certain modes of public transport because of potential collision with birds.

234 *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311, para 3. This included living in a "eco-renovated" home and not travelling by aeroplane.

235 A Brown, "The 'Who' Question in the Hate Speech Debate: Part 1: Consistency, Practical and Formal Approaches" (2016) 29 *Canadian Journal of Law & Jurisprudence* 275, 306.

236 *McEleny v Ministry of Defence* [2017] ET (Scotland) 4105347/2017, para 32.

237 *Olivier v Department of Work and Pensions* [2013] ET 1701407/2013.

238 I Frodsham, "Nudists should be protected from abuse under hate crime law, says British Naturism" (January 2020) *Sky News*, available at https://news.sky.com/story/nudists-should-be-protected-from-abuse-under-hate-crime-law-says-british-naturism-11948106.

Harm to society more widely

14.205 Hate crime can cause harm to wider society. In Chapter 10 we set out two key ways that this harm to society might be measured.

14.206 It seems clear that politically motivated abuse and violence such as the examples we have outlined pose a real threat to democratic values and the ability of individuals to participate in political life. Evidence in relation to the wider impact of hostility towards others philosophical beliefs is somewhat less apparent, but the inclusion of philosophical belief within the equality laws underlines the relevance of the protection of such beliefs to equality more widely in society.

SUITABILITY CRITERION

14.207 The protection of philosophical beliefs in hate crime does not appear likely to raise any significant suitability concerns. However, we note several potential issues.

Compatibility with the rights of others

14.208 In Chapter 10, we note that protection of a characteristic or group would not be consistent with the rights of others if it would provide additional legal protection to a characteristic or group that is harmful to other members of society.

14.209 The breadth of the scope of views and values encompassed by philosophical beliefs raises concerns at some of the extreme ends – for example the protection of racist or otherwise socially harmful belief systems.

14.210 As we noted in Chapter 10, our question about whether the protection of a characteristic or group is consistent with the rights of others draws upon the Grainger test. This test is particularly relevant in the context of philosophical beliefs because Grainger elucidated the types of philosophical beliefs that would be "worthy of respect in a democratic society and not incompatible with human dignity or the fundamental rights of others".

14.211 The test was adopted in *Grainger* in order to exclude harmful philosophical beliefs which do not warrant protection, for example white supremacism and militant extremism. It therefore follows that some philosophical beliefs will be harmful and would not be considered consistent with the rights of others. Each must be considered on a case by case basis.

Potentially harmful consequences (concerns about a chilling effect)

14.212 The inclusion of philosophical beliefs may also raise free speech issues, especially in the context of political beliefs. It could be argued that the protection of such beliefs in a political context could create a "chilling effect" on freedom of speech – for example, people may be reluctant to express their views during an election in fear of perpetuating abuse. This is already a concern as it relates to currently protected characteristics such as religion. We outline concerns about the "chilling effect" of hate speech in Chapter 18 in more detail.

Workable in practice (definitional concerns)

14.213 As with alternative subcultures, there is a concern that the list of philosophical beliefs is non-exhaustive and therefore presents practicality issues in terms of having to continue to assess suitability on a case-by-case basis. Recent EAT and ET decisions suggest that "philosophical belief" is an evolving concept. For instance, we have seen that the category "philosophical beliefs" has expanded to include less traditionally recognised beliefs such as ethical veganism, as well as various other political beliefs.

14.214 Furthermore, there are potential concerns about the practical workability of including philosophical beliefs in hate crime laws. In particular, the non-exhaustive nature of philosophical beliefs may lead to confusion in practice and to police officers being unable to recognise and record the targeted characteristic accurately. Indeed, as we noted at paragraph 14.165, there have been quite a few cases in the context of employment law where there was a real question as to whether a particular belief met the legal definition.

CONCLUSION IN RELATION TO PHILOSOPHICAL BELIEFS

14.215 Above we have considered whether the experiences of philosophical beliefs accord with the criteria we set out in Chapter 10.

14.216 Each criterion raises detailed questions, and we invite consultees to submit evidence in response to the questions raised as part of each criterion, as well as the ultimate question of whether philosophical beliefs, including certain political beliefs, ought to be protected in hate crime laws.

Consultation Question 20.

14.217 We invite consultees' views on whether "philosophical beliefs" should be recognised as a hate crime category.

Chapter 15: The legal test for hate crime laws

INTRODUCTION

15.1 As we described in Chapter 4, proof of hostility is required for either an aggravated offence or an enhanced sentence. Two limbs of the hostility test exist. The motivation limb will be satisfied by proof that the offence was motivated by hostility. The demonstration limb will be satisfied by proof that the defendant demonstrated hostility at the time of committing the offence, or immediately before or after doing so.

15.2 A different, higher, threshold of "hatred" applies in respect of the stirring up hatred offences in Parts 3 and 3A of the Public Order Act 1986. We discuss this threshold further in Chapter 18.

15.3 In this chapter we consider arguments for revising the legal test as it applies in the context of aggravated offences under the Crime and Disorder Act 1998 ("CDA 1998") and enhanced sentencing under the Criminal Justice Act 2003 ("CJA 2003"). In particular, we consider the following three issues:

- Should the legal test be consistent for both aggravated offences and enhanced sentencing?
- Should the "demonstration" limb of the legal test – one of the distinctive features of hate crime laws in the United Kingdom – be retained?; and
- Should the "motivation" limb of the test be reformed due to concerns it is ineffective in the context of disability hate crime?

15.4 We first outline the current legal test of "hostility" and criticisms of it, and then consider each of these three issues in order below.

CURRENT LAW

15.5 "Hostility" is not defined in either the CDA 1998 or the CJA 2003, and there is no standard legal definition. Walters notes that "[t]he failure of the courts to mark out the definitional borders of 'hostility' has meant that legal practitioners have relied heavily on dictionary definitions."[1] Indeed, CPS guidance states that "consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike."[2]

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1 M Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 52.

2 Crown Prosecution Service, *Disability Hate Crimes and other crimes against disabled people* (15 August 2018), available at https://www.cps.gov.uk/legal-guidance/disability-hate-crime-and-other-crimes-against-disabled-people-prosecution-guidance.

15.6 Ultimately, it will be a matter for the tribunal of fact (a jury in the Crown Court or a bench of magistrates in a magistrates' court) to decide whether a defendant has demonstrated, or the offence was motivated by, hostility.

The two limbs of hostility

Provisions in the CDA 1998

15.7 An offence is aggravated if it falls within either of the two limbs of the test set out in sub-sections 28(1)(a) and (b) of the CDA 1998. Under limb (a), the prosecution must prove the demonstration of hostility, but no subjective intent or motivation is required: it is an objective test. The courts have been clear that when considering this limb, it is an error of law to look beyond the outward manifestation of hostility and attempt to discern the defendant's actual motivation.[3] However it is arguable that the fault or mens rea element of the offence requires that the defendant should at least be aware that his or her expression is likely to be perceived by other right-minded individuals as demonstrating racial or religious hostility.[4]

15.8 Limb (b) – motivated by hostility – requires proof of the defendant's subjective motivation for committing the offence.[5] It is considered much more difficult to mount a prosecution on the basis of this limb. While exact figures are unavailable, CPS prosecutors advised us that prosecutions that rely solely on the motivation limb are uncommon.

15.9 The prosecution should make clear on which of the two limbs it is relying.[6] If evidence is available to support both limbs, the prosecution is free to rely on both.[7]

15.10 Section 28(3) provides that it is immaterial for offences under either limb (a) or (b) that the offender's hostility is also based "to any extent" on any other factor.

15.11 Section 28(1)(a) refers explicitly to "hostility based on the victim's membership (or presumed membership)"[8] of a racial or religious group. Thus, a slur based on a mistaken view about the victim's racial or religious group will be caught. Section 28(2) provides that "membership of a racial or religious group includes association with members of that group". "Association" may be interpreted quite broadly. It includes association through marriage, but also association through socialising.[9]

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3 *R v SH* [2010] EWCA Crim 1931, at [29].

4 Walters, M, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 67.

5 *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] and [20].

6 *Dykes* [2008] EWHC 2775 (Admin), (2009) 173 Justice of the Peace 88 at [20] by Calvert Smith J.

7 *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] by Ouseley J; *G* [2004] EWHC 183 (Admin), (2004) 168 Justice of the Peace 313 at [15] by May LJ.

8 Presumed by the offender: Crime and Disorder Act 1998, s 28(2).

9 Eg if one white person were to say to another, having assaulted him, "you n****r lover" upon seeing the victim rejoin a group of black friends at the bar: *DPP v Pal* [2000] Criminal Law Review 756 at [13] by Simon Brown LJ.

Provisions in the CJA 2003

15.12 Section 145(3) of CJA 2003, which applies to the characteristics of race and religion, provides as follows:

> Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

15.13 Thus, the legal test that applies in respect of sentence enhancements under section 145 of the CJA 2003 is the same as that used in the CDA 1998.

15.14 As there is no pre-existing CDA 1998 definition for hostility relating to disability, sexual orientation and transgender identity, section 146 introduces an almost identical scheme for these characteristics. It provides:

> (1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).
>
> (2) Those circumstances are—
>
> (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—
>
> (i) the sexual orientation (or presumed sexual orientation) of the victim, or
>
> (ii) a disability (or presumed disability) of the victim, or
>
> (iii) the victim being (or being presumed to be) transgender, or
>
> (b) that the offence is motivated (wholly or partly)—
>
> (i) by hostility towards persons who are of a particular sexual orientation, or
>
> (ii) by hostility towards persons who have a disability or a particular disability, or
>
> (iii) by hostility towards persons who are transgender.[10]
>
> (3) The court—
>
> (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
>
> (b) must state in open court that the offence was committed in such circumstances.

[10] Section 146(2)(a) and (b) mirror the hostility test laid down by the aggravated offences, so the case law on these elements of the aggravated offences is also relevant in interpreting section 146.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

15.15 Section 146 does not include "association with members of that group", as is the case under section 28(2) of the CDA 1998, to which section 145(3) refers. The scope of the protections under section 146 therefore arguably do not apply to "association" with LGBT or disabled persons, though we are not aware of this issue being tested in court.

EVALUATING THE HOSTILTY TEST

15.16 The two-limbed, hostility-based approach to aggravated offences and enhanced sentencing has now been in place for over 20 years in England and Wales. Its use has expanded from its original function in relation to racially aggravated offences, and it now applies to religiously aggravated offences under the CDA 1998,[11] and enhanced sentencing across all five characteristics.[12] A similar legislative approach is adopted in Scotland, where the phrase "malice or ill-will" is used in place of the term "hostility",[13] but was intended to have the same effect.[14]

15.17 While a legal test requiring evidence of a "motivation" of hostility (a subjective test) is a common feature of hate crime laws in many jurisdictions, the jurisdictions of the United Kingdom are unusual in also allowing for proof of the offence through the objective "demonstration" of hostility. Western Australia is one of the few other jurisdictions that takes this approach. This is significant because as noted above in practice it is usually much easier to prove the objective demonstration of hostility.[15]

15.18 It may also be the case that the incidence of crimes involving the "demonstration of hostility" – such as assaults involving the use of a racial or homophobic slur – are more prevalent than crimes which can be shown to be motivated by such hostility. That is, there are a proportion of crimes involving hostile speech or action where the underlying motivation for the behaviour is quite different – for example, a drunken response to a perceived insult. Chakraborti and Garland have described these as the "banal motivations" that underline a significant proportion of offending.[16] The extent of these

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11 Introduced by the Anti-terrorism, Crime and Security Act 2001, s 39.

12 Criminal Justice Act 2003, ss 145 and 146.

13 In Scotland, as with England and Wales these provisions have been in enacted in various stages, beginning with the Crime and Disorder Act 1998, s 96 (race); Criminal Justice (Scotland) Act 2003, s 74(2A) (religion); Offences (Aggravation by Prejudice) (Scotland) Act 2009, s 1(3) (disability) and s 2(3) (sexual orientation and transgender identity)).

14 During the passage of the 1998 Bill, the Lord Advocate explained that the two phrases were intended to have the same effect, but on balance the phrase "evincing malice and ill-will" was chosen because it had a historical place in Scottish criminal law and it was familiar to the Scottish courts Hansard, House of Lords, 12 February 1998, col 1305.

15 Though juries may still be reluctant to convict on the basis of mere demonstration of hostility – see M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017), pp 117 to 130, available at https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539.

16 N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16 *Theoretical Criminology* 499, 503 and 505.

more spontaneous manifestations of hostility (as opposed to pre-meditated "mission" offending[17]) is difficult to quantify, and in many cases both the hostile motivation and the outward demonstration of hostility will co-exist. In some cases, the offending may not be particularly pre-meditated, but the hostile motivation may form very rapidly at the time of the offending conduct. Further, many victims would understandably argue that regardless of the perpetrator's underlying motivation, the impact on the victim of experiencing such hostility is still very damaging.[18]

15.19 The United Kingdom tests of "hostility" (England and Wales, Northern Ireland) and "malice or ill will" (Scotland) fall more broadly within what has been described as the "animus" model for hate crime laws. Under these laws, the aggravated form of the crime is committed where the offence was motivated by or (additionally in the case of the UK jurisdictions) the defendant demonstrated hostility against the victim group.

15.20 This approach is distinct from the "discriminatory selection model" of hate crime laws adopted in several jurisdictions of the United States. This model focuses on whether the victim has been selected by the defendant because of their membership of a protected group.

15.21 The important distinction with the "animus" model is that under a discriminatory selection model there is no need for evidence that the perpetrator was outwardly hostile to or motivated by hostility towards people who share the victim's characteristic (though this may well be the case). This can be particularly relevant to fraud or theft cases, where a particular victim group may be targeted by the offender on the basis that they are considered an "easier target" or more likely to have cash or valuable items, rather than because of any dislike for that group.

Should the legal test be the same for all hate crime sentence aggravations?

15.22 As we have outlined, the current legal position is that essentially the same legal test is applied for both aggravated offences and enhanced sentencing: was the conduct motivated by hostility towards the protected characteristic, or was hostility demonstrated at the time of the offending? We also noted that one potential distinction is that section 146 does not make express reference to "association with members of that group", which arguably means that the scope of the protections does not apply to "association" with LGBT or disabled persons. This distinction appears to be arbitrary, and perhaps unintended. We do not see any principled or practical reason why this distinction should be maintained.

15.23 More broadly, we provisionally consider that whatever conclusion is reached in relation to the appropriate legal test, it is important that the same test applies in respect of both aggravated offences and enhanced sentencing. We have considered whether a more stringent test might be applied in respect of aggravated offences, in recognition of the higher maximum penalties that apply. However, we are concerned that there is already a significant degree of complexity in existing hate crime laws, and differential legal tests would add to this and likely lead to errors and confusion in practice. Adopting the same

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17 J McDevitt, J Levin, and S Bennett, "Hate crime offenders: an expanded typology" (2002) 58(2) *Journal of Social Issues* 303.

18 This is underscored by research in this area. See, eg, P Iganski, "Hate hurts more" (2001) 45(4) *American Behavioral Scientist* 626.

test for both legal mechanisms ensures a consistent standard is applied in recognising and responding to hate crime.

15.24 In the following two chapters we discuss each of these legal mechanisms in more detail.

Consultation Question 21.

15.25 We provisionally propose that the legal test that applies in respect of enhanced sentencing should be identical to that which applies to aggravated offences.

15.26 Do consultees agree?

The demonstration limb: Is "demonstration" of hostility too broad?

15.27 A concern that is sometimes raised in respect of the United Kingdom approach to hate crime laws is that it equates words or conduct that "demonstrate" hostility with proof of a hostile motivation.[19] The criticism is that this is overly expansive – a person may say or do something indicating hostility at the time of the offending, but this in fact may have very little to do with why the offending occurred. Indeed, Walters has highlighted that some lower courts have been quite reluctant to allow these cases to be considered hate crimes.[20] He notes that this has even extended to the Court of Appeal, where in *Rogers* Lord Phillips expressed concern that:

> [there is] a danger that charges of racially aggravated offences may be brought where vulgar abuse has included racial epithets that did not, when all the relevant circumstances are considered, indicate hostility to the race in question.[21]

15.28 The rationale for including "demonstration" as well as "motivation" in the legal test was set out in the Home Office Consultation Paper, *Racial Violence and Harassment* in 1997:

> Ministers recognise that the creation of offences which required the prosecution to prove that the offence was motivated on racial grounds would create a difficult hurdle to be overcome by the prosecutors. The prosecution would need to distinguish a racial motive from other possible motives and would have to demonstrate the degree to which a person had been influenced by various motives. There may be a whole range of different circumstances and motives at work in such cases and this may put a conviction in doubt for all but the most overtly racist incidents.

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19 See further: M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 120.

20 See M Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 61 to 63.

21 [2005] EWCA Crim 2863, [2006] 1 WLR 962, [24].

> The government intends that the new offences should cover cases where the prosecution is able to show racial motivation but it believes that for most racial incidents of violence and harassment a much more realistic test will be necessary.[22]

15.29 This "more realistic" demonstration approach has indeed formed the basis of the vast majority of hate crime convictions. However, the demonstration of hostility test has not been widely adopted outside the United Kingdom. While there are other jurisdictions such as New Zealand which use the term "hostility",[23] this is limited to the context of hostile motivation,[24] not mere demonstration.

15.30 Some have argued that the law should focus solely on a subjective assessment of the perpetrator's motivation. Under this view, the demonstration of hostility may provide evidence of such motivation, but should not alone be sufficient to fulfil the criteria for hate crime. For example, the New South Wales Law Reform Commission's 2013 Sentencing report stated:

> We do not favour the *demonstration of a hostility test*. In many cases evidence of the demonstration of hostility immediately before, during or immediately after the offending conduct, for example, through speech, will be available to make good the motivation test. In other cases however that behaviour may be unrelated to the reason for the offence, and involve little more than spontaneous insult.[25]

15.31 We accept that the equation of the demonstration of hostility with motivation raises concerns. It is clear that demonstration of hostility in the course of a crime can significantly worsen its impact – for example, the spontaneous use of a homophobic slur in the context of a drunken assault may cause significantly more distress to an LGB victim. However, it is less clear that the moral blameworthiness of such a spontaneous outburst justifies the label of "hate crime". Some have argued that only the deliberate, hostile targeting of victims on the basis of their characteristic can truly be considered a hate crime. For example, in our pre-consultation discussion, Australian hate crime academic Gail Mason expressed a strong preference for a motivation-only based test for hate crime laws that involve enhanced penalties. Mason argued that this approach focuses on whether there is evidence that the accused committed the crime *because of* their prejudice. By contrast, the demonstration test does not require any causal link between the demonstration and the perpetration of the offence, and the relationship with hostility or prejudice is not necessarily as strong.

15.32 However, Goodall has questioned whether such a clear distinction should be drawn between prior and contemporaneous motivation and conduct.[26]

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22 Home Office, *Racial Violence and Harassment: A Consultation Document* (Sep 1997), para 8.2, available at https://webarchive.nationalarchives.gov.uk/+/https://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/rvah.htm

23 Sentencing Act 2002 (NZ), s 9(1)(h).

24 The provision requires that "the offender committed the offence partly or wholly *because of* hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability" (emphasis added).

25 New South Wales Law Reform Commission, Sentencing (Report 139, 2013), para 4.183.

26 K Goodall, "Conceptualising 'racism' in criminal law" (2013) 33 *Legal Studies* 215, 222, 237.

> The critics do not make it clear why they think that a subsequent racial element is necessarily incidental. The offender who turns to racist language during the conduct of the offence is capable of understanding the purport of his words. He either intends to show racist antipathy for a reason associated with his attack – as Paul Iganski puts it, he makes a 'quick calculation'– or he is callously indifferent to a meaning that at heart he knows his words have.
>
> …
>
> Such 'quick calculation' acts are not necessarily incidental, however fleeting and opportunist the expressions of antipathy may be. So long as an offender flung out his racial insult intending it at that moment to diminish his victim on that ground – or utterly disregarded the possibility that it would have that effect – then it is an integral part of his conduct, not any mere ulterior intent nor unintended by-product.

15.33 Considering an example of a supposedly thoughtless racial slur, Walters similarly argues that:

> It would take a very unusual situation for an adult offender to be unaware that racist language has a subjugating effect on others. The offender's realization of this will come from his own socialization and learnt knowledge about the socio-cultural and socio-economic processes that have historically marginalized minority groups. One such process has been the negative stereotyping of certain identity groups. Pernicious labels are often attached to groups in an attempt to control and subordinate them, both socially and economically. The majority of people become aware of negative stereotypes, and other terms of prejudice, during adolescence. They become conscious of the fact that identity related prejudices work to marginalize certain groups within society. In fact, it would be fair to assert that the vast majority of people know that discriminating against someone based on their race, religion or sexual orientation is not only harmful but also deemed by most people to be wholly immoral.[27]

15.34 Walters concludes that:

> The act of intentionally or knowingly belittling others based on their race, religion or other protected characteristic should therefore be conceived as another process by which people are demeaned for being 'different'. It matters not that the offence was not primarily intended as an act of racial or religious animus, neither should it matter that the offender does not feel deep-seated hatred for the victim's characteristics. Rather, the criminal law should be concerned only with the fact that the offender's racial or religious hostility makes up a 'constitutive element' of the offence committed. As such, it must remain irrelevant to the law when an offender says that in hindsight he did not mean his actions to be racist, such as where he exclaims 'it was the drink talking not me!'. What matters then, is that the offender intends to express the insult and is aware that to do so will likely demean the victim's identity.[28]

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[27] M Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 70.

[28] M Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxford Journal of Legal Studies* 47, 69.

15.35 This question was carefully considered in the Bracadale review of hate crime laws in Scotland. Scotland has a functionally equivalent legal test that asks whether the defendant "evinces… malice and ill-will."[29] Lord Bracadale ultimately recommended that this limb should be retained:

> The threshold of evincing malice and ill-will, or demonstrating hostility, may well catch words uttered 'in the heat of the moment'. But that should be no excuse. This threshold does not require the court or jury to make a judgment about the accused's character generally; what is significant is the fact of what has been said (or otherwise evinced) and the potential impact that has on the victim and the wider group who share the relevant protected characteristic. It is worth remembering here that this is not just a question of a person demonstrating hostility or using bad language towards another. The underlying conduct must amount to an offence (for example, threatening or abusive behaviour, contrary to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010). The significance of the demonstration of hostility is that it highlights the context of that offending behaviour. The impact of a particular remark or action has to be taken into account: it upsets people in a direct way and targets the core identity of the individual or group. It is vital to send a message that this will not be tolerated or shrugged off as 'mere banter'. To do that risks undermining the principles of equality and respect.[30]

15.36 The Bill currently before the Scottish Parliament retains this dual approach, but limits the application of the "evinces malice or ill-will" limb to contexts where there is a specified victim.[31]

15.37 We are inclined to agree with Lord Bracadale's conclusion as we do not consider that a compelling case has been made to roll back the "demonstration" limb of the test. While some forms of hate crime will naturally be worse than others, both the motivation by and demonstration of hostility on the basis of a protected characteristic should be sufficient to constitute a hate crime. This approach has been in operation in the United Kingdom for some decades. There is still scope within a finding of hate crime for the sentencing judge or magistrates to distinguish between different degrees of wrongfulness. Indeed, the Sentencing Council's recently finalised public order offences guidance provides significant assistance to sentencers as to how to do so.[32]

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29 Crime and Disorder Act 1998, s 96(2).

30 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 3.8, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

31 Hate Crime and Public Order (Scotland) Bill 2020, cl 1.

32 Sentencing Council, *Disorderly behaviour/ Racially or religiously aggravated disorderly behaviour* (Effective from: 1 January 2020), available at https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/disorderly-behaviour-racially-or-religiously-aggravated-disorderly-behaviour/.

Consultation Question 22.

15.38 We provisionally propose that the current legal position – where the commission of a hate crime can be satisfied through proof of "demonstration" of hostility towards a relevant characteristic of the victim – be maintained.

15.39 Do consultees agree?

The motivation limb: should England and Wales laws adopt a discriminatory selection approach instead?

15.40 Several groups we have engaged with – most prominently disability rights advocates and some academics – have made cogent arguments for changing the motivation test so that it does not always require evidence of "hostility" on the part of the defendant. They argue that disabled people are disproportionately targeted for various forms of crime, but that compared with the crime experienced by other protected groups, the presence of "hostility" is often less apparent or more difficult to prove. This is partly because negative attitudes towards disabled people are often characterised by derision, contempt, and a perception that they are easy targets. While overt hostility towards disabled people does occur, it is perhaps less prevalent than other forms of prejudice such as racism and homophobia. Alternatively, as some stakeholders noted, it may be that disablist language is so normalised that it is often not perceived to be "hostile" in circumstances where equivalent racist or homophobic words or conduct would be.

15.41 The CPS publishes detailed legal guidance in relation to disability hate crime, noting that common features include:

- Incidents escalate in severity and frequency. There may have been previous incidents, such as: financial or sexual exploitation; making the victim commit minor criminal offences such as shoplifting; using or selling the victim's medication; taking over the victim's accommodation to commit further offences such as taking/selling drugs, handling stolen goods and encouraging under-age drinking.

- Opportunistic criminal offending becomes systematic and there is regular targeting, either of the individual victim or of their family/friends, or of other disabled people.

- Perpetrators are often partners, family members, friends, carers, acquaintances, or neighbours. Offending by persons with whom the disabled person is in a relationship may be complicated by emotional, physical and financial dependency and the need to believe a relationship is trusting and genuine, however dysfunctional.

- Carers, whether employed, family or friends, may control all or much of the disabled person's finances. This provides the carer with opportunities to abuse, manipulate and steal from the disabled person.

- There are a number of common triggers for crimes against disabled persons, for example: access or equipment requirements, such as ramps to trains and buses,

can cause irritability or anger in perpetrators; perceived benefit fraud; jealousy in regard to perceived "perks", such as disabled parking spaces.

- Multiple perpetrators are involved in incidents condoning and encouraging the main offender(s) – for example, filming on their mobile phones and sending pictures to friends or social networking sites.

- False accusations of the victim being a paedophile or "grass".

- Cruelty, humiliation and degrading treatment, often related to the nature of the disability: for example, blindfolding someone who is deaf; destroying mobility aids.

- Barriers to, and negative experience of, reporting to criminal justice agencies, which leads disabled people to feel that they are not being taken seriously.

- Disabled people have a tendency to report incidents to a third party rather than to the police.[33]

15.42 Many stakeholders we have spoken to – including victims' groups, prosecutors, and academics – have argued that at least in the context of disability hate crime, the legal test should change. A replacement test relying on proof of causation – that the crime was committed "by reason of" the victim's characteristic (or perceived characteristic) – has been proposed as a model of reform[34] that better responds to the targeting of disabled people.

15.43 A reformed test may also be used in cases where some (possibly inaccurate) stereotype exists about a community, leading to them being selected as victims (even if there is little to no evidence of actual hostility or dislike for that community). For example, there have been cases where it appears Asian families in Britain have been targeted for burglary in recent years,[35] due to a belief that they are more likely than others to own valuable gold jewellery. It is not generally suggested that a particular hostility to these communities is also a motivating factor, though this may also be present.

15.44 In the absence of any clear evidence of "hostility" towards these groups by the perpetrator (motivated by or demonstrated), this kind of cynical targeting of certain groups would be unlikely to meet the current threshold for the imposition of an aggravated sentence under either the CDA 1998 or the CJA 2003.

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33 Crown Prosecution Service, *Disability Hate Crimes and other crimes against disabled people* (15 August 2018) available at https://www.cps.gov.uk/legal-guidance/disability-hate-crime-and-other-crimes-against-disabled-people-prosecution-guidance.

34 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 206, available at https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539.

35 BBC News, "Asian gold: More than £140m stolen in UK in last five years" (23 March 2019), available at https://www.bbc.co.uk/news/uk-47655662.

15.45 Sentencing guidelines do recognise "vulnerability" as an aggravating sentencing feature,[36] separately from hate crime, though this does not have the same statutory basis as sentence enhancements under sections 145 and 146 of the CJA 2003. There is therefore no requirement that "vulnerability" enhancements be announced by the judge in open court, nor that the judge demonstrably increase the sentence compared to what it otherwise might have been.

15.46 It is useful to note, at this point, how a judge would approach the sentencing of an offender where the victim was perceived to be vulnerable. The Sentencing Council publishes sentencing guidelines which the sentencing court is required to follow.[37] These definitive guidelines are published following public consultation. Each guideline specifies the range of sentences appropriate for each type of offence depending on the degree of seriousness. Within each offence, the Council identifies categories which reflect different degrees of seriousness, a sentencing range within each category and a provisional starting point within each category. Vulnerability is taken into account in assessing both the culpability of the offender and the harm caused. Once the starting point is established, a judge will identify any aggravating and mitigating factors and previous convictions so as to calculate the appropriate sentence within the range. Although it does not have the same force as a statutory aggravating feature, the presence of any listed aggravating feature, such as the victim being targeted as vulnerable, will be a significant factor in a judge's assessment of the appropriate type or length of sentence. In addition, judges are provided with guidance, for example, the Equal Treatment Benchbook[38] which considers fair treatment and disparity of outcomes for different groups in the criminal justice system. Judges will also take this guidance into account to ensure fairness in the court proceedings.

15.47 However, many disabled victims also strongly reject the suggestion that crimes targeted at them should be understood as arising merely from their perceived "vulnerability"; and argue that a deeper prejudice or hostility towards disabled people – or even hatred – underlies this offending.

15.48 There is currently no specific form of aggravation that applies in cases that do not involve "hostility" or "vulnerability" – for example the targeting of Asians for theft of gold items referred to above. Yet even without the presence of hostility or exploitation, such a systematic targeting of a community may worsen the impact of the offending on the victim, and more broadly lead that community to feel unsafe and disproportionately affected.

15.49 This discrimination and additional harm could justify the classification of such conduct as a hate crime. The University of Sussex The Lifecycle of a Hate Crime Project has argued that:

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36 Sentencing Guidelines Council, *Definitive Guideline Assault* (2011) p 12. Proposed revisions to this guideline are currently subject to public consultation. See https://www.sentencingcouncil.org.uk/publications/item/assault-offences-consultation/.

37 Coroners and Justice Act 2009, ss 125(3) to (4).

38 Judicial College, *Equal Treatment Bench Book* (February 2018 edition, September 2019 revision), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Equal-Treatment-Bench-Book.pdf.

> The intentional targeting of members of subjugated groups "because of" their identity is to purposefully subjugate those identities because of who they are. Such actions feed directly into the negative stereotyping of certain groups and builds upon the social oppression that they have experienced historically …[39]

15.50 The authors further argue that:

> Victims are "selected" because their "difference" means that they are deemed to be somehow less, and their worth as equal members of society is therefore diminished. We see evidence of this throughout the cases of so-called "mate crime", where offenders purposefully manipulate their victims, treating them as playthings to be used and later abused. These types of incident cannot be explained away by saying that the victim was simply vulnerable to abuse. Their perceived vulnerability is based on a prejudice that the offender holds towards the victim. Hence, evidence that shows that an offender purposively selects a perceivably vulnerable victim by reason of their protected characteristics is evidence of identity-based prejudice. [40]

15.51 The report acknowledges that the adoption of a discriminatory selection approach would "mark a significant shift in the model used to legislate against hate crime,"[41] but argues that the change would not extend the scope of the law:

> Rather, it would lead to more appropriate uses of the law. Thus, where a defendant may have been convicted of a basic offence against a disabled victim and had their sentence increase because of the victim's perceived "vulnerability", under our proposal, the offence could more accurately be labelled and disposed of as a hate crime…[42]

15.52 Ultimately, the authors contend that without change "the current system will continue to fail many victims of hate crime."[43]

15.53 However, this view is not universally accepted. While it is generally acknowledged that there is an additional harm to victims who have been discriminatorily selected, and greater wrongdoing that attaches to such discriminatory selection, there is concern that such a model would capture conduct that should not be labelled as "hate crime".

15.54 Goodall has criticised a discriminatory selection approach as mischaracterising the nature of the offending. She argues that the offending should be considered more serious, but on a different basis:

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39 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 203.

40 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp 204 to 205.

41 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 205.

42 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 205.

43 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 206.

> One can reject a discriminatory selection model without being forced to say that when an offender selects his victim on the basis of a convenient stereotype, it adds nothing to the seriousness of the offence. We may regard it as aggravated on another ground – the pre-planned selection of a vulnerable group victim. There can be enhanced punishment without treating this as a hate crime.[44]

15.55 A broadly similar conclusion was reached in the Independent Review of Hate Crime Legislation in Scotland, which found that a discriminatory selection approach "risks mischaracterising exploitation as a hate crime."[45] While acknowledging that he was "initially attracted by the approach", review chair Lord Bracadale ultimately decided it was not appropriate for Scottish hate crime laws. However, he did recommend that the added harm and wrongs of exploitation and vulnerability targeting be separately considered for law reform:

> The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.[46]

15.56 As we noted above, while there is no statutory aggravation for exploitation and vulnerability in England and Wales, sentencing guidelines do recognise "vulnerability" as an aggravating sentencing feature,[47] separately from hate crime.

15.57 We have given serious consideration to reforming the test so that it incorporates discriminatory selection – particularly in the context of exploitation of disabled people. As we noted above, several US States take this approach. The US state of Maine, for example, requires proof of:

> selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected because of [the protected characteristic][48]

15.58 In Virginia, the punishment for an assault is enhanced:

> if the person intentionally selects the person against whom a simple assault is committed *because of* his race, religious conviction, color or national origin.[49]

15.59 In Illinois, the Criminal Code provides that:

> A person commits hate crime when, *by reason of* the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he or she commits assault, battery,

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44 K Goodall, "Conceptualising 'racism' in criminal law" (2013) 33 *Legal Studies* 215, 222, 228.

45 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 3.25.

46 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.70.

47 Sentencing Guidelines Council, *Definitive Guideline Assault* (2011) p 12. Proposed revisions to this guideline are currently subject to public consultation. See https://www.sentencingcouncil.org.uk/publications/item/assault-offences-consultation/.

48 Me Rev Stat tit 17A § 1151(8).

49 Code of Virginia § 18.2-57A. emphasis added.

aggravated assault, intimidation, stalking, cyberstalking, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action, disorderly conduct, transmission of obscene messages, harassment by telephone, or harassment through electronic communications as these crimes are defined…[50]

15.60 In Louisiana, hate crime laws operate by creating a separate, parallel offence of committing a hate crime, with a sentence that operates consecutively to the base offence. The hate crime offence is as follows:

> It shall be unlawful for any person to *select the victim* of the following offenses against person and property because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of actual or perceived membership or service in, or employment with, an organization, or because of actual or perceived employment as a law enforcement officer, firefighter, or emergency medical services personnel…[51]

15.61 Often these approaches also adopt a causation test – requiring evidence that the crime was committed "because of" the particular characteristic. For example, in Iowa the test is whether the crime was:

> "committed against a person or a person's property because of [the protected characteristic]"[52]

15.62 There are also examples in European jurisdictions – for example Article 132-76(1) of France's Penal Code provides that the penalties incurred for a felony or a misdemeanour be increased when the offence is committed *because of* the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.[53]

15.63 It is important to recognise that none of these jurisdictions adopts *both* a discriminatory selection model and a demonstration of hostility test. Where used, discriminatory selection is typically the sole available legal test. If England and Wales were to retain a "demonstration" limb as well, it would further widen what is already arguably the most expansive legal test for the application of hate crime laws of any comparable jurisdiction.

15.64 Possibly the closest approximation of a discriminatory selection model in England and Wales law is the recently introduced sentencing aggravation that applies in respect of assaults on emergency workers. The Assaults on Emergency Workers (Offences) Act 2018 increases the maximum penalty available in cases where a common assault or battery is "committed against an emergency worker acting in the exercise of functions as such a worker" from 6 months' imprisonment to 12 months'.[54] The applicable test

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50 Criminal Code of Illinois, s 12-7.1. emphasis added.

51 Louisiana Criminal Statute, §107.2. emphasis added.

52 Iowa Code § 729A.2.

53 Emphasis added.

54 Assaults on Emergency Workers (Offences) Act 2018, s 1.

here is exceptionally broad; not even requiring a causal link between the victim's status and the offending. Such an approach is not workable for hate crime characteristics more generally, as given some characteristics such as race are held by all individuals, the aggravation would effectively apply to all offences.

15.65 An appropriately defined, but broader legal test would provide recognition of the harm and victimisation caused to individuals and groups who experience such targeting. It also recognises the wrongdoing of the perpetrator in either exploiting a perceived vulnerability, or taking advantage of the personal characteristic in some other cynical way.

15.66 There are also risks associated with a discriminatory selection approach. Foremost amongst these is the concern that it shifts the focus of enhanced punishment away from a requirement for animosity and hatred, and incorporates subtler forms of prejudice and cynical exploitation. This means that a person may be found guilty of a "hate crime" (not the legislative terminology, but the widely used descriptor) without any evidence that they have held hostile views towards the characteristic in question, or demonstrated this towards the victim. While additional harm and wrongdoing may be present, to call such conduct "hate" crime could stretch the concept considerably. "Bias crime" or "exploitation" may be more accurate descriptions of the offending in some cases.

15.67 More broadly, there is a risk that an overly expansive test for the application of hate crime laws would dilute their impact. That is, by drawing in offending that is more "opportunistic" or "exploitative" rather than "hostile", the label may lose its value in denouncing and deterring such conduct.

15.68 Against this, it may also be observed that where a person is targeted because of who they are, whatever form this takes, that person may experience this as an attack on an aspect of their identity. So rather than "diluting" laws, it might be argued that a previously unrecognised manifestation of harm would in fact be properly recognised. Yet while recognising the harm such conduct causes, Goodall's concern remains that a discriminatory selection approach places insufficient emphasis on the blameworthiness of the defendant to justify the "hate crime" label. Considering the context of racist hate crime specifically, Goodall argues that:

> A focus which is primarily on harm, and tackling harm, is insufficient to constitute the background justification for an enhanced and nominate penalty for racist crime. The blameworthiness of the individual is part of what would make enhanced punishment for a racist offence legitimate.[55]

15.69 While a discriminatory selection test may encompass conduct that is not currently caught by hate crime laws in England and Wales, it is important to remember that this does not bind sentencers to treat all forms of hate crime in the same way for sentencing purposes. While the current law requires the sentencer to increase the sentence above that which would otherwise have been imposed, they retain the discretion to determine the degree of sentence aggravation that is appropriate in the specific circumstances of the case. This means that sentencers can treat cases involving clearer manifestations

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55 K Goodall, "Conceptualising 'racism' in criminal law" (2013) 33 *Legal Studies* 215, 235.

of hostility more seriously than others, if they consider this to be justified in the circumstances.

15.70 There are strong arguments – particularly in the context of disability hate crime – that favour broadening the applicable test to allow for discriminatory selection. Some of these arguments are principled – that discriminatory selection is, at its core, a form of hatred or hostility, because it amounts to an attack upon the identity of the victim and those that share the targeted identity characteristic. Others are more pragmatic – in particular that it is currently so hard to prove motivation in hate crime, that consistent with the approach to the "demonstration" limb, the law should lower the legal threshold to recognise the real harm that is caused by the discriminatory selection and targeting of certain characteristic groups.

15.71 But both of these arguments are also open to criticism. The label of "hate crime" implies a degree of conscious animus towards the targeted characteristic. If the law treats all forms of targeting as "hate", there is a risk that the importance of the label "hate crime" could be undermined. Similarly, adopting an expansive definition of hate crime to recognise the harm caused to targeted victim groups risks overly condemning certain offenders as "bigots", when their conduct, while unacceptable, might be more fairly characterised as cynical or opportunistic, and this can still be reflected in the sentence as an aggravating feature.

15.72 We have not yet reached a provisional view on this difficult question, and welcome further input from stakeholders.

Possible reforms to the "motivation" test

15.73 If consultees consider that a wider approach to motivation should be adopted, the scope and content of such a test would need to be considered in further detail. We consider options for this below.

Option 1: A widened definition of "hostility"

15.74 One option to address some of the concerns would be to retain the requirement to prove that the perpetrator was motivated by or demonstrated "hostility" towards the characteristic group, but provide further statutory guidance as to how the term "hostility" should be interpreted. While the CPS has provided various iterations of such guidance for prosecution purposes over the years, there has never been any further guidance or statutory definition.

15.75 For example, hate crime laws might specify that evidence that indicates a hostile motivation on the part of the defendant may include conduct indicating "contempt, derision or disregard for the rights of people with the protected characteristics".

15.76 Under such an approach, "hostility" might be understood not only in an aggressive sense – such as anger, violence and hatred, but as also including "hostility" towards the rights and dignity of the protected group.

15.77 For example, the false befriending and subsequent financial exploitation of an intellectually disabled person might be characterised as "hostile" in that it was motivated by a fundamental contempt for intellectually disabled people. This may be so, even though the defendant displayed no aggression or even outward dislike of disabled

people. Rather, the jury would be invited to determine whether their conduct demonstrated a “hostility” towards people with a disability through a contempt and disregard for their personhood.

15.78 Such an approach constitutes a less radical shift in the nature of hate crime laws away from the current approach. Indeed, it is broadly consistent with the approach the CPS has been moving towards in recent years. The most recent iteration of the guidance provides the following examples of types of harassment commonly reported by disabled people, which in combination with the commission of a criminal offence may amount to "hostility" – either “motivation” or “demonstration”:

- Actions relating to disability and mobility aids. For example:
    - Carers or perpetrators of domestic violence may exploit someone's impairment by moving aids out of reach, or by withholding food, water, communication, money or medication.
    - Throwing or kicking away a walking stick or walking frame, or using these objects as weapons against the disabled person.
- Actions relating to accessibility aids. For example:
    - Removal of an access ramp, preventing the disabled person from gaining access to transport or a building.
    - Use of an access ramp as a weapon, such as throwing the ramp at the disabled person.
- Challenging the right of a disabled person to use accessible facilities, such as reserved parking, or reserved seating or spaces on public transport; or showing impatience or annoyance towards disabled people using such facilities.
- Targeting only disabled persons' homes for crimes (eg criminal damage; burglary), which are sometimes identified by mobility aids, such as adapted parking spaces, ramps and other adaptations outside the properties.
- Staring or laughing at or mimicking the disabled person.
- Filming the offending, such as a physical or sexual assault.
- Filming and uploading images of disabled persons, possibly with abusive comments, onto social networking sites.[56]

15.79 However, the guidance also notes that in cases of acquisitive crime (theft, fraud etc) and sexual offences, it is likely that prosecutors will need to show something more than

[56] Crown Prosecution Service, *Disability Hate Crimes and other crimes against disabled people* (15 August 2018), available at https://www.cps.gov.uk/legal-guidance/disability-hate-crime-and-other-crimes-against-disabled-people-prosecution-guidance.

the fact that the perpetrator saw the victim as an easy target if they are to meet the requirements of "hostility".

15.80 Under a redefined hostility approach, the basis for the hate crime label would still be framed in terms of animus towards the characteristic group; but it would be an animus more broadly understood as including a fundamental disregard for the rights of the targeted group.

15.81 However, even with careful direction, we have doubts whether such a subtle shift in the interpretation of "hostility" would significantly influence the outcome of cases in a way that would meaningfully benefit disabled victims. In the more than 15 years in which "hostility" has been the applicable test in respect of disability hate crime, the consistent concern has been that the criminal exploitation and abuse of disabled people is not understood as "hostile" in too many cases. The Sussex University Report authors reached a similar conclusion:

> Despite a myriad of criminal justice inquiries, CPS guidance, research reports, and the lobbying efforts by disability groups, it is clear that judges and many enforcement agencies refuse to comprehend discriminatory selection of disabled victims as evidence of hostility. It is likely that this is due to the word "hostility" itself. Scholarly discussions that aim to illustrate how targeting perceived vulnerability can also amount to a form of identity-based hostility are unlikely to be applied in practice.

15.82 If the term "hostility" were to remain the key test, our provisional view is that there would not be a significant shift in attitudes towards disability hate crime, and prosecution levels would remain low.

Option 2: Offence committed "by reason of" the protected characteristic

15.83 The Sussex University report proposed the following formulation:

> the offence is committed by reason of the victim's membership (or presumed membership) of a racial or religious group, or by reason of the victim's sexual orientation (or presumed sexual orientation), disability (or presumed disability) or transgender identity (or presumed transgender identity).[57]

15.84 The authors argued that the current "demonstration of hostility" test should be retained, but that their proposed test should replace the "motivation" test.[58]

15.85 A "by reason of" test is a causation-based test. Under such an approach, it is immaterial whether the defendant: was motivated by hatred or hostility towards the characteristics; saw the victim as vulnerable or an easy target; or had some other motivation such as a belief about the material possessions of people sharing a certain characteristic.

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[57] M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 206. This report was limited in scope to consideration of the existing five characteristics, and supported by a number of stakeholder groups in our pre-consultation meetings.

[58] M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 206.

15.86 While this approach enjoys significant support amongst some disability rights advocates, we have concerns about the wider implications of removing evidence of animus from the legal test altogether. We question whether it is right that offenders who do not hold or display any animus towards the characteristic group should be characterised as "hate crime" offenders.

15.87 A further challenge would be created if the characteristic of "women" or "sex or gender" is included within hate crime laws. We discuss this further in Chapter 12, where we consider whether hate crime laws are an appropriate model for these offences in the context of sex or gender-based aggravation. The answer to this question may to some extent depend on the legal test that is applied.

15.88 The application of a "by reason of" test in the context of sexual offences (which are not currently specified as aggravated offences, but can be recognised as hate crime under the regime of enhanced sentencing) could be particularly significant. Data in the Crime Survey for England and Wales suggests that targeting of personal characteristics plays a role in only a minority of crime generally.[59] However, if the characteristic of sex or gender is added, and a "by reason of" test is adopted, there may be a significant increase in the proportion of sexual offences that are characterised as hate crimes. This may occur in a significant proportion of cases involving male sexual offending against female victims, where the offence may conceivably be characterised as committed "by reason of" the sex of the victim. The implications of this need to be carefully considered. In Chapter 12 we consider the issue that arises in the context of gender or sex-based recognition and sexual offences in more detail.

