



**Law  
Commission**  
Reforming the law

# Hate crime laws: Final report

Law Com No 402

# **Hate Crime Laws**

## **Final Report**

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

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# The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 2 December 2021.

The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk>.

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# Chapter 1: Introduction

- 1.1 “Hate crime” is a subject which can provoke powerful reactions in our society. The term itself is subject to multiple definitions and understandings. In England and Wales, it is generally used to refer to the aggravation of the seriousness of existing criminal offences – such as assault, harassment or criminal damage – because there is an additional “hostility” element. Specifically, that in committing the offence, the offender was motivated by, or the offender demonstrated hostility towards a protected characteristic of the victim. For example, if an offender assaults an Asian person while using the racial slur “p\*\*i”, this would become a race-based hate crime, namely racially-aggravated assault.<sup>1</sup> In addition to race, the other protected characteristics included in current hate crime laws are religion, sexual orientation, disability and transgender identity.
- 1.2 Hate crime laws have developed in England and Wales – and in most other comparable countries – due to concern about the disproportionate criminal targeting of, and additional harm caused to, certain groups in society. There is evidence that crimes that are motivated by hostility towards a personal characteristic, or offenders who demonstrate such hostility, cause additional harm to individual victims of these crimes, and create fear and anxiety amongst members of the targeted community. Hate crimes are also argued to be damaging to wider society, through heightening of community tensions and divisions, and undermining wider civic values such as equality and participation in public life. We discussed these rationales in considerably more detail in Chapter 3 of our consultation paper.<sup>2</sup>
- 1.3 One of the most notorious examples of hate crime in England and Wales was the racially motivated murder of a black teenager – Stephen Lawrence – in London in 1993. The outcry over this killing was one of the major spurs for the introduction of racial hate crime laws in 1998, which have since expanded to include first religion in 2001, then disability and sexual orientation in 2003, and most recently transgender identity in 2012.
- 1.4 Similar laws have been implemented in Scotland and Northern Ireland, and most other comparable nations – including common law countries such as Canada, the United States of America, Australia and New Zealand. Recently the Republic of Ireland has announced the introduction of a comprehensive set of hate crime laws, while a new Hate Crime and Public Order Act was passed in the Scottish Parliament in March 2021 (replacing pre-existing laws that already broadly resembled those in England and Wales, though with some notable differences).
- 1.5 However, despite their wide adoption, support for hate crime laws is not universal. Some people consider that hate crime laws are unjust because they result in the law treating criminal offending differently depending on the characteristics of the victim. It

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<sup>1</sup> See Crime and Disorder Act 1998, s 29.

<sup>2</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf>.

is argued that this creates further division and inequity in society, rather than redressing it. While we accept these concerns are genuinely held, as we outlined in our consultation paper, we do not agree with this conclusion. Hate crime laws depend on the motivation of the offender, or their demonstration of hostility, not merely the identity of the victim. If a Muslim person is the victim of an assault, but there is no evidence that the assault was motivated by the fact the victim was Muslim, or that the offender demonstrated hostility towards the victim on this basis, then it will not be treated as a hate crime. Sentencing law recognises that the same basic offence may have various aggravating and mitigating circumstances, and evidence of criminal hostility towards a characteristic (or presumed characteristic) of the victim is a relevant consideration because such hostility causes additional harm to the victim, and the community more widely.

1.6 Additionally, it is argued that hate crime laws unreasonably infringe upon the freedom of a person to hold views and prejudices which are not consistent with those of the prevailing politics of the day. In this sense they have been criticised as “thought” crimes, that go beyond punishing the offender for the criminal act, but also for the views and values that they hold or express. However, the kinds of relatively serious criminal offences we consider in this report involve both an action and a mental state, like intention or recklessness.<sup>3</sup> The law does not punish a person merely for holding beliefs that others consider to be homophobic, but if those beliefs lead the offender to attack a gay or lesbian person, then the law rightly steps in.

1.7 A further source of confusion and discontent is the disparity between the legal definition of hate crime – which relies on objective proof of the hostility – and the following much broader definition used by the police and the Crown Prosecution Service (“CPS”) for the purposes of recording 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 disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation or transgender identity or perceived transgender identity.<sup>4</sup>

1.8 In the view of some, this perception-based recording is unfair to the accused person, as it results in a “hate crime” recording that is based largely or solely on the victim’s version of events, and without any scrutiny in a court of law. The legality of this recording policy was challenged in the case of *Miller*, and found to be lawful, though

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<sup>3</sup> There are a large number of “strict liability” regulatory offences which do not require a particular mental state. See A. Ashworth & M Blake, “The Burden of Proof and the Presumption of Innocence” [1996] *Crim LR* 306.

<sup>4</sup> The origin of the definition was a recommendation 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. The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny (1999) Cm 4262-I, Chapter 47, Recommendation 12.

the conduct of the police in this case was found to have breached the defendant's right to freedom of expression.<sup>5</sup>

- 1.9 Though we recognise that there are strong views on this subject, police and CPS hate crime recording policy is not the subject of this review. This review is concerned with the laws that apply once a prosecution has commenced, and the matter is determined by a court of law according to the criminal standard. There were 10,679 prosecutions and 9,263 convictions for hate crimes in England and Wales in 2020/21.<sup>6</sup>
- 1.10 Hate crime laws are related to, but distinct from hate speech laws. In England and Wales, hate speech laws are primarily found in Parts 3 and 3A of the Public Order Act 1986, which contain specific offences to counter the dissemination of inflammatory material that is designed to incite violence, inflame community tensions or instil fear among or of particular groups. There are also broader "public order" and "communications offences" in the law of England and Wales, which criminalise certain forms of abusive or grossly offensive speech and content. These offences are not limited to the expression of hostility or hatred towards certain groups, but are often prosecuted in this context.
- 1.11 Hate speech offences are even more controversial than hate crime laws. They directly engage the right to freedom of expression and provoke fierce debates about how far this right should extend. It is widely accepted that there should be some limits to freedom of expression. For example, planning the commission of a criminal offence, or threatening to kill someone, are not protected forms of speech. Immediate incitement to violence is also generally considered a form of speech that can reasonably be prohibited by law. However, the criminalisation of hate speech that might be considered a precursor to such violence, or harmful in itself, is much more contentious. Indeed, some people who are ambivalent towards or even supportive of hate crime laws for violent offending are strongly opposed to the criminalisation of "hate speech".
- 1.12 Hate speech offences have existed for some time in England and Wales. Since 1965, incitement to racial hatred has been a criminal offence,<sup>7</sup> and comparable, though more limited offences of stirring up hatred in relation to religious belief and sexual orientation were created in 2006 and 2008 respectively. Prosecution numbers for these offences are low – usually less than 10 per year. Yet they remain highly controversial, as does the prospect of extension of these offences to further characteristics.

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<sup>5</sup> *Miller v College of Police and the Chief Constable of Humberside* [2020] EWHC 225 (Admin) 261.

<sup>6</sup> See Crown Prosecution Service, *CPA Annual Publication: Hate crime & crimes against older people pre-charge and prosecution outcomes by crime types* (2021) available at <https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-Annual-Data-Tables-Year-Ending-March-2021.xlsx>.

<sup>7</sup> Race Relations Act 1965, s 6.

## THE LAW COMMISSION'S REVIEW

1.13 In this review, we have been asked to consider both hate crime and hate speech laws in England and Wales. We have set out our terms of reference in more detail below, but in essence we have been asked to consider:

- (1) Who should be protected by hate crime and hate speech laws; and
- (2) How these laws should operate.

1.14 It is important to note that our terms of reference do not contemplate the repeal of hate crime or hate speech laws. Rather, they ask us to review “the adequacy and parity of protection offered by the law relating to hate crime”. This review is therefore predicated on the assumption that hate crime and hate speech laws will continue to exist. However, as we note further at paragraph 1.30, we did receive a large number of (mostly personal) consultation responses that advocated the repeal of these laws altogether.

1.15 One aspect of hate speech laws – the “communications offences” – was the subject of a separate Law Commission review that made detailed recommendations for the reform of these offences. We describe these recommendations further at paragraph 1.48 to 1.50 and at relevant points throughout this report.

### Our terms of reference

1.16 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.

1.17 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; and
- 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.

1.18 In particular, we were 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 classified as 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 in 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.

## Background to the review

- 1.19 This review is the second review of hate crime laws that we have conducted in recent years. We conducted a previous review of hate crime laws from 2012 to 2014, when the government asked the Law Commission to consider the disparity of treatment amongst the five characteristics specified in hate crime laws: race, religion, sexual orientation, disability and transgender identity. We were asked whether the reach of the criminal law should be extended to cover these groups equally.
- 1.20 In our 2014 report,<sup>8</sup> 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.
- 1.21 In late 2018, the government asked us to undertake this wider and more in-depth review, which now also considers the efficacy of the legal mechanisms, and whether any further characteristics should be added to those currently specified.
- 1.22 We launched the review in March 2019, publishing a brief background paper,<sup>9</sup> and hosting an academic conference at Oxford Brookes University. Throughout the remainder of 2019 we conducted a large number of pre-consultation events across England and Wales. This included meetings with legal and academic experts, police and the CPS, charities and civil society groups, and numerous individuals with an interest in hate crime laws.

## Our consultation paper

- 1.23 These initial meetings, together with our own research, helped shape the consultation paper that we published in September 2020. Publication was slightly delayed by the impact of the COVID-19 pandemic, which also meant that subsequent consultation meetings that we conducted between October and December 2020, were held remotely using video conferencing technology.
- 1.24 The consultation paper contained 62 questions, and a number of provisional proposals for reform. There was also a summary version of the paper that contained

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<sup>8</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348.

<sup>9</sup> 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](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).

20 of the most important questions. The detail of the provisional proposals made in the consultation paper will be outlined again throughout this report, but some of the main provisional proposals and issues we raised were:

- (1) the consolidation of hate crime laws into a single act;
- (2) parity of legal protection for the existing five characteristics through:
  - (a) the extension of aggravated offences to cover sexual orientation, disability and transgender status;
  - (b) the creation of new offences of stirring up hatred on the basis of disability and transgender status; and
  - (c) the extension of the “racialist chanting” offence at football matches to cover other characteristics.
- (3) more detailed legal changes including:
  - (a) revisions to the definition of “transgender” and “sexual orientation”;
  - (b) creation of aggravated versions of certain other offences; notably communications offences; and
  - (c) revisions to the stirring up hatred offences, including changes to achieve parity across all characteristics.
- (4) the inclusion of “sex or gender” as an additional protected characteristic in hate crime laws, subject to potential carve-outs in contexts where the existing Violence Against Women and Girls (VAWG) framework might be considered more appropriate. In particular, we discussed the carve out of sexual offences and domestic abuse due to concerns that hate crime laws might prove unhelpful in these contexts.

1.25 We also asked open questions about a number of further possible changes, without indicating a preferred option, including:

- (1) amending the legal test for hate crime laws to include motivation by hostility *or prejudice* – to reflect the lived reality of disability hate crime, and address challenges in its prosecution;
- (2) the possible inclusion of other characteristics: age; homelessness; sex workers; alternative subcultures and philosophical belief; and/or the potential for a “residual category” of protection in hate crime laws.
- (3) the creation of a Hate Crime Commissioner role to provide a centralised voice to encourage best practice in hate crime prosecution and prevention.

1.26 The length of the consultation paper and the technical nature of some of the consultation questions were criticised by some, including within a number of



consultation responses, and also in an article by former Crown Court Judge, HHJ Charles Wide QC.<sup>10</sup>

- 1.27 There was also concern that our pre-consultation meetings were unbalanced and failed to reflect a full diversity of perspectives. We recognise and have reflected on these concerns, but we are confident that the voluminous and diverse range of consultation responses we received in our formal consultation period has ensured that we have had the benefit of a very wide range of perspectives in shaping our final recommendations.

### Consultation responses

- 1.28 Through October, November and December 2020 we met with hundreds of stakeholders to discuss these provisional proposals. This included an online public event where we presented some of our main proposals and invited questions and comments. Over 100 participants joined us for this event, and hundreds more in the various other forums we conducted.
- 1.29 We then received 2,473 written responses to our consultation paper. This is one of the highest numbers ever for a Law Commission consultation and demonstrates the depth of interest and feeling in society for this area of the law. We are extremely grateful to everyone who took the time either to meet with us, or prepare a written response.
- 1.30 A high proportion of the written responses we received were personal, and a significant majority of these personal responses indicated strong opposition to hate crime laws altogether, or any extension of those that currently exist. It followed that these responses generally opposed most of our proposals for reform. In quite a number of cases these responses did not directly address the specific question that had been asked. This was because many of our questions were premised on the continued use of hate crime laws – a proposition with which the response fundamentally disagreed. We recognise the importance of this perspective and have sought to reflect these views in our consultation analysis. As we note at 1.41, the concerns expressed in these responses have influenced our final recommendations in a number of key respects.
- 1.31 By contrast, there were 173 responses on behalf of organisations; comprising of law enforcement agencies, legal experts, government and local authorities, charitable and community organisations, civil society groups and religious bodies with an interest in hate crime laws. The majority of these responses were supportive of the broad direction of our proposals, and in particular the emphasis on parity of protection amongst the existing five characteristics already recognised under hate crime laws. There was more variation in responses to some of the more detailed questions we asked about how the law should work, and the potential inclusion of additional characteristics in hate crime laws. For example, a wide range of views were expressed in relation to our provisional proposal to add a new characteristic of sex or gender to hate crime laws.

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<sup>10</sup> Charles Wide, “Hostility crime and the Law Commission” (2021) *Policy Exchange*, available at <https://policyexchange.org.uk/publication/hostility-crime-and-the-law-commission/>.

- 1.32 We discuss the consultation responses in much more detail throughout this report. However, the contrast between personal and organisational responses was stark, and once again demonstrates the significant divergence of views on this subject.
- 1.33 We have read and taken account of all responses we received. In most cases, in numerical terms, a majority of responses were not in favour of the course of action we had proposed.<sup>11</sup> This has influenced the more conservative approach to reform we have recommended compared with some of the provisional proposals in our consultation paper. However, it is also important to recognise that some of the organisational responses we received can broadly be said to represent the interests of many thousands of individuals. For example, Age UK is a charity that advocates for the interests of older persons, whilst Dimensions UK is an organisation that supports people with learning disabilities and autism. Other responses, such as those from police, prosecutors, and legal bodies such as the Bar Council and Law Society, reflect considerable practical and technical expertise, and therefore also feature prominently in our analysis. In our consultation analysis, we evaluate and weigh the various arguments made by consultees, rather than simply counting the number of views in favour of and against a particular proposal.
- 1.34 In the interests of transparency, we will publish the consultation responses on our website. However, in order to ensure the privacy of consultees, and comply with data protection obligations, we will redact the names of personal responses, unless the respondent is an academic or responding in some other relevant professional capacity. We will also remove material that identifies other individuals or that we consider to be potentially criminal or defamatory.

### **Our final recommendations**

- 1.35 As we have noted in this introduction, there are a wide range of views and a number of significant competing considerations that are at issue in this review. These include the importance of freedom of thought and expression, protection of vulnerable and targeted communities, countering hatred and extremism, and the need for an effective and workable criminal justice system.
- 1.36 We have sought to balance these competing considerations in this final report. We have made a number of difficult decisions, including changing and reversing provisional proposals that we had made in our consultation paper. Most notable amongst these is our final recommendation that sex or gender should not be included as a protected characteristic for the purposes of aggravated offences and enhanced sentencing (though in Chapter 10 we do recommend that an offence of stirring up hatred on these grounds be introduced). In the consultation paper, we indicated that some of our practical concerns may be surmountable. However, closer analysis and the consultation responses have revealed that to include this characteristic would be an unwise policy decision. In short, the risks associated with the addition of sex or gender to hate crime laws outweigh the potential benefits. We discuss our reasons for this conclusion in detail in Chapter 5, but wish to note here that despite the significant

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<sup>11</sup> This included some instances when, logically, it might be anticipated that some of these responses might be supportive – such as when we proposed the introduction of freedom of expression protections.

public commentary on this issue in recent months, we have reached this conclusion entirely independently, based on the strength of the evidence before us.

- 1.37 Our final recommendations are primarily focussed on providing parity of protection amongst the existing hate crime characteristics, and ensuring these laws work fairly, effectively and proportionately. We consider the principle of equal protection to be the single most important of all our recommendations. We remain firmly of the view that we expressed in our 2014 report and in our most recent consultation paper, that the current inconsistency in the way that hate crime laws treat different characteristics is unprincipled and causes significant injustice and confusion.
- 1.38 We recognise that there will be significant segments of the community that are disappointed with the various conclusions we have reached – either because they consider that our proposals intrude too far into personal freedoms, or that they do not go far enough to provide protection to targeted groups.
- 1.39 Those groups and communities whose characteristics we do not recommend for inclusion may feel particularly aggrieved. While we have sought to be as objective and transparent as possible in reaching these conclusions, we understand that there will be disagreement and even anger.
- 1.40 We also recognise the view that hate crime laws are unjust because they treat crimes against different groups differently, or that they reflect a particular political perspective that favours the interests of certain, specified groups. While we do not agree with this analysis for the reasons outlined at paragraph 1.5, we accept that it is a concern that is shared by many.
- 1.41 It is not within the remit of this review to consider the repeal of hate crime laws – as many personal responses advocated – but we do acknowledge that at least within certain segments of the community, there is considerable discomfort with the prospect of any further expansion of the laws which currently exist. This lack of community consensus for hate crime laws is an important consideration in any analysis of whether to widen their scope, and has informed the more limited approach to extension of existing laws in this report than we had contemplated in the consultation paper. In particular, this lack of consensus has led us to proceed with significant caution in considering the extension of hate crime characteristics beyond those already firmly established by Parliament in recent decades.
- 1.42 We emphasise that in not recommending the inclusion of further groups or characteristics we are not suggesting that criminal conduct that is directed at these groups is not harmful or worthy of condemnation. Crime directed at any individual is to be condemned. The fact that a group or characteristic is not included in hate crime laws does not mean that any additional wrongfulness or harm associated with the hostile targeting of a member of that group or characteristic cannot be recognised in sentencing. Indeed, as we noted in our consultation paper, this was the approach the Court took in the sentencing for the murder of Sophie Lancaster, whose attack was motivated by hostility towards her “goth” appearance.<sup>12</sup> Sentencing courts have a wide

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<sup>12</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 13.

discretion to reflect aggravating and mitigating circumstances of offending, and specific hate crime laws are just one of the means by which this is done.

## **OTHER IMPORTANT REVIEWS**

### **Recent developments in Scotland, Northern Ireland and the Republic of Ireland**

- 1.43 While conducting this review, we have been closely monitoring developments in other jurisdictions – most notably Scotland and Northern Ireland, and more recently the Republic of Ireland.
- 1.44 Scotland completed a review of hate crime laws in 2018,<sup>13</sup> and the Scottish Parliament passed the Hate Crime and Public Order (Scotland) Act 2021 earlier this year. This Act extended the protections of the stirring up hatred offences to all characteristics, revised some of the definitions of protected characteristics, and added a new characteristic of “age”.
- 1.45 In 2019, the Northern Ireland executive announced an independent review of hate crime laws, chaired by Judge Marrinan.<sup>14</sup> The review concluded with a final report in late 2020.<sup>15</sup>
- 1.46 The Irish Government published a report, *Legislating for Hate Speech and Hate Crime in Ireland*, in 2020.<sup>16</sup> It has since introduced the Criminal Justice (Hate Crime) Bill 2021.
- 1.47 We describe each of these developments in more detail in Chapter 2.

### **The Law Commission’s review of Harmful Online Communications**

- 1.48 In addition to our review of hate crime, we have recently completed another review into the offences which are prosecuted in the context of harmful online communications.
- 1.49 This report – *Modernising Communications Offences* – recommends replacement of the existing “communications offences” contrary to section 1 of the Malicious Communications Act 1988, and section 127 of the Communications Act 2003 with new offences that are more clearly defined, and targeted at the most harmful material.
- 1.50 We consider the current communications offences and recommended replacements further in Chapter 8 – where we look at the regimes of aggravated offences and enhanced sentencing.

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<sup>13</sup> 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/>.

<sup>14</sup> Further general information is available at <https://www.hatecrimereviewni.org.uk/>.

<sup>15</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020).

<sup>16</sup> *Legislating for Hate Speech and Hate Crime in Ireland*, Report on the Public Consultation 2020. Available at [http://www.justice.ie/en/JELR/Legislating\\_for\\_Hate\\_Speech\\_and\\_Hate\\_Crime\\_in\\_Ireland\\_Web.pdf/Files/Legislating\\_for\\_Hate\\_Speech\\_and\\_Hate\\_Crime\\_in\\_Ireland\\_Web.pdf](http://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf).

## STRUCTURE OF THIS REPORT

1.51 The structure of this report is as follows:

- Chapter 2 outlines the history of hate crime laws, and describes the current law in England and Wales.
- Chapter 3 considers the issue of the selection of protected characteristics in hate crime laws, and how we might decide on the addition of any further characteristics.
- Chapter 4 considers the definitions of existing characteristics, and the need for greater parity of protection regarding association with members of these groups.
- Chapter 5 outlines our consideration of the inclusion of a new characteristic of sex or gender in hate crime laws. It explains that while we consider that there is a serious problem of crime that is connected to misogyny, we have concluded that the particular model of hate crime laws is unlikely to prove an effective response to misogynistic offending, and may prove more harmful than helpful, both to victims of violence against women and girls, and also to efforts to tackle hate crime more broadly. We suggest that reforms in other areas are more likely to result in tangible, positive results.
- Chapter 6 considers the case for the inclusion of the characteristic of age. We acknowledge the significant harm caused by both elder abuse and child abuse, but conclude that hate crime laws are unlikely to be an effective response to these concerns, and therefore do not recommend the inclusion of this characteristic in hate crime laws.
- Chapter 7 considers the case for the inclusion of various other characteristics and groups in hate crime laws: sex workers, alternative subcultures, people experiencing homelessness, and philosophical belief. After careful consideration we do not recommend that any of these groups should be added to current hate crime laws, though we recognise that there may be value in police continuing to record hate crimes against some of these groups.
- Chapter 8 considers the legal model for hate crime laws and recommends the retention of the current dual model of aggravated offences and enhanced sentencing. It also recommends against the introduction of any new aggravated offences, and considers other technical reforms, including how the law might better facilitate the prosecution of hostility towards multiple characteristics.
- Chapter 9 considers the legal test for the application of hate crime laws. We recommend reform to the “motivation” limb of the test to include motivation by hostility *or prejudice* towards members of a group sharing a protected characteristic, based on their membership of that group.
- Chapter 10 considers the offences of stirring up hatred under the Public Order Act 1986. We recommend the addition of three new characteristics, the first two of which are already protected by hate crime laws: disability, transgender identity and sex or gender. We also recommend that a consistent approach be taken to all

characteristics, including the provision of freedom of expression protections. We recommend the “dwelling exemption” be replaced with an exemption for “private conversation”. We also recommend a range of more technical reforms.

- Chapter 11 considers the offence of “racialist chanting” at football matches. We consider the history of this offence and its important symbolic value in countering the challenge of racism at football matches. We recommend the retention of this offence – in large part due to the potential for any repeal to be misinterpreted as a signal that racism at football is no longer a serious matter. However, we do not recommend this football-specific approach be expanded to encompass all other protected characteristics. Instead, we argue that public order offences can be used to cover targeting of other characteristics, and that our recommendations to create aggravated versions of these offences for sexual orientation, disability, and transgender identity (in addition to race and religion) will provide police and prosecutors with sufficient tools to address harmful conduct.
- Chapter 12 recommends that government consider creation of a Hate Crime Commissioner role to complement the legal reforms we recommend. It also recommends that various hate crime laws be brought together into a single Act.
- Chapter 13 contains a full list of the recommendations in this report.

## **ACKNOWLEDGMENTS**

- 1.52 The Commissioners would like to record their thanks to the following members of staff who worked on this report: Martin Wimpole and Robert Kaye (team lawyers), F Carey, Ruby Ward, Elizabeth Hartley, Abhaya Ganashree, Olivia English (research assistants), and David Connolly (Head of Criminal Law Team).

## Chapter 2: History and Current Law

### INTRODUCTION

- 2.1 In our 2020 consultation paper, we outlined in detail the development of hate crime laws across several jurisdictions and provided an overview of the current legal and operational context and its development in England and Wales.<sup>1</sup>
- 2.2 In this chapter we again outline the law of hate crime in England and Wales. We summarise the development of hate crime laws in England and Wales, and also more recent developments in other jurisdictions within the United Kingdom. This background will provide the basis for the recommendations and analysis that follows in this report.

### LEGISLATIVE DEVELOPMENT IN ENGLAND AND WALES

- 2.3 Hate crime laws in England and Wales comprise three distinct sets of provisions:
- (1) Aggravated offences under the Crime and Disorder Act 1998 (“CDA 1998”): these consist of the commission of a “base” offence, where either the offence is motivated by, or the offender demonstrates, hostility against specified groups. Aggravated versions of offences have higher maximum penalties than their base equivalents. Aggravated offences currently exist for offences involving racial or religious hostility.<sup>2</sup>
  - (2) “Enhanced sentencing” provisions under the Sentencing Code (“SC”): these are provisions that, without creating new offences or increasing the maximum penalty available, require that courts treat as an aggravating factor proof that the offender was motivated by or demonstrated hostility against a specified group and state this in open court. These apply to hostility on the grounds of race, religion, sexual orientation, disability or transgender identity.<sup>3</sup>
  - (3) Offences of stirring up hatred under the Public Order Act 1986 (“POA 1986”): these apply to conduct intended, or likely, to stir up hatred based on race, religion and sexual orientation.<sup>4</sup>
- 2.4 Additionally, a small number of discrete, specific offences form part of the overall hate crime framework. In particular, the offence of “indecent or racist chanting” under the

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<sup>1</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, Chapters 2, 4 and 6. Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf>.

<sup>2</sup> Crime and Disorder Act 1998, ss 29 to 32.

<sup>3</sup> Sentencing Code, section 66.

<sup>4</sup> Public Order Act 1986, ss 18 to 23 and ss 29B to 29G.

Football (Offences) Act 1991,<sup>5</sup> prohibits engaging or taking part in chanting of an indecent or racist nature at a designated football match.

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

#### 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: amended Crime and Disorder Act 1998 to include religiously aggravated forms *and enhanced sentences for religious hostility.*

2003: *Criminal Justice Act 2003 sections 145 to 146: 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: amended Public Order Act 1986 to include stirring up religious hatred.

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

2012: Legal Aid, Sentencing and Punishment of Offenders Act 2012: *amended 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.*

2020: Sentencing Act 2020, which contains the Sentencing Code: repealed and replaced the enhanced sentencing provisions contained in the Criminal Justice Act 2003.

- 2.6 We consider each of these provisions in greater detail in the following sections. We then consider recent developments in Scotland, Northern Ireland and Ireland to provide further context for the reforms under consideration later in this report,

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



## AGGRAVATED OFFENCES

- 2.7 Any offence may be “aggravated” in the sense that there may be factors that increase an offender’s culpability or lead to a more severe penalty. However, in this report we use the term “aggravated offences” to refer to the aggravated forms of assault, criminal damage, public order offences and harassment offences created by the CDA 1998. These offences can be aggravated by either racial or religious hostility and they have higher maximum penalties than the base offences to which they relate (see table at paragraph 2.37).
- 2.8 The racially aggravated offences were introduced in the CDA 1998, whilst religious aggravation was added by the Anti-terrorism, Crime and Security Act 2001.
- 2.9 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”.<sup>6</sup> 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 8.
- 2.10 The aggravated offences under the CDA 1998 were extended to religious aggravation as part of a package of measures introduced by the Anti-terrorism, Crime and Security Act 2001. The main argument in favour of this extension was one of equal treatment: some religious groups, such as Jews and Sikhs, which were also ethnic groups, had the protection of the racially aggravated offences, but this was not available to multi-ethnic religions, such as Christianity and Islam.<sup>7</sup>

### The Crime and Disorder Act 1998

- 2.11 Section 28(1) of the CDA 1998 provides that an 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.

### The offences which can be aggravated

- 2.12 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;<sup>8</sup>

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<sup>6</sup> Labour Party (1997), “New Labour, because Britain deserves better”.

<sup>7</sup> Hansard (HL), 27 Nov 2001, vol 629, col 150.

<sup>8</sup> Crime and Disorder Act 1998, s 29(1)(a).

- (2) assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861;<sup>9</sup>
- (3) common assault;<sup>10</sup>
- (4) destroying or damaging property contrary to section 1(1) of the Criminal Damage Act 1971;<sup>11</sup>
- (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;<sup>12</sup>
- (6) intentionally causing harassment, alarm or distress using threatening, abusive or insulting words or behaviour contrary to section 4A of the POA 1986;<sup>13</sup>
- (7) threatening or abusive conduct likely to cause harassment, alarm or distress contrary to section 5 of the POA 1986;<sup>14</sup>
- (8) harassment and stalking contrary to sections 2 and 2A of the Protection from Harassment Act 1997;<sup>15</sup> and
- (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.<sup>16</sup>

2.13 These offences were selected because they were regarded as the most likely offences to involve racial hostility.<sup>17</sup> When the aggravated offences were made applicable to religious hostility in 2001,<sup>18</sup> 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 the Sentencing Code (outlined in greater detail from paragraph 2.49).

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<sup>9</sup> Crime and Disorder Act 1998, s 29(1)(b).

<sup>10</sup> Crime and Disorder Act 1998, s 29(1)(c).

<sup>11</sup> Crime and Disorder Act 1998, s 30(1).

<sup>12</sup> Crime and Disorder Act 1998, s 31(1)(a).

<sup>13</sup> Crime and Disorder Act 1998, s 31(1)(b).

<sup>14</sup> 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.

<sup>15</sup> Crime and Disorder Act 1998, s 32(1)(a).

<sup>16</sup> Crime and Disorder Act 1998, s 32(1)(b). The offences contained in sections 4 and 4A of the Protection from Harassment Act 1997 did not exist when the Crime and Disorder Act 1998 was passed. Section 32 of the Crime and Disorder Act 1998 was amended to include aggravated versions of these offences by section 144 of the Protection of Freedoms Act 2012.

<sup>17</sup> 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.

<sup>18</sup> Anti-terrorism, Crime and Security Act 2001, Pt 5.

- 2.14 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)<sup>19</sup> to return an alternative verdict of guilty of the non-aggravated form of the offence.

## Hostility

- 2.15 “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. It will ultimately be a matter for the tribunal of fact to decide whether a defendant has demonstrated, or the offence was motivated by, hostility.
- 2.16 An offence is aggravated if it falls within either of the two limbs of the test set out in subsections 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.<sup>20</sup> The prosecution should make clear on which of the two limbs it is relying.<sup>21</sup> If evidence is available to support both limbs, the prosecution is free to rely on both.<sup>22</sup>

### Limb (a): “Demonstrates hostility”

#### What constitutes a demonstration of hostility?

- 2.17 A demonstration of hostility will usually involve words<sup>23</sup> or gestures, but can be manifested in other ways, such as by wearing a swastika or singing certain songs.<sup>24</sup>
- 2.18 Whether hostility was demonstrated is a wholly objective question. The victim’s perception of, or reaction to, the incident is not relevant.<sup>25</sup> It is also immaterial that the defendant’s frame of mind was such that, while committing the offence, they would have used abusive terms towards any person by reference to any other obvious personal characteristics.<sup>26</sup> The objective nature of this limb also means that the motivation for the offence is irrelevant to the question of whether hostility has been demonstrated.
- 2.19 Whether hostility was demonstrated will be a question of fact for the jury or magistrates to decide, in light of all the circumstances. In *Pal*, Simon Brown LJ stated

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<sup>19</sup> See further paragraph 2.36.

<sup>20</sup> *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] and [20].

<sup>21</sup> *Dykes* [2008] EWHC 2775 (Admin), (2009) 173 Justice of the Peace 88 at [20] by Calvert Smith J.

<sup>22</sup> *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.

<sup>23</sup> See *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar); *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

<sup>24</sup> *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [13] by Baroness Hale.

<sup>25</sup> *DPP v Green* [2004] EWHC 1225 (QB); The Times 7 July 2004.

<sup>26</sup> *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”.

that the use of racially abusive insults will ordinarily be sufficient to prove demonstration of racial hostility.<sup>27</sup>

- 2.20 Hostility can be demonstrated by the defendant towards someone of the defendant's own racial or religious group.<sup>28</sup>

#### When must hostility be demonstrated?

- 2.21 Hostility must be demonstrated either at the time of committing the offence or immediately before or immediately after doing so.<sup>29</sup> In *Babbs*,<sup>30</sup> 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 events" which occurred some 15 minutes later.<sup>31</sup> The question for the jury was whether the words used had so affected the subsequent behaviour.<sup>32</sup>

#### Demonstration must be towards an identifiable victim

- 2.22 A noteworthy distinction between the demonstration and motivation limbs is that the demonstration limb requires the identification of a victim, who must be the person towards whom the hostility is directed. The motivation limb does not require such an explicit link.
- 2.23 For the purposes of the offence of causing harassment, alarm, or distress, contrary to section 5 of the Public Order Act 1986, the CDA 1998 specifically provides that the victim should be understood as "the person likely to be caused, harassment, alarm or distress" within the terms of that offence.
- 2.24 However, in other contexts, the availability of the "demonstration" limb may depend on whether a victim can be identified. This can be significant in contexts such as the offence of criminal damage, where the legal "victim" is the owner of the property that is damaged, and that owner (for example, a local council) may not be the target of any abusive language or image contained within the damage caused. The "demonstration limb" may also not be available for the aggravation of a "communications offence" contrary to section 127(1) of the Communications Act 2003, where the communication does not target an identifiable victim.

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<sup>27</sup> *Pal* [2000] Criminal Law Review 756 at [16].

<sup>28</sup> 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.

<sup>29</sup> Crime and Disorder Act 1998, s 28(1)(a); *Parry* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) at [19].

<sup>30</sup> [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct).

<sup>31</sup> *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.

<sup>32</sup> *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8].

## Limb (b): “Motivated by hostility”

### What constitutes motivation?

2.25 Section 28(1)(b) turns on the defendant’s subjective motivation and 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.<sup>33</sup>

### How is motivation proved?

2.26 Section 28(1)(b) 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,<sup>34</sup> provided that the prosecution can establish relevance and admissibility. The applicable CPS guidance states:<sup>35</sup>

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.

2.27 In practice, cases are more commonly brought under the “demonstration” limb because it is difficult to prove motivation.<sup>36</sup>

### Need a victim experience the hostility which motivated the defendant?

2.28 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. In the case of public order offences,<sup>37</sup> or other offences such as communications offences committed online, there may be no specific victim. This contrasts with the demonstration limb, which does require a specific victim.

## Matters common to limbs (a) and (b)

### Presumed membership and membership by association

2.29 Section 28(1)(a) refers explicitly to “hostility based on the victim’s membership (or presumed<sup>38</sup> membership)” of a racial or religious group. Therefore, a slur based on a mistaken view about the victim’s race or religion will be caught.<sup>39</sup> Section 28(2)

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<sup>33</sup> *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8].

<sup>34</sup> *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

<sup>35</sup> Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (21 October 2020) available at <https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>.

<sup>36</sup> E Burney and G Rose, *Racially Aggravated Offences – how is the law working?* (Home Office Research Study 244, Jul 2002) p 13. Although this research was conducted nearly 20 years ago, the CPS advise that this remains the case to this day.

<sup>37</sup> *Taylor v DPP* [2006] EWHC 1202 (Admin), (2006) 170 Justice of the Peace 485.

<sup>38</sup> Presumed by the offender: Crime and Disorder Act 1998, s 28(2).

<sup>39</sup> 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).

provides that “membership of a racial or religious group includes association with members of that group”. “Association” may be interpreted quite broadly and can include association through marriage, as well as association through socialising.<sup>40</sup>

### Hostility based partly on other factors

- 2.30 Section 28(3) provides that it is immaterial for the purposes of either limb (a) or (b) that the offender’s hostility is also based “to any extent” on any other factor.
- 2.31 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.<sup>41</sup> 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,<sup>42</sup> the desire to avoid arrest,<sup>43</sup> hostility towards some other group such as parking attendants<sup>44</sup> or a dispute over payment for food.<sup>45</sup> This does not affect the analysis, so long as racial or religious hostility was then demonstrated in the course of committing the offence.

### Meaning of “racial group”

- 2.32 “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”.<sup>46</sup> The Court of Appeal has said that it is for the jury to decide whether the use of a particular term demonstrated hostility.<sup>47</sup>
- 2.33 In *Rogers*,<sup>48</sup> 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:

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<sup>40</sup> 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.

<sup>41</sup> 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.

<sup>42</sup> *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar).

<sup>43</sup> *Green* [2004] EWHC 1225 (Admin), The Times 7 Jul 2004.

<sup>44</sup> *Johnson* [2008] EWHC 509 (Admin), The Times 9 Apr 2008.

<sup>45</sup> *M* [2004] EWHC 1453, [2004] 1 WLR 2758.

<sup>46</sup> 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.

<sup>47</sup> *A-G’s Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

<sup>48</sup> *Rogers* [2007] UKHL 8, [2007] 2 AC 62. Depending on the context, use of the term “foreigners” can also demonstrate racial hostility. *M* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758; likewise with “immigrant”, ie non-British. *A-G’s Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

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.<sup>49</sup>

### Meaning of “religious group”

2.34 “Religious group” is defined in section 28(5) of the CDA 1998 as a “group of persons defined by reference to religious belief or lack of religious belief”. The scope of “lack of religious belief” is limited to groups defined by the simple absence of religious belief (for example, atheists or apostates). Hostility towards a group defined by non-religious beliefs or philosophies that extend beyond mere lack of religious belief (for example, humanism) is therefore excluded.<sup>50</sup> 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.<sup>51</sup>

2.35 The inclusion of groups defined by a lack of religious belief means that if, for example, an offender is motivated to assault a 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 by the definition of “religious group”.

### Alternative verdicts and alternative charges

2.36 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.<sup>52</sup> However, there is no such power in the magistrates’ courts. 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.<sup>53</sup> A defendant who is charged with an aggravated offence and,

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<sup>49</sup> *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12] by Baroness Hale.

<sup>50</sup> 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).

<sup>51</sup> *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.

<sup>52</sup> 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).

<sup>53</sup> Crown Prosecution Service, *Racist and Religious Hate Crime – Prosecution Guidance* (21 October 2020).



alternatively, the non-aggravated form of the offence, cannot be convicted of both offences.<sup>54</sup>

## Sentencing

2.37 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.

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
<b>Key:</b>			
OAPA: Offences Against the Person Act 1861			
CDG: Criminal Damage Act 1971			

<sup>54</sup> *R (Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin), (2013) 177 Justice of the Peace 265.



PHA: Protection from Harassment Act 1997

CJA: Criminal Justice Act 1988

POA: Public Order Act 1986

- 2.38 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.<sup>55</sup> 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 set out a number of factors which indicate either a higher or lower level of racial aggravation in the circumstances.
- 2.39 These recommendations were largely adopted by the Court of Appeal.<sup>56</sup> 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".<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>
- 2.40 The Sentencing Council does not have a separate guideline dealing with aggravated offences, or hate crime offending more generally. However, the Sentencing Council has issued guidance in relation to public order offences, which includes significant detail in relation to the assessment of racial and religious aggravation.<sup>60</sup>
- 2.41 In relation to the offence of racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress,<sup>61</sup> the most commonly prosecuted

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<sup>55</sup> Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences* (2000). See also the 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.

<sup>56</sup> *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 is the leading case.

<sup>57</sup> *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [64].

<sup>58</sup> *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.

<sup>59</sup> 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 said at paras 19 to 23 that the differential increases in the maximum penalties, as set by Parliament, carry no special significance.

<sup>60</sup> This guidance came into effect on 1 January 2020. See Sentencing Council, *Public Order Offences* (25 September 2019), available at <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/public-order-offences/>.

<sup>61</sup> Crime and Disorder Act 1998, s 31(1)(b)). The base offence is Public Order Act 1986, s 4A.

aggravated offence,<sup>62</sup> the guidance specifies the following factors as indicating a “high level of racial or religious aggravation”:<sup>63</sup>

- 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.

2.42 These factors indicate that 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.”

2.43 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.

2.44 These factors indicate that 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.”

2.45 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).

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<sup>62</sup> See statistics outlined in our consultation paper: Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 16.15.

<sup>63</sup> 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/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/>

- 2.46 These factors indicate that the sentencer should “consider a more onerous penalty of the same type identified for the base offence.”
- 2.47 Similar guidance has also been developed in relation to the racially or religiously aggravated form of the section 4 POA 1986 offence of engaging in threatening, abusive or insulting conduct with intent to cause fear of violence or provoke violence against another.<sup>64</sup>
- 2.48 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,<sup>65</sup> 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 if the sentence was passed in the Crown Court.<sup>66</sup> However, the list does not include any of the non-aggravated forms of these offences (and none are indictable only).

## ENHANCED SENTENCING

- 2.49 The enhanced sentencing provision in section 66 of the Sentencing Code is somewhat different to the aggravated and stirring up offences set out at paragraphs 2.7 to 2.48, in that it does not create new offences or increase the maximum sentence available for any offence to reflect aggravation on the ground of hostility. It provides 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.
- 2.50 Section 66 of the Sentencing Code requires the sentencing court to treat as an aggravating factor hostility based on race, religion, disability, sexual orientation, and transgender identity in sentencing for any offence. Racial and religious hostility is to be treated as an aggravating factor at the sentencing stage for all criminal offences except the racially and religiously aggravated offences under the CDA 1998, in order to avoid duplication.<sup>67</sup>
- 2.51 Section 66 of the Sentencing Code provides:
- (1) This section applies where a court is considering the seriousness of an offence which is aggravated by—
    - (a) racial hostility,
    - (b) religious hostility,
    - (c) hostility related to disability,

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<sup>64</sup> Crime and Disorder Act 1998, s 31(1)(a), Public Order Act 1986, s 4

<sup>65</sup> Criminal Justice Act 1988, ss 35 and 36. The Court of Appeal may substitute a different sentence (higher or lower).

<sup>66</sup> Criminal Justice Act 1988 (Review of Sentencing) Order 2006, sch 1.

<sup>67</sup> See *R v O’Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11. We discuss the case in greater detail in Chapter 8 of this report from paragraph 8.240.

- (d) hostility related to sexual orientation, or
- (e) hostility related to transgender identity.

This is subject to subsection (3).

- (2) The court—
  - (a) must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and
  - (b) must state in open court that the offence is so aggravated.
- (3) So far as it relates to racial and religious hostility, this section does not apply in relation to an offence under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated offences).
- (4) For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—
  - (a) 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 victim's membership (or presumed membership) of a racial group,
    - (ii) the victim's membership (or presumed membership) of a religious group,
    - (iii) a disability (or presumed disability) of the victim,
    - (iv) the sexual orientation (or presumed sexual orientation) of the victim, or (as the case may be)
    - (v) the victim being (or being presumed to be) transgender, or
  - (b) the offence was motivated (wholly or partly) by—
    - (i) hostility towards members of a racial group based on their membership of that group,
    - (ii) hostility towards members of a religious group based on their membership of that group,
    - (iii) hostility towards persons who have a disability or a particular disability,
    - (iv) hostility towards persons who are of a particular sexual orientation, or (as the case may be)
    - (v) hostility towards persons who are transgender.

- (5) For the purposes of paragraphs (a) and (b) of subsection (4), it is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
- (6) In this section—
  - (a) references to a racial group are to a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins;
  - (b) references to a religious group are to a group of persons defined by reference to religious belief or lack of religious belief;
  - (c) “membership” in relation to a racial or religious group, includes association with members of that group;
  - (d) “disability” means any physical or mental impairment;
  - (e) 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;
  - (f) “presumed” means presumed by the offender.

2.52 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 Sentencing Code 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 Sentencing Code, 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 Sentencing Code can apply to all offences;<sup>68</sup>
- (4) the fact of the racial or religious aggravation under the CDA 1998 will appear on an offender's criminal record. However, the court is obliged to state its finding of aggravation under the Sentencing Code in open court. Recording of an enhanced sentence on the Police National Computer – a recommendation we

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<sup>68</sup> However, where the offence is one that could be racially or religiously aggravated, the Court will not apply the sentence uplift if the defendant has been charged with the racially or religiously aggravated form of the offence and acquitted.

made in our 2014 report<sup>69</sup> – has recently been introduced, which has reduced this distinction.<sup>70</sup>

2.53 Section 66 forms part of the general sentencing regime in the Code. The Code provides that when sentencing, the courts must have regard to the five fundamental purposes of sentencing:<sup>71</sup>

- (1) the punishment of offenders;
- (2) the reduction of crime (including its reduction by deterrence);
- (3) the reform and rehabilitation of offenders;
- (4) the protection of the public; and
- (5) the making of reparation by offenders to persons affected by their offence.

2.54 In assessing the seriousness of any offence, 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.<sup>72</sup> 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.<sup>73</sup> Some offences have specific guidelines tailored to them, while other offences have a general seriousness guideline.

2.55 The Sentencing Code requires certain aggravating factors, if present, to be taken into account in assessing seriousness. These include hostility on the basis of race, religion, sexual orientation, disability or transgender identity. 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.<sup>74</sup>

2.56 The court has a duty to “state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence”.<sup>75</sup>

### **Development of the enhanced sentencing regime**

2.57 Section 82 of the CDA 1998 introduced enhanced sentencing for offences where the offence was motivated by or the offender demonstrated hostility on the basis of race at the same time as the racially aggravated forms of assault, wounding/grievous bodily harm, criminal damage, harassment and public order offences. Section 82 was

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<sup>69</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 3.104.

<sup>70</sup> We discuss recording of the enhanced sentence on the Police National Computer in further detail in Chapter 8 of this report at para 8.16.

<sup>71</sup> Sentencing Code, s 57.

<sup>72</sup> Sentencing Code, s 63.

<sup>73</sup> Unless it is contrary to the interests of justice to do so: Coroners and Justice Act 2009, s 125(1).

<sup>74</sup> Sentencing Code, s 230(6) provides that courts must consider all mitigating and aggravating factors when imposing discretionary custodial sentences.

<sup>75</sup> Sentencing Code, s 52(2).

repealed and re-enacted as section 153 of the Powers of Criminal Courts (Sentencing) Act 2000.

- 2.58 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.
- 2.59 The CJA 2003 repealed and re-enacted section 153 as section 145. The CJA 2003 also included a new section 146, making provision for hostility on the ground of sexual orientation or disability. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended section 146 to include hostility towards transgender people. The Sentencing Act 2020 repealed and re-enacted sections 145 and 146 of the CJA 2003 as section 66 of the Sentencing Code.

### **Evidence of hostility for the purposes of enhanced sentencing**

- 2.60 Whereas hostility must be proved as part of the offence for the aggravated offences under the CDA 1998, under section 66 of the Sentencing Code it is a question of fact for the judge or magistrates in sentencing.
- 2.61 If the offender wishes to challenge the allegation that hostility was present and that the sentence should be enhanced in accordance with section 66, 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.<sup>76</sup> In a Newton hearing the judge or magistrates act as the tribunal of fact, applying the criminal burden and standard of proof. A Newton hearing will only be necessary where there is likely to be a significant impact on the sentence.<sup>77</sup>

### **Meaning of racial and religious hostility**

- 2.62 The definitions of racial<sup>78</sup> and religious<sup>79</sup> hostility for the purposes of enhanced sentencing are the same as those used in the Crime and Disorder Act 1998 for the purposes of aggravated offences. We discuss these definitions at paragraph 2.135 and 2.136.

### **Meaning of “disability”**

- 2.63 Disability is defined broadly as “any physical or mental impairment”.<sup>80</sup>
- 2.64 Under the Equality Act 2010 (“EA 2010”), a person (“P”) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities. The definition of

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<sup>76</sup> See *R v Newton* (1983) 77 Cr App R 13.

<sup>77</sup> Detailed guidance is set out in *R v Underwood* [2004] EWCA Crim 2256; [2005] 1 Cr App R 13.

<sup>78</sup> Sentencing Code, s 66(6)(a).

<sup>79</sup> Sentencing Code, s 66(6)(b).

<sup>80</sup> Sentencing Code, s 66(6)(d).

disability under the EA 2010 is therefore somewhat narrower in scope than the definition under the Sentencing Code as it requires a degree of permanence.

### Meaning of “sexual orientation”

2.65 Section 66 does not define sexual orientation. However, in *B*, the Court of Appeal considered that “sexual orientation” refers to orientation towards people of the same sex, the opposite sex, or both; it does not encompass preferences for particular acts, or asexual people.<sup>81</sup>

### Meaning of “transgender identity”

2.66 Section 66(6)(e) of the Sentencing Code 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.<sup>82</sup>

### Presumed membership and membership by association

2.67 Section 66(4)(a) provides that it is sufficient for hostility to be demonstrated towards the victim based on their “presumed membership” of one of the listed groups. However, if an offender is unaware of the person’s status, but uses abusive language related to it, it will be difficult to establish that there was hostility based on the person’s presumed status.

