



**Law  
Commission**  
Reforming the law

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**HATE CRIME:  
CONSULTATION PAPER SUMMARY**



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## THIS SUMMARY








This summary is intended as an overview of the key issues that we discuss in our Hate Crime Consultation Paper. It explains what the project is about, and provides some context. In it we also ask some of the most important questions from the consultation paper.

For those with a particular interest in the topics raised in this Summary, we encourage you to read the relevant parts of the full Consultation Paper, which provides significantly more detail. This is particularly true for organisations that are planning to prepare an institutional response to this consultation.

It is also possible to engage with some of the key issues in this review by reading the summary alone, and responding to its questions. This may be particularly useful for members of the public who would like to share their views on some of the main issues, but are less interested in the more detailed and technical questions.



## RESPONDING TO OUR CONSULTATION

<p><b>Who are we?</b></p> 	<p>The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.</p>
<p><b>What is it about?</b></p> 	<p>Reform of hate crime and hate speech laws including aggravated offences, enhancing sentencing and stirring up hatred offences.</p>
<p><b>Who do we want to hear from?</b></p> 	<p>We would like to hear from as many stakeholders as possible, including law enforcement, criminal law practitioners, human rights and civil liberties groups, and people who have been victims of hate crime and the service providers who support them.</p>
<p><b>Where can I read the full Consultation Paper?</b></p> 	<p>The full Consultation Paper is available at our website: <a href="https://www.lawcom.gov.uk/project/hate-crime/">https://www.lawcom.gov.uk/project/hate-crime/</a></p>
<p><b>What is the deadline?</b></p> 	<p>The deadline for responses is 24 December 2020.</p>
<p><b>How to respond?</b></p> 	<p>If you are responding to the full length Consultation Paper we would appreciate responses using the online response form available at: <a href="https://consult.justice.gov.uk/law-commission/hate-crime">https://consult.justice.gov.uk/law-commission/hate-crime</a></p> <p>Otherwise, you can respond:</p> <ol style="list-style-type: none"><li>1. by email to <a href="mailto:hatecrime@lawcommission.gov.uk">hatecrime@lawcommission.gov.uk</a></li><li>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).</li></ol>
<p><b>What happens next?</b></p> 	<p>After analysing all the responses, we will make recommendations for reform, which we will publish in a report. It will be for Government to decide whether to implement the recommendations.</p>

For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees' responses, please see page i of the Consultation Paper.

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## INTRODUCTION

### What is hate crime?

Hate crime refers to existing criminal offences (such as assault, harassment or criminal damage) where the victim is targeted on the basis of one or more “protected characteristics” – race, religion, sexual orientation, disability and transgender identity. The crime is considered more serious as a result. In the law of England and Wales, a hate crime is committed if:

1. the offence was “motivated by hostility” towards the protected characteristic (for example, the offence of assault against a gay person was motivated by homophobic views); or
2. the defendant “demonstrated hostility” towards the protected characteristic at the time of committing the offence (for example, the defendant defaced a Synagogue with a swastika).

There are also a number of “hate speech” offences. These include offences of “stirring up” hatred (for example through the dissemination of inflammatory racist material) and the offence of “racialist chanting” at a football match.

Many other countries have hate crime and hate speech laws, but there is significant variation in the characteristics that are protected, the legal tests that are applied, and the mechanism by which the law recognises the behaviour as a hate crime.

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### What is this review about?

In this review we have been asked to look at the various hate crime and hate speech laws in England and Wales and make recommendations for reform where appropriate.

The main issues we have been asked to consider are:

- **Who should be protected by hate crime laws?** In particular, should there be more consistency of protection across the existing characteristics, and should any further characteristics such as sex/gender or age be added?
- **How should hate crime laws work?** In particular, are the current range of offences and sentence enhancements working well?

Although not everyone agrees with hate crime laws, we have not been asked to review the fundamental question of whether they should exist at all.