Option 3: Victim motivated by hostility *or prejudice* towards a protected characteristic

15.89 An alternative approach to the "by reason of" test would be to adopt a more narrowly constrained test that still captures some forms of targeting that do not meet the threshold of "hostility". This test could apply where the offender was motivated by hostility *or prejudice* towards a protected characteristic of the victim, or perceived protected characteristic. In essence, the term "prejudice" would be added to the motivation limb (we would not propose that it also be added to the demonstration limb, as this would very significantly widen the ambit of this limb).

15.90 The definition of "prejudice" in the Oxford English Dictionary includes "unreasoned dislike, hostility, or antagonism towards, or discrimination against, a race, sex, or other class of people." While "hostility" is part of this definition, it also includes lower threshold concepts such as "discrimination".

15.91 We consider that a prejudice-based test would likely capture more of the exploitative and prejudice-based criminal conduct that disabled victims disproportionately experience. In particular, in some cases of acquisitive crime or sexual exploitation of disabled people, prejudice towards the victim's disability may have influenced the defendant's assessment that the victim's disability made them less likely to resist.

15.92 We also consider that is more likely to encompass criminal conduct that is based on an erroneous assumption – a prejudice, about the characteristics. As the CPS guidance at paragraph 15.41 notes, disabled people are sometimes targeted on the false

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[59] See Chapter 5 at para 5.8.

assumption that they are paedophiles. The tragic case of Bijan Ebrahimi that we described in Chapter 1 is an example of this. In Chapter 10 we stated our view was that paedophilia itself was not an appropriate characteristic to be protected in hate crime laws. However, where a disabled person is targeted based on a prejudiced assumption that their disability means they are a paedophile, we consider that the law should characterise this behaviour as a disability hate crime.

15.93 It is less likely that a "prejudice" test would capture other forms of opportunism which do not involve negative associations, such as targeting of an ethnic group perceived to be cash or asset rich. However, we welcome further views on this. It may be that where the opportunism is also linked to a negative stereotype that exists about a group – for example, historical prejudices against Jewish people linked to the idea that they are "greedy", and there is evidence that these ideas formed part of the defendant's motivation, a "prejudice" based test may operate to capture the conduct.

15.94 A "motivated by hostility or prejudice" test is also less likely than a "by reason of" test to encompass a wide range of sexual offending, applying in a more specific set of circumstances where "prejudice" towards the victim group can be demonstrated. However, as we noted in Chapter 12, a concern that some groups have expressed to us is that by requiring proof of some additional "prejudice" in sexual assault and rape of women by men, the law might be implicitly rejecting the idea that *all* such conduct should be understood as sex or gender-based violence.

15.95 Ultimately, we do not consider that this change would very significantly expand the number of crimes that meet the legal threshold. Prosecutors would still need to prove the defendant's prejudicial motivation to the criminal standard – a significantly more difficult task than for cases that involve clear outward manifestations of hostility. However, it may be better adapted to some of the circumstances that are of particular concern to disabled victims of crime at present.

Option 4: Limit any broader test to disability hate crime

15.96 A final option would be to limit the application of a broader test to the specific context of disability hate crime. We would propose this be either by way of the "by reason of" test, or "motivated by hostility *or prejudice*" approach we outlined as options 2 or 3 above.

15.97 This would respond to the group that have expressed the most serious concerns with the current test. It would also recognise what a number of different groups and individuals have told us: that disability hate crime is different – it takes a different form to that experienced by the other main protected characteristic groups. Further, the model for existing hate crime laws has been developed primarily with racial hatred in mind, and while this has been extended to characteristics such as religion and sexual orientation with some success, it does not adequately recognise and address crimes against disabled people.

15.98 Such a bespoke approach would enable the law to address a particular concern of disability groups, without necessarily reshaping the nature of hate crime law more generally. It could therefore be considered a more proportionate and tailored response to this concern. A broader approach (the test in option 1 or 2) is also likely to raise fewer concerns and unintended consequences where limited to this characteristic.

15.99 We have some reservations about a disability-only approach, however. First, it would retain formal disparity in the way different characteristics are treated. This goes against one of the core concerns of participants in our initial meetings – that the law should strive for equality of treatment amongst protected groups. Against this, it might be argued that what is being sought is substantive equality – with the differential treatment for disability amounting to recognition of the demonstrably distinct nature of the way in which disabled people experience hate crime.

15.100 Secondly, while better recognition of disability hate crime is probably the most pressing rationale for broadening the legal test, it is not necessarily the only context where reform may enable hate crime to be better recognised. For example, if the characteristic of "age" were to be added to hate crime laws – a proposition we discuss in more detail in Chapter 13, it may be unduly limiting not to apply the revised test across a wider group of characteristics.

Provisional evaluation

15.101 Of the four approaches outlined above, we currently prefer option 3 – a revised test considering whether the crime was "motivated by hostility *or prejudice* towards" the victim's characteristic group. We consider that option 2 is over-inclusive and would risk capturing some offenders whose conduct does not justify the label of "hate crime". By contrast, our concern with option 1 is that it may prove too subtle a shift to have a significant effect in practice. While option 4 is pragmatically appealing, it reinforces distinctions in the way law treats different characteristic groups in an undesirable way.

Consultation Question 23.

15.102 We invite consultees' views as to whether the current motivation test should be amended so that it asks whether the crime was motivated by "hostility or prejudice" towards the protected characteristic.

Chapter 16: Aggravated offences

INTRODUCTION

16.1 In Chapter 4 we outlined the current legal framework for hate crime and hate speech laws in England and Wales: aggravated offences; enhanced sentencing; offences of stirring up hatred; and the offence of racialist chanting at a football match.

16.2 In the previous chapter we considered the appropriate legal test for recognition of an offence as a hate crime. We considered options for retaining the current "hostility" approach, and whether the law should allow for motivations based on "prejudice" towards a protected characteristic (in addition to hostility) to be recognised as hate crime. We also argued that whatever the approach, it should be consistent, regardless of the legal mechanism involved.

16.3 In this chapter we focus on reform options for "aggravated offences", which are currently found in sections 29 to 32 of the Crime and Disorder Act 1998 ("CDA 1998"). Only offences involving hostility on grounds of race or religion have aggravated forms. The principal effect is to increase the maximum penalty available to the judge when sentencing.

16.4 We present two main options for reform in this chapter. The first option – currently our preferred option – is to retain the model of specified aggravated offences with increased maximum penalties, and expand their operation across all protected characteristic groups.[1] We also consider whether further offences should be added to the eleven that are currently specified, and some other more technical issues that arise.

16.5 The second option – a model heavily based on a 2017 Sussex University law reform report[2] (which is also similar to the approach in Scottish hate crime laws), would be to remove the specific aggravated offences and adopt a singular approach to hate crime offending that draws in elements of both the aggravated offences (proof of the hostility element as part of the finding of guilt) and enhanced sentencing models (application to all criminal offences). This option has the significant advantage of simplicity and clarity of approach. However, it would involve removing the increased maximum penalties that currently apply for racially and religiously aggravated offences; an approach that some may consider sends the wrong message about this kind of offending.

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1 This approach of parity across characteristics groups is consistent with the recommendation we made in our 2014 report (though at the time we presented this an alternative option, in the absence of a wider review of hate crime laws – which we are now undertaking). Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 5.105.

2 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017), available at http://sro.sussex.ac.uk/id/eprint/70598/3/FINAL%20REPORT%20-%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf.

CURRENT LAW

16.6 We have set out the current law in greater detail in Chapter 4. Below we recap the key elements of aggravated offences under the CDA 1998.

16.7 Section 28(1) of the CDA 1998 provides that a specified offence is racially or religiously aggravated if:

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group;

or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

16.8 Aggravated offences under the CDA 1998 are separate offences, which have higher maximum penalties than the base offences to which they relate. The relevant offences and their maximum penalties are set out in the table below.

Section No	**Offence**	**Maximum Penalty Non-aggravated**	**Maximum Penalty Aggravated**
OAPA, s 20	Malicious wounding / grievous bodily harm	5 years	7 years
OAPA, s 47	Actual bodily harm	5 years	7 years
CJA 1988, s 39	Common assault	6 months	2 years
CDG, s 1	Criminal damage	10 years	14 years
POA, s 4	Fear or provocation of violence	6 months	2 years
POA, s 4A	Intentional harassment, alarm or distress	6 months	2 years
POA, s 5	Harassment, alarm or distress	£1,000 fine	£2,500 fine
PHA, s 2	Harassment	6 months	2 years
PHA, s 2A	Stalking	6 months	2 years
PHA, s 4	Putting people in fear of violence	10 years	14 years

PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	10 years	14 years

Key:

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

16.9 The prosecution must prove not only that the underlying or "base" offence was committed, but also that in committing it the defendant demonstrated, or the offence was motivated by, racial or religious hostility.

Alternative verdicts and alternative charges

16.10 If the racially or religiously aggravated element of the offence is not proven, it is open to the Crown Court to return an alternative verdict of guilty of the non-aggravated version of the offence.[3] However there is no such power in the magistrates' courts, with the result that even if a district judge or the bench of lay magistrates are satisfied to the criminal standard that the defendant committed the non-aggravated form of the offence, the defendant must be acquitted unless aggravation has also been proved. For this reason, the CPS recommends that, for racial and religious hate crime, prosecutors consider charging both the non-aggravated and the aggravated versions of the offence.[4]

16.11 It has been suggested that the approach of charging both offences may lead to "plea bargains" whereby the aggravated charge is dropped in exchange for a guilty plea to the non-aggravated form of the offence, with the result that the hostility element goes unrecognised.[5] CPS policy is not to accept pleas to lesser offences for reasons of expediency, and only to do so where the seriousness of the offending, and any aggravating features, can adequately be reflected in the sentence for the lesser offence.[6]

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3 On account of the Criminal Law Act 1967, s 6(3), the Criminal Justice Act 1988, s 40, and CDA, ss 31(6) and 32(5).

4 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (last updated 21 October 2019), available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

5 This concern was raised at the time the offences were introduced, and some evidence for it was found, see E Burney and G Rose, *Racially Aggravated Offences – how is the law working?* (Home Office Research Study 244, 2002).

6 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (last updated 21 October 2019).

16.12 A defendant who, on the same set of facts, is charged with an aggravated offence and, alternatively, the non-aggravated form of the offence, cannot be convicted of both offences.[7]

STATISTICAL CONTEXT

Prosecution and conviction figures

16.13 Ministry of Justice sentencing statistics[8] show that in 2018 there were 6826 prosecutions of racially or religiously aggravated offences under the CDA 1998 and 5264 convictions secured in that same year. The trend over the past 3 years has been a fall in prosecutions and convictions: there were 7088 such prosecutions and 6084 convictions in 2017; and 8005 prosecutions and 5969 convictions in 2017. As we noted in Chapter 5, this corresponds broadly with a similar drop in police referrals over this period.[9]

16.14 CPS data shows that in 2018-19 there were 12,828 prosecutions and 10,817 convictions for *all* hate crime flagged cases (both aggravated offences and enhanced sentencing).[10] Although the differing time periods only permit a rough comparison, it appears that approximately half of all hate crime prosecutions are for aggravated offences under the CDA 1998.

16.15 A breakdown by each offence prosecuted and convictions secured in 2018 is as follows:

Section	Offence	Racially or religiously aggravated prosecutions	Racially or religiously aggravated convictions	Convictions for base offence	Proportion of convictions for the offence that were racially or religiously aggravated
OAPA, s 20	Malicious wounding / grievous bodily harm	20	11	2878	0.4%
OAPA, s 47	Actual bodily harm	117	50	6232	0.8%

7 *R (Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin), (2013) 177 Justice of the Peace 265.

8 See Ministry of Justice, *Criminal Justice System Statistics publication: Outcomes by Offence 2008 to 2018: Pivot Table Analytical Tool for England and Wales* (2019), available at https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018.

9 See Chapter 5 at paras 5.29 to 5.33.

10 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 29, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

CJA 1988, s 39	Common assault	1178	852	39573	2.1%
CDG, s 1	Criminal damage	208	104	717	12.7%
POA, s 4	Fear or provocation of violence	632	464	5056	8.4%
POA, s 4A	Intentional harassment, alarm or distress	3187	2580	3404	43.1%
POA, s 5	Harassment, alarm or distress	1296	1070	4210	20.2%
PHA, s 2	Harassment	1	1	4096	Less than 0.1%
PHA, s 2A	Stalking	135	100	582	14.7%
PHA, s 4	Putting people in fear of violence	0	0	576	0%
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	52	30	305	9.0%

Key:

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

16.16 This table shows that public order offences are by far the most commonly prosecuted racially or religiously aggravated offences, followed by assaults. It is also noteworthy that for public order offences contrary to sections 4A and 5 of the POA, the aggravated versions form a significant proportion: 43.1% and 20.2% respectively.

16.17 The statistics are not further broken down to separate racial from religious aggravation, though other prosecution statistics provided in the CPS Hate Crime Report suggest that

each year recordings of racial hate crime across all offences are very significantly higher than religious hate crime. For example, in 2018-19 there were 605 completed prosecutions involving religious hostility (this figure includes enhanced sentencing under the CJA 2003 as well as aggravated offences under the CDA 1998), whilst for racial hostility the figure was 9,931.[11]

16.18 As we note in Chapter 5, there are important limitations to the accuracy of the available data. One of these is the tendency for some religious hate crime to be recorded as racist hate crime,[12] which might cause the figures for recording of religious hate crime to be lower than they should be.

Sentencing outcomes

16.19 An indication of the relative sentencing outcomes for aggravated and non-aggravated offences can be observed from the table below (drawn from Ministry of Justice data[13]) which compares the 2018 average custodial sentence (or in the case of the section 5 POA 1986 offence, average fine) for the 11 aggravated offences, and their non-aggravated equivalents. For offences other than section 5 POA 1986, this data is limited to circumstances where a custodial sentence was imposed (and not, for example, another outcome such as a fine or community order).

16.20 The sentencing data shows relatively higher average sentencing outcomes for almost all the aggravated offences for which data is available. Notable exceptions are the offences of criminal damage and stalking involving fear of violence or serious alarm or distress, though in both cases the conviction numbers for the aggravated version of the offence are quite low.

Section	Offence	Non-aggravated version	Aggravated version
OAPA, s 20	Malicious wounding / grievous bodily harm	Max: 5 years 2018 average custodial sentence: **23.4 months**	Max: 7 years 2018 average custodial sentence: **30.3 months**
OAPA, s 47	Actual bodily harm	Max: 5 years 2018 average custodial sentence: **13.6 months**	Max: 7 years 2018 average custodial sentence: **14.1 months**

11 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF

12 A point emphasised by anti-islamophobia charity Tell MAMA.

13 See Ministry of Justice, *Criminal Justice System Statistics publication: Outcomes by Offence 2008 to 2018: Pivot Table Analytical Tool for England and Wales* (2019), available at https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018.

CJA 1988, s 39	Common assault	Max: 6 months 2018 average custodial sentence: **2.8 months**	Max: 2 years 2018 average custodial sentence: **3.7 months**
CDG, s 1	Criminal damage	Max: 10 years 2018 average custodial sentence: **6.0 months**	Max: 14 years 2018 average custodial sentence: **3.1 months**
POA, s 4	Fear or provocation of violence	Max: 6 months 2018 average custodial sentence: **2.4 months**	Max: 2 years 2018 average custodial sentence: **3.8 months**
POA, s 4A	Intentional harassment, alarm or distress	Max: 6 months 2018 average custodial sentence: **2.0 months**	Max: 2 years 2018 average custodial sentence: **2.9 months**
POA, s 5	Harassment, alarm or distress	Max: £1,000 fine 2018 average fine: **£111**	Max: £2,500 fine 2018 average fine: **£181**
PHA, s 2	Harassment	Max: 6 months 2018 average custodial sentence: **2.7 months**	Max: 2 years: 2018 average custodial sentence: **N/A**
PHA, s 2A	Stalking	Max: 6 months 2018 average custodial sentence: **3 months**	Max: 2 years 2018 average custodial sentence: **3.4 months**
PHA, s 4	Putting people in fear of violence	Max: 10 years 2018 average custodial sentence: **11.1 months**	Max: 14 years 2018 average custodial sentence: **N/A**
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	Max: 10 years	Max: 14 years

		2018 average custodial sentence: **16.1 months**	2018 average custodial sentence: **5.3 months**
Key: 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			

16.21 In 2018 there were too few racially or religiously aggravated convictions for the offences in sections 2 or 4 of the Protection from Harassment Act 1997 (1 and none respectively) to draw any sentencing comparison.

EVALUATING THE CURRENT LAW CONCERNING AGGRAVATED OFFENCES

16.22 The introduction of racially aggravated offences under the CDA 1998 was a manifesto pledge of the incoming Labour government and was preceded by a Home Office consultation.[14] It came into effect alongside the enhanced sentencing regime (which initially also applied in respect of race only). We discuss the enhanced sentencing model in more detail in Chapter 17.

16.23 As a model for addressing hate crime, there are both positive and negative aspects to aggravated offences with higher maximum penalties. Many of the groups we spoke to who are not protected by aggravated offences – particularly LGBT and disabled people – saw aggravated offences as a superior model of punishing and deterring hate crime. They cited several reasons for this:

- The higher maximum penalties attached to aggravated offences, which were seen to have a greater symbolic and deterrent effect.
- The "fair labelling" of the offence[15] as a racially or religiously aggravated hate crime at charge, conviction, and on the offender's criminal record.
- The elevation of certain offences from summary only to either-way offences, which results in them being regularly pursued in the Crown Court rather the magistrates' court. Galop, for example, argued that this provided a more appropriate forum for dealing with the gravity and more serious victim impact of hate offences. They argued further that in practice, facilities for victims – including the ability to keep victims apart from defendants – were generally superior in the Crown Courts.

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14 Home Office, *Racial Violence and Harassment: A Consultation Document* (Sep 1997), https://webarchive.nationalarchives.gov.uk/+/https://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/rvah.htm.

15 See A Ashworth, "The Elasticity of Mens Rea" in C Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) pp 45 to 53.

- The requirement that the prosecution prove the "hostility" element as part of the offence, which incentivises law enforcement agencies to gather the evidence and build the case for hostility from the outset. In contrast, in the enhanced sentencing model, it is perceived that the relevant evidence is often collected, presented and considered as somewhat of an afterthought. This can mean the evidence is insufficient and / or that the centrality of the "hostility" to the harm caused is not adequately reflected in the presentation of the case before the court.

16.24 However, other stakeholders argued that there were problematic aspects to aggravated offences. For example, criminal law practitioners noted the following:

- The increased maximum penalties for some offences are very considerably higher than for the base offences. For example, the maximum penalties for harassment, stalking and common assault increase from six months to two years' imprisonment. This is arguably disproportionate, and in practice judges are very reluctant to sentence anywhere near the increased maximum (or indeed, exceed the maximum available for the base offence, though as we note below, this does occur).

- The concern that aggravated offences cause some lower level offences to be elevated to a Crown Court trial before a jury (which entails increased time and cost), when they could be adequately and appropriately dealt with by a magistrates' court.

- Related to this, a concern that the Crown Court trial process takes longer, and could in some cases prove more arduous for the victim than the comparatively faster, more streamlined summary process in magistrates' courts. This was not a universally held view, but was expressed particularly in relation to lower level offending – where the victim may want the complaint dealt with, but may also not wish to have the matter drag on for many months or even years.

- There was some anecdotal suggestion that juries may be reluctant to find that a person was a "racist" merely because certain language was used at the time of the offending. This may be the case even though the evidence shows that the words or conduct fairly clearly satisfied the "demonstration" of hostility element.[16]

- Similarly, there was anecdotal suggestion that a degree of plea bargaining sometimes occurs, whereby pressure is put on the prosecution to drop the racially or religiously aggravated charges in exchange for a guilty plea for the base offence.

16.25 In our 2014 Hate Crime Review Final Report, we expressed the view that:

> most if not all of the benefits that have been argued for the aggravated offences could flow from a reformed and properly applied enhanced sentencing system. That regime reflects the will of Parliament to single out hostility as an aggravating factor and to sentence hostility-based offending more severely. Published sentencing remarks are capable of conveying, through the court, the state's and society's condemnation of hate crime and of recognising the severe harm it causes to victims and wider communities. In practice, the higher maximum sentences that aggravated offences

[16] Similar arguments also made in M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017), pp 122 to 123.

make available appear not to be needed except in a very small number of racially or religiously aggravated common assault cases.[17]

16.26 We further expressed concern that:

> complexities in the offences and difficulties in their use may be causing aggravated offence prosecutions to fail. These complexities may also be having adverse effects on the operation of enhanced sentencing given that the two systems share the same hostility test.[18]

16.27 In a subsequent evaluation of the law in practice, a Sussex University law reform research project noted that proving hostility to the jury was considered by some practitioners to be "God's Gift to Defence",[19] as trials could descend into long arguments about whether the defendant was racist or not.

16.28 The report of this project recommended a range of reforms to aggravated offences – notably reform of the legal test of motivation by hostility to a "by reason of" approach (which we discussed in Chapter 15). It also recommended that the reformed legal test should be proved as an element of the offence (as is currently the case for aggravated offences), rather than at the sentencing stage (the current enhanced sentencing model), and apply to all criminal offences. This singular approach would replace the separate need for enhanced sentencing under the CJA 2003, but would also remove the increased maximum penalties currently specified under the CDA 1998. We consider these recommendations later in this chapter as an alternative option for reform from paragraphs 16.157 to 16.179.

16.29 Within the United Kingdom, the use of separate, aggravated offences with higher maximum penalties is unique to England and Wales. Equivalent laws in Scotland and Northern Ireland do not increase the available maximum for the "base" offence. However, in Scotland the relevant aggravation laws are arguably somewhat more symbolically impactful than the "enhanced sentencing" regime we discuss in the next chapter, because they enable prosecutors to add the aggravation to the indictment, and if the offence is proved it is labelled on conviction as an "aggravated offence". Northern Ireland is also distinct in that when the relevant hate crime provisions were introduced there in 2004, the maximum penalties for certain base offences were also increased in line with the equivalent England and Wales maximums for the racially or religiously aggravated versions of these offences under the CDA 1998.[20] As the ongoing review of hate crime legislation in Northern Ireland recently noted, these penalty increases were made:

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17 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 125.

18 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 126.

19 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 125.

20 See The Criminal Justice (No. 2) (Northern Ireland) Order 2004, s 4

without the rationale for doing so i.e. the principle that higher sentences can be imposed in instances where there is evidence of targeted hostility …[21]

16.30 Outside the United Kingdom, a comparable approach to aggravated offences can be found in Western Australia, which includes provisions that increase the maximum penalty for threats and criminal damage offences in "circumstances of racial aggravation".[22]

Provisional conclusion on aggravated offences

16.31 Though in our 2014 review we concluded that a strengthened enhanced sentencing system could be a preferable approach to hate crime laws overall, our pre-consultation discussions have led us to the view that many groups would be concerned about revocation of the current aggravated offences regime. Consultees saw this mechanism as a core component of hate crime laws. Indeed, stakeholder groups not already protected by aggravated offences – specifically LGBT and disability stakeholders – wanted these mechanisms to cover *their* characteristic, rather than see these additional protections removed altogether.

16.32 Aggravated offences are among the most powerful forms of condemnation of characteristic-based criminal hostility in England and Wales, and have now been in place for more than two decades. We are reluctant to undo this mechanism, which has become well-established, and accounts for nearly half of all hate crime prosecutions.[23] Our concern is that to remove these offences, and rely only on sentencing enhancement within existing maximum penalties, would be to reduce the force of laws currently available in respect of two key characteristic groups: race and religion. We consider such a roll back of existing protections to be problematic, particularly as one of the key purposes of hate crime laws is to signal the unacceptability of this conduct.

16.33 While it is uncommon for aggravated offence sentences to exceed the maximum sentence for the base offence,[24] it does happen. For example, 2018 Ministry of Justice statistics show that:

- 19 racially or religiously aggravated common assault convictions resulted in sentences of more than the base maximum of 6 months (854 convictions were recorded in that year);

- 29 racially or religiously aggravated intentional harassment, alarm or distress convictions (contrary to section 4A PHA) resulted in sentences of more than the base maximum of 6 months (2580 convictions were recorded in that year); and

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21 Hate Crime Legislation in Northern Ireland Independent Review, *Consultation Paper* (January 2020) p 67, available at https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20Paper%20Feb%202020.pdf.

22 Criminal Code Compilation Act 1913 (WA), ss 80I, 338B, 444.

23 Though we acknowledge that this is largely because racially motivated hate crime is by far the largest category, and the specified offences are the most commonly prosecuted.

24 A point we also noted in our 2014 report, see Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 125.

- 1 conviction for racially or religiously aggravated malicious wounding or causing grievous bodily harm (contrary to section 20 OAPA) resulted in a sentence in excess of the 5-year maximum available for the base offence (11 convictions were recorded in that year).

16.34 Our provisional view is that the symbolic and deterrent[25] effect of these increased maximum penalties remains an important component of hate crime laws. We are concerned that removal could send the wrong message to victims and the broader community. But we also acknowledge that there are costs to retention of these offences – specifically, the retention of the complexity of a dual system of hate crime laws, comprising both aggravated offences and enhanced sentencing. It is for this reason that later in this chapter we present an alternative, singular option.

Consultation Question 24.

16.35 We provisionally propose that the model of aggravated offences with higher maximum penalties be retained as part of future hate crime laws.

16.36 Do consultees agree?

16.37 If aggravated offences with increased maximum penalties are to be retained, we consider that the protection offered by aggravated offences should extend equally across all the protected hate crime characteristics: the existing five characteristics of race, religion, sexual orientation, disability and transgender identity, and any further characteristics that are added to hate crime laws (see Chapters 10 to 14 for further discussion of these). This would provide more equitable protection than is currently afforded. It is also broadly consistent with the views expressed in our previous hate crime review, where a significant majority of consultees supported the extension of aggravated offences to all five current hate crime characteristics.[26]

16.38 England and Wales is somewhat anomalous amongst comparable jurisdictions in having different levels of protection for different characteristics. Support for parity of treatment across the existing five characteristics was almost universal in our initial stakeholder consultations. Given the strength of support for such an approach, both in our 2014 review, and in pre-consultation meetings we have conducted since, we are firmly of the view that the law should strive for greater parity of protection, beginning with a consistent approach to the characteristics protected by aggravated offences.

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25 Though we note in Chapter 3 that the deterrent value of hate crime laws has been questioned.

26 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 81.

Consultation Question 25.

16.39 We provisionally propose that the characteristics protected by aggravated offences should be extended to include: sexual orientation; transgender, non-binary and intersex identity; disability, and any other characteristics that are added to hate crime laws (in addition to the current characteristics of race and religion).

16.40 Do consultees agree?

SELECTION OF AGGRAVATED OFFENCES

How were the current offences chosen?

16.41 The current range of offences that have aggravated forms are outlined in the table at paragraph 16.20. These offences were originally selected in respect of racial aggravation only.[27]

16.42 The Home Office consultation that preceded the legislation indicated that the offences chosen were "the existing main offences which deal with violence against the person (except those which carry a maximum sentence of life imprisonment) and offences of harassment."[28]

16.43 During the passage of the legislation, Lord Williams, for the Government, gave a slightly different explanation: that the offences chosen were the most frequent forms of racist crime.[29]

16.44 When first introduced into Parliament, the Crime and Disorder Bill (which became the CDA 1998) did not include the offence of criminal damage. A racially aggravated form of this offence was added to the Bill at its third reading in March 1998 as it was recognised that criminal damage (for example, racist graffiti) can be designed to terrorise or harass or dismay members of racial groups.[30]

16.45 The racially or religiously aggravated forms of the specified public order offences make up a significant proportion of convictions for those offences, as do the offences of stalking and criminal damage.[31] For the remaining specified offences the proportion of racially or religiously aggravated convictions is much smaller. Nonetheless, for the

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27 The offences of stalking were created and added subsequently in 2012 – see Protection of Freedoms Act 2012, s 111 and Sch 9, Pt 11, para 144.

28 Home Office, *Racial Violence and Harassment: A Consultation Document* (Sep 1997) para 3.1, available at https://webarchive.nationalarchives.gov.uk/+/https://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/rvah.htm.

29 *Hansard* (HL), 12 Feb 1998, vol 585, cols 1280 to 1284.

30 *Hansard* (HL), 31 Mar 1998, vol 588, col 201. See also Taylor, R.D, "The Role of Aggravated Offences in Combating Hate Crime – 15 years after the CDA 1998 – Time for a change?" (2014) *Contemporary Issues in Law* 76.

31 See prosecution data at table at paragraph 16.15.

reasons we have set out at paragraphs 16.31 to 16.34, we do not provisionally propose removing offences from the current list of aggravated offences.

Should aggravated forms of any other offences be created?

16.46 The 2014 Law Commission Hate Crime Report, which recommended the extension of the aggravated offences regime to include transgender identity, disability and sexual orientation, also considered the rationale underlying the selection of offences for inclusion within sections 28 to 32 of the CDA 1998.[32] The Report acknowledged consultees' doubts that the list of offences currently capable of being aggravated would be appropriate for these characteristics.[33] The particular concerns raised in the Consultation Paper were that the offences that were most commonly targeted at these groups were not necessarily those that were already covered by the CDA 1998.[34]

16.47 Looking at the table at paragraph 16.85, which shows the proportion of categories of offence by characteristic, prevalence-based arguments appear to be particularly strong in respect of public order offences and offences against the person – some of which are already capable of being aggravated. However, in respect of disability hate crime at least, there are also strong indications of prevalence in relation to property and sexual offences.

16.48 Though the retention of the current approach of aggravated offences was not their preferred model of reform (see further paragraph 16.157 and following), the 2017 Sussex University law reform project did consider which additional offences should be considered for inclusion if this model were to be retained. Based on statistical data concerning the prevalence of hate offending in these contexts, and interviews with legal professionals, they recommended the following list for inclusion:[35]

- Affray
- Violent disorder
- All sexual offences
- Theft and handling stolen goods
- Robbery
- Burglary
- Fraud and forgery
- Grievous bodily harm with intent (s 18 OAPA 1861)

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32 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 1.7.

33 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 5.32.

34 Law Commission (2012) CP213, Hate Crime: The Case for Extending the Existing Offences, paras 3.8 to 3.17.

35 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 198.

- Homicide

16.49 In considering whether any further offences are appropriate for aggravated forms, we acknowledge that we are guided somewhat more by pragmatic, rather than principled concerns. Through the provisions in sections 145 and 146 of the Criminal Justice Act 2003, the law already recognises that almost any offence is more serious if it involves hostility towards a protected characteristic group. But there are certain offence types that are particularly associated with hate crime, and where the justification for creating a separate form of the offence with a higher maximum penalty might be considered strongest.

16.50 One possible rationale that we have considered for adding offences to the specified list is the degree of additional harm that individual instances of a particular offence cause to the victim and the community when committed in the context of hate crime. However, we are not convinced that there is a reliable, empirical basis on which we can make such an assessment. Instead, another option would be to consider the extent of harm caused by the offence to the community as a whole, measured principally by reference to the information we have as to the prevalence of hate crime offending for that offence.

16.51 Another factor that we consider important in selection is the consistency and coherence of the criminal law. For example, practical issues are created by the fact that there is currently no racially or religiously aggravated version of the offence of wounding with intent to do grievous bodily harm contrary to section 18 of the OAPA, yet there is an aggravated version of the lesser offence of malicious wounding contrary to section 20 of the OAPA. Though this was a deliberate policy decision when the offences were created – as the section 18 offence already has a maximum penalty of life imprisonment – in practice it can create unhelpful distortions in the way cases are charged and presented at court. We consider this further below at paragraph 16.68.

16.52 Finally, though we note below that arguments have been made that life maximum sentences should not necessarily be a barrier to the creation of an aggravated version of an offence, it remains relevant to consider whether the creation of a separate, aggravated offence is proportionate where the sentencer already has adequate scope to reach an appropriate (though enhanced) sentence within the existing maximum available. For example, in the context of sexual offences, which are already notoriously challenging to prosecute, the creation of additional elements for consideration by the jury may, on balance, be unduly burdensome[36] given that the high maximum penalties available for these offences should provide adequate scope for the sentence to reflect the harm and wrongdoing. While it is true that in such cases the "base" offence would almost certainly be pursued as an alternative, and the overall prosecution would therefore not fail merely because the aggravation could not be proven, it would undoubtedly lengthen trials and thereby make them even more challenging for victims.

16.53 We therefore suggest that the main criteria for creating aggravated versions of further offences should be:

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[36] We consider these challenges in more detail in Chapter 12 at paragraphs 12.119 to 12.127, where we outline the problems that might be created by recognising gender in hate crime laws in the specific context of sexual offences.

- The overall numbers and relative prevalence of hate crime offending as a proportion of an offence;
- Whether it is necessary to create an aggravated offence to ensure consistency across the criminal law;
- The adequacy of the maximum penalty for the base offence;
- Whether the offence is of a type where the imposition of additional elements of the offence requiring proof before a jury may prove particularly burdensome.

16.54 In the following sections, we apply this approach to various groups of offences for which aggravated versions have been proposed.

Consultation Question 26.

16.55 We provisionally propose that the decision as to whether an aggravated version of an offence should be created be guided by:

- The overall numbers and relative prevalence of hate crime offending as a proportion of an offence;
- The need to ensure consistency across the criminal law;
- The adequacy of the existing maximum penalty for the base offence; and
- Whether the offence is of a type where the imposition of additional elements of the offence requiring proof before a jury may prove particularly burdensome.

16.56 Do consultees agree?

Communications offences

16.57 As we noted in our 2018 Scoping Report in relation to Abusive and Offensive Online Communications, the proliferation of damaging forms of hatred online is a serious problem.[37] While some of the worst forms of such hatred may fall within one of the offences of stirring up hatred (see further Chapter 18), abusive or offensive communications falling short of stirring up hatred are commonly prosecuted as one of the "communications offences":

- Improper use of public electronic communications network contrary to sections 127(1) or (2) of the Communications Act (CA) 2003 (6 months' maximum); and
- Sending a letter, electronic communication or article with intent to cause distress or anxiety contrary to section 1 of the Malicious Communications Act (MCA) 1988 (2 years' maximum).

[37] Abusive and Offensive Online Communications: Scoping Report (2018) Law Com No 381, Chapter 9.

16.58 Our provisional view is that these offences – which are very often pursued in an online context – are amongst the most logical additions to the regime of aggravated offences. Indeed, they satisfy all the indicators we identified for inclusion:

(1) In relation to the criterion of prevalence, they are commonly charged in the context of hate crime: in the financial year from 2017-18, 214 offences under section 127 of the CA 2003 and 221 offences under section 1 of the MCA 1988 were flagged by prosecutors as hate crimes. This represented approximately 7% of all communications offences prosecutions.[38]

(2) Considering the need to ensure greater consistency across criminal law, inclusion would create alignment with the "offline" equivalents of these offences – sections 5 and 4A of the POA 1986, which currently have aggravated versions.

(3) In assessing the adequacy of the existing penalty, the maximum penalty for the offences under section 127 of the CA 2003 is 6 months' imprisonment. This may be considered insufficient in the context of the most serious online hate crime.

(4) We have also considered how burdensome it would be for the prosecution to prove additional matters over and above the base offence. The nature of the conduct covered by these offences means that the "hostility" towards the characteristic is likely to be apparent in the communication itself, therefore evidence of hostility is easier to obtain. We conclude that proving hostility before a jury is not likely to create significant additional complexity.

16.59 This would also capture certain forms of offline communication. For example, it would create an aggravated offence for circumstances such as the conduct of David Parnham, who (along with various other forms of criminal activity) sent a number of Muslims the "Punish A Muslim Day" series of letters last year. These letters encouraged people to commit acts of violence against Muslims and contained a "score sheet" in which a variety of acts were proposed ranging from verbal abuse to attacking the holy site in Mecca. Parnham was convicted of seven counts of sending letters with intent to cause distress or anxiety, contrary to section 1 of the Malicious Communications Act 1988.[39]

16.60 At the time of preparing this consultation paper, the Law Commission is also conducting a separate review of the communications offences, which may result in their reform.[40] It is likely that similar considerations would bear on the decision to specify aggravated versions of any reformed communications offences.

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38 Crown Prosecution Service, *Hate Crime Report 2017-18* (October 2018) p 18, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf.

39 Crown Prosecution Service, *Anti-Muslim extremist who praised US killer sentenced* (3 September 2019), available at https://www.cps.gov.uk/cps/news/anti-muslim-extremist-who-praised-us-killer-sentenced.

40 See further https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/.

Consultation Question 27.

16.61 We provisionally propose that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws.

16.62 Do consultees agree?

Offences related to the taking, making and sharing intimate images without consent

16.63 The Law Commission is also currently undertaking a separate review into the criminal law concerning "taking, making and sharing intimate images without consent". This incorporates a review of the following existing offences:

- disclosing private sexual photographs and films with intent to cause distress contrary to section 33 of the Criminal Justice and Courts Act 2015[41]
- voyeurism offences under section 67 and 67A of the Sexual Offences Act 2003;
- exposure under section 66 of the Sexual Offences Act 2003; and
- the common law offence of outraging public decency.

16.64 In the course of this review, we have heard from stakeholders that this offending is frequently targeted at people with protected characteristics – for example the forced "outing" of LGBT people with the use of intimate images.

16.65 We will be considering these issues in greater detail in this separate review, and propose to consider the appropriateness of creating aggravated versions of these offences in that context.

Offences with a maximum penalty of life imprisonment

16.66 No offences for which life imprisonment is the maximum available sentence were included within the list of aggravated offences, as it would not be possible to impose a sentence higher than the maximum for the base offence. The reason was explained by the Home Office Minister during the passage of the Bill:

> Where the base offence already carries a maximum sentence of life imprisonment as under section 18 of the Offences Against the Person Act 1861, the racially aggravated offence is not in practical terms required as the sentence cannot be increased. In other words, there is nothing to be gained, if there is no increased sentence, in placing the additional burden on the Crown Prosecution Service to meet the racially aggravated

[41] Sometimes referred to colloquially as the "revenge pornography" offence, though many victims consider this term to be offensive and inappropriate.

test. For that reason [also], we have not included murder and manslaughter in the list of offences.[42]

16.67 As Taylor points out, however:[43]

> This approach is not entirely unproblematic as it suggests that the only reason for enacting the specific offences is to increase the available sentence, ignoring arguably at least equally powerful considerations of denunciation which would justify the creation of specific offences.

16.68 The coexistence of comparable offences with and without aggravated versions can also create difficulty in practice. For example, where there is a section 18 OAPA 1861 offence (wounding with intent to do grievous bodily harm) that appears to be racially aggravated, there is no racially aggravated version of that offence (because the base offence carries a maximum life sentence). The CPS could, however, charge an aggravated section 20 OAPA 1861 offence (malicious wounding) in addition to and as an alternative to the section 18 offence. Careful directing of the jury would be needed. They would not be asked to consider the racial aggravation in respect of the section 18 offence. However, if they did not convict of the section 18 offence and then moved on to considering the section 20 offence, they would have to decide whether the offence was motivated by or the defendant demonstrated hostility on the basis of race, which is an integral element of the aggravated section 20 offence. Barristers who responded to our 2013 Consultation Paper confirmed that this causes difficulties in such cases – particularly where no clear direction is given to the jury in relation to the consequences of a finding of guilt in relation to one or other of the offences.[44]

16.69 The question thus remains whether a range of violent offences (excluding sexual offences, which we consider separately below), which currently have life maximum penalties, should nonetheless have aggravated versions. This would arguably create a more coherent set of provisions, and allow for fairer labelling of the conduct. These could include:

- Grievous bodily harm with intent (section 18 OAPA 1861)
- Throwing a corrosive substance on a person (section 29 OAPA 1861)
- Arson with intent or reckless as to whether life is endangered (sections 1(2) and 1(3) Criminal Damage Act 1971)
- False imprisonment (common law)
- Kidnap (common law)
- Murder and manslaughter (common law)

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42 Alun Michael, Home Office Minister of State, *Hansard*, (HC) 12 May 1998, Standing Committee B 12 May, 1998, col. 3

43 Taylor, R.D, "The Role of Aggravated Offences in Combating Hate Crime – 15 years after the CDA 1998 – Time for a change?" 13(1) *Contemporary Issues in Law* 76, 80.

44 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, pp 133 to 134, para 5.29

16.70 Murder has a *fixed* (rather than a maximum) sentence of life imprisonment. This means that the judge *must* impose a sentence of life imprisonment and decide the minimum term that an offender must serve before being considered for release. Judges follow guidance to determine this minimum term, which is also known as "the tariff".

16.71 Depending on the facts of the offence, the starting point for the tariff for an adult ranges from 15 to 30 years. In some exceptionally serious cases, a whole life tariff may be imposed.

16.72 In the cases of murder involving aggravation in relation to one of the five currently protected characteristics, paragraph 5(2)(g) of Schedule 21 to the Criminal Justice Act 2003 provides that the starting point for the tariff is 30 years, rather than 15 years. Therefore, murder would be arguably one of the more problematic inclusions within the aggravated offences regime, as the "aggravation" would achieve even less in practical terms than for other offences with a life sentence maximum. There may still be value in adequately labelling the offence as "aggravated". In this regard, we note that the racially motivated murder of Stephen Lawrence in 1993 was one of the key drivers for the subsequent introduction of racially aggravated hate crimes in England and Wales. However, in our 2006 report on murder we rejected the approach of an aggravated form of murder more generally, including in the context of racial motivation, stating:

> We regard the aggravating features as best reflected through an uncompromising approach to the length of the minimum custodial sentence imposed for murder.[45]

16.73 Having weighed up the different arguments, we move on to evaluate them against our four criteria for inclusion.

(1) Management data provided by the CPS suggests that a higher number of hate crime flags (a method of counting for statistical purposes) are applied in respect of section 18 OAPA cases (1035 between 2017-18 and 2019-20) than section 20 OAPA cases (647 over the same period). There are significant limitations to the reliability of this data, however, as the flag is applied to the entire case, not just the particular offence. Nonetheless, it does indicate a comparatively high prevalence of section 18 offending flagged as a hate crime. None of the other offences with life maximum sentences listed at paragraph 16.69 are flagged in high numbers.

(2) The strongest consistency argument also arises in respect of the offence of grievous bodily harm with intent contrary to section 18 OAPA 1861, which as we note at paragraph 16.68 creates issues for prosecutors given there is an aggravated version of the offence under section 20 OAPA. In addition, the CPS have highlighted that there is inconsistency in specifying criminal damage, but not the offence of arson with intent or reckless as to whether life is endangered contrary to sections 1(2) and 1(3) Criminal Damage Act 1971. This has been a cause of concern, for example, where there is arson involving a place of worship such as a mosque or synagogue.

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45 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.36.

(3) The strongest argument for not including these offences is the adequacy of the existing penalty, given the discretion which the judge has to impose a penalty up to and including life imprisonment. Further, specified[46] and serious[47] violent offences trigger additional sentencing considerations for a judge where an offender may be considered dangerous by reference in part to the risk of serious harm presented to the public by the offender committing further offences of a particular type.[48] If the offender is found to be dangerous having committed a serious violent offence (an offence listed in Schedule 15 which is punishable with a maximum penalty of at least 10 years' imprisonment), a judge must impose life imprisonment[49] if it is available and the seriousness of the offending warrants it. Where an offender has a prior conviction for such an offence and was sentenced to imprisonment for at least 10 years, there is a residual discretion to impose life imprisonment. If the offence committed is a specified violent offence (one listed in Schedule 15), a judge may impose a more serious form of sentence where the licence period is extended to reflect the additional supervision required to protect members of the public upon release.[50] In the case of murder, the sentence is fixed by law and the starting point reflects the enhanced seriousness of the offending. Therefore, we conclude that the seriousness of the offending can be reflected in all cases identified above within the existing maximum penalty, assisted by the dangerousness provisions where triggered.

(4) We have also considered how burdensome it would be for the prosecution to prove additional matters over and above the base offence. Balancing the additional evidential requirement that inclusion would necessitate in serious offences against the maximum penalty already available, we conclude that there may be little to be gained in practical terms.

16.74 Based on our assessment of these offences against our four criteria for inclusion, we conclude that the strongest argument for inclusion is likely to be in respect of the offence of grievous bodily harm with intent contrary to section 18 OAPA 1861, and there are also some consistency arguments that favour the inclusion of arson. We are less persuaded in respect of other violent offences which currently carry a maximum or fixed penalty of life imprisonment, but welcome further views.

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46 Criminal Justice Act 2003, Schedule 15, Part 1.

47 Criminal Justice Act 2003, s 224(2).

48 Criminal Justice Act 2003, ss 225 to 228 and 229(2).

49 Detention for life in the case of a youth offender.

50 Criminal Justice Act 2003, ss 226A and 226B.

Consultation Question 28.

16.75 We provisionally propose that aggravated versions of the following offences should be created, notwithstanding that they have life maximum penalties:

- Grievous bodily harm with intent contrary to section 18 of the OAPA 1861; and
- Arson with intent or reckless as to whether life is endangered contrary to sections 1(2) and 1(3) of the Criminal Damage Act 1971.

16.76 We do not propose that aggravated versions be created in respect of any other offences with a life maximum penalty.

16.77 Do consultees agree?

Other offences against the person

16.78 Several other offences against the person that do not have life maximums might also be considered for inclusion, for example:

- Maliciously administering poison so as to endanger life or inflict grievous bodily harm (section 23 OAPA 1861) – 10 years' maximum
- Maliciously administering poison with intent to injure, aggrieve or annoy any other person (section 24 OAPA 1861) – 5 years' maximum
- Threats to kill (section 16 OAPA 1861) – 10 years' maximum[51]
- Threatening with an offensive weapon or article with a blade/point (section 1A Prevention of Crime Act 1953/ section 139AA(1) Criminal Justice Act 1988) – 4 years' maximum (and mandatory minimum for a repeat offender)

16.79 We consider whether these offences meet our four criteria for inclusion:

(1) In terms of prevalence, management data provided by the CPS suggests that none of these offences are flagged as hate crimes in significant numbers.

(2) Likewise, save for the symbolic impact of including these offences, we have not identified any consistency issues which need to be addressed.