2.68 Section 66 provides that “membership” in relation to a racial or religious group includes “association with members of that group”.<sup>83</sup> Similar provision does not exist in relation to sexual orientation, disability and transgender identity.

### The approach to sentencing under section 66

2.69 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* (discussed at paragraph 2.39),<sup>84</sup> also applies for the purposes of sections 145 and 146 of the CJA 2003, now contained in section 66 of the Sentencing Code.

2.70 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

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<sup>81</sup> [2013] EWCA Crim 291. We consider the inclusion of asexual people in Chapter 4 at paras 4.114 to 4.152.

<sup>82</sup> 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 revision of this definition in Chapter 4 from paragraph 4.153.

<sup>83</sup> Sentencing Code, s 66(6)(c).

<sup>84</sup> *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).



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.<sup>85</sup>

- 2.71 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;<sup>86</sup> or the offence caused particular distress to the victim and/or the victim's family.<sup>87</sup>
- 2.72 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.<sup>88</sup>

### General aggravating factors under the Sentencing Code

- 2.73 In addition to the statutory requirement in section 66 that hostility on the basis of a protected characteristic 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.
- 2.74 The sentencing guideline *General guideline: overarching principles*<sup>89</sup> 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 usual serious degree of harm.
- 2.75 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;

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<sup>85</sup> *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.

<sup>86</sup> 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.

<sup>87</sup> *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].

<sup>88</sup> *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [66].

<sup>89</sup> 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/>.

- (3) that there was an abuse of trust or dominant position;
- (4) that there is evidence of community/wider impact.

2.76 For each of these factors, “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”.<sup>90</sup>

### Specific provision for murder

2.77 A separate sentencing scheme exists in respect of murder, which carries a mandatory life sentence.

2.78 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 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.<sup>91</sup> 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,<sup>92</sup> including which starting point it selected and why.<sup>93</sup> However, the court is not bound to follow the statutory guidance and may depart from it if appropriate,<sup>94</sup> although it must state its reasons for doing so.<sup>95</sup>

2.79 Schedule 21 to the Sentencing Code outlines how a court should set a minimum term to be served when sentencing a person to a mandatory life sentence for murder. 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.

2.80 Paragraph 3 of that schedule provides that where the murder is racially or religiously aggravated, or aggravated on the basis of sexual orientation, disability or transgender identity, this normally indicates “particularly high” seriousness. Therefore, the appropriate starting point for determining the minimum term should be 30 years. In deciding whether these factors are present, the court must apply the criminal standard of proof.<sup>96</sup>

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<sup>90</sup> Sentencing Council, General guideline: overarching principles (effective from 1 October 2019).

<sup>91</sup> As well as the effects of the defendant’s previous convictions, any plea of guilty and whether the offence was committed on bail.

<sup>92</sup> Sentencing Code, s 52.

<sup>93</sup> Sentencing Code, s 322(4).

<sup>94</sup> *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].

<sup>95</sup> Sentencing Code, s 322(4)(b).

<sup>96</sup> *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.”

## Aggravating factors

- 2.81 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.<sup>97</sup>
- 2.82 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*<sup>98</sup> held that the trial judge was entitled to 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.

## ASSAULTS ON EMERGENCY WORKERS

- 2.83 Though not considered to fall within the regime of “hate crime” laws, a similar model of laws is used in relation to assaults on “emergency workers”, including police and rescue services, health workers and prison and custodial officers.<sup>99</sup> These do not form part of this review, but we briefly describe them here given the similarity of these provisions to aggravated offences and enhanced sentencing. As we outline in Chapter 8 at paragraph 8.250 and following, there can be circumstances where these provisions overlap with hate crime laws, as some assaults on emergency workers also involve hostility against a protected characteristic.
- 2.84 Section 1 of the Assaults on Emergency Workers (Offences) Act 2018 creates an aggravated version of common assault or battery that is committed against an emergency worker “acting in the exercise of functions as such a worker”. This increases the maximum penalty for the offence from six months to 1 year (likely to further increase to two years if clause 2 in the Police, Crime, Sentencing and Courts Bill currently before Parliament is passed into law), and in this sense it bears similarity to the aggravated offences model in hate crime laws.
- 2.85 Similarly section 67 of the Sentencing Code – “Assaults on emergency workers” operates somewhat similarly to the enhanced sentencing regime in that it requires the court to increase the sentence passed (within the existing maximum) and announce

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<sup>97</sup> Sentencing Code, Sch 21, paras 7, 9, 3(2)(g) and 3(2)(h).

<sup>98</sup> [2008] EWCA Crim 769, [2009] 1 Cr App R (S) 2.

<sup>99</sup> The full list in section 3(1) of the Assaults on Emergency Workers (Offences) Act 2018 is: a constable; a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes; a National Crime Agency officer; a prison officer; a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer; a prisoner custody officer, so far as relating to the exercise of escort functions; a custody officer, so far as relating to the exercise of escort functions; a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services; a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both); a person employed for the purposes of providing, or engaged to provide NHS health services, or services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

this in open court where a specified offence<sup>100</sup> is “committed against an emergency worker acting in the exercise of functions as such a worker.”<sup>101</sup>

- 2.86 The government has also announced that it plans to introduce mandatory life sentences for those who kill an emergency worker in the course of their duty.<sup>102</sup>
- 2.87 The main difference with these provisions from hate crime laws is that they do not include a “hostility” test. Under the emergency worker provisions it is sufficient that the victim was an emergency worker “acting in the exercise of functions as such a worker”. No further proof of the defendant’s motivation nor a demonstration of hostility against emergency workers is required.

## **RACIALIST CHANTING AT FOOTBALL MATCHES**

- 2.88 Under section 3(1) of the Football (Offences) Act 1991 it is an offence to “engage or take part in chanting of an indecent or racist nature at a designated football match”.
- 2.89 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.
- 2.90 “Chanting” is defined as “the repeated uttering of any words or sounds (whether alone or in concert with one [or] more others).”<sup>103</sup>
- 2.91 “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>104</sup>
- 2.92 The act must take place at the football match. This is in contrast to banning orders made under the Football Spectators Act 1989, which may be made in respect of a variety of offences committed in the vicinity of a match.<sup>105</sup>

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<sup>100</sup> Defined in section 67(3) of the Sentencing Code as an offence under any of the following provisions of the Offences against the Person Act 1861: section 16 (threats to kill); section 18 (wounding with intent to cause grievous bodily harm); section 20 (malicious wounding); section 23 (administering poison etc); section 28 (causing bodily injury by explosives); section 29 (using explosives etc with intent to do grievous bodily harm); section 47 (assault occasioning actual bodily harm); and, an offence under section 3 of the Sexual Offences Act 2003 (sexual assault); manslaughter; kidnapping; an inchoate offence in relation to any of the preceding offences.

<sup>101</sup> Sentencing Code, s 67(2)

<sup>102</sup> Ministry of Justice, *Press release: Government to introduce 'Harper's Law'* (24 November 2021), available at <https://www.gov.uk/government/news/government-to-introduce-harper-s-law>.

<sup>103</sup> Football (Offences) Act 1991, s 3(2)(a). See Chapter 11 for further discussion.

<sup>104</sup> Football (Offences) Act 1991, s 3(2)(b).

<sup>105</sup> Football Spectators Act 1989, Sch 1.

- 2.93 The maximum available penalty for this offence is a £1000 fine,<sup>106</sup> but conviction may also allow for a football banning order to be made against the offender.<sup>107</sup>
- 2.94 While this is the main offence specifically tailored to the context of football matches, the conduct may overlap significantly with other public order offences in sections 4, 4A and 5 of the POA 1986. These base offences all carry equivalent (in the case of section 5) or higher penalties (sections 4 and 4A) than the Football (Offences) Act 1991, and these differences are increased further for the racially or religiously aggravated versions of sections 4, 4A and 5 under section 31 of the CDA 1998. Enhanced sentencing may also be applied in circumstances of homophobic, transphobic or disablist abuse.<sup>108</sup>

## OFFENCES OF STIRRING UP HATRED

- 2.95 The offences of stirring up hatred on the grounds of race, religion or sexual orientation are contained within Parts 3 and 3A of the POA 1986.

### Racial hatred

- 2.96 The earliest form of these offences was stirring up racial hatred, criminalised by the Race Relations Act 1965. 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 Public Order Act 1936 (“POA 1936”). We covered these in detail in the consultation paper at paragraphs 2.15 to 2.18.

### The Race Relations Act 1965

- 2.97 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<sup>109</sup> and the Bristol bus boycott in 1963.<sup>110</sup> Section 6 was as follows:

- (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
  - (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.

- 2.98 The conduct must have been both intended and likely to stir up racial hatred.

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<sup>106</sup> Football (Offences) Act 1991, s 5(2).

<sup>107</sup> Football Spectators Act 1989, Sch 1, para m.

<sup>108</sup> See Sentencing Code, s 66.

<sup>109</sup> A Ashworth (2010) Sentencing and Criminal Justice (5th ed) p 80.

<sup>110</sup> “Bus Boycott by West Indians: Company’s Refusal to Employ Man” (3 May 1963), *The Times*.

## The Race Relations Act 1976

2.99 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.<sup>111</sup>

2.100 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.

2.101 Unlike the 1965 provision, it was sufficient that racial hatred was likely to be stirred up; there was no requirement that the accused intended 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 suspected, nor had reason to suspect, that it was threatening, abusive or insulting.

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

2.103 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*<sup>112</sup> that "national origins" did not encompass nationality.<sup>113</sup>

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<sup>111</sup> Sir Leslie Scarman (1974), *The Red Lion Square Disorders of 15 June 1974*.

<sup>112</sup> *Ealing London Borough Council v Race Relations Board* (1972) AC 342.

<sup>113</sup> Race Relations Act 1976, ss 3(1) and 70(2).

## The Public Order Act 1986

- 2.104 The present provisions on stirring up hatred are contained in the POA 1986, which was the product of a comprehensive reconsideration of the POA 1936. The 1986 Act followed the recommendations in our 1983 Public Order Report.<sup>114</sup>
- 2.105 The review started with a Green Paper, which noted that the existing provision (section 5A of the POA 1936, as inserted by the Race Relations Act 1976) was regarded as ineffective because there was still material circulating which was highly offensive to ethnic minority communities but that fell just within the law.
- 2.106 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.<sup>115</sup>
- 2.107 The White Paper,<sup>116</sup> 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 noted 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 racist views can be incited to further hatred and acts of violence.
- 2.108 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.
- 2.109 During its passage through committee in the House of Commons, the Public Order Bill was extensively amended.<sup>117</sup> 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 also undertook to include provision for sound and video recordings.

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<sup>114</sup> Criminal Law: Offences Relating to Public Order (1983) Law Com 123.

<sup>115</sup> The Law Relating to Public Order, Fifth report from the Home Affairs Committee (1979-80), HC 756 para 95.

<sup>116</sup> Review of Public Order Law (1985) Cmnd 9510, paras 6.5 to 6.12.

<sup>117</sup> 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.



2.110 The police were given a power of immediate arrest, and the scope of the words and behaviour offence was extended to private as well as public places.<sup>118</sup> A new offence of possession of racially inflammatory material was introduced.

2.111 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;<sup>119</sup> but in the second case there is a defence that the defendant did not intend the words or material to be, and was not aware that they might be, threatening, abusive or insulting;<sup>120</sup> and
- (3) the words or behaviour need not be in public, but there is a defence if they were in a private dwelling and were not heard or seen except by other persons in that or another dwelling, or if the defendant had no reason to believe that they would be heard or seen from outside that or any other dwelling.<sup>121</sup>

### Religious hatred

2.112 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, as explained in the next section.<sup>122</sup>

### Anti-Terrorism, Crime and Security Act 2001

2.113 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, and from Muslim groups, which, having lobbied for the extension, were troubled by its inclusion in a Bill concerning terrorism.

2.114 Opponents of the extension feared that without a requirement for intent, and with the offence including merely “insulting” words, (which need not be directed at a person) legitimate criticism of religions could be caught by the new offence.

2.115 Lord Lester, at report stage, argued that the Bill was not the right place to deal with religious hatred and that there should be a separate Bill, also addressing religious discrimination and the abolition of blasphemy, and preferably hatred against gay and lesbian people.<sup>123</sup>

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<sup>118</sup> Hansard (HC), 30 Apr 1986, vol 96, cols 1053 to 1054.

<sup>119</sup> Amendment made 30 Apr 1986: Hansard (HC), 30 Apr 1986, vol 96, col 1050.

<sup>120</sup> Public Order Act 1986, s 18(5).

<sup>121</sup> Public Order Act 1986, ss 18(2), (4).

<sup>122</sup> 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.

<sup>123</sup> Hansard (HL), 10 Dec 2001, vol 629, col 1169.



2.116 The clauses extending the law in this way were removed by the House of Lords.

### Racial and Religious Hatred Act 2006

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

2.118 The House of Lords did not block the legislation but raised the threshold to require intention to incite hatred and restricted the offence to the use of threatening words or behaviour. Despite Government opposition to this 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

2.119 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.<sup>124</sup> Home Secretary Charles Clarke said that the Bill was not the appropriate place to consider the issue as new characteristics should be considered narrowly and one at a time.

### Criminal Justice and Immigration Act 2008

2.120 In 2007, at committee stage for the Criminal Justice and Immigration Bill, then in the House of Commons,<sup>125</sup> the Government proposed an amendment introducing offences of stirring up hatred on the ground of sexual orientation. The offences 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. Therefore, as with the religious hatred offences, the words or behaviour had to be threatening (not merely abusive or insulting), and there had to be intent. The amendments inserting the section and schedule creating the new offences were agreed to.<sup>126</sup>

### The amendment introducing protection for freedom of expression

2.121 At committee stage in both Houses, amendments were proposed to incorporate a clause protecting freedom of expression in a similar way to section 29J of the POA 1986, but both were withdrawn.

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<sup>124</sup> Second reading, Lynne Jones, Hansard (HC), 21 Jun 2005, vol 435, col 669.

<sup>125</sup> Public Bill Committee, Hansard (HC), 29 Nov 2007, cols 681 to 710.

<sup>126</sup> Public Bill Committee, Hansard (HC), 29 Nov 2007, col 692.

2.122 At report stage, Lord Waddington introduced an amendment inserting a clause protecting freedom of expression, which was passed by the House of Lords.<sup>127</sup> 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.

2.123 Unlike the previous proposed amendments in relation to religious hatred, this wording only clarified the meaning of “threatening” and “intended to stir up hatred”. It did not provide a defence for words or conduct that had already been found to be threatening or intended to stir up hatred. The House of Commons disagreed with the Lords’ amendment,<sup>128</sup> but on a vote,<sup>129</sup> 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**

2.124 In 2008, in the House of Commons committee debates on the Criminal Justice and Immigration Bill, an amendment was proposed adding offences of stirring up hatred on the ground of transgender status.<sup>130</sup> The amendment was not debated and was withdrawn.

### **Conduct covered by the offences**

2.125 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, and also cover recordings, broadcasts and theatrical productions.

2.126 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.

2.127 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;<sup>131</sup>

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<sup>127</sup> Hansard (HL), 21 Apr 2008, vol 700, col 1365.

<sup>128</sup> Hansard (HC), 6 May 2008, vol 475, cols 599 to 625. See col 599.

<sup>129</sup> Hansard (HL), 7 May 2008, vol 701, cols 614 to 615.

<sup>130</sup> Hansard (HC), 9 Jan 2008, vol 470, col 437.

<sup>131</sup> Public Order Act 1986, s 18. The equivalent offence for religion or sexual orientation is at s 29B.

- (2) publishing or distributing written material which is threatening, abusive or insulting;<sup>132</sup>
- (3) presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour;<sup>133</sup>
- (4) distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting;<sup>134</sup>
- (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;<sup>135</sup> 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.<sup>136</sup>

2.128 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).

2.129 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, due to the concerns about freedom of expression, 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);<sup>137</sup> 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 2.138 to 2.141.

2.130 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

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<sup>132</sup> Public Order Act 1986, s 19. The equivalent offence for religion or sexual orientation is at s 29C.

<sup>133</sup> Public Order Act 1986, s 20. The equivalent offence for religion or sexual orientation is at s 29D.

<sup>134</sup> Public Order Act 1986, s 21. The equivalent offence for religion or sexual orientation is at s 29E.

<sup>135</sup> Public Order Act 1986, s 22. The equivalent offence for religion or sexual orientation is at s 29F.

<sup>136</sup> Public Order Act 1986, s 23. The equivalent offence for religion or sexual orientation is at s 29G.

<sup>137</sup> We discuss the meaning of “likely to” in more detail in Chapter 10.

means that a broadcaster, publisher or distributor may be criminally liable if they had reason to believe that material might be inflammatory.

2.131 In *R v Sheppard*,<sup>138</sup> the Court of Appeal held that publication on the internet meets the requirement that publication be to the public or a section of the public,<sup>139</sup> 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 have extra-territorial application, it is sufficient that the actions of the defendant in publishing the material took place in England and Wales. It is therefore not necessary that hatred be intended or likely to be stirred up in England and Wales.<sup>140</sup>

2.132 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 of the POA 1986 if the social media provider was unaware of the content of the material. These are as follows:

Section 19(b) – publishing written material: “In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.”

Section 21(3) – distributing, showing or playing a recording: “it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.”

## Definitions

### Meaning of “hatred”

2.133 Hatred is not defined in the POA 1986 and it can be taken to bear its ordinary meaning. It is generally thought that “hatred” is a stronger term than “hostility”.<sup>141</sup> 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 trier of fact (jury or magistrates) whether this standard has been met.

2.134 The hatred must be directed at a group, not merely an individual.

### Meaning of “racial hatred”

2.135 Racial hatred is defined to mean hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national

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<sup>138</sup> *R v Sheppard* [2010] EWCA Crim 65.

<sup>139</sup> Public Order Act 1986, s 19.

<sup>140</sup> *R v Lawrence Burns* [2017] EWCA Crim 1466.

<sup>141</sup> 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.”

origins.<sup>142</sup> This is the same definition used for the aggravated offences and enhanced sentencing, albeit that “hostility” is in place of “hatred”. We discuss the courts’ broad interpretation of language that is racial in nature at paragraph 2.33.

### Meaning of “religious hatred”

2.136 “Religious hatred” is also defined in the same way for the stirring up offence as for the aggravated offences and enhanced sentencing:<sup>143</sup> hatred against a group of persons defined by reference to religious belief or lack of religious belief.<sup>144</sup>

### Meaning of “hatred on the grounds of sexual orientation”

2.137 Unlike the enhanced sentencing provisions in section 66 of the Sentencing Act 2020, where sexual orientation is not defined, “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)”.<sup>145</sup>

## Protection of freedom of expression

### Religious belief

2.138 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:

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.<sup>146</sup>

2.139 There are no reported cases interpreting this provision, and prosecutions under the religious hatred provisions are rare.

### Sexual conduct or practice

2.140 As we noted at 2.122, 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.

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<sup>142</sup> Public Order Act 1986, s 17.

<sup>143</sup> Again, substituting the word “hatred” for the word “hostility”.

<sup>144</sup> Public Order Act 1986, s 29A.

<sup>145</sup> Public Order Act 1986, s 29AB.

<sup>146</sup> Public Order Act 1986, s 29J.

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.<sup>147</sup>

2.141 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 the offence of stirring up hatred on the ground of sexual orientation.<sup>148</sup>

### Dwelling exemption

2.142 The POA 1986 extended the stirring up racial hatred offences to the private sphere. However, the POA 1986 contains an exemption 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,<sup>149</sup> or the defendant had no reason to believe that they would be heard or seen from outside that or any other dwelling.<sup>150</sup>

2.143 Similar protections were later incorporated into the legislation on stirring up religious hatred and hatred on grounds of sexual orientation.

2.144 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.<sup>151</sup>

### Procedural matters

#### Attorney General's consent

2.145 For all the stirring up offences, the Attorney General must consent to bring a prosecution.<sup>152</sup> 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”.<sup>153</sup> However, some critics have argued that the requirement for consent has unduly limited the number of prosecutions brought.<sup>154</sup>

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<sup>147</sup> Public Order Act 1986, s 29JA.

<sup>148</sup> See *R v Ali, Javed, and Ahmed* (2012) 720110109 (Derby Crown Court, Feb 10).

<sup>149</sup> Public Order Act 1986, s 18(2).

<sup>150</sup> Public Order Act 1986, s 18(4).

<sup>151</sup> Public Order Act 1986, s 4(2).

<sup>152</sup> Public Order Act 1986, ss 27(1) and 29L.

<sup>153</sup> 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.

<sup>154</sup> Geoffrey Bindman, “Bringing race bigots to book” (20 October 1993) *The Guardian*.

## Penalties and sentencing guidelines

- 2.146 For all six forms of the stirring up hatred offences, and across the three forms of hatred, the penalties are the same. Upon conviction on indictment, the maximum is seven years' imprisonment or a fine, or both. Upon summary conviction, the maximum is imprisonment for a term not exceeding six months, a fine not exceeding the statutory maximum, or both.<sup>155</sup>
- 2.147 The Sentencing Council guidelines for these offences are based on three levels of culpability for racial hatred and two for religion or sexual orientation.<sup>156</sup> 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 where the prosecution has proven not that the defendant intended to stir up hatred, but that hatred was likely to be stirred up (such cases fall outside the scope of the offences relating to religious hatred and hatred on grounds of sexual orientation which require proof that the defendant intended to stir up hatred). 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.
- 2.148 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 be taken into account to raise or lower the sentence. For example, in *R v Bitton*,<sup>157</sup> 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. In *R v Davison*,<sup>158</sup> the Court of Appeal held that a sentence of four years' imprisonment imposed following a conviction for three offences of publishing material with intent to stir up racial hatred, was not manifestly excessive given the nature of the offences and the need to deter others.

## Jurisdiction

- 2.149 Cases involving activity over the internet may cause jurisdictional difficulties. 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 courts have jurisdiction (unless comity requires otherwise).<sup>159</sup> Following the decision in *R v*

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<sup>155</sup> 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.

<sup>156</sup> See Sentencing Council, *Racial hatred offences/ Hatred against persons on religious grounds or grounds of sexual orientation* (25 September 2019), available at <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/racial-hatred-offences-hatred-against-persons-on-religious-grounds-or-grounds-of-sexual-orientation/>.

<sup>157</sup> *R v Bitton* [2019] EWCA Crim 1372.

<sup>158</sup> *R v Davison* [2020] EWCA Crim 665.

<sup>159</sup> *R v Smith (Wallace Duncan) (No. 4)* [2004] EWCA Crim 631.

*Burns*,<sup>160</sup> it appears clear that it is not necessary that the intended or likely target of the stirring up of hatred be located within England and Wales.<sup>161</sup> Mere use of a foreign web server to upload content prepared in England and Wales, and intended for a domestic audience, does not prevent prosecution here.<sup>162</sup> However, the case law does not resolve the position regarding material intended or likely to incite racial hatred in England and Wales but created elsewhere.<sup>163</sup>

## OTHER JURISDICTIONS

2.150 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 with the other jurisdictions within the UK. We also consider recent developments in Ireland at from paragraph 2.203.

2.151 At paragraphs 2.82 to 2.122 of the consultation paper we explore in detail the approaches taken in other common law jurisdictions, namely the United States of America, Canada, Australia and New Zealand.

### Scotland

2.152 Scotland 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 31 May 2018.<sup>164</sup> The Hate Crime and Public Order (Scotland) Bill,<sup>165</sup> which sought to implement many of Lord Bracadale's recommendations, was debated in the Scottish Parliament and the Bill became law on 23 April 2021.<sup>166</sup>

2.153 Prior to the Hate Crime and Public Order (Scotland) Act 2021, the offences of stirring up racial hatred, contained in sections 18 to 22 of the POA 1986, applied equally across England, Wales and Scotland. However, there was no equivalent offence in Scotland for religious hatred or hatred on grounds of sexual orientation. The CDA 1998, which contains the racially and religiously aggravated offences applicable to England and Wales, also contained provision for the racial aggravation of offences in Scotland, in section 96.

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<sup>160</sup> *R v Burns* [2017] EWCA Crim 1466.

<sup>161</sup> Abusive and Offensive Online Communications: Scoping Report (2018) Law Com No 381, para 9.29.

<sup>162</sup> *R v Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [32] by Scott Baker LJ.

<sup>163</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 2.51. The decision in *R v Burns* is explained in greater detail at paragraphs 4.109 to 4.113 of the consultation paper.

<sup>164</sup> 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/>.

<sup>165</sup> Hate Crime and Public Order (Scotland) Bill, available at <https://www.parliament.scot/bills-and-laws/bills/hate-crime-and-public-order-scotland-bill>.

<sup>166</sup> Hate Crime and Public Order (Scotland) Act 2021, available at <https://www.legislation.gov.uk/asp/2021/14/contents/enacted>.



2.154 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.

2.155 Sentencing enhancement was provided for in Scotland in cases of religious aggravation by section 74 of the Criminal Justice (Scotland) Act 2003. The Offences (Aggravation by Prejudice) (Scotland) Act 2009 was later enacted,<sup>167</sup> which provided for sentence enhancement in respect of crimes aggravated by prejudice against disability,<sup>168</sup> sexual orientation<sup>169</sup> and transgender identity.<sup>170</sup> However, unlike in England and Wales, there are no offences which attract a higher maximum penalty.

2.156 Scotland's laws adopted (and continue to use) a legal test similar to that in England and Wales, though different terminology is used. Under these laws the test is satisfied 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]".<sup>171</sup>

#### Lord Bracadale's recommendations in 2018

2.157 Lord Bracadale's final report recommended an enhanced sentencing regime that could apply to any offence and maintained demonstration of, and motivation by, hostility as the "thresholds".<sup>172</sup>

2.158 Lord Bracadale also recommended enacting "stirring up of hatred" offences extending to all protected characteristics, including any new protected characteristics. He also recommended that the elements of the offence be the same regardless of the characteristic.<sup>173</sup>

2.159 Lord Bracadale recommended recognising both gender<sup>174</sup> and age<sup>175</sup> as protected characteristics. He also considered the addition of protected characteristics of

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<sup>167</sup> Detailed discussion of 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).

<sup>168</sup> 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".

<sup>169</sup> Defined as "sexual orientation towards persons of the same sex or of the opposite sex or towards both": s 2(7).

<sup>170</sup> 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": s 2(8)(a).

<sup>171</sup> The test is now found in section 1 of the Hate Crime and Public Order (Scotland) Act 2021.

<sup>172</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 17.

<sup>173</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) pp 56 to 68.

<sup>174</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 43.

<sup>175</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) pp 44 to 49.

immigration status, socio-economic status and Gaelic speaking, but did not recommend that any of these groups be covered.<sup>176</sup>

2.160 Separately from the hate crime regime, Lord Bracadale also recommended the creation of offences involving exploiting vulnerability which would carry an enhanced sentence.<sup>177</sup>

2.161 On 14 November 2018, the Cabinet Secretary for Justice and Cabinet Secretary for Communities launched a public consultation on hate crime legislation in Scotland<sup>178</sup> in response to recommendations made by Lord Bracadale.

### The Hate Crime and Public Order (Scotland) Act 2021

2.162 The Hate Crime and Public Order (Scotland) Bill was introduced by the Scottish Government to the Scottish Parliament on 23 April 2020, following the public consultation. The Bill aimed to modernise, consolidate and extend hate crime legislation in Scotland.<sup>179</sup> This consolidation was intended to provide greater clarity, greater transparency and improved consistency within hate crime legislation in Scotland.<sup>180</sup>

2.163 The Bill aimed to bring the vast majority of existing hate crime laws into one piece of legislation, namely the statutory hate crime aggravations set out under section 96 of the Crime and Disorder Act 1998 (race); section 74 of the Criminal Justice (Scotland) Act 2003 (religion) and the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (disability, sexual orientation and transgender identity); and the bulk of the current stirring up of racial hatred offences set out in Part 3 of the Public Order Act 1986.

2.164 The Bill was debated in the Scottish Parliament and became law on 23 April 2021.

#### *Part 1: Aggravation of offences by prejudice*

2.165 Part 1 of the Act is titled “Aggravation of offences by prejudice”. It provides that a criminal offence is aggravated if either: at the time of committing the offence, or immediately before or after doing so, the offender demonstrates malice and ill-will towards the victim,<sup>181</sup> or the offence is motivated (wholly or partly) by malice and ill-will

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<sup>176</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) pp 50 to 54.

<sup>177</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) pp 20 and 49.

<sup>178</sup> One Scotland: consultation on current hate crime legislation (14 November 2018), available at <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/2/>.

<sup>179</sup> Hate Crime and Public Order (Scotland) Bill Policy Memorandum (2020) p 1. Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>.

<sup>180</sup> Hate Crime and Public Order (Scotland) Bill Policy Memorandum (2020) p 17.

<sup>181</sup> Hate Crime and Public Order (Scotland) Act, s 1(1)(a).

towards a group of persons based on the group being defined by reference to a listed characteristic.<sup>182</sup>

- 2.166 The listed characteristics consist of the five already protected characteristics (race, religion, disability, sexual orientation and transgender identity) as well as a new characteristic: age, and the separate listing of “variations in sex characteristics”, which had previously been captured within the Scottish definition of transgender identity.<sup>183</sup>
- 2.167 Lord Bracadale had recommended that the language of “evinced malice and ill-will” should be changed to “demonstrating hostility”, so that it could be more easily understood in respect of the operation of the threshold.<sup>184</sup> The Act maintains the existing threshold, of malice and ill-will, but has changed the language from “evinces” to “demonstrates”.<sup>185</sup>
- 2.168 Lord Bracadale also recommended that the statutory aggravations should apply where hostility based on a protected characteristic is demonstrated in relation to persons who are presumed to have the characteristics or who have an association with that particular identity.<sup>186</sup> The Act provides that all of the hate crime statutory aggravations apply in relation to people who are presumed to have the characteristic.<sup>187</sup> It remains the case that the maximum penalty available to the sentencer for the offence remains unchanged.

### *Part 2: Racially aggravated harassment*

- 2.169 Part 2 of the Act provides for a specific offence of racially aggravated harassment.<sup>188</sup> This repeals and replaces the existing standalone offence of racially aggravated harassment contained in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.
- 2.170 Lord Bracadale recommended that section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.<sup>189</sup> He was of the view that the offence was no longer needed to meet the aims it was intended to achieve when created, particularly as the offence of threatening or abusive behaviour in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 provided an alternative route to target such behaviour.<sup>190</sup>

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<sup>182</sup> Hate Crime and Public Order (Scotland) Act, s 1(1)(b).

<sup>183</sup> Hate Crime and Public Order (Scotland) Act, s 1(2).

<sup>184</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) pp 16 to 17.

<sup>185</sup> Hate Crime and Public Order (Scotland) Act, s 1(1)(a).

<sup>186</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 23.

<sup>187</sup> Hate Crime and Public Order (Scotland) Act, s 1(1)(a)(ii).

<sup>188</sup> Hate Crime and Public Order (Scotland) Act, s 3(1).

<sup>189</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 90.

<sup>190</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 89, para 7.23.

### *Part 3: Stirring up hatred offences*

- 2.171 Lord Bracadale recommended that stirring up of hatred offences should cover each of the protected characteristics, including any new protected characteristics.<sup>191</sup>
- 2.172 Part 3 of the Act creates offences of stirring up hatred against a group of persons based on the group being defined by reference to a listed characteristic. The offence of stirring up racial hatred under section 4(1) of the Act replaces the similar existing offences under sections 18 to 22 of the POA 1986. Section 4(2) of the Act creates new offences which apply in relation to the stirring up of hatred against a group defined by reference to age, disability, religion, (or, in the case of a social or cultural group, perceived religious affiliation), sexual orientation, transgender identity, and variations in sex characteristics.
- 2.173 Notably, the new offence of stirring up racial hatred under section 4(1) of the Act does not replicate the dwelling exception contained in section 18 of the POA 1986. Section 18(2) provides that “no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.”<sup>192</sup> The section 4(1) offence can therefore be committed inside a private dwelling, unlike the previous section 18 offence.
- 2.174 Lord Bracadale recommended that the threshold for the new stirring up hatred offences should be conduct that is “threatening or abusive”.<sup>193</sup> The Scottish Government agreed that this would “strike[] the right balance between conduct which ought to be criminalised and one’s right to freedom of expression, and represent[] a measure familiar to Scots law, which works well currently in practice.”<sup>194</sup> The Act adopts this threshold for the new stirring up hatred offences.<sup>195</sup> However, it retains the term “insulting” in relation to the offence of stirring up racial hatred.<sup>196</sup>
- 2.175 Lord Bracadale recommended that the stirring up racial hatred offences should retain the intention and likely to limbs of the existing stirring up offences in sections 18 to 22 of the POA 1986.<sup>197</sup> Section 4(1) of the Act maintains the two limbed approach in relation to the retained offence of stirring up racial hatred, however the new offences with respect to the other characteristics are limited to intention.<sup>198</sup>

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<sup>191</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 68.

<sup>192</sup> Public Order Act 1986, s 18(2).

<sup>193</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 68.

<sup>194</sup> Hate Crime and Public Order (Scotland) Bill Policy Memorandum (2020) p 38.

<sup>195</sup> Hate Crime and Public Order (Scotland) Act, s 4(2).

<sup>196</sup> Hate Crime and Public Order (Scotland) Act, s 4(1)(a).

<sup>197</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 68.

<sup>198</sup> Hate Crime and Public Order (Scotland) Act, s 4(2)(b).

#### Part 4: Protected characteristics

2.176 Part 4 defines the characteristics that are listed in sections 1(2), 4(3) and 9(a).<sup>199</sup>

2.177 Lord Bracadale recommended that there should be a new statutory aggravation based on gender hostility.<sup>200</sup> Although gender was not included in the aggravation of offences by prejudice regime, Part 4 provides a power for the Scottish Ministers to make regulations adding the characteristic of sex to any of these lists of characteristics.<sup>201</sup> The Working Group on Misogyny and Criminal Justice in Scotland has been set up independently to consider how the Scottish criminal justice system deals with misogyny, and whether a statutory aggravation and/or a stirring up of hatred offence in relation to the characteristic of sex should be added to the Act by regulation.<sup>202</sup>

2.178 Under section 2(8)(a) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, “transgender identity” was 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”. Under section 11(7) of the Act “transgender identity” is redefined as follows:

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, and references to transgender identity are to be construed accordingly.

2.179 The category of “variations in sex characteristics” that was previously contained within the transgender identity definition as “intersexuality” is now separated listed and defined 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, and references to variations in sex characteristics are to be construed accordingly.<sup>203</sup>

2.180 Lord Bracadale recommended that there should be a new statutory aggravation based on age hostility.<sup>204</sup> He was of the view that there is sufficient evidence of hostility-based offences against the elderly to include age as a protected characteristic.<sup>205</sup> The Scottish Government agreed with Lord Bracadale and age was added as a listed

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<sup>199</sup> Hate Crime and Public Order (Scotland) Act, s 11.

<sup>200</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 43.

<sup>201</sup> Hate Crime and Public Order (Scotland) Act, s 12.

<sup>202</sup> See *Misogyny and Criminal Justice in Scotland Working Group*, available at <https://www.gov.scot/groups/misogyny-and-criminal-justice-in-scotland-working-group/>.

<sup>203</sup> Hate Crime and Public Order (Scotland) Act, s 11(8).

<sup>204</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 49.

<sup>205</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 48, para 4.66.

characteristic under the aggravation of offences by prejudice regime.<sup>206</sup> The Scottish Government also created a new offence of stirring up hatred against a group defined by reference to age.<sup>207</sup>

### *Freedom of expression provision*

2.181 Lord Bracadale recommended that “[a] protection of freedom of expression provision similar to that in sections 29J and 29JA of the Public Order Act 1986 and section 7 of Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 should be included in any new legislation.”<sup>208</sup>

2.182 The Bill as introduced sought to provide additional protection for freedom of expression in relation to religion and sexual orientation (sexual conduct and practices).<sup>209</sup> At Stage 2, Humza Yousaf, Scotland’s Justice Minister, tabled an amendment to the Bill, which was never moved.<sup>210</sup> The amendment would have protected “discussion or criticism of matters relating to transgender identity”. At the Stage 2 Committee session, held on 2 February 2021, all parties agreed to bring forward a Freedom of Expression clause that covers all protected characteristics, except race. Mr Yousaf tabled another amendment to the Bill at Stage 3, which took the form of a broad freedom of expression clause that covers all protected characteristics, except race.<sup>211</sup>

2.183 Part 3 of the Act contains the freedom of expression clause tabled at Stage 3:<sup>212</sup>

#### 9. Protection of freedom of expression

For the purposes of section 4(2), behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—

(a) discussion or criticism of matters relating to—

- (i) age,
- (ii) disability,
- (iii) sexual orientation,

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<sup>206</sup> Hate Crime and Public Order (Scotland) Act, s 1(2).

<sup>207</sup> Hate Crime and Public Order (Scotland) Act, s 4(2).

<sup>208</sup> Lord Bracadale, Independent review of hate crime legislation in Scotland: final report (May 2018) p 68.

<sup>209</sup> Hate Crime and Public Order (Scotland) Bill, ss 11 and 12. Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf>.

<sup>210</sup> Hate Crime and Public Order (Scotland) Bill, Marshalled List of Amendments for Stage 2, s 82. Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/stage-2/second-marshalled-list-of-amendments-at-stage-2.pdf>.

<sup>211</sup> Hate Crime and Public Order (Scotland) Bill, Marshalled List of Amendments for Stage 3, s 11. Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/stage-3/marshalled-list-of-amendments-at-stage-3.pdf>.

<sup>212</sup> Hate Crime and Public Order (Scotland) Act, s 9.

- (iv) transgender identity,
  - (v) variations in sex characteristics,
- (b) discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards—
- (i) religion, whether religions generally or a particular religion,
  - (ii) religious beliefs or practices, whether religious beliefs or practices generally or a particular religious belief or practice,
  - (iii) the position of not holding religious beliefs, whether religious beliefs generally or a particular religious belief,
- (c) proselytising, or
- (d) urging of persons to cease practising their religions.

## Northern Ireland

- 2.184 The current legislative regime in Northern Ireland is similar to that in England and Wales. However, 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.
- 2.185 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<sup>213</sup> 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.<sup>214</sup> The protected characteristics are race, religion, disability and sexual orientation.
- 2.186 Northern Ireland also 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. The scope of the stirring up offences in Northern Ireland is however broader because they include disability as well as race, religion and sexual orientation.<sup>215</sup> 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.<sup>216</sup>
- 2.187 In June 2019, the Northern Ireland Department of Justice announced an independent review of hate crime legislation, to be carried out by Deputy County Court Judge

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<sup>213</sup> Sections 2(3)(a)(i) to (iv).

<sup>214</sup> Sections 2(3)(b)(i) to (iv).

<sup>215</sup> Section 8 Public Order (Northern Ireland) Act 1987 as amended by the Criminal Justice (Northern Ireland) Order 2004, s 3.

<sup>216</sup> Section 9 Public Order (Northern Ireland) Act 1987.



Desmond Marrinan.<sup>217</sup> We outlined the aims of the review in the consultation paper at paragraph 2.68.

2.188 The completed review was presented to Justice Minister Naomi Long on 30 November 2020.<sup>218</sup> The final report contains 34 recommendations relating to issues such as: the range of protected characteristics; an aggravated offence model for prosecutions; the use of stirring up offences; opportunities for restorative justice; support for victims; and online hate speech. Some of the notable aspects of these recommendations are set out below.

### *Aggravation of offences*

2.189 Judge Marrinan recommended that statutory aggravations should be added to all existing offences in Northern Ireland and that this should become the core method of prosecuting hate crimes in Northern Ireland.<sup>219</sup> This follows the model adopted in Scotland and would mean that any criminal offence could be charged in its aggravated form (although without a higher maximum penalty as is the case for aggravated offences in England & Wales).

2.190 Accordingly, if this model were adopted, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary. Judge Marrinan therefore recommended that those provisions should be repealed and replaced by consolidated hate crime provisions.<sup>220</sup>

2.191 Judge Marrinan was content to retain the current language of “hostility” but acknowledged that the introduction of a wider range of attitudes such as “bias, prejudice, bigotry and contempt” might prove beneficial.<sup>221</sup>

2.192 Judge Marrinan recommended that a variation of the “by reason of” test (which we discuss in more detail in Chapter 9) should be added as a third threshold to supplement the current thresholds of (a) demonstration of, and (b) motivation by hostility.<sup>222</sup>

### *Protected characteristics*

2.193 Judge Marrinan recommended that all current protected characteristics – race, religion, disability and sexual orientation – should continue to receive protection under

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<sup>217</sup> Review of Hate Crime Legislation launched (June 2019), available at <https://www.justice-ni.gov.uk/news/review-hate-crime-legislation-launched>.

<sup>218</sup> Long welcomes completion of review into hate crime legislation (November 2020), available at <https://www.justice-ni.gov.uk/news/long-welcomes-completion-review-hate-crime-legislation>.

<sup>219</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 2, p 10. Available at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf>.

<sup>220</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 3, p 10.

<sup>221</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 5, p 11.

<sup>222</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 6, p 11.



his proposed model.<sup>223</sup> Judge Marrinan further recommended that the characteristics of age, sex/gender (which would include transgender identity) and variations in sex characteristics should be protected.<sup>224</sup>

- 2.194 The report recommended that any future legislation should be framed in such a way as to allow any other protected characteristic to be added to the list of protected characteristics by statutory instrument if sufficient evidence emerges to show that such a group or groups are victims of hate crime or hate speech.<sup>225</sup>
- 2.195 Judge Marrinan recommended that any new legislation should provide appropriate recognition of circumstances where more than one characteristic is targeted.<sup>226</sup> This could be accommodated by including offences involving hostility to “one or more of the protected characteristics”.<sup>227</sup>
- 2.196 Judge Marrinan also recommended that there should be a new statutory aggravation for sectarian prejudice, as a separate additional characteristic, which should be monitored by the proposed Hate Crime Commissioner on an annual basis.<sup>228</sup>

### *Stirring up offences*

- 2.197 Judge Marrinan recommended stirring up hatred offences for all of the current and proposed protected characteristics<sup>229</sup> and that the dwelling defence in Article 9(3) be repealed and replaced by a specific defence for private conversations.<sup>230</sup>
- 2.198 Judge Marrinan also recommended that there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics.<sup>231</sup>

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<sup>223</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 9, p 19.

<sup>224</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 9, p 19.

<sup>225</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 10, p 19.

<sup>226</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 11, p 19.

<sup>227</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 7, p 12. The draft offence read: “Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this section...”.

<sup>228</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 13, p 22.

<sup>229</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 14, p 29.

<sup>230</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 14, p 29.

<sup>231</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 14, p 29.

2.199 Finally, all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions.<sup>232</sup>

### *Restorative justice*

2.200 Restorative justice is an alternative or supplement to the retributive model of sentencing, with a focus on repairing the harms caused by the offending.

2.201 Recommendations 16 to 22 of the Judge Marrinan's report related to the establishment of a new statutory scheme for restorative justice to deal with hate-motivated offending by adults, organised and delivered along lines similar to the Youth Justice Agency in Northern Ireland. The Recommendations detailed the funding, structure and operation of the scheme.<sup>233</sup>

### *Consolidation of laws into a single act*

2.202 Judge Marrinan recommended that all hate crime and hate speech law should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.<sup>234</sup> He also recommended that an office of a Hate Crime Commissioner for Northern Ireland should be established, or in the alternative, that there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner.<sup>235</sup>

## **Ireland**

2.203 Ireland has no aggravated offences or enhanced sentencing provisions, but it does have offences of stirring up hatred; the Prohibition of Incitement to Hatred Act 1989 ("the 1989 Act") creates three offences:

- (1) 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);<sup>236</sup>
- (2) broadcasts likely to stir up hatred;<sup>237</sup> and
- (3) preparation and possession of material with a view to its being distributed.<sup>238</sup>

2.204 There are some differences from the UK legislation described earlier in this Chapter. First, there is a single offence covering hatred on grounds of race, religion, sexual orientation and membership of the travelling community. Second, there is a single threshold (threatening, abusive or insulting written material, words, behaviour, visual

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<sup>232</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 14, p 29.

<sup>233</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendations 16 to 22, pp 34 to 35.

<sup>234</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 31, p 46.

<sup>235</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) Recommendation 33, p 47.

<sup>236</sup> Prohibition of Incitement to Hatred Act 1989 (Ire), s 2.

<sup>237</sup> Prohibition of Incitement to Hatred Act 1989 (Ire), s 3.

<sup>238</sup> Prohibition of Incitement to Hatred Act 1989 (Ire), s 4.

images or sounds) which applies to all characteristics. Third, with the exception of broadcasts, all forms of use and dissemination are consolidated in a single offence. Fourth, prosecutions require the consent of the Director of Public Prosecutions (rather than the Attorney General).

## Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020

2.205 The Irish Government published a report, *Legislating for Hate Speech and Hate Crime in Ireland*, in 2020.<sup>239</sup> This report reached 10 conclusions, detailed below:

- (1) The Prohibition of Incitement to Hatred Act 1989 is not effective in dealing with incitement to hatred and should be replaced by a single piece of legislation to deal with both incitement to hatred and hate crime.
- (2) The characteristics protected by the new legislation should include all of those listed in the 1989 Act (race, religion, sexual orientation and membership of the travelling community), as well as gender, gender expression or identity, and disability.
- (3) The definition of “ethnicity” in the new legislation should explicitly include membership of the Travelling Community on the same footing as other ethnicities.
- (4) New offences of incitement to hatred are needed and should prohibit: (i) deliberately or recklessly inciting hatred against a person or group of people due to their association with a protected characteristic; and (ii) displaying or distributing material inciting hatred.
- (5) The new legislation should contain robust safeguards for freedom of expression, such as protections for reasonable and genuine contributions to literary, artistic, political, scientific or academic discourse, and fair and accurate reporting.
- (6) Thresholds for criminal incitement to hatred should be high, for example incitement to harm or unlawful discrimination. However, it should not be necessary to show that anyone was actually influenced by the incitement or persuaded to act upon it.
- (7) A company accused of displaying or distributing hateful material should be able to defend itself by showing that it has reasonable measures in place to prevent dissemination of this type of material in general, was complying with those measures at the time and was unaware and had no reason to suspect that this particular content was inciteful.
- (8) Threatening and abusive communications, criminal damage, harassment, assault and intimidation are all common forms of hate crime. Specific, aggravated forms of existing criminal offences should be included in the

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<sup>239</sup> *Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020*. Available at [http://www.justice.ie/en/JELR/Legislating\\_for\\_Hate\\_Speech\\_and\\_Hate\\_Crime\\_in\\_Ireland\\_Web.pdf/Files/Legislating\\_for\\_Hate\\_Speech\\_and\\_Hate\\_Crime\\_in\\_Ireland\\_Web.pdf](http://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf).

legislation to deal with these and ensure that such crimes are properly categorised and recorded.

- (9) Additional elements may be needed to help ensure that the new legislation is effective, such as allowing alternative verdicts for juries where the aggravating “hate” element is not proven, and including a general provision (for crimes that are not specific hate offences) to say that a judge will always consider whether hate should be an aggravating factor in sentencing, and where it is, that this factor will be on the record.
- (10) Not every hate incident is serious enough to be a crime – many incidents are better dealt with outside the criminal sphere and proper measures to ensure this happens will be needed. In the long term, prevention of such incidents is the most desirable outcome for all concerned. Success in this regard will depend almost entirely on non-criminal, education and awareness-based measures.<sup>240</sup>

### The Criminal Justice (Hate Crime) Bill 2021

2.206 The proposed Criminal Justice (Hate Crime) Bill 2021 is set to contain the new offences.<sup>241</sup>

#### *Head 2: Interpretation*

2.207 Head 2 defines words and terms used in the Bill:

- (1) The Bill defines “hatred” as “detestation, significant ill will or hostility, of a magnitude likely to lead to harm or unlawful discrimination against a person or group of people due to their association with a protected characteristic”. This is in contrast to hate crime laws in England and Wales, where neither hatred nor hostility are defined.
- (2) “Protected characteristic” is defined as “race; colour; nationality; religion, ethnic or national origin; sexual orientation; gender; or disability.”
- (3) “Ethnicity” is further defined to include membership of the Traveller community.
- (4) “Religion” is defined to include the absence of religious belief.
- (5) “Gender” is defined to include gender expression or identity.
- (6) “Disability” has the same meaning it has in the Equal Status Act 2000.<sup>242</sup>

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<sup>240</sup> Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020, p 38.

<sup>241</sup> Criminal Justice (Hate Crime) Bill 2021, available at [http://www.justice.ie/en/JELR/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf/Files/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf](http://www.justice.ie/en/JELR/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf/Files/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf).