We have also not been asked to review related matters such as police and prosecutor training and practice, services for hate crime victims, and hate crime prevention initiatives in the community. However, we recognise that these issues are important, and we do refer to them where relevant.

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## WHAT DOES THE CURRENT LAW SAY?

There are a number of different legal provisions that comprise hate crime and hate speech laws in England and Wales. These laws are considered rather complicated because they involve multiple, overlapping legal mechanisms. They are also inconsistent in their application to different protected characteristics.

### Hate crime – making existing offences more serious

There are two ways in which hate crime laws currently make existing criminal offences more serious. These are:

- **Aggravated offences:** which are separate, aggravated versions of eleven existing criminal offences (including assault, public order offences, harassment, and criminal damage) which carry higher maximum penalties than the “base” offence to which they relate.
- **Enhanced sentencing:** which is available for all other criminal offences, and requires the sentence to be increased, but within the existing maximum available.

The legal test for both aggravated offences and enhanced sentencing is proof that either the offence was motivated by hostility towards the protected characteristic, or the defendant demonstrated hostility towards the protected characteristic at the time of committing the offence. However, an important distinction is that for aggravated offences this hostility must be proven at the trial stage, as part of the finding of guilt for the offence (often before a jury), whereas

for enhanced sentencing this occurs at the sentencing stage, once guilt for the offence itself has already been established.

Another important distinction is that aggravated offences apply only in respect of racial and religious hostility. Enhanced sentencing applies for race, religion, sexual orientation, disability and transgender status.

In 2018/19 there were 103,379 hate crimes reported to police in England and Wales,<sup>1</sup> 12,828 hate crime prosecutions and 10,817 convictions.<sup>2</sup> A significant majority of these related to the characteristic of race: 76% of police reports and 78% of convictions.



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<sup>1</sup> “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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf).

<sup>2</sup> Crown Prosecution Service, “Hate Crime Annual Report” (2018-19), p 30, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF>.

## Hate speech offences

The vast majority of abusive speech that is targeted at protected characteristics is dealt with through general criminal offences, which are then aggravated on the basis of the “hostility” element (see page 4). In particular:

- Public order offences contrary to sections 4A and 5 of the Public Order Act 1986; and
- Communications offences contrary to section 127 of the Communications Act 2003 or section 1 of the Malicious Communications Act 1988.

For example, if a black person is subjected to racist abuse in the street, the perpetrators may be charged with a racially aggravated public order offence: typically, the offence of causing harassment, alarm or distress contrary to section 5 of the Public Order Act 1986, or the more serious offence of intentionally causing harassment, alarm or distress contrary to section 4A of the same Act. Similarly, if a disabled person is sent grossly offensive online abuse relating to their disability, the sender may have committed the offence of improper use of a public electronic communications network contrary to section 127(1)(a) of the Communications Act 2003, and any sentence they receive may be enhanced on the basis of the hostility the sender demonstrated towards the victim’s disability.

However, there are also specific offences of stirring up hatred in respect of race, religion and sexual orientation (there is no equivalent offence for disability or transgender status). These are serious offences that have a maximum penalty of 7 years’ imprisonment.

They require the consent of the Attorney General before they can be prosecuted.

These offences do not criminalise conduct expressing or inciting hostility or hatred towards specific individuals. Rather, they address conduct (such as use of words, material or behaviour) intended or likely to cause others to hate entire groups.

The threshold for prosecution of stirring up racial hatred is high, and it is even more stringent in respect of religion and sexual orientation. As a result, prosecution is quite rare: in 2018-19 there were 13 prosecutions for stirring up hatred offences, 11 of which resulted in convictions.<sup>3</sup> This was the highest annual number ever.



### Stirring up racial hatred

The conduct of the defendant must be “threatening, abusive or insulting.”

The prosecution must further prove that the defendant either intended to stir up racial hatred, or in the circumstances, racial hatred was likely to be stirred up.<sup>4</sup>

<sup>3</sup> See Crown Prosecution Service, “Hate Crime Annual Report” (2018-19), p 47, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Annual-Report-2018-2019.PDF>.