(3) In assessing the adequacy of the existing penalty, the maximum penalty for each of the offences is a substantial term of imprisonment. No concerns were raised by stakeholders as to the adequacy of these penalties or increased impact on

[51] Note that in our 2015 report on Offences Against the Person, we recommended that the offence of threats to kill under the Offences Against the Person Act 1861 should be extended to cover threats to cause serious injury and threats to rape. See Reform of Offences Against the Person, Final Report (November 2015) Law Com No 361 at paras 8.11 to 8.12. If this reform were to be implemented it would be necessary to consider whether aggravated versions of these offences should be created.

communities. We also note the existing powers to consider a more onerous form of sentence where an offender is considered to be dangerous.[52]

(4) We have also considered how burdensome it would be for the prosecution to prove additional matters over and above the base offence. The nature of the conduct covered by these offences means that any motivation of "hostility" towards the characteristic could be more challenging to prove if the threat were oral rather than a written communication. Further, proving hostility over and above the ordinary elements of the offence would, at the very least, create an additional hurdle for the prosecution to overcome.

16.80 Weighing the burden of proving an additional element and the significant maximum penalties already available against the lack of evidence on prevalence, we provisionally conclude that these offences should not be included.

Consultation Question 29.

16.81 We provisionally propose that aggravated versions of the following offences against the person should not be introduced in reformed hate crime laws:

- Maliciously administering poison so as to endanger life or inflict grievous bodily harm (section 23 OAPA 1861);
- Maliciously administering poison with intent to injure, aggrieve or annoy any other person (section 24 OAPA 1861);
- Threats to kill (section 16 OAPA 1861); and
- Threatening with an offensive weapon or article with a blade/point (section 1A Prevention of Crime Act 1953/ section 139AA(1) Criminal Justice Act 1988).

16.82 Do consultees agree?

Fraud and property-based offences

16.83 With the exception of criminal damage, there are currently no fraud or property-based offences that have racially or religiously aggravated versions under the CDA 1998.

16.84 Disability groups have argued that they are targeted for theft and exploitation on the basis of their disability, and that this should be recognised and punished as a form of hate crime. A recent report by Dimensions UK, a learning disability charity, argues that law reform should consider:

> Recognising prejudice in the most prevalent crimes and forms of abuse perpetrated against people with learning disability and autism, including sexual offences, property damage, fraud, coercive behaviour and exploitation, grooming, stalking and

[52] Criminal Justice Act 2003, ss 225 to 228 and 229(2).

harassment. These might form the basis of a new list of aggravated offences, akin to those that exist for racially and religiously aggravated crime.[53]

16.85 The concerns of disability groups in relation to property offences are borne out by the table below, which shows the proportion of hate crime prosecutions (either aggravated offences or enhanced sentencing) by offence grouping and characteristic strand. For each strand, the table shows the proportion of total offending within that strand for each offence category. When the main property offences of burglary, robbery, theft and fraud are grouped together, these offences accounted for 34.2% of disability hate crimes in 2017-18 and 25% in 2018-19. This is a significantly high proportion compared with homophobic and transphobic crime, where these offences made up just 3.4% of hate crime flags in 2017-18 and 2.9% in 2018-19. Similarly, these offences accounted for just 2% of racially and religiously aggravated crime hate crime flags in 2017-18, and 1.5% in 2018-19).

Principal offence category for each hate crime strand[54]

Offence category	Disability		Homophobic and transphobic		Racially and Religiously	
	2017-18	2018-19	2017-18	2018-19	2017-18	2018-19
Homicide	0.6%	0.0%	0.3%	0.1%	0.1%	0.0%
Offences against Person	48.1%	53.5%	56.2%	60.0%	86.8%	88.5%
Sexual offences	3.2%	3.4%	0.6%	0.4%	0.1%	0.2%
Burglary	7.2%	3.9%	0.3%	0.2%	0.3%	0.2%
Robbery	9.7%	6.9%	1.2%	0.6%	0.5%	0.3%
Theft and handling	8.0%	8.8%	1.7%	1.7%	1.1%	0.9%
Fraud and forgery	9.3%	5.4%	0.2%	0.4%	0.1%	0.1%
Criminal damage	1.4%	3.0%	4.6%	3.4%	2.2%	2.2%
Drugs offences	0.7%	1.3%	1.5%	2.2%	0.4%	0.5%

53 Dimensions UK, "#I'm with Sam: people with learning disability and autism's perceptions of crime and abuse" (2019) p 8.

54 Crown Prosecution Service, *Hate Crime Report 2018-19* (2019) p 31, available at https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF.

Offence category	Disability		Homophobic and transphobic		Racially and Religiously	
Public order offences	11.1%	11.8%	32.8%	29.7%	7.9%	6.5%

16.86 Property and sexual offences also form a significantly higher proportion of hate crimes experienced by disabled victims, though the proportions are still relatively low.

16.87 The offence of blackmail is likely to be particularly relevant to closeted LGBT individuals, who are threatened with "outing" in relation to their sexual orientation or gender identity.

16.88 Below we list a range of property and fraud-based offences that could potentially have aggravated versions:

- Blackmail (section 21 Theft Act 1968) – 14 years' maximum
- Robbery (section 8(1) Theft Act 1968) – life maximum
- Burglary (section 9 Theft Act 1968) – 14 years' maximum (plus the 'three strikes' minimum sentence provisions)
- Aggravated burglary (section 10 Theft Act 1968) – life maximum
- Theft (section 7 Theft Act 1968) – 7 years' maximum
- Fraud by false representation (section 2 Fraud Act 2006) – 10 years' maximum
- Fraud by abuse of position (section 4 Fraud Act 2006) – 10 years' maximum

16.89 These offences already have high maximum penalties.[55] This means that the sentencing judge is likely already to have significant latitude to reflect the additional hostility within the existing maximum penalty, so the creation of aggravated versions would primarily serve the purposes of denunciation and fair labelling we identified at paragraph 16.23.

16.90 We move on to consider our four criteria:

(1) Management data provided by the CPS indicates hate crime flagging in relatively high numbers for the offences of theft contrary to section 1(1) of the Theft Act 1968 (3826 cases between 2017-18 and 2019-20), robbery (1,488 cases in the same period), and burglary (1,118 cases). However, the CPS have cautioned that a significant proportion of these flags are likely to relate to another part of the offending conduct (such as an assault) that was charged alongside the property offence, rather than the theft, burglary or robbery itself. Over the same period there were also a not insignificant number of hate crime flags in cases involving

[55] Indeed, two of these offences have maximum penalties of life imprisonment. We discuss the implications of life maximums in greater detail at paragraphs 16.66 to 16.74 above.

charges of fraud by false representation (568 cases). Considered in the light of the data in the table at paragraph 16.85 which indicates a higher proportion of disability hate crime involving property offences, this data might weigh in favour of specifying these offences as aggravated offences.

(2) Save for the symbolic impact of including these offences, we have not identified any specific consistency issues which need to be addressed. However, consistency issues may arise if some of the relevant offences are included in revised laws, and others are not.

(3) In assessing the adequacy of the existing penalty, the maximum penalty for each of the offences varies greatly. Where the penalty allows for a discretionary life sentence, there are adequate sentencing powers available to the sentencing judge to reflect the totality of the offending. Again, we also note the existing powers to consider a more onerous form of sentence where an offender is considered to be dangerous. Theft and fraud allow for substantial sentences of imprisonment to be imposed with a maximum penalty of seven years and 10 years respectively. The maximum penalty compared to robbery, for example, will also reflect the fact that these are offences against property rather than the person. However, it is arguable that this may still be inadequate to reflect the culpability of the offender and the harm caused in the context of hate crime, particularly given the increased impact on the disabled community.

(4) We have also considered how burdensome it would be for the prosecution to prove additional matters over and above the base offence. Proving a motivation of "hostility" towards the characteristic can be more challenging in the context of property offences. However, were a revised test adopted – such as one of those outlined in Chapter 15 – evidential difficulties may decrease.

16.91 As the arguments are more finely balanced and are inter-linked with our provisional proposals on reforming the legal test, we reach no provisional view on the inclusion of theft and fraud offences at this stage and invite consultees' views.

Consultation Question 30.

16.92 We invite consultees' views on whether any property or fraud offences should be included within the specified aggravated offences.

Sexual offences

16.93 Sexual offences in England and Wales are contained within the Sexual Offences Act 2003.

16.94 The offences of widest application are rape,[56] assault by penetration,[57] sexual assault,[58] and causing a person to engage in sexual activity without consent.[59]

16.95 There are also a range of more specific sexual offences, including:

- Child sexual offences and abuses of positions of trust[60]
- Offences against persons with a mental disorder[61]
- Indecent images and sexual exploitation of children[62]
- Prostitution and trafficking offences[63]
- Exposure and voyeurism[64]

16.96 Disabled people and groups representing those with disabilities have told us that they are targeted for sexual offences, and that such targeting arises out of a fundamental lack of respect for their personhood, in addition to a perception that they are "easy targets" and may be less likely to complain. This was particularly apparent in our 2019 meetings with disabled individuals that were organised by Inclusion London and Dimensions UK.

16.97 As we discuss in Chapter 12, sexual offences are also widely acknowledged to be gendered crimes. Women are highly disproportionately victims of rape, sexual assault, and other forms of sexual offending, and their victimisation in this context is linked to wider expressions of male dominance over women in society.[65]

16.98 Lesbians and asexual women can be doubly victimised when they are targeted for so-called "corrective rape."[66]

16.99 We have considered whether these offences are appropriate for inclusion within a revised set of aggravated offences. We are concerned that to do so may ultimately prove more harmful than helpful to victims in practice.

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56 Sexual Offences Act 2003, s 1.

57 Sexual Offences Act 2003, s 2.

58 Sexual Offences Act 2003, s 3.

59 Sexual Offences Act 2003, s 4.

60 Sexual Offences Act 2003, ss 5 to 29

61 Sexual Offences Act 2003, ss 30 to 44.

62 Sexual Offences Act 2003, ss 45 to 51.

63 Sexual Offences Act 2003, ss 51A to 60C.

64 Sexual Offences Act 2003, ss 66 to 68.

65 M Walters and J Tumath, "Gender hostility, rape and the hate crime paradigm" (2014) 77 *Modern Law Review* 565.

66 The act of forcing a woman to have sex because the woman is believed to be a lesbian.

16.100 Our primary concern is that, for a variety of reasons, sexual offences are already amongst the most difficult offences to prosecute, and the process can be traumatising for victims. To overlay these offences with a requirement to prove the aggravated element of hostility (or perhaps "prejudice" – an option we consider in Chapter 15) before a jury may exacerbate this.

16.101 We are also concerned that additional "aggravated" sexual offences may create unhelpful hierarchies amongst victims, which could risk minimising the harms suffered by those who are unable to prove an additional "hate" element was present. We discuss this in more detail in the specific context of the characteristic of gender or sex in Chapter 12.

16.102 With regard to more specific offences – such as those that apply to a person with a mental disorder – we consider that the harms and wrongs concerned with the exploitation of the victim are inherent in the offences themselves, and it would make little sense to overlay them with aggravated versions.

16.103 Finally, we note that sexual offences are already considered very serious offences, with high maximum penalties. Rape and assault by penetration have maximum penalties of life, and sexual assault has a ten-year maximum. Above we have suggested that the availability of a high or life maximum penalty should not necessarily preclude the creation of an aggravated version of the offence. But it is also important to bear in mind that within the existing offences there is considerable scope for a sentencing judge to enhance the sentence under the CJA 2003, and reflect the totality of the seriousness of the offending.

16.104 In summary, when applying our four criteria we reach the following conclusions:

(1) CPS Management data shows that between 2017-18 and 2018-19 hate crime flags were applied in 448 cases involving sexual assault, 194 cases involving rape and 160 cases involving exposure. There is also anecdotal evidence from stakeholders as to prevalence – particularly amongst disabled and LGBT victims.

(2) There are specific offences within the Sexual Offences Act 2003 where the ingredients of the offence already reflect the harms and wrongs concerned with the exploitation of the victim. Creating aggravated versions would not promote greater consistency.

(3) Existing penalties are substantial and provide sentencers adequate scope to reflect any additional seriousness that a hate component might add to offending.

(4) Our principal concern is the imposition of an additional burden on the prosecution in proving its case where there are existing concerns that prosecuting sexual offences is challenging and conviction rates are poorer by comparison with other offending. Due to the nature of sexual offending, there may only be a sole witness, the victim, who is able to provide evidence. Requiring the prosecution to prove an additional element is likely to make successful prosecutions harder.

16.105 While there is data to suggest that hate crimes do occur in the context of sexual offences, we provisionally conclude that it may be preferable for this to remain an aspect

that is considered by the sentencer under an enhanced sentencing regime. However, we invite stakeholders' views on this matter.

Consultation Question 31.

16.106 We provisionally propose that aggravated versions of sexual offences should not be introduced (and hate crimes in these contexts should continue to be dealt with through enhanced sentencing).

16.107 Do consultees agree?

OTHER CONSIDERATIONS

Multiple characteristics and intersectionality

16.108 Many victims told us that they had experienced hate crime based on more than one characteristic. This was particularly prominently described by Muslim women, disabled women, and LBT+ women, who experienced misogyny in addition to other more recognised forms of hostility. The phenomenon of combined forms of discrimination and disadvantage, and the unique dynamic this creates, is often referred to as "intersectionality".

16.109 Muslim women – particularly those who chose to wear a head scarf – told us they felt targeted because they were visibly Muslim, and also because as women, there was a perception they were less likely to fight back.[67] Further, these women told us that the abuse often contained a raft of prejudicial assumptions about them – such as that they were forced to cover up by male partners, and had little personal autonomy. Disabled women told us that their bodies were particularly targeted for sexual abuse and exploitation in a manner over and above that experienced by disabled men. Lesbian and trans women also experienced forms of abuse that gay men or cisgender women did not.

16.110 People of faith from ethnic minority backgrounds informed us that where criminal hostility was directed at them it was often a combination of racism and religious hatred. Many Asian people described being explicitly abused on the basis that they were, or were presumed to be, both Muslim *and* of South Asian or Middle Eastern origin. To focus on only one of these aspects was inadequate to understand and describe the extent of the hostility, and the harm they and their community had experienced.

16.111 Many considered that the law, and law enforcement agencies often only recognised one aspect of the hostility they had experienced. From a pragmatic perspective, and given the current legal context, it is understandable that police and prosecutors choose the approach that they consider will result in the highest penalty for the defendant. For example, if there is a racial component to an assault that also has homophobic elements, law enforcement agencies are likely to focus particularly on the racial element, as the assault can be racially (but not homophobically) aggravated under the

[67] We discuss the specific targeting of Muslim women in more detail in Chapter 12.

CDA 1998. Similarly, where abuse is directed towards a gay woman, police and prosecutors may focus on the enhanced sentence that may be available on the basis of the hostility towards the victim's sexual orientation, rather than on any misogynistic element that may also be present.

16.112 Our proposals to equalise protection across the designated protected characteristics might reduce the current arbitrary legal incentives to prioritise certain forms of hostility over others. However, this alone will not remove the legal complexities in reflecting multiple forms of hostility within the aggravated offences regime. These arise from the relatively inflexible way that charges and criminal indictments operate.

16.113 At present this difficulty only arises where both racial and religious hostility are present. If one of these characteristics is combined with another protected characteristic – sexual orientation, disability or transgender identity – the task for the prosecution is more straightforward as they can pursue the racially or religiously aggravated offence, and also seek an enhanced sentence for the other characteristic under section 146 of the Criminal Justice Act 2003. For example, if a common assault is committed, and the perpetrator demonstrates hostility based on race and sexual orientation, the prosecution can charge racially aggravated common assault, and also seek an enhanced sentence in relation to the sexual orientation hostility. It is likely that if both forms of hostility are proven (the aggravated offence and the additional sentence enhancement), the sentencer would announce only one overall uplift – to reflect the totality of both forms of hostility (being careful not to engage in any "double counting"). Importantly, however, the sentencing remarks should specify that *both* forms of hostility were present, thereby recognising the full nature and extent of the harm caused.

16.114 Where both racial and religious hostility is present, this creates more difficult decisions for prosecutors.

16.115 CPS practice is not to specify *both* forms of aggravation in a single count. First, this might be open to challenge due to the rule against duplicity; this requires the prosecution to draft the indictment reflecting a single criminal offence in relation to each count. Secondly, if permissible, it would require that the trier of fact (the jury in the Crown Court, district judge or bench of lay magistrates in the magistrates' court) to find to the criminal standard that the legal test was met in respect of *both* the characteristics specified in the charge. If the prosecution failed to satisfy the trier of fact in respect of one of the characteristics, but were satisfied in respect of another, the entire aggravated prosecution would fail. It would then be necessary to fall back on the base offence as the alternative.

16.116 The CPS guidance in cases of both racial and religious hostility states:[68]

> The Crime and Disorder Act 1998 provides that a specific aggravated offence is committed if it involves racial or religious hostility. If both elements are present, then two offences should normally be charged: one in respect of the racially aggravated offending and another in respect of the religiously aggravated offending.

[68] Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (21 October 2019), available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

Consideration should also be given to putting a “base” non-aggravated alternative charge in accordance with the guidance above.

Where there is evidence to support a realistic prospect of conviction in respect of both racial and religious aggravation, but it is clear from the evidence that:

1. the offence was predominantly motivated by one type of such hostility; and/or

2. involved a demonstration of hostility predominantly based on one type of aggravation,

then it may be appropriate to charge only the one aggravated offence, (together with the “base” offence in the alternative if considered appropriate).

However, in doing so, the prosecutor should make it clear to the defence that all of the defendant's words and behaviour will be opened by the prosecution, including that which relates to the element of aggravation which has not been charged. If the defence do not accept this, then separate offences relating to the racial aggravation and to the religious aggravation may be required in the public interest.

Prosecutors must always apply the overarching principles contained in the Code for Crown Prosecutors and ensure that the charges selected:

- reflect the seriousness and extent of the offending;

- give the court adequate powers to sentence and impose appropriate post-conviction orders; and

- enable the case to be presented in a clear and simple way.

Where the offence is not a specific aggravated offence provided by the Crime and Disorder Act 1998 offence, only one charge can be put as there is only one offence established in law. However, if such an offence involves evidence of both racial and religious hostility, both elements should be drawn to the court's attention as an aggravating factor at sentencing, applying the provisions of section 145 Criminal Justice Act 2003.

16.117 The CPS advised us that previous versions of this guidance had been more rigid in the requirement that both forms of aggravation should be charged where arguable. The current guidance provides greater discretion to prosecutors to balance competing considerations in presenting their case – ensuring the full extent of the wrongdoing is captured, while also ensuring the case is presented in a clear and comprehensible way, and a conviction is likely to be secured.

16.118 The CPS have told us that in some cases they have pursued both a racially aggravated offence and a religiously aggravated offence. In some of these cases the perpetrator has been found guilty in respect of both. Anecdotally, the CPS have advised that some courts – predominantly magistrates’ courts – have imposed an aggravated sentence in relation to one of the offences, reflecting the totality of the conduct. No additional penalty has been imposed in respect of the other offence, (but both forms of aggravation appear on the offender’s criminal record).

16.119 If two criminal offences had in fact been committed, it would be permissible to "load" the penalty for the totality of offending onto the most serious charge and impose no separate penalty in relation to the second conviction.

16.120 However, where two charges arising out of the same incident have been proffered but it amounts to a single instance of criminality, it is not permissible for the trier of fact to convict on both charges.[69]

16.121 In such a case, for example a single violent act where there is evidence of either racial or religious hostility, or a combination of both, the CPS must consider three separate alternative charges in the magistrates' court or three separate and alternative counts on an indictment in the Crown Court:

(1) The racially aggravated offence

(2) The religiously aggravated offence; and

(3) The alternative "base" offence if the aggravation cannot be proven in respect of either characteristic.

16.122 This is a more cumbersome process for judges and juries requiring careful direction on each step of the process. A jury would need to be satisfied, to the criminal standard, of each element of each offence and would need to move through the counts sequentially, considering them separately. Each count would represent an alternative way of viewing the gravamen of the offence and the jury would only be permitted to convict in relation to *one* of the three counts, if they were satisfied that the prosecution had proved their case to the requisite standard. Where the alternative counts are of equal gravity, the jury would be asked whether they find the defendant guilty on either count; the count would then be identified and the verdict taken. If convicted, no verdict should be taken on the alternative count.[70]

Options for reform

16.123 We have carefully considered proposals to meet the challenges of prosecuting intersectional hate crimes. We consider a possible option to do so below, but reform is limited by the fact that except in very limited circumstances,[71] juries do not provide narrative verdicts – they are simply asked whether a defendant is guilty or not guilty in respect of a particular charge.[72] As we have noted, if a single count or charge were to contain allegations of aggravation based on two or more characteristics, it may be open to challenge on the grounds that the indictment was bad for duplicity; the principle that only one offence can be charged in each count. If the indictment was found to be effective, the prosecution would fail unless both allegations were proven to the requisite standard. This is because it is a fundamental principle of criminal trials that in arriving

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69 *Harris* (1969) 53 Cr. App. R. 376.

70 *Seymour* (1954) 38 Cr. App. R. 68, CCA.

71 See Archbold, para. 5A-273.

72 For the procedure to be followed in taking the verdict of the jury, see the Criminal Procedure Rules 2015 (SI 2015/1490), r 25.14.

at their verdict the jury must be sure that every element necessary to constitute the offence has been proven.[73]

16.124 Cases of intersectional hate crime will therefore require very careful, strategic decision-making by prosecutors, and may require tough decisions to drop characteristics from a prosecution where the evidence is less strong. Victims reasonably may struggle to understand why the totality of their experience is not reflected in the charge. These limitations to reflecting intersectionality in law should not, however, prevent the appropriate police recording of intersectional hate crimes, nor the provision of appropriate support based on multiple forms of targeting.

An alternative approach: requiring proof of hostility based on "one or more" characteristics

16.125 An alternative approach would be to include a provision allowing for the recognition of hostility based on "one or more" protected characteristics. The characteristics could be specified in the charge or count on the indictment but conviction would only require the jury to be satisfied that at least one had been made out on the evidence by the prosecution. For example, in the case of an assault against a person of visible Muslim and South Asian appearance, where the perpetrator had called the victim a "p*ki Muslim terrorist", the charge could specify that the assault was aggravated by "a demonstration of racial hostility and/or religious hostility". The jury would be asked whether a demonstration on the basis of either characteristic was present, and on this basis to deliver a verdict of guilty or not guilty.

16.126 The advantages of this approach from the perspective of prosecutors and victims are clear. It would mean that charges for aggravated offences could better reflect the true nature of the offending and also encourage more accurate recording of prosecution and conviction statistics in respect of different characteristics. It would allow the CPS to pursue a single charge which reflects the totality of the offending with a single alternative base offence, and ensure that charges and indictments were simplified rather than offering multiple alternatives and complex routes to verdict which may confuse a jury, particularly when dealing with multiple victims and multiple defendants.

16.127 We have also considered whether the defendant would be prejudiced by this approach and the fairness of the trial impeded. As the prosecution would be required to set out their case and the characteristics on the indictment, the defendant would know the case against him or her. The evidence would be open to challenge in the usual way with the opportunity for cross-examination of the complainant and any witnesses. However, we recognise that the proposal for specifying "one or more" characteristics in a single indictment would be rather novel, and could create unfairness for defendants by being somewhat less precise as to the exact nature of the hostility or prejudice that the jury is asked to decide on.

16.128 There is some precedent for an offence specifying multiple options in the indictment. The inchoate offence of encouraging or assisting offences believing one or more will be committed[74] specifies that a person commits this offence if (1) he does an act capable of encouraging or assisting the commission of one of more offences, and he believes

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[73] *Brown (K.)* (1984) 79 Cr App R. 115, CA.

[74] Section 46 of the Serious Crime Act 2007. This is a less serious offence than encouraging or assisting an offence believing it will be committed, found in section 45 of the Serious Crime Act 2007.

(2) that one or more of those offences will be committed (but has no belief as to which) and (3) that his act will encourage or assist the commission of one or more of them. In drafting the indictment, the prosecution will specify each possible offence. The Court of Appeal in *R v Sadique*[75] held that an indictment drafted in this form is not bad for duplicity, nor defective for uncertainty. It gives sufficient indication to the accused of the criminal conduct alleged against him or her.[76] The judge would be able to sentence the defendant having heard the entirety of the evidence at trial and impose an appropriate sentence to reflect the totality of the offending.

16.129 This flexible offence suggests that a similar approach to specification of characteristics in an indictment for an aggravated offence would be workable.

16.130 Whatever approach is taken, we would not propose that the recognition of hostility based on more than one characteristic should operate in any automatic way to increase the sentence over and above the fact that an aggravated version of the offence has been proven. It would remain within the discretion of the sentencer to decide how, in all the circumstances of the case, the sentence should be increased. It would also be subject to any guidance which would be drafted and issued by the Sentencing Council, a body that submits draft guidance to public consultation. We discuss this in more detail in the next section.

Consultation Question 32.

16.131 We invite consultees' views on whether a provision requiring satisfaction of the legal test in respect of "one or more" protected characteristics would be a workable and fair approach to facilitate recognition of intersectionality in the context of aggravated offences.

Sentencing guidance

16.132 The Sentencing Council does not have a separate guideline dealing with aggravated offences, or hate crime offending more generally. However, it has recently finalised guidance in relation to public order offences, which includes significant detail in relation to the assessment of racial and religious aggravation. This guidance came into effect on 1 January 2020.

16.133 In relation to the offence of racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress,[77] the most commonly prosecuted aggravated offence,[78] the guidance specifies the following factors as indicating a "high level of racial or religious aggravation":[79]

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75 [2013] EWCA Crim 1150, [2013] 4 All ER 924.

76 *R v Sadique* [2011] EWCA Crim 2872, [2012] 1 Cr. App. R. 19; at [36].

77 Crime and Disorder Act 1998, s 31(1)(b)). The base offence is Public Order Act 1986, s 4A.

78 See table at paragraph 16.15.

79 Sentencing Council, *Disorderly behaviour with intent to cause harassment, alarm or distress/ Racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress* (effective 1

- Racial or religious aggravation was the predominant motivation for the offence.

- Offender was a member of, or was associated with, a group promoting hostility based on race or religion.

- Aggravated nature of the offence caused severe distress to the victim or the victim's family (over and above the distress already considered when categorising the seriousness of the offence more generally).

- Aggravated nature of the offence caused serious fear and distress throughout local community or more widely.

16.134 These factors indicate the sentencer should "increase the length of custodial sentence if already considered for the base offence **or** consider a custodial sentence, if not already considered for the base offence."

16.135 A "medium level of racial or religious aggravation" is indicated where:

- Racial or religious aggravation formed a significant proportion of the offence as a whole.

- Aggravated nature of the offence caused some distress to the victim or the victim's family (over and above the distress already considered when categorising the seriousness of the offence more generally).

- Aggravated nature of the offence caused some fear and distress throughout local community or more widely.

16.136 These factors indicate the sentencer should "consider a significantly more onerous penalty of the same type **or** consider a more severe type of sentence than for the base offence."

16.137 Finally, a "low level of racial or religious aggravation" is indicated where:

- Aggravated element formed a minimal part of the offence as a whole.

- Aggravated nature of the offence caused minimal or no distress to the victim or the victim's family (over and above the distress already considered when categorising the seriousness of the offence more generally).

16.138 These factors indicate the sentencer should "consider a more onerous penalty of the same type identified for the base offence."

16.139 Similar guidance has also been developed in relation to the comparable offence of racially or religiously aggravated threatening behaviour – fear or provocation of violence.[80]

January 2020), available at https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/disorderly-behaviour-with-intent-to-cause-harassment-alarm-or-distress-racially-or-religiously-aggravated-disorderly-behaviour-with-intent-to-cause-harassment-alarm-or-distress/.

[80] Crime and Disorder Act 1998, s 31(1)(a), Public Order Act 1986, s 4

16.140 This guidance – which resulted from extensive research and consultation by the Sentencing Council – provides a detailed and useful basis for sentencers considering how to apply the aggravation to a sentence. In particular, it distinguishes between the different degrees of hate aggravation in a way which the CDA 1998 itself does not.

16.141 The replication of this guidance across further aggravated offences would likely be a useful complement to reformed hate crime laws.

The extent of increases in maximum sentences

16.142 The table at paragraph 16.8 illustrates the increase in maximum sentences across the various aggravated offences. The intervals are consistent across the offences: 6 month maximums become 2 years, 5 year maximums become 7 years, and 10 year maximums become 14 years.

16.143 In the case of racially or religiously aggravated harassment, alarm or distress,[81] the base offence (contrary to section 5 of the Public Order Act 1986) carries a maximum penalty of a £1,000 fine. The aggravated version carries a £2,500 penalty. While this is a significant jump in monetary terms, the CPS have highlighted that this opens up a significant gap compared with the more serious public order offences under section 4 and 4A, the aggravated versions of which have maximum sentences of 2 years. In many cases, the conduct of a perpetrator will be such that either a section 5 or section 4A (intentional harassment, alarm or distress) offence is available. Prosecutors will need to select the appropriate charge based on the seriousness of the conduct, and whether the maximum penalty for the offence is likely to be sufficient. For aggravated offences, prosecutors have told us that there is a lack of an appropriate "middle ground", whereby the offending may warrant a penalty more serious than a fine, but a two-year maximum penalty, and the prospect of a Crown Court trial, is also disproportionate. An option worthy of consideration therefore, may be to increase the maximum penalty for the aggravated offence of causing harassment, alarm or distress contrary to section 5 of the Public Order Act to 6 months' imprisonment. This would allow for more proportionate charging decisions to be made by prosecutors.

16.144 This raises the question more generally of whether the right balance is struck regarding the increased maximum penalties for racially and religiously aggravated offences, and whether these are proportionate with other, equivalent criminal penalties. For example, where an assault is committed against an emergency worker acting in the exercise of functions as such a worker, the maximum penalty increases from 6 to 12 months,[82] whereas for racially and religiously aggravated assaults the maximum penalty increases to 2 years.[83] However, we note that government has recently launched a consultation on doubling the maximum penalty for assaulting an emergency worker to two years,[84] which would align it with that applicable to racially and religiously aggravated assaults.

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81 Crime and Disorder Act 1998, s 31(1)(c). The base offence is Public Order Act 1986, s 5.

82 Assaults on Emergency Workers (Offences) Act 2018, s 1(2).

83 Crime and Disorder Act 1998, s 29(3).

84 See Ministry of Justice, *Consultation launched on doubling maximum sentence for assaulting an emergency worker* (13 July 2020), available at https://www.gov.uk/government/news/consultation-launched-on-doubling-maximum-sentence-for-assaulting-an-emergency-worker.

Consultation Question 33.

16.145 We invite consultees' views on whether the maximum sentences for the aggravated offences in the CDA 1998 are appropriate.

Allowing for alternative verdicts in magistrates' courts

16.146 As noted at paragraph 16.10, there is currently no power for the magistrates' courts to deliver an alternative verdict for a base offence where the court is unpersuaded that the prosecution has proven the racial or religious aggravation to the criminal standard.[85]

16.147 Such a power does exist in the Crown Court, as a result of section 6(3) of the Criminal Justice Act 1967, which provides:

> Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

16.148 However, this power is limited to offences which fall within the jurisdiction of the Crown Court.[86] This means that for aggravated versions of common hate crime offences which are ordinarily summary only offences (such as some harassment and public order offences) the Crown Court is not empowered to enter an alternative verdict for less serious summary offences not included in the indictment.

16.149 As a result, the CPS has developed the following prosecution guidance for aggravated offences:

> In summary cases there is no power for the court of trial to return an alternative verdict to a lesser or alternative offence. Therefore, in cases heard in the magistrates' court the 'basic offence' should normally be included as an alternative charge. This will enable the court to convict the defendant of the 'basic offence' when it finds those facts to be proved, but is not satisfied in relation to the element of racial and religious aggravation…
>
> For cases tried in the Crown court, it is good practice to include the basic offence as an alternative count on the indictment, even though the jury has the power to return an alternative verdict. The inclusion of the alternative count clarifies the position at the outset and avoids reliance on the trial judge or prosecuting counsel in bringing the possibility of an alternative verdict to the jury's attention.

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85 The criminal standard of proof is "beyond reasonable doubt".

86 An exception to this general position is common assault, which the Crown Court is specifically empowered to return as an alternative verdict to more serious offences in relevant cases by virtue of section 40 of the Criminal Justice Act 1988.

16.150 While this approach is a logical response to the current legal position, the requirement to include both charges on the indictment is arguably rather cumbersome. It has also led to practical concerns. For example, in *Dyer v Watford Magistrates Court*[87] the Divisional Court found that the magistrates' court had erred in convicting the offender of both the racially aggravated version of the offence of causing fear or provocation of violence,[88] and the base version of the offence.[89] The magistrates' reason for convicting for both offences was that if a conviction had been recorded only for the former, a successful appeal would not have permitted the Crown Court to substitute the latter.[90] However the Divisional Court found that it was unjust to convict for two offences arising from the same wrongdoing, and the correct approach was for the magistrates' court to adjourn the base offence sine die (indefinitely). This approach was subsequently affirmed in *Henderson v Crown Prosecution Service*.[91]

16.151 It is important to note that specifying a separate charge or count of the indictment acts as a safeguard to ensure the overall fairness of the trial. A defendant should not be unfairly prejudiced. Without this, there is a risk that a defendant may find themselves facing an allegation not previously advanced by the prosecution or foreseen by them. If this is the case, they may be deprived of the opportunity to prepare and present a defence to the lesser charge which would undermine the fairness of the trial and the safety of their conviction. In *Lahaye*, the Court of Appeal observed that it was preferable to include a separate count of the indictment in the context of alternative charges under the Offences Against the Person Act 1861.[92]

16.152 However, the general approach in relation to racially and religiously aggravated offences may be contrasted with that under section 24 of the Road Traffic Act 1988, which specifies a range of alternative verdicts that may be available where a more serious offence is not proven. These include the summary only offences of:

- Driving or attempting to drive while unfit through drink or drugs[93]
- Driving or attempting to drive with excess alcohol in breath, blood or urine[94]
- Dangerous cycling[95]

16.153 This raises the question whether a similar approach might be taken in respect of aggravated offences and their non-aggravated versions. Courts could be specifically empowered to find a perpetrator guilty of a non-aggravated version of an offence.

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87 [2013] EWHC 547 (Admin)

88 Crime and Disorder Act 1998, s 31(1)(a).

89 Public Order Act 1986, s 4,

90 *Director of Public Prosecutions v Gane* [1991] JP 846.

91 [2016] EWHC 464 (Admin); [2016] 2 Cr App R 7.

92 *Lahaye* [2005] EWCA Crim 2847.

93 Road Traffic Act 1988, s 4(1).

94 Road Traffic Act 1988, s 5(1)(a).

95 Road Traffic Act 1988, s 28.

16.154 While the current CPS practice of including both the aggravated and non-aggravated charges on the indictment would remain the prudent approach, and accord with guidance from the Court of Appeal on the general desirability of separate charges and counts, this change would empower courts to deliver the alternative verdict in cases where this had not been specified. In cases where a conviction was entered for the aggravated offence, it would also obviate the need for courts to adjourn the non-aggravated version of the offence sine die, as it would be open to the Court of Appeal to substitute the verdict or remit the case back to the lower Court for reconsideration.[96]

16.155 Allowing for alternative charging would, however, represent a departure from ordinary criminal process. If it resulted in the prosecution routinely not including the base offence on the charge, it would place greater reliance on the court or prosecution bringing the possibility of an alternative verdict to the jury's attention.

Consultation Question 34.

16.156 We invite consultees' views on whether where only an aggravated offence is prosecuted, the Courts should always be empowered to find a defendant guilty of the base offence in the alternative.

AN ALTERNATIVE OPTION: A HYBRID OF AGGRAVATED OFFENCES AND ENHANCED SENTENCING

16.157 As we have noted, an alternative approach to the current dual approach of aggravated offences and enhanced sentencing has been proposed by academics at the University of Sussex in an important and influential report entitled, "Hate Crime and the Legal Process: Options for Law Reform" ("the Sussex Report").

16.158 There is significant merit in this alternative model, and for this reason we outline its core elements below as a possible alternative approach.

16.159 One of the core recommendations of the Sussex Report was the replacement of the "motivated by hostility" test with a "by reason of" approach. We discussed this option in greater detail in Chapter 15, and considered whether this could be adopted as a component of the reform proposals we have outlined.

16.160 The other major recommendation – and the one we elaborate on further below – was for the law to adopt a singular, hybrid approach to hate crime, combining aspects of both the CDA 1998 (a separate, aggravated version of the offence, and a requirement to prove the aggravation before a jury) and the CJA 2003 (enhanced sentencing which applies across all protected characteristics and all offences). This would mean that for any offence, the aggravation could be added on the indictment, and if proved the court would be required to state on conviction that the offence was aggravated by the relevant hostility, and record the conviction in a way that shows this.

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96 Criminal Appeal Act 1968, s 3.

16.161 The report proposes extending the reach of aggravated offences to all criminal offences and five currently protected characteristics (broadening the characteristics was beyond the scope of the project), but without the applicable increase in maximum penalties that currently apply. The authors acknowledge that to try and specify increased maximum penalties across all criminal offences would be administratively unworkable, and for the reasons set out at paragraph 16.174, they consider the increased penalties to be unnecessary in any event. However, under this model sentencers would still be required to increase the sentence above that which they would otherwise have imposed if the aggravation was not present (or not proven).

16.162 The authors argue that the key advantages of such an approach are:

- Greater simplicity and coherence in the law through having one single mechanism to aggravate offences.
- The fair labelling of offences as "aggravated", rather than the aggravation forming part of enhanced sentencing for a "base" offence.
- Fairness to the accused, in requiring the prosecution to prove the aggravated elements of the offence before a jury.
- Improved case preparation – through incentivising law enforcement agencies to prepare and build the case around the aggravation, rather than risk it becoming an afterthought at sentencing.
- More appropriate trial forums – more expeditious and cost-effective outcomes could be achieved through not unduly elevating aggravated offences to the Crown Court in cases where they could be adequately dealt with in a magistrates' court.

16.163 There are two significant challenges with such a model, which the authors acknowledge:

(1) The requirement that the aggravation be proven before a jury in all cases, and the practical challenges this can cause for the prosecution; and

(2) The removal of increased maximum penalties.

16.164 We consider these issues below.

Requirement to prove aggravation before the jury

16.165 The first concern – which applies to the current use of aggravated offences – is the practical challenges in requiring the aggravated element of the offence to be proven before a jury. As the authors acknowledge, in some cases this can prove to be "God's Gift to Defence",[97] as trials are diverted by long arguments about whether the defendant is racist or not (for example, evidence is presented to show that he or she has friends, family or colleagues who are from other racial groups). These arguments may be irrelevant to the legal question whether the defendant demonstrated or was the offence

[97] M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 125.

was motivated by hostility toward the victim's race (or presumed race) at the relevant time, but might nonetheless be persuasive to juries.

16.166 The Sussex Report authors argue that a key advantage of the proposal is that defendant's rights will be better protected. They cite three main reasons for this:[98]

(1) The requirement that the prosecution prove the aggravation to the relevant criminal standard before a jury;

(2) The abovementioned reluctance of juries to find that offences were so aggravated;

(3) The appropriateness of juries, rather than trial judges, determining questions of fact in a criminal trial.

16.167 They also noted that "where the finding of hostility comes from a jury, rather than a judge, it may also be more readily accepted by both the defendant and wider community."[99]

16.168 Responding to concerns that prosecution is more difficult under this approach, the authors argue:

> The criminal law is a very powerful tool which the state uses to control and regulate behaviour, and criminal convictions come with far-reaching consequences, including potential loss of liberty. It is, therefore, paramount that there is sufficient evidence to support a conviction.[100]

16.169 As noted above, a change to the legal test in line with the authors' recommendation for a "by reason of" approach would make certain forms of hate crime – notably those involving less obvious manifestations of hostility – easier to prosecute. This may also mitigate concerns about the difficulties concerning proof before a jury.

16.170 There are certainly advantages in requiring proof of the aggravating circumstances as an element of the offence; it is clearer from the outset and arguably fairer to the defendant. This is the approach that is taken in Scottish hate crime laws, and it has been continued in the Hate Crime and Public Order Bill that is currently before the Scottish Parliament.

16.171 However, as we noted in our 2014 Review, proof before a jury can also make aggravations more difficult to secure, and potentially lengthens trials. By contrast, enhanced sentencing under the CJA 2003 is consistent with the general approach to sentencing, which allows the trial judge to make a variety of factual findings relevant to the imposition of the criminal penalty.

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98 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp 189 to 191.

99 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 191.

100 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 192.

16.172 Where the maximum penalty for the aggravated offence remains the same as the base offence, it is less obvious that separate proof of the aggravation is necessary prior to the sentencing stage. Indeed, our 2014 review tended towards the opposite finding – that it was possible to deal with sentence aggravation at the sentencing stage, avoiding the creation of unnecessary hurdles for the prosecution.[101]

Removal of increased maximum penalties

16.173 The second concern – which is not contemplated in our preferred model – is the removal of the increased maximum penalties currently specified under the CDA 1998.

16.174 The Sussex report authors point to several reasons why the increased maximum penalties are not essential to an effective hate crime scheme:

- Statistics showing that average sentences for current racially and religious aggravated offences are nowhere near the available maximum;
- The need to move away from purely punitive responses, with greater focus placed on community, restorative and rehabilitative approaches; and
- The symbolic value of labelling an offence as "aggravated" is itself powerful, and does not necessarily require a sentence beyond the maximum available for the base offence.[102]

16.175 As we have noted above, while average sentences for aggravated offences are well below the increased maximum, there are a small number of cases where the maximum for the base offence is exceeded. This would no longer be possible if the hybrid model were to be adopted.

16.176 We have also outlined our concerns about the symbolism of reducing the available maximum penalties, which have been in place for decades, and are seen by many as an important indication of the seriousness with which hate crime is treated by the law in England and Wales.

16.177 Some groups who are not currently protected by aggravated offences – notably LGBT charity Galop – sought parity across all protected characteristics, and recognition of the aggravation in the labelling of the offence. They were less concerned that the aggravated offence also carried a higher maximum penalty. However, many other consultees we spoke to – in particular race and faith representatives who already enjoy these protections – were keen to retain the increased maximums within the aggravated offences regime.

16.178 As we have indicated, we are currently unpersuaded that the removal of increased maximum penalties is a desirable reform outcome; principally due to the negative message it could send to already marginalised racial and religious groups. We welcome further views on this important question.

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101 Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 126.

102 M Walters, S Wiedlitzka, A Owusu Bempah and K Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 200.

Consultation Question 35.

16.179 We invite consultees' views on whether they consider the Sussex Report's proposed "hybrid" approach to hate crime laws to be a preferable approach to the model that we have proposed.

Chapter 17: Enhanced sentencing

INTRODUCTION

17.1 In the previous chapter we considered the ongoing role for "aggravated offences", found in sections 28 to 32 of the Crime and Disorder Act 1998 ("CDA 1998"). While we acknowledged some of the disadvantages with this approach, we provisionally concluded that on balance, specified aggravated offences with enhanced maximum penalties form an important component of hate crime law in England and Wales. Our preferred option was therefore that they should be retained, and that their operation should be expanded so that they apply more consistently across all protected characteristics. We also asked whether further offences should be added to the list of aggravated offences and provisionally proposed several for inclusion.

17.2 We also presented an alternative model similar to that in Scotland. Under this model there are no specified offences with increased maximum penalties, but all offences are capable of aggravation, and the aggravation must be proved as an element of the offence.

17.3 In this chapter we proceed largely on the assumption that of our preferred option – the retention of specified aggravated offences with increased maximum penalties – will be adopted, and move on to consider the current parallel approach of "enhanced sentencing" which is available for all other non-specified offences. This is currently set out in sections 145 and 146 of the Criminal Justice Act 2003 ("CJA 2003").

17.4 We consider the ongoing utility of the model of enhanced sentencing, and whether the enhancement should be determined at the trial or sentencing stage of a proceeding. The former approach – determination at trial – would be much more akin to the alternative option described in Chapter 16.

17.5 Finally, if the sentence enhancement is to be determined at the sentencing stage, we consider whether there is scope for a more flexible approach to characteristic recognition than that which is proposed for aggravated offences.

CURRENT LAW

17.6 The enhanced sentencing rules contained in sections 145 and 146 of the CJA 2003 form part of the general sentencing regime in Part 12 of that Act. These provisions will be largely transposed into Chapter 3 of the Sentencing Code if the Sentencing Bill[1] currently before Parliament is passed into law. The section 145 and 146 provisions will be consolidated into a single "hostility" provision in clause 66.

17.7 In determining the seriousness of an offence, section 143(1) CJA requires the court to consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. The CJA 2003 requires certain aggravating factors, if present, to be taken into account in

[1] Sentencing Bill [HL] 2019-21.

assessing seriousness. These include hostility on the basis of race or religion (section 145) and on the basis of sexual orientation, disability, or transgender identity (section 146). Sentencing guidelines set out these "statutory aggravating factors", as well as "general aggravating factors" (for example, planning of the offence, a vulnerable victim, and abuse of trust), to which the court must have regard in considering all the circumstances of the offence.[2] The guidelines are clear that sentencers should avoid double counting where sentencing factors overlap.[3] However, there have been cases where this has occurred.[4]

17.8 These factors do not allow for a sentence to be imposed that is above the maximum penalty prescribed by the substantive offence provision. The court must "state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence".[5]

Section 145: Race and religion

17.9 Section 145 of the CJA 2003 provides as follows:

> (1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).
>
> (2) If the offence was racially or religiously aggravated, the court—
>
> (a) must treat that fact as an aggravating factor, and
>
> (b) must state in open court that the offence was so aggravated.
>
> (3) Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

17.10 This provision cannot be used to increase a sentence where the offender was acquitted of an aggravated offence but convicted of the corresponding non-aggravated offence.[6] However, there may be circumstances where section 145 aggravation can apply at sentencing where the prosecution has not pursued an aggravated version of the offence.[7] We discuss this issue further at paragraph 17.109.

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2 Section 156(1) provides that courts must consider all mitigating and aggravating factors when imposing community sentences and discretionary custodial sentences.

3 See further: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/

4 See, eg, *R v Letchfield* [2014] EWCA Crim 1474, where the Court of Appeal found that the trial judge had made the error of double counting in sentencing by treating the racial component of the offending as both placing it in a higher sentencing category, and then aggravating the sentence in addition – at [24].

5 Criminal Justice Act 2003, s 174(2).

6 *R v McGillivray* [2005] EWCA Crim 604.