<sup>242</sup> “Disability” is defined as (a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body; (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness; (c) the malfunction, malformation or disfigurement of a part of a person’s body; (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or; (e) a condition, disease or illness which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour: s 2(1), Equal Status Act 2000.

### *Head 3: Incitement to Hatred*

2.208 Paragraphs (1) and (3) create new offences of incitement to hatred, which will replace the offences in the 1989 Act. Paragraph (1) prohibits communicating with the public by any means, where the purpose of the communication is to incite hatred, or where the person is aware that there is a significant risk that the communication will incite hatred. The incitement can be against a person, or a group of people, but must be due to their association with a protected characteristic as defined in Head 2.

2.209 Paragraph (3) prohibits disseminating or distributing communications prohibited under paragraph (1) to the public or a section of the public. Paragraph 5(a) contains an exception to this offence; the publication or distribution of communications which consist solely of a reasonable and genuine contribution to certain fields such as literary, artistic or scientific discourse, or are necessary for lawful purposes such as the reporting or prosecution of an offence under the Bill.

2.210 Paragraph (5)(b) contains a defence which can be used where a body corporate is charged with a distribution offence under paragraph (3), if they can show that they have effective and reasonable measures in place to deal with this kind of material generally, were complying with their own measures at the time of the offence and did not know or have reason to suspect that the specific material concerned was inciteful. The defence does not apply where there is deliberate or reckless incitement by the company.

2.211 Paragraph (5)(c) contains a defence for an individual charged with a distribution offence, where they can show that they did not know, and had no reason to suspect, in all the circumstances, that the material was intended or likely to be inciteful. "All the circumstances" includes the manner in which they received the material, and the manner in which they distributed it.

2.212 Paragraph (9) requires the consent of the Director of Public Prosecutions for any prosecutions for incitement to hatred. This is intended to prevent vexatious, frivolous or malicious prosecutions.

### *Heads 4 to 6: Aggravated Offences*

2.213 Heads 4 to 6 essentially create a regime equivalent to the aggravated offences regime in England and Wales, discussed at paragraphs 2.7 to 2.48. In Ireland, it is proposed that aggravated forms of the following existing offences will be created:

- (1) assault;<sup>243</sup>
- (2) assault causing harm;<sup>244</sup>
- (3) causing serious harm;<sup>245</sup>

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<sup>243</sup> Non-Fatal Offences Against the Person Act 1997, s 2.

<sup>244</sup> Non-Fatal Offences Against the Person Act 1997, s 3.

<sup>245</sup> Non-Fatal Offences Against the Person Act 1997, s 4.

- (4) threats to kill or cause serious harm;<sup>246</sup>
- (5) coercion;<sup>247</sup>
- (6) harassment;<sup>248</sup>
- (7) endangerment;<sup>249</sup>
- (8) damaging property;<sup>250</sup>
- (9) threatening, abusive or insulting behaviour in a public place;<sup>251</sup>
- (10) distribution or display in a public place of material which is threatening, abusive, insulting or obscene;<sup>252</sup>
- (11) entering building, etc. with intent to commit an offence;<sup>253</sup>
- (12) assault with intent to cause bodily harm or commit an indictable offence;<sup>254</sup>

2.214 Like in England and Wales, these aggravated offences generally carry an increased penalty, compared to the base form of the offence. In each new offence, there is provision for an alternative verdict, whereby the jury can find the person guilty of the ordinary form of the offence, if they find that the “aggravation” aspect has not been proven.

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<sup>246</sup> Non-Fatal Offences Against the Person Act 1997, s 5.

<sup>247</sup> Non-Fatal Offences Against the Person Act 1997, s 9.

<sup>248</sup> Non-Fatal Offences Against the Person Act 1997, s 10.

<sup>249</sup> Non-Fatal Offences Against the Person Act 1997, s 13.

<sup>250</sup> Criminal Damage Act 1991, s 2.

<sup>251</sup> Criminal Justice (Public Order) Act 1994, s 6.

<sup>252</sup> Criminal Justice (Public Order) Act 1994, s 7.

<sup>253</sup> Criminal Justice (Public Order) Act 1994, s 11.

<sup>254</sup> Criminal Justice (Public Order) Act 1994, s 18.

# Chapter 3: Hate crime characteristic selection

## INTRODUCTION

- 3.1 There are currently five characteristics recognised in hate crime laws in England and Wales: race, religion, sexual orientation, disability and transgender identity. However, as we have already outlined in this report, these characteristics are not treated equally, which has been a source of criticism. There have also been calls to consider the addition of new groups or characteristics.
- 3.2 Our terms of reference ask us to review:
- the existing range of protected characteristics, identifying gaps in the scope of the protection currently offered and making recommendations to promote a consistent approach.
- 3.3 We considered these issue in Chapters 10 to 14 of our consultation paper.<sup>1</sup> In this Chapter we focus on the question we considered in Chapter 10 of that paper: the basis on which any new characteristics for hate crime laws should be selected.
- 3.4 In the following four chapters we consider the existing five characteristics, and how they should be defined (Chapter 4), and then we move on to consider the case for and against the inclusion of the characteristics of sex or gender (Chapter 5), age (Chapter 6), and the four other groups that we considered for inclusion in our consultation paper: people experiencing homelessness, sex workers, alternative subcultures and non-religious philosophical beliefs (Chapter 7).

## THE BASIS ON WHICH CHARACTERISTICS SHOULD BE SELECTED

- 3.5 In Chapter 3 of our consultation paper we considered some of the underpinning rationales for the existence of hate crime laws. We noted that the *additional harm* caused to victims and the wider community by hate crimes was the primary justification for their specification in law, and the increased penalty these offences entailed.
- 3.6 In Chapter 10 of our consultation paper we surveyed some of the academic literature that has considered the basis on which characteristics might be selected for inclusion in hate crime laws. We also looked at the approaches adopted in comparable jurisdictions in the United Kingdom, North America, Australia and New Zealand.
- 3.7 We outlined a number of different approaches that have been proposed for deciding whether a group should be added. In summary these were:
- A fairly **open approach**, including almost any group with common characteristics capable of recognition. We noted that there were some advantages to the

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<sup>1</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf>.

flexibility entailed by this approach, but also expressed concern about the lack of focus on the most prevalent forms of hate crime, and that in some jurisdictions it has led to the recognition of socially damaging characteristics such as paedophilia.

- **Leaving courts and juries a wide discretion** to decide whether to recognise a characteristic. We considered this to create a high risk of inconsistency in practice, and not necessarily to be an appropriate role for jurors.
- Asking whether a characteristic is “**immutable**” or not. We considered this to be a relevant consideration, but not necessarily determinative. We considered the “immutability” of a characteristic to be particularly relevant to the question of whether additional harm is caused to victims of hate crime on the basis of that characteristic.
- Asking whether a characteristic is one which is **central to personal identity**, such that an attack upon it might be considered particularly harmful. While a useful consideration, we noted that whether a characteristic was central to personal identity was not easy to assess and may vary significantly between different people and contexts.
- Asking whether the proposed group is from a **minority or is disadvantaged** in society. We considered this to be a potentially useful indicator insofar as it was linked to the overarching question of the “additional harm” hate crime causes to victims and the wider community.
- Asking whether the proposed group is **vulnerable to violence and abuse because of their perceived difference**. We noted that the term “vulnerable” has been criticised by disabled victims. We also queried whether such an approach might still be too broad.
- Asking whether the proposed group is “**deserving**” of protection in the sense that they are not a cause of harm to others. We considered this to be a potentially useful check on the limits of recognition, but not particularly helpful in deciding which groups should be included.
- Adopting an approach that mirrors the legal recognition of characteristics under the **Equality Act 2010**. Here we noted that while there are some important parallels, the civil anti-discrimination legal context could not be directly transposed into the criminal sphere.
- Adopting a **minimal criminalisation approach** that would only extend protection based on a demonstrable need for such additional laws. We considered this to be an important component of any assessment criteria.

### The continued specification of characteristics

- 3.8 One of the first issues we considered was whether laws should specify characteristics at all or adopt a more open approach.



- 3.9 A small number of jurisdictions use this open approach. For example, laws in the state of Victoria in Australia simply specify “a group of people with common characteristics”,<sup>2</sup> and the Northern Territory of Australia refers to “hate against a group of people”.<sup>3</sup>
- 3.10 Open approaches such as these have the advantage of flexibility, and the ability to respond to less well-recognised forms of hatred. They also avoid criticism that the law unfairly singles out certain characteristics for protection over others.
- 3.11 However, this approach also risks diluting the impact of laws in addressing the most serious and widespread forms of prejudice and hostility; for example, racism. It also risks opening up protection to groups or characteristics that may be considered socially damaging; for example, paedophilia.<sup>4</sup>
- 3.12 In our consultation paper we provisionally proposed that the hate crime laws in England and Wales should continue to specify certain characteristics because this:
- recognises that certain groups in society experience more severe harms as a result of being targeted for criminal behaviour – for example, racial minorities;
  - makes the law more certain and comprehensible; and
  - reduces the risk of perverse outcomes in the recognition of socially damaging groups.
- 3.13 We also noted that the approach of characteristic specification was the more widely adopted approach in hate crime laws internationally and was also the approach taken in comparable discrimination laws; notably the Equality Act 2010.

## Consultation

- 3.14 We put this issue to consultees as follows:

### Consultation Question 2

We provisionally propose that the law should continue to specify protected characteristics for the purposes of hate crime laws.

Do consultees agree?

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<sup>2</sup> Sentencing Act 1991 (Vic), s 5(2).

<sup>3</sup> Sentencing Act 1995 (NT), s 6A(e)

<sup>4</sup> As we note in our consultation paper, in two cases in the state of New South Wales, the open approach in that state has led to the recognition of “paedophiles”. These were the cases of *R v Robinson* [2004] NSWSC 465 (Supreme Court of NSW) and *Dunn v The Queen* [2007] NSWCCA 312 (Court of Criminal Appeal of NSW). See further Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 181.

- 3.15 A majority of organisational stakeholders responded positively,<sup>5</sup> while a smaller number responded negatively.<sup>6</sup>
- 3.16 Of those consultees who responded positively to the question, a significant number did so on the basis that specifying protected characteristics enables the criminal law to recognise the additional harm suffered by the victim and the group to which they belong.
- 3.17 For example, the Crown Prosecution Service stated that:

Specifying protected characteristics enables the criminal law to recognise those groups who are victimised because of who they are, and who suffer the additional harm which hate crime causes not only to individuals but to whole communities. Specifying protected characteristics also enables the criminal law to provide additional protection to those groups through the mechanism of aggravated offences and enhanced sentencing.

- 3.18 The Association of Police and Crime Commissioners (“APCC”) stated:

We believe that hate crime legislation should continue to specify the characteristics it protects, in order to recognise that certain groups in society experience more severe harms as a result of being targeted for criminal behaviour.<sup>7</sup>

- 3.19 The Government’s Independent Advisory Group on Hate Crime noted that:

The range of those characteristics needs to be finite to recognise where resources need to be prioritised.

- 3.20 Professor Mark Walters wrote:

This is central to the workability and symbolic value of hate crime legislation. Specifying protected characteristics recognises that certain group identities are targeted disproportionately and impacted distinctly, and that this requires the special protection of the law.<sup>8</sup>

- 3.21 Several consultees who responded positively to the question expressed concern that if the law did not specify protected characteristics, hate crime laws would extend to all characteristics, which could have unintended consequences. For example, English PEN stated:

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<sup>5</sup> Including the Bar Council, the Crown Prosecution Service, Index on Censorship, Victim Support, British Transport Police, The Jo Cox Foundation, Stonewall, TransActual UK, Antisemitism Policy Trust, the Welsh Government, the Law Society, the Magistrates Association, the National Police Chiefs’ Council, the Equality and Human Rights Commission, Equally Ours, English PEN and The London Mayor’s Office for Policing and Crime (“MOPAC”).

<sup>6</sup> Including Christian Concern, Lovewise, Families Need Fathers Ltd, Gender Parity UK, Civitas and Men and Women Working Together.

<sup>7</sup> Association of Police and Crime Commissioners (APCC).

<sup>8</sup> Professor Mark Walters.

We support the Law Commission's recommendation that the law continues to specify "protected characteristics". The alternative, where any trait could be deemed by the police or a court to trigger hate crime/speech prosecutions, would increase uncertainty and therefore the "chill" on free speech.

3.22 Of those opposed to our proposal, a significant number indicated that they did so because they were opposed to hate crime laws in general.

3.23 The Free Speech Union stated:

We do not see it as the function of the criminal law to punish people, or punish them more severely, on account of the specific opinions they hold – however repellent.

3.24 They also argued that such laws were socially divisive:

In our view, the continued reference in hate crime laws to specific groups designated by a particular characteristic encourages an undesirable tendency for members of those groups to see their identity as tied up with their membership of those groups, rather than to view themselves as individuals who happen to fit a particular description. This we see as socially divisive.

3.25 Some members of the public were of the view that all offences should be treated equally, and that offences should not be considered more serious because they were motivated by or the offender demonstrated hostility towards a protected characteristic. For example, a member of the public said:

A crime is a crime - it shouldn't make any difference if its motivated by homophobia, racism or whatever. The seriousness of the actual crime should be the issue.

3.26 A related concern was that the specification of characteristics offended the principle of equality before the law.

3.27 Families Need Fathers Ltd stated:

The concept of protected characteristics is an assault on the fundamental principle of equality under the law; if we abandon this principle as the manner in which every citizen interacts with the law, then we will divide society further...

3.28 Civitas argued that:

Hate crime legislation ends equality before the law. Rather than treating people equally, irrespective of race, sex or sexuality, it does the exact opposite and insists that these characteristics of a person's identity are made central to any legal dispute by acting as the basis for determining whether a crime has or has not been committed. Comparable crimes are no longer treated similarly based on the objective facts surrounding the offence, but are instead treated differently depending upon the identity of the victim.

3.29 Civitas went on to say that:

Equality is redefined as an equality of victimhood (for some) when the law comes to relate to vast swathes of the population as citizens in need of protection. This

fundamentally alters the role of the law from neutral arbiter to an active and explicitly biased participant in disputes.

3.30 Consultees who responded negatively to this proposal expressed the view that hate crime laws interfere unduly with freedom of speech and impede debate on contentious issues. One member of the public stated:

To place any one demographic of people above any other in the eyes of the law not only stifles debate on specific issues but seeks to silence criticism and opposing views of both private citizens and organised opposition. For example, there is currently a dispute between feminist and transgender supporters as to what constitutes a 'real' woman, with accusations of bigotry and oppression being levelled by varied factions. This should always be unacceptable in any open, free society.

3.31 Other concerns included:

- (1) The list could be subject to political manipulation.
- (2) The list is potentially endless.
- (3) Only immutable characteristics should be included in any protected class.
- (4) Hate crime laws are subjective and can be easily abused.

3.32 A much smaller group opposed our proposal because they were more actively supportive of an open approach, without specification.

3.33 Protection Approaches suggested that rather than replace or remove the protected characteristics, "the list of protected characteristics should be expanded, and a 'residual' or generic category be created." Protection Approaches argued that "the creation of an additional 'residual category' would help catch cases that are motivated by 'hostility or prejudice' but that do not fit into protected characteristics." They suggested that this would accommodate technological advances and "safeguard the victims of new and emerging hate-based harms...".

3.34 Labour Women's Declaration Working Group suggested that instead of specifying protected characteristics, the crime could be aggravated when an individual or group is targeted "as being in some way 'different from', and in their view 'worth less' than the perpetrator of the crime".

#### Conclusion following consultation

3.35 We recognise that many individual consultees and some organisations do not agree with the continued use of hate crime laws. However, the abolition of hate crime laws is neither contemplated by nor within the scope of this review.

3.36 On the assumption that hate crime laws are to continue, we consider the continued specification of characteristics to be essential to provide sufficient clarity and ensure they operate within clearly defined limits. It also recognises that certain groups in society are particularly exposed to hostile criminal targeting, and experience distinct, additional forms of harm as a result.

- 3.37 We note that similar specification is also fundamental to the operation of anti-discrimination laws set out in the Equality Act 2010.<sup>9</sup> These laws reflect the view that certain forms of characteristic-based discrimination are particularly prevalent and damaging, and provide specific legal remedies for this.
- 3.38 Without clear specification, we are concerned that the predictability and certainty of application of hate crime laws would be significantly reduced. There may also be adverse consequences, such as the protection of groups whose actions are harmful to others – such as extremist organisations or sex offenders.
- 3.39 A significant majority of stakeholders who were not fundamentally opposed to hate crime laws supported the retention of the specification approach.

### Criteria to guide selection of characteristics

- 3.40 On the assumption that the law would continue to specify characteristics for protection, in our consultation paper we then considered what criteria might guide the selection of these characteristics.
- 3.41 Following consideration of the various approaches outlined at paragraph 3.7, we provisionally concluded that no single criterion should be determinative, and that a range of considerations were relevant.
- 3.42 As a starting point, we considered that respect for the principle of minimal criminalisation required a solid evidence base of criminal targeting based on hostility or prejudice toward a particular characteristic. That is, a hate crime characteristic should not be created “just in case” – there should be a clearly demonstrable need that justifies the additional criminalisation this would entail. We described this as the “demonstrable need” criterion, which would assess the prevalence and intensity of hostility or prejudice-based crime towards a particular characteristic group.
- 3.43 We then considered the fundamental rationales for the existence of hate crime laws and noted that these were primarily connected to the additional harm that hate crimes cause: to individual victims, other members of the victimised group, and to the community more widely. We therefore determined that evidence of “additional harm” caused by offending against a characteristic group was a second relevant criterion. Further factors such as the immutability of the characteristic, its centrality to personal identity, and whether or not the criminal targeting of the group further compounded existing disadvantage or marginalisation, might be relevant to assessing the extent of this additional harm.
- 3.44 Finally, we noted that in addition to these more theoretical considerations, there were practical concerns that required consideration. We described this assessment as a “suitability” criterion. This criterion would consider whether the particular legal response of hate crime laws was the right way to respond to the offending against the characteristic group. Some of the issues that might relevantly be considered under this criterion included whether the offending was already being addressed in some

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<sup>9</sup> Our terms of reference specifically ask us to consider “the implications of any recommendations for other areas of law including the Equality Act 2010.”

other way, and whether there could be unintended negative consequences of treating the offending as a hate crime.

3.45 In summary then, we provisionally proposed the following three criteria as the basis for deciding on inclusion of any further groups or characteristics:

- (1) **Demonstrable need:** evidence of the prevalence of the criminal targeting of the characteristic group based on prejudice or hostility. We identified three components of this need:
  - (a) Absolute prevalence: the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.
  - (b) 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.
  - (c) Severity: the nature and degree of the criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.
- (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.

### Consultation responses

3.46 We asked consultees to comment on our proposed criteria in Consultation Question 3 and Summary Question 1 of our consultation paper:

#### Consultation Question 3 / Summary Question 1

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.

Do consultees agree?

3.47 A majority of responses disagreed with the proposed criteria – notably personal responses.

3.48 A significant majority of organisational stakeholders were in favour of the criteria.

3.49 The Law Society stated:

We agree with the suggested criteria. As noted above, we have concerns that the criminal law is overcomplicated and can be made difficult to understand when criminal offences are used as a means to solve societal problems, but where use of the criminal law is not an appropriate tool. Clear and practical criteria will surely help to prevent this.

3.50 Index on Censorship also agreed with the proposed criteria:

Index on Censorship agrees with the three criteria proposed by the Law Commission for determining whether a characteristic ought to be included in hate crime laws. Placing disadvantage at the centre of any discussion is appropriate as it pinpoints the source of concern in the context of society, more generally, and ensures that the focus is only on those that are actually hindered from existing and participating in society on an equal basis. Looking, briefly, at each in turn:

Demonstrable Need:

Index on Censorship approves of the minimal criminalisation approach adopted by the Law Commission and agrees that characteristics should only be protected where there is evidence that a protected group is experiencing targeting in a significant way.

Additional Harm:

One of the core rationales behind the introduction of hate crime laws is that such crimes cause additional harm to the individual, to others that share that characteristic and to society generally. As such, these crimes must be punished more severely than equivalent crimes that do not involve these further levels of harm. As such, we support the inclusion of additional harm as a criteria.

Suitability:

If protection of a characteristic would not fit logically into the hate crime offences and sentencing framework, represent an efficient use of resources, be consistent with the rights of others or, crucially, would prove unworkable in practice, Index on Censorship agrees that it ought not to be included on the list of protected characteristics. Indeed, we consider these criteria to be a vital common-sense barrier to the over-inclusion of new protected characteristics that may diminish the symbolic power of hate crime and cause a chilling effect on freedom of expression.

3.51 However, Index on Censorship also advocated for a fourth criterion of “immutability”, as they were concerned that “defining a protected characteristic only by the context and scale of the negative reaction against it is overly simplistic.”

- 3.52 In doing so, Index noted the concerns that have been expressed that the characteristic of religion would not be consistent with an immutability criterion, but argued that in many cases it was not accurate to consider religion as a characteristic that could easily be changed:

Although personal religious beliefs may change, there can be significant community-based barriers to this. In order to understand religion as a protected characteristic, we need to appreciate the complex links between religion and culture that mean religious and cultural connections may persist, notwithstanding personal changes in beliefs.

- 3.53 The Office of Police and Crime Commissioner Hampshire stated:

The suggested criteria will mean any further characteristic(s) are all assessed against the same benchmark. This will ensure fairness in the decision-making process about adding any further characteristic(s) in the future.

- 3.54 Community Security Trust stated:

The criteria outlined above are sensible. In particular ‘additional harms’ is important – the experience of antisemitic hate crime having a wider communal (and societal) impact than the specific victim is key.

- 3.55 Dr Hannah Bows, an academic specialising in elder abuse and age-related crime, stated:

These criteria provide a clear basis for assessing [whether] particular groups should be included within the hate-crime framework – they are rooted in a need which must be evidenced based as well as broader considerations about whether the issues of concern fit within the remit of hate crimes.

- 3.56 Professor Mark Walters agreed with the criteria but suggested that under the “demonstrable need” criterion, it should be clarified that “group” “refers to a group of people who share an identity characteristic”. Professor Walters was of the view that “the legislature should ask: is there a shared characteristic amongst individuals that gives rise to a sense of collective identity?”:

Collective identity is central to defining hate crime. Research (particularly that conducted as part of the Sussex Hate Crime Project) has shown that the distinct harms caused by hate crime are intrinsically linked to individual's ‘group’ identity. Hate crimes result in both individual victims and other group members feeling ‘threatened’ because of their group characteristics are perceived to be under attack, that in turn predicts certain emotional responses (anger, anxiety, shame), which then predict certain behaviours (e.g. avoiding leaving one's home). These harms are distinct to hate-based offending based on the fact that offences are targeted at individuals because of their group identity.

By framing this question in relation to group identity characteristics, legislatures ensure that they protect only those characteristics in law, which if attacked, cause these ‘distinct’ types of harms.



This understanding also then frames the evidence that can be offered to show whether criterion 2 has been met.

- 3.57 A large number of consultees who responded negatively misunderstood that for hate crime laws to operate there must be an existing criminal offence. For example, a member of the public wrote:

An actual crime should be committed, just because somebody 'feels' they are a victim does not make it so and is a waste of resources, not to mention the concept of policing one's thoughts being a little worrying.

- 3.58 As we noted in the introduction to this report, there is a common misconception that hate crime laws take effect based on the perception of the victim. While it is true that decisions of the police to record a "hate crime" or "hate incident" for statistical and monitoring purposes are based on what the victim perceives, the prosecution of hate crime is different. For a hate crime to be recognised in law, a court must be persuaded to the criminal standard that the defendant has committed a criminal act that was motivated by, or demonstrated, hostility towards a protected characteristic.

- 3.59 Consistent with answers to Consultation Question 2, several personal responses were opposed to specifying protected characteristics for the purposes of hate crime laws because it prevents the law from applying equally to every individual. Comments to this effect included:

All should be equal before the law. There should be no hierarchy of (perceived) victimhood.

All victims of crime should have protection and enforcement regardless of the motive of the offender. The proposal creates a special victim group, which is unfair to those who do not fit into that group.

- 3.60 A number of consultees viewed the criteria as being too flexible.

- 3.61 The Evangelical Alliance stated:

We are concerned that these criteria are flexible and could lead to new or redefined characteristics being enshrined in legislation that would not be required in the future. An objective test of characteristic would be more appropriate.

- 3.62 Similarly, a member of the public wrote "[t]his definition is too broad and could encompass too many social categories, for example: Members of the Conservative party, Men, White men, old people etc."

- 3.63 Other arguments from those opposed to the proposal included;

- (1) Hate crime laws are an attack on freedom of speech.
- (2) Hate crime laws should be abolished.
- (3) No further characteristics should be added.
- (4) There is an ever-growing list of groups.

3.64 A number of consultees who responded neither yes nor no but rather “other”, expressed concern with the inclusion of a measurement of absolute prevalence within the “demonstrable need” criterion. They raised the concern that the criterion may fail to capture marginalised and minority groups, who are less likely to report their experiences of hate crime and may subsequently fail to meet the evidential requirement.

3.65 Stonewall stated:

When deciding whether a protected characteristic should be adopted in hate crime law, evidence-based policy is key, and Stonewall recognise the importance of a minimal criminalisation approach. At the same time, given that this model relies heavily on evidence of criminal targeting of a group and its resulting impact, it is crucial to note that many marginalised groups’ experiences are under-researched and unrepresented – particularly as many members of marginalised groups may not report their experiences of hate crime and discrimination to the police. As a result, in some cases it may be more difficult to obtain evidence that meets the criteria put forward by the Commission, and so in these instances, we strongly recommend that the Commission undertakes targeted consultation and engagement with these communities to develop a stronger understanding of the hate they experience.

3.66 Although the Magistrates Association responded “yes”, it also expressed this concern:

we...are concerned with the inclusion of a measurement of absolute prevalence. If hostility is to a minority group, the number of incidences will by definition be low. There is also the additional challenge that some communities may be less disposed to report incidences, which could lead to prevalence seeming to be low. We therefore suggest that relative prevalence would be a more useful measure. We then agree it would be helpful to balance criteria so that low level offences that are more numerous proportionately would be measured on a similar level to more serious offences that are less numerous proportionately.

3.67 The Hate Crime Unit<sup>10</sup> suggested a new formulation of the “demonstrable need” criterion:

We would like to see the criteria to be amended to be read as following: (1) Demonstrable need: evidence that crime based on hostility or prejudice towards this group is disproportionately prevalent in this group. The reason we suggest this amendment is because we believe that it emphasises the fact that crimes based on hostility or prejudice targeting minority groups will be as adequately protected as larger groups.

3.68 Some consultees who responded “no” or “other” expressed concern with the use of the word “prejudice”. For example, a member of the public who responded “other” wrote:

While in general agreement, as far as I understand it, with the words ‘crime based on hostility’ I feel that the word ‘prejudice’ is too vague, and could be used to accuse

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<sup>10</sup> A London-based student-led project dedicated to addressing the pervasive problem of hate crime through sustainable social justice.

someone who does not hate, but has strong views, based on for example their philosophical convictions or their religious beliefs. Criminal targeting is one thing: respectful, lively disagreement and debate is another.

- 3.69 A few consultees who responded “other” expressed concern that groups may struggle to prove the second criterion, “additional harm”. Birmingham & Solihull Women’s Aid stated:

The additional harm test is slightly harder to prove for more insidious and systematic types of hate crime which most of the protected characteristics can be. Therefore, this test would need to be defined and explained further to clarify the extent to which and the type of evidence needed.

- 3.70 A number of the consultees who responded “other” expressed concern that the third criterion, “suitability”, may ultimately be a determination of whether the cost of protecting a group outweighs the evidence in favour of them gaining protection under hate crime laws.

- 3.71 The Office of the Police and Crime Commissioner for Northumbria stated:

We do not agree that the third criterion – suitability – is appropriate. Certain groups should not be protected only if they are an ‘efficient use of resources’ or fit in with the legislative agenda. History has shown us that it is often ineffective to try to afford legal protection to victims of crime by attempting to force current law and sentencing framework to fit when it naturally does not... It is very probable that many potential characteristics would not fit logically within broader offences and sentencing frameworks, but this should not act as a barrier to victims accessing legal recourse.

- 3.72 The Alan Turing Institute had similar concerns:

We are cautious about including ‘logical fit’ and ‘workable in practice’ as part of the criteria given that they could result in certain groups not being given the appropriate protections. Specifically, these aspects are (a) likely to be highly debated and contentious and may generate resentment from any groups not given protection due to ‘workability’; and (b) could easily be mis-evaluated and the size of the implementation challenge overstated. This also raises a further problem given that (c) the cost of protecting groups should not be the primary determinant of whether they are given protection under the law. We strongly advise that ‘suitability’ is only considered when (1) and (2) are less well-evidenced and there is a compelling trade-off in terms of cost.

- 3.73 A member of the public was particularly concerned with the incorporation of cost into the criteria:

Economics should not be the main factor for deciding and should not be disguised under a banner of efficiency. There are some hate crimes which are so prevalent that tackling them will be expensive such as racism or misogyny – however, they should be dealt with all the same as doing so will create a much more equal society.

- 3.74 A few consultees who responded “other” were of the view that the third criterion, “suitability”, was too subjective.

3.75 Tyne and Wear Chapter of Citizens UK stated:

Of the proposed criteria, 'Demonstrable need' and 'Additional harm' seem to be useful. 'Suitability' we have less confidence in, as it is more subjective...It feels as though a rather more robust approach is required – less subjective and better supported by evidence.

3.76 The Office of the Police and Crime Commissioner for Northumbria argued that:

The criteria of suitability could be interpreted very subjectively and could mirror political, economic and social developments which may be dangerous to particularly groups of individuals...

3.77 A number of consultees who responded "yes" to the question were of the view that there must be a clear process to review the criteria at regular intervals, to ensure that they remain relevant.

3.78 Humanists UK agreed with the criteria but suggested that a fourth criterion be added:

There should be an additional criterion stating that a characteristic should be included if to do otherwise would be out of line with the legal requirements under the Human Rights Act 1998, which enshrines the ECHR into UK law. As part of this there would clearly need to be consideration of other international standards on combating hate crime, including the Rabat Plan of Action on Prohibition of Incitement. Such an approach would ensure that there is parity between the UK's hate crime legislation and both its national and international human rights frameworks.

### **Conclusion following consultation**

3.79 There were a significant number of personal respondents who were opposed to hate crime laws altogether, as well as to their expansion. This has fortified our view that clear and convincing evidence should be required before expanding the list of characteristics beyond those currently specified. However, given that we have been asked to consider the possibility of including any further characteristics, it is necessary to set out a basis on which to evaluate this question.

3.80 In reaching our conclusions on the criteria for characteristic selection, we have therefore focused on the responses that expressed views that directly addressed this question. Though there was not unanimous agreement amongst this subset of consultees, there was sufficient support for the criteria we proposed for us to conclude that we should use them when considering the addition of any further characteristics in this review. These criteria have therefore shaped the analysis we have undertaken in subsequent chapters.

3.81 In relation to the demonstrable need criterion, we recognise the concerns expressed by Stonewall and the Magistrates Association about the risk of a disproportionate emphasis on "absolute prevalence" of targeting, which might exclude smaller minority groups. However, as set out at paragraph 3.45, the demonstrable need criterion considers this question in addition to the question of relative prevalence and the severity of the crime experienced by the group. In this way we aim for the criterion to try to factor in potentially smaller, and more intensely targeted groups. Indeed, several

of the groups we have specifically considered – sex workers, alternative subcultures and people experiencing homelessness – are groups which make up a comparatively small proportion of the UK population.

- 3.82 At the same time, we consider that absolute prevalence is a relevant factor to which we should have regard, as there may be some groups that are so small that inclusion in hate crime laws, and the associated policy response this entails, is not justified. In smaller, rarer cases, it may be more appropriate to allow for courts to deal with individual instances on a case-by-case basis, having regard to wider sentencing principles, and drawing parallels with recognised categories of hate crime as appropriate.<sup>11</sup>
- 3.83 As outlined at paragraphs 3.50 to 3.52, Index on Censorship argued in favour of a distinct criterion of immutability and Professor Mark Walters (paragraph 3.56) argued that the additional harm criterion should focus on the harm which is associated with a shared sense of collective identity. However, while we consider both of these factors highly relevant to the question of whether the targeting causes additional harm, we do not think they should be distinct, determinative criteria in their own right.
- 3.84 In the case of immutability, we consider that the characteristic of religion illustrates the limitation of applying this criterion strictly, or wholly in the abstract. While it is theoretically possible for a person to change or abandon their religion in a society such as England and Wales – and many choose to do so – for many others such a course would be unimaginable. This may be because their faith is inextricably interwoven with their understanding and perception of the world, or because of a strong familial or cultural affinity they have with their religion. The reason that religion is protected in equality laws and hate crime laws is not because it is utterly impossible for a person to change their religion, but rather because society considers that it would be unreasonable and oppressive to expect someone to do so.
- 3.85 We agree with Walters that a “shared sense of collective identity” is usually a key factor in the additional harm that may be caused to a group through hate crime targeting. However, “collective identity” is a particularly difficult concept to assess objectively. For some groups, members may only experience a sense of identity within that group in very specific circumstances – such as when a member is discriminated against or abused. For example, evidence provided by Crisis indicates that homeless victims of targeted crime may only strongly manifest an identity of being “homeless” when targeted or abused as such. Being homeless may not be something the person ordinarily sees as central to their personhood, but in the moment of the abuse and thereafter they are made acutely conscious of their status, made to feel lesser or even dehumanised, and suffer additionally because of it. Other homeless individuals may also feel fearful and vulnerable as a result of such abuse and attacks, while society more widely is damaged by the abuse of an already marginalised group.
- 3.86 We also recognise concerns expressed by Tyne and Wear Chapter of Citizens UK and others about the breadth of the “suitability” criterion, and the idea that cost might be used as an excuse to deny protection to a group that is otherwise in need of it.

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<sup>11</sup> See for example the case of Sophie Lancaster that we discuss in more detail in our consultation paper: Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 13.

- 3.87 The primary concern of this criterion is to recognise that the legal model of hate crime laws may not be able to cater to all circumstances. The suitability criterion considers whether the practical application of the law in the context of the particular group or characteristic would be effective, and also whether there might be unintended, negative consequences.
- 3.88 For example, in Chapter 5 we consider whether a sex or gender hate crime characteristic – which would require additional proof of hostility on this basis – is well-suited to the complexities of violence against women and girls, and the contexts of sexual violence and domestic abuse in particular. We do not doubt that there is a significant problem to be addressed, but are persuaded that hate crime is not the right approach.
- 3.89 Cost may also be a relevant consideration where the recognition of a characteristic is expensive, and the issue might be better resolved in another, more cost-effective way. It has not emerged as a primary consideration in the characteristics we are considering, but it is a relevant factor in the policy development process.
- 3.90 The suitability criterion is designed principally as a common-sense check, to avoid unintended and negative consequences. It is necessarily broad, but we have attempted to apply it as transparently as possible in subsequent chapters.
- 3.91 The criteria we have established are stringent and require a clear evidential basis. Indeed, following the application of these criteria in subsequent chapters, we conclude that no further characteristics should be added to hate crime laws at this time.
- 3.92 Given the considerable stakeholder input we have received in developing these criteria, we also suggest that government might choose to use them as a reference point in any future consideration of expanding the categories of hate crime protection.

### **Recommendation 1.**

3.93 We recommend that decisions to include, or not to include further groups in hate crime laws should be based on the following criteria:

- (1) **Demonstrable need:** evidence of the prevalence of the criminal targeting of the characteristic group based on prejudice or hostility. A balance of the following considerations should inform this determination of need:
  - (a) **Absolute prevalence:** the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.
  - (b) **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.
  - (c) **Severity:** the nature and degree of the criminal behaviour that is targeted towards the characteristic based on hostility or prejudice.
- (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.

## Chapter 4: Defining existing characteristics

### INTRODUCTION

- 4.1 In Chapter 11 of our consultation paper we considered the existing characteristics in hate crime laws. We noted the strong evidence base that supported their inclusion – particularly in relation to the prevalence of hate crimes against these characteristics. We then considered whether the definition and scope of the characteristics – as defined in legislation – remained appropriate.
- 4.2 In this chapter we consider responses to the various proposals we made to retain or revise the definitions of each of these five characteristics groups.
- 4.3 We acknowledge at the outset that we have approached the question of existing characteristic definition somewhat differently to the way in which we have approached the addition of entirely new characteristics – which we have argued should be guided by the criteria we set out in Chapter 3.
- 4.4 In respect of existing characteristics, our starting point is that the decision to include the characteristic in hate crime laws has already been made by Parliament (though as outlined in Chapter 2, the extent of such inclusion has been quite uneven, with differing levels of protection afforded to five different characteristic groups). The narrower question that remains is whether the definition adopted in the law is appropriate for present circumstances; for example, whether there are any gaps or ambiguities that should be resolved.
- 4.5 In this context, we have been particularly cognisant of the parallel characteristic definitions that are used in the Equality Act 2010 (EA 2010) for the purpose of civil anti-discrimination law, and the desirability of adopting a consistent approach across both areas of law where it is reasonable to do so. Indeed, our terms of reference specifically direct us to consider “the implications of any recommendations for other areas of law including the Equality Act 2010.”
- 4.6 We ultimately recommend the retention of the existing definitions of race, religion and disability, but propose amendments to the definitions of sexual orientation and transgender identity.
- 4.7 We also recommend that a consistent approach should be taken to protection of victims on the basis of “association” with the protected groups.

### RACE

- 4.8 Race – a broadly defined characteristic – is the oldest characteristic recognised in hate crime laws.



4.9 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.”<sup>1</sup>

4.10 A similar definition is used in section 9 of the Equality Act 2010:

(1) Race includes—

- (a) colour;
- (b) nationality;
- (c) ethnic or national origins.

(2) In relation to the protected characteristic of race—

- (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

(5) A Minister of the Crown —

- (a) must by order amend this section so as to provide for caste to be an aspect of race;
- (b) may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

4.11 We discuss the final aspect of this definition – caste – further from paragraph 4.42.

4.12 “Race” has been broadly interpreted by the courts. In the case of *Rogers*,<sup>2</sup> 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 Crime and Disorder Act 1998 (“CDA 1998”). In finding that it could, the House of Lords found that a broad, flexible, non-technical approach should be adopted, and this:

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<sup>1</sup> Crime and Disorder Act 1998, s 28(4); Sentencing Code, s 66(6)(a). 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 10.

<sup>2</sup> *R v Rogers* [2007] UKHL 8, [2007] 2 AC 62.

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 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.<sup>3</sup>

- 4.13 Certain ethno-religious groups such as Jews and Sikhs,<sup>4</sup> 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.
- 4.14 Roma, Romani Gypsies,<sup>5</sup> and Irish Travellers<sup>6</sup> (“GRT”) are also recognised racial groups based on their ethnic origins. “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.

### Migration status and language

- 4.15 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*,<sup>7</sup> the Court of Appeal held that the phrase “an immigrant doctor” was capable of amounting to racial hostility.
- 4.16 “Language” is also not specified in the current definition of racial group. However, hostility based on the use of a language would in almost all cases be covered by the broader category of “ethnic origins”.
- 4.17 Though migration status and language appear to fall within the current legal definition of “race”, in our consultation paper we asked whether this should be made explicit in the definition.

### Consultation

- 4.18 Consultation Question 4 was as follows:

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.

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<sup>3</sup> *Rogers* [2007] UKHL 8, [2007] 2 AC 62, [12] by Baroness Hale.

<sup>4</sup> *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 2 WLR 620.

<sup>5</sup> *Commission for Racial Equality v Dutton* [1989] QB 783, [1989] 2 WLR 17.

<sup>6</sup> *O’Leary v Punch Retail* (29 Aug 2000) (unreported) as cited in Blackstone’s para B11.150.

<sup>7</sup> [2005] EWCA Crim 889.

4.19 The majority of responses were negative and the vast majority of personal responses simply responded “no”. Those in support of the proposal tended to elaborate more on their reasoning.

4.20 Several legal and government stakeholders thought the proposal would provide clarity. The Bar Council stated:

Given that one of the principal aims of enacting a bespoke Hate Crime Act is to avoid confusion and provide precision and clarity of language, the proposed enhanced definition, which has already been recognised in part by the CACD [Court of Appeal Criminal Division], is to be welcomed.

4.21 Similarly, The Law Society argued:

While we agree that the current broad definition of race would already include hostility based on migration and asylum status, and language, we do not see any reason not to include hostility based on these characteristics, for the avoidance of doubt.

4.22 The Welsh Government also supported inclusion:

Whilst we believe existing provisions would ordinarily protect most, if not all, migrants due to their nationality or national origins, we believe it would be helpful to clarify their inclusion within this definition. There is sometimes a narrow interpretation of the characteristic of ‘race’ to the unintentional exclusion of those from a migrant background. It may be useful to define this as including ‘those born outside the UK’ to ensure this captures asylum seekers and there is no dispute about whether immigration status has any bearing on protections bestowed.

4.23 A number of stakeholders thought that inclusion would provide protection to vulnerable individuals who already face numerous barriers in accessing the criminal justice system.

4.24 Birmingham & Solihull Women’s Aid stated:

We strongly believe that the definition of race in hate crime laws should be amended to include migration and asylum status, if not counted as their own protected characteristic under hate crime laws. Firstly, many of the most marginalised women in England and Wales are women deemed to have no recourse to public funds, or have insecure immigration status, these people are often further subjugated for the intersect of this with their ethnicity. A whole host of policies, systems, laws, quotas and historic attitudes produces hostile environments for a lot of migrant and asylum-seeking women. We believe that it is time to address the inequalities affecting these women by recognising their lived experience and the exacerbation of their situations. It is not fair, it is perpetuated discrimination and would have a great positive impact on their rights without infringing anyone else’s if this is granted. We don’t think this necessarily needs to be included in the same category as race, and that there is enough justification that migrant and asylum-seeking women deserve the prejudice they face to be recognised separately. It is also unnecessary because not all asylum seeking and migrant women are Black, Asian or ethnic minorities, some of these

women are Caucasian and thus it would start to blur lines between race, nationality and immigration status when it comes to hate crimes.

4.25 Protection Approaches was in favour of amending the definition of race in order to ensure that legal protection was available, having found that hate-based incidents against people because of their real or perceived migration and asylum status are “grievously underreported and had become normalised”.

4.26 London Mayor’s Office for Policing and Crime (“MOPAC”) stated:

Immigration status and language needs to be adequately addressed in hate crime laws, inclusion under race can reduce awareness or perceived seriousness of crimes targeted at individuals or groups because of their immigration status, language, or perceived immigration status and language. We saw spikes in hate crime against European Londoners after the EU Referendum, and against people seeking asylum during the pandemic. Migrants, refugees and people seeking asylum also face additional barriers to reporting hate crime because of their immigration status, particularly if they are undocumented out of fear immigration enforcement action will be taken against them. The hostile environment increased people's vulnerability and creates a context that enables discrimination.

4.27 The NPCC thought that inclusion would increase confidence amongst affected communities:

We agree that crimes targeting a victim because of hostility to their immigration status should be included. This grouping is on a common-sense basis deemed by the majority of the public to be racist and should enjoy clear and equal protection of the law. Our policy advice has always encouraged the recording of such crimes as racist hate crime but we believe the transparency of inclusion would be valuable to increase confidence in affected communities.

Following from the 2016 referendum, we have seen an increase in hostilities towards migrants and asylum seekers, as they are often wrongly blamed for the cause of the UK’s financial pressures. This has followed through into COVID, with negative fake reports circulating, indicating that the origin and indeed spread is related to foreign nationals within the UK.

Supporting evidence is illustrated with the targeting of a family group seeking asylum in the Stoke on Trent, who received verbal abuse because they communicated in their native language. They received continued verbal comments and hostility from local residence suggesting that they should speak English as they were in England.

4.28 Islington Council was also of the view that inclusion would help to make victims feel safer:

Islington Council is strongly in favour of strengthening hate crime laws. Including migration and asylum status to the definition of race in hate crime laws will improve the strength of hate crime laws. Islington Council notes that, as well as affecting the prosecution of hate crimes, extending hate crime laws can help to improve monitoring and tracking of hate crimes, help to challenge a culture of acceptance and make victims feel safer.

4.29 A number of stakeholders said that the definition does not need amendment because hostility based on migration or asylum status, or language, are already considered to be racial hostility.

4.30 The CPS stated:

'Race' is already broadly defined and interpreted by the courts. Hostility based upon migration/asylum status or language would be considered as racial hostility within the current legal framework and therefore further codification would be unnecessary.

4.31 Hampshire Constabulary stated:

Doesn't need to be amended as already included in the definition and [police] guidance. However, through case law, include examples of how this has been challenged and understood.

4.32 Nottingham City Council argued:

In our experience of working with communities and of responding to hate crime, we have found that the category of race as currently defined is broad enough to cover migration and asylum status as well as language. It is understood widely to cover both and an amendment to the definition would not necessarily add value.

4.33 The Office of the Police and Crime Commissioner for Northumbria stated:

We question whether crimes against those due to their actual or intended migration or asylum status, or language, could not be covered under the existing race protected characteristic.

4.34 A few stakeholders thought that migration and asylum status are not characteristics, they are legal statuses and can change.

4.35 The Office of the Police and Crime Commissioner for Nottinghamshire stated:

The legal status of a person does not represent a characteristic of that person in the same way as for instance their ethnicity. It is not supported as a specific characteristic therefore but I would always support wider activity to protect this vulnerable group. The provisions of for ethnicity and faith are more likely to be applicable to this group.

4.36 The Office of the Police and Crime Commissioner for Northumbria stated:

Migration or asylum status is a legal status definition that in many cases is temporary and subject to change, making this unworkable in practice.

### **Conclusion following consultation**

4.37 We consider the arguments for explicit inclusion of language and migration status as components of the definition of race to be finely balanced. On the one hand, some stakeholders were clearly of the view that understanding the scope of the protection afforded by race, and community confidence in reporting, could be improved through explicit inclusion of these two aspects. On the other hand, the proposal was not widely

supported, and there was also concern that it risked upsetting an already well-settled definition.

4.38 If clarification were to be included, it could be along the following lines:

- (1) nationality may include references to migration and asylum status;
- (2) ethnic or national origins may include references to language.

4.39 This would not materially expand the scope of the current definition as language and migration status are in practice already covered. Parliamentary Counsel have also advised that in adding this clarificatory text, the legislative interpretative principle of *expressio unius est exclusio alterius* may apply. This principle has the effect that when one or more members of a class are expressly mentioned (in this case language and migration status), other aspects of the same class are excluded. There is therefore a risk that clarifying the statutory definition could lead to a narrowing of the scope of the protection afforded by the definition of “race” – and more specifically the scope of “nationality” and “ethnic or national origins” in future interpretation.

4.40 The addition of this clarification would also cause the definition in hate crime laws to diverge (though not substantially) from the one used in the EA 2010. While we do not consider definitional alignment to be essential (and later in this chapter we argue that there is a policy basis for divergence in respect of the meaning of sexual orientation), we do consider alignment to be desirable in the absence of a compelling reason to depart from it. This is because it creates greater consistency and interpretative understanding.

4.41 Given the lack of majority stakeholder support, the fact that the addition would not materially change the legal position regarding “language” and “migration”, and the potential for interpretative uncertainty, we do not recommend its addition. We recognise the potential for greater clarity around the scope of protection, but consider this might better be achieved through other means – such as targeted education for migration and asylum support organisations.

## Caste

4.42 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.

4.43 There is no universally accepted definition of “caste”, though one is found in the Explanatory Notes to the EA 2010:

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 (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.<sup>8</sup>

- 4.44 There has been 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.<sup>9</sup>
- 4.45 Parliament sought to resolve the issue through a 2013 amendment to the EA 2010, which imposes a duty on the Government to prohibit caste discrimination by way of secondary legislation at some point in the future.<sup>10</sup>
- 4.46 Following this amendment, the Employment Appeal Tribunal decided the case of *Chandhok & Anor v Tirkey*.<sup>11</sup> The Tribunal found that for the purposes of the EA 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”.<sup>12</sup>

- 4.47 The Tribunal also remarked that other aspects of caste could be covered by grounds of religion or belief.<sup>13</sup>
- 4.48 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.<sup>14</sup>
- 4.49 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:

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

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<sup>8</sup> Equality Act 2010, Explanatory Notes, EN 49.

<sup>9</sup> See, eg, *Chandhok & Anor v Tirkey* [2014] UKEAT 0190\_14\_1912, referred to in more detail below.

<sup>10</sup> See Equality Act 2010, s 9(5), as amended by section 97 of the Enterprise and Regulatory Reform Act 2013, set out at paragraph 4.10.

<sup>11</sup> *Chandhok & Anor v Tirkey* [2014] UKEAT 0190\_14\_1912.

<sup>12</sup> *Chandhok & Anor v Tirkey* [2014] UKEAT 0190\_14\_1912, at [51].