<sup>4</sup> 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).



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## **Stirring up hatred on the basis of religion or sexual orientation**

These offences were added after the offence of stirring up racial hatred. There are differences which make them 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); and
3. there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

## **Racist chanting at football matches**

It is also an offence under section 3(1) of the Football (Offences) Act 1991 to “engage or take part in chanting of an indecent or racist nature at a designated football match”.

This offence is limited to the characteristic of race, and to the context of a “designated football match”, which 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. Other sports such as rugby and cricket are not covered by this offence.

“Chanting” is defined as “the repeated uttering of any words or sounds (whether alone or in concert with one more others).”<sup>5</sup>

“Of a racist 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.”<sup>6</sup>

The maximum available penalty for this offence is a £1000 fine,<sup>7</sup> but conviction may also allow for a football banning order to be made against the offender.<sup>8</sup>



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<sup>5</sup> Football (Offences) Act 1991, s 3(2)(a)

<sup>6</sup> Football (Offences) Act 1991, s 3(2)(b)

<sup>7</sup> Football (Offences) Act 1991, s 5(2).

<sup>8</sup> Football Spectators Act 1989, Sch 1, para m.

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## HOW DID HATE CRIME LAWS DEVELOP?

The laws with respect to hate crime and hate speech in England and Wales have developed in a number of phases 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<sup>9</sup> was established for specified racially (1998) or religiously (2001)<sup>10</sup> aggravated cases of certain specified offences, and a parallel statutory regime of enhanced sentencing for all other offences was introduced.<sup>11</sup> In 2003 the characteristics of sexual orientation and disability were added, and the enhanced sentencing regime was shifted to the Criminal Justice Act 2003.<sup>12</sup> Transgender identity was added to the enhanced sentencing regime in 2012.<sup>13</sup>

Meanwhile the offence of stirring up racial hatred, which originated in 1965,<sup>14</sup> was to some extent replicated for religious hatred in 2006<sup>15</sup> and hatred on the basis of sexual orientation in 2008,<sup>16</sup> though a higher criminal threshold was applied to these later additions.

### **Our previous review of hate crime laws**

In 2012, the government asked the Law Commission to consider the disparity of treatment amongst the five characteristics recognised in hate crime laws: race, religion, sexual orientation, disability and transgender identity. We were asked whether the reach of the criminal law should be extended to cover all of these characteristics equally.

In our 2014 report,<sup>17</sup> we recommended that a wider review of hate crime laws be conducted, but in the absence of such a review, we recommended the extension of the aggravated offences regime to all five of these characteristics. At that time, we found insufficient evidence to justify an extension of the “stirring up” hatred offences to the characteristics of disability and transgender identity.

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<sup>9</sup> Crime and Disorder Act 1998, ss 28 to 32.

<sup>10</sup> Anti-terrorism, Crime and Security Act 2001, pt 5.

<sup>11</sup> 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.

<sup>12</sup> Criminal Justice Act 2003, ss 145 and 146.

<sup>13</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 21, pt 1.

<sup>14</sup> See Chapter 18 for a more detailed historical account.

<sup>15</sup> Public Order Act 1986, pt 3A, as inserted by the Racial and Religious Hatred Act 2006.

<sup>16</sup> Public Order Act 1986, pt 3A, as inserted by section 74 of the Criminal Justice and Immigration Act 2008.

<sup>17</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348.



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## WHAT ARE THE REASONS FOR HATE CRIME LAWS?

There are a number of reasons why England and Wales and most other comparable jurisdictions have chosen to implement hate crime and hate speech laws.