7 See *R v O'Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11.

Section 146: Disability, sexual orientation and transgender identity

17.11 Whereas section 145 refers to the definitions of racial and religious aggravation in section 28 of the Crime and Disorder Act 1998, there is no pre-existing definition for hostility relating to disability, sexual orientation and transgender identity. Section 146 thus introduces an almost identical scheme for these characteristics. It provides:

> (1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).
>
> (2) Those circumstances are—
>
> (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—
>
> (i) the sexual orientation (or presumed sexual orientation) of the victim, or
>
> (ii) a disability (or presumed disability) of the victim, or
>
> (iii) the victim being (or being presumed to be) transgender, or
>
> (b) that the offence is motivated (wholly or partly)—
>
> (i) by hostility towards persons who are of a particular sexual orientation, or
>
> (ii) by hostility towards persons who have a disability or a particular disability, or
>
> (iii) by hostility towards persons who are transgender.[8]
>
> (3) The court—
>
> (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
>
> (b) must state in open court that the offence was committed in such circumstances.
>
> (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

17.12 Section 146 does not include "association with members of that group", as is the case under section 28(2) of the CDA 1998, to which section 145(3) refers. The scope of the protections under section 146 therefore arguably do not apply to "association" with LGBT or disabled persons, though we are not aware of this issue being tested in court.

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[8] Section 146(2)(a) and (b) mirror the hostility test laid down by the aggravated offences, so the case law on these elements of the aggravated offences is also relevant in interpreting section 146.

The distinction is replicated in the Sentencing Bill, which only includes association with members of the group in the context of racial and religious groups.[9]

Evidence of hostility for the purposes of enhanced sentencing

17.13 As we outlined in the previous chapter, for the aggravated offences under the CDA 1998 hostility is an element of the offence, and the hostility must be proved to the criminal standard before the defendant can be convicted of that offence. However, under sections 145 and 146 of the CJA 2003, hostility is a question of fact for the sentencer, post-conviction. The prosecution must prove to the criminal standard that the statutory aggravation should apply.

17.14 If sufficient evidence of hostility has not been introduced at trial,[10] or if the defendant has pleaded guilty to the offence but rejects the allegation that they demonstrated or the offence was motivated by hostility, then a "Newton hearing" may take place.[11] The purpose of a "Newton hearing" is to decide on the facts that remain in dispute between the defence and the prosecution that are relevant to sentencing.[12] Newton hearings are only necessary where there is likely to be a significant impact on the sentence.[13]

17.15 In a Newton hearing the judge acts as the tribunal of fact, applying the criminal burden and standard of proof. The judge will normally hear evidence from witnesses but the matter may be dealt with on submissions only if the evidence itself is unchallenged.

17.16 The 2017 Sussex University report found that in practice Newton hearings are rarely held, and identified a perception amongst legal practitioners that Newton hearings were not necessary in the majority of hate crime cases, either because the relevant evidence had been adduced at trial, or because the finding was unlikely to make a significant difference to the sentence (especially in the lower courts). There were also concerns that defendants were dissuaded from mounting legitimate challenges to hostility allegations by way of a Newton hearing due to fears of losing credit for a guilty plea.[14]

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9 Sentencing Bill, HL Bill 105, 58/1, clause 66(6)(b).

10 *Finch* 14 Cr.App.R. (S.) 226.

11 See Archbold (2020), para.4-537; *R v Newton* (1983) 77 Cr App R 13*; R v Underwood* [2004] EWCA Crim 2256.

12 See *R v Newton* (1983) 77 Cr App R 13.

13 Detailed guidance is set out in *R v Underwood* [2004] EWCA Crim 2256; [2005] 1 Cr App R 13. However, the Attorney General's guidance states that "the basis of a guilty plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests". See Attorney General's Office, *The Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2012), available at https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercisecthe-basis-of-plea.

14 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp 162 to 166. Sentencing guidance specifies that where a defendant has pleaded guilty to an offence, but the defendant's version of events is rejected at a Newton hearing (for example, if the defendant's argument that they had not demonstrated hostility based on the victim's sexual orientation is rejected), sentencing guidance states that the applicable reduction for the guilty plea should normally be halved. See Sentencing Council, "Reduction in Sentence for Guilty Plea – definitive guideline" (1 June 2017) p 7, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf.

17.17 In the 2019 case of *DPP v Giles*, Hickingbottom LJ affirmed the importance of holding such hearings in cases where the aggravation is disputed by the defence:[15]

> It is in theory open to a court to determine that a case presented by the prosecution as aggravated by virtue of section 146, which is disputed by the defence, does not require a Newton hearing, where it is of the opinion that the existence of the aggravating factor would not make a material (rather than "significant") difference to the sentence. However, where the evidence is such that it leaves open a finding that homophobic circumstances (or other circumstances set out in section 146) may be made out (and thus the statutory aggravation for sentencing purposes must be applied), it is difficult to conceive of circumstances which, in practice, the aggravation will be necessarily immaterial such that a Newton hearing to find the facts will not be required. Certainly, if such circumstances exist, they will be very rare in practice. In any event, for the reasons I have given, even if such a case were to arise, the court may be required to hold a hearing to ascertain whether section 146 circumstances were present at the time of the offence, so that a statement under section 146(3)(b) can be given in open court.

The approach to sentencing under sections 145 and 146

17.18 The level of increase in sentence where hostility is proved will depend on the circumstances of the case. The Magistrates' Court Sentencing Guidelines[16] suggest that the approach adopted by the Court of Appeal in *Kelly*, partially endorsing the Sentencing Advisory Panel's guidance on racially aggravated offences,[17] also applies for the purposes of sections 145 and 146 of the CJA.

17.19 The court should first decide on the appropriate sentence without the hostility aggravation, but including any other aggravating or mitigating features. The sentence should then be enhanced to take account of the aggravation, and the judge should say publicly what the appropriate sentence would have been without the aggravation.

17.20 The key exception to this approach are cases in which the aggravating feature of the offence is so inherent and integral to the offence itself that it is not possible sensibly to assess the overall criminality involved in such a discrete way. For example, in some public order cases, racially or homophobically charged abusive statements might amount to the entirety of the conduct, such that it would be almost impossible to assess the criminality separately from their hostile content. In such cases, the Court must assess the seriousness of the conduct involved and its criminality as a whole.[18]

17.21 Following *Kelly* and the Sentencing Council Guidance, the extent to which the sentence is increased under sections 145 and 146 will depend on the seriousness of the

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15 *DPP v Giles* [2019] EWHC 2015 (Admin) at [24].

16 Sentencing Council, *Magistrates' Court Sentencing Guidelines, Hate Crime: Approach to Sentencing* (2020), available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/hate-crime/3-approach-to-sentencing/.

17 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73. The guidance related to the aggravated offences and also to the Crime and Disorder Act 1998, s 82 (which provided for racial aggravation to increase sentence for offences other than the aggravated offences, and was repealed and re-enacted in the Criminal Justice Act 2003, s 145).

18 *R v Fitzgerald* [2003] EWCA Crim 2875.

aggravation, to which in turn the offender's intention and the impact of the conduct are relevant.[19]

17.22 With regard to the offender's intention, factors increasing aggravation include: that the hostility element was planned; the offence was part of a pattern of offending; the offender was a member of, or associated with, a group promoting hostility based on the protected characteristic in question; or the incident was deliberately set up to be offensive or humiliating to the victim or to the group of which the victim is a member.[20]

17.23 With regard to the impact of the conduct, factors indicating a high level of aggravation include: that the offence was committed in the victim's home; the victim was providing a service to the public; the timing or location of the offence was calculated to maximise the harm or distress it caused; the expressions of hostility were repeated or prolonged; the offence caused fear and distress throughout a local community or more widely;[21] or the offence caused particular distress to the victim and/or the victim's family.[22]

17.24 The aggravation may be regarded as less serious if: the hostility element was limited in scope or duration; the offence was not motivated by hostility; or the element of hostility or abuse was minor or incidental.[23]

17.25 Where a defendant has pleaded guilty to an offence, but the defendant's version of events is rejected at a Newton hearing (for example, if the defendant's argument that they had not demonstrated hostility based on the victim's sexual orientation is rejected), sentencing guidance states that the applicable reduction for the guilty plea should normally be halved.[24]

Key differences with aggravated offences

17.26 In sum, the key differences between enhanced sentencing and the aggravated offences regime under the CDA 1998 are that:

(1) The CDA 1998 applies only to the characteristics of race and religion, whereas the CJA 2003 applies to race, religion, sexual orientation, disability and transgender identity.

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19 Sentencing Council, *Magistrates' Court Sentencing Guidelines, Hate Crime: Approach to Sentencing* (2020), available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/hate-crime/3-approach-to-sentencing/.

20 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. See also *Re A-G's Reference* (No 92 of 2003) [2004] EWCA Crim 924, The Times 21 Apr 2004 at [17] and following.

21 See also *Saunders* [2000] 1 Cr App R 458, 2 Cr App R (S) 71 at [18]: "the same offensive remark is likely to attract a heavier penalty if uttered in a crowded church, mosque or synagogue than if uttered in an empty public house" by Rose LJ.

22 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. Many of these factors are set out in the earlier Court of Appeal decision in *Saunders* [2000] 1 Cr App R 458 at [18].

23 *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [66].

24 Sentencing Council, *Reduction in Sentence for Guilty Plea – definitive guideline* (1 June 2017) p 7, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf.

(2) The CDA 1998 increases the maximum penalty for each of the offences if aggravated, allowing for a higher sentence, whereas the CJA 2003 requires a sentencer to increase the sentence within the existing maximum for the base offence.

(3) Under the CDA 1998, the aggravation is an element of the offence, and will be assessed by the trier of fact at the liability stage, whereas under the CJA 2003 the hostility element will be determined by the sentencer at the sentencing stage.

(4) Under the CDA 1998, the aggravation will appear on an offender's criminal record as it will be a recorded particular of the offence that it was racially or religiously aggravated. While the court is obliged to state aggravation under the CJA 2003 in open court, it will not appear on the offender's criminal record.[25]

17.27 As noted, in cases of aggravation under section 146 (sexual orientation, disability and transgender status) "association with members of that group" is not expressly included.

Sentence enhancement for assaults on emergency workers

17.28 A similar approach to enhanced sentencing has recently been enacted in relation to assaults on "emergency workers".[26] This serves a somewhat different policy purpose: the protection of emergency workers while carrying out a vital public function.

17.29 Section 2 of the Assaults on Emergency Workers (Offences) Act 2018 provides that for a range of specified offences,[27] where the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court:

- must treat this an aggravating sentencing factor; and
- must state in open court that the offence is so aggravated.[28]

17.30 In this latter sense, the provision operates rather similarly to sections 145 and 146 of the Criminal Justice Act 2003. However, there are two key distinctions:

- enhancement only applies in relation to specified offences, rather than all criminal offences (similarly to the aggravated offences regime); and
- the enhancement is applied if the emergency worker was acting in the exercise of functions as such a worker at the time of the offending. There is no further requirement to prove "hostility" or any other form of targeting of the worker by the defendant.

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25 However, note further paragraphs 17.112 to 17.118 below.

26 Defined in section 3 of that Act to include police, prison officers and a range of law enforcement roles, fire services, search and rescue services and various health services (both paid and unpaid).

27 Defined in s 2(3) as: Offences against the Person Act 1861, ss 16 (threats to kill); 18 (wounding with intent to cause grievous bodily harm); 20 (malicious wounding); 23 (administering poison etc); 28 (causing bodily injury by gunpowder etc); 29 (using explosive substances etc with intent to cause grievous bodily harm); 47 (assault occasioning actual bodily harm); Sexual Offences Act 2003 s 3 (sexual assault); manslaughter; kidnapping; and ancillary offences in relation to any of the preceding offences.

28 Assaults on Emergency Workers (Offences) Act 2018, s 2(2).

17.31 The aggravation is therefore both narrower (in terms of its limitation to specified offences) and broader (through application to all such offending, without further qualification) reflecting its more targeted purpose of deterring and punishing assaults on emergency workers that occur in the course of their duty.

17.32 The Assaults on Emergency Workers (Offences) Act 2018 also increases the maximum penalty available in cases where a common assault or battery is committed against an emergency worker acting in the exercise of the functions of such a worker, from 6 to 12 months' imprisonment.[29] The offence also becomes an "either-way offence", which means it can be heard in either the magistrates' court or the Crown Court. In some ways this provision functions somewhat like an aggravated offence. Indeed, since its enactment, the CPS has had to consider the most appropriate course in cases where an emergency worker has been assaulted in circumstances that have also involved racial hostility. An important consideration would likely be that the maximum penalty for racially aggravated assault is twice as long. The government has recently launched a consultation on doubling the maximum penalty for assaulting an emergency worker to two years,[30] which would align it with that applicable to racially and religiously aggravated assaults.

STATISTICAL CONTEXT

17.33 The CPS hate crime data for 2018-2019 breaks down the total number of hate crime prosecutions by characteristic group as follows:

Characteristic	Prosecutions	Convictions
Race	9,931	8,416
Religion	605	507
Sexual orientation	1,624	1,409
Disability	579	419
Transgender	89	66
Total	12,828	10,817

17.34 For race and religion, prosecutions and convictions for both aggravated offences and enhanced sentencing are included.

17.35 This table shows that aggravations based on race remain by far the most prevalent, though several criminal justice professionals have advised us that the distinction

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29 Assaults on Emergency Workers (Offences) Act 2018, s 1.

30 See Ministry of Justice, *Consultation launched on doubling maximum sentence for assaulting an emergency worker* (13 July 2020), available at https://www.gov.uk/government/news/consultation-launched-on-doubling-maximum-sentence-for-assaulting-an-emergency-worker.

between racial and religious hate crime is not always clear, and incorrect recording is not uncommon.[31]

17.36 In Chapter 16 we outlined the conviction numbers for racially and religiously aggravated offences, which totalled 5,264 in 2018. This time period does not correspond exactly with 2018-19 period outlined above, but if these figures are compared it suggests that roughly 60% of prosecutions in relation to these two characteristics (and 50% of all hate crime prosecutions) are for aggravated offences, with enhanced sentencing accounting for the remaining 40% of racially and religiously based hate crime prosecutions (and the other 50% of all hate crime prosecutions).

EVALUATING ENHANCED SENTENCING

17.37 Enhanced sentencing is the most common approach adopted in hate crime laws in comparable jurisdictions, far more so than the approach of aggravated offences in England and Wales that we considered in the previous chapter. Yet it was clear in our initial consultations – particularly amongst disabled and LGBT groups – that within England and Wales enhanced sentencing is seen as a less powerful and less effective approach to tackling hate crime compared with aggravated offences.

17.38 As already noted, the CJA 2003 provisions do not increase the maximum penalty available for the offence, and therefore at least theoretically may result in lower penalties than might be the case if the conduct could be pursued as an aggravated offence. Aggravated offences are seen to have both an important symbolic effect, in that the conduct is labelled as a more serious offence, and as having the practical potential to increase the sentence above the previously available maximum. As noted in the previous chapter, these maximum increases can be very significant – with the maximum penalties for common assault and several harassment and stalking offences quadrupling from 6 months to 2 years.

17.39 Sussex University academics have argued that the practical effect of the higher maximum may not be as significant as first appears, as it is uncommon for sentences for aggravated offences to exceed the maximum available for the base offence.[32] As we noted in the previous chapter, Ministry of Justice statistics suggest that it does happen, but it is uncommon.[33]

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31 Her Majesty's Inspectorate of Constabulary and Fire Rescue Services, *Understanding the difference: The initial police response to hate crime* (July 2018) p 57, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf

32 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp 63 and 200.

33 In the previous chapter we noted that 2018 Ministry of Justice statistics show that:

- 19 racially or religiously aggravated common assault convictions resulted in sentences of more than the base maximum of 6 months (854 convictions were recorded in that year);
- 29 racially or religiously aggravated intentional harassment, alarm or distress convictions (contrary to s 4A PHA) resulted in sentences of more than the base maximum of 6 months (2580 convictions were recorded in that year); and

17.40 Arguably just as significant – particularly from the perspective of many victims – is that where the base offence is prosecuted and the sentence enhanced under the CJA 2003, the conviction is not labelled in a formal sense as a hate crime. It therefore does not carry the same symbolic and denunciatory impact as an aggravated version of the offence. This also has implications for how the conviction appears on the offender's criminal record – an issue we discuss further at paragraphs 17.112 to 17.118.

17.41 The combined effect of both of these factors is that groups who are protected by enhanced sentencing alone (LGBT and disabled victims) feel that the harm they experience is treated as lesser. This contributes to a perception that they are second class citizens in the eyes of the law, damaging trust and confidence in the criminal justice system.

17.42 Another more practical concern regarding enhanced sentencing under the CJA 2003, is that by not requiring proof of hostility as an element of the offence, police and prosecutors may be less motivated to gather the necessary evidence, and build the case around the hostility aspect of the offending. Victims and support organisations told us that as a result, evidence of hostility can either be neglected altogether, or presented as somewhat of an afterthought, rather than as a central part of the case.

17.43 For common summary-only offences, such as assault and internationally causing harassment alarm or distress contrary to section 4A of the Public Order Act 1986, victim support groups such as Galop also advised us that in cases with which they had assisted, the police did not always act expeditiously, resulting in expiry of the 6-month time limit to bring proceedings (which applies across all summary prosecutions).[34] This meant that a charge for the summary only offence could not be brought. Part of the confusion in these cases may have arisen from an erroneous belief on the part of law enforcement agencies that as the conduct was hate-related, the matter would be pursued in the Crown Courts in the same way as most racially or religiously aggravated offences, which, as indictable offences, do not have a fixed time limit within which proceedings must be brought.[35]

17.44 There has also been criticism of prosecutors in recent years for failing to apply for sentence enhancements under section 145 and 146. However, an increasing focus by the CPS on this issue has meant that the proportion of hate crime flagged cases resulting in a conviction with an announced and recorded sentence uplift was 73.6% in 2018-19, the highest ever level, and a 6.5% increase on the previous year.[36]

17.45 Some prosecutors also expressed concern that judges were sometimes reluctant to make a positive finding of hostility under sections 145 or 146, preferring to consider these and other circumstances as part of their general sentencing discretion in relation

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- 1 conviction for racially or religiously aggravated malicious wounding or causing grievous bodily harm (contrary to s 20 OAPA) resulted in a sentence in excess of the 5-year maximum available for the base offence (11 convictions were recorded in that year).

34 Magistrates' Court Act 1980, s 127 and Criminal Justice Act 2003, s 30.

35 Magistrates' Court Act, 1980 s 127(2).

36 Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) p 8.

to aggravating factors.[37] However, judges we spoke to did not consider this criticism to be well-founded.

17.46 Defence lawyers were concerned that under the enhanced sentencing provisions, an important factual finding is made by the judge, rather than by a jury.[38] This is not out of line with sentencing practice more generally; sentencing judges in the Crown Court inevitably make their own findings on the factual basis for sentences that have not been directly determined by the jury – for example, a judge may decide that the vulnerability of a particular victim of crime is an aggravating factor for the purposes of sentencing, when proof of such is not a necessary component of the offence. It is also worth noting that a significant proportion of offending involving section 145 or 146 uplifts is dealt with summarily before a district judge or a bench of lay magistrates who decide on both conviction and sentence.

REFORM OPTIONS

17.47 In considering options for reform, we have been conscious that many perceive enhanced sentencing to be inferior to aggravated offences.

17.48 However, this perspective is also heavily influenced by the inconsistency between the way in which the law at present elevates the treatment of racial and religious hate crime in the form of aggravated offences. If this were to be equalised across all protected characteristics in the manner proposed in the previous chapter, our provisional view is that the enhanced sentencing provisions should be retained in parallel. This is because they provide a flexibility and breadth that would be much more difficult to achieve with aggravated offences alone.

17.49 In summary we consider that enhanced sentencing retains an important function because:

- It can be applied to all existing offences, whereas aggravated offences, with increased maximum penalties, require the creation of discrete separate offences, which is impractical across the wide range of existing criminal offences.
- In the absence of an increased maximum penalty, it is not clear that it is proportionate to require the proof of the aggravation before a jury, district judge or bench of lay magistrates as a distinct element of the offence (however, views on this question vary).
- Enhanced sentencing can better reflect multiple, intersectional forms of hostility than aggravated offences, without requiring separate charges and separate jury determinations in respect of each characteristic.

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[37] Though the Sussex University report found that there was a perception that they were less reluctant to do so than juries. See Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp 122 to 125.

[38] This view was also expressed by researchers in the Sussex University Options for Law Reform Report. See Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 192.

17.50 The flexibility of enhanced sentencing also provides greater scope to consider a wider, more open category of characteristics which could be protected – an option we consider further at paragraphs 17.79 to 17.105.

17.51 We explore the merits and criticisms of enhanced sentencing in further detail below, including those aspects of the current legal approach that we provisionally consider should be retained, and those we consider should be reformed.

17.52 To summarise, we currently consider that the following aspects should be retained:

- The availability of enhanced sentencing across all criminal offences (though we consider strengthening the prohibition on utilising enhanced sentencing where an aggravated offence could be prosecuted).
- The enhancement should be determined at the sentencing stage.
- The enhancement should require the judge to increase the sentence and for this to be announced in open court.

17.53 We then outline options for aspects of enhanced sentencing that we consider could be reformed, specifically:

- Potentially widening the availability of enhanced sentencing beyond the current five characteristics, and the creation of a more open test to allow for recognition of other groups.
- Prohibiting the use of enhanced sentencing where an aggravated offence is available.

17.54 In each section that follows, we outline the basis on which we have reached each of these provisional positions, and ask questions for consultees to consider.

17.55 We also note our view that the enhancement of the sentence should appear on the offender's criminal record. However, as steps to implement this change are already underway at the time of writing we make no provisional proposal to do so.

Elements of enhanced sentencing that we provisionally consider should be retained

Application to all criminal offences

17.56 There are currently thousands of discrete criminal offences in England and Wales. While it is possible to create separate aggravated versions of more of these offences (an option we consider further in Chapter 16), to do so across the entire statute book would be unrealistic and unfocused. It would require the specification of thousands of additional maximum sentences and unduly complicate an already complex array of criminal offences. It would also, in effect, at least double the number of criminal offences in England and Wales (though it would not criminalise any conduct that was not already a criminal offence). Such a problem does not arise in respect of enhanced sentencing, which can be applied to any existing criminal offence without the need for the creation of a new and separate version of that offence.

17.57 Our Chapter 16 proposal to adopt a consistent approach to the aggravated offences regime across all characteristics is complementary to the retention of enhanced sentencing. Selection of any further offences for aggravation would rely on distinct criteria, which we outline in that chapter.

17.58 Enhanced sentencing therefore has a much wider potential application than aggravated offences – applying to all criminal offences without the need for the specification of a new offence and sentence. Even if a very expansive approach to aggravated offences were to be taken, with hundreds of aggravated criminal offences created, ending the availability of enhanced sentencing would still risk creating gaps, and remove potential enhancements that currently exist. We do not consider this a desirable outcome, as it may mean that the hate element of certain forms of offending is not properly recognised.

17.59 We acknowledge, however, that the co-existence of two parallel forms of recognising hate crime creates overlap and confusion in practice. At paragraphs 17.106 to 17.111 we consider how these boundaries might be clarified, though this is not likely to resolve the concern entirely.

17.60 As we noted in the previous chapter, a different approach has been advocated by academics at Sussex University, who have developed a comprehensive set of options for law reform. Their report considers the relative merits of the aggravated offences and enhanced sentencing approaches to hate crime, and proposes a single, hybrid model adopting aspects of each.[39] The report proposes that the aggravated element should be proven as an element of the offence (consistent with aggravated offences), but should apply to all offences and operate within the existing maximum penalty for the offence (consistent with enhanced sentencing).[40]

17.61 We have presented the Sussex "hybrid" model as a viable alternative approach to reform of hate crime laws (see further Chapter 16 from paragraph 16.157). This approach has the clear advantage of simplicity compared with both the current law, and our proposal to retain and reform the dual system of aggravated offences and enhanced sentencing. However, our provisional view is that its disadvantages outweigh its advantages, principally because it involves removing the increased maximum penalties that are available for racially and religiously aggravated offences. We are concerned that many affected communities would perceive this as a backwards step (though it is very clearly not the intention of the Sussex proposals to reduce action to tackle racially or religiously aggravated hate crime – quite the opposite), and that greater simplicity and clarity may in this instance come at the cost of reducing the symbolic and practical efficacy of hate crime law. If racial and religious communities were to feel significantly less well protected as a result of our proposals, we would consider this to be a significant policy failure.

Aggravation determined at the sentencing stage

17.62 A key distinction between aggravated offences and enhanced sentencing is the stage at which the legal test is applied. As we have explained, aggravated offences under the

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39 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 200.

40 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 195.

CDA 1998 require proof of the hostility as an element of the offence – requiring the jury to determine based on the evidence presented whether the offence was motivated by or the offender demonstrated the requisite "hostility".[41] The prosecution will typically charge both the "base" offence, and the racially or religiously aggravated version, so if the jury finds that the base offence was committed, but there was no racial or religious aggravation, the offender will be convicted of the base offence instead.

17.63 Enhanced sentencing requires the prosecution to pursue the base offence only. The jury is only asked to consider whether the core elements of the offence (for example, the elements of common assault, or harassment) have been met. The question of whether the offence was motivated by or the offender demonstrated hostility towards the protected characteristic (race, religion, sexual orientation, transgender identity, or disability) is determined by the sentencer.

17.64 The prosecution will raise the hostility element with the magistrates or trial judge, and if the offender wishes to challenge the allegation that the sentence should be enhanced, the prosecution will have to prove the hostility element beyond a reasonable doubt – usually by way of a Newton hearing.[42]

17.65 As we noted in the previous chapter,[43] in addition to an increased maximum penalty, the aggravated offences model has the following advantages:

(1) It is fairer to defendants to require proof of the hostility element during the trial, put defendants on notice of the aggravation at an early stage, and give them the opportunity to challenge the allegation before a jury.[44]

(2) Aggravated offences carry the advantage of distinct labelling, and a recognition of the "hostility" as an integral element of the offence. We have heard that this also tends to influence the way in which police gather evidence and prosecutors present the case – with the "hostility" aggravation forming a central aspect of the case presentation.

17.66 It has also been suggested that members of the public may be more likely to acknowledge and accept a finding that a "hate crime" has occurred if this has been accepted by a jury.[45]

17.67 We also noted that the aggravated offences model has the following disadvantages:[46]

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41 Crime and Disorder Act 1998, s 28.

42 See paragraphs 17.14 to 17.17.

43 See Chapter 16, paragraph 16.23.

44 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 189.

45 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 191.

46 See Chapter 16, paragraph 16.24.

(1) It may lead to delay, a lengthier and more expensive trial and create disproportionate barriers to the court recognising the additional harm and wrongdoing of the offending at sentence.

(2) Some juries may be reluctant to find that crimes are racially or religiously aggravated.[47] This may be particularly so in "demonstration of hostility" cases, where the offending conduct is said to have occurred in the "in the heat of the moment".[48]

(3) Defendants may be less likely to plead guilty to charges containing an aggravated version of the offence when they would have been willing to plead guilty to the base offence. CPS policy is not to accept pleas to lesser offences in hate crime cases for the sake of expediency.[49]

(4) For prosecutors, it is simpler to seek hostility aggravation at the sentencing stage. They only need to charge the base offence (rather than two separate offences).

17.68 While cogent arguments have been made for the adoption of a single model of proof, and there are certainly advantages to including the aggravation as an element of the offence, we are reluctant to remove the ability to reflect hate crime at the sentencing stage.

17.69 In the previous chapter we proposed the expansion of aggravated offences to a wider range of characteristics and offences. If these recommendations were implemented, aggravated offences would likely form the primary mechanism by which hate crime is recognised. They would apply to all the protected characteristics and the offences most prevalent in the case of hate crime.

17.70 However, we currently consider there remains an important role for enhanced sentencing through statutory aggravating factors, to allow for more flexible application in other circumstances, including future developments in understandings and manifestations of hate crime. In the absence of an increased maximum penalty, we also remain unpersuaded that the requirement of proof of hostility as an element of the offence is proportionate, both due to the procedural difficulties this creates, and the inevitably greater cost involved.

17.71 Finally, if the option we suggest below in relation to protecting a wider range of groups is adopted, we consider this would most appropriately be a matter for the sentencing stage. The more open approach to characteristic selection we propose would be less certain and final, and therefore less appropriate for the purposes of an aggravated

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47 Though we heard some criticism about the resistance of Judges and magistrates to apply hate crime provisions in our consultations, this appears to be less pronounced. Judges and magistrates tend to have a greater understanding of the purposes hate crime laws, and are less likely to resist the application of the enhanced sentencing provisions where they have been clearly demonstrated on the evidence presented, and therefore must be applied.

48 We consider the "demonstration" test in greater detail in Chapter 15.

49 Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (21 October 2019), available at https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.

offence. Additionally, proof before a jury could prove difficult in the case of relatively novel characteristics, which have not previously been defined in case law or statute.

Consultation Question 36.

17.72 We provisionally propose that the enhanced sentencing model remain a component of hate crime laws, as a complement to an expanded role for aggravated offences.

17.73 Do consultees agree?

Announcement in open court

17.74 The current law requires that, in relation to the finding of hostility, the sentencing court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.[50]

17.75 In previous years, inspectorate reports have found this not to be occurring routinely,[51] though there has been improvement recently.[52]

17.76 We consider this to be an appropriate and important component of recognising the additional harm suffered by the victim, and also wider members of their community. We therefore consider that this requirement should be retained.

Consultation Question 37.

17.77 We provisionally propose that sentencers should continue to be required to state the aggravation of the sentence in open court.

17.78 Do consultees agree?

A further option for reform: a broadened approach to protected characteristics

17.79 Enhanced sentencing already protects a wider range of characteristics than aggravated offences – applying to sexual orientation, disability and transgender identity, in addition to race and religion. In Chapter 16 we outlined our proposals and rationale for extending the scope of aggravated offences to cover all five of these characteristics, and also any other characteristics that are included following further consultation on the options presented in Chapters 12 (sex/gender), 13 (age) and 14 (sex workers, people

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50 See Criminal Justice Act 2003, ss 145(2), 146(3).

51 HMIC, HMCPSI, HMP, *Living in a Different World: Joint Review of Disability Hate Crime* (2013) p 36, available at https://www.justiceinspectorates.gov.uk/hmicfrs/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf.

52 Crown Prosecution Service, *Hate Crime Annual Report 2018-19* (2019) p 8.

experiencing homelessness, alternative subcultures and philosophical beliefs). This would align the two legal approaches in terms of characteristic protection.

17.80 In Chapter 10 we consider the underlying principles which might be used to determine the inclusion of certain characteristics, and propose three to guide selection:

(1) Demonstrable need: based on evidence of the prevalence of criminal targeting of the characteristic group.

(2) Additional harm: there is evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

(3) Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others.

17.81 In Chapter 11 we suggested that all five of the current characteristics were appropriate for inclusion on the basis of these three criteria, and seek further stakeholder input in relation to other possible characteristics in the three chapters that follow.

17.82 The selection criteria we propose are relatively stringent. We believe this is necessary given the significant implications of inclusion of a characteristic in hate crime laws – for victims, for defendants, for the criminal justice system, and for society as a whole. As a result, we anticipate that not all of the groups we consider in Chapters 12 to 14 will necessarily be included under the aggravated offences regime.

17.83 However, in the context of enhanced sentencing, there may be some scope for a somewhat more flexible approach to characteristic selection. There are two main reasons for this.

17.84 First, while it may be that the evidence for inclusion of some characteristic groups is stronger than others, it was clear from our initial meetings and from the available academic research that additional harm is caused to all these groups as a result of hostile or prejudicial targeting. Inclusion of a wider array of characteristics would allow the law to recognise this additional harm, and for law enforcement agencies to take further action to prevent the behaviour, and provide appropriate support for victims.

17.85 Second, while we consider that a fixed and definite list of characteristics is necessary for specified aggravated offences to ensure the finality and certainty of the criminal law,[53] this concern is less acute at the sentencing stage. There is greater scope for flexibility and judicial interpretation through enhanced sentencing, and this also allows the prospect of "future proofing" the law to some degree – as new social groups and

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53 In particular, the requirements of Article 7 of the European Convention in Human Rights, which prohibits punishment without law. See further *Sunday Times v UK* (No 1) (1979-80) 2 EHRR 245 at [49], in which the European Court of Human Rights considered the qualities necessary for something to be considered "prescribed by law" for the purposes of the Convention. In the case of *Kokkinakis v Greece* (1994) 17 EHRR 397 the Court held that "an offence must be clearly defined in law… [so] the individual can know from the wording of the relevant provision, and if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable" – at [52].

characteristics emerge. For example, social understandings of gender diversity have shifted markedly in recently years – gender diverse identifications such as "non-binary" had only limited prominence as recently as 2014 when the Law Commission last reported in relation to hate crime laws, yet are now far more widely accepted.

17.86 Below we therefore invite consultees to consider recognising a more open-ended range of characteristics for the purposes of enhanced sentencing.

17.87 Such an approach is open to criticism from opposite perspectives.

17.88 First, this approach replicates one of the core criticisms of the current law – it would inevitably create a new disparity in the way that different groups are protected. Groups that do not enjoy the same protections as those specified for the purposes of aggravated offences may understandably question this. Why should not all forms of characteristic-based hostility be treated the same way?

17.89 Second, a converse concern is one which some currently protected groups also expressed to us in our initial meetings; that an overly expansive approach risks diluting the impact and utility of hate crime laws. One aspect of this concern was pragmatic – the view that law enforcement agencies were already struggling to give effect to laws in respect of the existing characteristics, and this was likely to worsen if the scope of protection were to be expanded. The statistics we outlined in Chapter 5 showing lower police referral and prosecution rates in recent years, despite higher reporting levels, would tend to reinforce this concern.[54] Under this view, crimes targeted at other groups could be adequately dealt with within the existing criminal law, specifically through the exercise of sentencing discretion. This was, for example, the approach the courts took in the case of the murder of Sophie Lancaster. In this case, the Court of Appeal endorsed the trial judge's finding that the fact that the victims were "singled out for their appearance alone" was a "serious aggravating factor" for the purpose of sentencing.[55] Yet, while it is true that sentencing considerations provide scope for sentencers to take these matters into account, formalising the requirement in statute makes it more likely that this will be done consistently, and that victims will receive appropriate recognition in sentencing remarks. It also provides a more solid foundation for police and prosecutors to begin recording other forms of hate crime, so that the scale of the problem can be better understood and responses more appropriately tailored.

17.90 There are also significant practical concerns about a more open-ended approach. Most notably, how could this be drafted in a sufficiently clear and certain way?

17.91 The options that we consider most viable are the use of a "residual category", a set of criteria for a judge to determine, or a combination of both. However, it is not clear that either is a desirable policy course, and we therefore seek further stakeholder input into this difficult question.

17.92 As an alternative to statutory aggravation, we also consider the role for more explicit sentencing guidance in relation to characteristic-based hostility.

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54 See Chapter 5, paragraph 5.30.

55 See *R v Herbert* [2008] EWCA Crim 2501, [20] and [23].

A residual category

17.93 Canada, New Zealand and New South Wales include a "residual category" in their lists of protected characteristics.

17.94 In Canada, a sentence may be increased on the basis of:

> evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, *or on any other similar factor.*[56]

17.95 In New Zealand, the relevant sentencing provision states that a sentence may be aggravated on the basis that:

> the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic *such as* race, colour, nationality, religion, gender identity, sexual orientation, age, or disability…[57]

17.96 In New South Wales, it is an aggravating factor in sentencing that:

> the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (*such as* people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).[58]

17.97 The New South Wales provision has been interpreted to include "paedophilia",[59] which has led to criticism. The New South Wales Law Reform Commission has recommended that fixed categories, rather than a residual approach should be adopted.[60]

17.98 Though we share the concerns of the New South Wales Law Reform Commission in relation to recognising characteristics such as paedophilia, we can see the advantage of the Court having the discretion to recognise additional, non-specified characteristics. However, the New South Wales and Canadian provisions provide very little further guidance to courts, other than by analogy with the specified groups.

17.99 In New Zealand, some further limitation is provided through the specification that the group of persons "have an enduring common characteristic". This might rule out more changeable and circumstantial characteristics such as homelessness.

A set of criteria

17.100 Legislation could also set out criteria by which a court may recognise targeting of a characteristic as a hate crime. In particular, the court might be asked to consider

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56 Criminal Code (R.S.C., 1985, c. C-46), s 718.2(a)(i) (emphasis added).

57 Sentencing Act 2002 (NZ), s 9(1)(h) (emphasis added).

58 Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h) (emphasis added).

59 *R v Robinson* [2004] NSWSC 465 (Supreme Court of NSW); *Dunn v The Queen* [2007] NSWCCA 312 (Court of Criminal Appeal of NSW).

60 New South Wales Law Reform Commission, Sentencing (Report 139, 2013) para 4.186.

whether additional harm was caused to the victim as a result of hostility towards a characteristic of the victim. As a component of this assessment, it might further consider the elements we highlighted as key to this assessment in Chapter 10: whether the characteristic was core to the identity of the victim, and whether the characteristic group is one which faces systemic disadvantage in society. For these purposes, wider evidence of the prevalence of targeting of the characteristic, and secondary harms to the characteristic group, might be less important, because the implications would not necessarily extend beyond the particular case.

Recognise additional characteristics in sentencing guidelines

17.101 Another option would be to recognise other forms of characteristic-based hostility in sentencing guidelines. This approach was proposed in a discussion paper annexed to the Sussex Report.[61] The paper argued that sentencing guidelines may provide a practical and flexible means by which the court could recognise characteristics such as membership of a subcultural group or homelessness – and other forms of hostility which may not be sufficiently prevalent to warrant specification in law, but have significant impacts in individual cases.[62]

17.102 A limitation of such an approach is that it provides significant lesser recognition to the individual, and the affected community, than would be achieved through statutory enhanced sentencing. As the authors note, the age and sex of the victim are among characteristics already specified in some sentencing guidelines,[63] but this has not led to widespread adoption of consistent, measurable aggravations in response to these characteristics.

17.103 Further, in discussions with the Sentencing Council they expressed reservations about this task being left to them as a non-elected body, and suggested that it might be more appropriate for Parliament to set the parameters of any further characteristic recognition in legislation.

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61 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) Annex A.

62 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 211.

63 Walters, Wiedlitzka, Owusu Bempah and Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) p 211.

Consultation Question 38.

17.104 We invite consultees' views on whether a more flexible approach to characteristic protection would be appropriate for the purposes of enhanced sentencing.

17.105 Further, we invite consultees' views on whether this might be best achieved by:

- a residual category;
- a set of criteria for judges to consider;
- sentencing guidance; or
- a combination of approaches.

Proposal for reform: interaction between aggravated offences and enhanced sentencing

17.106 The interaction between aggravated offences and enhanced sentencing is understandably not clear to many working in the criminal justice system, let alone the public more widely.

17.107 Part of this confusion arises from the fact that there are two separate, but overlapping legal mechanisms for increasing sentences in circumstances of hate crime. This is exacerbated by the differential treatment of different characteristics under these regimes, which many find difficult to understand. Finally, the inclusion of some offences and not others in the context of aggravated offences is a source of further complexity and confusion.

17.108 Our proposals will retain some of this complexity: the two legal mechanisms will continue to operate concurrently, and some offences will be specified as aggravated offences while others will not. If the option of greater flexibility for characteristic recognition for the purposes of enhanced sentencing is adopted, this may also result in some characteristics only being protected by enhanced sentencing (and not aggravated offences) – replicating the inconsistency concerns in the current law.

17.109 To provide greater certainty, and fairness to the defendant, we consider it should be clear that a judge may not impose an enhanced sentence where an aggravated offence is available in relation to the targeted characteristic, but has either not been pursued by the prosecution, or has failed. This would represent a change from the current legal position set out in *R v O'Leary*, which leaves open the possibility that a court will apply the enhanced sentencing provisions where an aggravated offence has not been prosecuted.[64]

64 See *R v O'Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11.

Consultation Question 39.

17.110 We provisionally propose that, contrary to the more flexible approach set out in *R v O'Leary*, a court should not be permitted to apply an enhanced sentence to a base offence, where an aggravated version of that offence could have been pursued in respect of the specified characteristic.

17.111 Do consultees agree?

Appearance on criminal record

17.112 When a sentence is enhanced under CJA 2003 section 145 or 146, this is not automatically recorded on the Police National Computer ("PNC") and therefore does not usually appear on the offender's criminal record.

17.113 The Police National Computer (PNC) is a national database of information available to police and law enforcement agencies. It holds important general information such as license and vehicle registration details, and information of people who are, or have been, of interest to UK law enforcement agencies. This includes details of people with firearms certificates, who are disqualified from driving, are wanted or missing, who are subject to certain court orders, and who have convictions for certain offences.

17.114 The Police and Criminal Evidence Act 1984 grants a power to record individuals' convictions.[65] The relevant regulations specify that the recordable offences are any imprisonable offence, together with various other non-imprisonable offences.[66] Most offences that are commonly associated with hate crime are either imprisonable or included in the list, and thus the application of enhanced sentencing could be recorded in respect of them.[67] For example, the offence of causing harassment, alarm or distress contrary to section 5 of the Public Order Act 1986 and the offence of indecent or racialist chanting contrary to section 3 of the Football (Offences) Act 1991 are both specified. However, as we noted in our 2014 Report, the recordable offences do not include every possible offence that may be committed in the context of hostility towards a protected characteristic.

17.115 The recording of all information on the PNC is subject to the PNC Code of Practice ("the PNC Code"),[68] which contains general principles and standards relating to quality of data and timeliness of inputs.[69] The PNC Manual, issued subject to the Code, sets

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65 Police and Criminal Evidence Act 1984, s 27.

66 National Police Records (Recordable Offences) Regulations 2000 (SI 2000 No 1139), reg 3 and Schedule 1.

67 Eg, Communications Act 2003, s 127 and Malicious Communications Act 1988, s 1 are both imprisonable; Public Order Act 1986, s 5 and Football (Offences) Act 1991, s 3 (indecent or racialist chanting) is in the Schedule.

68 A statutory code of practice issued under s 39A Police Act 1996.

69 PNC Manual, ch 12, section 23; PNC Data Definitions document (a Home Office/police document which lists for PNC users the available disposal and qualifier codes).

out more detailed instructions as to how information, including conviction information, is to be recorded.[70]

17.116 When a person has been convicted of an aggravated offence, that does appear on the PNC. By contrast, where a sentence is enhanced under sections 145 and 146 of the Criminal Justice Act 2003, the fact that an offender has received an enhanced sentence is not routinely entered on the offender's criminal record on the PNC. As a result, agencies across the criminal justice system have access to information on hate crime offending in relation to convictions for aggravated offences, but not convictions where a sentence has been enhanced for this reason. Several agencies might benefit from such information, including the police, courts, probation service and prison service. All of these rely on the PNC as a source of information about offenders' previous convictions and the sentences and other disposal orders made in relation to them.

17.117 We reiterate our 2014 recommendation that where the enhanced sentencing provisions are applied, this should always be recorded on the Police National Computer (PNC) and reflected on the offender's record. As we stated in 2014, the aims of this recommendation are to:[71]

- improve safeguarding for future potential victims;
- accurately label the wrongdoing;
- aid with detection, investigation, character evidence and sentencing;
- improve the effectiveness of rehabilitation and re-education; and
- create better data and improved inter-agency cooperation.

17.118 At the time of writing this Consultation Paper, we were advised that this recommendation was close to implementation, and we therefore do not ask any further questions of consultees in this regard.

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[70] Instructions on entering information relating to charges, court hearings and convictions is contained 12 of the latest edition of the Manual (March 2012).

[71] Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, paras 3.59 to 3.77.

Chapter 18: Stirring up offences

INTRODUCTION

18.1 The offences of stirring up racial and religious hatred and hatred on the grounds of sexual orientation are found in sections 17 to 29N of the Public Order Act 1986 ("POA 1986"), alongside laws relating to riot, affray, harassment and public assemblies and processions. This largely reflects their historical evolution from legislation targeting fascist activities in the 1930s – primarily meetings, marches and assemblies. Nonetheless, since 1986, it has been possible to commit the offences in private,[1] and many cases of stirring up now take place online.

18.2 These offences are different from both the aggravated offences and the enhanced sentencing regimes discussed in Chapters 16 and 17. The previous chapters discussed how those regimes treat an existing offence differently where there is hostility on account of a protected characteristic. The stirring up offences, in contrast, are freestanding offences: there is no general offence of stirring up hatred (although, as discussed below, the common law offence of sedition, only abolished in 2009, did include activities intended to stir up disaffection between groups).

18.3 Likewise, while the stirring up offences have a resemblance to the offence of inciting or encouraging an offence[2] (and indeed between 1965 and 1986 the offence was one of "inciting" racial hatred) they can be distinguished in that whereas the encouragement offences apply to the incitement of behaviour which is itself criminal, the stirring up offences criminalise the incitement of something (racial hatred or hatred on grounds of religion or sexual orientation) which is not itself criminal (and which would rightly be considered a thought crime if it were).

18.4 The stirring up offences rather concern the use of words or behaviour, or the dissemination or possession (with a view to dissemination) of material which is intended to stir up racial hatred or hatred on grounds of religion or sexual orientation, or likely to stir up racial hatred.

18.5 The offences in section 23 and 29G of the POA 1986 refer to such material as "inflammatory material" and we adopt this terminology, which we believe rightly reflects the harm involved: it is not that the material is offensive (though it may be); the rationale for criminalisation is that the material is likely to provoke angry or violent feelings.

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1 Subject to an exclusion where the prohibited behaviour takes place in a dwelling: Public Order Act 1986, ss 18(2) to (4). See paragraphs 18.250 to 18.255.

2 Offences relating to the encouragement of crime are dealt with in the Serious Crime Act 2007, sections 44 to 46, which replaces the common law offence of incitement in respect of offences after 1 October 2008.

Separate legislation deals with offensive material[3] and this is the subject of a separate Law Commission review.[4]

DEVELOPMENT

18.6 Although the offence of inciting (later "stirring up") racial hatred was only created in 1965, its origins lie in the earlier common law offence of sedition and the 1936 Public Order Act.