<sup>13</sup> *Chandhok & Anor v Tirkey* [2014] UKEAT 0190\_14\_1912, at [10].

<sup>14</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727790/Caste_in_Great_Britain_and_equality_law-consultation_response.pdf).

“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.<sup>15</sup>

4.50 Some responses to the government consultation indicated that the complexity of caste could not be adequately captured by “ethnic origins” as the stratification of the caste system was more akin to social status or class. In the 2011 case of *Naveed v Aslam*, the employment tribunal had held that because the parties were both of Arain caste, the ground of “ethnic origin” did not apply.<sup>16</sup> The prevailing judgment of *Chandhok and Anor v Tirkey* does not address this issue. However, the government consultation that followed this decision was limited in its scope and did not account for issues of social status, class or economic differences within caste.

4.51 The government has now committed to repeal the duty to add caste in the EA 2010:

The decision to rely on emerging case-law renders that duty redundant and we will identify the most suitable legislative vehicle that can be used to repeal it at an early opportunity.<sup>17</sup>

4.52 The recently updated College of Policing Guidance on hate crime deals with caste in the following way:

#### Caste-based crimes

Some communities have a historical culture of caste definition where some sections of communities are considered to be less worthy than others. This can lead to isolation of subgroups within broader communities and this may lead to discrimination. It can, on occasion, also lead to hostility within communities. These incidents can be recorded and flagged as a race or religious hate crime or non-crime hate incident. But, that may not be appropriate in all cases and each incident should be considered on its facts and the perception of the victim.

4.53 CPS guidance on racial and religious hate crime briefly addresses caste, asking prosecutors to consider (among other factors):

Was there any use of derogatory language towards ethnicity, race, nationality or religion, (including caste, converts and those of no faith)?<sup>18</sup>

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<sup>15</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727790/Caste_in_Great_Britain_and_equality_law-consultation_response.pdf).

<sup>16</sup> *Naveed v Aslam* [2012] WL 12296514, at [27].

<sup>17</sup> Government Equalities Office, *Caste in Great Britain and equality law: a public consultation* (2018) p 15, 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727790/Caste_in_Great_Britain_and_equality_law-consultation_response.pdf).

<sup>18</sup> Crown Prosecution Service, *Racist and Religious Hate Crime - Prosecution Guidance* (21 October 2020), available at <https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>.



4.54 In our consultation paper we did not explore the question further, arguing:

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.<sup>19</sup>

4.55 However, a number of consultation responses expressed disappointment with this decision and made strong representations for the explicit inclusion of caste.

#### Consultation responses that raised the issue of caste

4.56 Humanists UK, the Dalit Solidarity Network (DSN-UK), the National Secular Society, Anti-Caste Discrimination Alliance, FABO UK (Federation of Ambedkarites and Buddhist Organisations UK), and The Anti Caste Discrimination Alliance (“ACDA”) all raised the issue of the inclusion of caste in hate crime laws.

4.57 The Dalit Solidarity Network provided a detailed submission as to why caste should be explicitly included in the definition of race for the purposes of hate crime laws, and included case examples of caste-based hate crime. In relation to the government’s EA 2010 consultation, DSN-UK stated:

The Government was criticized, inter alia by the Equality and Human Rights Commission, for ruling out a change in the law and restricting the scope of protection to what can be interpreted through case law. The EHRC considered that the Government had missed ‘a crucial opportunity to improve legal clarity’, that emerging case law does not replace the need for separate and distinct protection against caste discrimination in the law’, and that the government’s position was inconsistent with the UK’s international obligations under the UN International Convention on the Elimination of All Forms of Racial Discrimination (which captures caste discrimination as a form of descent-based racial discrimination) to provide for separate and distinct protection for caste in UK legislation.

However, successive Conservative governments since 2015 have made it clear that they consider caste to be captured in the Equality Act 2010 as currently worded, specifically by the concept of race/ ethnic origins, irrespective of whether or not a separate and distinct statutory remedy for caste discrimination is introduced. The logical consequence is that if ‘race’ in equality law includes caste (via statute or judicial interpretation), so should ‘race’ in criminal law.

4.58 Further, DSN-UK argued that:

Caste as a motivator for race hate crime is already recognized in the latest CPS guidance... DSN-UK’s recommendation is that recognition of caste as an aspect of race should be made explicit in the narrative definition of racial group in the CPS guidance (the alternative to explicit guidance on caste as an aspect of race would be the inclusion of caste as an additional protected characteristic for hate crime purposes).

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<sup>19</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 11.41.

Current academic research points to caste as a driver for certain types of honour-based violence/abuse, specifically where one or both partners in a male-female partnership are targeted by the female's family because the male is of a so-called lower caste than the female. If caste was explicitly included in the CPS definition guidance on race, such crimes could be prosecuted as race hate crimes thereby reinforcing their egregious and morally unacceptable nature.

4.59 FABO UK made the following arguments:

Caste and Caste-based discrimination and harassment are social and cultural issues brought with them by the South Asia diaspora. There are nearly 4 million (2011 census figures) people from India, Pakistan, Bangladesh, Burma, Nepal, Sri Lanka) in Great Britain. Caste and Caste-based discrimination (CBD) impact on all of these citizens. Evidence of CBD has been established in a number of government-commissioned and independent reports. The government has said no one should suffer discrimination and harassment as a result of their caste.

The Equality and Human Rights Commission (EHRC) supports the implementation of the law to add caste as a protected characteristic under race in the Equality Act 2010. In its response in July 2018 to the government's decision to repeal the law, the EHRC said 'The government has a crucial opportunity to improve legal clarity and has taken a step back by looking back to repeal the duty to include caste as an aspect of race in the Equality Act 2010'.

If somebody makes anti-Jewish, anti-Islam or anti-Christian remarks, they are considered offensive but if a person is harassed or taunted because of his/her caste, the law is not clear.

Considering the flaw in the legislation and give protection to the victims of Caste-based discrimination, we urge the Law Commission to add caste to the Hate crime.

4.60 The National Secular Society made the following representation in relation to caste-based hatred:

Across the world, Dalits face oppression and persecution. Research has estimated there are at least 50,000 (other estimates say as many as 500,000) people living in the UK who are regarded by some as low caste and are therefore at risk of caste-based hatred, prejudice and discrimination.

The National Institute of Economic and Social Research (NIESR) has found evidence of caste-based discrimination, harassment and bullying present in employment, education and in the provision of services. Its catalogue of these incidents include reports of violence and criminal activity that the victims say were motivated by caste. In one account, a radio station promoting the Ravidassia community (a Sikh sect with large numbers of Dalit adherents) was targeted with telephone threats and was burgled, apparently motivated by caste-based hatred.

4.61 The ACDA stated:

We call on the Law Commission to add Caste to the Hate Crime laws. Our submission is based on the evidence of those who have lived the experience of

Caste domination, Caste-based discrimination and Caste-related hatred, threats, violence and abuse and how it affects communities here in Britain.

### Conclusion in relation to caste recognition

- 4.62 We recognise that caste-based discrimination and violence occurs in England and Wales. We are grateful for the detailed responses that highlighted this further to us, and we understand the strongly held desire amongst victims and their supporters to have this recognised explicitly in law.
- 4.63 We also acknowledge the concerns that the case of *Chandhok and Anor v Tirkey*<sup>20</sup> has not entirely resolved the status of caste, and there remains a degree of ambiguity in the law.
- 4.64 The number of responses received in the 2018 government consultation on recognition (more than 16000) highlights the sensitivity and strength of feeling on this question. Having not asked consultees a specific consultation question on this subject, we do not feel we are equipped with a sufficiently broad range of perspectives in order to make a positive recommendation to depart from the position the government has reached in relation to the EA 2010. Our terms of reference direct us to consider “the implications of any recommendations for other areas of law including the Equality Act 2010”. Given that the government has made a clear policy decision to remove the current duty to add caste to the EA 2010, to recommend the reverse course in hate crime laws could lead to significant confusion in the meaning and scope of protection of caste across these two sets of laws.
- 4.65 If the government were to reverse this course, and include explicit reference to caste in the EA 2010 in the future, then we would recommend that an equivalent change is also made to hate crime laws.
- 4.66 We acknowledge that victims of caste-based violence and the groups that support them may consider this ongoing ambiguity to be a very disappointing outcome.

#### Recommendation 2.

- 4.67 We recommend that the definition of “race” in hate crime laws be retained in its current form.

## RELIGION

- 4.68 The current definition of “religious group” in hate crime laws is “[a] group defined by reference to religious belief or lack of religious belief”.

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<sup>20</sup> *Chandhok & Anor v Tirkey* [2014] UKEAT 0190\_14\_1912.

- 4.69 The leading authority for the definition is *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* (“*Hodkin*”). In this case, the Supreme Court observed:<sup>21</sup>

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 developments in the common understanding of the concept of religion due to cultural changes in society.

- 4.70 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:<sup>22</sup>

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.

- 4.71 Importantly, the definition includes “lack of religious belief”. This means that crimes that are motivated by or offenders who demonstrate hostility towards the victim on the basis of their lack of religious belief – for example, hostility towards apostates, are covered by the definition. However, unlike the EA 2010, the protection in hate crime laws does not extend to include hostility towards positively held non-religious beliefs.

- 4.72 In our consultation paper we provisionally concluded that the current definition of religion in law was adequate, and that the complexities of defining the exact boundaries of religious belief were better left to judicial interpretation as cases arose. We also indicated that there was no need to make explicit reference to “secularism” within the definition, as this was already widely understood.

- 4.73 We consider whether non-religious philosophical beliefs should be included in hate crime laws elsewhere in this report, as an entirely separate question.<sup>23</sup>

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<sup>21</sup> [2013] UKSC 77, [34].

<sup>22</sup> [2013] UKSC 77, [57].

<sup>23</sup> See Chapter 7.

## Consultation

4.74 We asked the following at Consultation Question 5:

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). Do consultees agree?

4.75 Just under half of responses agreed, and just under 40% disagreed, with the remaining responses listed as “other”.

4.76 A majority of organisations responded positively. A common theme amongst these responses was that the current definition should be retained because it is sufficiently broad and flexible.

4.77 The CPS answered:

Yes. ‘Religion’ is already broadly defined and interpreted by the courts and we are not aware of any instances where the existing definition has proved to be a barrier to prosecution. For that reason, we agree that no change is necessary.

4.78 Nottingham City Council stated:

The current definition of religion is widely understood and, in our experience, has not caused any issues in terms of interpretation or practical implications.

4.79 The Magistrates Association also noted the value in drawing on existing law and understanding in this context:

We agree this is a very complex issue, but that there is considerable case law to support courts using their discretion to identify hate crime on the basis of religion in a way that is sufficiently inclusive and responsive to deal with the rare cases which involve less traditional or well-established groups or sects.

4.80 Other stakeholders agreed that the current definition should be retained because it is practicable and easy to understand.

4.81 The National Secular Society (“NSS”) was concerned about the use of the word “group” within the current definition, which they thought might fail to protect the significant number of individuals who have religious or non-religious beliefs but who do not identify as belonging to a “group” defined by those beliefs. They noted that:

Many people who have no religion do not actively identify as atheists, humanists or any other group ‘label’. Yet these people may still be hate crime targets due to their beliefs. ‘Apostates’ from conservative religious communities, who frequently do not identify with a particular religious or nonreligious group, are especially vulnerable to hate crime yet they may not easily fit the definition necessary for legal recourse under hate crime laws.

4.82 The NSS recommended that the category of “religion” be changed to “religion or belief”, and that the definition of “religion or belief” under the EA 2010 should be adopted:

[T]he definition of the protected characteristic of ‘religion or belief’ in the Equality Act 2010 captures a broader range of people who may be victims of discrimination on the basis of religion or belief. The name of the characteristic, ‘religion or belief’, makes it explicit that beliefs that are not religious are included from the outset. The definition is also clearly inclusive of nonreligious beliefs including humanism and atheism: ‘(1) Religion means any religion and a reference to religion includes a reference to a lack of religion. (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.’<sup>24</sup>

- 4.83 Humanists UK submitted a detailed response setting out why the definition of religion should be amended to make explicit the parallel inclusion of non-religious worldviews that are analogous to religions. Although they acknowledged that apostates are covered by the present law by virtue of a lack of religious belief, they were concerned that, in practice, the law does not offer adequate protection against anti-apostasy hate crimes. They argued that the guidance accompanying the legislation and in use in police forces should require the clear identification and recording of hate crimes against apostates. They recommended that the term “religious hatred” should be changed to “religious or belief hatred”, to make the inclusion of non-religious beliefs explicit.
- 4.84 The Welsh Government also noted that there is an argument to align the definition of religion with the definition of “religion or belief” used in the EA 2010 and Article 9 of the ECHR:
- If someone with a non-religious belief (such as Humanists) can be discriminated against under the Equality Act 2010, it stands to reason that they should be able to bring a case to remedy any hate crime which might be experienced in extreme cases. However more research into the full implications of this would be beneficial.
- 4.85 British Naturism also noted the disparity between the protection of “religion or belief” under the EA 2010 and the more limited protection of “religion” under hate crime laws. They argued that this creates “an inconsistency in the law that is difficult to justify.”
- 4.86 The majority of members of the public who responded “no” were of the view that religion should not be a protected characteristic. A significant number stated that religion should be open to criticism and ridicule. We discuss issues concerning freedom of expression in the context of religion in more detail in Chapter 10.
- 4.87 There were also calls from some consultees to include the International Holocaust Remembrance Alliance working definition of antisemitism, which was formally adopted by the government of the United Kingdom in December 2016.<sup>25</sup> However, consistent with existing hate crime and anti-discrimination laws, we do not believe it is desirable to define specific forms of prejudice (such as antisemitism and islamophobia) in primary legislation, which focuses on the identification of protected characteristics such as “race” and “religion”.

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<sup>24</sup> Equality Act 2010, s 10.

<sup>25</sup> See David Torrance, “UK Government’s adoption of the IHRA definition of antisemitism” (4 October 2018) *House of Commons Library*, available at <https://commonslibrary.parliament.uk/uk-governments-adoption-of-the-ihra-definition-of-antisemitism/>.

## Sectarianism

- 4.88 We asked a specific question about sectarianism at Consultation Question 6. “Sectarianism” broadly refers to prejudice, discrimination, or hatred arising from attaching relations of inferiority and superiority to differences between subsections of a group and is most commonly used in the context of religion. The historical disputes between Catholic and Protestant Christians in the UK and Ireland are an example of a sectarian conflict.
- 4.89 In our consultation paper we indicated our provisional view that while sectarian conflict remains an issue of concern, it is already adequately addressed in law as it falls within the broader protections provided to the category of “religious group”.
- 4.90 Consultation Question 6 was as follows:
- 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”). Do consultees agree?
- 4.91 A clear majority of responses overall to this question agreed that it was not necessary to specify sectarianism in hate crime laws.
- 4.92 The most commonly cited reason for agreeing with our proposal was the fact that the existing law adequately addresses this context.
- 4.93 The CPS, NPCC, Nottingham City Council and the Welsh Government all argued that the existing law provides adequate protection.
- 4.94 A large number of personal responses agreed with the proposition because they were generally against expanding the scope of hate crime laws (though this had not been contemplated by this particular proposal).
- 4.95 Some of those who responded “no” did so because they were against hate crime laws or believed that religion should not be a protected characteristic under hate crime laws. These groups had also misunderstood that neither expansion nor contraction of the scope of the law was proposed by this particular question.
- 4.96 A number of consultees highlighted that sectarian hate does occur within religious groups and communities.
- 4.97 The Alan Turing Institute stated:
- It depends on how ‘sectarian groups’ are defined. In some cases, religious sects can suffer the worst prejudice, both from outside their religious community and from within them. In some cases, the abuse they receive can be adequately addressed through protections for hate against their identity in general but in other cases this will be inadequate. It could also lead to some unusual outcomes, such as Muslims being accused of Islamophobia if members of one sect are hateful against a different one; this (a) could undermine public confidence in the law and drive a backlash, (b) does not properly represent the nature of the hate and (c) could lead to inaccurate statistics for monitoring and evaluation.

4.98 The Evangelical Alliance stated:

We do not think that sectarian groups require specific protection because we agree that they are covered by protection within religious groups. However, it is important that specific groups within a faith system retain protection when their beliefs may differ. This is particularly important to protect minority groups within religious groups who may dissent or differ on key points of religious teaching.

#### Non-religious worldviews that are analogous to religions

- 4.99 Humanists UK also provided a detailed response that argued that the definition of religion for the purposes of hate crime laws should be understood to include non-religious worldviews that are analogous to religion. In our consultation paper we had considered the question of whether “philosophical belief” should be added as a category of protection in hate crime laws. In particular, we looked at how such belief had been recognised under the EA 2010. However, Humanists UK argued that non-religious worldviews that are analogous to religion should be understood to fall within the protection of existing laws – and this should be made explicit. They argued that it is well-established in domestic and international case law that discrimination against non-religious worldviews that are analogous to religions is covered by Article 14 of the European Convention on Human Rights (“ECHR”) (protection from discrimination) when this protection is read together with Article 9 of the ECHR (freedom of thought, conscience and religion.) Humanists UK further argued that pursuant to section 3 of the Human Rights Act 1998 – which provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention – references to religion under hate crime laws must be read in a way that protects worldviews such as humanism.
- 4.100 As a matter of current law, we do not agree that this interpretation of “religion” is required in the context of hate crime laws. The plain meaning of the term “religious belief” in section 66 of the Sentencing Code and section 28 of the CDA 1998 does not include non-religious philosophical belief. In order for an expanded meaning to be read into the term, the provision would need to be shown to be not compatible with the Convention. However, while both religion and belief are protected by Article 9 of the ECHR, we do not accept that failure to include non-religious philosophical belief in hate crime laws in itself interferes with the right of a person to hold and express personal beliefs.
- 4.101 Similarly, the protection against discrimination afforded by Article 14 ECHR applies only in relation to discrimination between groups as to the enjoyment of Convention rights. Groups who are protected by hate crime laws (race, religion, sexual orientation, disability and transgender) are no more able to enjoy their right to hold their beliefs than those not covered by it.
- 4.102 As the plain meaning of the protection of religion (but not non-religious worldviews) in hate crime laws is not in itself inconsistent with Convention rights, section 3 of the Human Rights Act 1998 is not engaged, and there is no need to read such an interpretation into hate crime laws.



4.103 As a matter of policy, Humanists UK acknowledged why there might be some anxiety around extending the category of belief in hate crime laws as far as has occurred under the EA 2010:

We understand that there is a desire to prevent this legislation becoming amorphous and offering legal protection to a wide range of beliefs, such as has been seen in some UK employment tribunal decisions based on the Equality Act 2010 (where for example opposition to foxhunting and support for public service broadcasting have come under protection), as this could undermine the symbolic and normative power of hate crime legislation. However, inclusion of just non-religious worldviews that are analogous to religions would be limited almost exclusively to humanism. As far as we know, the only other examples of analogous beliefs found in case law are atheism and agnosticism – both of which are only narrow views on the existence of a god or gods, and as such are already unambiguously covered through the provision related to a lack of religious belief.

4.104 Humanist UK therefore largely limited their focus to arguing for a much narrower expansion to include “belief” where this belief is analogous to religion. They acknowledged the relatively low rate of violence against humanists in the UK, but argued that this is similar to that experienced by Christians, and other less-persecuted religious groups:

It is undoubtedly the case that humanists, despite being one of the most persecuted belief groups around the world, are fortunate that in the UK, they have not often been the target of hate crime compared to the size of their population. In this respect, hate crimes against humanists, and the larger non-religious population, are comparable with those targeted at Christians, which are relatively small in comparison to the number of adherents in the UK. Although this is something to be thankful for, it is not an argument against protecting humanists, no more than anyone would suggest that the low number of Christian cases would justify removing protection. The law does not have a threshold of incidents for religious groups to be offered protection. This would be an absurd proposition. To take a different approach for humanists from for Christians or, say, Buddhists, would make a qualitative distinction between religious and non-religious beliefs, but not a quantitative one. In fact, many religious groups have no recorded hate crime incidents at all in 2020, but are still protected by virtue of their belief. There is no logical or just reason why humanists should be treated differently.

### **Conclusion following consultation**

4.105 A clear majority of consultees favoured our recommendation that the definition of religion should remain unchanged. Responses were also clear that it is not necessary to make special provision for secularism in law, as this is already adequately addressed.

4.106 The final issue that arises is the argument for the inclusion of non-religious worldviews advocated by Humanists UK. We do not agree that such views must be “read in” to the meaning of religion as argued by Humanists UK.

4.107 We deal with the broader question of the inclusion of “philosophical belief” in Chapter 7. However, we do not consider that a compelling policy case has been made to

include humanism as an almost unique additional category of “religion analogous world views” in this context. Humanists UK point to other, civil, contexts where this has been done in the United Kingdom, notably in the contexts of weddings<sup>26</sup> and education.<sup>27</sup> But as we noted in Chapter 3 at paragraph 3.7, we do not consider it appropriate that the civil anti-discrimination context is directly transposed into the criminal law without further analysis of the need for such laws. This is in keeping with the principal of minimal criminalisation and the demonstrable need criterion we propose in Chapter 3.

4.108 As Humanists UK fairly acknowledge, in the United Kingdom humanists “have not often been the target of hate crime compared to the size of their population”. While it may also be true that the level of targeting is comparable to that experienced by Christians, the evidence base for the inclusion of “religion” in hate crime laws derives primarily from anti-Semitic and Islamophobic hatred; both of which remain very serious concerns.<sup>28</sup> It would be practically unworkable (and highly divisive) to limit protection to only certain religious groups. However, while we acknowledge that there are significant parallels between humanist beliefs and religion – notably the development of a basis for understanding the world and a set of values to guide human behaviour – humanist beliefs are not religious beliefs, and there is not a strong, independent evidence base that would justify specific protection for this group in hate crime laws.

4.109 Finally, while we recognise that the proposal of Humanists UK is for a narrow religion-analogous worldview category (and not a wider category of “philosophical belief”), it is still not clear that such a contained definition can be drafted without raising similar definitional issues to those that we discuss further in Chapter 7 at paragraph 7.274 in the context of “philosophical belief”. Indeed, the case of *R v Secretary of State for Education ex parte Williamson*, one of the cases cited by Humanists UK in support of their claim to protection under Article 9 of the ECHR, the court stated that “Article 9 is apt, therefore, to include a belief such as pacifism”.<sup>29</sup> The European Court of Human

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<sup>26</sup> *Smyth* [2017] NIQB 55 (9 June 2017); *R (Harrison and others) v Secretary of State for Justice* [2020] EWHC 2096 (Admin).

<sup>27</sup> *(R) Fox v Secretary of State for Education* [2015] EWHC 3404 (Admin); Curriculum and Assessment (Wales) Act 2021, s 61(3)(b).

<sup>28</sup> As we noted in our consultation paper, statistics produced by the Home Office show 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%). See 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf). The more recent statistics follow a similar pattern and show that the most targeted religious groups are Muslims (50% of police recorded religious hate crime) and Jews (19% of recorded religious hate crime), followed by Christians (9%), Sikhs (3%) and Hindus (2%). See Home Office, *Hate Crime, England and Wales, 2019 to 2020* (15 October 2019) p 11, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/925968/hate-crime-1920-hosb2920.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925968/hate-crime-1920-hosb2920.pdf).

<sup>29</sup> *R v Secretary of State for Education ex parte Williamson* [2005] UKHL 15, [24].

Rights has also accepted “veganism” as falling within article 9 (albeit this was conceded by the UK government).<sup>30</sup>

4.110 We therefore consider that the definition of religion should remain unchanged in hate crime laws.<sup>31</sup>

### **Recommendation 3.**

4.111 We recommend that the definition of “religion” in hate crime laws be retained in its current form.

## **SEXUAL ORIENTATION**

4.112 Sexual orientation is defined in the Public Order Act 1986 (“POA 1986”) as a “group of persons defined by reference to sexual orientation, whether towards persons of the same sex, the opposite sex or both.” “Sexual orientation” is not defined further in the Crime and Disorder Act 1998, nor the Sentencing Code, but the POA 1986 definition has been adopted by the courts.<sup>32</sup> An equivalent definition is also used in the EA 2010.<sup>33</sup>

4.113 While the law in principle extends to the protection of heterosexual orientation, in practice, prosecutions asserting hostility on the basis of “sexual orientation” are used almost exclusively in respect of homophobic and biphobic hostility. This likely reflects a dearth of hostility-based offending on the basis of heterosexual orientation. The law does not extend to cover other forms of sexual preference – for example, sexual fetishes.

4.114 An issue that we raised in the consultation paper was whether the definition of sexual orientation should also extend to hostility towards people who are, or are presumed to be, “asexual”. At present it does not.

4.115 Asexuality may be broadly defined as an enduring lack of sexual attraction.<sup>34</sup> Some estimates suggest that approximately 1% of the population are asexual,<sup>35</sup> though research into asexuality is comparatively limited.

4.116 There is some debate as to whether asexuality should be considered a sexual orientation in its own right. Some psychological research suggests that it shares the same classificatory features as other sexual orientations and should be understood as

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<sup>30</sup> *H v United Kingdom* (Application 18187/91). The UK Government did not contest that veganism was capable of concerning belief within the meaning of Article 9 of the Convention.

<sup>31</sup> Public Order Act 1986, s 29B.

<sup>32</sup> See *R v B* [2013] EWCA Crim 291; [2013] 2 Cr. App. R. (S.) 69 (CA (Crim Div)).

<sup>33</sup> Equality Act 2010, s 12(1).

<sup>34</sup> A F Bogaert, *Understanding Asexuality* (Lanham, MD: Rowman & Littlefield Publishers, 2012).

<sup>35</sup> J Decker, *The Invisible Orientation: An Introduction to Asexuality* (Skyhorse Publishing, New York, 2014).

such.<sup>36</sup> However, Kathleen Stock, an academic with a strong interest in matters pertaining to sex and sexual orientation, has argued that asexuality should be understood “not [as] an orientation but the absence of one”.<sup>37</sup> Stock does, however, state:

I don't assume that denying that asexuality is an orientation entails that it's undeserving of political protection and advocacy.

4.117 In our 2014 review of hate crime laws 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 at that time.<sup>38</sup> In our most recent consultation paper we revisited this question, and noted that a parallel could potentially be drawn with the protection afforded to “lack of” religious belief.<sup>39</sup>

## Consultation

4.118 Consultation Question 7 was as follows:

We invite consultees' views on whether “asexuality” should be included within the definition of sexual orientation.

4.119 Generally, organisational stakeholders responded positively. However, for a number of stakeholders this support was conditional on there being sufficient evidence of hate crimes committed against asexual individuals.

4.120 The VAWG and Hate Crime Team, London Borough of Tower Hamlets noted that the inclusion of asexuality within the definition of sexual orientation would be consistent with the approach currently taken in respect of religion, where “lack of religious belief” is included within the definition:

Yes, ‘asexuality’ should be included within the definition of sexual orientation in the same way that ‘atheism’ (or no belief) is included in religion/ belief. ‘Sexual orientation’ should include all or no sexual preference.

4.121 Several stakeholders were in favour of including asexuality within the definition on the basis that it is a well-recognised sexual orientation.

4.122 TransOxford stated:

Yes – sexuality exists on a spectrum both in terms of subject of attraction and degree of attraction. The law should cover the complete spectrum of this characteristic. Asexuality is part of that spectrum.

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<sup>36</sup> Brotto, L.A., Yule, M. “Asexuality: Sexual Orientation, Paraphilia, Sexual Dysfunction, or None of the Above?” (2017) 46 *Arch Sex Behav* 619.

<sup>37</sup> K Stock, “Sexual Orientation: What Is It?” (2019) 119(3) *Proceedings of the Aristotelian Society* 295-319, p 300.

<sup>38</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 163.

<sup>39</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 11.70.

4.123 The Office of the Police and Crime Commissioner (PCC) for Northumbria agreed:

Yes we believe it should be. In our society today, people are feeling freer than ever to express their own sexual identities outside the binary of hetero or homosexual. Asexuality is a well-recognised sexual orientation and should of course be protected under the definition of sexual orientation, as should any other orientation or identity that an individual expresses themselves to be, including queer and pansexual.

4.124 Nottingham City Council stated:

We are in favour of the definition of sexual orientation being as inclusive as possible and the addition of 'asexuality' within the definition will enable that.

4.125 Some members of the public also agreed:

- “It is an orientation; it is not a choice like celibacy or abstinence. Many in this group face discrimination, bullying and abuse because asexuality is often ignored and misunderstood.”
- “Following the structure of the other categories, these need to follow the equal rights approach and be inclusive. There is a level of prejudice and potential hate crime which can be identified against asexual people, suggesting a demonstrable need to include this to ensure fair treatment under the law.”

4.126 A number of stakeholders thought that asexuality should be included because asexual people are subject to harassment, discrimination, abuse and violence but are not covered by existing hate crime laws.

4.127 Stonewall was strongly in favour of the proposition arguing that “there is a growing body of evidence highlighting the discrimination, harassment and abuse that ace<sup>40</sup> people face”.

4.128 Protection Approaches was also in favour on the basis that:

Asexual people face proportionately higher levels of discrimination, marginalisation, exclusion, and hate-based attacks.

4.129 The Hate Crime Unit noted that asexual people are vulnerable to violent offences:

The Hate Crime Unit firmly agrees with the inclusion of asexuality within the definition of sexual orientation. Asexuality is recognised by both the NHS and the UK Government as a legitimate sexual orientation. There is little legislation to discourage any prejudice against asexuals and, consequently, there is no legal framework to support asexual spectrum people in litigation proceedings. The asexual community is particularly vulnerable to offences such as corrective rape and

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<sup>40</sup> Stonewall defined “Ace” as follows: “An umbrella term used specifically to describe a lack of, varying, or occasional experiences of sexual attraction. This encompasses asexual people as well as those who identify as demisexual and grey-sexual. Ace people who experience romantic attraction or occasional sexual attraction might also use terms such as gay, bi, lesbian, straight and queer in conjunction with asexual to describe the direction of their romantic or sexual attraction.” See Stonewall, *Glossary of Terms*, available at: <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>.

sexual violence therefore it displays a legislative neglect to not include them alongside homosexuality, heterosexuality, and bisexuality.”

4.130 The CPS saw a parallel with the protection of lack of religion under religious belief:

Neither s.146 Criminal Justice Act 2003 nor s.66 Sentencing Act 2020 contain a definition of ‘sexual orientation’. In practice, this has not caused any difficulties as the term has been broadly interpreted by the courts. However, if a definition is to be included within a new hate crime legal framework then the inclusion of ‘asexuality’ (i.e. persons with no sexual orientation) would be consistent with the protection for religious beliefs, which explicitly includes persons with no religious beliefs.

4.131 The NPCC indicated support for inclusion of asexuality, but suggested it could be left to be interpreted by the courts:

The majority of chief officers recognised the need for such victims to be covered by the provisions. Given that the current Sexual Orientation provision is not limited by definition and the enhanced sentencing provision relates to the motivation of the perpetrator, we see an argument for the same approach as that taken in the addition of Transgender into Section 146 CJA 2003, where legislators left it for the [courts] to decide whether the provision was appropriate.

4.132 Although several stakeholders were not opposed to the proposal, they argued that more evidence was necessary.

4.133 The Welsh Government stated:

If there is enough evidence to show that individuals are experiencing hate crime due to being asexual, there is an argument for its inclusion within the definition of sexual orientation. As the Law Commission highlights in the consultation paper, the inclusion of asexuality would be consistent with the approach currently taken in respect of religion, where ‘lack of religious belief’ is included in the definition. However, the proposed definition could be clarified to read ‘both sexes’ and ‘neither sex’.

4.134 Devon & Cornwall Police stated:

If you are asexual you should receive the same protection as any other sexual orientation. A decision about this should be made based on considering the criteria set out in Q3. We are not sighted on the evidence relating to these criteria.”

4.135 The Bar Council stated:

The Bar Council is not in a position to comment. Aside from the two academic studies referred to in [§11.68] there appears to be insufficient empirical data to determine whether there is a need for the inclusion of asexuality pursuant to the criteria for a characteristic set out at [§10.89].

4.136 Several stakeholders were more firmly of the view that there was a lack of evidence to support inclusion – in particular, a number of women’s organisations.

4.137 Sex Matters stated:

We recommend that the Law Commission does not include asexuality. There is no evidence that identifying as asexual makes someone a target for hate. Most people don't want to have sex with most other people. Sexual harassment and sexual assault are already covered in law.

4.138 Women's Place UK also did not think the case had been demonstrated:

No, WPUK does not support the inclusion of asexuality in a definition of sexual orientation. Asexuality is a broad umbrella term which encompasses people who may have some sexual relationships, people who may have romantic relationships but do not experience sexual attraction, and people who may not have romantic or sexual relationships.<sup>41</sup> Even if it were appropriate to include asexuality in the definition of sexual orientation, it is difficult to envisage how the concept of 'hate crime' could usefully be applied to acts of prejudice against those who identify as asexual. It is not clear how asexuality would meet the criteria set out in Question 3. The consultation paper fails to make a convincing case that 'hate crimes' against asexual people are prevalent, that there is additional harm to the victim, or that this category would sit logically in the sentencing framework, be workable in practice, or represent an efficient use of criminal justice resources.

4.139 For Women Scotland contrasted the evidence base for asexual targeting with that for LGB hatred.

People are discriminated against (and still sentenced to death in parts of the world) for being homosexual or bisexual. Prejudice against homosexuality is the reason sexual orientation is included as a protected characteristic in the [EA 2010] and in hate crime legislation. We do not believe 'asexual' should be added in the list of characteristics. There is no evidence that people are discriminated against for being asexual. We believe the inclusion of protected characteristics should be strongly supported by empirical evidence.

4.140 The Free Speech Union similarly considered there was no significant problem that needed to be addressed:

We are opposed. There is no serious evidence of any social problem related to crime against asexuals.

4.141 Christian Concern was against inclusion on the basis that it is opposed to any expansion of the characteristics protected under hate crime laws.

4.142 A number of personal responses were also firmly opposed:

- "There is no such thing as 'asexuality' Your sexuality is present in your genes but I suppose someone might consider just that statement as hate-crime. How ridiculous! I don't really see why something that does not actually exist should be covered by law!"

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<sup>41</sup> Brunning and McKeever, "Asexuality" (13 October 2020) *Journal of Applied Philosophy*. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/japp.12472>.



- “No. This term is not a sex-based category. It is part of gender and queer ideology and cannot be defined well enough to be protected. It will conflict with the definition of sex and sex-based protections in the Equality Act. Asexuality must never be part of Hate Crime legislation.”
- “Sexual orientation is about same-sex attraction or opposite-sex attraction. Essentially it's about males or females being attracted to males or females. If you start to expand to asexual or other ways people identify then it moves beyond the combinations of male and female sexual attraction.”

### **Conclusion following consultation**

- 4.143 On balance, we consider that there is a good case to include asexuality within the scope of protections afforded by the “sexual orientation” characteristic.
- 4.144 There was significant support for this proposition, although we acknowledge it was not universal, and some individuals and groups were firmly opposed.
- 4.145 In making this recommendation, we acknowledge that the evidence base for significant criminal targeting of asexual persons is still relatively limited.
- 4.146 Our rationale in this instance is primarily that the current exclusion of asexuality is a clear gap in an otherwise very widely defined characteristic. Through its current inclusion of heterosexual orientation (in addition to homosexual and bisexual orientation), the “sexual orientation” characteristic already covers the vast majority of the adult population of England and Wales. In this sense, the lack of inclusion of asexuality might be seen as significant omission of one particular subset of the population.
- 4.147 While we accept the concern that the evidence concerning criminal targeting of asexual persons is limited, the same is also true for “heterosexual” orientation, which currently falls within the protected group. Indeed, given heterosexual orientation has been protected since 2003, there is arguably positive evidence of a lack of need for this particular group. However, as with the categories of “race”, and “religion”, a policy decision has been made to make this category inclusive rather than overly-specific. We consider that this inclusive approach also justifies the protection of asexuality.
- 4.148 We do not consider it necessary to resolve the question of whether asexuality should be considered a sexual orientation in its own right, or as some have argued, the absence of an orientation. In either case, a clear parallel can be drawn with the protection afforded to persons who lack religious belief for the purposes of that characteristic.
- 4.149 This is unlike the argument we rejected at paragraph 4.107, that a new category of non-religious belief (albeit only where “analogous” to religious belief) should be created. This would involve the creation of a distinctly new category of protection (non-religious belief) as opposed to a definitional adjustment of an existing one. We acknowledge that some consultees such as Women’s Place UK queried the definitional certainty of “asexuality”. It is true that there is limited precedent elsewhere in the law of England and Wales on which to draw. However, we do not consider that the challenges here are insurmountable from a drafting or interpretative perspective.



For example, asexual orientation could be defined as “a lack of sexual attraction to other people”. While we consider that the precise wording is best left to Parliamentary Counsel, a definition along these lines would be quite contained, and would not raise the same risk of unintended expansion as the inclusion of “non-religious beliefs”.

4.150 We note the argument of NPCC that the current definition of “sexual orientation” may be capable of incorporating asexuality without further change – particularly as it is not further defined in the Sentencing Code and CDA 1998. However, we consider this unlikely; the courts have instead endorsed the more detailed definition in the POA 1986 and EA 2010 as the definition for the purposes of the Sentencing Code and CDA 1998, and a plain reading of this expanded definition clearly excludes asexuality from its scope.

4.151 Finally, we note that this recommendation will result in a slightly different definition to that used in the EA 2010. As we noted at paragraph 4.40, we consider that consistency between these two definitions is desirable where possible, but not essential. In this case, there was no prior elaboration of the meaning of “sexual orientation” in the Sentencing Code and CDA 1998, so they are not in form identical to the EA 2010, though we acknowledge that they are in function and practice. We do not consider that the desirability of consistency outweighs the fairness arguments that favour including the category of “asexuality” in this case. To the extent that these definitions would differ, the scope and content of that divergence would be clear. It is also just one example of divergence between these two sets of laws – as we noted in our discussion of religion, “belief” is not covered in hate crime laws, whereas it is in the EA 2010. In the following two sections we discuss the “transgender” and “disability” definitions; both of which also substantively differ from their EA 2010 equivalents.

#### **Recommendation 4.**

4.152 We recommend that the definition of “sexual orientation” for the purposes of hate crime and hate speech laws be amended to include protection of persons who are “asexual”.

### **TRANSGENDER AND GENDER DIVERSE IDENTITIES**

4.153 Hostility towards “transgender identity” is covered by subsection 66(1)(e) of the Sentencing Code. Subsection 66(6)(e) further defines the interpretation of this provision 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.

4.154 During the original passage through Parliament of this provision in 2012,<sup>42</sup> Justice Minister Lord McNally said:

... I should be clear that ‘transgender’ is an umbrella term that includes, but is not restricted to, being transsexual<sup>43</sup>

4.155 In our previous reports we have indicated that it is unclear – though possible – that the definition includes references to people who cross dress, identify with another gender identity (such as non-binary) or are intersex.<sup>44</sup> We considered that it is inclusive and non-exhaustive and therefore does not necessarily exclude other potential meanings. By contrast, the equivalent definition in Scotland expressly includes people who cross dress and non-binary people within the definition of transgender,<sup>45</sup> and makes separate provision for variations in sex characteristics.<sup>46</sup>

4.156 A different term and definition exists in the EA 2010, which uses the term “gender reassignment”, and defines it in section 7 as follows:

#### Gender reassignment

(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment—

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

4.157 In the 2020 Employment Tribunal decision of *Taylor v Jaguar Land Rover Ltd*, this definition was held to be capable of including people on a spectrum that was not necessarily fixed at one biological sex or another.<sup>47</sup>

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<sup>42</sup> At the time it was introduced as section 146(6) of Criminal Justice Act 2003 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This provision has since been shifted to section 66(1)(e) of the Sentencing Code.

<sup>43</sup> See Hansard (HL), 7 February 2012, vol 735, col 153.

<sup>44</sup> See Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, para 6.75.

<sup>45</sup> Hate Crime and Public Order (Scotland) Act 2021, s 11(7).

<sup>46</sup> Hate Crime and Public Order (Scotland) Act 2021, s 11(8).

<sup>47</sup> *Taylor v Jaguar Land Rover Ltd* (2020), Employment Tribunal decision: 1304471/2018, [178]. See [https://assets.publishing.service.gov.uk/media/5fc8d559d3bf7f7f5c134ad3/Ms\\_R\\_Taylor\\_v\\_Jaguar\\_Land\\_Rover\\_Limited\\_-\\_1304471.2018\\_-\\_Reasons.pdf](https://assets.publishing.service.gov.uk/media/5fc8d559d3bf7f7f5c134ad3/Ms_R_Taylor_v_Jaguar_Land_Rover_Limited_-_1304471.2018_-_Reasons.pdf).

4.158 It is also important to note that the Employment Appeal Tribunal has recently determined that “gender critical” belief – the belief that sex is immutable and not to be conflated with gender identity – is protected for the purposes of the EA 2010.<sup>48</sup>

4.159 In our consultation paper we expressed the view that “the current definition places significant emphasis on the process of gender reassignment, rather than on the identity and personhood of the individual.”

4.160 We considered that there would also be benefit in including express recognition of “non-binary” persons, people who cross dress, and people who are intersex. We acknowledged that each of these groups are quite distinct, but that there may be sufficient similarity in the hostility these groups experience such that it would make sense to group them together for the context of hate crime laws.

4.161 Drawing in part on the definition adopted in Scotland, we suggested that a revised definition could include explicit recognition of each of these groups.

## Consultation

4.162 Consultation Question 8 was as follows:

We provisionally propose that the current definition of “transgender” in hate crime laws be revised to include:

1. People who are or are presumed to be transgender
2. People who are or are presumed to be non-binary
3. People who cross dress (or are presumed to cross dress); and
4. People who are or are presumed to be intersex

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. Do consultees agree?

We welcome further input from consultees on the form such a revised definition should take.

4.163 The question was structured in three parts – firstly asking about the definition the protected category should take, secondly about whether the current title “transgender” should be changed, and thirdly seeking input on the form of a revised definition.

### Part one of the question – should transgender, non-binary, cross-dressers and intersex persons be included?

4.164 The vast majority of personal responses – and therefore responses overall – responded negatively to the revised definition. A high proportion of these negative responses fundamentally disagreed with hate crime laws, and many more specifically

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<sup>48</sup> *Forstater v CGD Europe* (2021), Appeal No.UKEAT/0105/20/JOJ. See [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf).

thought that transgender people should not have protection under hate crime laws. A number of responses also referred to the debate around women's rights, and the tensions that have emerged with supporters of transgender rights in recent years.

4.165 Amongst organisational stakeholders, responses were more supportive than personal responses of a definition that was as inclusive as possible.

4.166 The CPS was particularly in favour of including cross-dressers within the definition:

Any refinement of the definition which clarifies the meaning of 'transgender' is to be welcomed... Hostility towards those who cross-dress has previously been prosecuted on the basis of hostility based [on] the victim being presumed to be transgender. However, an explicit reference in the definition and in the title to those who cross-dress would clarify the position and would, again, be more inclusive.

4.167 Stonewall was strongly supportive of the suggested revised definition, in particular the reference to "non-binary" people:

We recognise that the category of transgender identity was intended to be interpreted in an inclusive and non-exhaustive manner. However, it is crucial that statutory wording is updated to explicitly include non-binary people, as the Commission have proposed. Non-binary people face discrimination across many areas of life...

It is crucial that non-binary people are given legal clarity and clear reassurance that they are protected under hate crime law. The recent Employment Tribunal judgement of *Taylor v Jaguar Land Rover Ltd* explicitly recognised the right of non-binary individuals to be protected from discrimination, harassment, and victimisation under the Equality Act 2010 under the protected characteristic of 'gender reassignment'. This case represents an important example of the legal system recognising that non-binary people experience marginalisation for being themselves, and sending a clear message to this community that they are protected by law; we hope to see this reflected in a new Hate Crime Act.

4.168 Galop was also broadly in support of the proposed definition. However, Galop suggested an alternative definition:

We propose an alternative definition that follows the existing model of disability and transgender identity by simply listing the protected groups; namely 'trans, non-binary, gender non-conforming and intersex people'. In formulating a definition, it would be advisable to use the word 'trans' and avoid the words 'transsexual' and 'transgender' as they have come to hold negative connotations for trans communities in the same way that using the word 'homosexual' has come to feel outdated. Similarly, we advise against using the label 'cross-dresser' and instead use 'gender non-conforming'.

4.169 TransActual UK was also broadly supportive of the revised definition, but refrained from actively supporting the inclusion of "intersex".

4.170 Mermaids was largely in favour of the proposed revised definition. However, it also refrained from actively supporting the inclusion of “intersex”. They also suggested the use of an alternative term to encompass cross-dressers:

Mermaids agrees that the current definition of ‘transgender’ in hate crime laws be revised to include: people who are or are presumed to be transgender and people who are or are presumed to be non-binary.

We would also recommend the inclusion of ‘people who are or are presumed to be gender-diverse’. The term ‘gender-diverse’ is an umbrella term used to describe gender identities that demonstrate a diversity in expression beyond the gender binary framework and importantly, encompasses other identities and individuals who may not subscribe to the term non-binary.

We believe that all members of the gender diverse population should be protected, including those who ‘cross dress’, or presumed to cross dress. Such a category, we believe, would allow the law to evolve with society and embrace all possible victims, rather than risk creating a hierarchy.

We recommend that intersex people are protected by future reform. While we appreciate that there is overlap in the intersex and trans communities and that it is the presumption or perception which is often more relevant to the phenomenon of hate crime, we would encourage the commission to engage with expert intersex support organisations to ensure any reform is reflective of what the community feel is required to ensure their protection.

We recommend the following:

The current definition of ‘transgender’ be revised to include: ‘people who are or are presumed to be transgender, people who are or are presumed to be non-binary and people who are or are presumed to be gender-diverse.’

We urge the Law Commission to consult with intersex organisations directly to ensure reform is made sensitively to this community’s needs.

4.171 A number of stakeholders and individuals were against the inclusion of “intersex”.

4.172 The Christian Institute stated:

People with intersex conditions have been born with a physical anomaly or other difference to normal development, such as sexual characteristics from both sexes. Intersex therefore must be kept separate from transgender people, who are usually physically fully male or female. It is highly misleading to conflate these groups, and risks obscuring the existence of intersex people. Particularly given the toxicity of the discussion around transgenderism and the extreme demands of some trans activists, it is unfair to lump intersex people into the same category.

4.173 Sex Matters stated:

We recommend that the Law Commission does not include ‘intersex’ under ‘transgender’ or as a category for hate crimes at all.

4.174 TransOxford was more specifically opposed to the conflation of intersex and transgender status:

Yes but..... It should actually be purely gender, which would include all of the above bar intersex. Intersex is not a gender but a sex characteristic. It is important to get terminology and definitions correct. Gender relates to the inherent thoughts and behaviours relating to roles within nature that come from hard wired brain structures. This is not the same as sex which is simply about the physical characteristics used to support procreation. The two are not the same, nor necessarily related and cannot be used interchangeably. Gender exists on a bi-modal spectrum which includes gender fluid, transgender, non-binary and cis gender individuals. All these need protecting. Sex also exists on a bi-modal spectrum with intersex being those whose physical characteristics fall between the modal peaks. A separate category and definition for sex should be considered.

4.175 The Intersex: New Interdisciplinary Approaches (INIA) Consortium (led by the University of Huddersfield),<sup>49</sup> submitted a detailed response which made a case for protecting intersex people under hate crime laws and outlined their preferred terminology.

4.176 The INIA Consortium advocated for the creation of protection of “sex characteristics” as a separate category from “transgender”:

We support the inclusion of ‘sex characteristics’ instead of ‘intersex’ in hate crime laws and for it to be a separate category from ‘transgender’. As a first preference we ask for a separate category of ‘sex characteristics’. If not, we ask for its inclusion under a ‘sex’ category. We do not support its inclusion under the transgender or disability categories.

4.177 The INIA Consortium was also clear that “intersex” should not be included under “disability”:

Furthermore, intersex is not a disability and should not be included under the disability category. The framing of intersex as a disability is one of the rationales behind non-consensual medical interventions on intersex people and which, for a number of intersex people, can cause them medical problems which are themselves disabling. Inclusion under a disability category reinforces this pathologisation of intersex bodies. Intersex people themselves also mostly do not consider themselves to have a disability. In the UK Government Equality Office’s 2018 National LGBT survey, 66.3% of intersex respondents did not consider themselves to have a disability.

4.178 For this reason, the INIA Consortium was also against the use of “DSD”:

We do not support the inclusion of ‘DSD’ (disorders of sex development or differences of sex development) within hate crime laws. It is an unhelpful framing which suggests DSD be included under a disability category, however as explained previously being placed under the disability category is problematic. Further, intersex people will often use the language of DSD or specific medical diagnoses

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<sup>49</sup> See Intersex: New Interdisciplinary Approaches (2021) available at <https://www.intersexnew.co.uk/>.

within medical contexts in order to access the care they need but will rarely use it outside of those contexts.