The most commonly cited are:

1. the additional harm hate crime causes to both the individual victim and the wider community;
2. the symbolic function of the legislation as a tool for tackling bigotry, prejudice and inequality; and
3. the practical benefits flowing from it, such as the ability to monitor trends and encourage reporting by victims.<sup>18</sup>

In Chapter 3 of the Consultation Paper we consider the theoretical arguments that underlie hate crime laws in more detail. We also consider the specific rationales for hate speech laws, in particular:

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.

We also consider some of the important critiques of hate crime and hate speech laws; in particular concerns about the interference with other important rights such as freedom of expression.



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<sup>18</sup> Chakraborti and Garland, *Responding to Hate Crime – the case for connecting policy and research* (2015), p 1

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## WHAT ARE THE CRITICISMS OF THE CURRENT LAW?

Since aggravated offences were first introduced in 1998, the range of characteristics protected, and the mechanisms to protect them have significantly expanded. England and Wales now has one of the most comprehensive sets of hate crime legislation of any comparable jurisdiction. Hate crime reporting and conviction rates are also very high by international standards. However, as we outline in Chapter 8, there are a number of criticisms of the laws as they currently stand. These include:

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 **complexity and lack of clarity** in the current laws, which are spread across several different statutes, utilise multiple overlapping legal mechanisms, and do not operate consistently across the characteristics which are protected.
3. The particular **difficulty in prosecuting disability hate crime**, and the criticisms of the “hostility” test in this context.
4. Arguments that the law should expand to include **new protected characteristics** 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, people who hold non-religious philosophical beliefs (for example, humanists) and alternative subcultures (for example goths or punks). The language used to define some of the existing categories – notably the current legal definition of “transgender” – has also been criticised.

The proposals for reform that we outline in the Consultation Paper are primarily aimed at addressing these concerns, while also preserving aspects of the current law which are working well.

There are also a number of wider criticisms of the criminal justice response to hate crime, which are not as directly connected to law reform:

1. **Inconsistent enforcement** of hate crime laws amongst the police, prosecutors and the judiciary.
2. **Barriers to reporting** faced by certain groups. These can include the sheer scale and normalisation of the abuse, a lack of knowledge about rights, a lack of trust in law enforcement agencies, and other specific fears – such as the fear of “outing” faced by some individuals targeted on the basis of sexual orientation or transgender identity.
3. The **limitations of a purely criminal justice response**, and the need to tackle the causes of hate crime and provide adequate support for victims.

These concerns are somewhat beyond the scope of what we have been asked to address in this review. However, in Chapter 20 we ask whether a Hate Crime Commissioner should be introduced to help coordinate responses to these concerns.

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## WHAT ARE OUR MAIN PROVISIONAL PROPOSALS FOR REFORM?

We make a number of provisional proposals in the Consultation Paper in response to the concerns that have been identified. In summary these are to:

1. Establish criteria for deciding whether any additional characteristics should be recognised in hate crime laws.
2. Add the characteristic of sex/gender to hate crime laws, but note that further thought is needed in relation to the implications of this in the context of sexual offences and domestic abuse. We also ask for stakeholder views in respect of the characteristics of “age”, “sex workers”, “homelessness”, “alternative subcultures” and “philosophical beliefs”.
3. Extend the protections of aggravated offences and stirring up hatred offences so that all of the five currently protected characteristics, and any additional characteristics that are added (for example, sex/gender), are treated equally in law.
4. Add certain other specified aggravated offences – notably the “communications offences” in section 127 of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988.

We also discuss other possible reforms on which we seek views, the most important of which are to:

1. Consider allowing for the application of enhanced sentencing to a wider range of characteristics beyond those defined for the purposes of aggravated offences, so that particular instances of characteristic-based hostility can be recognised as a form of hate crime in sentencing.
2. Consider revising the test for the application of hate crime laws so that it is better adapted to recognise certain

forms of crime that are targeted towards disabled people.

3. Consider the establishment of a Hate Crime Commissioner to drive forward best practice in preventing hate crime and supporting its victims
4. Consolidate the specific hate crime offences and related reforms into a single “Hate Crime Act”

Below we describe in more detail these provisional proposals and other possible reforms, including both their benefits and limitations.