18.7 Until its abolition in the Coroners and Justice Act 2009,[5] the common law offence of sedition included promoting hostility between different classes of His Majesty's subjects.[6] Thus a paper falsely accusing a group of Portuguese Jews of killing a woman and child because the child's father was Christian amounted to sedition.[7] In a 1983 case,[8] the Court of Appeal, upholding a sentence for inciting racial hatred, held that the conduct was "also contrary to the common law of England because it amounts to sedition, in the sense that it arouses hatred against one section of Her Majesty's subjects, which has always been an offence in this country". However, case law suggested that the offence must involve a tendency[9] or even an intention[10] to incite violence or public disturbance or disorder.[11]

18.8 In 1936, in the context of rising activity by British fascists (the "Battle of Cable Street" having happened a few weeks earlier), the Government introduced the Public Order Act, which prohibited quasi-military organisations and the wearing of uniforms in connection with political objects, granted police additional powers to control processions, and created an offence of "offensive conduct conducive to breaches of the peace".

18.9 This last measure was based on an existing local provision under the Metropolitan Police Act 1839. Its importance in relation to the later stirring up offences is that it introduced the requirement that "threatening, abusive or insulting" words or behaviour be used. We return to this issue at paragraph 18.178 and following.

18.10 The Race Relations Act 1965 introduced a new offence of incitement to racial hatred. It covered the use of threatening, abusive or insulting words or behaviour in a public place or at a public meeting, or the distribution of written matter that was threatening, abusive

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3 Malicious Communications Act 1988, s 1, and Communications Act 2003, s 127.

4 Harmful Online Communications: The Criminal Offences (2020) Law Com Consultation Paper 248. The consultation closes on 18 December 2020 and the Consultation Paper is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf.

5 Section 73(a).

6 Stephen's Digest of the Criminal Law, Art 114.

7 *R v Osborne* (1732) Kel. W. 230.

8 *R v Edwards* (1983) 5 Cr App R (S) 145.

9 *R v Osborne*, 25 Eng. Rep. 585 (1732).

10 *R v Gaunt*, 64 LQR 203 (1948).

11 See also the Canadian case of *Boucher v R* [1951] 2 DLR 369, pp 382 to 384.

or insulting. It required proof of intent to stir up hatred against a section of the public distinguished by colour, race, or ethnic or national origins.

18.11 The offence was amended in 1976. In his inquiry into the 1974 racial disturbances in Red Lion Square, which culminated in the death of a student, Sir Leslie (later Lord) Scarman described the existing legislation as:

> merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is useless to a policeman on the street.[12]

18.12 The Race Relations Act 1976 therefore replaced the offence in the 1965 Act with a new offence, section 5A of the Public Order Act 1936: the requirement for intention was replaced by a provision that the offence was committed if racial hatred was likely to be stirred up.[13]

18.13 The 1976 Act also amended the definition of racial hatred to include nationality and citizenship, reversing the House of Lords' ruling in *Ealing LBC v Race Relations Board*[14] that "national origins" did not encompass nationality.[15]

18.14 In 1986, when the Public Order Act was reformed, the offence was amended further. Whereas in 1976, the "likely to" test had been introduced in place of intentional hatred, the revised offence could be committed if the defendant intended to stir up hatred *or* hatred was likely to be stirred up. This was to address perceived difficulties where inflammatory material was shared with people "such as clergymen or Members of Parliament who might be thought unlikely to be incited to racial hatred", even though this was clearly the intention.[16] This distinction created two "limbs" to the racial offence. We discuss this important bifurcated approach at paragraphs 18.178 to 18.181. It forms the basis of our proposal for reform.

18.15 In addition, the requirement for the "words or behaviour" offence to take place in a public place was dropped (although an exception remained for activities inside a dwelling – see paragraphs 18.250 to 18.255).

18.16 Following the attacks of 11 September 2001, the Government tabled measures in the Anti-Terrorism, Crime and Security Bill to extend the racial hatred offences in sections 17 to 23 to cover religious hatred. This received criticism within Parliament, including from the Home Affairs Committee; and from Muslim groups, which, having lobbied for the extension, were troubled by its inclusion in a bill concerning terrorism. When the clauses extending the law in this way were removed by the House of Lords, the Government accepted the amendment.

18.17 A key issue for opponents was a fear that without a requirement for intent, and with the offence being capable of being committed using merely "insulting" words (which need

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12 Sir Leslie Scarman, The Red Lion Square Disorders of June 15 1974 (1974) Cmnd 5919.

13 Sir Leslie Scarman, The Red Lion Square Disorders of June 15 1974 (1974) Cmnd 5919.

14 *Ealing London Borough Council v Race Relations Board* (1972) AC 342.

15 Race Relations Act 1976, ss 3(1) and 70(2).

16 Home Office, *Review of Public Order Law* (1985) Cmnd 9510.

not be directed at a person), legitimate criticism of religions could be caught by the new offence.

18.18 A second attempt to extend the law failed in 2005. However, in 2006, the Government tabled a self-contained Racial and Religious Hatred Bill, having included the proposal in the 2005 Labour manifesto. The House of Lords did not block the legislation, but narrowed it to require intention to incite hatred and the use of threatening words or behaviour (not abusive or insulting). Despite Government opposition to the amendment, the House of Commons voted to accept it. The Lords also successfully inserted a "freedom of speech clause" (section 29J) which circumscribed the application of the offence.

18.19 In 2007, the Government brought forward proposals to outlaw stirring up hatred on grounds of sexual orientation. The mechanism adopted was to extend the narrow religious offences in sections 29A to 29G (rather than the racial offences in sections 18 to 23) to cover hatred on grounds of sexual orientation. Again, the House of Lords inserted an interpretative clause, section 29JA, to provide that the discussion or criticism of sexual practices or the urging of persons to refrain from such conduct did not, of itself, amount to threatening conduct or proof of intent to stir up hatred. In 2013, this was extended to cover discussion or criticism of same-sex marriage.

18.20 The result is that there are now two sets of offences:

(1) those relating to stirring up racial hatred, which involve:

(a) threatening, abusive or insulting words or material

(b) intended or likely to stir up racial hatred

(2) those relating to religious hatred or hatred on grounds of sexual orientation, which involve:

(a) threatening words or material

(b) intended to stir up hatred.

COMMON LAW AND INTERNATIONAL LAW CONSTRAINTS ON HATE SPEECH LAWS

18.21 The United Kingdom is party to several international agreements which impose requirements affecting how hate speech is dealt with. These include the European Convention on Human Rights (ECHR), the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the UN International Convention on Civil and Political Rights (ICCPR). In contrast, the International Covenant on all Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of Persons with Disabilities do not impose similar obligations on states in relation to hate speech.

18.22 However, it is important to recognise that the right to freedom of expression has an independent existence in Common Law.

Freedom of expression in Common Law

18.23 While freedom of expression may have long been recognised as an important facet of English law, its legal standing is less clear cut. In a 2009 speech, Lord Hoffmann, referring back to the late eighteenth century, said:

> Everyone in Europe agreed that in England was a free country; that there was, for example, freedom of speech although there was no law which expressly said so. To say that we enjoyed freedom of speech was a descriptive generalisation of particular English laws which limited the circumstances in which publications were actionable or the government could suppress them. It was these specific laws which gave people their rights.[17]

18.24 Barendt, likewise, has argued

> A right to free speech (or expression) was not generally recognized by the common law, unlike, for example, the rights to property and reputation, which are strongly protected, respectively, by the laws of trespass and libel… the courts in England, particularly in the last thirty years, have sometimes suggested that the common law did recognize freedom of speech, and have also held that the right could be invoked to shape the interpretation and development of both statutory and common law. But the freedom enjoyed no clear constitutional status; it was difficult to predict when courts would recognize it as important to the resolution of particular cases.[18]

18.25 As Barendt argues, in the past few decades, courts have become more explicit in recognising freedom of expression in common law. In *Attorney General v Guardian Newspapers*,[19] Lord Goff held that there was no difference in principle between the common law on freedom of expression and the European Convention on Human Rights:

> I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.

18.26 In *ex parte Simms*,[20] the House of Lords articulated a more positive right of freedom of expression.

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a

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17 Lord Hoffman, "The Universality of Human Rights", Judicial Studies Board Annual Lecture, 19 March 2009.

18 Eric Barendt, "Freedom of Expression in the United Kingdom after the Human Rights Act 1998" (2009) 84 *Indiana Law Journal*, 866.

19 (1990) 1 AC 109. Lord Goff's position was endorsed by the whole House in *Derbyshire CC v Times Newspapers* [1993] HL18.

20 *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 WLR 328.

number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market."…Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

18.27 In a number of cases the domestic courts have, in applying the common law, tailored the law to take account of the principle of freedom of expression, for instance in developing the law of defamation,[21] breach of confidence[22] and misuse of private information.[23]

18.28 However, while the principle of freedom of expression could be used as an aid to statutory construction and read into legislation as an implied limitation on statutory powers, until the Human Rights Act 1998, there was no way of challenging the compatibility of a statutory provision itself with the right to freedom of expression.

18.29 It follows that much of the case law on freedom of expression under the Common Law has developed in line with the more extensive jurisprudence of both the domestic and Strasbourg courts under the ECHR.

The European Convention on Human Rights

18.30 The right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR") is an important consideration for law enforcement, prosecutors and courts when thinking about the criminalisation of hateful communication. However, this must be balanced against other rights, notably the prohibition on the abuse of the rights of others under Article 17, which is usually engaged in the context of hate crime, and has been used to prevent hate crime offenders from relying on Article 10 as a defence.[24] The Article 14 prohibition of discrimination is also highly relevant in this context.

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21 *Derbyshire CC v Times Newspapers* (1993) HL 18; *Reynolds v Times Newspapers* (2006) UKHL 44.

22 *Attorney General v Observer Limited* (1988) (The 'Spycatcher' case).

23 *Campbell v MGN* (2004) UKHL 22.

24 See, eg *Norwood v UK* (2004) ECHR (App. no. 23131/03). The applicant was a member of the British National Party, who displayed in the window of his first-floor flat a large poster that depicted the World Trade Centre towers in flames accompanied by the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. He was convicted of the religiously aggravated offence of harassment, alarm or distress under s 5 of the Public Order Act 1986 / s 31 of the Crime and Disorder Act 1998. After losing his appeal in the High Court, he appealed to the European Court of Human Rights, claiming the conviction violated his right to freedom of expression under Article 10 of the ECHR. In rejecting his application, the Court found his conduct was "incompatible with the values proclaimed and guaranteed by the Convention" and therefore could not enjoy the protection afforded by Article 10.

18.31 Freedom of expression is a qualified right in which States have a margin of appreciation under the ECHR.[25]

18.32 The jurisprudence of the European Court of Human Rights has tended to concentrate on what actions states *may* take in respect of hate crime. In particular, the Court has been concerned with how far measures to tackle hate crime are compatible with other rights, in particular the right to freedom of expression. However, there has recently been a developing jurisprudence on how far the ECHR might impose a positive obligation on domestic authorities to put in place measures to tackle hate crime. These are discussed at paragraphs 18.46 to 18.48.

18.33 Article 10 ECHR provides:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers … The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others…

18.34 Article 9 provides for freedom of thought, conscience and religion. Article 11 provides for freedom of assembly and association. Both Articles have similar provisions to Article 10 providing states with limited grounds to interfere with the exercise of these rights in the interests of public safety, public order, public health, public morals, or the protection of the rights and freedoms of others.

18.35 In addition, Article 17 of the ECHR provides:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

18.36 That is, Article 17 prevents those seeking to "destroy" the rights and freedoms in the Convention from relying on their Convention rights. Expression encouraging breaches of Convention rights, for instance by encouraging violence, therefore falls outside the protection of Article 10.[26]

18.37 In a series of cases, the Court has held that groups seeking to propagate hatred are prevented by Article 17 from relying on Article 10 to challenge actions taken by state

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25 *Handyside v UK* (1976) 1 EHRR 737 (App. no. 5493/72) at [48].

26 Article 14 provides that Convention rights and freedoms must be secured without discrimination on grounds of sex, race, colour, language, religion, opinion, association with a minority, property, birth or other status. It follows that incitement to discrimination which would amount to depriving a group of its rights can also be caught by Article 17 and therefore outside the protection of Article 10.

authorities. These include cases of religious hatred,[27] antisemitism,[28] and Holocaust denial.[29]

18.38 However, Article 17 only applies to activities *aimed* at the destruction of ECHR rights. In respect of expression or behaviour which may incite hatred but lacks such intent, states must rely instead on the limitations permitted by Article 10(2). Here the Court is much more sensitive to freedom of expression concerns, and its findings may be relatively fact-specific.

18.39 In *Vejdeland,*[30] the Court found no violation in the conviction of five Swedes for distributing leaflets within a school criticising homosexuality. It held that the interference with the applicants' Article 10 rights was necessary and proportionate. It held that inciting hatred does not require a call for violence or other criminal acts, but can include insulting, holding up to ridicule or slandering specific groups.

18.40 In *Soulas*,[31] the Court considered the conviction of a French publisher for publishing a work which argued that Europe was being overtaken by Muslims and that a civil war was a necessary step against the "colonisation of Europe". While holding that the words complained of were not sufficiently serious to bring Article 17 into play, the remarks were

> intended to provoke in the reader a feeling of rejection and antagonism, aggravated by employing military language and claimed, based on news reports, that "young Maghrebians were engaged in 'rape rituals' on young white girls, out of anti-European racism".

18.41 Consequently, the state's use of criminal sanctions was a permissible interference with Soulas's Article 10 rights.

18.42 Conversely, in *Tagiyev and Huseynov*,[32] the Court held that the imprisonment of two Azerbaijani authors for inciting religious hatred was a breach of their Article 10 rights. In particular, the Court found that the domestic courts examined the remarks detached from the general context and content of the article, without assessing the authors' intention, the public interest of the matter discussed and other relevant elements. It held that while some of the authors' remarks "may be seen by certain religious people as an abusive attack on the Prophet of Islam and Muslims living in Europe", "a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance".

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27 *Norwood v UK* (2004) ECHR (App. no. 23131/03); *Belkacem v Belgium* [2017] ECHR No 34367/14.

28 *Ivanov v Russia* ECHR 379 (App. No 27100/03).

29 ECtHR, *Garaudy v. France*, App. No. 65831/01 (2003); ECtHR, *M'Bala M'Bala v. France*, App. No. 25239/13 (2015); *Williamson v Germany* (App. No. 64496/17); *Pastörs v Germany* (Case no. 55225/14).

30 *Vejdeland and others v Sweden* [2012] (App. No. 1813/07).

31 *Soulas and others v France* [2008] (App. No. 15948/03).

32 *Tagiyev and Huseynov v Azerbaijan* [2019] (App. No. 13274/08).

18.43 A particular ECHR case concerning third party liability for dissemination of hate speech, to which we return below, is *Jersild v Denmark*.[33] Jersild was a Danish journalist, who had broadcast a short news item involving an interview with a group of young Danes who made derogatory comments about immigrants and black people. The youths were charged with disseminating a statement threatening, insulting or degrading a group on account of their race, colour, national or ethnic origin. The journalist was charged with aiding and abetting them. It was not alleged that in doing so he had any racist purpose.

18.44 The European Court of Human Rights held that Jersild's conviction was a breach of his Article 10 rights. Key considerations included (i) that the presenter's introduction and conduct clearly dissociated himself from the youths' views, (ii) that the item was broadcast as part of a serious broadcast and was intended for a well-informed audience, and (iii) it clearly sought to expose, analyse and explain this particular group of youths, thus dealing with specific aspects of a matter that already then was of great public concern.

18.45 *Jersild* has serious implications for how the law treats the innocent dissemination of inflammatory material as part of a legitimate exercise, such as journalism, a subject to which we return at paragraphs 18.94 to 18.102.

Positive obligations under the European Convention on Human Rights

18.46 For the most part, the Strasbourg Court's approach to freedom of expression and analogous rights has focused on interference by states with freedom of expression. However, a more recent line of authority has noted positive obligations on states.

18.47 In *Aksu v Turkey*,[34] the Court held that ethnic identity is a manifestation of an individual's physical and social identity and is covered by Article 8 (respect for private and family life). The failure of the state to provide a remedy for an attack on an individual's ethnic identity was capable of amounting to a violation of Article 8.

18.48 In *Karaahmed v Bulgaria*,[35] the Court held that the failure of Bulgarian authorities to safeguard Muslim worshippers from physical and verbal assaults amounted to a breach of its positive obligations under Article 9 of the Convention (freedom of religion).

The Convention on Elimination on All Forms of Racial Discrimination

18.49 Article 4(a) of the UN International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")[36] imposes a positive duty upon signatories to:

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33 *Jersild v Denmark* [1994] (App. No. 15890/89).

34 *Aksu v Turkey* [2012] (App. Nos. 4149/04 and 41029/04). Aksu, a man of Roma origin, complained that his right to private and family life had been violated by two publications financed or published by the Turkish Ministry of Culture, which had perpetuated negative stereotypes of Roma people. Although the Court dismissed his claim, it held (at para 58) that "negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group".

35 *Karaahmed v Bulgaria* [2015] (App. No. 30587/13).

36 Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, in force 4 January 1969.

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

18.50 Although not a reservation or derogation, the UK Government submitted a statement in 1966 that it interpreted this provision as requiring legislation:

> only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.[37]

18.51 That is, the UK Government's view is that the obligation in Article 4(a) only requires legislation insofar as that is necessary and proportionate in view of its other human rights obligations, in particular relating to freedom of opinion and expression, and of assembly and association, and the overall objective of eradicating incitement to racial hatred and discrimination. It also takes the view that religion and belief fall outside the scope of CERD.

18.52 Current law in England and Wales appears to fall short of the requirements of CERD in three ways:

(1) Dissemination of ideas based on racial superiority is not unlawful unless it amounts to stirring up racial hatred, which requires that threatening, abusive or insulting words are used and that the words are intended or likely to stir up racial hatred.

(2) Incitement of racial discrimination is not unlawful, except in limited circumstances as a matter of civil law or if the behaviour amounts to unlawfully stirring up racial hatred.

(3) Assisting and financing racist activities are only unlawful if those activities themselves constitute an offence.

18.53 The common law offence of incitement involved persuading or inducing another person, by advice, encouragement, inducement, threats or pressure to do an act or acts which, if carried out, would involve the commission of an offence.[38] The Serious Crime Act 2007 abolished the common law offence of incitement, in order to expand liability beyond simple incitement and to include facilitation of a crime, for instance by providing necessary equipment.[39] In its place, the legislation substituted three offences based on the concept of encouraging or assisting crime: encouraging or assisting a crime

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37 Reservation and Interpretative Statement of the United Kingdom, 11 October 1966.

38 See for example, *Race Relations Board v Applin* [1973] QB 815, 825G.

39 J. Spencer and G. Virgo, "Encouraging and assisting crime: legislate in haste, repent at leisure" (2008) *Arch. News*, pp 7 to 9.

intentionally,[40] encouraging or assisting a crime believing it will be committed,[41] and encouraging or assisting one or more of a number of offences coupled with a belief that one of them will happen.[42]

18.54 However, the legislation only covers incitement and facilitation of criminal offences. Incitement to discrimination on grounds of race and religion is, in almost all circumstances, a civil, not a criminal, matter.

18.55 Moreover, while inducing or attempting to induce race discrimination was unlawful as a matter of civil law under the Race Relations Act 1976, the corresponding provisions in the Equality Act 2010 are much more limited in scope. Under section 111 of the Equality Act 2010, it is unlawful to instruct, cause or induce another person to commit a "basic contravention" (broadly, an act of unlawful discrimination). Crucially, however, section 111 only applies to a person who is in a position to commit a basic contravention in relation to a person they are instructing or inducing. So, for instance, an employer who instructs a manager to not hire black candidates would be liable. However, a client who instructs a supplier not to send Asian employees to carry out work would not (because the Equality Act covers suppliers of services, but not purchasers).

18.56 In 2003, the Committee on Elimination of Discrimination, reviewing the UK, said:

> The Committee also reiterates its concern over the fact that the State party continues to uphold its restrictive interpretation of the provisions of article 4 of the Convention. It recalls that such interpretation is in conflict with the State party's obligations under article 4(b) of the Convention and draws the State party's attention to the Committee's general recommendation XV according to which the provisions of article 4 are of a mandatory character
>
> In the light of the State party's recognition that the right to freedom of expression and opinion are not absolute rights, and in the light of statements by some public officials and media reports that may adversely influence racial harmony, the Committee recommends that the State party reconsider its interpretation of article 4.[43]

The International Covenant on Civil and Political Rights

18.57 The International Covenant on Civil and Political Rights ("ICCPR"), to which the United Kingdom is a party provides:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[44]

18.58 The UK did not enter any reservation or derogation in respect of this provision.

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40 Serious Crime Act 2007, s 44.

41 Serious Crime Act 2007, s 45.

42 Serious Crime Act 2007, s 46. We discuss section 46 as a model for an approach to aggravated offences and intersectionality in Chapter 16 at paragraph 16.128.

43 Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by State Parties Under Article 9 of the Convention', 2003, CERD/C/63/CO/1110, December 2003.

44 International Covenant on Civil and Political Rights, Art 20(2).

18.59 Articles 18, 19 and 22 broadly replicate the provisions of Articles 9, 11 and 10 of the ECHR.

18.60 The scope of this provision is slightly less restrictive than Article 4 of CERD, as "prohibited by law" does not necessarily require criminalisation. However, for the same reasons as CERD, domestic law falls short of the ICCPR in that some forms of advocacy of hatred, in particular incitement to discrimination, are not covered by domestic legislation.

CRITICISM OF THE CURRENT STIRRING UP OFFENCES

18.61 Some of the problems identified with the existing criminal law on stirring up hatred reflect the more general problems also found with the aggravated offences and enhanced sentencing provisions, for instance that not all characteristics are protected under the law or that the current characteristics do not receive equal protection. However, there is also a view held by some which sees all hate speech legislation as an unwarranted infringement of freedom of expression.

18.62 Human rights organisation Liberty recognises that the right to free expression is not absolute, and criminalising the incitement of violence or threats can be a justifiable limit. Notwithstanding this, they have stated:

> We believe there needs to be a wholesale review of speech offences, particularly under the Public Order Act. These offences can be counterproductive (giving extreme groups publicity in the event of any trial), can have a chilling effect on legitimate debate and peaceful protest and have been extended in an ad hoc and piecemeal way.[45]

18.63 We consider these points below, in the following order. First, the piecemeal extension of the speech provisions. Second, the risk that they can be counterproductive giving prominence to extremist views. Third, their potential chilling effect on valid discussion and public debate.

18.64 First, the piecemeal development is evident in the provisions found in the stirring up sections of the POA 1986, as already highlighted in the historical analysis above.[46] Two inconsistencies result from incremental reform:

(1) The way intent is dealt with is different between racial hatred and hatred on grounds of religion or sexual orientation.

(2) The types of words and behaviour covered – "threatening", "abusive" and "insulting" – are now treated inconsistently throughout the Act.

18.65 A number of problems are created due to inconsistent treatment under law:

(1) treating some characteristics differently has given rise, with some justification, to a belief that the law creates "hierarchies of hate", with racial hatred, in particular,

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45 Liberty, *Speech Offences*, see https://www.libertyhumanrights.org.uk/human-rights/free-speech-and-protest/speech-offences.

46 See paras 18.6 to 18.20.

treated more seriously than religious hatred or hatred on grounds of sexual orientation.

(2) inconsistency provides fuel for some opponents of hate speech legislation who, in general, argue that hate speech laws also suffer from the defect of privileging certain types of harm or victims above others.[47]

(3) the categories of material covered date back to 1986 and may not adequately reflect the way in which inflammatory material is now communicated, especially online.

18.66 Secondly, in relation to the risk that the offences are counterproductive, Jacobs and van Spanje have argued that hate speech legislation risks creating "free speech martyrs". Prosecutions for alleged hate speech can have unintended consequences, such as increased publicity in the media and the opportunity for an individual to present themselves as a warrior for freedom of speech. These consequences may, for example, boost electoral support for an anti-immigration party amongst those with a pre-existing critical attitude towards multi-culturalism due to the perception that a valid viewpoint is suppressed by the state.[48]

18.67 Thirdly, hate speech legislation may also have a "chilling effect" on legitimate social and political discourse. In debates on extending the religious hatred offence to cover sexual orientation, a key concern of peers was that the law needed to be clearly defined so that legitimate political or religious speech was clearly excluded. Peers cited a number of cases where people had been investigated by police for legitimate comments even though no subsequent action was taken. Recently in *Miller v College of Policing*, it was held that such behaviour could have a "chilling effect" and therefore amount to an interference with the right to freedom of expression.[49]

WHAT FORMS OF COMMUNICATION ARE COVERED

18.68 Different provisions in the POA 1986 apply to different forms of material intended or likely to stir up hatred:

(1) Use of words or behaviour or displays of written material;[50]

(2) Written material;[51]

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47 See for instance, Laura Jacobs and Joost van Spanje, "Martyrs for Free Speech? Disentangling the Effects of Legal Prosecution of Anti-Immigration Politicians on their Electoral Support" (2019) *Political Behaviour*, published online at https://www.springerprofessional.de/en/martyrs-for-free-speech-disentangling-the-effects-of-legal-prose/17353368?fulltextView=true.

48 See for instance, Laura Jacobs and Joost van Spanje, "Martyrs for Free Speech? Disentangling the Effects of Legal Prosecution of Anti-Immigration Politicians on their Electoral Support" (2019) *Political Behaviour*.

49 *Miller v College of Police and the Chief Constable of Humberside* [2020] EWHC 225 (Admin) 261.

50 Public Order Act 1986, ss 18 and 29B.

51 Public Order Act 1986, ss 19 and 29C; ss 23 and 29G.

(3) Public performance of a play;[52]

(4) Recordings;[53]

(5) Broadcasting or including programme in a programme service.[54]

18.69 In relation to displays of written material, a person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation. There are a number of examples of successful prosecutions based on displays of written material. In the first prosecution under the amendments made by the Criminal Justice and Immigration Act 2008 to include hatred on grounds of sexual orientation, a pamphlet advocating the death penalty for homosexuals in which images showing an artist's dummy hanging from a noose were displayed resulted in conviction.[55] The jury were satisfied that the material was threatening with intent to stir up hatred on the grounds of sexual orientation.

18.70 In relation to racial hatred, displays of threatening, abusive and insulting words or material are covered by the offence if it is coupled with an intention to stir up racial hatred or racial hatred is likely to be stirred up thereby. A prosecution has also successfully been brought against a man who posted a recording of himself dressed in Ku Klux Klan robes hanging a life-sized "golliwog".[56]

18.71 Where the provision relates to the "public", "publish" or "publication", it is to be interpreted as meaning to the public at large or a section of the public. Publication to an individual or a family is not enough;[57] however, in such cases, the "use of words or behaviour" provision may apply.

18.72 However, there is a potential gap in the legislation. The offences in sections 18, 19, 23, 29B, 29C and 29G refer only to "written material". Sections 29 and 29N go on to define "written material" as including "any sign or other visible representation".

18.73 Several recent incidents involving inflammatory images create grounds for concern over this potential gap. These include Islamophobic cartoons cited by the Home Affairs Committee,[58] and a mural in East London,[59] described in the Morning Star as containing "exaggerated depictions of Jews … in a historically defined context that includes a powerful, even dominant, discourse that draws upon the long traditions of anti-

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52 Public Order Act 1986, ss 20 and 29D.

53 Public Order Act 1986, ss 21 and 29E; ss 23 and 29G.

54 Public Order Act 1986, ss 22 and 29F.

55 *R v Ahmed, Javed and Ali* [2012] 2 WLUK 329.

56 A golliwog is a children's doll, popular in the first half of the twentieth century, representing an offensive caricature of a black male. The name also invokes a racial slur. See the Times, 1 November 2013.

57 *R v Britton* (1967) 2 QB 51.

58 Home Affairs Select Committee, "Hate Crime: abuse, hate and extremism online" (2017), 2016-17: HC 609, para 12.

59 The mural featured images of six bankers, two with exaggerated noses representing the Jews Paul Warburg and Nathan Rothschild, linked to a number of conspiracist tropes.

semitism"[60] and by the then Leader of the Opposition Jeremy Corbyn as "deeply disturbing and antisemitic".[61]

18.74 In some cases, the other offences may adequately fill the gap. For instance, if inflammatory material is displayed in public, this will probably constitute "behaviour" for the purposes of sections 18 and 29B. If the display is posted as a video online, it would amount to distributing a recording under sections 21 or 29E.

18.75 However, if inflammatory material which does not amount to a display or recording is distributed – for instance, by the posting of inflammatory cartoons online – it may not be caught by the existing legislation. It may be possible to bring a prosecution under separate legislation – for instance the offence of sending by means of a public electronic communications network a message or other matter that is grossly offensive under section 127(1) of the Communications Act 2003.[62] However, this does not carry the same gravity or labelling as the stirring up offences. It does not reflect the fundamental harm involved, which is not that it is offensive, but that it incites hatred.

18.76 In our 1985 report on poison pen letters,[63] which led to the Malicious Communications Act 1988, we argued that the legislation should apply equally to material which takes the form of an offensive drawing, picture or photograph as it would to a letter. The same considerations apply here. We propose therefore that the reference to "written material" be replaced with a reference to "material".

Consultation Question 40.

18.77 We provisionally propose that the stirring up offences relating to "written" material be extended to all material?

18.78 Do consultees agree?

18.79 In addition to the core offence of using words or behaviour intended to stir up hatred, the law also features several specific offences which were consolidated into the POA 1986 along with the stirring up offence. Section 20 makes it an offence to stage a play[64]

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60 Morning Star, "Mear One's mural – bad art and bad politics" (4 April 2018), available at https://morningstaronline.co.uk/article/mear-ones-mural-bad-art-and-bad-politics.

61 BBC News, "Jeremy Corbyn regrets comments about 'anti-Semitic' mural" (23 March 2018), available at https://www.bbc.co.uk/news/uk-politics-43523445.

62 A separate Law Commission review of the communications offences is currently taking place. The terms of reference are available in full on the project webpage https://www.lawcom.gov.uk/project/online-communications/.

63 Criminal Law: Poison Pen Letters (1985) Law Com No 147.

64 The definition of play includes "any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or action, involves the playing of a role" and "any ballet given wholly or in part by one or more persons actually present and performing". It would thus embrace monologues, operas, and ballet (and potentially other dance) as well as well as other dramatic works. It would exclude stand-up comedy, unless the performer is clearly playing a character.

which involves the use of threatening, abusive or insulting words if racial hatred is likely to be stirred up thereby. This offence was previously in the Theatres Act 1968, which abolished theatre censorship but in its place created new offences prohibiting obscene and racially inflammatory plays. Section 22 makes it unlawful to include racially inflammatory material within a broadcast or cable programme service. This was previously found in section 27 of the Cable and Broadcasting Act 1984.

18.80 The result is an unnecessarily complex piece of legislation which creates at least eight distinct but overlapping offences with different provisions and defences. For instance, provisions in the Theatres Act 1968 restricting the liability of those who perform in plays have been transposed wholesale, but only apply to performers on the stage, not in broadcast productions. Broadcasters and directors of a play have a defence if they do not know that the circumstances are such that racial hatred is likely to be stirred up; those who publish books or show films or video recordings do not.

18.81 Equally, certain types of dissemination are not dealt with when one might have expected them to be. The POA 1986 offence of showing or distributing a recording makes no reference to legislation governing video recordings or cinemas, with the consequence that it can potentially be committed by distribution of material which has been certified for showing in cinemas or video distribution.[65]

18.82 More recently, there have also been reports of hate groups developing and disseminating video games which depict and intentionally encourage violent hatred against minorities.[66] It is not clear that these come within the ambit of existing legislation:[67] they are not "written material" and it is unlikely that they would constitute a "recording".[68]

18.83 This raises the question as to the need for separate offences relating to showing video and audio recordings, distributing articles, and making programmes for broadcast. The distinct categories set out in the current legislation potentially overlap and do not meet the challenge of the increasingly multi-channel nature of works. For instance, a staged play may be live-streamed over the internet at the same time as being shown in cinemas. Therefore, the categorisation approach to material may be outdated, unnecessarily restrictive and may result in unintended consequences whereby material which demonstrably incites hatred cannot be the subject of a prosecution.

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65 In contrast, some legislation explicitly exempts works which have received a licence from the British Board of Film Classification. See for instance Criminal Justice and Immigration Act 2008, ss 63 to 64 (Possession of extreme pornographic images).

66 See for instance "Antisemitic video game available via YouTube" (9 January 2017) *Jewish Chronicle*, available at https://www.thejc.com/news/uk/neo-nazi-video-game-1.430296; "Far Right Game encourages homophobic mass shootings" (13 November 2018) *Pink News*, available at https://www.pinknews.co.uk/2018/11/13/far-right-video-game-gay-club-mass-shooting/.

67 There is now legislation governing video games (the Video Recordings Act 1984 as amended by the Digital Economy Act 2010, sections 40 to 41) but "video game" is not defined in the Act.

68 Although the definition of recording in section 21(3) includes digital material from which visual material may be "reproduced", it is unlikely this would cover a program which spontaneously generates original gameplay visuals. In contrast, the Video Recordings Act 1984 (as amended by the Digital Economy Act 2010), explicitly covers video games, referring to visual images being "produced" (not reproduced).

18.84 We have considered whether an alternative approach is merited to categorisation given that there are multiple means of displaying material which elide with one another and may incite hatred.

18.85 There is a precedent for this in sections 23 and 29G of the POA 1986 which create offences of possession of racially inflammatory material (material intended or likely to stir up racial hatred) and possession of "inflammatory" material (material intended to stir up hatred on grounds of religion or sexual orientation) respectively. The offences cover both written material and recordings, possessed with a view to being displayed, published, shown, played or included in a broadcast. The material must be "threatening, abusive or insulting" to be racially inflammatory or "threatening" to be inflammatory under section 29G.

18.86 Likewise, it would be possible to have a single offence of distributing inflammatory material, with an inclusive list of each possible mode of distribution. This could be supplemented with separate provisions specifying how the mode-specific clauses apply (for example, those dealing with secondary liability for broadcasts and publications).

18.87 The Hate Crime and Public Order (Scotland) Bill, tabled by the Scottish Government in April 2020, consolidates these measures (other than broadcasting, which is not a devolved matter), along with "behaviour" into a single offence of stirring up hatred in section 3 of the Bill. Section 4 then deals specifically with how the offence is to apply to plays and public performances, and Schedule 1 to the liability of information service providers.

18.88 We provisionally propose a single offence of disseminating inflammatory material, based on the existing sections 23 and 29G of the Public Order Act 1986, which would explicitly, but not exhaustively, include:

(1) written and other material;

(2) plays and other staged performances;

(3) television and radio broadcasts;

(4) distribution and exhibition of film, sound and video recordings;

(5) video games; and

(6) online material.

18.89 We provisionally propose that this offence should be distinct from the "use of words or behaviour" offence currently in sections 18 and 29B of the Public Order Act 1986.[69]

18.90 At paragraphs 18.199 to 18.207 where we discuss the meaning of "inflammatory", we consider the discrepancy between the thresholds for the racial hatred (threatening,

[69] The reason for this is that whereas the section 18 and 29B offences are committed by a primary offender, the dissemination offences can be committed by third parties who make material available. Some of the defences applying in cases of "innocent" dissemination, where the person does not intend to stir up hatred (which currently arises in racial hatred cases only), will not necessarily apply to those who personally use words or behaviour.

abusive or insulting) and other stirring up offences (threatening), and propose a common threshold for all types of hatred. We would propose that the same single threshold would apply to this offence.

18.91 The current provisions and defences relating to plays and broadcasts could be incorporated within this. This would also mean that the current provisions and defences could be rationalised, for instance, by having a single provision dealing with the criminal liability of performers in directed works.

Consultation Question 41.

18.92 We provisionally propose to replace sections 19 to 22 and 29C to 29F of the Public Order Act 1986 with a single offence of disseminating inflammatory material.

18.93 Do consultees agree?

The dissemination defences

18.94 The dissemination offences under sections 19 to 22 of the POA 1986 have a number of defences available for a defendant who is not shown to have intended to stir up racial hatred – that is to say, under the "likely to" limb. Broadly, such a person has a defence if they did not know that the material in question was or might be threatening, abusive or insulting. (Similar provisions do not currently apply in respect of religious hatred or hatred on grounds of sexual orientation since intention to stir up hatred, a higher threshold of criminality, is a prerequisite of those offences.)

18.95 The provisions in question are inconsistent. For instance, the offence of using words or behaviour, or displaying written material, in section 18, provides that "a person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting". The burden is on the prosecution to show otherwise. However, for the offences in sections 19 to 23 (publishing or distributing written material, public performance of a play, distributing, showing or playing a recording, broadcasting or including programme in cable programme service and possession of racially inflammatory material) the burden is on the defendant to prove this.

18.96 Those involved in staging plays or broadcasting programmes have a defence that they did not know that the circumstances were such that hatred was likely to be stirred up;[70] those accused of distributing, showing or playing a recording or publishing written material do not. There does not seem to be any rational basis for these inconsistences.

18.97 It is not clear why publishing, distributing or showing a recording is treated differently from including material in a play or broadcast. Taken logically, it would mean that an online store which unwittingly sold Mein Kampf, or a cinema which showed Birth of a Nation, to a neo-Nazi group would be in breach of the law, even if unaware of the identity

[70] Public Order Act 1986, ss 20(2), 22(4) and 22(5).

of the purchasers. Both contain threatening, abusive or insulting material; and both may be likely to incite racial hatred in certain audiences.

18.98 Indeed, in the case of material included in a broadcast, we question whether the defence works as intended. Section 22(3) provides that a person who did not intend to stir up hatred has a defence if they can prove:

(1) they did not know and had no reason to suspect that the programme would involve the offending material; and

(2) having regard to the circumstances in which the programme was included in a programme service, it was not reasonably practicable for them to secure the removal of the material.

18.99 While this defence would work well in the case of, say, a live broadcast where a third party made inflammatory comments that the broadcaster could not have anticipated – and would be unable to remove – it could operate unduly harshly in other circumstances where one of the conditions was made out but not both. For instance, if the material was contained in a programme which the broadcaster had bought in and had no reason to suspect would contain the offending material, it is hard to see why the broadcaster should also have to prove that they could not have secured its removal (since even if they could, they would have had no reason to do so). Equally, if the broadcaster would have been unable to secure its removal in any case, it is not clear why the broadcaster's anticipation that inflammatory words or material might be used should be relevant.

18.100 A single offence of disseminating material would enable these defences to be applied consistently across all forms of dissemination. We provisionally propose the following:

(1) The provisions relating to performers, rehearsals and recordings of performances should apply to both plays and broadcasts.

(2) The defences available to third parties who did not intend to stir up hatred should be aligned, so that the offence would not apply to a person who did not realise that the material was to be included; did not realise that material was threatening or abusive; or did not realise that the circumstances were such that hatred was likely to be stirred up.

(3) Unless intention to stir up hatred is proved, no offence would be committed by showing a recording that has been certified by the British Board of Film Classification or licensed for cinema performance by a local authority.

Consultation Question 42.

18.101 We provisionally propose to align the defences available to innocent disseminators of inflammatory material to ensure consistency as follows:

(1) The provisions relating to performers, rehearsals and recordings of performances would apply to both plays and broadcasts.

(2) The defences available to third parties who did not intend to stir up hatred would be aligned, so that the offence would not apply to a person who did not realise that the material was to be included; did not realise that material was threatening or abusive; or did not realise that the circumstances were such that hatred was likely to be stirred up.

(3) Unless intention to stir up hatred is proved, no offence would be committed by showing a recording that has been certified by the British Board of Film Classification or licensed for cinema performance by a local authority.

18.102 Do consultees agree?

Online material and platform liability

18.103 The stirring up offences do not explicitly cover those who post inflammatory material on the internet. In practice, however, the existing categories have proved flexible enough to accommodate material posted online. In *R v Sheppard*[71] the Court of Appeal rejected a submission that section 19 of POA 1986 did not apply to material published on the internet and held that the expression "written material" was sufficiently wide to include articles in electronic form. It also held that a person who produced racially inflammatory material and posted it on a website hosted in the United States, could be tried in the United Kingdom if a substantial measure of his activities had taken place in the UK.

18.104 However, the situation is more complex for those who merely *host* inflammatory material. First, there are a number of anomalies. For instance, while a recording distributed over the internet would almost certainly constitute a recording for the purposes of sections 21 and 29G, a live broadcast over the internet would not constitute a "programme service" for the purposes of sections 22 and 29H. Therefore, while a video clip on a streaming service would be caught (subject to the limitation on platform liability discussed below), material broadcast live on a website would not.[72]

18.105 Second, while other forms of dissemination are dealt with in the POA 1986 itself, with specific provisions for those who broadcast material or stage plays, the liability of "information society service providers" for inflammatory material is regulated by

[71] [2010] EWCA Crim 65.

[72] The person featured in the video or broadcast would, however, be caught by the "words or behaviour" offence.

secondary legislation made under the European Communities Act 1972,[73] in order to give effect to the E-Commerce Directive 2002. The limitations on liability for online services under this Directive are more generous than the defences available to other distributors in the Act.

Platform liability under the E-Commerce Directive

18.106 The UK left the European Union on 31 January 2020, and the 1972 Act will cease to have effect from 31 December 2020. While the existing regulations will continue to have force as "retained EU law" for the time being, it follows that a substantial reform or even simple re-enactment of the stirring up laws would need to make new provision for platform liability.[74]

18.107 Directives are not in themselves retained EU law, and the UK will no longer be bound by the E-Commerce Directive. It is not clear at this stage whether the UK and EU will seek to replicate the Directive's provisions as part of their future relationship.[75]

18.108 The E-Commerce Directive, and the regulations made to implement it, restricts the liability of three classes of service:

(1) "Mere conduits" – that consist of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;

(2) Caching – defined as "automatic, intermediate and temporary storage … for the sole purpose of making more efficient onward transmission of the information to other recipients"; and

(3) Hosting – "the storage of information provided by a recipient of the service". This would include user-generated or shared material hosted on platforms, such as YouTube, Facebook, and Twitter.

18.109 A "mere conduit", such as an internet service provider (ISP), is not liable provided it does not initiate the transmission, did not select the receiver of the transmission, and does not select or modify the information contained in the transmission.

18.110 A caching service is not liable if it:

(1) does not modify the information;

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73 The current regulations are the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010.

74 While the existing regulations will remain in place as retained EU law, they would not apply to any new offences, nor could Ministers replicate the provisions using the European Union (Withdrawal) Act 2018. There are two reasons for this. First, it would not constitute a "deficiency" under the 2018 Act. Secondly, the ability to make regulations under the 2018 Act does not allow for the creation of criminal offences.

75 The draft UK-EU trade agreement published by the UK government proposes that each party may have its own regulatory requirements concerning the electronic transfer of information and that both parties should be free to adopt or maintain restrictions on cross-border transfer where that is necessary to achieve a legitimate public policy objective provided that the measure is proportionate and is not applied so as to constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

(2) complies with conditions on access to the information;

(3) complies with any rules on updating the information specified in a manner widely recognised and used by industry;

(4) does not interfere with lawful use of technology and used by industry to obtain data on the use of the information; and

(5) acts expeditiously to remove or to disable access to the information upon obtaining actual knowledge that the information at the initial source has been removed from the network, or access to it has been disabled, or that a court or administrative authority has ordered such removal or disablement.

18.111 A hosting service is not criminally[76] liable if it:

(1) does not have "actual knowledge" that the material is threatening and provided with the intention of stirring up hatred;[77] or

(2) upon obtaining such knowledge acts expeditiously to remove or to disable access to the information.

18.112 The focus of our attention in this section will mainly be on hosting services. This encompasses the main social media providers such as YouTube, Facebook, and Twitter, who provide a platform for individuals and groups to make material available publicly and privately.

The exclusions

18.113 On the face of it, the three categories and the protections they involve are not objectionable. The main difficulty is that the limitations mean that the liability of online providers is potentially different to a comparable offline provider.

18.114 In principle, for instance, there is no reason why an online "mere conduit" should be treated any differently than the operator of a telephone network or a delivery company. Yet the protection for an online conduit is absolute, whereas – for instance – a delivery company could (in theory, even if in practice a prosecution would be unlikely) be liable for the distribution of racially inflammatory material if it had reason to suspect that the material was threatening, abusive or insulting.[78] The fault or mens rea for distribution of racially inflammatory material is effectively one of recklessness.

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[76] The liability is slightly different under civil law. Here constructive knowledge from "facts or circumstances from which the illegal activity or information is apparent" is sufficient.

[77] This is from the Regulation pertaining to hatred on grounds of religion and sexual orientation. There is no specific Regulation dealing with racial hatred, since this offence existed before the E-Commerce Directive, and is therefore instead covered by the Electronic Commerce (EC Directive) Regulations 2002. These general regulations do not define what "actual knowledge" is relevant for the racial hatred offence.

[78] The discrepancy is more acute for racial hatred because of the requirement for intent in the stirring up offences related to hatred on grounds of religion or sexual orientation. Indeed, it is difficult to conceive of situations in which the limitations on liability in the 2010 Regulations could have any practical effect, since for the necessary intent to be demonstrated, the provider would normally have to have actual knowledge of the content of the material.

18.115 An online hosting service – such as YouTube – is only liable if it has "actual knowledge" that the material hosted on its platform is illegal. Yet an offline host – such as a broadcaster, or a bookshop, is subject to a more stringent "reason to suspect" test (and as noted above, this is reason to suspect that the material is threatening, abusive or insulting, not that the material is likely to stir up racial hatred).

18.116 A bookseller that had reason to suspect that a book was racially inflammatory would be liable if it posted a copy of the book to a customer, or sold it in store, but not if it supplied it as an e-book.

Should platforms be liable for online hate material?