4.179 Labour Women's Declaration working group stated:

The inclusion of intersex (better termed 'variations of sex characteristics', VSC or 'differences of sexual development', DSD) with these other terms is widely contested by those living with such conditions, as all people with VSC are one sex or the other. They have different interests and needs to trans communities, which are far too often ignored through this conflation.

4.180 Several stakeholders and individuals were against the inclusion of "non-binary".

4.181 Sex Matters stated:

We recommend that "non-binary" is not included under the definition of transgender, as it is not defined and not needed.

4.182 Labour Women's Declaration stated:

Non-binary has never been defined in any way, and since it appears to rest on some notion of innate gender, which is a scientifically unverifiable belief, it becomes difficult to see how such a definition could be workable in law.

4.183 The LGB Alliance similarly raised definitional concerns around the term:

The term "non-binary" cannot be defined at all, other than as a chosen self-definition. Persons who do not consider themselves to be particularly masculine or feminine may, or may not, call themselves "non-binary". Including this undefinable category of people in hate crime laws would introduce an element into legislation that is wholly subjective and in consequence wholly unenforceable.

4.184 Christian Concern:

The category of 'non-binary' should not be permitted as part of the definition of transgender. The Home Office has admitted in court that the provision of gender-neutral passports to assuage demands for recognition of non-binary identity would lower the efficacy of border security internationally. This should serve as a warning of what the criminal justice system would have to deal with if the transgender category were to be expanded further.

4.185 The Welsh Government was of the view that "non-binary" did not need to be explicitly included within the revised definition because non-binary people are likely to be covered under those "presumed to be" transgender or non-binary:

We are broadly in support of revisions to the legislation to include the concepts of non-binary and intersex identity. However, we are not convinced that a separate limb of the definition is required to include those who cross dress, as we believe this is likely to be covered under those 'presumed to be' transgender or non-binary. Further research into the current scale of hate crime targeted at these individuals would help to inform the need to broaden the definition. (See full response in the CQ8 analysis document).

4.186 A number of stakeholders and individuals were against the inclusion of “cross-dressers”.

4.187 Labour Women’s Declaration working group stated:

We do not consider it appropriate to include cross-dressing people in the legislation under this characteristic. Cross-dressing is at best a fashion statement, and at worst the public enactment of a male fetish to wear women’s clothing, particularly lingerie. Is this something that should be protected in law?

4.188 The Christian Institute stated:

The definition of transgender should not cover those who simply cross dress. There have been examples of men dressing in women’s clothes to access female dressing rooms or bathrooms. To include such a definition in a transgender hate speech law could have dangerous implications for women vociferously raising the alarm over privacy concerns. It could also create difficulties for parents strongly objecting to drag performers coming into their children’s primary schools. Cross dressing is controversial because it perpetuates sexualised stereotypes of women and as campaigner Susan Smith has contended, can be a ‘paraphilia’. She has argued that it would be a ‘bizarre situation’ if ‘something being done for arousal is protected under hate crime’.

4.189 The LGB Alliance stated:

Since women can wear so-called ‘men’s’ clothes without attracting opprobrium, the term ‘cross dressing’ refers to men who wear so-called ‘women’s’ clothing. To offer the protection of hate crime legislation to men who choose a particular style of dress, whatever their motives for doing so, trivialises the subject of hate crime legislation.

We oppose extending the protection of hate crime legislation to styles of dress. In addition, it should be noted that according to the glossary on Stonewall’s website, cross-dressers come under what it refers to as the ‘trans umbrella’ and would therefore automatically be covered by any provision governing ‘persons who are or are presumed to be transgender’.

4.190 The Alan Turing Institute expressed caution over the inclusion of “cross-dressers”:

It is important that all minority gender identifications are protected under the law – and we certainly welcome expanding the remit of the law to cover more types of non-cis-gendered identity, as this new wording proposes. However, we are cautious about subsuming a range of gender identifications within the term ‘transgender’ as this may not reflect the needs and concerns of people who solely identify as transgender as well as those who are better understood as intersex or non-binary. We are also slightly cautious about including ‘cross dressing’ within a legally protected category given that this by itself is not indicative of a non-cis-gendered identification. In particular, it could be easily exploited by hateful actors who use such an element – separated from its original context – to undermine the law and drive opposition. As such, this element would need to be implemented with due care and consideration.



4.191 A few stakeholders were concerned that broadening the definition of transgender could diminish protection for transgender people.

4.192 The National AIDS Trust was of the view that the current definition of transgender should remain:

No, we do not agree that the current definition of 'transgender' in hate crime laws be revised to include all the characteristics detailed in the question. We believe that people who are non-binary (or presumed to be), cross dress (or are presumed to), intersex (or presumed to be) warrant protection but it is essential that the definition of 'transgender' in hate crime laws is accurate.

4.193 The Welsh Government:

It is vitally important that transgender people do not lose protection as a result of any reform in UK hate crime law. In 2018/19, there was an 88% increase in reported hate crime in Wales where transgender identity was the motivating factor. In 2019/20, the number rose again with a 10% increase.

4.194 The Alan Turing Institute:

...we are cautious about subsuming a range of gender identifications within the term 'transgender' as this may not reflect the needs and concerns of people who solely identify as transgender as well as those who are better understood as intersex or non-binary.

4.195 Several stakeholders made suggestions for alternative language.

4.196 "Gender non-conforming" was proposed as an alternative to "cross-dressers" by SARI, Galop, MOPAC and Mishcon de Reya LLP.

4.197 The umbrella term "trans" was suggested as a replacement for "transgender" by Galop.

4.198 The CPS suggested that including "'gender identity' (biological and non-biological) within the definition would be a more inclusive approach."

4.199 Mermaids stated that the definition should include:

people who are or are presumed to be transgender, people who are or are presumed to be non-binary and people who are or are presumed to be gender-diverse.

4.200 GIRES suggested that the category "transgender" be renamed as "gender diverse" and that the definition be revised to include the following groups:

- People who are or are presumed to be trans/transgender;
- People who are or are presumed to be non-binary;
- People who are non-gender/agender or are presumed to be;

- People who cross dress (or are presumed to cross dress)
- People who are, or are presumed to be, intersex;
- People who are, or are presumed to be polygender, pangender, or otherwise gender diverse.

#### Part two of the question – revised title

4.201 Consistent with responses to the first part of the question, a majority of responses responded negatively to our proposals to expand the title used beyond the term “transgender”.

4.202 By contrast, a significant number of organisational stakeholders responded positively.<sup>50</sup>

4.203 Protection Approaches stated:

We welcome the broader title to appropriately reflect the more expansive definition. Gender-variant communities face unique risks requiring a distinctive category.

4.204 The National AIDS Trust saw this as important to ensure the meaning of transgender was not obscured

We agree with the proposal that the category be given a broader title such as ‘transgender, non-binary or intersex’. This would ensure that the definition of transgender is not expanded beyond what it is whilst ensuring non-binary and intersex people are protected.

4.205 Institutional stakeholders who responded negatively included the Intersex: New Interdisciplinary Approaches (INIA) Consortium, For Women Scotland, Kent ReSisters, the LGB Alliance and the Women’s Health Network.

4.206 The majority of responses reiterated the points made in response to the first part of the question regarding “intersex”, “non-binary” and “cross-dressers”.

4.207 Some consultees thought that, so long as the definition of “transgender” is sufficiently broad, the term was sufficient. For example, a member of the public wrote:

Provided the definition of transgender is inclusive of the other groups, there is an argument to be made that transgender is enough as an umbrella term. Keeping it consistent with the other categories, which are headed under one word to describe, I personally do not see the need to include all forms within the name of the category, as long as they are included in the definition, in a similar way as disability is defined as both physical and mental impairments, but the category is ‘disability’. Having a broader name for the category can make it seem less exclusive, by making it clear that a range of groups re included, whereas a list of characteristics could suggest

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<sup>50</sup> For example, the West Midlands Police and Crime Commissioner, the Magistrates Association, the National Police Chiefs’ Council (“NPCC”), Mishcon de Reya LLP, Stonewall, MOPAC, Hampshire Constabulary, Brandon Trust, the Government Independent Advisory Group on Hate Crime, the Office of the Police and Crime Commissioner for Nottinghamshire, Nottingham City Council, National AIDS Trust, Protection Approaches, TransOxford, Devon & Cornwall Police and the Alan Turing Institute.

that this is an exclusive list. It also makes it slightly more confusing and difficult from a practical perspective to record and investigate for criminal justice agencies.

#### Part three of the question – suggestions for a revised definition

4.208 In addition to the suggestions that were included in earlier answers, a number of further suggestions were made.

4.209 The Office of the Police and Crime Commissioner for Northumbria suggested an alternative title of “gender or transgender orientation/identity, in order to capture the continually evolving spectrum of gender diverse people and bring the law up to date with society.”

4.210 Schools OUT UK also suggested an alternative title:

We propose an alternative definition that follows the existing model of disability and transgender identity by simply listing the protected groups; namely ‘trans, non-binary, gender non-conforming and intersex people’. In formulating a definition, it would be advisable to use the word ‘trans’ and avoid the words ‘transsexual’ and ‘transgender’ as they have come to hold negative connotations for trans communities in the same way that using the word ‘homosexual’ has come to feel outdated and offensive. Similarly, we advise against using the label ‘cross dresser’ and instead use ‘gender non-conforming’.

4.211 The Welsh Government stated:

We further believe that it may make sense to reconsider the title of this category as ‘gender identity’ in recognition of the inclusion of non-binary individuals. Furthermore, if a ‘sex’ category is included (see Questions 11-14) then it would be pertinent to consider moving intersex individuals under that category instead.

4.212 Sex Matters argued that the term gender reassignment in the EA 2010 should be used:

The Equality Act 2010 includes a protected characteristic of “gender reassignment”, which is separate to sex. Section 7 of the Equality Act provides that a person has the protected characteristic of gender reassignment if the person: ‘is proposing to undergo, is undergoing or has undergone a process for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.’

4.213 Women for Scotland:

We would suggest that it must be stated clearly that the transgender identity category does not include the non-binary and cross-dressing categories and that the proposed reform moves forward with the categories relating to transsexuals, which has the benefit of aligning with existing legislation and does not stray into niche fetishes or nebulous concepts.

4.214 Dr Jen Neller, Birkbeck University of London argued that “sex characteristics or gender expression” should be used.

4.215 Other terms suggested included the following:

“Gender-related issues”;

“Other” or “All other”;

“Sex non-conforming”;

“Gender fluid”;

“Metagender”.

### Conclusion following consultation

4.216 Though our proposal for a revised definition of “transgender” did not seek to substantially change current understandings of its scope in hate crime laws, this has proved one of the most controversial aspects of our consultation paper. This no doubt reflects the wider controversy that has accompanied the increasing legal recognition of transgender and gender diverse people in society in recent decades. Cases such as *Miller v College of Policing*,<sup>51</sup> in which it was found that the police had reacted disproportionately to a series of “gender critical” tweets in violation of Article 10 of the ECHR (which protects freedom of expression) and the recent recognition of “gender critical” views as a protected belief under the EA 2010,<sup>52</sup> have highlighted the potential for a clash of views and values on this subject matter.

4.217 We recognise that there are diverse views in relation to understandings of sex and gender, and we do not seek to resolve these questions, nor issues relating to civil recognition of transgender rights, through the blunt instrument of the criminal law.

4.218 However, transgender people are already a protected group under hate crime laws, and there is a strong evidence base for this protection. Transgender people experience highly disproportionate levels of violence and abuse on the basis of who they are.<sup>53</sup> In this sense, they clearly meet the criteria for protection under hate crime laws that we set out in the previous chapter.

4.219 To the extent that there is anxiety that the protection of “transgender identity” in hate crime laws could lead to the suppression of legitimate freedom of expression – for example, suppression of “gender critical” views and their expression, we consider this to arise largely out of a lack of precision and specification in the underlying communications offences that are sometimes prosecuted in this context. In particular, as we have argued in several recent reports,<sup>54</sup> the offences found in section 1 of the Malicious Communications Act 1988, and section 127 of the Communications Act 2003 are vague, and leave a great deal to police and prosecutorial discretion. This certainly seems to have been the real concern in the case of *Miller*, where the key

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<sup>51</sup> [2020] EWHC 225 (Admin).

<sup>52</sup> *Forstater v CGD Europe* (2021), Appeal No.UKEAT/0105/20/JOJ. See [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf).

<sup>53</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para11.11.

<sup>54</sup> Abusive and Offensive Online Communications: A Scoping Report (2018) Law Commission Report No 381; Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399.

finding of the trial judge was that the underlying section 127 offence had not been committed.

- 4.220 In our recent report on reforms to the Communications Offences, we recommend that these offences be repealed, and replaced by offences that are far more precise, and target the most serious and harmful conduct.<sup>55</sup>
- 4.221 The key question that arises in this review is whether the current definition of transgender in the Sentencing Code is appropriate.
- 4.222 As we have previously noted, the current definition appears to be sufficiently flexible so as to cover people who cross-dress. It is arguable that it also includes non-binary persons. In the civil context, in the 2020 decision of *Taylor v Jaguar Land Rover Ltd*, the Employment Tribunal found that the term “gender reassignment” was capable of including people on a spectrum that was not necessarily fixed at one biological sex or another “without any violence to the statutory language”.<sup>56</sup> The facts of the case involved an engineer who had worked at Jaguar Land Rover for more than 20 years. She had previously presented as male but in 2017 began identifying as gender fluid, from which time she started to dress in women’s clothing. In light of this, she began to be subjected to insults and abusive jokes at work. Jaguar Land Rover had argued that the claimant’s then status as gender fluid/non-binary did not fall within the definition of gender reassignment under the EA 2010.
- 4.223 This is a relatively untested finding of a lower tribunal, and it is not in any event directly applicable to the context of hate crime laws, which uses the arguably broader term “transgender.” It is also an evolving area of law, and it is noteworthy the subsequent Employment Appeal Tribunal case of *Forstater*, which considered the protection of “gender critical” beliefs under the EA 2010, emphasised that the view that sex was binary and immutable is consistent with the law.<sup>57</sup>
- 4.224 We accept the force of the concern we have heard that the protection of intersex persons should not be included in any definition that relates to transgender persons. Our provisional proposal was that this group be a separately listed, and separately described group, within a wider definition that included “transgender, non-binary or intersex” persons. However, groups such as INIA Consortium strongly argued that this was still inappropriate, and we accept this.
- 4.225 The usage of the terms “cross-dress” and “non-binary” in our provisionally proposed definition also proved divisive.
- 4.226 In the case of the term “cross-dress”, the LGB Alliance argued that reference to styles of dress “trivialises the subject of hate crime”. Others considered it to be potentially limiting and outdated. While we accept the concern that some view the term as outdated, we consider that there is sufficient justification for inclusion of this category

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<sup>55</sup> Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399.

<sup>56</sup> *Taylor v Jaguar Land Rover Ltd, the Employment Tribunal* (14 September 2020) Case No 1304471/2018, para 178.

<sup>57</sup> *Forstater v CGD Europe* (10 June 2021) Appeal No.UKEAT/0105/20/JOJ, para 114. Available at [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf).

in the scope of protection afforded by the broader transgender grouping in hate crime laws. As a highly visible manifestation of gender diverse behaviour, cross-dressing can place a person at high-risk of transphobic abuse, harassment and violence.

- 4.227 In relation to the term “non-binary”, whilst some supported the explicit recognition of this emerging category, others considered it a nebulous term.
- 4.228 On reflection both of these more specific groups might be more usefully subsumed into a broader category of “gender diverse”; which was an overarching term suggested by several stakeholders.
- 4.229 The term “gender diverse” would more clearly include people who experience criminal hostility on the basis of non-conformity with gender roles and expectations. We also consider it to be more durable over time in the event that some of the more specific current terminology changes and evolves.

#### **Recommendation 5.**

- 4.230 We recommend that the term “transgender” in hate crime laws be replaced with the term “transgender or gender diverse”.
- 4.231 The definition of “transgender or gender diverse identity” should include people who are transgender or transsexual men or women, and people who are gender diverse; for example, people who are non-binary, and people who otherwise do not conform with male or female gender expectations; for example people who cross-dress.

#### **Variations in sex characteristics**

- 4.232 As we have concluded that variations in sex characteristics should not be included in a definition encompassing transgender and gender diverse people, a further question arises as to whether a separate category of “variations in sex characteristics” should be created.
- 4.233 In Scotland, a sixth characteristic “variations in sex characteristics” has been added in the Hate Crime and Public Order Act (Scotland) 2021, defined as follows:<sup>58</sup>

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,

and references to variations in sex characteristics are to be construed accordingly.

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<sup>58</sup> Hate Crime and Public Order Act (Scotland) 2021, s 11(8).

4.234 Part of the reason the Scottish government included this provision was that explicit reference to “intersexuality” already existed in section 2 of the Offences (Aggravation by Prejudice) (Scotland Act) 2009. This defined transgender identity 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

4.235 Whereas we consider that there is a good argument that other forms of gender diversity might be considered part of the existing definition of “transgender”, it is much less clear that variations in sex characteristics – as an entirely different concept – would fall within even the expansive definition currently adopted in the Sentencing Code.

4.236 A question then arises whether “variations in sex characteristics” should be added as a distinct characteristic in its own right. The Intersex: New Interdisciplinary Approaches (INIA) Consortium argued strongly that it should:

Intersex people should be included in hate crime law in recognition of the harms intersex people can face on the basis of hate towards differences of sex characteristics. In some regions around the world, intersex people are subject to infanticide and mutilation.

Where individuals may have visible intersex characteristics or non-conforming appearances they are at greater risk of being subject to violence and discrimination. Intersex people also experience physical assault and (sexual) violence within families, in society and in medical settings. In the 2019 European Union Agency for Fundamental Rights LGBTI study, intersex participants stated that their biggest problem was discrimination (34%) and bullying and/or violence (33%) on the basis of their sex characteristics. (The Equality Network in Scotland, in preparation for the Scottish Hate Crime legislation consultation, ran a survey on experiences of LGBTI hate crime and the responses further outline experiences of hate crime, prejudice and discrimination.

Inclusion is also important for deterrence. Non-consensual medical interventions that are performed on intersex young people are often based in fears of future stigma and harmful treatment to the intersex person if they look different. Inclusion in hate crime legislation makes it clear that this behaviour is not acceptable.

Including sex characteristics can also help empower intersex people. A history of silence and secrecy around intersex people in society and within families reinforces the idea that intersex people should not speak up about issues or harms they face. Inclusion is helpful in signalling that intersex people are recognised and have an avenue to report harms they experience.

4.237 However, while we accept the genuine concerns that have driven the suggestion that “sex characteristics” (INIA’s preferred terminology) should be included as a separate category in hate crime laws, there is currently very little evidence that people with variations in sex characteristics are the victims of crime involving hostility towards their

intersex status. We do not dismiss the possibility that this does occur, but at present such data is not available.

- 4.238 Some other jurisdictions provide specific protection in anti-discrimination laws. For example, in Australia, several jurisdictions have introduced anti-discrimination laws that provide protection on the basis of “intersex status”<sup>59</sup> or “sex characteristics”.<sup>60</sup> South Africa<sup>61</sup> has also introduced similar anti-discrimination laws.
- 4.239 Where people with variations in sex characteristics are the victims of crimes that are founded on transphobia or homophobia, the law will be able to recognise this as a form of hate crime; though not specifically intersex hate crime. This phenomenon of “misplaced hatred” is not uncommon in hate crime laws. For example, Sikh people are not infrequently the targets of Islamophobic hatred.
- 4.240 We recognise that some intersex people may be disappointed with this conclusion. We are grateful for the time that intersex people, and organisations that represent them have taken in engaging with the review, and in particular for emphasising the need for variations in sex characteristics not to be wrongly conflated with transgender identity.
- 4.241 We would further suggest that the government keep under review the issue of discrimination and violence experienced by intersex people, and consider inclusion of this characteristic in anti-discrimination and hate crime laws in the future if evidence to support such an approach emerges.

## DISABILITY

- 4.242 The current definition of disability in hate crime laws is “any physical or mental impairment”.<sup>62</sup>
- 4.243 This definition is based on a similar definition that is used in section 6 of the EA 2010. However the definition in hate crime laws is broader than the EA 2010 definition because unlike the EA 2010, there is no additional requirement that the “the impairment has a substantial and long-term adverse effect on [a person’s] ability to carry out normal day-to-day activities.”<sup>63</sup>
- 4.244 In our consultation paper we noted that the current definition suffered somewhat from the fact that it was extremely widely cast, and the term “disability” was not something that certain groups necessarily identified with, notably the deaf community.
- 4.245 However, we also found that the definition was well established, was broad enough to encompass the groups in need of protection under hate crime laws, and there was no

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<sup>59</sup> Sex Discrimination Act 1984 (Cth), s 5C; Anti-Discrimination Act 1998 (Tas), s 16, Equal Opportunity Act 1984 (SA), s 29(4).

<sup>60</sup> Discrimination Act 1991 (ACT), s 7(1)(v); Equal Opportunity Act 2010 (Vic), s 6(oa).

<sup>61</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (SA), s 1.

<sup>62</sup> Sentencing Code, s 66(6)(d).

<sup>63</sup> Equality Act 2010, s 6(1).



obviously preferable alternative to replace it. We therefore recommended that it remain essentially unchanged.

- 4.246 We were, however, concerned about circumstances where an individual experienced hostility and abuse on the basis that they were wrongly perceived to lack disability. We suggested that one way to address this might be to include “presumed lack of disability” within the scope of hate crime laws.

### Consultation

- 4.247 The first question we asked – at Consultation Question 9 – was whether consultees considered that that current definition of “disability” should be retained.

We invite consultees’ views on whether the current definition of disability used in the Criminal Justice Act 2003 should be retained.

- 4.248 Significantly fewer consultees responded to this question than the previous questions regarding characteristic definitions. The majority were in favour of retaining the current definition of disability because it is clear and easy to understand, as well as being broad and flexible. Of those who responded negatively, many were against hate crime laws in general or against specifying protected characteristics.

- 4.249 The majority of stakeholders were in support of retaining the current definition – seeing it as broad and flexible enough to cover a wide array of disabilities, conditions and impairments.

- 4.250 The Law Society stated:

The very broad definition of ‘any physical or mental impairment’ is, in our view, clear and appropriate (para 11.92). While we accept that some people take issue with aspects of the term and advocate disaggregating all the various physical and mental conditions, it is very important in the context of the criminal law that definitions are simple to apply and flexible enough to ensure that a wide array of disabilities and conditions are protected. We therefore have no objection to the Commission’s intent to retain the current definition.

- 4.251 The CPS agreed:

The definition of disability in the Criminal Justice Act 2003 and the Sentencing Act 2020 is very broad. We are not aware of any need to further extend or narrow it.

- 4.252 The NPCC was similarly supportive:

Most chief officers were supportive of the 2003 CJA definition and felt that a broad definition is the most appropriate test in these circumstances. Some mentioned the importance of coverage for those with a learning disability, sensory impairment etc but we have always advised the CJA should be interpreted broadly until case law places any restrictions.

- 4.253 The Bar Council was concerned that further categorisation or definition could create unnecessary complexity and lead to confusion:

the Bar Council is not in a position to comment on the experiences of individuals who have a disability and the appropriateness of that term. It is, though, a term which has a commonly understood and accepted meaning and the current statutory definition is equally clear. There is a risk that any attempt at further categorisation or definition will cause further unnecessary complexity and could lead to confusion.

- 4.254 The Foundation for People with Learning Disabilities and Mental Health Foundation was in support of retaining the current definition because it explicitly includes mental impairment.
- 4.255 The National AIDS Trust and the West Midlands Police and Crime Commissioner were both in favour of retaining the current definition because it includes people living with HIV.
- 4.256 Changing Faces made a case for a “visible difference” characteristic to be introduced.
- 4.257 The APCC also suggested the explicit inclusion of people with a visible difference, as well as deaf people, people on the autism spectrum and those living with HIV:

We would suggest that - similar to the proposals for changes to the definition of transgender to include the experiences of non-binary and intersex people - the current definition of disability could also be expanded to include the experiences of people with a scar, mark or condition on their face or body that makes them look different; deaf people; people on the autism spectrum; those living with HIV and other groups. Similarly, the category could additionally be given a broader title to reflect the inclusion of these groups.

- 4.258 The Free Speech Union was in support of retaining the current definition because it is against it being extended to cover disfigurement:

We do not approve of the existence of protected classes here in any case; and we certainly do not think they should be extended. It follows that we would not support the idea that disability should be extended to cover disfigurement. Other than that, we see no reason to modify the present definition.

- 4.259 A number of institutional stakeholders were of the view that the definition should align with the Social Model of Disability. Although the Welsh Government was broadly in support of retaining the definition, it noted that it has adopted the Social Model of Disability in its disability policy framework.<sup>64</sup>

For the reasons of inclusivity identified in the consultation paper, we are content for the current definition of disability used in the Criminal Justice Act 2003 to be retained, providing this approach is consistent with the views of disabled people received as part of consultation. It should be noted that the Welsh Government has adopted the Social Model of Disability, which makes an important distinction

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<sup>64</sup> Specifically, the model distinguishes between “impairment” and “disability”. It recognises that people with impairments are disabled by barriers that commonly exist in society. These barriers include negative attitudes, and physical and organisational barriers, which can prevent disabled people’s inclusion and participation in all walks of life. See further: Welsh Government, *Action on Disability: The Right to Independent Living* (2019) available at <https://gov.wales/sites/default/files/publications/2019-09/action-on-disability-the-right-to-independent-living-framework-and-action-plan.pdf>.

between 'impairment' and 'disability'. The Welsh Government is committed to work to increase understanding of the Model across Welsh Government and beyond.

4.260 The Foundation for People with Learning Disabilities and Mental Health Foundation suggested that accompanying guidance should explain that people with learning disabilities fall within the scope of the definition and thus are protected by the legislation:

We recommend that guidance and supporting materials explaining the Act should make it absolutely clear that crimes against people with learning disabilities are likely candidates for aggravated offences and enhanced sentencing. This would help to build awareness that there are additional tools available to police forces and prosecutors to use when dealing with crimes committed against people with learning disabilities.

4.261 Dr Jen Neller, Birkbeck University of London argued for an expanded definition:

I wonder if the definition might be extended to any physical or mental impairment, injury or medical condition. This would seem to cover those who do not identify with the label 'disabled' listed in paragraph 11.99, as well as persons with skin conditions, scars and other physical but non-impairing irregularities. I am concerned, however, as to how broader definitions (as well as existing ones) may feature in low level offences, where off-hand comments about a person's appearance or mental acuity, for example, will often be quite incidental to the offence.

#### Wrongly presumed lack of disability

4.262 We then asked a question that related to a further concern we had heard – that violence and abuse is sometimes directed at disabled people, or carers, that takes the form of a challenge to whether they are “really” disabled, or otherwise entitled to a particular form of access or service. CPS guidance on disability hate crime describes this as follows:

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.<sup>65</sup>

4.263 However, despite the harm experienced by the victim, it can be difficult to prosecute this conduct as a form of disability hate crime because the hostility is based upon the offender's perception that the victim is *not* disabled. We therefore questioned whether there may be value in extending the protection of the law to include hostility on the basis of a “wrongly presumed” lack of disability.

4.264 Consultation Question 10 was as follows:

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<sup>65</sup> 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>.

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.

4.265 There was a mixed response from institutional stakeholders and the majority of individuals responded negatively. There was also significant confusion over this question – a number of consultees stated that they did not understand the question.

4.266 Several consultees thought that criminal conduct based on a wrongly presumed lack of disability should fall within the scope of protection.

4.267 The CPS stated:

We are aware that disabled people are frequently victimised due to an incorrect presumption that they are not actually disabled and/or are falsely claiming to be disabled. These cases are considered by the victims and by the wider community to be disability hate crime but cannot be prosecuted as such because of the current definition of disability hostility contained in s.146 Criminal Justice Act 2003 and s.66 Sentencing Act 20[20]. This is an anomaly which results in injustice for disabled victims in this type of case. This anomaly should be rectified by including a 'perceived lack of disability' within the definition of 'hostility based upon disability'.

4.268 The Law Society agreed:

Given the examples outlined in the consultation paper where the CPS has had cases where people are targeted because they are wrongly presumed not to have a disability, or to be exaggerating their disability (e.g. attacks on blue badge holders and people in wheelchairs (see para 11.108)), it seems reasonable to include presumed lack of disability. The type of offending in both contexts seems to logically sit within the hate crime regime."

4.269 Several consultees thought that this would help to extend protection to individuals with hidden/invisible disabilities.<sup>66</sup>

4.270 However, some stakeholders and individuals thought that this type of offending does not fall neatly within the hate crime framework, since it is not motivated by hatred.

4.271 For example, the Welsh Government stated:

This is evidentially a common experience for disabled people across the UK and it is important that their views are received in response to this consultation question.

However, it is difficult to see how the targeting of those with hidden impairments could be seen as motivated by hatred for disabled people. It would seem perverse for a perpetrator to be given a sentence uplift for hate crime where they state that their actions were actually motivated by genuine concern to ensure disabled people can access services which they need.

Such behaviour may be due to the hidden nature of the impairments, but criminal conduct could then be prosecuted under general public order offences rather than

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<sup>66</sup> The Office of the Police and Crime Commissioner for Northumbria; The Magistrates Association; The APCC.

the hate crime regime. Nevertheless, seeking the views of those with hidden impairments is crucial to ensure they have an appropriate legal remedy when criminal actions take place.”

4.272 The Government Independent Advisory Group on Hate Crime also did not agree:

No – by definition this is not a Hate Crime. It may be highly harmful, but the motivation by definition is not hatred.

4.273 British Transport Police and MOPAC also argued that behaviour of this kind should not be considered a hate crime, as did several members of the public:

- (1) “If it's wrongly assumed it's not fuelled by hate??”
- (2) “This makes no sense. A person cannot be guilty of hatred towards a disabled person if they do not perceive that person to be disabled.”
- (3) “I am relatively sure that it shouldn't come under hate crime because that appears to be ignorance, and not actual active hate.”

4.274 A number of consultees responded negatively because they believed that adding “presumed lack of disability” to the definition of disability would prevent people from challenging the misuse of disability services and facilities. For example, a member of the public said: “I disagree with adding ‘mistaken presumption’ to the disability definition as I believe this will inhibit proper challenges to people who may be misusing or misappropriating certain concessions, privileges and benefits that are granted to those with disabilities.”

## **Conclusion following consultation**

### **Retention of the current definition**

4.275 Overall, there was strong support to retain the current definition of disability.

4.276 We are grateful for suggestions to improve the current definition, in particular:

- (1) The Welsh Government suggested the adoption of the Social Model of Disability, which distinguishes between ‘impairment’ and ‘disability’. This model recognises that people with impairments are disabled by barriers that commonly exist in society.
- (2) Changing Faces made a case for a “visible difference” characteristic to be introduced. The APCC also suggested the explicit inclusion of people with a visible difference, as well as deaf people, people on the autism spectrum and those living with HIV.
- (3) Dr Jen Neller, Birkbeck University of London suggested that “the definition might be extended to any physical or mental impairment, injury or medical condition.”

4.277 However, while we recognise that “disability” is not a term that perfectly describes the experience of all the victims that it protects, it has the advantage of being simple, flexible, and well understood. For example, it includes deaf people, people with

autism, people living with HIV, and people with disfigurements, all of whom, while not necessarily strongly identifying with the term “disability”, are clearly appropriate groups for protection under hate crime laws. It is also (subject to some small differences enumerated at paragraph 4.243) largely consistent with the equivalent definition used in the EA 2010. As we have indicated elsewhere in this chapter, we consider consistency of approach with the EA 2010 to be desirable where feasible, as it improves the clarity and consistency of the law.

4.278 We therefore recommend that the term “disability” and its current definition be retained.

#### **Recommendation 6.**

4.279 We recommend that the definition of “disability” in hate crime laws be retained in its current form.

#### **Wrongly presumed lack of disability**

4.280 Responses to our proposals to deal with abusive and violent challenges made to disabled people on the basis that they are “not disabled” or not entitled to the relevant service garnered mixed responses.

4.281 It seems clear based on the CPS response and testimony we have heard from disabled victims that this is a real issue. However, many considered that our proposal would capture circumstances that do not involve hostility or hatred towards disability, and was therefore overly inclusive.

4.282 Having considered the matter further, we agree that our proposal was overly inclusive, and risked undermining the legitimacy of hate crime laws.

4.283 We do consider that there remains a serious issue surrounding the challenging of disabled persons’ right to access services – sometimes through violence and abuse – and our recommendations in Chapter 9 to revise the legal test to include motivation by “hostility or prejudice” may be better adapted to this circumstance.

#### **ASSOCIATION WITH PROTECTED GROUPS**

4.284 A final issue that arises in the context of the current characteristics is the inconsistency in the scope of the protection afforded by the language of the characteristics in the current law. Whilst the law is clear that “association” with members of a racial or religious group is included within the scope of the protection of these characteristics, no such clarification exists in relation to sexual orientation, disability and transgender identity. In our 2014 consultation paper we stated that:

We agree with consultees that any new aggravated offences should apply to offending in which the defendant demonstrates hostility, or is motivated by hostility,

towards a person based on that person's association with disabled people (or with people of a particular sexual orientation, or who are transgender).<sup>67</sup>

4.285 We also noted that if an equivalent reform were not adopted in relation to enhanced sentencing this would have the “unfortunate consequence” of creating an inconsistency and a gap of protection in the law.<sup>68</sup>

4.286 We did not ask a specific question about this issue again in our 2020 consultation paper, however we did ask a range of other questions relating to parity of protection across the currently protected groups. In Chapter 8 of this report we recommend extension of the aggravated offences to all five characteristics, and in Chapter 10 we make a similar recommendation for a consistent approach to stirring up hatred offences across all these characteristics.

4.287 Consistent with the approach of parity of protection, we reiterate the view that we expressed in 2014 that the law should explicitly include hostility towards victims on the basis of “association” with these protected characteristics: disability, sexual orientation and transgender or gender diverse identity.

#### **Recommendation 7.**

4.288 We recommend that, consistent with the current approach to race and religion, the scope of protection for disability, sexual orientation and transgender or gender diverse identity be extended to “association” with these characteristics.

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<sup>67</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 159.

<sup>68</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 159.

# Chapter 5: Recognising sex or gender in hate crime laws

## INTRODUCTION

- 5.1 As part of our review of hate crime laws in England and Wales, 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.<sup>1</sup>
- 5.2 We first considered this question in Chapter 12 of our consultation paper, and provisionally proposed the addition of sex or gender to hate crime laws.<sup>2</sup> However, we also invited consultees' views about how far this protection should extend, asking whether offences that are particularly associated with violence against women and girls (VAWG), such as sexual offences, should be excluded from the scope of sex or gender-based hate crime laws.<sup>3</sup>
- 5.3 In this chapter, we re-visit the question of whether sex or gender characteristics should be added to hate crime laws, reflecting upon consultation responses, as well as further policy development undertaken on this complex issue.
- 5.4 We focus on the possibility of including hostility based on sex or gender as an aggravating factor for existing criminal offences. The possible creation of a stirring up hatred offence on the grounds of sex or gender engages distinct issues and is therefore separately analysed in Chapter 10 of this report.
- 5.5 Our final recommendation is that sex and gender should not be added as a characteristic for the purposes of enhanced sentencing and aggravated offences. This departs from the provisional proposal in our consultation paper. We set out our reasoning in greater detail in this chapter, but in very broad terms, we have reached the view that hate crime recognition would not be an effective solution to the very real problem of violence, abuse and harassment of women and girls in England and Wales, and may in fact be counterproductive in some respects.
- 5.6 This decision has not been taken lightly. It is an issue to which we have devoted significant thought, reflection and analysis, to ensure that all viable options for reform have been duly considered. We outline these options in detail at paragraphs 5.328 to 5.374. Most of the options that we have considered involve a bespoke treatment of

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<sup>1</sup> Law Commission website, Hate Crime <https://www.lawcom.gov.uk/project/hate-crime/>.

<sup>2</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, Consultation Question 11, para 12.194.

<sup>3</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, Consultation Question 11, para 12.194. The content of Chapter 12 of our consultation paper is further summarised as paragraphs 5.25 to 5.33.



sex or gender for the purposes of hate crime laws, that differs from that of the other characteristics.<sup>4</sup> The reason for this, as we outlined in our consultation paper and explain further in this chapter, is that crimes connected with sex or gender characteristics raise unique issues that are not present to the same extent in relation to the existing five characteristics protected in hate crime laws. After giving each option careful consideration, we find that they all involve unsatisfactory compromises. Having due regard to “the practical implications of changing the law”, as our terms of reference direct, we do not consider that any of the possible options represent a desirable policy course. Instead, more targeted options outside the hate crime framework – such as a possible offence of public sexual harassment – should be considered to address some of the specific concerns that have driven calls for misogyny to be included within hate crime laws. This, we argue, might complement other law reform work we are currently undertaking in areas such as intimate image abuse, and the use of evidence in rape and sexual offence trials.

- 5.7 In reaching this conclusion we wish to emphasise that we are not suggesting that crimes involving hostility towards women (or men) are any less serious than crimes that fall within the scope of one of the existing protected characteristics. Hate crime laws are an important means by which the criminal law recognises the distinct harms associated with characteristic-based offending. However, they are not the only means by which sentences can reflect significant harm. Recognition within the hate crime framework is also not necessary to ensure appropriate support is provided to victims of crime, and indeed many consultees considered VAWG-specific services to be superior in this regard.
- 5.8 Ultimately, we consider hate crime laws to be the wrong solution to a very real problem. We recognise that many people may disagree with our conclusion and find it difficult to understand given the prevalence of sex and gender-based violence and abuse. We wish to stress that despite the significant public debate around this issue, our recommendations have been decided independently by the Commission, on the strength of the evidence and policy considerations before us.

## BACKGROUND

- 5.9 The possible use of hate crime laws to tackle violence and hostility against women has gained prominence throughout the United Kingdom (UK) in recent years.
- 5.10 In 2016, Nottinghamshire Police piloted the recording of “misogyny hate crime”.<sup>5</sup> The force categorised the following behaviours, directed towards women, as misogyny hate crimes:

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<sup>4</sup> In this report, we recommend that all existing hate crime characteristics should be protected in the aggravated offences and enhanced sentencing regime (see further Chapter 8), as well as the stirring up offences (see Chapter 10).

<sup>5</sup> 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>.

Whistling, leering, groping, sexual assault, being followed home, taking unwanted photos on mobiles, upskirting, sexually explicit language, threatening/aggressive/intimidating behaviour, indecent exposure, unwanted sexual advances and online abuse.<sup>6</sup>

- 5.11 Women were encouraged to report this behaviour when they experienced it. When it was reported, Nottinghamshire Police categorised it either as “misogyny hate crime” or as a “misogyny hate incident”, depending on whether the relevant conduct amounted to a criminal offence. When an independent evaluation of the pilot scheme was conducted in 2018, 174 women had reported misogyny hate crimes from April 2016 to March 2018. 73 of these were classified as crimes and 101 were classified as incidents.<sup>7</sup>
- 5.12 Following this, other police forces voluntarily started to record sex or gender-based hate crime, for example Northamptonshire,<sup>8</sup> North Yorkshire,<sup>9</sup> and Avon and Somerset.<sup>10</sup>
- 5.13 In March 2021, the issue of “misogyny hate crime” gained renewed political and media attention in England and Wales. This followed the brutal murder of Sarah Everard, a 33-year-old woman who was abducted and murdered while walking home in South London on 3 March 2021.<sup>11</sup>
- 5.14 As well as prompting calls for “misogyny hate crime” to be recognised,<sup>12</sup> Sarah Everard’s murder sparked a national conversation about women and girls’ safety, and their experiences of violence.<sup>13</sup> This particularly focused on the sexual harassment that women and girls experience when occupying public spaces such as streets, and women and girls’ collective feelings of unsafety in these spaces. Thousands of

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<sup>6</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham’s Women’s Centre, 2018) p 3, available at <https://www.nottingham.ac.uk/lipp/documents/misogyny-evaluation-report.pdf>.

<sup>7</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham’s Women’s Centre, 2018) p 3.

<sup>8</sup> 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>.

<sup>9</sup> North Yorkshire Police, Fire and Crime Commissioner, “Misogyny recognised as a hate crime in North Yorkshire” (10 May 2017), available at <https://www.northyorkshire-pfcc.gov.uk/news/misogyny-recognised-hate-crime-north-yorkshire/>.

<sup>10</sup> Avon and Somerset Police, “Gender hate crime now recognised in Avon and Somerset” (16 October 2017).

<sup>11</sup> BBC News, “Sarah Everard murder: Met PC Wayne Couzens pleads guilty” (9 July 2021) <https://www.bbc.co.uk/news/uk-england-london-57774597>.

<sup>12</sup> Jaymi McCann “Labour urges Government to make misogyny a hate crime in a bid to tackle violence against women” *iNews* (13 March 2021) available at: <https://inews.co.uk/news/politics/labour-urges-government-to-make-misogyny-a-hate-crime-in-bid-to-tackle-violence-against-women-912824>.

<sup>13</sup> Amanda Taub, “In Rage Over Sarah Everard Killing, ‘Women’s Bargain’ Is Put on Notice”, *The New York Times* (15 March 2021) available at <https://www.nytimes.com/2021/03/14/world/europe/sarah-everard-women-protest.html>; BBC News, “How a woman’s death sparked a nation’s soul-searching” (14 March 2021) available at <https://www.bbc.co.uk/news/uk-56384600>.

(predominantly) women shared stories online about the time and effort they expend trying to stay safe when carrying out everyday tasks such as travelling home.<sup>14</sup>

- 5.15 On 17 March 2021, the Government announced that from Autumn 2021, all police forces in England and Wales will be required to record “crimes of violence against the person that are perceived by the victim to be motivated by hostility towards their sex”.<sup>15</sup> Speaking in the House of Lords, Baroness Williams of Trafford said:

I advise the House that on an experimental basis, we will ask police forces to identify and record any crimes of violence against the person, including stalking and harassment, as well as sexual offences where the victim perceives it to have been motivated by a hostility based on their sex. As I have said, this can then inform longer-term decisions once we have considered the recommendations made by the Law Commission. We will shortly begin the consultation with the National Police Chiefs’ Council and forces on this with a view to commencing the experimental collection of data from this autumn.<sup>16</sup>

- 5.16 Beyond England and Wales, two other reviews in Scotland and Northern Ireland have recently considered whether sex or gender should be recognised in hate crime laws.

- 5.17 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 “gender” hostility in Scottish criminal law.<sup>17</sup>

- 5.18 However, the Hate Crime and Public Order (Scotland) Act 2021 did not add a statutory aggravation relating to sex or gender. Instead, section 12 of the Act created a power for Ministers to add the characteristic of “sex” by regulations.

- 5.19 A “Working Group on Misogyny and Criminal Justice in Scotland” has been set up independently to consider how the Scottish criminal justice system deals with misogyny. This includes looking at whether there are gaps in the law that could be addressed by a specific criminal offence to tackle such behaviour, and whether a statutory aggravation and/or a stirring up of hatred offence in relation to the characteristic of sex should be added to the Hate Crime and Public Order (Scotland) Act 2021 by regulation at a future date. The group is being chaired by Baroness Helena Kennedy QC.<sup>18</sup>

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<sup>14</sup> BBC News, “Sarah Everard: How a woman's death sparked a nation's soul-searching” (11 March 2021) available at: <https://www.bbc.co.uk/news/uk-56384600>.

<sup>15</sup> *Hansard* (HL), 17 Mar 2021 vol 811, col 370.

<sup>16</sup> *Hansard* (HL), 17 Mar 2021 vol 811, col 370.

<sup>17</sup> 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/>.

<sup>18</sup> For further details see *Misogyny and Criminal Justice in Scotland Working Group*: <https://www.gov.scot/groups/misogyny-and-criminal-justice-in-scotland-working-group/>.

- 5.20 In 2020, an independent review of hate crime legislation in Northern Ireland led by *Judge Desmond Marrinan* also recommended that “sex/gender be included as a protected characteristic” in Northern Ireland.<sup>19</sup>
- 5.21 The Republic of Ireland recently introduced the Criminal Justice (Hate Crime) Bill 2021 which would include “gender” (including “gender expression”) as one of the protected characteristics alongside race, colour, nationality, religion, ethnic or national origin, sexual orientation, and disability.<sup>20</sup>

## THE CONSULTATION PAPER

- 5.22 We considered whether sex or gender should be added to hate crime laws in Chapter 12 of our consultation paper.
- 5.23 Our approach in Chapter 12 was shaped by the three criteria that we outlined in Chapter 10 of the consultation paper:
- (1) **Demonstrable need:** evidence that crime based on hostility or prejudice 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, other 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.
- 5.24 These criteria were designed to guide the addition of new hate crime characteristics. They sought to incorporate a minimal criminalisation approach to the development of the law and reflect understandings about hate crime law’s theoretical underpinnings.
- 5.25 Applying the first and second of these criteria, we found that the case for recognising sex or gender-based hate crime was strong.
- 5.26 In relation to demonstrable need, we cited evidence that women are disproportionately targeted for certain crimes and observed testimony and arguments to suggest that this criminal targeting of women has been linked to prejudice and/or hostility towards their sex or gender.<sup>21</sup>
- 5.27 In relation to additional harm, we outlined evidence that criminal targeting linked to sex or gender-based prejudice and/or hostility can cause additional harm to primary

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<sup>19</sup> Hate crime legislation in Northern Ireland Independent Review (November 2020) at para 7.138, available at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf>.

<sup>20</sup> See Criminal Justice (Hate Crime) Bill 2021, Head 2 (Interpretation), available at: [http://www.justice.ie/en/JELR/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf/Files/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf](http://www.justice.ie/en/JELR/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf/Files/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf).

<sup>21</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.32 to 12.75.

victims of the targeting, to others who share the characteristic, as well as to wider society.<sup>22</sup> For example, we highlighted how the prevalence of gendered harassment in particular spaces has been linked to women collectively feeling unsafe in those spaces. In turn, this can act as a barrier to women and girls' societal participation – they might avoid certain areas if travelling alone or choose not to express opinions online.

5.28 However, notwithstanding our provisional view that the first two criteria were met, we also found that the suitability criterion was much more difficult to satisfy in the context of sex or gender. We identified a range of suitability concerns that might arise as a result of recognising sex or gender-based hate crime. These included:

- (1) Potentially harmful consequences:
  - (a) It has been argued that violence against women and girls is closely related to sex or gender-based prejudice and inequality. Some groups have been concerned that if the gendered nature of VAWG must be expressly proven via hate crime laws, then this understanding would be unduly limited to cases where there was proof that specific gendered language was used.<sup>23</sup>
  - (b) Research has indicated that sex or gender-based hostility is more likely to be identified or proven in the context of sexual violence perpetrated by strangers, in non-private settings, particularly where this is accompanied by physical violence.<sup>24</sup> This has raised concerns that recognising sex or gender as a hate crime characteristic could contribute to hierarchies of sexual violence by re-introducing damaging standards of “real rape”<sup>25</sup> – a concept which falsely implies that a rape is more harmful, or is only real, if it takes place in certain circumstances, for example if it is perpetrated by a stranger in an alleyway.
  - (c) In the pre-consultation period, 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 considered to be more serious than those committed by same sex perpetrators.<sup>26</sup>

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<sup>22</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.86 to 12.113.

<sup>23</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250 paras 12.117 to 12.118.

<sup>24</sup> 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. See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.119 to 12.120 for our discussion of this.

<sup>25</sup> The term “real rape” was used by Susan Estrich in 1987, see S Estrich, *Real Rape* (1st ed 1987). For further discussion, see para 12.119 of our consultation paper.

<sup>26</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 12.121.

- (2) Difficulties relating to proof:<sup>27</sup>
- (a) It might be practically difficult to prove a sex or gender-based aggravation in the context of VAWG crimes that usually take place in private, for example sexual offences or domestic abuse.
  - (b) There is a risk that adding a sex or gender aggravation to sexual offences could compound well-documented difficulties of proof and low conviction rates in the VAWG context. This is particularly acute when it comes to sexual offences.
- (3) Issues related to resources:<sup>28</sup>
- (a) We considered whether the financial and time resources that the implementation of sex or gender-based hate crime may require could be spent more efficiently elsewhere in the VAWG context. This concern exists against the backdrop of a criminal justice system that is already heavily criticised because of very low prosecution and conviction rates for sexual offences,<sup>29</sup> as well as support services that are consistently facing funding challenges<sup>30</sup> and increasing service-user demand.<sup>31</sup>
- (4) Questions about whether hate crime is the right way to characterise VAWG offending:<sup>32</sup>
- (a) The question of whether macro-factors such as sexism or misogyny can accurately characterise offending was raised most pertinently in relation to domestic abuse, specifically intimate partner violence. Intimate partner violence can often involve a complex range of motivations that might relate specifically to individual relationships. Men can be victims of domestic abuse perpetrated by other men or by women, and women can

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<sup>27</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.122 to 12.127.