### Possible further characteristics for inclusion

During our initial meetings there were a wide range of views expressed in relation to which characteristics should be protected by hate crime laws. Few people proposed removal of protection for any of the existing groups, but some advocated that we should move away from a characteristic-based approach to hate crime altogether, and recognise the harmfulness of hatred and hostility expressed towards any personal characteristic.

However, we have provisionally concluded that there are certain forms of hostility and targeting that are particularly prevalent and damaging in society, and that it is important the law recognises these targeted groups explicitly.

In Chapter 10 we seek to establish criteria for selection of any additional characteristics. We review a range of academic literature on this subject and provisionally conclude that no single criterion is completely satisfactory as a means of selecting a characteristic for inclusion. Instead we propose that there are three criteria that should be considered:

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, represent an efficient use of resources, and is consistent with the rights of others.

In subsequent chapters (11 to 14) we then apply these to a range of proposed characteristics.

### Summary Consultation Question 1

We provisionally propose that the criteria that should be considered for the addition of any further characteristics into hate crime laws should be:

- **Demonstrable need:** evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.
- **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.
- **Suitability:** protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of resources, and is consistent with the rights of others.

Do you agree?

### Current characteristics: race, religion, sexual orientation, disability, transgender

In Chapter 11 we consider the current five protected characteristics, noting that in the case of all five we consider there to be a strong case for continued inclusion in hate crime laws according to the criteria we proposed in Chapter 10.

We also consider some further refinements of the definitions currently used:

- Including “asexuality” within the definition of sexual orientation.
- Revising the transgender definition to make explicit reference to people who are transgender, non-binary, cross-dressing or intersex.
- Considering whether the disability definition should include a mistaken presumption that a person is not disabled (so that the law can respond to abuse and violence experienced by disabled people who are challenged when using disability accessible services).

We welcome further comments on these provisional proposals.



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## Women, sex or gender

In Chapter 12 we consider the case for adding the characteristic of “women”, “sex” or “gender” to the list of protected characteristics, applying the Chapter 10 criteria. We conclude that there is a strong in-principle case that can be made for inclusion given the wealth of evidence of targeting of women, and the additional harm that this causes. We therefore provisionally propose inclusion of the characteristic of “sex or gender”. However, we also note that there are practical concerns that need to be considered in respect of the “suitability” criterion; most notably the risk that hate crime laws could prove unhelpful in certain contexts such as domestic abuse and sexual offences. We also consider ways that these concerns might be mitigated.

### Summary Consultation Question 2

Should the characteristic of “sex or gender” be added to the characteristics protected by hate crime laws?

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## Age

We also consider the characteristic of “age” in the context of the Chapter 10 selection criteria. We note the challenges faced by older people in the forms of elder abuse and age discrimination, and also the difficulties young people experience. We conclude that there may be a case for adding “age”, however it is not clear that much of the crime that older and young people experience results from hostility towards “age” specifically (as opposed to targeting based on situational factors such as isolation or disability).

### Summary Consultation Question 3

Should the characteristic of “age” be added to the characteristics protected by hate crime laws?



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## **Other characteristics: sex workers, homeless people, alternative subcultures and philosophical beliefs**

In Chapter 13 we consider a number of other characteristics that have been proposed for inclusion in hate crime laws, specifically: sex workers, homeless people, alternative subcultures and philosophical beliefs. We set out the available evidence in respect of each characteristic, noting that there are significant gaps in some of the data and research available. We therefore seek further views from consultees on the inclusion of these groups in hate crime laws.

### **Summary Consultation Question 4**

Should any of the following groups be specifically protected by hate crime laws?:

- sex workers
- homeless people
- alternative subcultures (for example, goths, punks, metallers, emos)
- philosophical beliefs (for example, humanism)

## **The legal test for hate crime**

In Chapter 15 we consider the appropriateness of the current legal test that applies to the proof of an aggravated offence and the application of enhanced sentencing. We begin by arguing that to maintain simplicity and clarity in the law, an identical test should continue to be applied to both legal mechanisms.