18.117 In 2017, at least four of the thirteen prosecutions for stirring up hatred concerned posts on Facebook.[79] However, concern has been expressed by Parliamentarians that inflammatory material is too readily available on social media outlets. A 2017 report by the House of Commons Home Affairs Committee found that

> It was shockingly easy to find examples of material that was intended to stir up hatred against ethnic minorities on all three of the social media platforms that we examined – YouTube, Twitter and Facebook. YouTube was awash with videos that promoted far-right racist tropes, such as antisemitic conspiracy theories… On Twitter, there were numerous examples of incendiary content found using Twitter hashtags that are used by the far-right… A search for those hashtags identified significant numbers of racist and dehumanising tweets that were plainly intended to stir up hatred... On Facebook we found community pages devoted to stirring up hatred, particularly against Jews and Muslims, although much of the content that is posted on Facebook is done so within "closed groups" and is not as openly available as similar content is on Twitter.[80]

18.118 They concluded

> If social media companies are capable of using technology immediately to remove material that breaches copyright, they should be capable of using similar content to stop extremists re-posting or sharing illegal material under a different name. We believe that the Government should now assess whether the continued publication of illegal material and the failure to take reasonable steps to identify or remove it is in breach of the law, and how the law and enforcement mechanisms should be strengthened in this area.[81]

18.119 An argument for attaching ancillary liability to those involved in hosting online content is made by O'Regan:

> most traditional publications insert an editorial decision between author and publication, a decision that is normally taken by a person other than the author. In

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79 Crown Prosecution Service, *Hate Crime Annual Report 2017-18* (2018) pp 7 and 42, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf.

80 House of Commons Home Affairs Committee (2017) Hate Crime: Abuse, Hate and Extremism Online, 2016/17: HC 609, paras 10 to 13.

81 House of Commons Home Affairs Committee (2017) Hate Crime: Abuse, Hate and Extremism Online, 2016/17: HC 609, para 30.

imposing civil liability for the publication of harmful speech, modern libel or defamation law often seek to constrain the editorial decision, as for example, in the defence of responsible publication. Such constraints are not available in relation to self-published online speech. It can probably be assumed that the editorial policy of many publications will not permit the publication of hate speech and that the insertion of an editorial decision applying that policy prior to publication will therefore often restrict the publication of hate speech. Such control is again absent in the case of direct author publication or posting on online platforms.

At least for the moment, a very small group of Internet platforms or intermediaries, for want of a better description, host a very substantial portion of all Internet speech. This characteristic means that if the online intermediaries are held responsible in an effective manner for ensuring that their platforms are not used for hate speech, much online hate speech might be reached.[82]

18.120 However, it should also be recognised that there are dangers in holding platforms criminally liable for material which they host. In particular, there is a possibility that criminal liability will lead platforms to be unduly cautious and to err on the side of removing material which has resulted in a complaint, in a way which could have a negative impact on freedom of expression.

18.121 The "no reason to suspect" test currently applied to other forms of dissemination could be highly problematic if applied to online hosts. Where material had been flagged in a complaint as hate speech, it would be difficult for a host to demonstrate that it had *no* reason to suspect that the material was unlawful. Faced with this scenario, it is conceivable that some hosts would simply take the legally safe route of removing or blocking the material.

18.122 Similar problems may occur where firms employ algorithms to identify hate speech. Research in the United States found that two corpuses used to identify hate speech were twice as likely to flag Tweets using African American English than tweets identified as "white".[83] In one notorious case, Facebook flagged the American Declaration of Independence as hate speech.[84]

18.123 Suan Benesch of the Dangerous Speech Project and Emma Llansó of the Free Speech Project have warned:

> Hate speech and abuse are notoriously hard to detect with software, since the slickest algorithms in the world can't parse the nuances of human communication. Algorithms often fail to distinguish between an insult and a genuine joke, or miss the many creative ways in which people attack and denigrate one another, such as by imitating the speech patterns of another group. Humans don't always understand what other

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82 Catherine O'Regan, "Hate Speech Online: an (Intractable) Contemporary Challenge?" (2018) 71(1) *Current Legal Problems* 403, 416 to 417.

83 Maarten Sap et al, "The Risk of Racial Bias in Hate Speech Detection" (2019) *Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics.* The authors identify a particular problem that "what is considered toxic inherently depends on social context (e.g., speaker's identity or dialect). Indeed, terms previously used to disparage communities (e.g., "n*gga", "queer") have been reclaimed by those communities while remaining offensive when used by outsiders".

84 The Declaration includes a reference to "merciless Indian savages".

people mean, but they can bring cultural, linguistic and social context into consideration.[85]

Discussion

18.124 As argued above, we would favour having a common set of defences applying across all forms of distribution. However, it should also be recognised that the limitations on liability applying to hate speech also apply to a suite of other offences that can be committed through supply of online services such as those dealing with obscenity or indecent images of children.[86] Bringing the rules applying to online hate material into line with other distributors of inflammatory material, would address one inconsistency but it would do so by introducing another discrepancy, creating a different platform liability regime for hate speech than for, say, indecent or grossly offensive material.

18.125 One possible solution which avoids this is to apply the liability regime currently applying to online platforms to non-digital forms of "innocent" dissemination (that is, where the distributor is not shown to have intended to stir up hatred). Under this model, any distributor – online or offline – would be liable only if they had actual knowledge of the content of the material. Mere reason to suspect would not be enough.

18.126 One strong argument for such an approach is that at the moment the "likely to" limb only applies to racial hatred. The requirement for intent in the existing offences for hatred on grounds of religion and sexual orientation means that innocent dissemination is not caught by the offence. If, as we propose in paragraphs 18.211 to 18.241, the "likely to" limb (with new protections) were extended to cover other protected characteristics, there would be more scope for innocent dissemination to be caught under the "likely to" limb.

18.127 We stress that the requirement for actual knowledge of the content of the material should only apply where an intent to stir up hatred cannot be proven. There are certain situations in which a distributor might intend to stir up hatred, without having actual knowledge of the content of the material. We consider that in such circumstances, the distributor has the requisite intention to justify criminalisation:

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85 Susan Benesch and Emma Llansó, "We can't let tech companies use algorithms to police us after COVID-19", *openDemocracy*, 24 April 2020.

86 The 2002 regulations mean that the Directive applies in practice to any offences existing before the Directive – such as, for instance, offences under the Obscene Publications Act 1959 or the Protection of Children Act 1978; while offences created after that date need specific provision. For instance, the "extreme pornography" offences created in the Criminal Justice Act 2008, have special provisions for information society service providers in Schedule 14 that replicate the E-Commerce Directive.

Hypothetical example: digital versus physical dissemination

18.128 X is a member of a British-based far right group and a professional website designer. X has seen Y, an American neo-Nazi in a serious of YouTube videos in which she delivers antisemitic, Islamophobic and homophobic tirades. Upon learning that Y has been banned from YouTube and her videos removed, X emails Y and offers to host Y's material on X's own website, telling her "I loved your YouTube stuff. If you can send me similar material, I'll put it on my site where I'm sure it will find an appreciative audience!"

18.129 X's website has several thousand regular users, and as a result he has been able to sell banner advertising, generating money from clicks on the embedded links.

18.130 X decides to send Y the password to his site so that she can directly upload her videos herself.

18.131 At the same time, Y also sends a file containing three speeches to Z, another member of the British group, who burns them onto CDs and passes them on to his friends.

18.132 In this scenario, if the prosecution can show that X's intention was to stir up hatred against Jews, Muslims and gay people, and he has knowingly hosted inflammatory material, we believe it is right that his behaviour should be criminalised. He is clearly a party to Y's stirring up hatred.

18.133 Yet the E-Commerce regulations would provide X with a defence, since although he is aware of the nature of Y's videos (to a far greater degree than just a "reason to suspect") he does not have "actual knowledge" that any video contains material which is threatening and intended to stir up religious hatred or hatred on grounds of sexual orientation, or contains material which is threatening, abusive or insulting and likely to stir up racial hatred.

18.134 Z, however, would be guilty of offences under sections 21 and 29E. Although on the face of it his culpability is no different, the fact that he has chosen to distribute the digitised files in a physical form, means he would have to show that he had no reason to suspect that they contained threatening (or in the case of the section 21 offence, abusive or insulting) material. Given Y's previous output, it is unlikely he could do this.

Combination of conduct and fault

18.135 A final problem is that the laws on possession and distribution of inflammatory material were crafted for forms of physical media in which dissemination is a one-off event. The same is also true for broadcasts and plays, albeit that there may be repeated showings or stagings. The relevant test for fault – in relation to the intent and knowledge of those involved in disseminating inflammatory material – is the point at which material is possessed, published, staged, played, broadcast or distributed.

18.136 In contrast, publication on the internet is an ongoing process. A service provider may be unaware at the point at which material is posted or uploaded that it is threatening or abusive or likely to incite hatred, but later become aware of this, while that material remains available.

18.137 One interpretation of sections 19 to 21 and 29C to 29E is that the act of publishing, distribution, etc is complete as soon as material is made available on a website or platform. On this interpretation, a hosting service would be able to use the defence in section 23(3) that at the time of publication it was unaware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

18.138 Such an interpretation, however, is hard to square with the provisions on liability in the Regulations, which anticipate that a host may become liable if it fails to remove or restrict access to material expeditiously upon obtaining actual knowledge of the content of the material.

Consultation Question 43.

18.139 Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host?

18.140 If "actual knowledge" is retained as a requirement for platform liability, should this be the standard applied in other cases of dissemination of inflammatory material where no intention to stir up hatred can be shown?

THE MENTAL ELEMENT

18.141 The required mental element (fault or "mens rea") differs between the offences relating to racial hatred and religious hatred/sexual orientation. The racial hatred offences have two limbs – behaviour that is *intended* to stir up racial hatred, and behaviour that is *likely to* stir up racial hatred. Incitement of religious hatred and hatred on grounds of sexual orientation are only unlawful where there is intent to stir up hatred.

Intentionally stirring up hatred

18.142 The offence of stirring up racial hatred in its simplest form is complete when a person uses threatening, abusive or insulting words or behaviour and intends thereby to stir up hatred. This particular combination of the conduct element (the words used) and the fault element (the intention to stir up hatred) results in a narrowly defined offence. This means that where the conduct involves threatening, abusive or insulting words or behaviour, and the accused intended to stir up racial hatred, the intent to stir up hatred alone is sufficient for a conviction. It is not necessary to show that the defendant knew that the words used were threatening, abusive or insulting, nor whether they were in fact likely to stir up racial hatred. Indeed, most of the defences available to someone who disseminates hate material are unavailable where they intended to stir up hatred.

18.143 In the case of religious hatred or hatred on grounds of sexual orientation, the words or behaviour must be threatening; abusive or insulting words or behaviour are insufficient.

Again, where the conduct involves threatening words or behaviour, and the accused intended to stir up hatred, the intent to stir up hatred alone is sufficient for a conviction. It is not necessary to show that the defendant knew that the words used were threatening, nor whether they were in fact likely to stir up hatred.

18.144 A key difficulty with the conduct element of the offence is that the requirement for threatening (or abusive or insulting) words to be used creates a loophole. It is not hard to envisage situations in which a person might deliberately spread hate by engaging in speech which, while defamatory of a group, does not involve threatening (or abusive or insulting) words – for instance by the deliberate spreading of untruths about the group. Examples would include antisemitic tropes such as the "blood libel"[87] or the Protocols of the Elders of Zion.[88]

18.145 Parliamentary debates on the legislation relating to racial hatred, religious hatred and hatred on grounds of sexual orientation generally centred on the need to protect those who engage in temperate criticism of particular religions or sexual practices, with no intention of inciting hatred.[89]

18.146 In this context, there is a real question as to the requirement for words used to be threatening (or in the case of racial hatred, threatening, abusive or insulting) when there is a demonstrable intention to stir up hatred. In this respect, it is worth considering the origins of the "threatening, abusive or insulting" provision. The words originated in section 54 of the Metropolitan Police Act 1839, and applied to threatening, abusive or insulting words intended to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.

18.147 In *Brutus v Cozens*,[90] the House of Lords considered the origins and application of this provision. Lord Reid said:

> Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore, vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting… Free speech is not impaired by ruling them out.

18.148 Lord Reid's arguments point to the notions of the "heckler's veto" and "fighting words". The "heckler's veto" applies where a party who disagrees with a speaker's message is

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87 The "blood libel" is antisemitic trope that Jews murder children in order to use their blood in religious rituals. Originating in Medieval England, where it was responsible for several massacres, the trope continues to circulate today.

88 The Protocols were a hoax text purporting to document a Jewish conspiracy to control the world by controlling the press and finance. The Protocols continue to be cited by modern antisemites and conspiracy theorists.

89 See for example *Hansard* (HC), 6 May 2008, vol 475, cols 599 to 633.

90 *Brutus v Cozens* [1973] AC 854, [1972] UKHL 6.

able to trigger events which result in the silencing of their opponents. It is something to which the domestic courts have long been alive and keen to avoid. In *Beatty v Gilbanks*,[91] the Queen's Bench quashed the convictions of three Salvation Army officers for unlawful assembly leading to a breach of the peace, holding that the disturbances were caused by people antagonistic to them, and that the order for them to disperse was unlawful.

18.149 Lord Reid's argument also highlights the court's concern that "fighting words" should not be protected speech. In *Chaplinsky v New Hampshire*, the US Supreme Court held that "'fighting words' – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace… are no essential part of any exposition of ideas" – were outside the protection of the First Amendment to the US Constitution which protects freedom of speech.

18.150 It can be argued that in order to avoid succumbing to the heckler's veto, Parliament restricted the offences in the 1839 and 1936 Acts to "fighting words" – "threatening, abusive and insulting words" that might provoke violence in others which should not be protected by freedom of expression.

18.151 However, the same considerations do not necessarily apply when considering the deliberate use of words and behaviour intended to stir up hatred. First, like threatening, abusive or insulting words, it is not clear that words intended to stir up hatred, which aim at the negation of others' rights, deserve to be protected. As we have seen, they will generally fall outside the protection of Article 10 of the ECHR (see paragraphs 18.35 to 18.42).

18.152 Second, unlike words which may provoke a recipient into a breach of the peace, no question of the heckler's veto arises. The argument for silencing the speaker is that the words are harmful in themselves, not merely that they may lead others to engage in unlawful conduct.

The "likely to" limb

18.153 The situation is more complicated under the "likely to" limb. The "likely to" limb was introduced into the racial hatred offence in 1976.

18.154 Two developments had led to this. First, as already noted, Sir Leslie (later Lord) Scarman was highly critical of the practical application of the existing law and concluded that the Act needed "radical amendment to make it an effective sanction, particularly… in relation to its formulation of the intent to be proved before an offence can be established."[92]

18.155 Second, the law relating to intent generally had changed. At the time of the original offence's passage in 1965, the law had been governed by the House of Lords' ruling in *DPP v Smith*.[93] This had established that a person was taken to foresee the natural and

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91 *Beatty v Gillbanks* (1882) 9 QBD 308.

92 Sir Leslie Scarman, *Inquiry into the Red Lion Square Disorders* (1974).

93 In *DPP v Smith* [1961] AC 290, the House of Lords had ruled that an objective test was applicable to the intent required for a murder conviction, such that a person would be taken to have intended what would

probable consequences of their actions. Consequently, a person whose words or behaviour had the natural and probable consequence of inciting racial hatred would be taken to have the requisite intent.

18.156 In 1967, however, Parliament legislated so that courts and juries were no longer bound to infer the defendant's intent from the natural and probable consequences of their actions.[94] Effectively, the bar for conviction had been raised – the prosecution now needed to prove that racial hatred was the intended purpose of the person's words or behaviour. The "likely to" limb, therefore, arguably did little more than restore the law to its 1965 position.

What does "likely" mean?

18.157 The CPS takes the view that "'likely' does not mean that racial hatred was simply possible". Although there does not appear to have been any consideration of the meaning of the phrase by superior courts in the context of stirring up legislation, the meaning of the words "likely to" has been the subject of considerable discussion in other areas of law.[95]

18.158 In *Re H*,[96] Lord Nicholls noted that "[t]he word 'likely' in ordinary language may mean probable, in the sense of more likely than not; or it may include what might well happen". In *Davies v Taylor*,[97] Lord Cross of Chelsea noted that

> The word "likely"… may be used in different senses. Sometimes it may be used to mean "more likely than not", at other times to mean "quite likely" or "not improbably" though less likely than not.

18.159 In *Parkin v Norman*[98] the Divisional Court considered the offence in section 5 of the Public Order Act 1936, "threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned" (broadly the offence now contained in section 4 of the Public Order Act 1986). In accordance with the principle that criminal law provisions are to be restrictively interpreted, the Court stressed that the offence was "likely to" not "liable to". The court concluded that, "this is a penal measure and the courts must take care to see that the

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have appeared to the "reasonable man" to have been the natural and probable consequences of an action, regardless of whether he or should did actually intend those consequences.

94 Criminal Justice Act 1967, s 8.

95 In this section we discuss case law considering the meaning of "likely to" where it appears in statute. The phrase has also been considered in some contract and negligence cases, including *Davies v Taylor* (1974) AC 207, and the 'Heron II' case, *C Czarnikov v Koufos* (1969) 1 AC 350. However, these cases are not strictly about interpreting the meaning of a statutory term, but about where the degree of likelihood should lie at common law.

96 *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1995] UKHL 16.

97 [1974] AC 207.

98 [1983] QB 92 (1982).

former expression is not treated as the latter",[99] considering "likely to" to indicate a greater degree of probability than "liable to".[100]

18.160 However, in the subsequent case of *Wallis v Bristol Water*[101] the High Court held that

> *Parkin v Norman* does not require that in all penal measures the court must take care to see that "likely" is not treated as if it meant "liable". As the court said in that case, the court's task is to construe the words of the section in light of the Act as a whole.

18.161 It went on to hold that in the particular offence – which concerned possible contamination of a water supply – "likely to" was being used in the sense of a "real possibility".

18.162 In support of this it citied *Re H*, where Lord Nicholls held that the Children Act 1989 standard of "likely to suffer significant harm" means a real or substantial risk of significant harm, but should not be equated with more likely than not.[102]

18.163 In *Dunning v United Liverpool Hospitals' Board of Governors*,[103] Lord Denning held that "likely to be made" in the Administration of Justice Act 1970[104] should be construed as meaning "may" or "may well be made", while James LJ interpreted it as a "reasonable prospect".

18.164 It is important that the criminal law is clear so that citizens are aware whether their behaviour is lawful. This is especially so with an offence such as stirring up racial hatred which can be committed without intent, and which interferes with a fundamental right. The European Court of Human Rights has repeatedly ruled that in order for interferences with Articles 8, 9, 10 and 11 (respect for private life, freedom of religion, freedom of expression and freedom of assembly) to be "prescribed by law", they must be sufficiently precise to enable the citizen to foresee the consequences which a given action may entail.[105] In the case of a criminal offence, a lack of clarity in the law may

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99 *Parkin v Norman* [1983] QB 92 (1982).

100 The conduct in question was masturbating in a public lavatory, and the risk of a breach of the peace was purported to be the possibility of a violent reaction by a witness "insulted" by the implied assumption that he was also homosexual. One possible explanation for the Court's reluctance to give the words "likely to" the meaning contended by the prosecution is that it felt that the conduct had been "charged under a provision which was never designed to deal with it" and wanted to establish that "section 5 of the Public Order Act will, more often than not, prove to be an inappropriate charge in the case of homosexual activity in public lavatories".

101 *Wallis v Bristol Water* (2009) EWHC 3432 (Admin) at [18].

102 *Re H* [1995] UKHL 16.

103 *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586.

104 Section 31 of the Administration of Justice Act 1970 allows an application to be made to the High Court for an order requiring disclosure of documents to a person likely to be a party to proceedings in that court in which a claim in respect of death or personal injury is likely to be made. An order may be made against any person likely to be a party to the proceedings or likely to have any documents relevant to that claim.

105 *Sunday Times v United Kingdom*, Application 6538/74, para 49.

also breach the prohibition in Article 7 that no one may be convicted for an act or omission that did not constitute an offence at the time of its commission.[106]

18.165 On the other hand, attempting to state the degree of likelihood which gives rise to criminal liability could be difficult. The Racial and Religious Hatred Bill 2005, which as initially tabled would have extended the existing stirring up racial offences to cover religious hatred, would have replaced the wording of the "likely to" limb – "having regard to all the circumstances, racial hatred is likely to be stirred up" – with the phrase "having regard to all the circumstances the words, behaviour or material are (or is) likely to be heard or seen by any person in whom they are (or it is) likely to stir up racial or religious hatred".

18.166 This definition does little to add clarity – since "likely to" is still undefined – and it is arguable that compounded use of "likely to" in this clause could encompass circumstances in which the possibility of hatred actually being stirred up is so remote that the conduct should not be criminalised. It does not, for instance, distinguish between the mere possibility of one unusually susceptible member of an audience and words directed at an already excitable mob.

18.167 However, a much tighter definition brings its own problems. For instance, the partial defence of loss of control (previously provocation) in homicide cases refers to a "person … with a normal degree of tolerance and self-restraint [who] might have reacted in the same way",[107] while libel law contemplates the "reasonable reader" who is "not naïve, but he is not unduly suspicious".[108] It would be possible to require that hatred be likely to be stirred up in such a person. The difficulty with such a definition is twofold: first, it assumes that there are circumstances where it might be reasonable, or at least normal, to be incited into hatred. Second, it fails to cover the circumstance where a person addresses their words to an excitable or impressionable audience who might be expected to be unusually susceptible to being inflamed.

18.168 While, therefore, we can see value in a clearer definition of what "likely to" means, this would entirely depend on there being a suitable definition.

18.169 We agree that the test should not be a mere possibility that hatred could be stirred up. At the same time, a requirement that it be more likely than not that hatred would be stirred up would be unsatisfactory. A test like this could lead to courts being invited to weigh up with an unrealistic degree of mathematical precision the probability that a particular audience (or even a putative audience) would be incited into hatred.

18.170 A test of "real and substantial possibility" might make clear that the offence required more than a merely fanciful or slight chance. "Real or substantial" is also the test which courts apply in "loss of chance" cases. We would suggest that the social risks involved

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106 See for instance *Cantoni v France*, Application 17862/91.

107 Coroners and Justice Act 2009, s 54.

108 Neill LJ in *Hartt v Newspaper Publishing PLC* (unreported), 26th October 1989, Court of Appeal (Civil Division). Cited with approval in *Skuse v Granada Television* (1993) EWCA Civ 34; *Jeynes v News Magazines Ltd* (2008) EWCA Civ 130; and *Stocker v Stocker* (2019) UKSC 17.

in inciting public hatred are more like the public health risks in *Wallis v Thames Water* than the prospects of provoking immediate violence in *Parkin v Norman.*

Consultation Question 44.

18.171 We invite consultees' views on whether the meaning of "likely to" in the racial hatred offence should be defined in statute (and for any other characteristics to which it would apply in future). We further invite views on how might this be defined.

Strict liability or recklessness?

18.172 Because the "likely to" limb focuses on the consequences of the words or material rather than the speaker's intent, in contrast to the intent limb, this seems to suggest strict liability. There is a presumption that whenever a statute creating a criminal offence is silent as to fault or mens rea, words importing mens rea should be read in. However, there are some exceptions to this general rule.[109] One is where other sections of an Act expressly require mens rea. This may suggest that Parliament intended strict liability in relation to other offences in the Act. However, in *Sweet v Parsley* it was held that "[i]n the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament."[110]

18.173 In this case, there are good reasons to displace the assumption of mens rea. First, if an assumption that the law required intent to stir up hatred was read into the offence, the "likely to" limb would not cover anything that was not already unlawful under the first limb. Second, the history of the provisions shows that this limb was created to address problems associated with the requirement for intent. Third, several provisions within the legislation creating defences for those who had no intention to stir up hatred, show that intent to stir up hatred was not intended to be a necessary part of the offence. Fourth, the presence of these defences shows that Parliament intended something more nuanced than a simple choice between mens rea and strict liability.

18.174 Where intent to stir up hatred is not proven and the prosecution relies on the "likely to" stir up hatred limb, section 18(5), covering the use or display of threatening, abusive or insulting words or behaviour, provides that a person is not guilty of an offence if they:

- did not intend their words or behaviour to be threatening, abusive or insulting; and
- were not aware that they might be threatening, abusive or insulting.

18.175 Thus, the mental element under the "likely to" limb is more like one of recklessness – *if* the person intended to use threatening, abusive or insulting words, *or* knew that their words might be threatening, abusive or insulting, then they can be convicted if those words were likely to stir up hatred, even if they did not intend to do so. By choosing to

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109 *Sweet v Parsley* [1970] AC 132.

110 *Sweet v Parsley* [1970] AC 132, at [148].

use words which might be threatening, abusive or insulting, they are put on notice to be careful not to say anything which is likely to stir up hatred.

18.176 As noted at paragraphs 18.79 to 18.91, there are similar defences for the other racial hatred offences, but they operate somewhat inconsistently in respect of those involved in the dissemination of material. It is no defence to a charge under sections 18 to 21 that the person did not know that hatred was likely to be stirred up, (although the defence is available for a broadcaster under section 22).

18.177 This is out of line with most criminal law, which proceeds on the basis that in general a person is to be convicted on the basis of the facts as they believed them to be at the time.[111] It is not immediately apparent why a person's failure to appreciate the impact that their words might have on others should be treated differently from their failure to appreciate that the words were threatening, abusive or insulting. The "likely to" limb is an interference with the right to freedom of expression, and where the words are not intended to promote hatred, the need to justify any interference is greater (they do not fall outside the protection of Article 10 on account of Article 17).

A NEW APPROACH

18.178 In our view the link between the nature of words spoken and the speaker's intentions are poorly aligned in the current stirring up provisions. First, the current legislation means that words clearly intended to promote hatred fall outside the law simply because the speaker avoided using threatening, abusive or insulting terminology. In our previous report we noted that Stop Hate UK had argued

> one of the reasons there are so few prosecutions for the existing stirring up hatred offences is that organised groups, such as the far-right (as opposed to individuals not associated with any group), who may be likely to make statements which would amount to an offence under the existing provisions are generally aware of the offences and limit their conduct accordingly, so as not to become criminally liable.

18.179 Second, conversely, the law may operate unduly harshly on those without an intent to stir up racial hatred, since the defences under the "likely to" limb are complex and inconsistent. We can, for instance, see no obvious reason for treating knowledge of whether the words used were threatening, abusive or insulting differently from knowledge of whether hatred was likely to be stirred up.

18.180 Third, without reform, the potentially harsh operation of the "likely to" limb may create concerns about the impact of extending the limb to cover other protected characteristics.

18.181 Our provisional proposal is for a new approach which makes it easier to prosecute those who deliberately promote hatred, while providing greater protection for freedom of expression under the "likely to" limb.

18.182 Under this new approach, the current linguistic constraints on prosecuting intentional incitement to hatred would be relaxed, but the protections under the "likely to" limb would be retained and strengthened, including by removing "insulting" words and

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[111] *B v DPP* (2002) 2 AC 428. There are some exceptions to this principle – such as where a person's belief is affected by self-induced intoxication.

behaviour from the offence's scope. We consider that this would enable prosecutors to focus on the more egregious cases of incitement, while reducing the possibility of a chilling effect on legitimate free speech.

18.183 Under our proposal, *intentionally* stirring up hatred would be an offence regardless of whether the words used were "threatening", or "abusive or insulting". The prosecution would be required to prove to the criminal standard that the words had been used with intent to stir up hatred. Of course, in many cases, the language used would be strong evidence of the speaker or writer's intent. However, there might be cases where despite using apparently moderate language, there is other evidence available to prove that the person did so with a demonstrable intention to stir up hatred. An example might be where a member of a neo-Nazi group is shown to have published claims which they knew to be false – such as, for example, the "blood libel" referred to at paragraph 18.144 – with an intention to stir up antisemitic hatred.

18.184 There would be a higher threshold applying to prosecutions under the likely to limb. Where a person is not shown to have intended to stir up hatred, that person would only be guilty of an offence if the prosecution could prove that the defendant

(1) had used threatening or abusive words or behaviour;

(2) knew or ought to have known that the words or behaviour were threatening or abusive;

(3) knew or ought to have known that hatred would be likely to be stirred up as a result; and

(4) in all the circumstances hatred was likely to be stirred up.

18.185 We prefer the formulation "knew or ought to have known" to a strict requirement for knowledge, or for knowledge or belief, that the words or behaviour were threatening or abusive, or likely to stir up hatred. First, requiring knowledge (or belief) to be proven would place an undue burden on the prosecution.

18.186 Second, our provisional proposal would make clear that culpable self-induced ignorance, whether because of intoxication or turning a blind eye, would give no defence.

18.187 Third, this formulation would be more satisfactory in relation to offences committed by corporations. Sections 28 and 29M explicitly contemplate that the offences may be committed by non-natural persons. However, in large organisations, it may be difficult to attribute the requisite intent or knowledge to the organisation itself. The formulation "knew or ought to have known" would permit an organisation complicit in the distribution of inflammatory material to be prosecuted if it should have had procedures in place to identify and prevent the distribution of such material, but did not.

Case Example

18.188 X is a specialist religious broadcaster. It regularly buys in material from religious organisations based overseas. These are supposed to be checked for legal and regulatory compliance. On several occasions, it has failed to check material prior to transmission and one occasion, it broadcasts material in which a foreign preacher tells viewers:

> It is your duty to kill those who turn their back on God. Those who cannot kill such men have no faith. If a man is an apostate, then it is not right to wait for the authorised courts; anyone may kill him.

18.189 Under the present law, the broadcaster would not commit an offence of stirring up religious hatred, because unlike racial hatred, the religious hatred offence requires an intention to stir up hatred. Under our proposal, the broadcaster would be liable because the words are threatening, abusive and likely to stir up hatred; and it ought to have known that the material was threatening and was likely to stir up hatred (because it ought to have checked the material in advance).

18.190 If, however, the same words were spoken unprompted by a caller to a phone-in programme, the broadcaster would not be liable, because it did not know, and ought not to have known, that inflammatory comments would be made.

18.191 Fourth, we prefer the formulation "knew or ought to have known" – which considers the subjective circumstances of the defendant – to possible alternatives such as a wholly objective test based, for instance, on what a "reasonable person" would have known.

18.192 For example, consider the case of a young person with a degree of learning difficulties who uses a racial slur in an online post. He knows that the slur is abusive, but does not realise that the post is likely to stir up racial hatred. Under the current law, that person would have no defence, because the requirement for knowledge only applies to the nature of the words – that they are threatening, abusive or insulting – and not to the likelihood of hatred being stirred up. This seems to amount to an injustice.

18.193 However, it would be equally unjust to judge his actions against the "reasonable person", who would presumably have a greater level of understanding than this particular defendant of the impact of his actions.

18.194 In assessing whether he "ought to have known" that the words were likely to stir up hatred, however, his learning difficulties would be taken into account.

Consultation Question 45.

18.195 We provisionally propose that intentionally stirring up hatred be treated differently from the use of words or behaviour likely to stir up hatred. Specifically, where it can be shown that the speaker intended to stir up hatred, it should not be necessary to demonstrate that the words used were threatening, abusive, or insulting.

18.196 Do consultees agree?

Consultation Question 46.

18.197 We provisionally propose that where intent to stir up hatred cannot be proven, it should be necessary for the prosecution to prove that:

(1) the defendant's words or behaviour were threatening or abusive;

(2) the defendant's words or behaviour were likely to stir up hatred;

(3) the defendant knew or ought to have known that their words or behaviour were threatening or abusive; and

(4) the defendant knew or ought to have known that their words or behaviour were likely to stir up hatred.

18.198 Do consultees agree?

DEFINING INFLAMMATORY: THE THRESHOLD FOR CRIMINALISATION

18.199 The racial hatred offences apply to words, behaviour and material which is "threatening, abusive or insulting". In contrast, the offences relating to hatred on the grounds of religion and sexual orientation apply only to "threatening" words, behaviour and material. This partly reflected previous free speech concerns – especially among members of the House of Lords – which had hampered previous attempts to outlaw stirring up religious hatred.[112]

18.200 When the Racial and Religious Hatred Bill was passing through Parliament, the House of Lords voted to restrict the religious hatred offence to threatening words and behaviour (excluding insulting or abusive). When the Government brought forward proposals to outlaw stirring up hatred on grounds of sexual orientation, it did so by extending the religious hatred offences in sections 29A to 29G (rather than the racial offences in sections 18 to 23) to cover hatred on grounds of sexual orientation. Thus, this set the

[112] Lucinda Maer / House of Commons Library, *Religious Hatred: Attempts to Legislate 2001-05* (2008), available at https://researchbriefings.files.parliament.uk/documents/SN03189/SN03189.pdf.

threshold for the offence at "threatening" words and behaviour "intended" to stir up hatred.

18.201 The situation has been further complicated in recent years by changes to the POA 1986. In 2013, in response to sustained campaigning from, among others, the Christian Institute, the National Secular Society, Big Brother Watch, the Peter Tatchell Foundation, the Freedom Association and Rowan Atkinson, the House of Lords approved legislation to remove the word "insulting" from the section 5 offence of causing harassment, alarm or distress (although not from the provisions relating to racial hatred[113] and intentional harassment, alarm or distress[114]).

18.202 The then Coalition Government had initially indicated that it intended to overturn the Lords' amendments to the Crime and Courts Bill to remove insults from section 5, but ultimately decided to allow the amendment to stand. Crucial to this change of stance was evidence from the then Director of Public Prosecutions, Sir Keir Starmer, that the CPS had been unable to identify a case in which behaviour leading to a charge under section 5 could be characterised as "insulting" but not "abusive".[115] He concluded that the word could therefore be safely removed without undermining the CPS's ability to bring prosecutions successfully.

18.203 There are thus three different categories of expression affected by the POA 1986:

(1) Sections 4 and 4A – deliberate harassment, alarm or distress – and sections 18 to 23 – racial hatred – apply to threatening, abusive and insulting words, material or behaviour

(2) Section 5 – harassment, alarm or distress – applies to abusive and threatening words, material or behaviour

(3) Sections 29A to 29G – religious hatred and hatred on grounds of sexual orientation – apply to threatening words only

18.204 There is a rational distinction between the offences in sections 4 and 4A, and section 5. The former offences cover behaviour aimed directly at another person; by contrast the offence in section 5 can be carried out merely where a person nearby is likely to be affected. Abuse directed at an individual is qualitatively different to insulting words which are not intended to cause a person harassment, alarm or distress.

18.205 Our provisional view is that there should be a single standard applying to all forms of hatred. Given the greater sensitivities around free speech considerations in respect of religion (as well possibly of sexual orientation and, should our recommendation in respect of it be accepted, to transgender identity), we doubt whether there would be support for a single standard that included merely "insulting" words that are "likely to" (as opposed to "intended to") stir up hatred.

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113 Public Order Act 1986, ss 18 to 23.

114 Public Order Act 1986, ss 4 to 4A.

115 Pat Strickland and Diana Douse / House of Commons Library, *Insulting words or behaviour': Section 5 of the POA 1986* (2013), available at https://researchbriefings.files.parliament.uk/documents/SN05760/SN05760.pdf.

18.206 As noted earlier, the CPS took the view that in practice there were no prosecutions brought under the "threatening, abusive or insulting" provisions in section 5 of the POA 1986 that could not have been brought under "threatening or abusive". Lord Bracadale "consider[ed] that an equivalent analysis would apply in relation to the offences on stirring up racial hatred, particularly given the very low level of prosecutions that there are in any event." Consequently, he proposed that there should be a single standard applying to all forms of stirring up, and that this should be "threatening or abusive, but not insulting.[116]

18.207 We are conscious, however, that applying a single standard limited to threatening and abusive words or behaviour would raise the current threshold for racial hatred and could be seen as legitimating the use of racial insults. Our recommendation on intention, discussed at paragraphs 18.178 to 18.198, would address this, and ensure that those who set out deliberately to stir up racial hatred through the use of words or behaviour which fall short of "threatening or abusive" would continue to be caught by the criminal law. Insulting words would continue to be caught where intent to stir up racial hatred could be proved, and racial insults targeted at a person would continue to be captured by sections 4 and 4A of the POA 1986. That is to say, our proposals would make it easier to prosecute those who intentionally stir up racial hatred, while making a relatively minor change to the law as it applies to material which is not intended to stir up hatred.

Consultation Question 47.

18.208 We provisionally propose that there should be a single threshold to determine whether words or behaviour are covered by the "likely to" limb of the stirring up offences, applying to all protected characteristics.

18.209 Do consultees agree?

18.210 If so, would consultees favour applying a single threshold of "threatening or abusive" but not "insulting" words to prosecutions brought under the "likely to" limb?

WHICH CHARACTERISTICS SHOULD BE COVERED

Disability and Transgender

18.211 In our 2014 report on extending the existing hate crime offences, we concluded that there was a case in principle for extending the stirring up offences to cover hatred on grounds of disability and transgender identity. However, at the time, and in the absence of a fuller review, we concluded that a practical need for the stirring up offences to be extended had not been demonstrated.

18.212 The main arguments proffered against extending the stirring up offences were:

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[116] Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) paras 5.37, 5.41, available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

(1) the potential impact on free speech;

(2) that the relevant conduct was already covered by existing offences; and

(3) a lack of evidence of a practical need for new offences.

18.213 Ultimately, we concluded that the issue came down to the third of these. While offences of stirring up hatred are not in themselves infringements of the right to freedom of expression, they are an interference with that right, and there is therefore a requirement to show that the interference is "necessary". Consequently, the practical need for the offences must be made out. In relation to the second argument, we reiterated our view that there was a theoretical gap in the law where existing offences would be inadequate to punish behaviour which would meet the high threshold of the stirring up offences if they were to be extended. However, we concluded that the evidence we had received did not demonstrate that such conduct occurred on a significant scale. We also considered that the examples of hate material provided by stakeholders to demonstrate a need for extending the stirring up offences, while clearly offensive, would not be caught by the existing definitions of stirring up if extended to cover disability and transgender.

Developments since 2014

18.214 In 2016, in its report on Transgender Equality, the House of Commons Women and Equalities Select Committee concluded that "the case is overwhelming for protecting all groups concerned, including trans people, on an equal basis" and urged the Government to "introduce new hate-crime legislation which extends the existing provisions on aggravated offences and stirring up hatred so that they apply to all protected characteristics".[117]

18.215 In 2018, the House of Commons Petitions Committee issued a Special Report on Online Abuse. It called upon the Government to "amend hate crime legislation to ensure disability hate crime has parity with other hate crime offences".

18.216 Since 2014, much greater evidence has emerged of rates of hate crime experienced by transgender and disabled people. In 2012/13 (the year for which data was available when we published our previous report), police recorded 364 cases of transgender hate crime and 1,911 cases of disability hate crime. In 2018/19, this had risen to 2,333 cases of transgender hate crime and 8,256 cases of disability hate crime.

18.217 It is important to acknowledge that these increases do not necessarily correlate to increased offending. Changes to police recording practices, a greater willingness to report hate crime, and a greater recognition of transgender and disability hate crime may well have contributed to these increases.

18.218 Equally, this data does not directly bear on the question of need for extending the stirring up offences. As stirring up disablist or transgender hatred is not currently unlawful, it would not necessarily be reported to or recorded by police.

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[117] Transgender Equality, Report of the Women and Equalities Committee (2015-16) HC 390, p 60.

18.219 In 2014, we noted this point in relation to arguments received that extending the stirring up offences would encourage people to report it and thus give an idea of the scale of the problem. We concluded that "the correct approach is first to establish whether there is a problem and then, if there is one, to create the offence. To approach it in the opposite order is to use the criminal law as a tool of social research".[118]

18.220 However, while we maintain this position, we also recognise that this means that we must rely on evidence other than recorded incidents of stirring up. To this extent, it is legitimate to read across from evidence of other hate offences. Whether or not the incidence of disabled and transgender hate crime has increased since our previous report, there is certainly greater evidence of a problem of transgender and disability hate crime than was available at that time.

18.221 In 2014, we expressed concern that stakeholders held unrealistic expectations about the kind of material that would be caught by extended versions of the stirring up offences. We retain that concern. For instance, the charity Changing Faces has highlighted the frequent portrayal of people with facial disfigurement as villains in films, such as the James Bond franchise. However, it is highly unlikely that this would be caught by the stirring up offences: there is no evidence that producers of, say, the James Bond films, do so with intent to stir up hatred against people with facial disfigurements. While we accept that many people might find such portrayals, and especially the repeated use of this trope, to be offensive, we do not consider it would amount to being abusive or threatening.

18.222 Nor would "deadnaming"[119] of trans people in media coverage. Again, while many trans people find this highly offensive and believe that it creates a hostile atmosphere, it is unlikely to have been intended or likely to stir up hatred.

18.223 Nonetheless, we have far greater evidence of hate crime against trans and disabled people than was available in 2014, and the case for including these categories within the stirring up offences on a practical, not just theoretical, basis is now more compelling.

18.224 Our provisional conclusion, therefore, is that there is a demonstrable case for extending the stirring up offences to cover transgender identity and disability, with suitable protections for freedom of expression.

Consultation Question 48.

18.225 We provisionally propose that the offences of stirring up hatred be extended to cover hatred on the grounds of transgender identity and disability.

18.226 Do consultees agree?

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[118] Hate Crime: Should the current offences be extended? (2014) Law Comm No 348, para 7.145.

[119] "Deadnaming" is the practice of referring to a transgender person by the name associated with their birth sex rather than their acquired gender.

Is there evidence of a need to extend the stirring up offences to cover sex or gender?

18.227 Our 2014 report did not examine the possibility of extending the stirring up offences to cover sex or gender. While we have concluded in this consultation paper that there is a case for extending the aggravated offences and enhanced sentencing regime to cover sex or gender, in our previous report we argued that additional considerations should be taken into account before protected characteristics under the aggravated offences and enhanced sentencing provisions should be covered by the stirring up offences.

18.228 We offered three reasons why it was necessary to consider the need for extending the characteristics protected under the stirring up offences separately from the considerations applying to the aggravated offences and the enhanced sentencing regimes.[120]

18.229 First, we argued that the aggravated offences and enhanced sentencing regimes constituted a single scheme applying across the five protected characteristics and were initially introduced in one statute. The stirring up offences, in contrast, fell outside that scheme and were created for different purposes.

18.230 While this was true in 2014, what we now provisionally propose is a unified scheme applying to stirring up offences across the protected characteristics of race, religion, sexual orientation, transgender, disability and sex or gender, and which would be incorporated with the aggravated offences in a single Hate Crime Act (although the enhanced sentencing provisions will be in the Sentencing Code, and a reference to them included in the Hate Crime Act). In this respect it would be highly anomalous if the sentencing measures applied equally to six characteristics, but the stirring up offences to only five. This argument thus carries less weight than in 2014.

18.231 Second, we argued that new stirring up offences, unlike new aggravated offences, would criminalise conduct that is not at present criminal, and third that creating such offences also carried the danger of infringing the right to freedom of expression. On this basis, it was important to provide evidence of a practical need for criminalisation.

18.232 We accept that these latter considerations also apply to sex or gender, and therefore we should explicitly consider whether there is a practical need to extend the stirring up offences.

18.233 In Chapter 12, we found that there is evidence that women are disproportionately targeted for certain crimes and found there was some evidence that this victimisation is based on prejudice, and hostility towards women. A notable part of this evidence was the abuse women face online. Nadim and Fladmoe recognise that women receive more specifically gendered online harassment compared to men.[121] We highlighted that women are frequently the target of sexist and sexualised abuse on social media and noted this has been particularly prevalent among women in politics.[122]

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120 Hate Crime: Should the current offences be extended? (2014) Law Comm No 348, para 7.18.

121 M Nadim and A Fladmoe, "Silencing Women? Gender and Online Harassment" (2019) 1 *Social Science Computer Review*, 11 to 12.

122 See Abusive and Offensive Online Communications: A Scoping Report, (November 2018) Law Com No 381. This report details gendered abuse online experienced by women.

18.234 Bakalis has also highlighted that women are disproportionately targeted by online hate offences.[123] A 2018 study by Amnesty International, found 1.1 million abusive and violent tweets targeting women.[124] While many of these tweets were directed towards individual women, their public visibility may encourage hatred and violence toward women generally.

18.235 Paul Gianassi, National Police Hate Crime Policy Lead, has also highlighted to us the ubiquitous nature of online misogynistic abuse and specifically, the rise of involuntary celibates ("incels").[125]

18.236 The Counter-Terrorism Division of the CPS[126] told us of the rise in extreme misogynistic hate speech they have encountered, mainly perpetuated by incels.[127] They noted that the spread of incel ideology has been linked to an increase in misogynistic murders and several mass killings in Northern America.

18.237 It is important to consider these examples of an increase in hate speech towards women within the wider context of the criminal targeting of women. This is an example of the harmful, real-life implications of gendered hate speech.

18.238 Consequently, we do consider there to be a practical need and compelling case for the stirring up offences to include gender or sex.

Intersectionality and combined characteristics

18.239 The stirring up offences currently apply to three distinct types of hatred. Any prosecution would need to be brought under a specific category, even if it were directed at a group defined by reference to two or more characteristics, such as Muslim women or black gay men.

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123 Online Hate Crime and Hate Speech: Understanding and Responding to Digital Hate conference, 18 September 2019.

124 Amnesty International, *Toxic Twitter: Violence and abuse toward women online* (2018), available at https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/.

125 "Incels" are a community of over 40,000 men who lack romantic relationships and sex. They are explicit in their hatred of and perpetuation of violence toward women. For example, incel groups have encouraged rape and other violence towards women on websites such as Reddit and 4Chan. See O Solon, *'Incel': Reddit bans misogynist men's group blaming women for their celibacy* (The Guardian, 2017), available at https://www.theguardian.com/technology/2017/nov/08/reddit-incel-involuntary-celibate-men-ban. See also, F Rankin, *Incels Uncovered: A look inside the misogynistic online community,* (Newsweek, 2018), available at https://www.newsweek.com/incels-reddit-4chan-internet-misogyny-1137740.

126 The Counter Terrorism Division of the CPS review the charges and prosecute every hate speech related case centrally. They consider whether a case has been correctly flagged as a stirring up offence or whether a different offence and charge is suitable.

127 A recent BBC Three documentary explored the issue of incel radicalisation of men in the UK. (BBC Three, 2019), available at https://www.bbc.co.uk/bbcthree/article/45bdcd7a-1cb1-4ad1-a3e0-ebc2a05243ac.

Consultation Question 49.

18.240 We provisionally propose that the stirring up offences be extended to cover sex or gender.

18.241 Do consultees agree?

18.242 As discussed in Chapter 16, paragraphs 16.108 to 16.122, many people experience hate crime based on more than one characteristic.