<sup>28</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.128 to 12.136.

<sup>29</sup> HM Government, *The end-to-end rape review report on findings and actions* CP 437 (June 2021) available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1001417/end-to-end-rape-review-report-with-correction-slip.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001417/end-to-end-rape-review-report-with-correction-slip.pdf); Centre for Women's Justice, End Violence Against Women Coalition, Imkaan and Rape Crisis England and Wales, *The Decriminalisation of Rape* (November 2020), available at <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisation-of-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf>; Clare Waxman, *The London Rape Review, Reflections and Recommendations* (July 2019), available at [https://www.london.gov.uk/sites/default/files/rape\\_review\\_-\\_final\\_-\\_web.pdf](https://www.london.gov.uk/sites/default/files/rape_review_-_final_-_web.pdf).

<sup>30</sup> Women's Budget Group, *Life-Changing and Life-Saving, Funding for the women's sector* (December 2018) pp 12 to 17, available at <https://wbg.org.uk/wp-content/uploads/2018/12/WBG-Funding-Report-2.pdf>.

<sup>31</sup> HM Government, *The end-to-end rape review report on findings and actions* CP 437 (June 2021) para 51; VAWG sector statement on COVID-19, available at <https://www.womensaid.org.uk/vawg-sector-statement-on-covid-19/>.

<sup>32</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.137 to 12.140.

experience domestic abuse perpetrated by other women. Some argue this reflects the individualised nature of this abuse, over and above the relevance of sex or gender-based prejudice.

(5) Concerns relating to double counting:<sup>33</sup>

- (a) This concern exists because maximum sentences for sexual offences are already high in England and Wales, reflecting 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. In relation to domestic abuse, sentencing guidelines now emphasise that “domestic abuse offences are regarded as particularly serious within the criminal justice system”, guiding sentencers to assess the offence as “more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship”.<sup>34</sup>

5.29 In response to these suitability concerns, we raised the possibility of excluding offences that are associated with violence against women and girls from the scope of sex or gender-based hate crime.<sup>35</sup> However, we also identified further problems which might arise where certain offences are excluded, for example, the coherence and intelligibility of the law might be undermined.<sup>36</sup>

5.30 Notwithstanding our serious suitability concerns, we made a provisional proposal to add a sex or gender-based characteristic to hate crime laws, because of the high prevalence of crimes that have been linked to prejudice and/or hostility towards women, as well as the extent and diversity of harm these crimes can cause. In addition to seeking reactions to this provisional proposal, we invited consultees’ views as to whether sexual offences, forced marriage, FGM and crimes committed in the domestic abuse context should be specifically excluded from the scope of sex or gender-based hate crime.

5.31 We also considered how a sex or gender-based characteristic should be framed in law, asking whether protection should be specifically framed (i.e. limited to women) or generally framed (i.e. gender neutral). We provisionally proposed that if a specific approach were adopted, then the term “women” rather than “misogyny” should be used, and if a gender-neutral approach were adopted, the term “sex or gender” rather than exclusive use of “sex” or “gender” should be adopted.<sup>37</sup>

5.32 We separately considered whether the stirring up offences should apply to sex or gender in Chapter 18 of the consultation paper. We referred to evidence of online hate

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<sup>33</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 12.141.

<sup>34</sup> Sentencing Council, *Overarching principles: domestic abuse* (24 May 2018), available at <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>.

<sup>35</sup> We discussed how these carve outs might work at paras 12.142 to 12.176 of the consultation paper.

<sup>36</sup> We discussed some of the problems that the carve outs might cause at paras 12.177 to 12.185 of the consultation paper.

<sup>37</sup> We discussed these issues at paragraphs 12.197 to 12.222 of the consultation paper.



speech directed towards women, particularly “incel” content. The Commission for Countering Extremism has defined “incels” as follows:

‘Involuntary celibates’ (or ‘Incels’) are an overwhelmingly male online community, whose members understand society as a three-tiered hierarchy dictated by physical appearance. Incels place themselves at the bottom of the pile, meaning that they perceive themselves to be forced into involuntary celibacy. The Incel worldview has been described as “a virulent brand of nihilism”, with many Incels advocating violence against women.<sup>38</sup>

5.33 We provisionally proposed that the stirring up offences should be extended to cover sex or gender.<sup>39</sup> We revisit this proposal in Chapter 10 of this report.

## CONSULTATION QUESTIONS AND ANALYSIS OF RESPONSES

5.34 This section of the chapter is divided into the following sub-sections:

- Responses to Consultation Question 11 (part one) and Summary Question 2, which asked whether consultees agreed that sex or gender should be added to hate crime laws.
- Responses to Consultation Question 11 (part two) which asked whether certain offences associated with VAWG should be excluded from the scope of sex or gender-based hate crime.
- Responses to Consultation Questions 12 to 14, which asked a series of questions about how sex or gender-based hate crime should be framed in law.
- Analysis of consultees’ responses.
- Options for reform.

## RESPONSES TO CONSULTATION QUESTION 11 (PART ONE) AND SUMMARY QUESTION 2: THE CASE FOR RECOGNISING SEX OR GENDER

5.35 The first consultation question that we asked on this issue concerned the case for recognising sex or gender in hate crime laws. It was put to consultees in the following way:

Consultation Question 11 (part one)

We provisionally propose that sex or gender should be recognised in hate crime laws. Do consultees agree?

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<sup>38</sup> See Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) p 30, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/963156/CE\\_Operating\\_with\\_Impunity\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963156/CE_Operating_with_Impunity_Accessible.pdf).

<sup>39</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 18.234 to 18.238.



- 5.36 A small majority of organisational consultees responded “other” to this question, whilst approximately the same number of organisational consultees responded “yes” as responded “no”.
- 5.37 A larger majority of individual responses to Consultation Question 11 (part one) answered “no”. Out of the remaining individual responses, more respondents selected “yes” than “other”.
- 5.38 In some instances, the additional comments provided by consultees differed from the option they selected between “yes”, “no”, and “other”. For example, a significant number of “no” and “other” responses were in favour of one or both of sex and/or gender being added as protected characteristics. However, this still does not alter the fact that most responses to Consultation Question 11 (part one) were opposed to the addition of this characteristic in any format.
- 5.39 We also asked a very similar question in our summary paper:

Summary Question 2:

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

- 5.40 Summary Question 2 did not elicit “yes”, “no” or “other” responses, instead consultees were asked an open question. There were significantly more individual responses expressing opposition to our proposal than support for it. The converse was true of organisational responses to this summary question: there were significantly more positive responses than negative responses.

### **Consultation responses highlighting the benefits of recognising sex or gender**

- 5.41 The key arguments that consultees offered in favour of recognising sex or gender are summarised under the relevant headings below.
- 5.42 The consultees cited below did not necessarily respond “yes” to the question of whether sex or gender should be added as a protected characteristic in hate crime laws. Some responded “other” because their support for hate crime recognition in this area was in some way qualified.

### **Tackling the prevalence of crime that women experience and the harm it causes**

- 5.43 Taking our three criteria as guidance, organisational consultees cited evidence of criminal targeting that is directed towards women, highlighting its extensive prevalence. They also discussed the harm this causes to women as individuals and as a group, as well as to society generally.
- 5.44 Refuge provided detailed evidence that “women are targeted by men for some of the most serious and violent crimes in the country”, and went on to argue that there is:

Clear evidence of the predominance of misogynistic crime in England and Wales... falling on a continuum of misogyny, from the ‘everyday sexism’ of street harassment and sexist online abuse, to threats of rape and violence (both online and offline) and violence, including homicide.

5.45 Stakeholders particularly observed the extent of misogynistic abuse that women face in online and offline public spaces.

5.46 The campaign group Our Streets Now made the following comments before including 26 testimonies (from their database of over 300 accounts) of public sexual harassment directed towards women:

We believe that public sexual harassment is a human rights issue that reflects societal discrimination. Misogyny and other forms of discrimination impacts our right to public space. We do not all experience public sexual harassment the same. The problem of street harassment can be committed on multiple grounds, from race to disability to sexuality, and it is often due to several overlapping factors. Our focus is centred on the prevalence and impact of gender-based public sexual harassment in particular, but all forms of harassment are interlinked.

Our research and bank of testimonies can show that there is a demonstrable need for “sex or gender” to be a protected characteristic, and that crimes motivated by misogyny cause additional harm to the individual, to women, girls and non-binary people, as well as to wider society.

5.47 The Centre for Women’s Justice (CWJ) noted the extent and impact of hatred towards women:

Hatred towards women is clearly extraordinarily widespread and harmful. Any woman who is different, any woman in the public eye, any women who expresses strong beliefs will almost certainly experience expressions [or] acts of hatred on account of her sex. Your report highlights the recent experience of many female MPs and through our work at CWJ we regularly receive reports of sickening and frightening expressions of hatred towards women. Such expressions perpetuate a culture of misogyny and help create a climate that encourages acts of violence towards women.

5.48 Similarly, the Jo Cox Foundation drew attention to the harassment of women who operate in the public eye, and the fact that women are being “driven out of the political sphere owing to misogynistic abuse”. The Local Government Association supported the addition of sex or gender because of the disproportionate abuse to which female leaders and councillors are subject.

5.49 The law firm Mishcon de Reya LLP supported the recognition of sex or gender in hate crime laws because of their “concern to tackle the persistent and widespread misogyny that women face and which – particularly online – seems to fall between the cracks of existing laws”. They added that:

We need to bridge the gap between online and offline spaces and tackle the pernicious idea that those most vulnerable to online abuse should modify their own behaviour to protect themselves. In the same way that the answer to unsafe streets is not to ask women to stay at home, it is not a solution to ask those who are disproportionately targeted online simply to leave those spaces.

5.50 Dr Laura Higson-Bliss from Birmingham Law School suggested that adding misogyny as a hate crime characteristic would give women “more leverage when reporting

online abuse to authorities” and allow for better monitoring of it and recording of trends.

- 5.51 One response submitted by a police chief noted the “ubiquitous nature of misogynistic abuse online”, linking this to the growth of extreme misogyny (namely the incel movement), as well as highlighting the significant psychological harm that online abuse can cause.
- 5.52 Many individual consultees cited the prevalence of offending which is motivated by hostility towards sex or gender, especially against women and girls. A number of consultees provided their personal experiences, and the experiences of women they knew, to demonstrate this prevalence.
- 5.53 Using this prevalence as a starting point, several individual consultees argued that sex or gender-based hate crime could:
- (1) Provide women with greater protection from harassment in public spaces.
  - (2) Help tackle online abuse and lead to effective monitoring and act as a deterrent, ultimately reducing its prevalence.

#### Reflecting the motivations underpinning VAWG and the additional harm it causes

- 5.54 Some consultees felt that protecting women in hate crime laws would be commensurate with the additional harm to the individual victim and to society caused by attacks on women involving hostility towards them as women, and would also reflect the motivations underlying VAWG. In the context of conduct such as street harassment, sexist online abuse, and threats of rape and violence, Refuge noted that:

As it stands, the gender-based hostility that motivates and is demonstrated in these behaviours is not adequately captured by current legislation. Introducing misogyny hate crime within the hate crime framework would reflect the seriousness of these crimes, in terms of capturing the additional harm to individual women, to women as a group, and to society more broadly, in line with existing hate crime categories.

- 5.55 More widely, the Fawcett Society felt that hate crime recognition could reflect the harm caused by gender/sex-based inequality in society.

#### Sending a message about the unacceptability of relevant conduct

- 5.56 Linked to this, the Fawcett Society felt that recognising crimes motivated by misogyny in hate crime laws “would contribute to a cultural shift in our society” and communicate that they are unacceptable. They compared this to existing characteristics saying “arguably, hate crime law around other characteristics has contributed in this manner, albeit with much work remaining to be done”.
- 5.57 More practically, the Fawcett Society felt that misogyny hate crime recognition might create space for rehabilitative sentences, which could be designed to address the misogyny underpinning relevant offences. However, they noted this would require resources and investment.

5.58 Similarly, Refuge said that including misogyny within the hate crime framework would reflect the seriousness of the range of VAWG crimes and “would also send the clear message that misogyny and sexism has no place in our society and will not be tolerated, thereby utilising the educative function of the law”.

5.59 Nottingham City Council also pointed to the symbolic value of this reform:

Practically, inclusion of this category provides a frame to understand behaviours towards women which have previously been normalised and invisible... By including women in this framework and enabling the everyday, public harassment of women to be reported and made visible in a way not done previously, a symbolic function is also carried out - of making these previously normalised behaviours explicitly unacceptable.

5.60 Stella Creasy MP also referred to the fact that recognising sex or gender in hate crime laws would enable courts “to send a strong message about the targeting of women”.

5.61 Responding on behalf of the Association of Police and Crime Commissioners (APCC), Derbyshire’s Police and Crime Commissioner, Hardyal Dhindsa expressed that in his view:

Misogyny is often at the root of Violence Against Women and Girls (VAWG), and that as part of the Criminal Justice System’s commitment to eradicate VAWG, we should be recording and investigating crimes and incidents motivated by misogyny or gender, so that we are able to gain a clear idea of the scale of the issue, and also send an unequivocal message to our communities that crimes motivated by misogyny or gender will not be tolerated.

#### Addressing a gap in hate crime laws

5.62 Several stakeholders argued that hatred towards women, or hatred based on sex or gender, constituted a notable gap in hate crime laws which our provisionally proposed reform could fill. For example, the CWJ noted that it was “extraordinary” and “unconscionable” that to date misogyny has been excluded from this list.

5.63 The CWJ caveated these sentiments by questioning the utility of hate crime laws as a tool to deal with violence against marginalised groups. They were concerned that hate crime legislation often fails to protect the most vulnerable because “it does not properly reflect structural imbalances of power between different groups in society and the exploitation of power”, which they linked to the way in which some characteristics, such as race, are generally framed. However, whilst the CWJ were not convinced that “extension of categories of groups to the hate crime rubicon is the right way forward”, they felt that insofar as hate crime laws will continue to exist and potentially be applied to new characteristics, sex should be added.

#### Enabling the recognition of hate crime based upon multiple characteristics, where one of these characteristics is sex or gender

5.64 Numerous stakeholders observed that female sex or gender was often also targeted in racist, religious, disablist and LBT+ hate crimes, and felt that adding sex or gender as a protected hate crime characteristic would provide the opportunity to recognise this.

- 5.65 The Equality and Inclusion Partnership (EQuIP) cited this in relation to women from black and minority ethnic backgrounds, whilst Stonewall highlighted this in the context of lesbian, bisexual and trans women. The Antisemitism Policy Trust discussed targeting on the basis of multiple characteristics in relation to Jewish women and in a consultation meeting, Tell MAMA spoke about the gendered nature of Islamophobic hate crime experienced by Muslim women. Stay Safe East felt that recognising misogyny hate crime could better reflect the hate crime experiences of disabled women, whilst the National Pensioners Convention and Women's Working Party also observed the need to recognise the intersection between gender and age.
- 5.66 Nottingham City Council said that the ability to recognise intersectional hate crime, particularly in the context of Islamophobic abuse of visibly Muslim women, was frequently cited in support of Nottinghamshire Police's Misogyny Hate Crime pilot when they were consulting on the Nottingham City Hate Crime Strategy.
- 5.67 This was also argued by Stella Creasy MP, who said that including sex or gender alongside existing protected hate crime characteristics is "an example of how an intersectional approach to hate crime law could be enabled".
- 5.68 Susannah Fish, who was Chief Constable of Nottinghamshire Police when the misogyny hate crime pilot was introduced, discussed the positive impact of the pilot on police understanding of VAWG offending.
- 5.69 The Fawcett Society noted that with sufficient leadership and resources, introducing misogyny hate crime could positively influence police training, feeding into a wider cultural shift regarding violence against women and girls and gender inequality.

#### Encouraging reporting of crimes against women

- 5.70 Several responses argued that this reform would improve reporting and recording of sex or gender motivated hate crime and encourage reporting of crime against women more generally.
- 5.71 For example, Nottingham City Council said:

In Nottingham's experience, this [misogyny hate crime pilot] policy has enabled women to report behaviours which constitute crimes which they would not have previously reported by bringing them into the public consciousness.

#### Suitability concerns are surmountable

- 5.72 In the consultation paper we outlined several suitability concerns that might arise if sex or gender were to be added to hate crime laws. Some stakeholders argued that these concerns were surmountable, and that as a result, they felt able to support the recognition of sex or gender-based hate crime. The following points were made in this regard:
- (1) *Use of the carve out:* Several responses acknowledged the significance of the suitability concerns we raised in the consultation paper, but felt that excluding sexual offences, FGM, forced marriage and offences committed in the domestic abuse context could respond to most of these concerns.

- (2) *The Nottingham experience*: Some responses cited the Nottingham Misogyny Hate Crime Pilot as evidence that the sex or gender-based hate crime approach was suitable. For example, The Government Independent Advisory Group on Hate Crime (IAG) said:

The IAG have moved its views on this area of legislation and are now strongly in favour of its inclusion. Fears about the practicality of such an extension of legislation have been roundly refuted by work done in Nottinghamshire and other force areas.

- (3) *Resource concerns should not be a barrier*: In response to the suitability concerns we identified in the paper regarding resources, the Alan Turing Institute said:

The lack of protection for gender and sex has been a noticeable omission from the laws on hate crime for some time. The only coherent rationale that has been given for not offering protection to this characteristic is the cost, which is a poor reason given the scale and impact of the problem.

- (4) *Women-specific protection*: Dr Nikki Godden-Rasul, responding on behalf of the Newcastle University Human Rights and Social Justice Forum, felt that questions about whether sex or gender hate crime was the most efficient use of VAWG resources could be answered by women-specific protection:

If it is women as a group, or the language of misogyny which is used, then resource and education used on hate crime would be going towards addressing violence against women and girls.

#### Other reasons given in favour of sex or gender hate crime

5.73 Other supportive reasons were offered by individual respondents:

- (1) Hate crime recognition would help to identify trends and prevent the escalation of harmful behaviour.
- (2) Hate crime recognition would ensure provision of adequate services for victims.
- (3) Hate crime recognition would achieve consistency with protections under the Equality Act 2010 (“EA 2010”).

5.74 Several individual consultees also caveated their support with the view that adding sex or gender as a protected characteristic in hate crime laws was an incomplete solution to providing legal protection for women and preventing relevant offending against them.

5.75 Several individual consultees who supported the proposal nonetheless raised concerns about freedom of speech. Freedom of speech concerns relating to the protection of sex or gender in hate crime laws are cited below at paragraphs 5.134 to 5.137 and discussed in more detail as part of the possible extension of the stirring up offences to cover sex or gender in Chapter 10 of this report.

## Consultees' concerns and arguments against recognising sex or gender

- 5.76 Below we summarise the concerns that consultees expressed about the potential addition of sex or gender in hate crime laws.
- 5.77 Those who are cited in the summary below did not necessarily provide a “no” response to the question of whether sex or gender should be added to hate crime laws, some responded “other”. Nonetheless, the content of these responses raised concerns about the addition of sex or gender, which have been incorporated below.
- 5.78 At the outset we note that among consultees who expressed concerns about sex or gender-based hate crime, very few contested the prevalence or additional harm caused by crime that is linked to hostility or prejudice towards a person’s sex or gender.
- 5.79 For instance, Rape Crisis England & Wales, who responded “no” to the question of whether sex or gender-based hate crime should be recognised, began their response by recognising the widespread prevalence of violence against women and its associated harm:

That women and girls experience violence and abuse based on their gender, is undeniable. As the Law Commission consultation paper sets out, there is ample evidence of the need for these harms to be addressed, and of the additional harm that they cause not just to women individually, but collectively, and to the wider society. PTSD<sup>40</sup> UK state that up to 94% of sexual violence and abuse survivors develop PTSD symptoms. 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.<sup>41</sup>

Women and girls are taught to do safety work to protect themselves from predatory men, whilst men are socialised into their right to public and private spaces. This creates a society in which women and girls are oppressed. Violence and abuse are used to reinforce this position of oppression and as ... mechanisms of power and control. Though women’s experiences are not homogenous and are affected by different intersecting factors, there is a collective harm done to women by society’s apparent acceptance of the prevalence and normalisation of violence and abuse against women and girls (VAWG).

- 5.80 Victim Support (who responded “other”), said:

There is no doubt that the scale of gender-based violence is staggering. Over a quarter of women will experience domestic abuse in their lifetime and one in five will experience sexual assault. On average, a woman is killed by a man every three days. Serious criminal offences are committed against women and girls, and are motivated by prejudice or hostility towards them because of their sex. It is clear that

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<sup>40</sup> PTSD is an acronym that refers to the psychological condition of post-traumatic stress disorder.

<sup>41</sup> 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” (2020) 217(4) *The British Journal of Psychiatry* 562.



these crimes cause considerable harm to both the victim/survivor and to wider society.

- 5.81 Although we received a large number of consultation responses on this issue, only a very small number of consultees were not convinced that there was sufficient evidence of prevalence or additional harm caused by crime motivated by hostility to or prejudice against a person's sex or gender.

#### Concerns related to proof and prosecutions

- 5.82 Consultees expressed numerous concerns surrounding the ability to prove sex or gender-based hostility, and the impact of a sex or gender-based hate crime aggravation on the prosecution of relevant base offences. These concerns can be broken down as follows:

##### *The legal test for hate crime is unsuited to the context of sex or gender*

- 5.83 The Crown Prosecution Service (CPS) anticipated that the addition of sex or gender could create evidential difficulties if the existing two-limb hostility test was retained (whereby it must be shown that the defendant *demonstrated*, or the crime was *motivated by*, hostility towards the relevant characteristic).
- 5.84 In relation to the demonstration limb, they said that "gender-based hostility is rarely demonstrated in the same clear and unequivocal way as it is in respect of the existing protected characteristics", and even if gendered language were used, "it would still be difficult to prove that the hostility was based upon the victim's gender rather than on the victim as an individual".
- 5.85 In the context of the motivation limb, they said that:
- Proving that an offence was motivated wholly or partly by hostility towards a particular gender would be even harder except in extreme cases where there was evidence of misogynistic/misandrist views or ideology.
- 5.86 Rape Crisis England & Wales felt that proof of hostility would be very difficult in the context of sex or gender-based violence:
- The majority of VAWG offences happen in private, making it incredibly difficult to prove that, for example, a gender-based slur was used at the time.
- In addition, most perpetrators of VAWG are known to the survivor, which would arguably make it more difficult to demonstrate hostility in a complex abusive relationship which does not appear as such on the face of it.
- 5.87 The Office of the Police and Crime Commissioner for Hampshire said it would not be possible to identify the alleged perpetrator's motivation as one of hatred of women, as opposed to another motivation. For this reason, they felt that sex or gender "would fail the suitability test as it is not workable".

##### *Detrimently impacting the prosecution of base offences*

- 5.88 The Law Society focused on the prosecution's already difficult task of proving rape and other sexual offences. They felt that also having to prove a sex or gender-based



aggravation could further complicate sexual offences trials and increase the trauma for victims.

- 5.89 Rape Crisis England & Wales also referred to the potential for sex or gender-based hate crime to exacerbate existing prosecution difficulties in the context of sexual offences. They were particularly concerned about the extent to which juries would be equipped to deal with questions surrounding sex or gender-based hate crime, stating:

We know that rape myths and stereotypes feature heavily in the minds of the general public, and by default, jurors. Contrary to the view that including gender/sex in a hate crime framework would lead to greater understandings of VAWG as a structural issue rooted in power and control of women, we believe that this is overly optimistic and predicated on jurors having some understanding of the systematic oppression of women and girls. The debate about the extent to which VAWG is a hate crime is a complex one. Without training, that knowledge cannot be expected to be adequately relayed to jurors.

- 5.90 They ultimately felt that:

At best, trials will be slowed down due to their more complex nature, potentially exacerbating the trauma that complainants already experience in the criminal justice system. At worst, convictions will be even more difficult to obtain.

- 5.91 Rape Crisis England & Wales were also worried that if sex or gender-based hostility were to arise in a private setting or intimate relationship, the private or intimate context could be invoked by the defence to dispute the fact that sex or gender-based hostility was demonstrated or that it motivated the offence. As a result, they felt sex or gender-based hate crime could add to the “defence’s armoury of myths and stereotypes used to cast doubt in a jury’s mind”.

- 5.92 Beyond sexual offences, Rape Crisis England & Wales also referred to potential disruption in the context of domestic abuse prosecutions, noting that:

Recent changes to domestic abuse legislation have meant that coercive and controlling behaviour is now finally recognised. There is a risk that introducing a need to prove hostility would undo this progress as prosecutors and courts will be asked to narrow their focus to one of hostility.

- 5.93 As well as disrupting the prosecution’s task, Rape Crisis England & Wales also felt that prosecutorial attempts to prove sex or gender-based hostility in the context of domestic abuse would carry a risk of harm:

Add to this the concerns around the disclosure of irrelevant third-party material and digital device data, which is routinely screened to test a complainant[’s] credibility and the proposed reforms become even more dangerous. Messages of love and affection from a perpetrator, or even a perpetrator’s history of abuse against men, could easily be used by the defence to show that the perpetrator was not motivated by hate or hostility against women and the complainant is lying.

- 5.94 Rape Crisis England & Wales further referred to existing difficulties in prosecuting “fleeting instances of sexual harassment”, which sex or gender-based hate crime

could compound. Fileborn and Vera-Gray, from whose work their response drew, expand on these existing difficulties, noting that:

There are practical policing difficulties directly connected to public sexual harassment such as the fleetingness of the encounter and the anonymity of the perpetrator that combine with the broader failures of policing and prosecution in relation to all forms of VAWG.<sup>42</sup>

### Hostility towards sex or gender does not reflect the reasons underpinning violence against women and girls

5.95 Rape Crisis England & Wales argued that hate crime was fundamentally unsuited to capture the systematic oppression of women and girls which they felt manifests in VAWG offences:

Hate crime takes a notably individualistic approach, focussing on hostility against an individual. Of course, the individual must belong to a group that is recognised as in need of further protection, but we do not believe that the framework adequately acknowledges the complex structural issues which underpin gender-based violence and abuse. An individualistic approach is unsuitable to recognise the continuum of sexual violence and other forms of VAWG. Gender-motivated hate crimes are not merely based on intense dislike of an individual woman or a sub-group of women, but work to enforce social hierarchies that are biased against all women. These crimes are rooted in power and control, not hatred, making the gender/sex an ill-fitting protected characteristic in the hate crime framework.

5.96 In this way, Rape Crisis England & Wales argued that hate crime does not reflect the root causes of violence against women and girls. Linked to this, in their response, Connected Voice noted that:

There are also some questions around motivation of abuse [and] threats on the basis of sex and gender – are these necessarily motivated by hate or are they caused by things like harmful gender norms and male entitlement?

5.97 Woman's Place UK said that:

Unpicking and understanding the motivation for violent crime is always difficult. In the case of intimate partner crime and sexual violence and harassment, the motivations can rarely be reduced to "hate".

### Hate crime's inability to capture intersectional instances of VAWG and the barriers faced by certain communities in the context of police reporting

5.98 Rape Crisis England & Wales did not "believe that the hate crime framework permits a sufficiently intersectional approach to VAWG". They drew upon the work of Fileborn

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<sup>42</sup> F Vera-Gray and B Fileborn (forthcoming), "Hiding the harm? An argument against misogyny hate crime" in *Landscapes of hate: spaces of abjection, discrimination and exclusion* Catherine Donovan, Edward Hall, John Clayton (eds).

and Vera-Gray, who comment on this purported aspect of the Nottingham misogyny hate crime pilot:

Though victim-survivors are able to identify multiple “motivations” (for example reporting one incident as both misogyny hate crime and a disability hate crime), this embeds an additive rather than intersectional approach to social inequalities. They are presented as discrete boxes to be ticked and prioritised, multiplied and subtracted, instead of understanding how they co-constitute one another and often cannot be readily separated. In this way, hate crime as a framework for VAWG disconnects and ranks different forms of violence and requires victim-survivors to disconnect and rank ourselves. As such we find it irreconcilable with an intersectional feminist perspective.<sup>43</sup>

5.99 Rape Crisis England & Wales also cited research conducted by the End Violence against Women Coalition, highlighting the view of one respondent who said:

Concepts around hate crime are clumsy, partly because they are based on simplified notions of identity. The understandings and meanings of hate crime are, therefore, inconsistent and do not offer a sufficiently inclusive and complex understanding of the intersections between violence, equalities and human rights.<sup>44</sup>

5.100 This point was also acknowledged in a roundtable discussion that took place during our consultation period. One participant said that although they had advocated hate crime’s inclusion of gender in the past, they were concerned that the hate crime framework struggles to deal with intersectional hate crimes. The participant cited developments in Nottingham, where there are concerns that even if it encourages women to report, it leaves out a huge group of women who do not have a good relationship with the police.

#### Concerns that hate crime recognition is not the solution to the problems facing VAWG victims in the criminal justice system

5.101 At a consultation roundtable event, one participant said that trying to fit VAWG crimes into the hate crime framework cannot tackle the criminal justice system’s current failure to address these crimes and could obscure and distract from existing problems. They said the law needs to start by going back and addressing the problems that already exist.

5.102 Woman’s Place UK, who argued against hate crime recognition in this area, also pointed to more pressing, existing failings. They focused on very low reporting rates of VAWG-associated crimes:

Rates of reporting for all types of VAWG, from street harassment, to rape, to domestic violence, to FGM, are extraordinarily low. The reasons for low levels of reporting are well understood and documented. Trauma, lack of trust in police, fear

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<sup>43</sup> F Vera-Gray and B Fileborn (forthcoming), “Hiding the harm? An argument against misogyny hate crime” in *Landscapes of hate: spaces of abjection, discrimination and exclusion* Catherine Donovan, Edward Hall, John Clayton (eds) pp 9 to 10.

<sup>44</sup> M Horvath, L Kelly, *From the Outset: Why violence should be a priority for the Commission for Equality and Human Rights* (End Violence Against Women, 2007) p 5.

of retaliation, shame, stigma, fear of not being believed, and love or loyalty towards the perpetrator are all factors in women and girls not reporting violent crimes.

The failure of the police, the Crown Prosecution Service, and the whole criminal justice system to take VAWG seriously, believe survivors, treat them with respect and dignity, and pursue prosecutions against perpetrators, has undermined women's trust in the system.

- 5.103 Similarly, Legal Feminist also considered that an "enquiry into motivation" was "irrelevant" given the "woefully inadequate" resources to combat VAWG and the "appalling prosecution rates":

In addition, outcomes for victims of VAWG are exceptionally poor, resulting in the widespread perception that rape, in particular, has been virtually decriminalised by unacceptably low prosecution rates. If allegations of rape, domestic abuse, stalking and sexual and sexist harassment were investigated and prosecuted more seriously, rather than being treated by police and prosecutors as part and parcel of the female experience in the United Kingdom, this would immeasurably improve women's experience of the justice system in this country. There seems little point in tinkering with laws on motivation and sentencing when far too few of these cases ever get to court.

- 5.104 Sex Matters also objected to the addition of sex or gender as a protected characteristic on the grounds that, "sexually motivated crimes, and violence against women and girls, should be a priority for policing using existing laws".
- 5.105 Rape Crisis England & Wales emphasised that sex or gender-based hate crime would fail to offer women and girls anything new because it would not alter the underlying law: "women will receive the same legal protections as they currently do, after reforms".
- 5.106 Professor Leslie J Moran questioned what sex or gender hate crime would add to the response to VAWG, noting that the potential addition of sex or gender "brings into sharp relief major questions about whether enhanced punishment works", and that:

It is difficult to see how the addition of gender/sex to the parameters of hate crime will actually work to improve safety for women and access by women to the criminal justice services related to improving their experience of safety.

#### Concerns about double counting

- 5.107 The Law Society said they accepted that the characteristic of "female sex or gender fulfils the criteria of demonstrable need and additional harm, both to the victim herself and to women in society generally, as set out in the detailed material in the consultation paper". However, they had concerns regarding the suitability of including this characteristic. This is based on the problem, acknowledged and discussed in the consultation paper, of how to deal with sexual offences, forced marriage, FGM and crimes committed in the domestic abuse context, which are predominantly committed against women. They continued:

We are particularly concerned about the issue of "double counting", in that sentences for sexual offences are already long, rightly reflecting the seriousness of

these offences, which we agree implicitly accounts for the fact that in many cases they are targeted towards women.

### Resource implications

5.108 Many personal responses thought that resources could be more effectively used to enforce existing laws and provide better services to victims of VAWG, rather than spending money on implementing a new initiative of sex or gender hate crime.

5.109 It is helpful to break down consultees' resource concerns in the following way:

#### *The VAWG support sector's resources*

5.110 Rape Crisis England & Wales noted that:

The VAWG support sector is already chronically underfunded. As of March 2020, 8,444 survivors were on Rape Crisis member centre waiting lists for support from Rape Crisis centres nationally.

5.111 They did not think that sex or gender hate crime would bring more funding to the VAWG sector: "some campaigners believe that recognition of VAWG in a hate crime framework would bring about more funding, however we believe this to be optimistic at best".

5.112 Further, Rape Crisis England & Wales were worried that:

- (1) The proposed reforms risk a loss of focus on VAWG (particularly if prevalence is misrepresented because of women's reluctance to report sex or gender-based hate crime).
- (2) Sex or gender-based hate crime could result in competition between different victim categories i.e. "hate crime" vs. "VAWG".

5.113 They questioned whether resources may be better directed towards providing funding to frontline support services and changing societal attitudes about VAWG.

#### *Resources to enforce existing laws*

5.114 Several responses pointed to problems with enforcing existing laws that arguably require more urgent funding attention, as well as existing pressures on the criminal justice system.

- (1) Woman's Place UK felt that it would be best for police to direct their stretched resources towards enforcing existing laws.
- (2) The Centre for Women's Justice said:

If the purpose of hate crime legislation is to protect vulnerable groups from harm, then our view is that resources must be put into tackling actual violence and confronting the extent of impunity that currently exists for perpetrators of violence against women. Our concern therefore is that criminal laws which are designed to offer protection and accountability around violence against women and girls require proper implementation and enforcement.

- (3) Rape Crisis England & Wales argued that the criminal justice system is already overburdened and risks being “further stretched” by the addition of sex/gender hate crime. They questioned whether resources might be better spent on improving the existing criminal justice response to VAWG.

5.115 The Authentic Equality Alliance argued that any extension of hate crime would “only worsen” the situation of over-stretched police resources, noting that police forces would be completely overwhelmed, with the result that, in the context of hate crime, “already abysmal, clear-up/conviction rates would plummet”.

5.116 A police chief, responding in a personal capacity, also objected on this basis saying that the expansion of hate crime laws in this way was “not workable and policing does not have resources to do that”. Three other police chiefs expressed concerns about the “volume” of work sex/gender hate crime would create.

5.117 However, it is important to note that hate crime laws only apply in respect of existing criminal offences. The addition of sex or gender would not criminalise new conduct that might not already be potentially subject to police investigation.

#### *Hate crime resources*

5.118 The West Sussex County Council Community Safety and Wellbeing team was concerned that:

Broadening to “sex” or “gender” may dilute what the people in the currently protected groups are experiencing, as support services such as their commissioned Hate Incident Support Service may be unable to provide a service to the many people this change may produce referrals from.

#### *Negative and harmful consequences*

5.119 Consultees’ concerns about negative consequences can be broken down in the following ways:

#### *Hierarchies of sexual violence*

5.120 Rape Crisis England & Wales were concerned about adding another category of sexual violence – sexual violence where sex/gender-based hostility is present – in the context of persistent myths and existing hierarchies which centre around the factual circumstances in which sexual violence arises:

There is already an implicitly acknowledged hierarchy of sexual violence in our society, with the “real rape” stereotype of an unknown perpetrator attacking a woman in a dark alleyway, using physical force. [Rape Crisis England & Wales] and other organisations have spent years unpicking these myths and addressing the blame, shame and guilt that are felt by survivors as a result of their experience not fitting this stereotype. The proposed reforms would ask us to look also for evidence of hostility against women and girls and therefore creates an additional category of sexual violence in the hierarchy. We know that beneath all sexual violence is a demonstration of male dominance over women, but we do not believe that viewing sexual violence and other forms of VAWG as hate crimes would draw this out in a helpful way.

5.121 Rape Crisis England & Wales were concerned that if understandings of VAWG were reduced to individualised understandings centring around men’s “intense dislike” of women then rape myths could be promulgated. In making this point, Rape Crisis drew upon Fileborn and Gray who point out that “the motivation of hostility then is more likely to be applied to stranger perpetrators, and here we see the hate crime frame as propping up harmful myths about VAWG”.<sup>45</sup>

5.122 The danger of creating a “hierarchy of victims” was argued in a different way, by the organisation Christian Concern:

Same-sex sexual assault would be considered less serious in the criminal justice system than crimes that would come under the designation of sex-based or misogyny-based hate crimes.

5.123 Similar points were made in relation to male survivors of crimes such as sexual offences and domestic abuse, particularly by the Men and Boys Coalition and ManKind Initiative. However, these points were made in relation to whether certain offences should be excluded from sex or gender-based hate crime, and how sex or gender-based hate crime should be framed, and so they are cited in more detail below.

#### *Impacting survivors’ recovery*

5.124 Rape Crisis England & Wales said that:

Many survivors do not see their experience as rooted in hate/hostility and asking them to frame their experience in this way would arguably add additional barriers to reporting and making sense of violence and abuse in journeys of recovery.

[...]

The vast majority of clients of Rape Crisis centres carry self-blame and shame. Much of Rape Crisis practitioners’ work focusses on unpicking and challenging these notions, and helping women and girls to reframe their experiences. By readjusting the frame, we risk complicating the issue further and adding to existing confusion.

#### *Creating practical difficulties for support services*

5.125 Victim Support also questioned whether hate crime legislation “provides the right framework with which to tackle gender-based violence”:

Given that offences such as domestic abuse and sexual violence are overwhelmingly, although not exclusively, committed by men against women, will making sex or gender a protected characteristic create confusion as to how the offence is characterised; as VAWG, hate crime or both? This could also have a

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<sup>45</sup> F Vera-Gray and B Fileborn (forthcoming), “Hiding the harm? An argument against misogyny hate crime” in *Landscapes of hate: spaces of abjection, discrimination and exclusion* Catherine Donovan, Edward Hall, John Clayton (eds).



significant impact on victim services, as it may create confusion within referral pathways for victims and survivors.

#### Data collection problems

5.126 Consultees' concerns relating to data collection can be broken down as follows:

##### *The ability to monitor trends is undermined by low reporting rates in this context*

5.127 Woman's Place UK questioned the view that sex or gender-based hate crime could help monitor and track crimes that are rooted in hatred in women. This is because reporting rates of all forms of VAWG are incredibly low, particularly compared with the reality of a very high volume of offending.

##### *Misrepresenting the prevalence or reality of VAWG*

5.128 Woman's Place UK said:

It is likely that there would be a good deal of media interest in a new hate crime category and Home Office data releases relating to police recorded hate crime would be seen as an authoritative source of data on the prevalence of VAWG. Yet we anticipate that the reporting rates would remain low. We believe that there is a risk that the likely low levels of reporting would be misunderstood by many as an indication that VAWG is not as prevalent as women say and is less prevalent than crimes against other groups.

5.129 Rape Crisis England & Wales observed that various campaigners have advocated for "misogyny hate crime", on the basis that it would provide an opportunity to keep track of non-criminal instances of VAWG (as well as criminal instances), via the recording of misogynistic hate incidents alongside hate crime. Rape Crisis objected to this argument, again citing Vera-Grey and Fileborn to pose the following specific objections:

- (1) Reports of misogyny hate incidents are arguably the "tip of the iceberg" when it comes to VAWG. Using hate crime provisions to track the volume of non-criminal instances of VAWG could hide the extent of the issue.
- (2) If the prevalence of VAWG is underrepresented it could lead to unintended consequences, such as the diversion of funds out of the areas that need resources, but which experience low reporting levels.
- (3) The evaluation of recording misogyny hate crime and incidents in Nottingham showed no change in reporting levels, and so did not aid better data collection.
- (4) Emphasis on this argument further risks a system whereby only police reported incidents are seen as representing women's experiences.

##### *An insufficient basis upon which to expand the criminal law*

5.130 Legal Feminist questioned whether the "ability to monitor trends" can be a "proper or democratic basis for expanding the criminal calendar" and said that "monitoring trends should be dealt with via the Office for National Statistics, not the police". They felt that



citizens should not face the “hazard of criminalisation in order to gather sociological or criminological data”.

### Violence against women and girls is not connected to sex or gender-based inequality or prejudice

5.131 Mike Bell, responding on behalf of Gender Parity UK, disputed the connection between violence against women and girls and prejudicial ideas about women. He argued that this connection is:

Only generally agreed on in feminist research and organisations that use female-focused/exclusive research. Violence against women and girls is not closely connected to prejudicial ideas about women and their place in society, or overt hostility towards women in the UK.

### Concerns about a disproportionate focus on violence against women and girls

5.132 Mike Bell, responding on behalf of Gender Parity UK opposed any inclusion of sex or gender because:

There is already a disproportionate focus on violence against women, even the gender-neutral inclusion of sex/gender would only increase the disproportionate protection of women... The vast majority of VAWG is caused by individual bad behaviour (eg sexual harassment), inter-personal issues (eg domestic abuse) or culture (eg FGM). Hate is almost never a driving factor.

5.133 Commenting on the consultation paper, he added:

Women are far more likely to assume that their gender is contributor to their victimisation even if that is not the case. Men are also far less likely to identify gender based abuse as abuse. Both is based on the extreme awareness and highlighting of gender-based violence against women through media and government and the complete neglect to address gender-based violence against men. This document is an example of this gender discrimination.

### Freedom of expression concerns

5.134 Some respondents were opposed to protecting sex or gender in hate crime laws because they felt it might threaten freedom of expression.

5.135 Legal Feminist were particularly concerned about the impact of the proposed addition on the freedom to engage in debate about sex and gender. They said:

There is a real possibility that the use of accurate sex-based language would be criminalised; ‘misgendering’ and ‘deadnaming’ may offend a person’s sincerely held subjective view of themselves, but they both emanate from objectively verifiable truth.

5.136 They also said: “we predict that hate crime legislation will be used to silence, oppress and marginalise people who would speak openly about their gender critical beliefs”.

5.137 The Free Speech Union were concerned about the application of a protected characteristic of sex or gender to offences under the Communications Act 2003 or Public Order Act 1986 (POA 1986). They said:

We are unhappy with this recommendation. In terms of speech crimes such as those under the Communications Act 2003 or the Public Order Act 1986, it would essentially mean increased sentencing on the basis of a defendant's opinion of women (or men). We do not as an organisation have any desire to promote sexist or misogynist views. But it is our strong opinion that people ought to be allowed to hold and express any views about women (or men) without threat of criminal prosecution, or of increased sentence if some other crime is committed accompanied by their expression.

#### Lack of consensus in terms of support for the proposal

5.138 Another argument against recognition offered by Rape Crisis England & Wales focused on the fact that there is no clear agreement amongst academics, service providers, or survivors themselves regarding the suitability of gender/sex as a protected characteristic, and how it will fit into the VAWG framework.

#### Questions surrounding hate crime's ability to change social attitudes

5.139 Rape Crisis also pointed out that a key argument in favour of "misogyny hate crime" recognition is that it would carry symbolic significance. However, they noted that:

This has not been the case, in our view, for other forms of hate crime based on existing protected characteristics, where there are still high levels of offences being committed.

They therefore felt that this possible benefit did not outweigh the risks associated with sex or gender hate crime recognition.

#### General objections

5.140 A significant number of consultees repeated general objections about hate crime laws in response to many of our consultation questions. These consultees made the following (often overlapping) comments:

- (1) Hate crime laws are damaging to free speech.
- (2) Hate crime laws are damaging to equality.
- (3) Hate crime laws should not be extended.
- (4) Hate crime laws should be abolished.
- (5) Hate crime laws inaccurately group people together.
- (6) Hate crime laws are divisive.

5.141 Some examples of these general objections given by personal respondents, many of whom requested to remain anonymous, are listed below:

- (1) “No this indicates the political nature of the advocates of this type of legislation. All these laws should be cancelled as everything should be open for debate without risk of violating some thought-crime.”
- (2) “The concept of hate crime is a socially and legally regressive step which elevates the feelings of individuals with 'protected' characteristics above those of the general population. This results in: unequal treatment before the law, social tension, diversion of police resources from offences against property and persons in order to investigate incidents of people claiming to be offended.”
- (3) “All ‘Hate Crime’ should be abolished. Providing additional protection for specific groups is unjust. Justice requires punishment be proportional to the harm inflicted, not if that harm had anything to do with ‘wrong think’.”
- (4) “Hate crime laws are wrong and should be struck from law. The above are already illegal and the law should be enforced.”

### **RESPONSES TO CONSULTATION QUESTION 11 (PART TWO): EXCLUDING OFFENCES ASSOCIATED WITH VIOLENCE AGAINST WOMEN AND GIRLS**

5.142 The second issue of whether offences associated with violence against women and girls should be excluded from the scope of sex or gender-based hate crime was put to consultees as follows:

Consultation Question 11 (part two)

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.

5.143 Consultation Question 11 (Part 2) did not elicit “yes”, “no” or “other” responses. Instead it was an open question, inviting consultees’ views. A significant number of consultees, both organisational and individual, appeared to misunderstand the question and thereby provided responses that were difficult to interpret. Whilst we found some responses difficult to categorise, we found that there were more individual responses expressing support for the carve outs, than responses expressing opposition to them. On balance, most organisational responses also provided supportive reasons for excluding the listed offences.

5.144 We emphasise that consultation responses to this question were conditional – this issue would only be relevant if sex or gender were added as a protected characteristic in hate crime laws.

5.145 The key arguments offered for and against excluding offences associated with violence against women and girls from the scope of sex or gender-based offences are summarised below.

## Arguments in favour of excluding sexual offences, domestic abuse, FGM and forced marriage from the ambit of sex or gender-based hate crime

### Addressing concerns about male victim-survivors of these offences

5.146 The Men and Boys Coalition began their response by expressing that they were neutral on the question of whether sex or gender-based hate crime ought to be recognised in law:

We recognise and understand that the large proportion of offences of this type are directed at women, not men, and that the political will to extend hate crime legislation on this front has come from our friends and colleagues in the women's sector. We defer to their judgement as to what is in the best interests of women.

5.147 However, they added that:

Some of the proposals intended to protect women do have significant implications for the legal status and the wellbeing of men and boys, and so this does oblige us to take positions.

5.148 This included taking a position about whether areas such as sexual offences and domestic abuse should be excluded from the scope of sex or gender-based hate crime – something for which the Men and Boys Coalition expressed very strong support. They argued that a carve out would:

Very largely eliminate the most serious concerns we have regarding the impacts of this proposal on the status and wellbeing of male victims of sexual and domestic abuse and other intimate crimes.

5.149 These serious concerns were expanded upon by the Men and Boys Coalition in their responses to questions about how hate crime protection in this area should be framed (i.e. whether it should be gender neutral or limited to women). They largely relate to the message that sex or gender-hate crime recognition could send to male victim-survivors of crimes such as sexual offences and domestic abuse, if a statutory carve out for sexual offences and domestic abuse were not implemented *and* protection were limited to women.

5.150 The Men and Boys Coalition also expressed misgivings about paragraphs 12.117 to 12.118 of the consultation paper, which discussed arguments posed by the Fawcett Society:

We note with concern the suggestion in sections 12.117-12.118 [of the consultation paper] that all acts of sexual and domestic violence committed by a man against a woman should be considered inherently misogynistic and therefore hate crimes.

5.151 The Men and Boys Coalition asked the Law Commission “to reject this argument in entirety”, noting that:

It rests upon a highly contentious article of ideological faith, one that is highly controversial and widely challenged within academic theory and clinical practice by criminologists, psychologists, and other behavioural scientists.

5.152 The ManKind Initiative also strongly expressed support for the exclusion of the offences listed, pointing to concerns about male victims of these crimes. They said:

We believe that “VAWG” crimes should not be classe[d]/defined as “hate crimes” (we agree with a “carve out”) as this is a very biased and contested ideological position and one that is contested by a huge body of evidence to the contrary. It would also in reality not be applied to male victims because societal/gender stereotypes both minimise or mitigate against fully accepting that men are and can be victims of these crimes.

5.153 The National Secular Society supported the carve out on similar grounds, saying:

While we agree that sex is a factor in the crimes listed here, we are concerned that presenting some of these crimes as entirely sex-based may lead to unequal treatment of boys and men who may be victims of these crimes. Men can also be victims of sexual offences, forced marriage and domestic abuse, yet these cases are often underreported due to fears of not being taken seriously (and presenting these crimes as those that only happen to women reinforces this).