We then consider the two limbs of the test in more detail.

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## **Demonstrated hostility**

The “demonstration” limb of the test – whether the perpetrator “demonstrated” hostility towards the victim in respect of a protected characteristic at the time of committing the offence or immediately before or after – has been criticised on the basis that it may give the very serious label of “hate crime” where something offensive has been said in the heat of the moment, but the offender may not have been motivated to commit the offence due to hatred. In such circumstances it is argued that prejudice or hostility may have had very little to do with the circumstances of the offending, and it is unfair to the defendant to be punished as a hate crime offender. More broadly, it may undermine the impact and community acceptance of the label “hate crime” if it is applied in such circumstances.

We take these concerns seriously but note the following counter arguments:

- Significant additional harm may still be caused to the victim and the wider community by such conduct, regardless of the offender’s motivations;
- The sentencer (judge or magistrates) retains the discretion to apply only a small sentence uplift if they consider the aggravation to be of a less serious nature; and
- A lack of evidence of pre-meditation does not necessarily mean that the defendant did not mean to cause additional harm with their words or conduct – a “quick calculation” to do so may have been made.

We conclude that this aspect of the test, which has been in place for more than two decades, and was recently endorsed in a separate review in Scotland (and retained in the recently introduced Hate Crime and Public Order (Scotland) Bill), should be maintained in England and Wales.



### Summary Consultation Question 5

We provisionally propose that the current legal position – where the commission of a hate crime can be satisfied through proof that the defendant demonstrated hostility towards a protected characteristic of the victim – should be maintained.

Do you agree?

### Motivation - hostility and prejudice?

We then consider the “motivation” limb of the test – whether the offence is motivated (wholly or partly) by hostility towards members of the protected group based on their membership of that group. This is considered much more difficult to prove in practice than the demonstration limb.

In particular, we note the significant concern amongst disabled people and advocates, prosecutors, and some academics, about the limitations of the law in properly recognising the harm caused by crimes that are targeted at disabled people. The criminal exploitation of disabled people sometimes takes forms which, while lacking overtly hostile features, is founded on a fundamental disregard for them as human beings and as members of the community.

In response, a wider test, which considers whether the victim was targeted “by reason” of the protected characteristic, has been proposed. We have considered this approach carefully, but are concerned it is too expansive, and may capture conduct where there is no evidence that the defendant harbours any animosity towards the protected group.

Instead we consider that if the test is to be widened it should ask whether the offence was “motivated by hostility or prejudice” towards the protected characteristic.

### Summary Consultation Question 6

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.



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## Aggravated offences and enhanced sentencing

There have been criticisms of the complexity of the current dual approach of operating aggravated offences and enhanced sentencing simultaneously.

We have considered seriously the possibility of simplifying this through the adoption of one single legal mechanism of aggravation. However, we have provisionally concluded that to do so would be undesirable because it would inevitably involve the removal of some protections currently in place:

- Removing aggravated offences would take away the increased maximum penalties that are available for certain racially and religiously aggravated offences. While we acknowledge that it is only in rare cases that the increased maximums are actually required, we are concerned that the symbolic power of these offences would be lost.
- Removing enhanced sentencing, and retaining only aggravated offences, would remove the ability for sentence aggravation to apply to *any* offence (unless aggravated versions of all offences were created, which we consider unworkable).

Hybrid models – such as one put forward by academics at the University of Sussex – have been proposed to combine the most important aspects of the current approach; in particular the specific labelling of the offence as a hate crime that is characteristic of aggravated offences, and the application across all offences as is the case for enhanced sentencing.

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### Summary Consultation Question 7

We provisionally propose that both specified aggravated offences and statutory enhanced sentencing should be retained in the law of England and Wales.

Do you agree?