18.243 There seems little question that the stirring up offences would apply to a subsection of a racial or religious group, or a group defined by sexual orientation: a sub-group would still be "defined by" race, or religion (or lack thereof), or sexual orientation. For instance, a prosecution for words that have the effect of stirring up hatred against black lesbians could be brought under sections 18 (racial hatred) or 29B (hatred on grounds of sexual orientation).

18.244 The difficulty that arises is that requirements as to intent and the nature of the words covered would depend on which offence was selected. The threshold for a successful prosecution would be lower if the group was at least partly defined by race than by sexual orientation or religion.

18.245 This problem would be addressed by our proposal to align the thresholds for prosecution between racial hatred and hatred on grounds of religion or sexual orientation. However, consolidating the offences in a single crime of stirring up hatred would allow provision to be made explicitly for subgroups defined by more than one protected characteristic.

18.246 By aligning the thresholds and fault requirements applying to the currently protected characteristics, it would be possible to replace the offences in sections 18 and 29B with a single offence of unlawfully stirring up hatred, with the definition of "hatred" listing not only each of the current and proposed characteristics, but also hatred against a group defined by a combination of more than one characteristic.[128]

18.247 Thus, for instance, if a person put up posters targeting, say, black gay men, it would no longer be necessary for the prosecution to have to decide whether to bring a charge for stirring up racial hatred or stirring up hatred on grounds of sexual orientation. The indictment could specify both as constituting unlawful stirring up of hatred.

18.248 Such an offence may also encompass hatred incited against a group where the target is ambiguous but clearly falls into one or more protected characteristics. For instance, a person spreading hate may use a term such as "queers" or "perverts" where it is not clear whether they are referring to sexual orientation, transgender identity, both, or not distinguishing between them. Or it may be clear that posters are intended to stir up hatred against a minority group, but not be clear whether they are being targeted for their race or religion. With a single crime of stirring up hatred, it would be sufficient to

[128] We deal with a similar issue in relation to aggravated offences in Chapter 16 at paras 16.123 to 16.131.

prove that the hatred was intended or likely to be stirred up against members of a group defined by one or more of the protected characteristics.

Consultation Question 50.

18.249 We invite consultees' views on whether the definition of hatred for the purposes of the stirring up offences should include hatred on grounds of one or more protected characteristics.

LIMITATIONS AND EXCLUSIONS

The Dwelling Exception

18.250 Until 1986, the offence of using words or behaviour intended or likely to incite racial hatred could only be committed in a public place. In the POA 1986, Parliament extended the offences to the private sphere. However, an exception exists where words or behaviour are used or written material displayed within a dwelling, provided that they cannot be seen or heard outside that or another dwelling.[129] Similar protections were later incorporated into the legislation on religious hatred and hatred on grounds of sexual orientation.

18.251 This exception also applies to the POA 1986 offences of using threatening, abusive or insulting words or behaviour with intent to put a person in fear of violence, or to provoke violence, or causing a person harassment, alarm or distress.[130]

18.252 To the extent that the aim is to ensure that the criminal law does not intrude on purely private matters, the exception is poorly targeted. It would include a meeting held in a large private house, for instance, but would exclude a private conversation conducted in an office. Other jurisdictions handle this issue differently. For instance, the Canadian Criminal Code excludes a "private conversation" from the offence of wilful promotion of hatred.[131]

18.253 It is also anomalous that the parallel offence of showing video or sound recordings does apply in a dwelling.

18.254 We question the need for this exception to the stirring up offences. As discussed in Chapter 3, the harm at which these offences is targeted is the propagation of hatred. Other incitement offences, such as inciting or encouraging commission of an offence,[132] are not protected simply because they take place within a person's home.

18.255 We therefore propose that the dwelling exception should be removed from the stirring up offences.

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129 Public Order Act 1986, ss 18(2) and (3).

130 Public Order Act 1986, s 4(2).

131 Criminal Code, s 319(2).

132 Serious Crime Act 2007, ss 44 to 67.

Consultation Question 51.

18.256 We provisionally propose that the current exclusion of words or behaviour used in a dwelling from the stirring up offences should be removed.

18.257 Do consultees agree?

Protections for Freedom of Expression

18.258 The POA 1986 sets out fairly broad protections for freedom of expression in respect of religion and sexual conduct or practice, but not racial hatred.

18.259 In relation to religion, section 29J of the POA 1986 states:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

18.260 Similarly, in relation to sexual orientation, protection is provided in section 29JA for:

- the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices; and
- discussion or criticism of marriage which concerns the sex of the parties to marriage.

18.261 However, the protection in section 29JA is not absolute. It merely provides that these shall not, of themselves, be taken to be threatening or intended to stir up hatred. The context, tone, or manner can provide evidence of an intent to stir up hatred.

18.262 The protection in section 29J is more extensive. It excludes a whole class of speech from the offences. Provided that the criticism, ridicule or abuse is targeted at the religion – the belief system, its institutions, or practices – and not at its adherents, it falls outside the offence.

Should the free speech clauses be retained?

18.263 The "free speech" clauses generated a great deal of controversy at the time of their introduction.

18.264 Since passage of section 29JA in 2008, Parliament has extended its scope. During the passage of the Marriage (Same-Sex Couples) Act 2013, Ministers were persuaded to extend 29JA to cover discussion of same-sex marriage.

18.265 In our previous report, we noted that some commentators had suggested that these provisions had effectively denuded the new laws of any practical impact.[133] However,

[133] Hate Crime: Should the current offences be extended? (2014) Law Comm No 348, para 2.47.

since publication, prosecutions have successfully been brought for both offences. Prosecutions have been fewer than for racial hatred. However, it is hard to say whether this is due to: the effect of the "free speech clauses"; the need to prove intention; the requirement that "threatening" words be used; or simply the particularly high incidence of racial hatred.[134]

18.266 Lord Bracadale's review of hate crime legislation in Scotland concluded that any legislation should include protection along the lines of sections 29J and 29JA.[135] Although the Bill tabled by Scottish Ministers would broadly replicate sections 29J and 29JA in respect of religion and sexual orientation, no protections have been included in respect of the additional characteristics which the Bill would cover.

18.267 We are especially conscious that extending the characteristics protected, adopting a single threshold of "threatening or abusive", and applying the "likely to" limb to all characteristics, could, in the absence of further measures, lead to a chilling effect. Our provisional proposals are not intended to restrict legitimate discussion of matters pertaining to religion, sexual orientation, gender and transgender issues. In particular, we are conscious of the judgment in *Miller v College of Policing.*[136] The High Court held that the treatment of the complainant by Humberside Police after a series of messages he had posted on Twitter were reported as transphobic, was unlawful as a breach of his rights under Article 10(1) of the European Convention on Human Rights.

18.268 The judgment referred to a "vigorous ongoing debate about trans rights":

> Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.[137]

18.269 The judge also pointed to evidence from Index on Censorship of

> the apparent growing number of cases in which police are contacting individuals about online speech that is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and – more significantly – further suppressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act.[138]

18.270 We therefore accept that the clauses are necessary to provide clarity and reassurance that legitimate discussion is not caught by the offences.

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134 As we note in Chapter 5 at para 5.26, 76% of police recorded hate crime relates to the characteristic of race.

135 Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 5.42.

136 *Miller v College of Policing* [2020] EWHC 225 (Admin).

137 *Miller v College of Policing* [2020] EWHC 255 (Admin) at 250.

138 *Miller v College of Policing* [2020] EWHC 255 (Admin) at 249.

18.271 We do, however, recognise some potential problems in how they operate. First, the piecemeal way in which legislation has been developed means that the free speech protections in section 29J only apply to religious hatred and those in section 29JA only apply to hatred on grounds of sexual orientation. As already noted, in some cases – notably Judaism and Sikhism – a group can be covered by both racial and religious hatred. The effect of this is that while the protection in section 29 can be used as a defence to a charge of stirring up religious hatred against Jews and Sikhs, it is not a defence to a charge of stirring up racial hatred against them.

18.272 Second, this reinforces the existing discrepancies between treatment of some religions: words and behaviour targeting halal methods of slaughter would be protected, even if it could be proven that they were intended to stir up hatred against Muslims. However, similar words and behaviour reflecting antipathy towards kosher methods would not be protected in relation to a charge of stirring up racial hatred against Jews.

18.273 Third, in provisionally proposing to extend the stirring up offences to cover transgender identity, disability, and sex or gender, we need to address whether similar provisions are required in relation to these characteristics.

18.274 The existing protections in sections 29J and 29JA have a number of common threads:

(1) clarifying that the law applies to hatred against persons, not against institutions or belief systems (section 29J);

(2) clarifying that criticism of behaviour is permitted (sections 29J and 29JA(1)); and

(3) maintaining a space for discussion of public policy on potentially controversial issues (section 29JA(2)).

18.275 Our preferred approach is to retain the existing exemptions, and to add other exemptions to address potential issues which might arise as a result of expanding the scope of the stirring up offences. In consolidating all the stirring up offences, we propose that the existing protections in sections 29 and 29JA should apply across all stirring up offences (recognising that in practice they will usually be relevant only to a single form of hatred).

18.276 Possible additional protections could therefore include:

- the discussion or criticism of physical or behavioural differences relating to sex or gender;

- the discussion or criticism of gender reassignment; treatment for gender dysphoria; provision of and access to single-sex facilities and activities.

Consultation Question 52.

18.277 We provisionally propose that the current protections in sections 29J and 29JA apply to the new offence of stirring up hatred.

18.278 Do consultees agree?

18.279 We invite consultees' views on whether similar protections should be given in respect of transgender identity, disability and sex or gender, and what these should cover.

18.280 At present there are no "free speech" protections applying to the racial hatred offence.

18.281 This may (falsely) give the impression that some kinds of expression explicitly protected in relation to sexual orientation and religion are not also protected in the context of racial hatred. For instance, in 2016 the then Home Secretary Amber Rudd was reported to police by Professor Joshua Silver of Oxford University over the contents of her speech to the Conservative Party conference, in which she had suggested that firms might be required to disclose the proportion of foreign workers they employ.[139]

18.282 The decision of West Midlands Police to record this as a "non-crime hate incident" was widely criticised. Shazia Awan, writing in the Independent newspaper, argued:

> The question for me is, why can't we have a conversation about immigration? To have this discussion isn't racist or xenophobic ... Whether Rudd was right or not, at least she was attempting to start a conversation about how this might look with regard to immigration and employment.[140]

18.283 Julia Rampen, writing in the New Statesman said that the incident had "provided ammunition for those who oppose the idea of criminalising hate speech altogether".[141] John Mann, then a Labour MP and now the government's adviser on antisemitism said that the decision of the police to record the incident "undermines actual race hate incidents".[142]

18.284 In our view, nothing in the current offence of stirring up racial hatred prevents discussion of controversial issues such as immigration. However, the fact that it was

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139 BBC News, "Joshua Silver reports Amber Rudd to police for hate speech" (12 January 2017), available at https://www.bbc.co.uk/news/video_and_audio/headlines/38600100/joshua-silver-reports-amber-rudd-to-police-for-hate-speech.

140 Shazia Awan, "Calling Amber Rudd's speech 'hate crime' is nonsense – I should know, I've experienced it", *The Independent* (13 January 2017), available at https://www.independent.co.uk/voices/amber-rudd-speech-hate-crime-incident-conservative-conference-ive-experienced-it-a7525521.html.

141 Julia Rampen, "Should you really report politicians to the police for hate?", *New Stateman* (12 January 2017), available at https://www.newstatesman.com/politics/staggers/2017/01/amber-rudd-speech-should-you-really-report-politicians-police-hate.

142 Steven Hawkes, "MPs lash out after cops log Amber Rudd's immigration speech as hate incident", *The Sun* (12 January 2017), available at https://www.thesun.co.uk/news/2596323/amber-rudds-speech-proposing-companies-compile-lists-of-foreign-workers-declared-as-a-hate-incident/.

possible for a member of the public to interpret the legislation as criminalising such discussion suggests that this may not be sufficiently clear. If this view is widely held, and people wrongly believe that discussion of such topics is legally off-limits, this amounts to a chilling effect. As *Miller v College of Policing* demonstrates, police recording of such allegations as "hate incidents" – even if lawful – may have an impact on people's ability to discuss freely matters of political importance.

18.285 Following the principles which we identify in paragraph 18.274 as underpinning sections 29J and 29JA, possible protections in line with those already in place for religion and sexual orientation might include:

- the discussion or criticism of immigration, asylum or citizenship policy;
- criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular countries or their governments.

18.286 Lord Bracadale's review of hate crime legislation considered, and rejected, suggestions that hate crime law should cover "hostility towards a political entity which the victim is perceived to be associated with by virtue of their race or religion". He argued that this would extent the concept of hate crime too far, and risk infringing the right to engage in political debate and protest.

18.287 We are conscious of the complex relationship between antisemitism and attitudes towards Israel. The International Holocaust Remembrance Alliance (IHRA) definition of antisemitism, among examples of antisemitism, includes:

> accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust; accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations; denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour; applying double standards by requiring of it a behaviour not expected or demanded of any other democratic nation; using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis; drawing comparisons of contemporary Israeli policy to that of the Nazis; and holding Jews collectively responsible for actions of the state of Israel.[143]

18.288 Not all of these examples, however, would necessary amount to stirring up antisemitic hatred for the purposes of the criminal law. More fundamentally, the IHRA accepts that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic."[144] We agree. Criticism of particular countries and their governments is a legitimate exercise of freedom of expression – indeed, it does not lose this protection simply because the person may be motivated by racism. For instance, a person who singles out the state of Israel for criticism while overlooking the failings of other countries

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143 International Holocaust Remembrance Alliance, *Working Definition of Antisemitism*, available at https://www.holocaustremembrance.com/working-definition-antisemitism.

144 International Holocaust Remembrance Alliance, *Working Definition of Antisemitism*, available at https://www.holocaustremembrance.com/working-definition-antisemitism.

may well be motivated purely by antisemitism; but this does not legitimate criminalising the speaker's words if they do not stir up hatred against Jewish or Israeli people.

Consultation Question 53.

18.289 We invite consultees' views on whether there should be similar protections to those in sections 29J and 29JA under the racial hatred offences.

Attorney General's Consent

18.290 Proceedings for the stirring up offences may only be brought with the Attorney General's consent. This function may only be exercised by the Attorney General or Solicitor General ("the Law Officers") personally.

18.291 In many cases alternative public order or communications offences could be charged which do not require the Attorney General's consent.

18.292 This role of the Attorney General has in the past attracted some criticism.[145] Sir Geoffrey Bindman, QC, for instance, has stated that the reluctance of successive Attorneys General to prosecute the offence of stirring up racial hatred had inhibited action against those who promoted hatred.[146] In 1993, the House of Commons Home Affairs Committee recommended that the requirement for consent should be transferred to the DPP.[147]

18.293 In our review of Consents to Prosecution in 1998,[148] we concluded that consent provisions should be used to control the prosecution of those offences where it is very likely that the defendant would contend that a prosecution would violate their rights to freedom of expression or another Convention right. We also recommended that except for those offences which require consent because they involve national security or some international element, consent should be for the DPP rather than the Law Officers.[149]

18.294 It is possible that were the requirement for consent to be removed altogether, this could result in private prosecutions being brought with a view to restricting the freedom of expression of a defendant. Unlike the Crown Prosecution Service, such third parties would not be subject to the constraints of the Human Rights Act 1998 to have regard to a defendant's rights to freedom of expression and respect for their home, correspondence, private and family life.[150] Although in such circumstances, it would be

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145 Law Society Gazette, 26 January 1994.

146 Geoffrey Bindman, "Bringing race bigots to book", *The Guardian* (20 October 1993), available at https://www.theguardian.com/uk/1993/oct/20/lawrence.ukcrime.

147 Racial Attacks and Harassment: Third Report of the Home Affairs Select Committee (1993-94) HC 71 para 97.

148 Consents to Prosecution (1998) Law Com No 255.

149 Consents to Prosecution (1998) Law Com No 255, para 7.13.

150 The Human Rights Act 1998 only applies to acts of "public authorities" (s 6), which includes "any person certain of whose functions are functions of a public nature" (s 6(3)(b)). Even if bringing a private prosecution were thought to be of a public nature, it is unlikely it would amount to a "function" of the person bringing it.

open to the CPS to take over and discontinue a prosecution as not being in the public interest, it is conceivable that private prosecutions – or threats of private prosecutions – could have a chilling effect on communication.

18.295 We therefore provisionally conclude that the requirement for consent to prosecute should remain, but provisionally propose that the requirement for Attorney General's consent be replaced by a requirement for the DPP's consent.

18.296 Unlike Attorney General's consent, unless the law explicitly requires this consent to be given personally, the power is delegable by the DPP to a Crown Prosecutor. Exceptions where consent must be given personally include certain bribery offences,[151] and applications for a retrial following acquittal.[152] Given the low number of stirring up prosecutions, and the gravity and complexity of the stirring up offences, we believe that this discretion should be exercised personally by the DPP (as it currently is by the Attorney or Solicitor General).

Consultation Question 54.

18.297 We provisionally propose that prosecutions for stirring up hatred offences should require the personal consent of the Director of Public Prosecutions rather than the consent of the Attorney General.

18.298 Do consultees agree?

Other exemptions

18.299 Sections 26 and 29K of the POA 1986 currently exempt from the scope of the stirring up offences:

- fair and accurate reports of proceedings in Parliament, the Scottish Parliament or the National Assembly for Wales
- fair and accurate reports of court proceedings publicly heard before a court or tribunal where the report is
  - published contemporaneously with the proceedings; or
  - if it is not reasonably practicable or would be unlawful to do so, published as soon as it is lawful and practicable to do so.

18.300 We would be interested to know if consultees have any comments on the consequences of these provisions.

18.301 We would also be interested to know if there are any other categories of publication which should be privileged in this way, such as fair and accurate reporting of local

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151 Bribery Act 2010, s 10. The DPP may also personally designate another person to given consent to prosecution in the event of the DPP being unavailable.

152 Criminal Justice Act 2003, s 76(3).

council meetings, or material in scientific or academic publications, both of which enjoy a degree of protection under defamation law, or works of artistic or similar merit, which enjoy protection under obscenity legislation.

18.302 Following a sustained campaign, the Defamation Act 2013 introduced protection against proceedings for defamation for peer reviewed material in a scientific or academic journal, with similar protection for a fair and accurate copy of, extract from, or summary of the material. The Act also extended the existing absolute privilege attaching to domestic courts to courts outside the United Kingdom, and to overseas legislatures.

18.303 While such material could be exempted from the stirring up offence altogether, it would alternatively be possible to provide a limited exemption so that such material would have a defence under the "likely to" limb of our proposed offence, but continue to be covered when intended to stir up hatred. This latter approach would be in line with our general approach to material which intentionally stirs up hatred.

Consultation Question 55.

18.304 We invite consultees' views on whether the current exemptions for reports of Parliamentary and court proceedings should be maintained in a new offence. Further, we invite views as to whether there are any additional categories of publication which should enjoy full or partial exemption from the offence, such as fair and accurate reports of local government meetings or peer reviewed material in a scientific or academic journal.

Chapter 19: Football Offences

THE OFFENCE IN ENGLAND AND WALES

19.1 Under section 3 of the Football (Offences) Act 1991 ("1991 Act"), it is an offence to engage or take part in "chanting of an indecent or racialist nature at a designated football match."

19.2 The offence was created in the wake of the Hillsborough disaster of 1989. In his report into the disaster, Lord Justice Taylor concluded:

> No-one could expect that verbal exchanges on the terraces would be as polite as those at a vicarage tea party. But shouting or chanting gross obscenities or racialist abuse ought not to be permitted. If one starts, others join in, and to the majority of reasonable supporters, as well as to those abused, the sound of such chants from numbers in unison is offensive and provocative.[1]

19.3 The number of arrests for racist chanting has declined from 44 in 2010/11 to 14 in 2018/19.[2] However, the Home Office also records that the number of matches marked by one or more "hate crime" reports increased from 131 matches in 2017/18 to 193 in 2018/19.[3] Clearly, therefore, the offence under section 3 is not the main method for dealing with racist behaviour at football matches. Stakeholders have told us that offences under the Public Order Act 1986 ("POA 1986") tend to be used instead. We discuss this approach at 19.16.

19.4 Figures from Kick It Out[4] indicate that among reported hate incidents at professional football matches, the characteristic in question was:

- 65% race (excluding antisemitism)[5]
- 19.5% religion of which
  - 16% antisemitism
  - 1.9% Islamophobic

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1 Taylor LJ, *The Hillsborough Stadium Disaster: Final Report* (1990) para 289.

2 Home Office, *Football-related arrests and banning orders, England and Wales: 2018-19 season,* 19 September 2019, Table 6, available at https://www.gov.uk/government/statistics/football-related-arrests-and-banning-orders-england-and-wales-2018-to-2019-season.

3 Home Office, *Football-related arrests and banning orders, England and Wales: 2018-19 season,* 19 September 2019, Table 6.

4 Taken from Kick It Out, *Annual Reporting Summary for the 2018/19 season* (2019) available at https://www.kickitout.org/pages/faqs/category/reporting-statistics. Kick it Out is an equality and Inclusion organisation for English football.

5 Kick It Out include antisemitism within the category of religious discrimination. We have separated out antisemitism because it also constitutes racism.

- 1.3% sectarian
- 0.3% other (1 report)

- 19.2% sexual orientation
- 5% gender
- 0.9% disability

(Figures do not add up to 100% since a small number of incidents may involve more than one type of abuse.)

19.5 The 1991 Act has several limitations. First, while it covers racist and indecent chanting, it does not cover all forms of discriminatory abuse. It does not cover homophobic chanting,[6] or the use of racist gestures. The definition of "chanting" was amended in 1999[7] to include solo chanting as well as chanting in concert with others. However, it remains the case that chanting requires "repeated uttering of any words or sounds".[8]

19.6 Second, the conduct must take place at a designated football match. A match is "designated" if it involves a club that is a member of the Football League, the Football Association (FA) Premier League, or the National League.[9] It also includes games played as part of the FA Cup, any match involving a club from outside England and Wales played within England or Wales, and those involving a national team. It does not cover matches played at venues other than those of a Premiership or Football League team, unless played as part of the FA Cup.

19.7 Third, the conduct must take place "at" the match. In contrast, the Football Spectators Act 1989, which governs football banning orders, allows a banning order to be given in respect of a variety of offences committed in the vicinity of a match, while the accused was in the vicinity of a match, entering, leaving, or on a journey to a football match.[10]

19.8 The maximum penalty is a fine not exceeding Level 3 on the Standard Scale,[11] currently £1000.[12] In addition, these offences also trigger the court's power to impose a football banning order under the Football Spectators Act 1989.

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6 We received some evidence that the "indecent" category had been used to prosecute homophobic chanting. This is discussed at paras 19.40 to 19.41.

7 Football (Offences and Disorder) Act 1999, s 9.

8 Football (Offences) Act 1991, s 3(2)(a).

9 Formerly known as the Football Conference, and referred to as such in the legislation.

10 Schedule (j) of the Football Spectators Act 1989 includes offences under Part III of the Public Order Act 1986 – ie the stirring up offences (see further Chapter 18) – among those which may result in a ban if carried out while the accused was at, entering, leaving, or on a journey to or from a designated football match.

11 Football (Offences) Act 1991, s 5(2).

12 Criminal Justice Act 1982, s 37, as amended by the Criminal Justice Act 1991, s 17(1).

THE SCOTTISH EXPERIENCE

19.9 Before considering whether the offence under the 1991 Act should be retained, amended or extended, it is worth considering the recent experience of Scotland. The 1991 Act only ever extended to England and Wales.

19.10 In 2012, the Scottish Government proposed and successfully passed the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. This Act proved controversial and was completely repealed in 2018 against the wishes of the Scottish Government,[13] including sections 6 to 9 of the Act which dealt with threatening communications.

19.11 A prime objective of the legislation was to tackle issues of sectarianism among Scottish football supporters. This sectarian divide has been reflected in football team allegiances,[14] most notably in Glasgow, where the "Old Firm" rivalries between Glasgow Rangers (traditionally Protestant) and Glasgow Celtic (traditionally Catholic) persist.[15]

19.12 The Scottish offence was broader than the English offence, covering behaviour that was likely, or would have been likely, to incite public disorder and which expressed hatred towards a group or individual on the grounds of race, sexual orientation, transgender identity, disability, or religion. It was religion which was the prime target of the legislation and a source of controversy. Intended to target sectarian abuse and chanting, the offence covered not only hatred towards a religious group but also "a social or cultural group with a perceived religious affiliation". For example, it appeared to cover the word "Fenian".[16] In particular, it was believed that it would cover the singing of traditional sectarian songs associated with one or other community.

19.13 The offence had extra-territorial effect – it could be prosecuted where committed overseas in relation to a match involving a Scottish team, if committed by a person habitually resident in Scotland.[17]

19.14 The key complaints seem to have focussed on the Act's breadth. In particular, it extended beyond offences involving hatred, to "other behaviour that a reasonable person would be likely to consider offensive".[18] It applied not only to behaviour likely to incite disorder, but also to behaviour that would have been likely to incite disorder but for the fact that measures were in place to prevent disorder or persons likely to be incited to disorder were not present or not present in sufficient numbers.[19] In an

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13 Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018.

14 John Horne, "Race, Sectarianism and Football in Scotland" (1995) 12 *Scottish Affairs* 27.

15 There has occasionally been a sectarian divide between football teams in Northern English cities and towns Irish and Northern Irish heritage such as Liverpool and Manchester. In Liverpool, for instance, there is evidence of a sectarian divide among supporters of Liverpool and Everton (See David Kennedy, *Merseyside's Old Firm: the sectarian roots of Everton and Liverpool Football Clubs* (2017); Keith Daniel Roberts, *Liverpool Sectarianism: The rise and demise* (2017).)

16 In 2013 a fan was acquitted of shouting "Fenian bastard" and "Fuck the Pope" at a match. He was acquitted, however, on the grounds that his behaviour was not likely to incite a breach of the peace.

17 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 10.

18 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 1(2).

19 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 1(5).

infamous case, a Sheriff dismissing a case brought under the Act described the legislation disparagingly as "mince".[20]

19.15 This culminated in the repeal of the whole Act – including those provisions relating to offensive communications – in 2018, when an alliance of opposition parties united behind a private member's bill tabled in the Scottish Parliament by Labour MSP James Kelly.

SHOULD THE ENGLAND AND WALES OFFENCE BE RETAINED?

19.16 The key argument against retaining the offence would be that it is arguably unnecessary. Most behaviour covered by the racialist chanting offence would constitute an offence under section 4A or section 5 of the Public Order Act 1986 of insulting or abusive behaviour in a public place intended or likely to cause a person harassment, alarm or distress. When racially aggravated, the section 4A offence is triable either way and the maximum sentence is two years' imprisonment. The racially aggravated section 5 offence is summary-only and the maximum penalty is a Level 4 fine (currently £2,500).

19.17 By contrast, the offence under the Football (Offences) Act 1991 is summary only and punishable only by a Level 3 fine (currently £1000).

19.18 The POA 1986 offences are in one sense more useful for football-related offending, as they can trigger a banning order when committed on a journey to or from a football match,[21] whereas the offence of racialist chanting can only be committed at the ground around the time of the match.[22]

19.19 A further argument against retaining the current offence is that the law should apply equally and to single out one sport is discriminatory. The Act does not cover racist chanting at, say, a rugby or cricket match. Fans Against Criminalisation, opposing the 2012 Scottish Act, have said:

> It is both discriminatory and dangerous to create a law which creates an offence for one group within a society, when the same actions or behaviours would not result in a criminal charge for others. This act does exactly that. It explicitly states that if you are deemed to be a football fan (whether attending the game or even watching a match on the television) then you are automatically subject to this law and your rights are restricted.[23]

19.20 The Football Supporters' Association expressed dissatisfaction with legislation singling out football in relation to behaviour which can also be found in other sports. For instance, the Sporting Events (Control of Alcohol) Act 1985 criminalises certain activities, such as taking alcohol into a sports ground or special supporters' services on

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20 Alan Cochrane, "Sheriff makes mincemeat of ill-considered lawmaking" (12 April 2013) *Daily Telegraph*, available at https://www.telegraph.co.uk/news/uknews/scotland/9991384/Sheriff-makes-mincemeat-of-ill-considered-law-making.html.

21 Football Spectators Act 1989, sch 1, cl 1(c).

22 The Football (Offences) Act 1991, s 1(2) specifies a time frame of two hours before kick-off to one hour after the end of the match.

23 Fans Against Criminalisation, http://fansagainstcriminalisation.com/.

coaches or trains, but only football matches have been designated under the legislation.[24]

19.21 There are, however, arguments for retaining the distinct offence. First, in the Taylor Report, Taylor LJ argued that chanting in football stadiums presented a particular risk. He concluded that racist chanting

> would, of course, be an anti-social nuisance anywhere. But at a designated sports ground [it is] fraught with potential disorderly consequences. There is good reason therefore to treat as a special case the prohibition of these activities at such grounds. By analogy, having alcohol in one's blood over a fixed limit has been made an offence only in relation to driving, because it is dangerous to the public in that special context.[25]

19.22 Second, there is some behaviour which is caught by the 1991 Act but not the POA 1986. The Taylor Report considered whether the offences in the POA 1986 were sufficient. Taylor LJ found that racist chanting might not reach the threshold for prosecution under sections 4 and 5:

> Although the chanting may be proved abusive or insulting it would also have to be shown, under section 4, that it was used "towards another person ... with intent to cause that person to believe that immediate unlawful violence will be used against him etc". Proof of those elements may not be possible. …Under section 5, whilst again the chanting may be proved to have contained "abusive or insulting words", it may be difficult to show that this was done "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby". The words may cause nothing other than disgust.[26]

19.23 Although the Taylor report preceded the introduction of the POA 1986 section 4A offence in 1995, section 4A is subject to the same obstacle as the section 5 offence in that it requires that someone would likely have been caused harassment, alarm or distress. (Indeed, the threshold is higher than that in section 5 since it is also necessary to show that the intention was to cause harassment, alarm or distress.)

19.24 Third, convictions under the 1991 Act automatically trigger the ability to impose a Football Banning Order under the Football Spectators Act 1989, whereas such orders can only be imposed for offences under section 5 of the POA 1986 if there has been a separate finding that the behaviour related to a designated football match. Such a finding can only be made if the prosecution has given five days' notice. Football Banning Orders cannot be made in relation to offences under section 4 of the POA 1986 unless the offence involved the threat of violence.[27]

19.25 We can see a value in retaining the offence in section 3 of the Football (Offences) Act 1991, given that it covers some behaviour which might not be caught by the Public

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24 Other football-specific offences are outside the scope of this review.

25 Taylor LJ, *The Hillsborough Stadium Disaster: Final Report* (1990) para 292

26 Taylor LJ, *The Hillsborough Stadium Disaster: Final Report* (1990) paras 295 to 296.

27 Football Spectators Act 1989, Schedule 1, s 1(r).

Order Act 1986 or other legislation; behaviour which was not likely to have caused harassment, alarm or distress.

19.26 Football Banning Orders are also a useful bespoke deterrent. However, some stakeholders perceived the CPS to operate a policy of seeking banning orders in all cases, and felt that they were a blunt and disproportionate tool. Banning orders are for a minimum of three years and a person subject to an order cannot apply for it to be lifted until two-thirds of the specified duration has passed.[28]

19.27 Football stakeholders with whom we have spoken, including the Football Supporters' Association, have accepted that discriminatory chanting and other forms of hate speech and behaviour, while not exclusive to football, are often concentrated in and around football matches. Those stakeholders have told us that scrapping the legislation would send out a damaging signal.

Consultation Question 56.

19.28 We provisionally propose that racist chanting at football matches remain a criminal offence distinct from the current Public Order Act 1986 offences.

19.29 Do consultees agree?

SHOULD THE OFFENCE BE EXTENDED?

19.30 In 2018, Damian Collins MP, then Chair of the House of Commons Digital, Culture, Media and Sport Select Committee, in partnership with the former Welsh rugby union and rugby league international Gareth Thomas, launched a campaign to extend the legislation.[29] Mr Collins tabled a private member's bill to extend the existing offence so that it would:

- cover gestures as well as chanting;
- cover sexual orientation, gender reassignment and any other protected characteristic under the Equality Act 2010;
- define "indecent" as consisting of or including any matter which is threatening, abusive or insulting to a person.

19.31 We have some technical concerns with the redefinition of indecent to include any matter which is threatening, abusive or insulting, which would create inconsistency with use of the term in other legislation.[30] "Indecent" is not defined in other statutes, and case law

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28 Football Spectators Act 1989, ss 14F and 14H.

29 Gareth Thomas came out as gay in 2009. He has since made two films for the BBC about homophobia in football: *Gareth Thomas v Homophobia: The Legacy*, September 2019, BBC2, 60 mins; *Gareth Thomas v Homophobia: Hate in the Beautiful Game*, August 2017, BBC2, 60 mins.

30 For instance, Protection of Children Act 1978; Criminal Justice Act 1988; Criminal Justice and Immigration Act 2008.

has made clear that it is for a jury to decide whether something is or is not indecent.[31] There is a separate body of law which deals with threatening, abusive and insulting matters (including the POA 1986) and conflating the two for this one offence would introduce the potential for uncertainty and confusion.

19.32 Moreover, retention of "insulting" would be hard to reconcile with the 2013 changes to section 5 of the POA 1986 (see Chapter 18 at paragraphs 18.201 to 18.202). We would expect a great deal of non-discriminatory chanting at football matches could be considered "insulting".

19.33 The proposals to include gestures and other protected characteristics have been echoed by football stakeholders in our pre-consultation meetings.

19.34 Based on the evidence produced by Kick It Out and other stakeholders, we recognise that there is a significant amount of behaviour at football matches which targets characteristics other than race.

19.35 Football chants of course nonetheless engage the right to freedom of expression. Indeed, the former Poet Laureate Andrew Motion has compared them to a form of folk poetry.[32] We recognise that there is a potential tension between the principle of minimal criminalisation and the approach of treating all protected characteristics equally in order to avoid "hierarchies of hatred". Any extension of the offence needs to be based on a compelling case to justify the interference with the right to freedom of expression.

19.36 Meetings with stakeholders have revealed to us that there is a strong case for extending the offence to homophobic chanting at football matches.

19.37 Racist and homophobic behaviour constitute the overwhelming majority of hate incidents recorded by Kick It Out.

19.38 As noted earlier, Damian Collins MP advocated extending the offence to cover homophobic chanting at football matches. Gareth Thomas described homophobia as one of the most prevalent forms of hate speech he has encountered at football matches and noted that it is normalised among generations of football fans. This is also evident from the two films he made for the BBC on this subject.

19.39 Gareth Thomas further stated that, not only is homophobic chanting extremely harmful to fans but it has a significant impact on players – it creates a culture of hostility which makes players feel they are unable able to come out and "be themselves". He argued that football offences should be used to signal to football fans that homophobic chanting is unacceptable.

19.40 In 2017, the House of Commons Select Committee on Culture, Media and Sport described homophobic chanting at football matches as "reasonably commonplace".[33]

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31 *R v Stamford* (1972) 2 QB 391

32 BBC News, "Football's First Chant Laureate" (11 May 2003), available at http://news.bbc.co.uk/1/hi/england/london/3702313.stm.

33 Homophobia in Sport, Report of the Select Committee on Culture, Media and Sport (2016/17) HC 113, para 9.

Greg Clarke, the former director of the FA, has linked this behaviour to the low visibility of LGB players and fans:

> There is a very, very small minority of people who hurl vile abuse at people who they perceive are different. Our job is stamp down hard on that behaviour… If I was a gay man, why would I expose myself to that?[34]

19.41 We did hear evidence that prosecutors had successfully used the "indecent" provision of the offence to prosecute instances of homophobic chanting, and therefore have considered whether a separate provision is necessary.

19.42 It is unclear whether in these cases a prosecution for indecent chanting was possible because the underlying homophobia was considered to make the chanting indecent. We are mindful that much homophobic chanting is sexually explicit and it may be this factor which made a prosecution for indecent chanting possible. Furthermore, relying on the "indecent" provision of the offence is unlikely to have the same force in delineating homophobic chanting as unacceptable as the explicit provision made for racist chanting.

19.43 We have concluded that there is a compelling case to extend the offence to cover chanting targeting sexual orientation.

19.44 Stakeholders have given us examples of highly offensive and damaging behaviour which relates to protected characteristics beyond race and sexual orientation, including insults relating to religion, gender and disability. In addition to the impact on players targeted, this can create a hostile environment for spectators who possess those protected characteristics.

19.45 The vast majority of designated football matches are men's events. The only women's events that would fall within the current criteria for designation[35] are those involving a national or overseas team. However, in a meeting with the Premier League, we were told that sexist chanting frequently occurs at football matches, directed toward both female football fans and women working within the match, for instance, assistant referees or stewards. We were told, however, that while misogynistic chanting occurs frequently, it is not as prevalent or severe as racist and homophobic abuse.

19.46 Kick it Out provided examples of common disablist slurs directed towards players, such as "mongol". However, we were told that, as with sexism, this form of hate speech was less prevalent and severe than racist chanting.

19.47 We were also told that it is not unknown for fans with disabilities to be targeted by people who do not believe they have a disability, such as a fan who uses a wheelchair but is

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34 Oral evidence to the House of Commons Select Committee on Culture, Media and Sport, "The Governance of Football", 17 October 2016, Question 156.

35 Under the Football (Offences) (Designated Football Matches) Order 2000, these are matches in which one or both of the participating teams represents a club which is for the time being a member of the Football League, the FA Premier League or the Football Conference (the National League), or represents a club from outside England and Wales, or represents a country or territory; and which is played at a sports ground which is designated by order under section 1(1) of the Safety of Sports Grounds Act 1975(1), or the home ground of a club which is a member of the Football League or Premier League; or in the FA Cup (other than in a preliminary or qualifying round).

able to stand up at a key moment during a match.[36] Targeting of fans with disabilities may be particularly problematic where visiting spectators with disabilities are accommodated alongside home fans.

19.48 We would welcome further evidence on the prevalence of discriminatory chanting targeting characteristics other than race and sexual orientation. We also seek consultees' views on whether the offence should be extended to cover all protected characteristics.

Consultation Question 57.

19.49 We provisionally propose that the offence under section 3 of the Football (Offences) Act 1991 of engaging in "chanting of an indecent or racialist nature at a designated football match" be extended to cover chanting based on sexual orientation.

19.50 Do consultees agree?

19.51 We welcome consultees' evidence on the prevalence of discriminatory chanting targeting characteristics other than race and sexual orientation, and would welcome views on whether the offence should be extended to cover all protected characteristics.

SHOULD THE OFFENCE BE EXTENDED TO COVER OTHER FORMS OF BEHAVIOUR AND TRAVEL?

19.52 We can see a strong case for extending the offence to cover types of behaviour not currently covered. For instance, as noted earlier, a one-off instance of abuse is not covered. The extension to cover gestures proposed in the Collins Bill seems to address a genuine problem: "monkey gestures" made towards black players have been successfully prosecuted as racially aggravated public order offences.[37] We have also been advised by Kick It Out of Muslim players being targeted with "aeroplane gestures" implying support for terrorism.

19.53 We were also informed that Tottenham Hotspur supporters – due to the team's historical association with Jewish supporters – are sometimes targeted with hissing noises, referring to the gassing of Jews during the Holocaust. It is regrettably unclear whether the need to prove that the sounds were "repeated" might prevent a successful

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36 We discuss the issue of people who are wrongly perceived as not being disabled, or "not disabled enough", in Chapter 11.

37 Crown Prosecution Service, *Football fan who made monkey gestures at black player convicted of hate crime* (6 February 2020), available at https://www.cps.gov.uk/west-midlands/news/football-fan-who-made-monkey-gestures-black-player-convicted-hate-crime. The defendant was convicted of racially aggravated harassment, alarm or distress. The Guardian, "Football fan, 72, convicted of making 'monkey' gestures at black players" (29 July 2015), available at https://www.theguardian.com/uk-news/2015/jul/29/football-fan-72-convicted-monkey-gestures-black-players. The defendant was convicted of two public order offences – one racially aggravated.

prosecution being brought in respect of such behaviour, which we consider to be unquestionably racist and highly offensive.

19.54 A separate section of the 1991 Act also prohibits throwing "missiles" onto the pitch or adjacent area. However, we are aware of several incidents in which black players have had bananas thrown at them during matches,[38] and it may be more appropriate for such behaviour to be captured by a provision reflecting the racist nature of this activity.

19.55 Finally, the limitation to conduct *at* a designated football match limits its effectiveness. The disorder must take place "at the ground" and within a period beginning two hours before the start of the match and an hour after its conclusion.

19.56 In contrast, the Football Spectators Act 1989, which provides the framework for banning orders, adopts a broader approach. Misconduct is covered if it occurs while the defendant is entering, trying to enter, or leaving the grounds, and while the defendant is on a journey to or from a designated match.[39]

19.57 We seek views on whether the offence should be extended to include conduct while the defendant was in the vicinity of a match, entering, leaving, or on a journey to a football match as is the case for the Football Spectators Act 1989.

Consultation Question 58.

19.58 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover gestures and missile throwing.

Consultation Question 59.

19.59 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover journeys to and from a designated football match.

SHOULD THE OFFENCE BE AMENDED TO ALIGN WITH THE AGGRAVATED OFFENCES AND ENHANCED SENTENCING REGIMES?

19.60 There are also technical improvements which could be made to bring the 1991 Act more in line with other legislation. These improvements would ensure a consistent and coherent approach is taken to the different strands of law relating to hate crime.

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38 BBC, "Arsenal v Tottenham: Man charged after banana skin thrown during derby" (3 December 2018), available at https://www.bbc.co.uk/sport/football/46422171. The defendant was convicted of throwing a missile under section 2 of the 1991 Act.

39 Schedule 1, clause 320 of the Football Spectators Act 1989 provides that a person's journey includes breaks (including overnight breaks), and that a person may be regarded as having been on a journey to or from a football match whether or not he attended or intended to attend the match.

19.61 First, the term "racialist" is not used elsewhere in legislation. This is potentially confusing given that the term "racialism", while sometimes used as a synonym for racism, can also be used as a value-neutral term denoting the scientific belief that races are distinct biological (or sometimes social) categories, without any notion of racial superiority.[40]

19.62 Second, the definition of racialist requires that the behaviour must be "threatening, abusive or insulting to a person by reason of *his* colour, race, nationality (including citizenship) or ethnic or national origins." It is not clear that it covers behaviour relating to a person's association with a group (for instance, chanting targeting a player's partner). This is in marked contrast to the rules on aggravated offences and enhanced sentencing, which we discussed in Chapters 16 and 17, which concentrate on whether the conduct was motivated by, or demonstrated, hostility towards a person on grounds of the relevant characteristic.

19.63 Third, it is not clear that the current terminology extends to perceived race. While this may be less problematic with a generally visible characteristic like race, if extended to other protected characteristics there is a risk that it would not cover, for instance, abuse targeted at a player's perceived sexual orientation. Indeed, research indicates that homophobic chanting is often directed at a player not because he is believed to be gay, but because it is believed questioning his sexual orientation will prove off-putting.[41]

Consultation Question 60.

19.64 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be amended to include association and perceived characteristics.

IS THE MAXIMUM PENALTY SUFFICIENT?

19.65 The maximum penalty for this offence is a level 3 fine (currently £1000). We observed earlier in this chapter that when racially aggravated, the offences under section 4A or section 5 of the POA 1986 of insulting or abusive behaviour in a public place intended or likely to cause a person harassment, alarm or distress have higher maximum penalties.

19.66 We question whether the current penalty is sufficient given the disparity between this figure and the sanctions available under the POA 1986, and we invite consultees' views on this issue.

19.67 A further issue is that since the only sanction available is a fine, rehabilitative measures such as attendance at race-awareness training cannot be ordered by the court. In contrast, where an offence is punishable by imprisonment a community order including attendance as a condition may be given instead. (The CPS can insist on rehabilitative

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40 Neil McMaster, *Racism in Europe* (2001) pp 1 to 11; Peter Schuck, "Racism and Racialism are different" (21 February 2015) *Huffington Post*.

41 Rory Magrath, "'To Try and Gain an Advantage for My Team': Homophobic and Homosexually Themed Chanting among English Football Fans" (2017) 52 *Sociology* 709.

measures as part of an out-of-court disposal by including them within a conditional caution.) We were told by stakeholders involved in providing such training, that it can be a very effective intervention for less serious offenders who may be unaware of the seriousness or the impact of their behaviour.

Consultation Question 61.

19.68 We invite consultees' views on whether the current penalty for the offence under section 3 of the Football (Offences) Act 1991 of engaging in chanting of an indecent or racialist nature at a designated football match, a Level 3 fine, is sufficient.

Chapter 20: A Hate Crime Commissioner?

INTRODUCTION

20.1 In this chapter we discuss the option of establishing a Hate Crime Commissioner to complement the legislative reform options we have outlined in this paper. The establishment of such a role is not directly contemplated within the terms of reference of this review, but it has been suggested to us by a number of consultees, and is an approach the government has already adopted in respect of other criminal justice priority areas. We therefore consider it a matter worthy of further consideration in the context of this review.

20.2 Below we explore the functions that a Hate Crime Commissioner might serve, and the benefits that this role might bring. We consider in particular, whether a Hate Crime Commissioner might play a role in addressing some of the victims' concerns we outlined in Chapter 7, and help to implement more effective non-criminal justice responses to prevent and mitigate the harmful effects of hate crime in the community. We also observe arguments against introducing a Hate Crime Commissioner. In particular, we consider whether a Commissioner would represent an effective use of public funds, and invite further stakeholder input in this regard. We end this chapter by discussing relevant practical matters, such as the legal basis for a Hate Crime Commissioner, their reporting obligations, and how their budget might be determined.