#### [It would be difficult to prove sex or gender-based hostility in relation to these crimes](#)

5.154 Professor Mark Walters argued that:

The main practical concerns that pertain to inclusion of gender hostility include the evidential barriers already involved in proving gendered offences (especially sexual offences), as well as the potential for confusing the labelling of such offences where hostility aggravation is added.

5.155 Professor Walters felt that these difficulties would be particularly stark in the context of the aggravated offences under the Crime and Disorder Act 1998 (CDA 1998), presumably if sexual offences were added to the list of aggravated offences – something that we do not recommend in Chapter 8 of this report. However, Walters was of the view that these issues were less pronounced in the context of enhanced sentencing because:

Proving hostility at sentencing does not affect the evidence required to prove guilt during trial. Indeed, the courts already have the power to aggravate sentence for these types of offence, which could include sex or gender hostility.

5.156 As a result, Professor Walters explained that his support for a carve out of the listed offences would depend upon the model of hate crime laws adopted generally – namely whether the aggravated offences contained in the CDA 1998 are retained. Whether or not sexual offences are added to the list of aggravated offences would also be relevant.

#### [Avoiding unhelpful legal distinctions between “misogynistic” and “non-misogynistic” VAWG offending](#)

5.157 The Fawcett Society, Women’s Aid and Refuge all supported the exclusion of sexual offences, domestic abuse, FGM and forced marriage, in order to avoid the creation of what they felt would be a difficult distinction between “misogynistic” and “non-misogynistic” VAWG offending.

5.158 They felt this was particularly problematic in relation to the offences listed and in the context of sex or gender, because they considered all of these offences to be connected to misogyny. They did not think this connection should be reduced to factors such as whether a perpetrator used specific language when committing an offence.

5.159 Refuge added:

It is essential that these crimes are understood as motivated by misogyny and are used to reinforce patriarchal social norms and power structures, but we do not believe that the way to increase this understanding is to arbitrarily designate some of these crimes as misogynistic and others as not. In fact, we believe this would be regressive. Therefore, we support the proposed carve-out for domestic abuse and sexual violence offences.

5.160 Women's Aid said:

Including VAWG crimes within the hate crime framework could undermine the understanding of VAWG as inherently misogynistic – with the result, for example, that some domestic abuse offences may be categorised as motivated by hostility towards women and some that aren't. This would not be helpful for the societal understanding of and response to VAWG crimes.

#### Avoiding hierarchies

5.161 The Fawcett Society were in favour of excluding the listed offences because they were particularly concerned that specific instances of sexual violence, for example stranger rape accompanied by a gendered slur, were most likely to be subject to a sex or gender-based aggravating factor. They felt this could reaffirm stereotypes that elevate stranger rapes/rapes involving physical violence as most serious or real.<sup>46</sup>

5.162 The ManKind Initiative were in favour of a carve-out because it would avoid creating a “misleading hierarchy of victims of crimes”.

#### Preventing negative implications for domestic and sexual violence in non-heterosexual relationships

5.163 Mishcon de Reya LLP said:

We note that if domestic abuse is not carved out there will be a new anomaly in which heterosexual domestic abuse is treated more seriously than other types of domestic abuse.

5.164 The NPCC LGBT+ portfolio on behalf of the National LGBT+ Police Network observed that:

Just because the majority of sexual offences and domestic abuse is perpetrated by men against women this does not demonstrate a causal link. Such a simplistic analysis ignores the existence of sexual offences [i]nvolving LGBT offenders and

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<sup>46</sup> This argument was also used by Rape Crisis England & Wales to oppose any recognition of sex or gender-based hate crime, as cited at paragraph 5.121.

victims, as well as domestic abuse within female same-sex relationships and male same-sex relationships. The impact of these offences involving LGBT victims is no less than that upon heterosexual women, or heterosexual men for that matter.

#### The sex or gender-based hate crime label would be under-used in relation to the listed offences

5.165 In explaining their support for excluding the listed offences from the scope of sex or gender-based hate crime, Refuge expressed concern that these offences would be unlikely to acquire an aggravation based on sex/gender hostility, which would ultimately fail to reflect the misogynistic nature and prevalence of these crimes. As a result, they felt it would be better to exclude them from scope completely. In explaining this concern, they made the following points:

- (1) Refuge believe that gender inequality constitutes a cause and consequence of VAWG. However, in their experience of educating the public about the dynamics surrounding VAWG, they have found this to be poorly understood by the general public. They argued that this lack of understanding would be particularly concerning if crimes such as sexual offences were included as possible (sex or gender-based) aggravated offences, because juries would be responsible for deciding whether there is evidence of misogyny in individual cases.
- (2) They would be similarly concerned about a lack of understanding of these crimes as inherently misogynistic amongst the police, CPS, judges, and other professionals in the criminal justice system leading to an under-utilisation of both the misogyny aggravated offences, and enhanced sentencing frameworks for domestic abuse and sexual offences.
- (3) Even in cases where criminal justice officials involved have a very high level of understanding about the misogyny of VAWG crimes, Refuge were concerned that it would be difficult to prove sex or gender-based hostility in relation to the crimes listed, for two reasons. Firstly, general barriers associated with proving “motivation” in hate crime cases mean that prosecutions rely upon the demonstration limb. However, using the demonstration limb would be difficult in the context of sex or gender-based hate crime because misogyny is so deeply ingrained in society, making it less likely that perpetrators would explicitly articulate misogynistic hostility. Secondly, even if an explicit gendered slur was used, it would be very difficult to prove this because these crimes are so frequently perpetrated in private.

#### Crimes such as sexual offences or domestic abuse do not necessarily coincide with gender-based hostility

5.166 The VAWG and Hate Crime Team at the London Borough of Tower Hamlets commented on the complexity of motivations which result in offences including sexual offences, forced marriage, FGM and domestic violence, saying, “[t]hese offences are usually more complex than simply hatred”. Several personal responses also offered this argument in support of excluding them.

5.167 SARI (Stand Against Racism & Inequality) referred to forced marriage and FGM “which occurs due to ill-conceived cultural and religious interpretations” noting that



characterising these behaviours as hate crimes would dilute the purposes of hate crime legislation. This argument was also made by The Brandon Trust.

#### Preserving specific expertise in the VAWG support sector

5.168 Rights of Women urged caution around introducing an approach to hate crime which could dilute the specific expertise built up in the VAWG sector noting that they were:

Particularly mindful of the risks of domestic abuse and sexual violence being subsumed under the umbrella of hate crime. While such crimes are undeniably motivated by misogyny, a specific approach is needed, with a carved-out area of specialist understanding resourced by expert knowledge and experience. Discrete expertise and approaches have been developed to support survivors of VAWG, and it is essential that these approaches, including those “by and for” Black and minoritised women, are protected and not – entirely inadvertently – diluted by a reframing as part of hate crime law.

#### Preserving the benefits of “misogyny hate crime”.

5.169 The Fawcett Society felt that the carve out managed to address their practical concerns, whilst still preserving the importance and benefits of so-called misogyny hate crime recognition. Explaining this, they cited the prevalence of other offences which would not be excluded, saying that:

While sexual and domestic abuse offences are certainly a significant proportion of the offences committed that are motivated by misogyny, they are by no means all of them. Misogynistic hate crimes where the offences are online communications, public order or common assault offences are well evidenced in the Commission’s paper and achieving the aim of responding to this misogyny in law would be a positive outcome of legislative reform.

#### The exclusion of the offences listed in the consultation can be readily achieved

5.170 Although they did not give a view as to whether sex or gender should be added, or whether certain offences should be excluded, the Bar Council commented on the achievability of the “carve-out” that we outlined in the consultation paper:

There is no issue of law which arises in respect of the proposed extension; the wording of the characteristic is easily understood and, if there is to be a carve-out as suggested, it can be readily achieved without undue legal complexity.

5.171 The Equality and Human Rights Commission argued in favour of the addition of sex or gender, but suggested this be limited to aggravated offences (an issue we consider further as “Option 2b” at paragraphs 5.355 to 5.361):

The EHRC has long recommended that the UK Government consider amending hate crime legislation to extend protections on the basis of sex or gender, but only in relation to aggravated offences. As such we are supportive of the proposal to add the characteristic of sex, in line with the Equality Act 2010 definition, to hate crime laws. However, we agree that further thought is needed in relation to the implications of this in the context of sexual offences and domestic abuse, as noted in the consultation paper.



### Remaining reasons given to support the exclusion of certain offences

5.172 Some other reasons given by individual respondents in favour of excluding the listed offences were:

- (1) The crimes listed were (or should be) adequately catered for in specific legislation outside the hate crime framework (most common answer).
- (2) Hate crime would not assist in preventing or prosecuting the crimes listed.
- (3) Hate crime could make it more difficult to prosecute the crimes listed.
- (4) More resources should instead be directed towards preventing and prosecuting the base offences listed.
- (5) The crimes listed should not be subjected to the hate crime framework as it is flawed and unclear.
- (6) Without a carve out, these offences could almost always be characterised as sex or gender-based hate crime, which could reduce the symbolic importance of the hate crime framework.
- (7) Applying the hate crime framework to domestic abuse would not bring anything additional of value to victims.
- (8) Enhanced punishment should not be seen as a solution to crimes such as sexual offences.

### Arguments against excluding VAWG offences from the ambit of sex or gender-based hate crime

5.173 Concerns that consultees expressed about the carve out are summarised below.

#### The carve out would create added complexity and cause confusion

5.174 Rape Crisis England & Wales said that only applying sex/gender protection in hate crime laws to some offences would add confusion to current hate crime laws.

5.175 In the same vein, The Government Independent Advisory Group on Hate Crime objected to the carve out because it “would add unhelpful legal complications [and] should be avoided”.

5.176 The Law Society said that the proposed carve out may be difficult to draft and would add a degree of complexity to the legislation. Similarly, the Magistrates Association acknowledged the reasons for proposing a carve out but said the benefits of ensuring consistency and clarity in law might be reduced if these carve outs were introduced.

5.177 Several individual responses also highlighted that the carve out could add complexity and bring inconsistency to the laws in this area, as well as create operational difficulties for the police (e.g. resulting in officers struggling to “pick the right charge”).

### A domestic abuse carve out would create difficulties

5.178 Rape Crisis England & Wales suggested that a “domestic abuse carve out would be even more unintelligible”. This was 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.

5.179 In the specific context of domestic abuse, Women’s Aid argued that the exclusion of certain offences and offence contexts, including domestic abuse, would need to:

[a]void the Government strategy of separating VAWG and domestic abuse frameworks which originally had an integrated approach, because it is vital that the gendered nature of domestic abuse is recognised.

5.180 In the consultation paper we suggested that the definition of “domestic abuse” set out in the Domestic Abuse Act 2021 could be used in order to exclude domestic abuse from sex or gender-based hate crime.<sup>47</sup> However, a participant at one of our consultation roundtable events said that the use of this definition as part of the statutory carve out was problematic because there are certain types of violence or harm that are excluded from the definition.

### A carve out would not be consistent with the aim of parity

5.181 Rape Crisis England & Wales said a sex or gender-specific carve out for certain offences (and the different treatment it would entail) would be “antithetical to the other reforms suggested by the Law Commission which seek to provide equal protection for all current protected characteristics”.

5.182 This point was also made in several individual responses.

### It would be tokenistic to include only a few offences

5.183 Some consultees felt that only including some VAWG offences, such as public street harassment, whilst excluding the most prevalent and serious forms of VAWG, might result in a tokenistic reform.

5.184 One police chief also opposed the exclusion of listed offences because it would detract from the “paradigm shift” that adding sex or gender to hate crime laws has the potential to bring about.

### It is contradictory to exclude the most prevalent and serious instances of violence against women and girls

5.185 Although supportive of the carve out on balance, Refuge said “it seems perverse to leave out some of the most extreme examples of misogynistic crimes from the remit of misogyny hate crime”.

5.186 Women’s Aid noted that it is “inherently contradictory” to include women within hate crime law but exclude “most forms of gender-based violence”. While supportive of the

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<sup>47</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.169 to 12.171.

carve out, they said is it important not to “underestimate the challenge of developing” it.

- 5.187 A participant at a consultation roundtable discussion said that the carve out eradicated a large proportion of the evidence that had been used to make the case for adding sex and gender, under the “demonstrable need” and “additional harm” criteria. They said that the “criteria felt the wrong way around”, because the evidence used to meet the first two criteria focused on VAWG crimes, but a lot of these are then removed during the suitability analysis when the exclusion of these offences is discussed.
- 5.188 Some personal responses similarly argued that a carve out would remove a large part of the evidence base for including sex or gender as a protected characteristic. This point was also made by UNISON.

#### The message that the carve out might send

- 5.189 Rape Crisis England & Wales were concerned that applying hate crime laws for some offences, but not sexual offences and domestic abuse, might send a damaging message to women who are sexual offence or domestic abuse complainants – “denying the frequently misogynistic nature of the offending against them”.
- 5.190 The Newcastle University Human Rights and Social Forum also objected to the carve out because it would undermine the message that VAWG crimes are a cause and consequence of gender inequality.
- 5.191 Although supporting the carve out on balance, Refuge were concerned that it would prevent “deeply misogynistic crimes like rape, sexual assault, and domestic abuse” from being labelled as such in law. They worried that the carve out could send the wrong message to perpetrators, survivors, and the public, that these crimes are not capable of being misogynistic.
- 5.192 Similarly, some personal responses expressed concern that a carve out could impact understandings about the gendered nature of listed offences.

#### Disrupting the notion of a continuum of sexual violence and contributing to a distinction between public and private VAWG offending

- 5.193 Rape Crisis England & Wales felt that the spectrum of VAWG would be hidden if only certain offences were acknowledged in hate crime legislation.
- 5.194 They emphasised that by excluding the suggested offences, the focus would appear to be on more public offences. Although they felt there was merit in acknowledging overt, public displays of sexist harassment, they felt that a carve out would expressly divide and deny the continuum of violence and abuse. They felt that such a division could contribute to prevailing myths and stereotypes that suggest that VAWG committed in private is somehow less serious.
- 5.195 Vera-Gray and Fileborn, from work Rape Crisis used in their response, explain this in more detail:

The inclusion of misogyny as a hate crime in practice *separates* the various forms of men’s violence that women experience over a lifetime. It separates these in terms of

what forms are and are not included, as well as by separating out motivations and locating those as motivated by hostility only as eligible for enhanced sentencing.

While the siloed effect caused by hate crime provisions applies generally, it is particularly problematic in relation to VAWG as it runs directly counter to the widely accepted continuum model of sexual violence, developed by Liz Kelly (1988).<sup>48</sup> The continuum model recognises the interconnection between *all* forms of sexual and gender-based violence and does not assume their seriousness or harm based on a presumed hierarchy of motivation. Such a model is antithetical to misogyny hate crime both conceptually, and in practice.<sup>49</sup>

5.196 A participant at a consultation discussion felt that these issues highlighted a tension with the carve out that simply cannot be resolved. On the one hand, intimate partner violence should be carved out of hate crime laws, because it is too simplistic to argue that it is motivated by sex or gender-based hatred. On the other hand, intimate partner violence should not be distinguished from other forms of VAWG (as the carve out would do) because these forms of violence are intricately interlinked.

5.197 The Labour Women's Declaration Working Group challenged the logic and coherence of excluding the listed offences:

The "carve-outs" are singularly unhelpful in promoting any understanding of the structural nature of offences against women, which cannot be usefully understood in this atomised way. Such an approach runs counter to the government's Violence against Women Strategy, which recognised connections across a range of forms of abuse and violence, reflecting international law from the UN and the Council of Europe. How can some of these forms be seen as hate crime and others not? What is the theoretical logic here?

#### Giving the impression that these offences are or should be taken less seriously

5.198 The Hate Crime Unit were strongly opposed to the carve out because it gives the impression that the listed offences are not being taken seriously or are being neglected. They argued that the inclusion of these offences in hate crime law is important for deterrence, and protection of women.

#### Contributing to the narrative that hate crime is about minor incidences and offensive speech

5.199 Galop and Schools Out UK shared this concern. Galop said that an important part of anti-hate crime work is emphasising that hate crime encompasses *all* criminal offences driven by relevant hostility, from verbal abuse to murder. They felt that carve outs would undermine this message and leave anti-hate crime work open to attacks at a policy and media level from those who seek to reduce hate crime to expressions of offensive speech or characterise it as minor.

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<sup>48</sup> L Kelly, *Surviving Sexual Violence* (Polity Press, 1988).

<sup>49</sup> F Vera-Gray and B Fileborn (forthcoming), "Hiding the harm? An argument against misogyny hate crime" in *Landscapes of hate: spaces of abjection, discrimination and exclusion* Catherine Donovan, Edward Hall, John Clayton (eds).

The law should have the capacity to recognise explicit instances of misogyny in these contexts

5.200 The Centre for Women’s Justice did not agree that there should be a sex or gender specific carve out for the specified offences. They said that:

Although most crimes of violence against women and girls are inherently misogynistic, some such crimes are committed with specific misogynistic intent, which could be regarded as an aggravating factor.

5.201 A carve out would prevent these overt displays of misogyny being recognised, leading The Centre for Women’s Justice to oppose it.

## **RESPONSES TO CONSULTATION QUESTIONS 12 TO 14: FRAMING SEX OR GENDER-BASED HATE CRIME**

### **Should protection be sex or gender-neutral, or limited to women?**

5.202 When considering how hate crime protection in this area should be framed, the first question concerned whether the relevant characteristic should be sex or gender-neutral or limited to women. It was put to consultees in the following way:

Consultation Question 12

We invite consultees’ views as to whether the protected characteristic group should extend to both men and women or be limited to women only?

5.203 There were significantly more individual responses favouring protection of both men and women (as well as, in some cases, people of other gender-identities).

5.204 On balance, a small majority of organisational responses favoured the protection of both men and women.

### **Arguments in favour of sex or gender-neutral protection**

5.205 Consultees offered the following arguments in favour of a sex or gender-neutral approach which would not limit protection to women.

#### **Only protecting women would be an unequal and discriminatory approach**

5.206 Equality was cited as a central reason why protection should not be limited to women. Many consultees pointed to the EA 2010 and several argued that only protecting women would amount to unlawful discrimination.

5.207 The Men and Boys Coalition made an extensive submission in which they argued that “any sex or gender-based hate crime protection MUST include both women and men”. They said this was particularly the case if the sex or gender-based hate crime approach “did not exclude offences such [as] sexual, intimate and domestic abuse crimes”:

As a charity with a stated objective of working to attain gender equality, we believe that equality under the law is one of the fundamental principles of British justice. With very few exceptions, British law (within all jurisdictions of the UK) has never discriminated according to the personal characteristics of defendants or alleged

victims, and we assert that this should always be the default in law-making unless there are insurmountable reasons why it cannot.

5.208 The ManKind Initiative said:

In essence, to bring in a law that only applies to women is itself a discriminatory act and creates division and exclusion, not unity and inclusion. Those who argue for it to just be applied to women, do so on ideological grounds and not on equality and inclusion grounds. In essence, it could be argued that not to apply this to men, is in itself misandric in nature and relegates them to being second class citizens.

5.209 The Men and Boys Coalition specifically pointed to the EA 2010 which protects sex (without applying special protection to women) as an approach which should be mirrored in this context.

5.210 Similarly, the Welsh Government noted that “the Equality Act 2010 definition of sex does not single out women”, adding:

For the sake of consistency and parity, there is a case for misandry to be treated as a hate crime along with misogyny. While women are disproportionately affected by sex or gender-based crimes, it is important to recognise the effects that such crimes can have on male victims. Gender protection should not be limited to women.

5.211 The group “Men and Women Working Together” similarly referred to the EA 2010, saying:

We feel that the authors of this consultation have failed to comply with both the Equality Act 2010 and the Human Rights Act 1998 together with creating an unbalanced consultation document. The fact that you have even considered limiting protection to women only clearly shows your lack of compliance. This, accompanied by outdated and ill-informed anti-male propaganda leaves us no option but to disagree with any formulation surrounding women or gender to be included in the list of hate crimes.

If women were to join the list of 5 groups on the Hate Crime list, white heterosexual males as a major group would stand alone without protection. In practice, men are already suffering from gender apartheid legislation in the areas of equal parenting, domestic abuse, lack of anonymity in rape trials, form the highest levels of rough sleepers (83%), highest levels of suicide (75%) and in 2018 prostate cancer deaths overtook breast cancer deaths for the first time and still no reliable test available. We have no confidence that even if men were placed on the hate crime list they would obtain any more equality than they receive by their supposed inclusion on the equality list.

5.212 Gender Parity UK also said:

The proposal to treat women and men differently before the law based on their gender is discriminatory. Men already receive dramatically less protection, representation and support.

5.213 Several individual consultees expressed concern about the fact that not including men in a sex or gender-based protected group was even being contemplated, calling this “nonsense”, “state sponsored discrimination” and “sexist”.

5.214 One individual consultee suggested that any perceived discrimination against men could have very negative consequences:

Even if you are so bigoted against men that you honestly think no atrocity done in the name of misandry could possibly deserve “hate-crime” status, surely you understand that this will be rocket-fuel to misogynists? If there were a male in a horrible spot in life, looking for someone to blame, how could you not think that a suggestion as ludicrously discriminatory as saying only the other sex deserves protection would not absolutely push him down a darkened path?

#### Only protecting women would be damaging to male victims of VAWG-associated crimes

5.215 The Men and Boys Coalition described their “most pressing and serious concern” as the impact of legislative change which only protected women without a carve out for VAWG crimes. They said:

As a matter of the utmost seriousness, we ask the Law Commission to consider the devastating effects that would be felt by male victims of creating a whole new hierarchy of sexual violence, encoded into legal statute, which would say quite explicitly that offences conducted against men and boys are less serious than those committed against women and girls.

5.216 They added that if women-specific protection were adopted:

Male rape victims will be told that according to the law of the land, their rape was a less serious offence than that of a woman. Male victims who may carry the scars of years of extreme and brutal domestic violence will see their abuser convicted of a less serious crime, with a less severe sentence, just because they are the ‘wrong’ gender.

5.217 Many of these sentiments were also echoed by The ManKind Initiative, who emphasised that limited protection could be “personally devastating” for those men and boys who had been victims of domestic abuse.

5.218 Other consultees similarly felt that if there was not a carve out and the protection only extended to women, this could make male victims feel less able to report those crimes committed against them. One individual said:

Men are victims of sexual assault, rape and domestic abuse, and to only record gender-based hate crimes for women will skew the figures and make those victims feel undermined. Data is needed for both genders to form clear pictures that will aid the policing of these crimes.

5.219 The Hate Crime Unit gave a response which varied based on whether or not there was a carve out for sexual offences and domestic abuse. In the absence of a carve out, they believed protection should include both men and women, the starting point being that although offences such as sexual offences are often deeply gendered, men are also victims of these crimes:



We fear that if men were excluded from the category, the fact that this would mean similar crimes targeting men would consistently not result in as high a sentence as those targeting women, would contribute to society's harmful portrayal of men as being strong and unable to be the victim of crimes committed by women, such as sexual offences and domestic violence. We further believe that this would result in a contribution to the persistent problem of men not reporting these types of offences, in part because of this societal stigma which would only be seen as "endorsed" by the law, if only women could seek an "enhanced" or "aggravated" sentence.

5.220 However, the Hate Crime Unit continued that if sexual offences, domestic abuse, FGM and forced marriage are excluded then "the above problem would not apply [and] the category should be limited to women only", because recognising women as disproportionately targeted could result in "increased awareness in society which may encourage specific measures to be put in place to protect this group."

#### Consistency with the existing hate crime characteristics of race, religion and sexual orientation rather than the characteristics of transgender or disability

5.221 The Law Society argued that only protecting women "would be inconsistent with the other hate crime characteristics of race, religion and sexual orientation, which are framed in general terms".

5.222 The Men and Boys Coalition observed that existing hate crime legislation "has never excluded white people from articles on racial discrimination or heterosexual people from protection from sexuality-related hate crimes". They continued:

We note there has never been any suggestion that the law, written in this way, has undermined people's understanding of the true nature of racism or homophobia. We submit that these are much stronger and more relevant comparisons to the current proposal than those of protections given to disabled or transgender people.

#### A women-specific approach would not receive workable support.

5.223 The Men and Boys Coalition felt that public support for sex or gender-based hate crime would be closely linked to it being applied in a sex/gender neutral manner:

We would add that popular public support for (or acceptance of) hate crime legislation is very strongly centred on a sense of fairness. It is our assessment that people would be far less likely to assent to and/or support hate crime legislation if it were gender-exclusive rather than inclusive.

5.224 The Law Society also noted that "creating laws that will clearly discriminate against men is likely to prove controversial".

#### A sex or gender-neutral approach would be inclusive of all gender identities

5.225 Some stakeholders felt that limiting protection to women would exclude other gender identities from the ambit of protection (particularly those who have gender identities that exist beyond the gender binary, but who may also experience prejudice such as misogyny). GIRES (Gender Identity Research and Education Society) said that sex or gender-based hate crime protection:



Should be extended to anyone who is victimised based on their real or perceived gender or sex, which includes people of all genders. This protection should include non-binary and otherwise gender diverse people as well as women and men (including trans women and men).

5.226 TransOxford, Trans Actual UK CIC and Mermaids also offered similar arguments.

[It would be inconsistent if the law could not respond to sex or gender-based hate crime against men on occasions where it arose](#)

5.227 The Men and Boys Coalition expressed that it would be “bizarre and inconsistent to treat a male victim differently to a female victim”, if and when sex or gender-based hate crime occurred against men.

5.228 Stand Against Racism & Equality (SARI) and Resolve West felt that while hate crime against women may be far more prevalent, “it should be protected for when it happens” against men.

[The importance of a gender-neutral approach notwithstanding evidence of disproportionate offending against women](#)

5.229 Several organisations and individual responses recognised that sex or gender-based crime is disproportionately targeted against women rather than men. However, they argued that in spite of this, a sex or gender-neutral approach remained preferable.

5.230 For example, the Law Society said:

While we acknowledge that evidence clearly shows the need for such protection applies to women far more than to men, creating laws that will clearly discriminate against men is likely to prove controversial and would be inconsistent with the other hate crime characteristics of race, religion and sexual orientation, which are framed in general terms.

5.231 Similarly, the Magistrates Association said:

Although we acknowledge that this protection is likely to overwhelmingly involve women as victims, we believe it is important that the protection should cover both women and men, and so a neutral term should be used.

[Evidence of a need to protect men](#)

5.232 Protection Approaches argued that there was some evidence of targeting of men and boys:

We believe there are questions to be afforded to men and boys, particularly those who are vulnerable and in cases of sexual offences and other forms of exploitation where their gender identity was a fundamental part of the offence [...] If this expansion was not made, it supports the inclusion of a residual category that would capture offences where the gender identity of men and boys was a fundamental part of the offence.

5.233 The National Secular Society was concerned that limiting protection to women would “result in decreased protection for men”, particularly those impacted by the offences proposed in the carve out, if they were not excluded from scope.

5.234 An individual noted that protection of men could extend to hatred they experience for not conforming to male gender stereotypes.

5.235 Several groups and individuals objected to the protection of women only on the grounds that women can also express hatred and aggression and be violent towards men.

5.236 The Free Speech Union said, “if protection is introduced, then in our view equality demands that what is sauce for the goose should be sauce for the gander. There are cases of women oppressing and taunting men.”

5.237 The group Families Need Fathers said:

On our social media our members experience harassment and aggressive acts by women because they are men. Such aggression can turn to more serious crime. Mostly men who are vulnerable and already hurting. They must have the same protection under the law as women from similar acts.

5.238 Mike Bell, responding on behalf of Gender Parity UK, sought to highlight the victimisation of men and drew attention to a specific case that took place in Scotland in 2018 involving Jolene Doherty, which he described as involving “a young woman [who] killed a boy based on her self-professed man-hate”.<sup>50</sup>

### **Arguments in favour of limiting protection to women**

5.239 Conversely, consultees made the following arguments in favour of protecting women only.

#### **The benefits of hate crime recognition are bound up in women-specific protection**

5.240 This was argued by the Fawcett Society, Refuge, and Women’s Aid amongst others.

5.241 For example, Women’s Aid said that it is important that the disproportionate targeting of women is recognised via women-specific hate crime protection to ensure that society “names” the problem and delivers the right response. Furthermore, they said a women-specific approach could help to facilitate a change in social attitudes and challenge social acceptance of misogyny, which a gender-neutral protected characteristic would not achieve. The VAWG and Hate Crime Team at the London Borough of Tower Hamlets noted the importance of a women-only approach for “labelling” purposes.

5.242 Refuge also alluded to the declaratory benefits of a women-specific approach, noting that sex or gender-based hate crime must:

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<sup>50</sup> See further “Teen who murdered boy while pregnant ‘boasting about being a man hater’” (26 March 2019) *The Scotsman*, available at <https://www.scotsman.com/news/crime/teen-who-murdered-boy-while-pregnant-boasting-about-being-man-hater-549144>.

recognise that women are disproportionately victims of crimes that cause additional widespread harm, in which violence and abuse is used to subjugate women and reinforce patriarchal power structures. It must also recognise that this is not the case for men.

#### The introduction of a gender-neutral category could do more harm than good

5.243 Women's Aid expressed serious concern that a gender-neutral protected characteristic has "significant potential to do more harm than good". For this reason, they said "we're clear that it would be better not to bring in this proposal at all than for it to include both men and women". They argued the "hostility that women receive is deeply rooted in the societal inequality between women and men" and understanding the gendered nature of abuse is "crucial".

5.244 The harms described by stakeholders can be broken down in the following ways:

- (1) *Specific harms in the domestic abuse context:* Women's Aid highlighted particular harms that might stem from a gender-neutral approach in domestic abuse context:

In relation to domestic abuse, Women's Aid is very alert to the far-reaching impacts of the failure to recognise its gendered nature, which is particularly evident in the current commissioning of services. We are concerned by the increasing shift to gender neutral service provision, which lacks understanding that women are disproportionately the victims of repeated, serious and long-term domestic abuse and coercive control and require gender-specific services that meet their needs. All survivors of domestic abuse, regardless of gender or sexual orientation and any other protected characteristics, must be able to access support that they need but treating men and women equally, however, does not mean treating them the same.

Also in the domestic abuse context, the Fawcett Society highlighted a potential risk, raised by some VAWG stakeholders in discussions with Fawcett, that men who are domestic abusers could use a hate crime framework that included men within it as "a tool of oppression", in relation to any acts committed by women in self-defence.

Some individual responses expressed similar concern about protection extending to men. One consultee said:

My worry is that if protection were to include men as well as women, then some male perpetrators would use this as a further means of harassment by for example bringing hate crime charges against a woman who tried to defend herself from his assault.

- (2) *Undermining a fragile public understanding of VAWG:* The Fawcett Society were concerned that a gender-neutral approach could undermine the message that gender-based hate crime sends, by suggesting an equivalence in how women and men are targeted that the evidence does not support. They argued that this would undermine an already fragile public understanding of VAWG.

- (3) *Erasing or diluting the scale or impact of crimes committed against women and girls*: Nottingham City Council argued that a neutral category would “erase the nature and scale of the problem and nullify the purpose of the policy and law change”. They suggested that incidents against men could still be separately recorded as “hate crime – other”. Our Streets Now said that a neutral category “runs the risk of diluting the historical and cultural impact of crimes committed against women and girls”.

#### Arguments about “equality” should focus on substantive equality, rather than formal equality

5.245 Several consultees rejected arguments that called for the same treatment of men and women, describing this as a formal equality approach. They contrasted this with a substantive equality approach, which, rather than calling for identical treatment of different groups, considers whether different treatment might be necessary because the circumstances affecting the groups are different.

5.246 For example, the Newcastle University Human Rights and Social Justice Forum rejected the “formal equality” arguments in favour of including men on the basis that there was a lack of demonstrable need or recognised harm in respect of this group:

To do so would undermine substantive equality for women and girls, potentially undermining the reasons for extending the hate crime categories. While in practice the majority of hate crime cases will be with women and girls, the important symbolic function of hate crime laws will be undermined. Having new hate crime laws (and potentially a commissioner) provides the opportunity for increased education. This needs to be focused on what hate crimes are against women and girls (as the evidence shows they are the ones who suffer them), increasing public knowledge that these are crimes, and increase public trust in the police for women and girls to report such crimes. Having a gender-neutral category risks failing to recognise the gender inequality at the heart of hate crimes and increasing women and girls’ reporting of such crimes. Finally, having a gender-neutral hate crime could mean funds are not used to address gender inequality and hate crime against women and girls, but misdirected to all in society when there is no evidence of the harms of hate crimes against men.

#### Unlike for race and religion, it is feasible to specify the targeted group in law: women

5.247 This was argued by several respondents. The Fawcett Society said that a one-directional, women-only approach “reflects the nature of the power dynamic within our society”, adding that:

There are complexities within other characteristics where the directions of hostility may be multi-faceted, for example race and religion – however, on the issue of sex/gender, that is not the case. It is women who face structural oppression.

5.248 Similarly, Refuge said that whilst:

It would be impracticable in the cases of race, religion, and sexual orientation to produce a list of all the sub-categories that are the subject of hate crime, owing to the huge diversity within each of these categories... gender hate crime is capable of being unidirectional, applying exclusively to women. As such, it is preferable and

practicable to protect just women under the proposed new category of gender-based hate crime.

5.249 Rape Crisis England & Wales noted that whilst other protected characteristics such as religion do not specify particular sub-groups:

Practical considerations make the case of sex/gender different. The diversity of race and religious groups would make it very difficult to single out sub-groups for hate crime protection, and no one group needs more protection than the other. Whereas in the case of gender, there is ample evidence that there is a need for additional protection for women.

The demonstrable need exists in relation to women and there is no analogous demonstrable need in relation to men

5.250 This point was highlighted by various respondents, for example the Jo Cox Foundation, the Antisemitism Policy Trust, Islington Council, UNISON, the VAWG and Hate Crime Team at the London Borough of Tower Hamlets and the Wild Woman Writing Club amongst others.

5.251 Nottingham City Council acknowledged that “men do also experience some of these behaviours (including sexual harassment on the street)” but it is “not at a comparable scale as that experienced by women and does not impact men as a group in the same way”. They considered it was therefore “essential” to recognise the specific harm to women.

5.252 Birmingham and Solihull Women’s Aid agreed, saying:

We strongly believe that that sex or gender-based hate crime protections should be limited to women and not include men. This is due to the deep rooted and historic inequalities that women face. The evidence for this is explained in the consultation paper and through the Ending Violence Against Women and Girls Strategy as well as other pseudo legal documents such as the Istanbul Convention<sup>51</sup> and CEDAW.<sup>52</sup> Men do not experience the same prejudice and violence that women do on the basis of their sex, as evidence shows.

5.253 Rape Crisis England & Wales said that women-specific protection was necessary “in recognition of the evidence that violence and abuse is overwhelmingly perpetrated by men towards women, as a means of asserting power and control.” They continued that, “same-sex violence, and women’s violence against men, is part of the same patriarchal structures that need to be addressed”.

The importance of limiting expansion to characteristics with an evidence-base

5.254 Linked to this, English PEN focused on the importance of limiting extension of hate crime laws to the evidence base:

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<sup>51</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, available at <https://rm.coe.int/168008482e>.

<sup>52</sup> UN Convention on the Elimination of All Forms of Discrimination Against Women (signed 18 December 1979, entered into force 3 September 1981).

An expanding list of characteristics, not limited to those where there is evidence of prevalent discrimination, risks an undesirable expansion of the law that will be significantly detrimental to freedom of expression. Therefore, we support a thorough, consultative and evidence-based approach to the designation of “protected characteristics”...The historic and current discrimination against women is well documented. If the purpose of “protected characteristics” and hate crime laws are to protect specific groups who have suffered formal and informal discrimination, then clearly women as a group should be included.

5.255 For Women Scotland also noted the importance of sticking to an evidence-based rationale for extending protected characteristics and said that while there is a “plethora” of evidence of misogynistic crimes, “there is no strong evidence that men are exposed to similar crimes for being of the male sex”. Similarly, the Deputy Police and Crime Commissioner for Nottinghamshire said they were “not presently persuaded of the case for the specific protection of men within a future hate crime act”.

#### Women offending against men very rarely demonstrate, or are motivated by, misandry

5.256 The Centre for Women’s Justice said:

Insofar as there are examples of crimes of violence against men committed by women these are usually committed as a consequence of resistance in the immediate or long-term experience of male violence. There are rare examples of some acts of violence towards men that are committed by women where there may be an explicit motivation of hatred towards men, but this is usually because the woman in question has suffered a history of serious male violence and abuse and finally snapped. We don’t think it is appropriate to describe such crimes as hate crimes.

In relation to violence towards men from other men, we can think of examples where there is a misogynistic context to such crimes. For example, male rape can be performed specifically to emasculate and or humiliate the victim. This is a crime motivated by hatred but it is not hatred on account of the victim being a man.

5.257 The Labour Women’s Declaration Working Group asked, “How often are men targeted because they are of the male sex? Is there a purpose to including them?” They continued that:

This is a vanishingly small aspect of crime and does not have an impact on wider perceptions, whereas the huge numbers of crimes committed against women because they are women has a major impact on women, who find it necessary to be on guard against harassment, violence and sexual assault in many contexts. Hence, if such hate crime protection is to be included (which we do not think is helpful anyway), it should refer solely to women.

#### If protection is limited to women, should the term “women” or “misogyny” be used?

5.258 The second question relating to the way in which hate crime protection in this area should be framed asked what term should be used if protection were limited to women. It presented two choices: “women” and “misogyny”:

### Consultation Question 13

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. Do consultees agree?

5.259 Most personal responses to this question responded “no”, although a significant number responded “yes”, and a slightly smaller number responded “other”.

5.260 There were more “yes” responses from organisations than “no” or “other” responses, but the difference was very marginal – roughly the same number of consultees responded “yes” as responded “no” and “other”.

5.261 The following arguments were made in favour of the term “women” over “misogyny”.

- (1) *The term “women” is more easily understood than “misogyny”*: This was argued by the Law Society, and several individual respondents. Mishcon de Reya LLP said that “women” is a “clear and straightforward term”. By contrast, some stakeholders pointed out how unclear the term “misogyny” was. The Free Speech Union said that “misogyny” is “a word of such indeterminate meaning that it should not appear in the definition of any criminal offence”, (as noted earlier, The Free Speech Union did not agree with any hate crime protection relating to sex or gender, but felt that if it were introduced, it should use a sex or gender-neutral term).
- (2) *The term “women” is compatible with the way existing protected characteristics are framed and international legal instruments*: The Antisemitism Policy Trust noted that “current legislative provisions afford protection from hate crime for protected characteristics, as defined as a group of people”. “Women” unlike “misogyny” represent a group of people.
- (3) *The term “women” is more comprehensive*: Explaining this, the Alan Turing Institute said that:

The language of “misogyny” evokes a particular type of sexist behaviour; one that is highly emotive and driven by a particularly aggressive and vitriolic form of prejudice. However, hate crimes can be committed by individuals who are “cool, calm and collected” – their emotional state is not what defines hate.

Therefore, they supported using the terminology of “women” as this should “allow for a more comprehensive protection against hate”.
- (4) *“Misogyny” would be more difficult to prove in court*: This was argued by Birmingham and Solihull Women’s Aid and several individual responses.
- (5) *The term “misogyny” does not resonate with the specific protection of biological women*: The LGB Alliance were concerned that the term “misogyny” would lead to “the prioritisation of transwomen over biological women”, and they would like protection to be limited to “biological women”.



- (6) *The term “women” is more inclusive of other gender identities:* Although preferring a gender-neutral term, if choosing between “misogyny” or “women”, Gender Identity Research and Education Society (GIREs) felt that “women” was more inclusive of other gender identities. They added that this would depend on it being explained that “women” would include those who identify as or are presumed to be women.

5.262 Conversely, the main arguments offered in favour of the term “misogyny” rather than “women” were:

- (1) *“Misogyny” is more inclusive of diverse gender identities than “women”:* Mermaids and TransOxford felt that if a gender-specific term was going to be used, then “misogyny” would be more inclusive of other gender identities. TransOxford said “you cannot create a definition of women that is workable. Neither gender nor sex are biologically binary while misogyny is not sex or gender specific, making it more appropriate”. Mermaids also felt that:

Hate crime law that focuses on “misogyny” rather than “women” may offer wider protection to a greater number of people for it would ensure protection for, amongst others, trans and non-binary people who do not identify with the term women, but regardless face hate due to misogyny and misogynistic views of their identities.

- (2) *“Misogyny” is a powerful term:* This was argued by the Centre for Women’s Justice.
- (3) *It might enable the term “misogyny” to become more widely known:* This was also argued by the Centre for Women’s Justice.
- (4) *“Misogyny” was successfully used as part of the Nottingham pilot:* This point was made by Islington Council.

### **If protection is neutral, should the term “sex or gender” be used rather than exclusive use of the term “sex” or “gender”?**

5.263 Our final consultation question about the way hate crime protection in this area should be framed asked what term should be used if hate crime protection is sex or gender-neutral. It asked whether the wider term “sex or gender” would be preferable to exclusive use of either the term “sex” or “gender”:

Consultation Question 14:

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. Do consultees agree?

5.264 Although a significant number of responses agreed with our proposal, the majority of personal respondents disagreed that the term “sex or gender” should be used.

5.265 A small majority of organisational responses also disagreed with our proposal, although this was much more marginal – there were only a handful more negative



organisational responses to this question than positive responses. A smaller but still significant number of organisations responded “other”.

### Arguments in favour of the term “sex or gender”

5.266 The main arguments offered in favour of the term “sex or gender” were as follows:

#### “Sex or gender” is the most inclusive term

5.267 This view was expressed widely in personal responses and organisational responses, including by Gender Identity Research and Education Society (GIRES), Hampshire Constabulary, Stonewall (who emphasised its ability to capture all women), the Equality and Inclusion Partnership (EQUIP), Interconnecting South East and East Asians in the UK / The UK Federation of Chinese Professionals, Trans Actual UK CIC (who emphasised the importance of recognising non-binary people), Mermaids, Galop, Stella Creasy MP (who argued that “‘sex or gender’ would also ensure that transmisogyny is captured by hate crime law and no perpetrator could evade prosecution by impugning the victim’s status”).

5.268 In a similar vein, RCT People First<sup>53</sup> said, “[d]ifferent terminology is used in different areas etc so if both are used it will suit more people’s purposes.”

5.269 Several individual responses also favoured the phrase “sex or gender” because it is more inclusive. Some examples of this viewpoint include the following quotations:

- (1) “It is also important to take a holistic approach to ensure that across all protected categories, that there is protection for people of diverse sexes (including intersex persons); genders (including trans, gender queer and non-binary persons) as well as protection for people who may be targeted for their gender expression. It is agreed that choosing between “gender” or “sex” could result in the exclusion of particular individuals”.
- (2) “I think that a general approach is a good idea, as by putting sex and gender together, this can cover a range of people who may experience misogynistic hate on the basis of either of these things or both”.
- (3) “The phrase “sex or gender” will ensure that victims whose gender identity is not tied to their biological sex feel included within this definition”.
- (4) “Hate crime against women is based on an intersection of physical sexual characteristics and on how society expects women to behave (gender stereotypes) and on the gender expression of women. A butch lesbian can be attacked for being too masculine, a cis woman can be attacked for being too feminine, anyone perceived as a woman can be attacked because the attacker presumes she is a women.”

#### Use of this phrase reflects the nature of “sex” and “gender”

5.270 TransActual UK CIC felt that this was the right approach, explaining that they rejected a distinction between gender and sex on the basis that they are “mutually and

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<sup>53</sup> Cwm Taf People First is a charity for people with learning disabilities who live in the Rhondda-Cynon-Taff, Merthyr and Blaenau Gwent areas of Wales.

intrinsically linked ways of understanding a person and not terms which should have legal distinction between them”.

5.271 Several other consultees considered the terms “interchangeable” or “interdependent” and were therefore in favour of including both.

**This term is an important response to the division in this area.**

5.272 One individual response emphasised that inclusivity was especially important given the highly politicised nature of this issue, meaning “it is best to go with the solution that’s as inclusive as possible to avoid creating unnecessary conflicts”.

5.273 Both Resolve West and Stand Against Racism & Inequality (SARI) thought this would “help with the current division and toxic hostility going on regarding trans and some cisgender women”.

**This term is most flexible and able to withstand future developments**

5.274 TransActual CIC UK also argued that “sex and/or gender” would be the “most flexible, functional and future-proof category”. Galop also referred to “sex or gender” as a flexible term that avoids conceptual conflicts with the existing transphobic hate crime strand.

### **Arguments against the term “sex or gender”**

5.275 The main arguments made against the use of the term sex or gender are listed below.

#### **Sex and gender should not be conflated or confused**

5.276 A significant number of individual responses to this question objected to the terms “sex” and “gender” being included in one category. They argued that they were distinct terms which must not be conflated and should be protected separately. The following are several quotations illustrating this viewpoint:

- (1) “Treating sex and gender as interchangeable is scientifically illiterate and causes huge damage!”
- (2) “Sex and gender are not exchangeable terms and both should be retained as they relate to distinctively separate realities or identities”.
- (3) “I’ve already written extensively about the devastation to women’s position in society if gender and sex are conflated. Men are already using this conflation to shut down feminism. We should be aiming to abolish gender as an oppressive and exploitative system that harms women and gender non-conforming men”.

5.277 Linked to this, a significant number of individual responses argued for exclusive use of the term “sex”.

5.278 The LGB Alliance felt that the inclusion of the word “gender” would “only deepen a confusion that has unfortunately permeated much of society, including government bodies”.

5.279 Woman’s Place UK, rejected the addition of any form of sex or gender-based hate crime category, but felt that if this were to be recognised, exclusive use of the term

“sex” rather than “sex or gender” would be needed “for the avoidance of confusion or ambiguity” in legislation aimed at protecting women.

5.280 The Labour Women’s Declaration working group said that the term “sex or gender” would create conflation and confusion that may render protection of women as a group “null” and “void”. (They felt there should be specific protections women and for those who identified as transgender).

5.281 TransOxford argued that both sex and gender should be protected in hate crime laws, but as two separate categories. They stated that sex and gender are:

not the same thing, and neither are biologically binary. The use of them interchangeably or collectively leads to a great deal of confusion and indeed hate crime. Combining the two will simply perpetuate this.

#### Victims should have a specific choice

5.282 The West Midlands Police and Crime Commissioner argued that “there should [be] an option for victims to choose between gender or sex and this should not be in the same category as it is up to the victim to determine which [characteristic] they consider was targeted.”

#### The term “sex or gender” is inconsistent with the Equality Act 2010

5.283 A number of organisational stakeholders argued that “sex or gender”, unlike exclusive use of the term “sex”, would be inconsistent with the EA 2010 and should not be adopted. The Centre for Women’s Justice, Tyndale House, Birmingham and Solihull Women’s Aid, and the Women’s Health Network all expressed this view.

#### Trans people are already protected in hate crime laws

5.284 The Centre for Women’s Justice said:

This report raises the issue of a trans woman being targeted for misogynistic hate crime and suggests gender is a more inclusive term. But if a trans woman is targeted by hate crime then she already had the protection of transgender hate crime legislation.

#### Women are frequently targeted based on their sex

5.285 Birmingham and Solihull Women’s Aid said:

It has also been argued that violence against women and girls is strongly connected to female biology and physicality. Choosing “sex” would accommodate victims who feel they have been targeted based on their sex characteristics.

5.286 This point was also made by the independent policy analysis collective MurrayBlackburnMackenzie, who supported exclusive use of the term sex.

#### Implications for free speech

5.287 Kent ReSisters felt that if “gender” were to be included in any way:

Debate in this area can be strongly predicted to be further curtailed, specifically perspectives that acknowledge the relevance of biological sex, or advocate for women's rights on this basis, will be at risk of being reported and potentially criminalised for stirring up hate on the basis of transgender identity.

5.288 They urged the Law Commission only to protect the term sex.

5.289 The Reclaim Party also said that the term "sex or gender" posed free speech issues, by precluding the "possibility for an individual to ask another individual if they were a man or a woman, without fear of legal prosecution".

#### Legislating for self-identification by the back door

5.290 Sex Matters implied that protection of "sex or gender" in hate crime laws, would essentially involve legislation for self-identification by the back door, via hate crime legislation, which they felt would not be acceptable.

#### Preference for the term gender

5.291 A few individual responses rejected the term "sex or gender" because they preferred the term gender only. This view was offered by The London Mayor's Office for Police and Crime ("MOPAC") although they did not expand on their reasons for this.

### ANALYSIS OF CONSULTATION RESPONSES

5.292 We now turn to analyse the substance of consultees' arguments, identifying their main strengths and weaknesses in the light of the key purported benefits of the legal recognition of sex or gender-based hate crime.

#### The case for recognising sex or gender in hate crime laws

##### Analysis of arguments in favour of recognising sex or gender in hate crime laws

5.293 Many of the arguments put forth by consultees in favour of recognising sex or gender echoed those we heard in the pre-consultation period. We were most persuaded by the following arguments in favour of recognition, although we also acknowledge their potential limits:

- (1) *The omission of sex or gender constitutes a clear gap in hate crime laws.*

We found this argument superficially compelling and share the view that the omission of sex or gender can result in potentially arbitrary outcomes. For example, if two defendants commit an assault and one uses a racist slur, whilst the other uses a sexist slur, hate crime laws would only apply to the defendant who used a racist slur.