We then consider each of the models in more detail.

### Reforms to aggravated offences

We reiterate the conclusion we reached in 2014 that there is no principled reason why aggravated offences should not apply consistently across all five characteristics protected by hate crime laws. This was also the single strongest message to emerge from our pre-consultation meetings.

We also consider they should apply to any other characteristic that is added following further consultation (for example, sex or gender, age, sex workers, homelessness, alternative subcultures, or philosophical beliefs).

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### Summary Consultation Question 8

We provisionally propose that aggravated offences should apply to all five of the current characteristics equally, and any further characteristics that are added.

Do you agree?

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We then consider whether aggravated versions of any further existing offences should be created, and suggest criteria to be used to decide this:

- 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 base maximum penalty;
- 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.

Applying these criteria to a number of potential candidates, we suggest the strongest case exists in respect of the “communications offences” contrary to section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. These offences are particularly associated with online abuse, and there is strong evidence of their prevalence in the context of hate crime. The Law Commission is currently conducting a separate review which is considering the scope and content of these offences in more detail.<sup>19</sup>

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### Summary Consultation Question 9

We provisionally propose that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws.

Do you agree?

There is also a case to add the offence of causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861 (OAPA 1861), given that the less serious offence of malicious wounding or inflicting grievous bodily harm contrary to section 20 OAPA 1861 already has an aggravated version. The reason the section 18 offence is not currently specified is that it already has a maximum penalty of life imprisonment. However, given the section 20 offence is routinely charged as an alternative to the section 18 offence, the lack of an aggravated version of the section 18 offence creates added complexity in hate crime cases.

There are a number of other offences we consider for inclusion – notably theft, for which there is some evidence that disabled people are targeted on the basis of their disability. We consider sexual offences less suitable given they are already amongst the most difficult offences to prosecute, and the existing maximum penalties are high.

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<sup>19</sup> 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>.



### Summary Consultation Question 10

Do you think aggravated versions of any other offences should be created? Why/Why not?

The chapter also considers a number of more detailed questions such as:

- The appropriateness of the levels of the increased maximum penalties;
- The availability of alternative verdicts;
- The prosecution of aggravation based on more than one characteristic (and the broader issues around intersectionality in hate crime)



### Reforms to enhanced sentencing

In Chapter 17 we propose to retain the system of enhanced sentencing for the existing five characteristics, and also to extend it to any other characteristics that are to be added following further consultation.

We note further that in the context of enhanced sentencing there may be a case to recognise harm caused by targeting of characteristics beyond those that are specified. This could be achieved either through a “residual category”, by which courts can recognise further groups as the law develops, or through sentencing guidelines.

### Summary Consultation Question 11

Do you think that a wider group of characteristics should be protected through the process of sentencing?

If yes, should this be achieved by:

- A residual characteristic in statutory enhanced sentencing; or
- Sentencing guidelines?

We also consider other issues related to enhanced sentencing in this chapter including whether enhanced sentencing should be available where an aggravated offence could have been charged but was not.

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## Stirring up hatred offences

In chapter 18 we consider the offences of stirring up hatred. We propose that the current protections should be extended to cover disability, transgender and sex/gender.

At present, the offences stirring up racial hatred can be committed by the use of words and behaviour intended to *or likely to stir up racial hatred*. We propose that the current two-limbed approach applied to racial hatred should be applied across all protected characteristics. However, we propose amending these tests to provide greater protection against deliberate stirring up of hatred and to increase protection for freedom of expression in the absence of intent:

1. Where it can be shown that the defendant intended to stir up hatred against a group, it would not be necessary to show that the words used were threatening (or in the case of race, abusive or insulting), but
2. where intent to stir up hatred is not proved, the prosecution would need to show that the words or behaviour were threatening or abusive (not merely insulting) and that the offender knew or ought to have known that they were likely to stir up hatred.

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### Summary Consultation Question 12

We provisionally propose that intentionally stirring up hatred should be treated differently to 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.