POSSIBLE FUNCTIONS OF A HATE CRIME COMMISSIONER

Functions served by existing, comparable Commissioner models

20.3 The Government has already created several Commissions and Commissioner roles that are relevant to the criminal justice system and to hate crime more specifically. These include:

- **The Victims' Commissioner** (England and Wales),[1] created by section 48(1) of the Domestic Violence, Crime and Victims Act 2004.
- **The Independent Anti-Slavery Commissioner** (United Kingdom),[2] created by section 40(1) of the Modern Slavery Act 2015.
- **The Commission for Countering Extremism** (England and Wales),[3] which was established by the British government in March 2018, and describes itself as "an

1 Victims' Commissioner website, available at https://victimscommissioner.org.uk/.

2 Independent Anti-Slavery Commissioner website, available at https://www.antislaverycommissioner.co.uk/.

3 Commission for Counter extremism website, available at https://www.gov.uk/government/organisations/commission-for-countering-extremism/about.

independent, non-statutory expert committee of the Home Office".[4] In the absence of a statutory basis, the Commission is underpinned by a bespoke charter.[5]

- **The Domestic Abuse Commissioner** (England and Wales),[6] whose appointment is set out in clause 3(1) of the Domestic Abuse Bill, which is yet to be enacted by Parliament. A Designate Domestic Abuse Commissioner has been pre-emptively appointed.

20.4 The Independent Anti-Slavery Commissioner (IASC) and the Domestic Abuse Commissioner (DAC) are most analogous to a proposed Hate Crime Commissioner because their remit relates to a specific criminal context.

20.5 The government also has a number of independent advisors on specific matters relating to faith, hatred and extremism:

- Lord Mann, Independent Adviser on Anti-Semitism (Ministry for Housing, Communities and Local Government).
- Colin Bloom, Faith Engagement Advisor (Ministry for Housing, Communities and Local Government).
- Qari Asim, Government Advisor on Islamophobia (Ministry for Housing, Communities and Local Government).
- John Woodcock, UK Special Envoy for Countering Violent Extremism (Home Office).

Functions of the Independent Anti-Slavery Commissioner

20.6 According to section 41(1) of the Modern Slavery Act 2015, the IASC's key functions are to encourage good practice in:

- the prevention, detection, investigation and prosecution of slavery and human trafficking offences; and
- the identification of victims of those offences.

20.7 The IASC can carry out several non-exhaustive activities to fulfil these functions,[7] including making reports on any permitted matter to the Secretary of State, the Scottish Ministers and the Department of Justice in Northern Ireland; making recommendations

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4 Commission for Countering Extremism, *Challenging Hateful Extremism* (October 2019) p 20, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874101/200320_Challenging_Hateful_Extremism.pdf.

5 Charter for the Commission for Countering Extremism, available at https://www.gov.uk/government/publications/charter-for-the-commission-for-countering-extremism/charter-for-the-commission-for-countering-extremism.

6 Gov.uk, *UK's first Domestic Abuse Commissioner announced as government pledges to tackle crime Domestic Abuse Commissioner announced* (September 2019), available at https://www.gov.uk/government/news/uks-first-domestic-abuse-commissioner-announced-as-government-pledges-to-tackle-crime.

7 Modern Slavery Act 2015, ss 41(3)(a) to (f).

to any public authority about the exercise of its functions; undertaking or supporting[8] the carrying out of research; and providing information, education or training.

20.8 Section 43(1) of the Modern Slavery Act 2015 also gives the Commissioner the power to request that a specified public authority[9] co-operates with the Commissioner in any way that the Commissioner considers necessary for the purposes of the Commissioner's functions, and section 43(2) imposes a duty upon the public authority to comply with this request so far as is reasonably practicable. Duties are also imposed on the Commissioner in section 42, relating to strategic plans and annual reports that must be produced by the Commissioner.

Functions of the forthcoming Domestic Abuse Commissioner

20.9 Clause 6(1) of the Domestic Abuse Bill sets out the Commissioner's functions, which are to encourage good practice in:

- the prevention of domestic abuse;
- the prevention, detection, investigation and prosecution of domestic abuse-related offences;
- the identification of perpetrators, victims and children affected by domestic abuse; and
- the provision of protection and support for victims.

20.10 Clause 6(2) of the Bill lists a number of activities that the Commissioner might perform in carrying out these functions, which are similar to those listed in section 41(3) of the Modern Slavery Act 2015. Clause 6 of the Explanatory Notes to the bill summarises these activities as follows:

> assessing and monitoring the provision of services to people affected by domestic abuse. In this context the 'provision of services' will cover the provision of specialist services for victims and their children, such as refuges or other specialist support services; mainstream provision of statutory services, such as healthcare, which play a role in identifying victims, children and perpetrators and referring them onto more specialist services; and specialist provision for perpetrators, such as perpetrator behaviour change programmes. In carrying out such activities, the Commissioner is expected to co-operate and consult with specialist third sector organisations, public authorities, and other relevant Commissioners such as the Commissioner for Victims and Witnesses and the Children's Commissioner for England.[10]

20.11 The Bill gives the Domestic Abuse Commissioner identical powers to request the co-operation of specified public authorities as those given to the IASC.[11] Public authorities

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8 (financially or otherwise).

9 Specified public authorities are set out in Schedule 3 to the Modern Slavery Act 2015.

10 Domestic Abuse Bill, Explanatory Notes Clause 6, General Functions of Commissioner at [69], available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0422/en/19422en.pdf.

11 Clause 14(1) of the Domestic Abuse Bill. Specified public authorities are set out in clause 14(3).

have an identical duty to comply with this request.[12] However, unlike with the IASC, an additional obligation is imposed on specified public authorities in clause 15 of the Bill – to respond to the Commissioner where the Commissioner publishes a report under section 7 containing recommendations in relation to any specified public authority or Government Department in the charge of a Minister. As with the IASC, duties are also imposed on the Commissioner in clauses 12 and 13 of the Bill, relating to strategic plans and annual reports that must be produced by the Commissioner.

Functions that might be served by a Hate Crime Commissioner

20.12 If the functions of the IASC and DAC were largely mirrored in the hate crime context, the Hate Crime Commissioner's key functions might be to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, as well as the identification of victims and perpetrators of these offences. To carry out these functions, a Hate Crime Commissioner might perform any number of the following activities:

- Assess and monitor the provision of services to people affected by hate crime. In this context, the "provision of services" might capture the provision of specialist services for victims such as advocacy and emotional support across all strands of protected hate crime categories, as well as specialist provision for perpetrators, such as perpetrator education and rehabilitative programmes. The Commissioner could recommend improvements where the need for such is identified.

- Complement the work of Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) in monitoring the consistency and effectiveness of police recording of hate crime and incidents.

- Complement the work of Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) in monitoring the extent to which the CPS applies its hate crime legal and policy guidance in relevant hate crime areas.

- Monitor the effectiveness of alternatives to prosecution, such as restorative justice programmes being used in response to hate crime.[13]

- Support the carrying out of research relevant to various aspects of hate crime.

- Support the development and implementation of relevant educational resources which challenge the prejudicial attitudes that underpin hate crime.

- Raise awareness of the prevalence and specific impacts of hate crime on individuals and communities more widely, through media, social media and speaking opportunities.

- Conduct centralised consultation with a diverse range of stakeholders who represent the views of affected parties across all hate crime strands.

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12 Clause 14(2) of the Domestic Abuse Bill.

13 We consider the function and effectiveness of restorative justice programmes in the hate crime context in Chapter 6 of this consultation paper, at paragraphs 6.29 to 6.32.

- Co-operate and consult with other Commissioners, such as the Victims' Commissioner, Domestic Abuse Commissioner, or the Lead Commissioner for Counter Extremism on areas which overlap.

20.13 A Hate Crime Commissioner might also have a role in keeping hate crime legislation under review. For example, a Commissioner may consider whether the evidence supports the addition of further characteristic groups, or further specified aggravated offences to the existing regime.

THE BENEFITS OF INTRODUCING A HATE CRIME COMMISSIONER

20.14 There are several arguments in favour of introducing a Hate Crime Commissioner.

20.15 On a general level, there may be value in the centralised oversight that a Hate Crime Commissioner could provide.

20.16 Responsibility for tackling hate crime is currently split between the Home Office and the Ministry of Housing, Communities and Local Government.[14] There are also other departments, such as the Ministry of Justice, the Government Equalities Office and the Attorney General's Office which have strong interests. On the law enforcement side, while the CPS operates as a largely unified organisation across England and Wales (albeit broken down into 14 CPS Areas), there are 43 separate police force areas and 43 corresponding police and crime commissioners.

20.17 Amongst these organisations significant effort is made to ensure a consistent, joined-up response to tackling hate crime; including regular cross-government policy development and the appointment of a hate crime lead in the National Police Chief's Council. However, as with many areas of criminal justice, the level of coordination is imperfect. A Hate Crime Commissioner – operating alongside these different departments and agencies, may assist with ensuring a more consistent, joined up approach to tackling hate crime.

20.18 On a more specific level, the functions and activities that a Hate Crime Commissioner might perform could bring benefit to hate crime laws and practices.

20.19 We will consider these more specific benefits below.

Benefits related to policing

20.20 Monitoring police practices relating to hate crime would be useful owing to inconsistency in this area. To some extent, this role is already undertaken by HMICFRS; indeed, a 2018 inspection into the initial police response to hate crime highlighted that some hate crime victims get a better service from the police than others, and that forces apply the national minimum standard of response inconsistently.[15] This point was echoed by participants at a Citizens UK meeting we attended in Birmingham. The HMICFRS report

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[14] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Service, *Understanding the difference: The initial police response to hate crime* (2018) p 10, available at https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf.

[15] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Understanding the difference, the initial police response to hate crime* (July 2018) p 22l

also observes inaccuracies in the ways that hate crime reports are flagged, [16] as well as gaps in the quality and quantity of the information that police gather from victims and perpetrators.[17]

20.21 While the recent thematic focus that HMICFRS and HMCPSI have given to hate crime in recent years has been extremely helpful in understanding the current issues in police and prosecution practice, a Hate Crime Commissioner may be better placed to keep these matters in focus on a more routine basis, in addition to these periodic thematic inspectorate reports.

20.22 A Commissioner could also develop a greater understanding of best practice in relation to recording and information gathering and promote this amongst local police forces. This would enable a more accurate and detailed overall picture of national hate crime offending.

Benefits related to those affected by hate crime

20.23 A Hate Crime Commissioner might use their oversight function to identity inconsistencies in the quality and quantity of hate crime support services for victims. A Commissioner could use their profile to draw attention to gaps and recommend improvements.[18] This could be beneficial in the specific context of hate crime, where national inconsistency has been identified and funding for support services can depend on local commissioning in each area. [19]

20.24 A Hate Crime Commissioner might also assess the provision and effectiveness of programmes involving perpetrators, recommending improvement where necessary. Indeed, there is a need for such improvement in hate crime. As we highlight in Chapter 6, various rehabilitative programmes have had positive outcomes, for example Promoting Human Dignity ("PHD") (England),[20] Diversity Awareness Prejudice Pack ("DAPP") (England),[21] and Race Equality in our Communities (England).[22] However, these programmes focus heavily on racist or other "traditional" forms of hate crime. It

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16 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Understanding the difference, the initial police response to hate crime* (July 2018) p 58.

17 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Understanding the difference, the initial police response to hate crime* (July 2018) pp 59 to 61.

18 This function has been considered in relation to the Domestic Abuse Commissioner. HM Government, Transforming the Response to Domestic Abuse (March 2018) p 65, available at https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf.

19 S Hardy and N Chakraborti, *A Postcode Lottery? Mapping Support Services for Hate Crime Victims,* (University of Leicester, 2017) p 9.

20 P Iganski and D Smith, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, Scotland, 2011) pp 32 to 33. The PHD was introduced in 2008 to tackle racist hate reoffending.

21 P Iganski and D Smith, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, Scotland, 2011) pp 28 to 30. The DAPP began in 2001 to deal with racist hate offending but developed to tackle disablist and homophobic hate offending.

22 P Iganski and D Smith, *The Rehabilitation of Hate Crime Offenders – an International Study* (Equality and Human Rights Commission, Scotland, 2011) p 35.

would be useful to have programmes which target other forms of hate more widely available to offenders.

Benefits related to prevention

20.25 In addition to monitoring the provision and effectiveness of programmes for perpetrators, a Hate Crime Commissioner might bring other benefits to preventative efforts. Their ability to provide education and training would be relevant in this regard;[23] research by Sussex University academics has outlined the provision of educational programmes in relation to hate crime.[24]

20.26 Indeed, the Government's updated action plan on hate crime commits to preventing hate crime by "supporting the education sector in educating and protecting young people from hate". [25] A Hate Crime Commissioner might therefore support the provision of educational programmes for young people, as well as monitoring their progress. In addition, a Commissioner might usefully highlight the need for greater government investment in community-wide programmes if and where this is necessary.

20.27 We noted above that the IASC is permitted to support the carrying out of research.[26] If this were mirrored in the context of the Hate Crime Commissioner, it might also be beneficial to prevention work.

20.28 For example, this research function has been used by the Commission for Counter Extremism (CCE) for prevention purposes. In addition to the CCE's report on Challenging Hateful Extremism,[27] which looked at the causes of extremist attitudes, the CCE published eight peer-reviewed academic papers on the causes of extremism, extremism online, and approaches to countering extremism in 2019.[28] In the hate crime context, a Commissioner might support similar research into the sources of hateful attitudes, or effective ways to reduce recidivism and prevent hate crime offending in the

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23 By comparison we note the IASC's power to do this. See section 41(3)(d) of the Modern Slavery Act 2015.

24 M Walters, R Brown and S Wiedlitzka, *Preventing Hate Crime, Final Report* (October 2016) pp 38 to 44, available at http://sro.sussex.ac.uk/id/eprint/64925/1/Interventions%20for%20Hate%20Crime%20-%20FINAL%20REPORT_2.pdf.

25 HM Government, *Action Against Hate, The UK Government's Plan for Tackling Hate Crime – 'Two years on'* (October 2018), p 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748175/Hate_crime_refresh_2018_FINAL_WEB.PDF.

26 Section 41(3)(c) of the Modern Slavery Act.

27 Commission for Counter Extremism, *Challenging Hateful Extremism*, (October 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874101/200320_Challenging_Hateful_Extremism.pdf.

28 Commission for Countering Extremism publishes, *Commission for Countering Extremism publishes further eight academic papers on extremism* (31 July 2019), available at https://www.gov.uk/government/news/commission-for-countering-extremism-publishes-further-eight-academic-papers-on-extremism.

first place; adding to the valuable contributions made by the Leicester Hate Crime Project[29] and the Sussex Hate Crime Project in this area.[30]

Benefits related to raising awareness

20.29 This function has been important in the context of the IASC. In an independent review of the IASC role, Frank Field MP noted that the first IASC "has played a significant role in shining a spotlight on the scale and nature of modern slavery".[31]

20.30 The Government's recent domestic abuse consultation also noted that a Domestic Abuse Commissioner could raise awareness of domestic abuse since it remained largely hidden, with only an estimated one-fifth of victims reporting it to the police.[32]

20.31 This issue of underreporting also arises in the context of hate crime. We discuss research that demonstrates this, as well as barriers to reporting amongst specific groups, in Chapter 7.[33]

20.32 Police Recorded Crime figures imply that there has been an increase in hate crime being committed in recent years.[34] However, this upward trend has been partly attributed to heightened public awareness of issues relating to hate crime, which increases the likelihood of victims making reports to the police.[35] In order to maintain what appears to be increased reporting, a Hate Crime Commissioner could continue to raise public awareness of the issues surrounding hate crime, as well as the impact it has on victims; with particular emphasis on hate crime affecting those groups who are least likely to report.[36]

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29 N Chakraborti, J Garland, S Hardy, *The Leicester Hate Crime Project: Findings and Conclusions,* (University of Leicester, 2014), available at https://www2.le.ac.uk/departments/criminology/hate/documents/fc-executive-summary.

30 J Patterson, M.A Walters, R Brown, and H Fearn, *The Sussex Hate Crime Project: Final Report*, (University of Sussex, 2018), available at http://sro.sussex.ac.uk/id/eprint/73458/1/__smbhome.uscs.susx.ac.uk_lsu53_Documents_My%20Documents_Leverhulme%20Project_Sussex%20Hate%20Crime%20Project%20Report.pdf.

31 Rt Hon Frank Field MP, *Independent Review of the Modern Slavery Act 2015: Final report* (May 2019) p 30, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf.

32 HM Government, Transforming the Response to Domestic Abuse, (March 2018) p 65, available at https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf

33 We highlight the distinct barriers to engagement with the Criminal Justice System facing different minority groups in Chapter 7 of this consultation paper at paragraphs 7.60 to 7.64.

34 See Chapter 5 of this consultation paper at paragraph 5.20.

35 O Hambly and others, *Hate Crime: A Thematic Review of the Current Evidence* (Home Office, October 2018) pp 8 to 9; Home Office, *Hate Crime, England and Wales, 2016/18* (Statistical Bulletin 20/18, 16 October 2018) p 14.

36 Research conducted by the Leicester Hate Crime project showed that that only 21% of participants who had been victims of racist hate crimes reported their experience to the police – this was particularly low amongst Black British participants who had been victims of racist hate crime (14%) – see *The Leicester Hate Crime Project (2014) Briefing Paper 4: Racist Hate Crime,* p 12. Reporting figures were also low amongst victims of transphobic hate crime (27% of participants who had been victims of transphobic hate crime reported to

Benefits relating to consultation and collaboration

20.33 Existing Commissioners are given statutory powers to conduct consultation. In the case of the VC this is with "anyone (the Victims' Commissioner) thinks appropriate".[37] In the case of the IASC and (provisionally) the DAC this is with "public authorities, voluntary organisations and other persons".[38]

20.34 Consultation conducted by a central figure might be especially beneficial in the context of hate crime, primarily because hate crime is an inherently wide and diverse area of law and practice.

20.35 Some third sector organisations which provide support and information relating to hate crime are focused on specific protected characteristics – for example Galop[39] and Stonewall[40] provide support to LGBT victims of hate crime.[41] This is important because different groups face different barriers[42] and have different needs.

20.36 However, the specific needs of hate crime groups often intersect.[43] Also, victims might be targeted based on multiple characteristics. This was emphasised by participants in Manchester, Birmingham and Cardiff in our Citizens UK meetings, and in a stakeholder meeting with Tell MAMA, who referenced the specific context of Muslim women. Accordingly, a Hate Crime Commissioner could work with the Independent Advisory Group on hate crime to bring together voices from different victim groups.

20.37 Finally, in the Victims Commissioner's 2019-22 Strategy, Dame Vera Baird notes her intention to work collaboratively with the Domestic Abuse Commissioner, setting out the basis for engagement in a joint memorandum of understanding.[44] If this co-operation

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the police) – see *The Leicester Hate Crime Project (2014) Briefing Paper 3: Homophobic Hate Crime*, p 13, available at https://www2.le.ac.uk/departments/criminology/hate/documents/bp3-homophobic-hate-crime.

37 Domestic Violence, Crime and Victims Act 2004, s 49(2)(e).

38 Modern Slavery Act 2015, s 41(3)(e). See also Domestic Abuse Bill s 6(2)(f).

39 Galop are a specialist LGBT charity. As part of their wider functions, they offer hate crime services to LGBT victims in the form of emotional support, advice, advocacy, and reporting/recording (independent of police reporting/recording).

40 Stonewall are an LGBT specific policy organisation. As part of their wider functions, they give information and advice about LGBT hate crime. See https://www.stonewall.org.uk/help-advice/hate-crime.

41 Other specific organisations include Mermaids, which can offer support to victims of transphobic hate crime. Real offer an assisted disability hate crime reporting service. We note that there aren't equivalent, national organisations which provide specific support to victims of hate crime based on race or religion categories. However, there are organisations supporting sub-groups within these categories. Tell MAMA support victims of Islamophobia and anti-Muslim hate, Community Security Trust provides support to victims of antisemitism and antisemitic hate crime. GATE Herts work with victims of hate crime from Gypsy Roma and Traveller communities.

42 We highlight the distinct barriers to engagement with the Criminal Justice System facing different minority groups in Chapter 7 at paragraphs 7.60 to 7.64.

43 For example, the needs of a BAME LGBT person would have both BAME-specific and LGBT-specific needs. Equity Partnership, *The Challenge of Diversity*, *BME LGB&T Health and Wellbeing Needs Assessment*, available at https://www.equitypartnership.org.uk/wp-content/uploads/2016/12/The-Challenge-of-Diversity-BME-LGBT-Report-2015.pdf.

44 Victims' Commissioner for England and Wales, *Victims' Commissioner for England and Wales Strategy June 2019-June 2022*, p 5, available at https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/06/annual-report-2018-2019.pdf.

were mirrored in the hate crime context, it might bring specific benefits, particularly given that the terms of reference for this review ask us to consider whether gender or sex ought to be recognised as protected characteristics. As discussed in Chapter 12, the potential recognition of sex or gender-based hate crime creates specific challenges in the context of domestic abuse.

Benefits related to legislative review

20.38 Above we note that a Hate Crime Commissioner could keep the scope and application of hate crime legislation under review.

20.39 This function acquires additional importance in the context of our current review into hate crime laws in England and Wales, which considers the possible introduction of new legislation.

ARGUMENTS AGAINST THE INTRODUCTION OF A HATE CRIME COMMISSIONER

20.40 We now turn to consider arguments against the introduction of a Hate Crime Commissioner.

The cost of a Hate Crime Commissioner and risk of duplication of effort

20.41 The financial cost of a Hate Crime Commissioner might be one key argument against introducing the role.

20.42 The Impact Assessment accompanying the Domestic Abuse Bill notes that the budget for the Domestic Abuse Commissioner is likely to be around £1 million per year.[45] This would provide for the Commissioner's salary and variable overhead costs, as well as the employment of a team of support staff. It assumes the Commissioner would be supported by up to 15 staff members.

20.43 In 2018/19, the Victims' Commissioner's budget was £500,000, and her expenditure was £495,000.[46] This compares with a budget of £496,000 in 2017/18.[47] The most recent annual report published by the Independent Anti-Modern Slavery Commissioner notes that the Commissioner's annual budget was £575,000 in 2016/17, and his expenditure was £588,025.[48]

20.44 The budget for a Hate Crime Commissioner may be somewhat less than the Domestic Abuse Commissioner, as the scale of hate crime is lower than domestic abuse: the CPS

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45 Home Office, Ministry of Justice, *Impact Assessment, Draft Domestic Abuse Bill* (June 2019) p 19, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772187/Draft_Domestic_Abuse_Bill_-_Impact_Assessment.pdf.

46 Victims Commissioner for England and Wales, *2018/19 Annual Report Victims Commissioner for England and Wales* (2019) p 49, available at https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2020/07/Victims-Commissioners-Annual-Report-2019-20-with-hyperlinks.pdf.

47 Victims Commissioner for England and Wales, *2018/19 Annual Report Victims Commissioner for England and Wales* (2019) p 49.

48 The Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner Annual Report 2016-17* (2017) p 41, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654162/iasc_annual_report_2016_2017_web_new.pdf.

recorded 78,624 domestic abuse-flagged prosecutions in 2018-19[49] compared with 12,828 hate crime prosecutions.[50] By contrast, in 2016, 81 prosecutions were brought for modern slavery offences,[51] though the endemic[52] and largely hidden nature[53] of modern slavery means the scale of the need in this area cannot easily be measured by prosecution numbers alone. Based on these examples, we might estimate that at Hate Crime Commissioner's budget would sit somewhere in between that of the Domestic Abuse Commissioner's and the IASC's, though more detailed costings would be necessary to make a more accurate forecast.

20.45 In any case, the cost of introducing a Hate Crime Commissioner will not be insignificant. We might question whether incurring this cost would represent the most efficient use of the limited resources available to deal with hate crime.

20.46 As we have highlighted above, the quality and quantity of third party support services for victims of hate crime varies nationally. While on the one hand, a Commissioner may assist in ensuring more consistent victim standards across England and Wales, the cost of a Commissioner might also be better spent by funding third party victim support agencies directly.

20.47 When considering the cost effectiveness of this role we also acknowledge the risk that some of the functions served by a Hate Crime Commissioner could duplicate work currently conducted by Government departments or inspectorate agencies. For example, as we highlighted above, a Hate Crime Commissioner might play a role in providing more routine monitoring of police force's hate crime recording practices and adherence to national minimum standards. However, some of these functions are conducted periodically by HMICFRS who are likely to have more direct expertise in police practices more generally.

20.48 If the cost of a Hate Crime Commissioner is considered justified, it will still be important to carefully devise the Commissioner's functions to avoid duplication and to ensure their contribution to hate crime response is somewhat novel and innovative.

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49 See Crown Prosecution Service, Violence Against Women and Girls Report (2018-19) A10, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf.

50 See Chapter 5, Table 7 at para 5.32.

51 The Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner Annual Report 2016-17* (2017) p 44, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654162/iasc_annual_report_2016_2017_web_new.pdf.

52 The Economist, "Modern Slavery: Everywhere in Supply Chains" (March 2015), available at https://www.economist.com/international/2015/03/12/everywhere-in-supply-chains.

53 Home Office, *2018/19 Annual UK Report on Modern Slavery* (October 2019) p 4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840059/Modern_Slavery_Report_2019.pdf.

The Government's consultation on the Domestic Abuse Bill

20.49 In 2018 the Government launched consultation on "transforming the response to domestic abuse" [54] and outlined the provisional contents of a Domestic Abuse Bill. As we have noted above, one of the proposals in the Bill related to the introduction of a Domestic Abuse Commissioner.

20.50 The details given about the Commissioner's role attracted a range of criticisms, which are highlighted in a report written by the Joint Committee on the Draft Domestic Abuse Bill.[55] They broadly relate to the following points:

(1) The real and perceived independence of a Commissioner that is appointed by, and accountable to the Home Office: concerns about the lack of independence that a Domestic Abuse Commissioner would have were primarily expressed by Kevin Hyland OBE,[56] who drew from his experience as the UK's first IASC. Further concerns were raised by the End Violence Against Women and Girls Coalition, in the specific context of migrant women who are deeply impacted by Home Office immigration policies.[57]

(2) The adequacy of the resources made available to the Commissioner: according to the report, there was virtual unanimity that the "resources currently allocated to the Domestic Abuse Commissioner were inadequate".[58] Another respondent expressed concern that one Commissioner would not have the sole expertise to understand the full range of issues associated with domestic violence.[59]

(3) The extent of the powers given to the Commissioner: concern was expressed about the Domestic Abuse Commissioner's ability to "direct local authorities".[60] Whilst many voices were in favour of the meaningful power this afforded the Domestic Abuse Commissioner, some dissent was expressed. One respondent argued "there would invariably—and sometimes rightly—be differing levels and types of services provided by different councils, as the picture of domestic abuse varied dramatically from one authority to another".[61] Whilst we recognise this criticism, we note that the Bill does not provisionally give the Domestic Abuse

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54 HM Government, *Transforming the Response to Domestic Abuse, Government Consultation* (March 2018), available at https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf.

55 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075.

56 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, pp 76 to 80.

57 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, p 79.

58 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, p 80.

59 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, p 80.

60 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, p 82.

61 Draft Domestic Abuse Bill, House of Commons, House of Lords, Joint Committee of the Draft Domestic Abuse Bill, (2017-19), HL Paper 378, HC 2075, p 82.

Commissioner the power to "direct local authorities".[62] Rather, the Commissioner has the power to make requests and recommendations to public authorities, and public authorities have a duty to comply with requests "so far as is reasonably practicable",[63] or respond to a Commissioner's recommendations.[64] We explain this more fully at paragraph 20.12.

20.51 It is possible that some of these criticisms could also apply in the context of a government appointed Hate Crime Commissioner.

PRACTICAL MATTERS

Legal basis of the appointment

20.52 We noted by way of introduction that the appointment of the VC and the IASC were obligated by statute. This statutory obligation will also apply to the appointment of a DAC if the Domestic Abuse Bill receives royal ascent.

20.53 Logically then, if the introduction of a Hate Crime Commissioner were accepted in principle, this appointment might also be a statutory requirement.

20.54 In Chapter 9 of this consultation paper, we set out the case for creating a Hate Crime Act to encapsulate relevant laws and address the piecemeal nature of existing statutes associated with hate crime.[65] A Hate Crime Act would be the most appropriate place to require the appointment of a Hate Crime Commissioner, as well as set out the functions, duties and powers of a prospective Hate Crime Commissioner.

Other matters

20.55 Other matters that would need to be determined would be:

(1) Which Government Department appoints the Hate Crime Commissioner.

(2) The territorial remit of the Hate Crime Commissioner.

(3) Which Secretary of State the Hate Crime Commissioner must report to.[66]

(4) Whether the role is full-time or part-time.

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62 Domestic Abuse Commissioner factsheet, available at https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestc-abuse-commissioner-factsheet.

63 Duty to co-operate with Commissioner found in section 14 of the Domestic Abuse Bill, available at https://publications.parliament.uk/pa/bills/cbill/58-01/0096/cbill_2019-20210096_en_2.htm#pt2-pb2-l1g6.

64 The duty to respond Commissioner's recommendations is found in section 15 of the Domestic Abuse Bill, see https://publications.parliament.uk/pa/bills/cbill/58-01/0096/cbill_2019-20210096_en_2.htm#pt2-pb2-l1g6.

65 At paragraphs 9.21 to 9.27.

66 In the case of the other Commissioners mentioned above, this requires presenting a progress report to a designated Secretary of State. For example, the Victims Commissioner must present a progress report in respect of each calendar year to the Secretary of State for Justice, as well as also the Attorney General and the Secretary of State for the Home Department – section 49(5) of the Domestic Violence, Crime and Victims Act (2004).

(5) The Commissioner's budget.

20.56 The Home Office plays a key role in managing England and Wales' response to hate crime, and it is most likely that a Hate Crime Commissioner would be appointed by this department. Similarly, we note that the IASC is primarily appointed by the Home Office, and the Designate Domestic Abuse Commissioner was appointed by the Home Office. The Commission for Counter Extremism is also a committee of the Home Office. The Victim's Commissioner by contrast is appointed by the Ministry of Justice.

20.57 We would expect that the territorial remit of the Commissioner would relate to England and Wales, save that some functions may be limited in Wales to the extent they fall within the competence of the devolved administration in Wales.

20.58 Given the cross-cutting nature of hate crime, we would imagine that departments to which the Commissioner would be required to report would include:

(1) The Home Secretary

(2) The Justice Secretary

(3) The Attorney General

(4) The Secretary of State for Housing, Communities and Local Government

20.59 The budget and staffing of the Commissioner role would most likely be determined by the Government department which appoints them.

CONCLUSION

20.60 It seems likely that a Hate Crime Commissioner could provide a useful function in monitoring and coordinating key bodies and agencies that work to counter and prosecute hate, and promoting best practice in supporting victims and rehabilitating offenders. The role may also help to raise the profile of hate crime in communities, and encourage confidence in victims coming forward and reporting hate crimes and incidents.

20.61 What is less clear is whether the cost involved in the creation of such a role is proportionate, and if the funding may better be spent in other ways, such as enhanced support for third party victim support agencies.

20.62 In light of the Hate Crime Commissioner's envisaged functions, as well as the arguments for and against the introduction of this role, we seek consultees' views on whether a Hate Crime Commissioner should be introduced.

Consultation Question 62.

20.63 We invite consultees' views on whether they would support the introduction of a Hate Crime Commissioner.

Chapter 21: Consultation Questions

Consultation Question 1.

21.1 We provisionally propose that a single "Hate Crime Act" be used to bring together the various reforms to hate crime laws proposed in this paper. This could include:

- shifting the substantive aggravated offences currently in the CDA 1998 and the stirring up hatred offences in parts 3 and 3A of the POA 1986 to the new Hate Crime Act;
- making amendments to the enhanced sentencing provisions (currently in the CJA 2003 but planned to move to the Sentencing Code) and the Football (Offences) Act 1991; and
- if a Hate Crime Commissioner is to be introduced, the establishment of this office and its powers.

21.2 Do consultees agree that hate crime laws should, as far as practicable, be brought together in the form of a single "Hate Crime Act"?

Paragraph 9.26

Consultation Question 2.

21.3 We provisionally propose that the law should continue to specify protected characteristics for the purposes of hate crime laws.

21.4 Do consultees agree?

Paragraph 10.85

Consultation Question 3.

21.5 We provisionally propose that the criteria to determine whether a characteristic is included in hate crime laws should be:

(1) Demonstrable need: evidence that crime based on hostility or prejudice towards the group is prevalent.

(2) Additional Harm: there is evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.

(3) Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others.

21.6 Do consultees agree?

Paragraph 10.154

Consultation Question 4.

21.7 We invite consultees' views on whether the definition of race in hate crime laws should be amended to include migration and asylum status; and/or language.

Paragraph 11.33

Consultation Question 5.

21.8 We provisionally propose to retain the current definition of religion for the purposes of hate crime laws (we consider the question of non-religious beliefs separately in Chapter 14).

21.9 Do consultees agree?

Paragraph 11.55

Consultation Question 6.

21.10 We do not propose to add sectarian groups to the groups protected by hate crime laws (given that they are already covered by existing protection for "religious groups").

21.11 Do consultees agree?

Paragraph 11.61

Consultation Question 7.

21.12 We invite consultees' views on whether "asexuality" should be included within the definition of sexual orientation.

Paragraph 11.71

Consultation Question 8.

21.13 We provisionally propose that the current definition of "transgender" in hate crime laws be revised to include:

- People who are or are presumed to be transgender
- People who are or are presumed to be non-binary
- People who cross dress (or are presumed to cross dress); and
- People who are or are presumed to be intersex

21.14 We further propose that this category should be given a broader title than simply "transgender", and suggest "transgender, non-binary or intersex" as a possible alternative.

21.15 Do consultees agree?

21.16 We welcome further input from consultees on the form such a revised definition should take.

Paragraph 11.89

Consultation Question 9.

21.17 We invite consultees' views on whether the current definition of disability used in the Criminal Justice Act 2003 should be retained.

Paragraph 11.107

Consultation Question 10.

21.18 We invite consultees' views on whether criminal conduct based on a wrongly presumed lack of disability on the part of the victim should fall within the scope of protection afforded by hate crime laws.

Paragraph 11.114

Consultation Question 11.

21.19 We provisionally propose that gender or sex should be a protected characteristic for the purposes of hate crime law.

21.20 Do consultees agree?

21.21 We invite consultees' views on whether gender-specific carve outs for sexual offences, forced marriage, FGM and crimes committed in the domestic abuse context are needed, if gender or sex is protected for the purposes of hate crime law.

Paragraph 12.194

Consultation Question 12.

21.22 We invite consultees' view as to whether sex or gender-based hate crime protection should be limited to women or include both women and men.

Paragraph 12.211

Consultation Question 13.

21.23 We provisionally propose that a protected category of "women" is more suitable than "misogyny", if sex or gender-based hate crime protection were to be limited to the female sex or gender.

21.24 Do consultees agree?

Paragraph 12.215

Consultation Question 14.

21.25 We provisionally propose a protected category of "sex or gender" rather than choosing between either "gender" or "sex" if hate crime protection were to adopt a general approach.

21.26 Do consultees agree?

Paragraph 12.223

Consultation Question 15.

21.27 We invite consultees' views on whether age should be recognised as a protected characteristic for the purposes of hate crime law.

Paragraph 13.127

Consultation Question 16.

21.28 We invite consultees' views as to whether any age-based hate crime protection should be limited to "older people" or include people of all ages.

Paragraph 13.128

Consultation Question 17.

21.29 We invite consultees' views on whether "sex workers" should be recognised as a hate crime category.

Paragraph 14.65

Consultation Question 18.

21.30 We invite consultees' views on whether "alternative subcultures" should be recognised as a hate crime category.

Paragraph 14.110

Consultation Question 19.

21.31 We invite consultees' views on whether "people experiencing homelessness" should be recognised as a hate crime category.

Paragraph 14.157

Consultation Question 20.

21.32 We invite consultees' views on whether "philosophical beliefs" should be recognised as a hate crime category.

Paragraph 14.217

Consultation Question 21.

21.33 We provisionally propose that the legal test that applies in respect of enhanced sentencing should be identical to that which applies to aggravated offences.

21.34 Do consultees agree?

Paragraph 15.25

Consultation Question 22.

21.35 We provisionally propose that the current legal position – where the commission of a hate crime can be satisfied through proof of "demonstration" of hostility towards a relevant characteristic of the victim – be maintained.

21.36 Do consultees agree?

Paragraph 15.38

Consultation Question 23.

21.37 We invite consultees' views as to whether the current motivation test should be amended so that it asks whether the crime was motivated by "hostility or prejudice" towards the protected characteristic.

Paragraph 15.102

Consultation Question 24.

21.38 We provisionally propose that the model of aggravated offences with higher maximum penalties be retained as part of future hate crime laws.

21.39 Do consultees agree?

Paragraph 16.35

Consultation Question 25.

21.40 We provisionally propose that the characteristics protected by aggravated offences should be extended to include: sexual orientation; transgender, non-binary and intersex identity; disability, and any other characteristics that are added to hate crime laws (in addition to the current characteristics of race and religion).

21.41 Do consultees agree?

Paragraph 16.39

Consultation Question 26.

21.42 We provisionally propose that the decision as to whether an aggravated version of an offence should be created be guided by:

- The overall numbers and relative prevalence of hate crime offending as a proportion of an offence;
- The need to ensure consistency across the criminal law;
- The adequacy of the existing maximum penalty for the base offence; and
- Whether the offence is of a type where the imposition of additional elements of the offence requiring proof before a jury may prove particularly burdensome.

21.43 Do consultees agree?

Paragraph 16.55

Consultation Question 27.

21.44 We provisionally propose that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws.

21.45 Do consultees agree?

Paragraph 16.61

Consultation Question 28.

21.46 We provisionally propose that aggravated versions of the following offences should be created, notwithstanding that they have life maximum penalties:

- Grievous bodily harm with intent contrary to section 18 of the OAPA 1861; and
- Arson with intent or reckless as to whether life is endangered contrary to sections 1(2) and 1(3) of the Criminal Damage Act 1971.

21.47 We do not propose that aggravated versions be created in respect of any other offences with a life maximum penalty.

21.48 Do consultees agree?

Paragraph 16.75

Consultation Question 29.

21.49 We provisionally propose that aggravated versions of the following offences against the person should not be introduced in reformed hate crime laws:

- Maliciously administering poison so as to endanger life or inflict grievous bodily harm (section 23 OAPA 1861);
- Maliciously administering poison with intent to injure, aggrieve or annoy any other person (section 24 OAPA 1861);
- Threats to kill (section 16 OAPA 1861); and
- Threatening with an offensive weapon or article with a blade/point (section 1A Prevention of Crime Act 1953/ section 139AA(1) Criminal Justice Act 1988).

21.50 Do consultees agree?

Paragraph 16.81

Consultation Question 30.

21.51 We invite consultees' views on whether any property or fraud offences should be included within the specified aggravated offences.

Paragraph 16.92

Consultation Question 31.

21.52 We provisionally propose that aggravated versions of sexual offences should not be introduced (and hate crimes in these contexts should continue to be dealt with through enhanced sentencing).

21.53 Do consultees agree?

Paragraph 16.106

Consultation Question 32.

21.54 We invite consultees' views on whether a provision requiring satisfaction of the legal test in respect of "one or more" protected characteristics would be a workable and fair approach to facilitate recognition of intersectionality in the context of aggravated offences.

Paragraph 16.131

Consultation Question 33.

21.55 We invite consultees' views on whether the maximum sentences for the aggravated offences in the CDA 1998 are appropriate.

Paragraph 16.145

Consultation Question 34.

21.56 We invite consultees' views on whether where only an aggravated offence is prosecuted, the Courts should always be empowered to find a defendant guilty of the base offence in the alternative.

Paragraph 16.156

Consultation Question 35.

21.57 We invite consultees' views on whether they consider the Sussex Report's proposed "hybrid" approach to hate crime laws to be a preferable approach to the model that we have proposed.

Paragraph 16.179

Consultation Question 36.

21.58 We provisionally propose that the enhanced sentencing model remain a component of hate crime laws, as a complement to an expanded role for aggravated offences.

21.59 Do consultees agree?

Paragraph 17.72

Consultation Question 37.

21.60 We provisionally propose that sentencers should continue to be required to state the aggravation of the sentence in open court.

21.61 Do consultees agree?

Paragraph 17.77

Consultation Question 38.

21.62 We invite consultees' views on whether a more flexible approach to characteristic protection would be appropriate for the purposes of enhanced sentencing.

21.63 Further, we invite consultees' views on whether this might be best achieved by:

- a residual category;
- a set of criteria for judges to consider;
- sentencing guidance; or
- a combination of approaches.

Paragraph 17.104

Consultation Question 39.

21.64 We provisionally propose that, contrary to the more flexible approach set out in *R v O'Leary*, a court should not be permitted to apply an enhanced sentence to a base offence, where an aggravated version of that offence could have been pursued in respect of the specified characteristic.

21.65 Do consultees agree?

Paragraph 17.110

Consultation Question 40.

21.66 We provisionally propose that the stirring up offences relating to "written" material be extended to all material.

21.67 Do consultees agree?

Paragraph 18.77

Consultation Question 41.

21.68 We provisionally propose to replace sections 19 to 22 and 29C to 29F of the Public Order Act 1986 with a single offence of disseminating inflammatory material.

21.69 Do consultees agree?

Paragraph 18.92

Consultation Question 42.

21.70 We provisionally propose to align the defences available to innocent disseminators of inflammatory material to ensure consistency as follows:

(1) The provisions relating to performers, rehearsals and recordings of performances would apply to both plays and broadcasts.

(2) The defences available to third parties who did not intend to stir up hatred would be aligned, so that the offence would not apply to a person who did not realise that the material was to be included; did not realise that material was threatening or abusive; or did not realise that the circumstances were such that hatred was likely to be stirred up.

(3) Unless intention to stir up hatred is proved, no offence would be committed by showing a recording that has been certified by the British Board of Film Classification or licensed for cinema performance by a local authority.

21.71 Do consultees agree?

Paragraph 18.101

Consultation Question 43.

21.72 Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host?

21.73 If "actual knowledge" is retained as a requirement for platform liability, should this be the standard applied in other cases of dissemination of inflammatory material where no intention to stir up hatred can be shown?

Paragraph 18.139

Consultation Question 44.

21.74 We invite consultees' views on whether the meaning of "likely to" in the racial hatred offence should be defined in statute (and for any other characteristics to which it would apply in future). We further invite views on how might this be defined.

Paragraph 18.171

Consultation Question 45.

21.75 We provisionally propose that intentionally stirring up hatred be treated differently from the use of words or behaviour likely to stir up hatred. Specifically, where it can be shown that the speaker intended to stir up hatred, it should not be necessary to demonstrate that the words used were threatening, abusive, or insulting.

21.76 Do consultees agree?

Paragraph 18.195

Consultation Question 46.

21.77 We provisionally propose that where intent to stir up hatred cannot be proven, it should be necessary for the prosecution to prove that:

(1) the defendant's words or behaviour were threatening or abusive;

(2) the defendant's words or behaviour were likely to stir up hatred;

(3) the defendant knew or ought to have known that their words or behaviour were threatening or abusive; and

(4) the defendant knew or ought to have known that their words or behaviour were likely to stir up hatred.

21.78 Do consultees agree?

Paragraph 18.197

Consultation Question 47.

21.79 We provisionally propose that there should be a single threshold to determine whether words or behaviour are covered by the "likely to" limb of the stirring up offences, applying to all protected characteristics.

21.80 Do consultees agree?

21.81 If so, would consultees favour applying a single threshold of "threatening or abusive" but not "insulting" words to prosecutions brought under the "likely to" limb?

Paragraph 18.208

Consultation Question 48.

21.82 We provisionally propose that the offences of stirring up hatred be extended to cover hatred on the grounds of transgender identity and disability.

21.83 Do consultees agree?

Paragraph 18.225

Consultation Question 49.

21.84 We provisionally propose that the stirring up offences be extended to cover sex or gender.

21.85 Do consultees agree?

Paragraph 18.240

Consultation Question 50.

21.86 We invite consultees' views on whether the definition of hatred for the purposes of the stirring up offences should include hatred on grounds of one or more protected characteristics.

Paragraph 18.249

Consultation Question 51.

21.87 We provisionally propose that the current exclusion of words or behaviour used in a dwelling from the stirring up offences should be removed.

21.88 Do consultees agree?

Paragraph 18.256

Consultation Question 52.

21.89 We provisionally propose that the current protections in sections 29J and 29JA apply to the new offence of stirring up hatred.

21.90 Do consultees agree?

21.91 We invite consultees' views on whether similar protections should be given in respect of transgender identity, disability and sex or gender, and what these should cover.

Paragraph 18.277

Consultation Question 53.

21.92 We invite consultees' views on whether there should be similar protections to those in sections 29J and 29JA under the racial hatred offences.

Paragraph 18.289

Consultation Question 54.

21.93 We provisionally propose that prosecutions for stirring up hatred offences should require the personal consent of the Director of Public Prosecutions rather than the consent of the Attorney General.

21.94 Do consultees agree?

Paragraph 18.297

Consultation Question 55.

21.95 We invite consultees' views on whether the current exemptions for reports of Parliamentary and court proceedings should be maintained in a new offence. Further, we invite views as to whether there are any additional categories of publication which should enjoy full or partial exemption from the offence, such as fair and accurate reports of local government meetings or peer reviewed material in a scientific or academic journal.

Paragraph 18.304

Consultation Question 56.

21.96 We provisionally propose that racist chanting at football matches remain a criminal offence distinct from the current Public Order Act 1986 offences.

21.97 Do consultees agree?

Paragraph 19.28

Consultation Question 57.

21.98 We provisionally propose that the offence under section 3 of the Football (Offences) Act 1991 of engaging in "chanting of an indecent or racialist nature at a designated football match" be extended to cover chanting based on sexual orientation.

21.99 Do consultees agree?

21.100 We welcome consultees' evidence on the prevalence of discriminatory chanting targeting characteristics other than race and sexual orientation, and would welcome views on whether the offence should be extended to cover all protected characteristics.

Paragraph 19.49

Consultation Question 58.

21.101 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover gestures and missile throwing.

Paragraph 19.58

Consultation Question 59.

21.102 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover journeys to and from a designated football match.

Paragraph 19.59

Consultation Question 60.

21.103 We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be amended to include association and perceived characteristics.

Paragraph 19.64

Consultation Question 61.

21.104 We invite consultees' views on whether the current penalty for the offence under section 3 of the Football (Offences) Act 1991 of engaging in chanting of an indecent or racialist nature at a designated football match, a Level 3 fine, is sufficient.

Paragraph 19.68

Consultation Question 62.

21.105 We invite consultees' views on whether they would support the introduction of a Hate Crime Commissioner.

Paragraph 20.63