Do you agree?

We propose that, where intent to stir up hatred is not proved, the same threshold should apply across all characteristics, and that this should be threatening or abusive words or behaviour.

### Summary Consultation Question 13

Where it cannot be shown that the defendant intended to stir up hatred, we provisionally propose that the offences should cover only “threatening or abusive” (but not “insulting”) words or behaviour likely to stir up hatred.

Do you agree?

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Under the current law there are separate offences dealing with different forms of dissemination of hate material, including broadcasts, recordings, and plays. We propose that these be replaced with a single offence of disseminating inflammatory material, and that the defences available to those who disseminate inflammatory material should be aligned.

### Summary Consultation Question 14

We provisionally propose to:

- replace the separate offences dealing with different forms of dissemination of inflammatory material (in sections 19 to 22 and 29C to 29F of the Public Order Act 1986) with a single offence of disseminating inflammatory material;
- align the defences available to innocent disseminators of inflammatory material to ensure consistency.

Do you agree?

At present, although the law contains provisions to show how liability is intended to work for those who disseminate inflammatory material in books, recordings, broadcasts and plays, it is unclear how liability works in the case of hosts of inflammatory material on the internet. We ask whether the law should explicitly make hosting services criminally responsible for hate speech material which they make available.

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### Summary Consultation Question 15

Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host?

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 law currently contains specific legal protections for discussion of religion and sexual orientation. In relation to religion, the law states:

Nothing in [the offences of stirring up religious hatred] 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.<sup>20</sup>

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<sup>20</sup> Public Order Act 1986, s 29J.

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Regarding sexual orientation, the law states:

In [relation to the offences of stirring up hatred on the grounds of sexual orientation], 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... [or] 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.<sup>21</sup>

We propose that these should be retained and ask whether similar protections should be included in respect of the new characteristics that we propose to cover.

### **Summary Consultation Question 16**

We provisionally propose that:

- the current protections for discussion of religion and sexual orientation should apply to the new offence of stirring up hatred;
- similar protections be given in respect of transgender identity, sex/gender and disability.

Do you agree and if so what should these cover?

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## **Football offences**

We provisionally propose that racist chanting at a football match should remain covered by a distinct offence, even though the behaviour would often be covered by other public order offences. This is primarily because of the particular historic and current risks associated with chanting at football matches, and because removal of the offences may lead to certain forms of conduct being inappropriately decriminalised.

### **Summary Consultation Question 17**

We provisionally propose that racist chanting at football matches should remain a distinct criminal offence.

Do you agree?

We also provisionally propose that the offence should be extended to cover chanting targeting a person's sexual orientation, and ask whether it should apply to all protected characteristics.

### **Summary Consultation Question 18**

We provisionally propose that the offence in section 3 of the Football (Offences) Act 1991 should be extended to cover chanting based on sexual orientation.

Do you agree?

We also seek 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.

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<sup>21</sup> Public Order Act 1986, s 29JA.



The current offence is limited to “chanting”. We ask whether the offence should be extended to cover other behaviour such as gestures and throwing missiles. We also ask whether the offence should be aligned with other football offences so that conduct when entering or leaving a ground and when on a journey to a ground would be covered.

### **Summary Consultation Question 19**

Should the offence under section 3 of the Football (Offences) Act 1991 be extended to cover gestures and missile throwing?

Should the offence under section 3 of the Football (Offences) Act 1991 be extended to cover journeys to and from a designated football match?

### **A Hate Crime Commissioner?**

In the final chapter we consider the case for a Hate Crime Commissioner. We consider 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 responses to prevent and mitigate the harmful effects of hate crime in the community. We also canvass arguments against introducing a Hate Crime Commissioner. In particular, we ask whether the cost, which would likely be between £500,000 to £750,000 per year, would represent an effective use of public funds.

### **Summary Consultation Question 20**

Should a Hate Crime Commissioner be introduced in England and Wales?