Although the omission of sex or gender appears arbitrary and problematic on its surface, the legal position is more complex than this. As consultees' responses extensively highlight, suitability concerns surround the possible introduction of sex or gender-based hate crime, which do not apply in the same way to existing characteristics such as race or religion. We are therefore concerned that recognising sex or gender in hate crime laws simply to fill a gap could be a reductive solution.

- (2) *There is a very high prevalence of certain crimes against women and these have been linked to hostility or prejudice towards their sex or gender.*

We considered prevalence as part of our analysis of the demonstrable need criterion in Chapter 12 of the consultation paper and found the criterion to be convincingly satisfied. As part of this, we cited evidence that women disproportionately experience certain criminal conduct, such as sexual offences or sexual harassment in physical and virtual public spaces. We also recognise, as identified in the consultation paper and in consultation responses, that VAWG-associated offences have been linked to sex or gender-based hostility, prejudice and inequality.

However, for the reasons discussed in Chapter 3, we do not think that prevalence should be the only criterion when deciding whether a characteristic should be added to hate crime laws. Whilst prevalence of relevant offending is a very important starting point for these purposes, it does not explain why hate crime would be an effective, efficient or appropriate way to tackle the identified volume of relevant crime – something our suitability criterion is more equipped to tackle.

Stakeholders who emphasised the prevalence and damaging effects of VAWG did not necessarily explain why extending hate crime laws was the best way to deal with the identified problem.

Some stakeholders did expand on how hate crime recognition in this area could tackle the identified prevalence of crimes against women. For example, as noted at paragraph 5.50, Dr Laura Higson-Bliss said that “adding misogyny as a hate crime characteristic would give women more leverage when reporting abuse to the authorities”. It was also argued that misogyny hate crime would result in a greater ability to monitor the nature and prevalence of crimes committed based on hostility towards women, enabling future initiatives to be created in response to the evidence base this would create.

However, we do not currently have evidence to support the “more leverage” claim, i.e. the view that law enforcement bodies take the report of a hate crime more seriously than a report of the relevant base offence. Benefits relating to “monitoring the nature and prevalence of crimes committed based on hostility towards women” might be achieved just as effectively by non-criminal data collection initiatives or national police recording – measures that would raise fewer suitability concerns than changes to the law in this area.

- (3) *Misogyny hate crime would serve a symbolic value, communicating that crimes rooted in sexism or misogyny are unacceptable.*

We acknowledge that the need to communicate unacceptability is particularly acute in relation to violence against women and girls. This is because of the endemic and arguably normalised nature of such conduct.<sup>54</sup> However, this

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<sup>54</sup> APPG for UN Women, *Prevalence and reporting of sexual harassment in UK public spaces*, (March 2021) available at [https://www.unwomenuk.org/site/wp-content/uploads/2021/03/APPG-UN-Women-Sexual-Harassment-Report\\_Updated.pdf](https://www.unwomenuk.org/site/wp-content/uploads/2021/03/APPG-UN-Women-Sexual-Harassment-Report_Updated.pdf); End Violence Against Women, *Snapshot Report 2020/21* (January 2021),

argument is indiscriminate and, in our view, therefore not a useful way of selecting those characteristics which should be added to hate crime laws. All crimes involving hostility to a characteristic of the victim are unacceptable, whether that characteristic is the victim's sex, race or status as a homeless person, to take just three examples which we discuss in this report.

- (4) *Adding sex or gender could allow for greater recognition of intersectional hate crime.*

We recognise the instinctive strength of this argument, because much of the anecdotal evidence we have heard since the conception of this project suggests that female sex or gender is often also targeted in racist, religious, disablist and LGBT+ hate crimes. In Chapter 8 we recommend reforms to the aggravated offences regime to better facilitate the prosecution of hate crimes based on the targeting of multiple characteristics where this is supported by the evidence.<sup>55</sup> However, we also acknowledge arguments by those who have suggested hate crime is fundamentally unsuited to respond to the intersectional nature of violence against women and the inequalities that different women experience.

5.294 We are not convinced, at this stage, about the remaining purported benefits of sex or gender-based hate crime.

5.295 For example, several stakeholders felt that adding sex or gender to hate crime laws could help to bolster the reporting of crimes included in its scope. Whilst we acknowledge this argument, we also note that the Nottingham "Misogyny Hate Crime" pilot has not been associated with increased reporting.

5.296 An independent survey was used to evaluate the Nottingham pilot scheme two years after its introduction. Despite the scheme being in place, only 6.6% of respondents to the survey who had experienced behaviours identified by Nottinghamshire Police as Misogyny Hate Crime said they had reported the incident they experienced to the police, compared to 64.5% of respondents who did not report the incident to police. 84.6% of respondents said that the Misogyny Hate Crime Pilot had not influenced their decision whether to report one of these incidents.<sup>56</sup> Ultimately, the authors of the evaluation report noted that "under-reporting is a significant issue and remains so, despite the introduction of the policy".<sup>57</sup>

5.297 The authors of the evaluation report did add that "one of the main issues identified by the research findings was that, if the policy is to continue, it needs to be heavily publicised across the city and the county; many respondents simply did not know

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available at: <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Violence-Against-Women-and-Girls-Snapshot-Report-FINAL-1.pdf>; Department for Education, *Sexual violence and sexual harassment between children in schools and colleges*, (June 2021) pp 7 to 8, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1014224/Sexual\\_violence\\_and\\_sexual\\_harassment\\_between\\_children\\_in\\_schools\\_and\\_colleges.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014224/Sexual_violence_and_sexual_harassment_between_children_in_schools_and_colleges.pdf).

<sup>55</sup> See paragraphs 8.146 to 8.196.

<sup>56</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre, 2018) p 12, available at <https://www.nottingham.ac.uk/lipp/documents/misogyny-evaluation-report.pdf>.

<sup>57</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham's Women's Centre, 2018) p 12.



about the policy”.<sup>58</sup> It might therefore be argued that recognising sex and gender as a protected characteristic in hate crime laws would help raise awareness about the possibility of reporting sex or gender-based hate crime, although this is speculative.

5.298 However, raising awareness of reporting options is not a particularly convincing argument in favour of changing the law. As highlighted in the introduction, sex or gender-based hate crime is to be recorded by all police forces in England and Wales, starting in Autumn 2021. Insofar as lack of awareness is thought to be driving low reporting rates, a public awareness campaign accompanying the recording of sex or gender-based hate crime might be a more targeted response to legitimate reporting concerns than extending hate crime laws.

5.299 More fundamentally, the reporting barriers that exist in the context of offences associated with violence against women and girls are deeply embedded,<sup>59</sup> and it is not clear how hate crime recognition will materially change this. The option to report sexual offences is widely known, but that does not change the fact that victim-survivors of these offences frequently choose not to report.<sup>60</sup>

5.300 The Nottingham Misogyny Hate Crime Pilot was limited to police recording and as it did not involve any change in the law, it did not include the possibility of prosecution of “misogyny” as part of the offence. However, public focus groups conducted with women in Nottingham as part of the independent evaluation did not suggest that this was a barrier to reporting. Indeed, the evaluation report says: “it is notable that conviction is not the key thing motivating women to report – instead it is the fact that they are being taken seriously that matters”.<sup>61</sup>

5.301 Consultees also argued that the suitability concerns we identified in the consultation paper were: misplaced, i.e. they should not be relevant considerations; and surmountable, for example via the carve out option we identified in the consultation paper. These two points were used to argue in favour of recognising sex or gender in hate crime laws.

5.302 The first view, that the suitability concerns identified were misplaced, related to our concerns about resources. As noted at paragraph 5.72, the Alan Turing Institute argued that “the only coherent rationale that has been given for not offering protection to this characteristic [sex or gender] is the cost, which is a poor reason given the scale and impact of the problem”. We do not agree with the view expressed by the Institute, for two reasons.

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<sup>58</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham’s Women’s Centre, 2018) p 12.

<sup>59</sup> Centre for Women’s Justice, End Violence Against Women Coalition, Imkaan and Rape Crisis England and Wales, *The Decriminalisation of Rape* (November 2020), available at <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisation-of-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf>.

<sup>60</sup> HM Government, *The end-to-end rape review report on findings and actions* CP 437 (June 2021) para 51, available at <https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>.

<sup>61</sup> L Mullany and L Trickett, *Misogyny Hate Crime Evaluation Report* (Nottingham’s Women’s, Centre 2018) p 55, available at <https://www.nottingham.ac.uk/lipp/documents/misogyny-evaluation-report.pdf>.

- 5.303 First, suggesting that the *only* coherent suitability concern relates to cost runs contrary to the views of many consultees, who recognised the range of difficulties that adding sex or gender to hate crime laws could bring. Secondly, by raising resource-based suitability concerns we did not question whether gender-based violence is “worth” spending money on. Rather, we acknowledged the scale and impact of VAWG, and questioned whether the introduction of sex or gender-based hate crime is the most efficient use of resources to tackle such an extensive problem.<sup>62</sup> This engages important questions about the purported benefits that hate crime would bring in the context of gender-based offending.
- 5.304 Turning to the view that identified suitability concerns are surmountable via a statutory carve out for certain VAWG offences – we agree that excluding sexual offences and domestic abuse from the scope of sex or gender-based hate crime responds to many of the suitability concerns identified in the consultation paper. However, this is not a straightforward solution that automatically bolsters the case for recognising sex or gender in hate crime laws, because such a carve out would also give rise to a series of independent problems (summarised at paragraph 5.311), as consultees also highlighted.
- 5.305 It was also argued that the Nottingham Misogyny Hate Crime pilot illustrates the suitability and workability of hate crime recognition in this area. However, the Nottingham pilot was quite different to the anticipated protection of sex or gender in hate crime laws. Most obviously, it did not involve crimes being prosecuted as misogyny hate crimes.
- 5.306 Moreover, the pilot pre-designated certain conduct, such as sexual assault or being followed home as examples of “misogyny hate crime” or “misogyny incidents”. Where this conduct was reported, it was automatically categorised as a misogyny hate crime or incident (depending on the nature of the underlying conduct). This is different to the way in which hate crime laws function, which require proof that a criminal offence was motivated by, or the offender demonstrated, hostility towards a specific characteristic. As we noted in Chapter 1, police recording of hate crimes and incidents is based on victim perception. However, for the purposes of the criminal law, no behaviour or criminal offence would be automatically considered a sex or gender-based hate crime. Proof of prejudice or hostility towards the victim’s sex or gender would be needed in addition to proof of the elements of the base offence (for example, assault or harassment).
- 5.307 As we have highlighted, many potential suitability concerns relate to the requirement of proof of a motivation or demonstration of hostility in the context of gender-based violence, as well as practical difficulties associated with prosecution. While it is an important study, the Nottingham Misogyny Hate Crime pilot is of limited utility in illustrating whether or not adding sex or gender to national hate crime laws would be desirable or workable because experience of recording an offence as a hate crime does not involve experience of prosecuting it as one.

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<sup>62</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 10.145 to 10.147.



## Analysis of arguments against recognising sex or gender in hate crime laws

5.308 For the most part, the arguments that consultees provided against recognising sex or gender coincided with the suitability concerns we identified in the consultation paper, and we agree with a large proportion of these.

5.309 In this section we address the following arguments that consultees offered against the recognition of sex or gender:

(1) *Difficulties posed by the hostility test in the context of sex or gender.*

Several consultees were concerned about the use of the hostility test in the context of sex or gender, for various reasons, and we accept most of these concerns. However, we do not entirely share the CPS's view that sex or gender-based hostility is rarely demonstrated in the same clear and unequivocal way as it is in respect of the existing protected characteristics.

The CPS argued that even if gendered language accompanied a crime, "it would still be difficult to prove that the hostility was based upon the victim's gender rather than [against] the victim as an individual".

We acknowledge that gendered language is to a large extent normalised in society. Its ubiquitous nature might make it less likely for a jury or magistrates to associate gendered language with sex or gender-based hostility, than they would use of racist or homophobic slurs with racism or homophobia. Nonetheless, we note that throughout the consultation period we have heard numerous examples of serious and overt manifestations of hostility towards women that we have no doubt would reach the criminal threshold.

(2) *Notions of "hate" or "intense dislike" do not reflect the motivations underpinning violence against women and girls.*

Whilst we note arguments made by those such as Woman's Place UK and Rape Crisis England & Wales that notions of "hate" and "intense dislike" of women do not accurately reflect the structural inequality underpinning VAWG, the legal test for hate crime does not require proof of this hatred or intense dislike against a group. "Hostility" is the test used in current hate crime laws, and in Chapter 9 we propose that a motivation of "prejudice" towards the characteristic should be added in addition to the term "hostility".

(3) *The link between sexual or domestic violence and sex or gender-based prejudice.*

Gender Parity UK opposed the protection of sex or gender in hate crime laws by arguing against any connection between purported VAWG crimes such as sexual offences, and prejudicial ideas relating to women.<sup>63</sup>

In our consultation paper, we raised the possible connection between violence against women and girls perpetrated by male offenders on the one hand, and

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<sup>63</sup> They also argued that such crimes were rarely connected to sex or gender-based hostility or prejudice towards men.

sex or gender-based hostility or prejudice on the other hand, as part of our demonstrable need criterion. Consultees scarcely challenged the view that sex or gender satisfies the demonstrable need criterion.

We acknowledge, as pointed out by stakeholders such as the Men and Boys Coalition, that a range of complex factors, specific to individual interactions and relationships, can motivate all offences, including VAWG-associated offences committed by men against women. However, this does not prevent the demonstrable need criterion from being satisfied in relation to sex or gender, for the following reasons:

- (a) The role of individual factors in motivating violence against women and girls need not displace the relevance of wider societal factors. The former might include individual factors that relate to a specific relationship or interaction, irrespective of sex or gender. The latter could include offenders' feelings of entitlement or desire to dominate and assert power over their victims, which might be linked to prejudicial ideas surrounding men and women's relational positions in society. The two are not mutually exclusive.
- (b) Linked to this, the demonstrable need criterion is widely framed, considering the prevalence of crimes which have, to varying degrees, been linked to prejudice or hostility towards a relevant characteristic. It is not intended to identify an exclusive or complete explanation of criminal victimisation against a group or characteristic, which can of course, be motivated by a range of complicated factors.
- (c) On a related note, the demonstrable need criterion's search for a link between relevant conduct and prejudice or hostility is not intended to be synonymous with the legal test for hate crime. Whilst a wider connection between the prevalence of violence against women and girls and sexism can be relevant for the purposes of the former, the latter requires evidence, in each individual case, that a defendant demonstrated, or that the crime was motivated by, relevant hostility.
- (d) In any case, throughout this consultation, we have also heard examples of violence against women and girls accompanied by explicit hostility towards the victim's sex or gender, for example the use of sex or gender-based slurs accompanying threats of sexual violence.

Ultimately, we do not think the satisfaction of our demonstrable need criterion is undermined by the fact that a range of complex factors and motivations might underpin various forms of violence against women and girls. However, we do think this point raises questions about whether a legal test based on hostility or even prejudice towards sex or gender is too reductive to apply to specific cases of VAWG, and whether a hate crime approach constitutes a suitable approach to VAWG.

- (4) *Freedom of expression concerns.*

We acknowledge the freedom of expression concerns which surrounded the possibility of sex or gender-based aggravated communications offences. However, since the aggravated offences and enhanced sentencing regimes only apply where the conduct already amounts to a criminal offence, we consider that the freedom of expression discussion was more relevant to the nature of the communications offences themselves, and the recommendations that we made in our recent report *Modernising Communications Offences*, particularly our recommended new communications offence based on likely harm.<sup>64</sup> This report recommended replacing offences based on vague and nebulous terms such as “grossly offensive” – which risk having a chilling effect on freedom of expression due to their breadth – with more specific and targeted offences that focus on harm likely to be caused by the communication.

- (5) Finally, some of consultees’ arguments against the addition of sex or gender are beyond the scope of our review. The quality of the Government’s or indeed the criminal justice system’s wider response to VAWG is not directly engaged by this review. However, as we have noted, there are legitimate questions as to whether any additional cost associated with sex or gender recognition in hate crime laws would represent the most effective use of limited resources in this area. The wider VAWG context is also relevant to this review because the reform we are considering could create problems, as opposed to improvements, in this very important area.<sup>65</sup>

### **Excluding sexual offences, domestic abuse, FGM and forced marriage from the scope of sex or gender-based hate crime**

5.310 Many arguments in favour of the carve out largely coincided with the suitability concerns we identified in the consultation paper. We agree with most of consultees’ arguments in favour of it, and share the view expressed by the Bar Council that a statutory carve out could be drafted in this area.

5.311 Turning to arguments against the carve out, we also share many of the substantive concerns that consultees highlighted about its operation or indeed about any sort of bespoke sex or gender hate crime solution. We recognise the range of independent problems to which consultees argued a carve out might give rise, and the potential for these problems to obscure any benefits that adding sex or gender to hate crime laws could bring. These include:

- A concern that the specific exclusion of VAWG offences might be perceived as denying the potential for these offences to be understood as misogynistic;
- A concern that it may be tokenistic for the law to apply only in certain contexts such as harassment and online abuse;
- Creating added complexity in hate crime laws, when greater simplicity has been one of the key calls for reform; and

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<sup>64</sup> *Modernising Communications Offences: A Final Report (2021)* Law Com No 399, pp 24 to 75.

<sup>65</sup> *Hate crime laws: A consultation paper (2020)* Law Commission Consultation Paper No 250, para 12.142.

- Undermining the wider aim of treating protected characteristics consistently in hate crime laws.<sup>66</sup>

## Framing sex or gender-based hate crime

### Women-specific or gender-neutral protection

5.312 Several respondents pointed out that hate crime recognition in this area is very unlikely to achieve workable public support if protection is limited to women.

5.313 This argument clearly reflects the consultation responses we received. Most individual responses opposed the protection of women only. Whilst we did not provisionally propose that protection should be limited to women in our consultation paper – preferring instead to ask an open question on this issue – some consultation responses mistakenly assumed that we had. Following this, several responses very strongly opposed what they considered to be the “discriminatory” exclusion of men.

5.314 Some consultees advocated a women-specific term because sex or gender is more analogous to existing hate crime categories that are specifically framed such as disability or transgender. In doing so, they argued that whilst practical reasons require the use of a wide term in relation to highly diverse groups such as “race” and “religion”, there are no clear practical barriers which would prevent use of a specific term, such as “women”, in the context of sex or gender. They argued that it was easier to specify the targeted group when it came to sex or gender, as has been done with the transgender and disability categories.

5.315 This contrasted with consultees who simply stated that sex or gender was analogous to generally framed characteristics such as race, without expanding on their reasons for this.

5.316 Several responses pointed out that it was very important to limit the expansion of hate crime characteristics to what has an evidence-base, and that criminal targeting which is linked to prejudice or hostility towards sex or gender almost exclusively pertains to female sex or gender. Against this, and subject to the discussion above, we note that the generally-framed characteristics—race, religion and sexual orientation—include sub-groups which infrequently experience relevant hate crime. For example, there is little evidence that heterosexual people experience hate crime based on hostility towards their sexual orientation.

5.317 We agree that we have received very little evidence of crimes which are linked to misandry, or more widely, prejudice or hostility towards the male sex or gender. However, we acknowledge that on rare occasions these might arise. If the characteristic were specifically framed, i.e. the term “women” were used, hate crime laws would not be able to recognise these instances if they arise, which might be considered arbitrary. In this way we recognise arguments made by the Men and Boys’ Coalition in favour of a gender-neutral approach, whereby they suggested that it would be “inconsistent to treat a male victim differently to a female victim”, and endorsed the following part of Lord Bracadale’s conclusions from the Scottish review that while:

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<sup>66</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.177 to 12.185.

[t]he essence of the conduct which we are seeking to cover is usually against women, it is not inconceivable that there could be hostility against a man (or nonbinary person) based on their gender [...].

#### “Sex or gender” or exclusive use of “sex” or “gender”?

- 5.318 Many responses argued in favour of exclusively using the word “sex” in hate crime laws.
- 5.319 Some consultees had concerns about the potential conflation of sex *and* gender. In this regard, we think it is important to emphasise that the term we would propose, if hate crime recognition is introduced in this area, is “sex *or* gender”.
- 5.320 Some consultees argued that because the term “sex” is used in the EA 2010, it should also be used in hate crime laws. While we agree that there is value in aligning the terminology used in the EA 2010 with hate crime terminology where it is possible to do so, as we outlined in chapters 3 and 4, hate crime laws and the civil discrimination laws contained in the EA 2010 serve different purposes. Further, the terminology of definitions in these two areas already differ in certain respects; notably the definitions of “disability” and “transgender”. We therefore consider that it can be appropriate to depart from the terminology of the EA 2010 where there is a clear policy basis on which to do so.
- 5.321 We acknowledge the point made by some consultees that trans women are already protected by the “transgender” category in hate crime laws. However, this protection would apply where trans women are targeted based upon hostility towards the trans aspect of their identity. Where a trans woman is targeted based on hostility towards her being a woman, the “transgender” category might not be engaged – indeed a perpetrator might not even be aware the woman was trans. Instead, a hate crime category directly attributable to the victim being female would be more relevant. It is also possible that a trans woman may experience misogyny in circumstances where the perpetrator is aware that the person is trans. In this case, neither the category of “transgender” nor “sex” would be particularly apt to capture the nature of the hostility experienced, if the hostility was directed towards the victim’s female gender.<sup>67</sup>
- 5.322 It was also argued that the term “sex” would be preferable because it would accommodate victims who have experienced hostility that is specifically referable to their sex characteristics, i.e. their female biology and physicality. In response, we note that prosecution on this basis would still be possible if the term “sex or gender” were used, as this incorporates the term sex.
- 5.323 The group Sex Matters argued that including gender would essentially “legislate for self-identification by the back door”.
- 5.324 However, if we were to recommend that “sex or gender” should be added to hate crime laws, this recommendation would only apply in relation to this particular aspect

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<sup>67</sup> We made a similar argument in our consultation paper. See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.220 to 12.222.

of the criminal law. It would not affect the civil law provisions that apply in relation to the Gender Recognition Act 2004.

- 5.325 Finally, we take the freedom of expression concerns raised by some consultees seriously. Consultees such as Kent ReSisters expressed concern about the inclusion of “gender”, noting that this might curtail “perspectives that acknowledge the relevance of biological sex”. They drew attention to the stirring up offences, and any extension of these to include gender. We discuss how the law might respond to freedom of expression concerns of this nature in Chapter 10 of this report and propose the use of bespoke free speech protections in relation to the discussion of biological sex, if the stirring up offences are extended to cover “sex or gender”.
- 5.326 Outside the context of “stirring up” offences – which as we note in Chapter 10 operate at a very high threshold of criminality – we acknowledge that there are legitimate freedom of expression concerns in the context of other speech offences, such as the communications offences under section 1 of the Malicious Communications Act 1998 and section 127 of the Communications Act 2003. These offences have lower maximum penalties, lower criminal thresholds, and are prosecuted in significantly higher numbers. Indeed, section 127(1) was the offence in question in the case of *Miller*,<sup>68</sup> which is often cited by gender-critical organisations as an example of the over-reach of the criminal justice system. We consider that the fundamental concern in relation to these offences is their over-reliance on vague terms such as “grossly offensive”; a concern that is not limited to the hate crime context. We have separately recommended reform of these offences in our report *Modernising Communications Offences*,<sup>69</sup> and consider that these reforms, if implemented, would address wider concerns about freedom of expression.
- 5.327 Having reflected on consultees’ arguments about the way this characteristic should be framed, we were most persuaded by arguments in favour of the term “sex or gender”, which pointed out the flexibility and inclusivity of this term. We regard these two qualities as important in this context, given the divided and divisive debate surrounding definitions of “sex” and “gender” and their relationship.

## OPTIONS FOR REFORM

- 5.328 In the preceding section we have explored the main arguments emerging from consultees’ responses to our consultation questions about sex or gender-based hate crime.
- 5.329 The wide ranging and contingent nature of the arguments offered by consultees makes it difficult to draw a definitive policy steer from the consultation, particularly in terms of whether sex or gender should be added as a hate crime characteristic. This illustrates the challenges that beset this policy area – it involves a range of tensions that are hard to resolve.

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<sup>68</sup> *Miller v College of Policing* [2020] EWHC 225 (Admin). We discuss this case further in Chapter 4 at para 4.216 and also in our consultation paper: *Hate crime laws: A consultation paper* (2020) Law Commission Consultation Paper No 250, para 6.17.

<sup>69</sup> *Modernising Communications Offences: A Final Report* (2021) Law Com No 399.

5.330 The possible reform options we have considered are set out below. They are divided into three broad groups:

- Option 1 involves full recognition of sex or gender in hate crime laws on the same basis as all currently recognised characteristics
- Option 2 involves partial recognition of sex or gender, with options 2(a) to (d) outlining differently possibilities for how this might be achieved
- Option 3 involves no recognition of sex or gender in hate crime laws

5.331 We outline and explore these options in some detail in the section that follows, in order to explore the advantages and disadvantages of each approach. There is a degree of unavoidable legal technicality in the presentation of these options, which is necessary in order to illustrate one of our key concerns with a number of these options – the complexity and inconsistency they would create.

5.332 We consider the issue of offences of stirring up hatred based on sex or gender separately in Chapter 10, as there are unique considerations that apply.

#### **Option 1 – full recognition of sex or gender on the same basis as other characteristics**

5.333 Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.

5.334 Add sex or gender to the enhanced sentencing regime.

#### **Option 2 – partial recognition of sex of gender, with certain offences and contexts excluded**

5.335 Only add sex or gender to hate crime laws if sex or gender-specific conditions are put in place:

Option 2a: include sex or gender in hate crime laws, but specifically exclude certain VAWG offences and the context of domestic abuse.

- Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.
- Add sex or gender to the enhanced sentencing regime but exclude certain offences that are strongly associated with violence against women and girls such as sexual offences, Female Genital Mutilation (FGM) and forced marriage.
- Also exclude offences committed in the context of domestic abuse by way of an express statutory provision which would apply in relation to both aggravated offences and enhanced sentencing.

Option 2b: include sex or gender for aggravated offences only.

- Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.
- Use non-statutory guidance to prevent offences which arise in the domestic abuse context being pursued as sex or gender-based hate crimes.



Option 2c: include sex or gender for offences related to harassment and abuse only.

- Create aggravated offences (based on hostility towards sex or gender) for the following base offences:
  - The three POA 1986 offences that are currently included in the CDA 1998 (POA, s 4, Fear or provocation of violence | POA, s 4A, Intentional harassment, alarm or distress | POA, s 5, Harassment, alarm or distress).
  - The four Protection from Harassment Act 1997 (PHA 1997) offences that are currently included in the CDA 1998: (PHA, s 2, Harassment | PHA, s 2A, Stalking | PHA, s 4, Putting people in fear of violence | PHA, s 4A, Stalking involving fear of violence or serious alarm or distress).
- Create a unique example of sex or gender-based enhanced sentencing for the communications offences<sup>70</sup> (since aggravated versions of the communications offences do not exist, and in Chapter 8 we do not recommend they be created).
- Use non-statutory guidance to prevent offences which arise in the domestic abuse context being pursued as sex or gender-based hate crimes.

Option 2d: include sex or gender for enhanced sentencing only.

- Only include sex or gender in the context of enhanced sentencing.
- Do not create aggravated offences (based on hostility towards sex or gender).

**Option 3 – no recognition for sex or gender in either aggravated offences or enhanced sentencing**

5.336 Do not create aggravated offences (based on hostility towards sex or gender).

5.337 Do not add sex or gender to the enhanced sentencing regime

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<sup>70</sup> Malicious Communications Act 1988, s 1; Communications Act 2003, s 127.

## Advantages and disadvantages of the options for reform

### Option 1 – full recognition on the same basis as all other characteristics

- **Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.**
- **Add sex or gender to the enhanced sentencing regime.**

5.338 This option would simply add sex or gender to hate crime laws, on an equal basis with all other characteristics, without any further qualification.

5.339 The key advantages of this option are:

- (1) It would achieve parity of protection, consistent with wider reforms that we recommend in this report.
- (2) It would be simple to draft, avoiding the legal complexity that partial inclusion of sex or gender might bring to hate crime laws.
- (3) It would avoid concerns about sex or gender being viewed as a lesser or tokenistic addition to hate crime laws, that are raised in relation to some of the partial inclusion options we consider.

5.340 Under Option 1, a sex or gender hate crime aggravation could be used in relation to all criminal law offences, if there were evidence that the defendant demonstrated, or the offence was motivated by, hostility towards the victim's sex or gender. This would be advantageous in that:

- (1) It would respond to the prevalence of crime that has been linked to hostility or prejudice towards women (predominantly), as identified in the consultation paper and by consultees. This prevalence includes sexual offences and a wide range of criminal offences that are committed in the domestic abuse context.
- (2) It would respond to the diverse harm that all types of sex or gender-based offending causes, primarily directed to women and girls as a group, and to wider society – as identified in the consultation paper and by consultees.
- (3) It would not divide violence against women and girls into those offences which the law can mark as aggravated by hostility towards the victim's sex or gender and those which it cannot.

5.341 However, the clear weakness of Option 1 is that it would not address any of the suitability concerns identified in the consultation paper and by consultees – most prominently those relating to sexual offences and domestic abuse.

5.342 We think this would be a very significant disadvantage, because we consider the suitability concerns relating to sex or gender to be very serious. We are particularly concerned about the potential for this to make some sexual offence prosecutions more difficult, and also indirectly create and reinforce a hierarchy of sexual violence. These difficulties were clearly shared and expanded upon by consultees.

5.343 As a result, we do not believe that Option 1 – inclusion of sex or gender in hate crime laws without VAWG-related offence carve outs – is a desirable policy course. We have reached the clear conclusion that if sex or gender were to be recognised in hate crime laws, such recognition should be partial only.

#### Option 2 – partial recognition of sex or gender, with certain offences and contexts excluded

#### **Only add sex or gender to hate crime laws if sex or gender-specific conditions are put in place.**

5.344 All of the permutations of Option 2 that we have outlined would add sex or gender to hate crime laws, but only if the scope of sex or gender-based hate crime laws were limited in some way.

5.345 The general advantages of partial recognition for sex or gender are:

- (1) It could respond to many of the serious suitability concerns that were identified in our consultation paper and by consultees.
- (2) It would still allow sex or gender to be added to hate crime laws, even if in a limited format. This goes some way towards responding to the high prevalence of crime linked to hostility or prejudice towards women (predominantly) and the diverse range of harm this causes.

5.346 However, partial recognition of sex or gender would undermine two key aims that our wider recommendations seek to bring to hate crime laws – simplification and parity across the protected characteristics. Some forms of partial recognition present greater challenges than others in this regard as will be detailed below.

5.347 Also, any approach which limits sex or gender-based hate crime to a fixed number of offences could (or indeed would):

- (1) Fail to respond fully to the prevalence of crime linked to hostility or prejudice towards women identified in the consultation paper and by consultees, which includes sexual offences and domestic abuse.
- (2) Create distinctions between different forms of violence against women and girls, expressly separating instances of sexual violence such as rape from conduct such as public sexual harassment. This is something that some consultees have highlighted as potentially damaging for various reasons.
- (3) Be considered tokenistic or result in the protection of sex or gender being viewed as somehow lesser.

5.348 Nonetheless, our view is that if sex or gender were to be included in hate crime laws, it would be necessary to accept the disadvantages of partial recognition, given the strength of the suitability concerns in this context.

5.349 The more specific arguments for and against the range of partial recognition options are considered below.

Option 2a: broadly include sex or gender in hate crime laws, but specifically exclude VAWG offences

- **Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.**
- **Add sex or gender to the enhanced sentencing regime.**
- **Exclude offences associated with VAWG such as sexual offences, crimes committed in the domestic abuse context, FGM and forced marriage.**

5.350 This option is the most inclusive of the partial recognition options. The starting point would be to include sex or gender in hate crime laws, but then specifically exclude the VAWG offences and contexts we consider raise the most concerns in practice.

5.351 In legislative terms, this would involve the specific exclusion of certain offences: sexual offences, FGM, forced marriage and coercive control offences from the ambit of hate crime laws, and also a specific exclusion of any offending committed in the context of domestic abuse.

5.352 The domestic abuse context exclusion could adopt the definition of domestic abuse in section 1 of the Domestic Abuse Act 2021. In practical terms it would mean that offending such as an assault, or criminal damage, which might otherwise fall within the scope of a sex or gender-based hostility aggravation, would be excluded from this aggravation if the context of the offending was found to be one of domestic abuse for the purposes of the definition. It is worth reiterating at this point that this would not remove the scope of the sentencer to recognise the harm and wrongfulness of the defendant's conduct, as they would retain a wide discretion to do so. Indeed, as we note at paragraph 5.28, sentencing guidelines already require sentencers to consider the particular seriousness with which the criminal justice system treats domestic abuse in deciding on a sentence.

5.353 The main advantages of this option are:

- (1) It was conditionally supported by most organisational consultees who responded to Consultation Question 11 (part two).
- (2) Whilst it would exclude a fixed number of offences, a sex or gender-based aggravation could still be applied to many criminal offences. As a result, Option 2a might be less vulnerable to the perception that adding sex or gender to hate crime laws is tokenistic, or that sex or gender-based hate crime is somehow less important, when compared with the other partial recognition options we explore below.

5.354 Notwithstanding these advantages, using a statutory exclusion of certain VAWG offences and contexts creates independent problems. Perhaps more than any other partial recognition option, it could undermine our aim to make the law in this area simpler, because of the complexity that a statutory carve out would create. We also

share many of the concerns that consultees expressed surrounding the nature and existence of a statutory carve out.<sup>71</sup>

Option 2b: include sex or gender as a characteristic for aggravated offences only

- **Create aggravated offences (based on hostility towards sex or gender) for all the offences which currently have aggravated versions in sections 28 to 32 of the CDA 1998.**
- **Use non-statutory guidance to prevent offences which arise in the domestic abuse context being pursued as sex or gender-based hate crimes.**

5.355 This option would involve only including sex or gender within the aggravated offences regime, and not the more widely applicable approach of enhanced sentencing. The current aggravated offences correspond with several of the areas of concern prompting calls to introduce “misogyny hate crime” – in particular public order<sup>72</sup> and harassment offences.<sup>73</sup> By not including all offences, concerns in other areas such as sexual offences would be avoided.

5.356 This option would also use non-statutory guidance for police and prosecutors to exclude domestic abuse offending that could potentially be prosecuted using sex or gender-based aggravated offences. There is a more limited overlap between the existing aggravated offences and domestic abuse offending (for example, the assault, criminal damage and harassment offences are also prosecuted in the context of domestic abuse). We consider that guidance, rather than a statutory exclusion, would be a more proportionate response to address this overlap.

5.357 The main advantage of this option is that it would exclude the enhanced sentencing regime, with its very wide scope. It is therefore a simpler option to draft and apply. Although sex or gender-based hate crime would only apply in limited contexts, these contexts are among the most frequently invoked in the calls to introduce sex or gender-based hate crime laws.

5.358 The use of non-statutory guidance to guide prosecutions in the context of domestic abuse might be criticised as a weaker response to the specific concerns that have been raised in this area. This is because guidance (rather than a statutory exclusion) would not firmly ensure the exclusion of offences committed in this context. However, the more flexible approach entailed by guidance may also be seen as an advantage because some consultees have argued that a blanket statutory exclusion of all domestic abuse cases is not desirable and could result in arbitrary outcomes.

5.359 The independent problems created by Option 2b are arguably less serious than those brought about by Option 2a in the sense that Option 2b is less complex and there is therefore less risk of operational uncertainty when it is applied.

5.360 However, it is also vulnerable to criticism that it is a weaker response than Option 2a (and Option 1) and leaves relatively arbitrary gaps in the potential for hate crime

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<sup>71</sup> See para 5.311.

<sup>72</sup> Public Order Act 1986, ss 4, 4A and 5.

<sup>73</sup> Protection from Harassment Act 1997 (PHA 1997), ss 2, 2A, 4 and 4A.

aggravation. For example, it would not be possible to apply an enhanced sentence to an online communications offence<sup>74</sup> (in contrast to an in-person public order or harassment offence, where an aggravated offence would be available to prosecute). Whereas Option 2a adopts an approach of parity of protection except where it is considered necessary to exclude an offence or context, Option 2b is simpler but less principled.

5.361 A further criticism of this option is that victims of sex or gender-based hate crime might be seen as lesser, or the poor relation of the wider hate crime framework. The option would recreate a hierarchy of protection that we have recommended should be removed amongst the existing five characteristics.

**Option 2c: include sex or gender-based recognition for offences related to harassment and abuse only**

- **Create aggravated offences (based on hostility towards sex or gender) for the following base offences:**
  - **The three POA 1986 offences that are currently included in the CDA 1998 (POA, s 4, Fear or provocation of violence | POA, s 4A, Intentional harassment, alarm or distress | POA, s 5, Harassment, alarm or distress).**
  - **The four PHA 1997 offences that are currently included in the CDA 1998: (PHA, s 2, Harassment | PHA, s 2A, Stalking | PHA, s 4, Putting people in fear of violence | PHA, s 4A, Stalking involving fear of violence or serious alarm or distress).**
- **Create a unique example of sex/gender-based enhanced sentencing, specifically for the communications offences (since aggravated versions of the communications offences do not exist, and we do not recommend that they be created).**
- **Use non-statutory guidance to prevent offences which arise in the domestic abuse context being pursued as sex or gender-based hate crimes.**

5.362 This option starts from the premise that the legal model of hate crime laws is unsuitable as a response to a significant proportion of VAWG offending (for the reasons that we have outlined in the chapter). However, the model could operate effectively in relation to a limited number of offences – those associated with abuse and harassment of women.

5.363 Like Option 2b, it creates significant gaps in the extent to which hate crime aggravation may apply – particularly compared to the other characteristics, and thereby recreates a hierarchy of protection in law.

5.364 Option 2c has certain advantages when directly compared with Option 2b:

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<sup>74</sup> See Communications Act 2003, s 127 and Malicious Communications Act 1988, s 1.

- (1) It is more targeted than Option 2b. Rather than applying to all aggravated offences in the CDA 1998, it applies to offences that may arise in more suitable sex or gender-based violence contexts – namely public sexual harassment and online abuse.
- (2) Online abuse of women has been highlighted as one very prevalent area of offending which could be compatible with a sex or gender-based hate crime framework.
- (3) It is better equipped to respond to suitability concerns surrounding domestic abuse, because under Option 2c, a sex or gender aggravation would not apply to criminal damage and assault – offences which are strongly associated with domestic abuse.

5.365 However, Option 2c is even more vulnerable than Option 2b to criticisms that adding sex or gender to hate crime laws is tokenistic, or that the protection of sex or gender is somehow lesser, because it only extends to a very small number of offences.

5.366 Its selective nature also means it is more complicated than Option 2b, which is a disadvantage because it may prove more difficult to implement consistently.

#### Option 2d: include sex or gender for enhanced sentencing only

- **Only include sex or gender in the context of enhanced sentencing.**
- **Do not create any aggravated offences related to hostility on the basis of sex or gender**

5.367 This option would include hostility based on sex or gender in the enhanced sentencing regime. The practical effect of this is that it would not exclude sexual offences, FGM, forced marriage or offences committed in the domestic abuse context from the scope of sex or gender-based hate crime.

5.368 The rationale for this solution is that enhanced sentencing, unlike aggravated offences, only requires proof of hostility at the sentencing stage, which does not affect the evidence required to prove guilt during trial. As a result, the risk of exacerbating the prosecution's challenges in the context of sexual offences is not engaged, and so a carve out is less necessary.

5.369 However, Option 2d does not respond to other suitability concerns relating to sexual violence or to any of the concerns surrounding domestic abuse, including:

- The creation of arbitrary distinctions between “misogynistic” and “non-misogynistic” incidences of violence against women and girls;
- The difficulties of proof that are likely to exist given the majority of these offences occur in private, and concerns about adding extra requirements of proof in the context of sexual offences, which are already very difficult to prove;
- Whether the additional cost associated with adding these characteristics within the hate crime framework is the best use of the limited resources available to tackle VAWG;



- Whether hate crime is a useful or appropriate way of characterising intimate partner violence;
- The potential for double counting in relation to sexual offences, the sentences for which should arguably already reflect any misogyny present.<sup>75</sup>

5.370 Further, Option 2d would replicate the current position of the sexual orientation, transgender and disability categories in hate crime laws as “second class” levels of protection – a position we recommend should be reformed. This has been strongly criticised by stakeholders representing these groups, who have described the aggravated offences – which form part of the substantive criminal law as opposed to sentencing law – as symbolically and practically important. Therefore, if aggravated offences were not available in respect of the characteristic of sex or gender, criticisms about its different treatment might be more acute.

### Option 3 – no recognition for sex or gender in either aggravated offences or enhanced sentencing

- **Do not create aggravated offences (based on hostility towards sex or gender).**
- **Do not add sex or gender to the enhanced sentencing regime**

5.371 This option would retain the status quo. Sex or gender would not be a protected characteristic for the purposes of the regimes of aggravated offences or enhanced sentencing.

5.372 This would avoid the potential concerns we have about including sex or gender within hate crime laws in contexts where it may be ineffective and counter-productive – a risk most acute with complete recognition on the same basis as all other characteristics (Option 1) – and all the complexities and unsatisfactory limitations in scope entailed by the various permutations of partial recognition (Option 2).

5.373 The key disadvantage of this option is that it fails to respond to the evidence:

- (1) that women are disproportionately targeted for certain crimes on the basis of prejudice and/or hostility towards their sex or gender;<sup>76</sup> and
- (2) that such criminal targeting can cause additional harm to primary victims of the targeting, other women and wider society.<sup>77</sup>

5.374 Though we have outlined that hate crime is not the only means by which the harms and culpability in offending can be recognised, it is clearly considered very important by many victims. Indeed, regardless of the very real concerns we have about how sex or gender-based hate crime laws would operate in practice, the non-inclusion of this

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<sup>75</sup> For greater detail, see paragraph 5.27.

<sup>76</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.32 to 12.75.

<sup>77</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 12.86 to 12.113.



characteristic risks sending the erroneous message that misogynist crime does not exist.

### Comparing these options in the light of consultation responses

5.375 We now explore consultees' views of these options. In doing so, we acknowledge two key limitations:

- (1) In relation to partial recognition, although Option 2a (which involves recognising sex or gender in hate crime laws but excluding offences that are associated with VAWG) was discussed in our consultation paper and consulted upon, we did not discuss Options 2b to 2d in the consultation paper, nor did we expressly consult on them.
- (2) We did not expressly ask whether not recognising sex or gender in hate crime laws at all (Option 3), would be better than partial recognition to accommodate identified suitability concerns (Option 2).

5.376 Notwithstanding these limitations, several points of significance emerge from our consultation which direct us towards not recognising sex or gender in hate crime laws (Option 3). These are:

- (1) Most personal responses to Consultation Question 11 (part one), asking whether there was a case to add sex or gender, were opposed to its addition.
- (2) Whilst organisational responses were only marginally against adding sex or gender, those who expressed support for its addition did not do so in a straightforward way –
  - (a) In many cases, support was qualified or in some way conflicted. This was especially true amongst those organisations who frequently engage with victim-survivors of violence against women and girls. For example, Women's Aid were clear that if gender neutral language such as "sex or gender" were used instead of "women" in hate crime legislation, they would oppose the reform because they strongly believe it would do more harm than good.
  - (b) Rape Crisis England & Wales, the largest sexual violence support organisation in England and Wales, firmly rejected our provisional proposal to recognise sex or gender in any format. They submitted a long response detailing serious concerns about the proposal. Rights of Women, who offer legal support to women on a range of issues, including those related to VAWG questioned whether the hate crime approach is the best way to address "complex societal problems". They added that they had "concerns around the unintended consequences of reforming hate crime laws to introduce misogyny as a hate crime".
  - (c) Operational/law enforcement stakeholders did not clearly support adding sex or gender to hate crime laws.

On the one hand, the Association of Police and Crime Commissioners (APCC) firmly supported the addition. This support was echoed in individual responses from the Deputy Police and Crime Commissioner for Nottinghamshire, and the Police and Crime Commissioner for Cheshire. MOPAC also expressed support.

On the other hand, the Office of the Police and Crime Commissioner for Hampshire felt that sex or gender “would fail the suitability test”. The National Police Chiefs Council (NPCC) LGBT+ portfolio noted that “it is far from clear that hate crime is the right framework for the criminal justice system to deal with gender-based crimes”.

The National Police Chiefs Council did not express any consensus on this matter. Their submission also annexed responses from individual police chiefs. Of these, the majority appeared to support sex or gender hate crime recognition. However, some of these supportive responses also highlighted specific problems or concerns about recognition, and the need to limit the ambit of recognition for this characteristic. A significant minority of responses from police chiefs were opposed to recognition of sex or gender in hate crime laws. They cited various reasons for this such as issues surrounding double counting, the view that sex or gender hate crime is not workable in practice and would significantly stretch police resources and the view that sex or gender fails to satisfy the suitability criterion.

The CPS did not comment on whether sex or gender should be added, but outlined practical difficulties that could be associated with prosecuting hate crime in the context of gendered violence.

The Magistrates Association supported the provisional proposal based on the evidence we set out in the consultation paper relating to the first two criteria. However, they too acknowledged the risks of recognition and the potential issues to which the nature and operation of a statutory carve out for certain offences could give rise.

- (3) The content of most responses to Consultation Question 11 (part two), about excluding offences associated with VAWG, were positive. This arguably points towards partially recognising sex or gender in hate crime laws but excluding offences associated with VAWG (Option 2a).

However, it is important to note that the answers to Consultation Question 11 (part two) are conditional – the question asked whether a carve out should be adopted *if* sex or gender is recognised in hate crime laws. Therefore, it is difficult to deduce freestanding support for Option 2a over Option 3 (i.e., not recognising sex or gender) from the responses to Consultation Question 11 (part two) alone. More fundamentally, consultees raised a range of substantive concerns about the use of a sex or gender specific statutory carve out for certain offences.

- (4) Many of consultees’ arguments against the carve out (Option 2a) also apply to the other bespoke partial recognition solutions (Options 2b to 2d) because:

- (a) Any partial recognition approach would undermine two of the wider concerns we have heard throughout this review – the need to bring parity to hate crime laws and reduce the complexity of the laws in this area.
  - (b) All of the partial recognition approaches would divide VAWG offences, separating instances of sexual violence, such as rape, from behaviour such as public sexual harassment. Some consultees have argued this would undermine understandings about the interconnected nature of these behaviours in the context of violence against women and girls.
- (5) These points are compounded by division and disagreement over the way hate crime in this area should be framed. This directly impacts the case for recognition; some consultees’ support for or opposition to the addition of this characteristic was contingent upon protection being women-specific or gender neutral, and/or upon a specific term – for example only sex, only gender or both – being used.

5.377 As a result of these factors, we have concluded that the consultation responses largely point towards not recognising sex or gender in relation to aggravated offences or enhanced sentencing (Option 3).

## CONCLUSION

### The case for adding sex or gender as a protected characteristic in hate crime laws.

5.378 Throughout this project’s pre-consultation and consultation period, we have heard extensive testimony about a wide range of crimes that are associated with violence against women and girls. This has powerfully illustrated its scale and impact. Violence against women and girls remains a significant problem in England and Wales, and is deeply harmful.

5.379 However, long-standing questions about whether hate crime is an appropriate response to this problem remain. Acknowledging the contested nature of the issue, particularly the question of including “sex” or “gender”, we put forth multiple options and have concluded that not adding sex or gender to hate crime laws – Option 3 – is the best way to proceed, for the following reasons:

- (1) *Aggravated offences and enhanced sentencing are not a suitable way to approach sex or gender-based violence.*

Many consultation responses agreed with the wide range of suitability concerns that were identified in the consultation paper and indeed expanded upon them.

In light of the strength of these concerns, we argued that only a partial recognition option should be chosen if sex or gender were to be added as a characteristic in hate crime laws.

However, as we explain in point (2) below, all partial recognition options give rise to further concerns. This compounds our view that hate crime recognition is not an appropriate way forward in the context of sex or gender-based offending.

- (2) *The partial recognition options are each seriously problematic. As such, it is difficult to describe any as a good solution to the problems we have identified.*

We note that the different treatment involved in all the partial recognition (Option 2) solutions we have considered would significantly undermine the broader objective of parity and consistency that we have recommended for hate crime laws in England and Wales. In addition to this broad challenge, the specific challenges for each of the partial recognition options can be summarised as follows:

- In relation to a statutory carve out for VAWG offences (Option 2a), stakeholders provided detailed and thoughtful responses outlining the various problems that this could cause. We summarised these at paragraph 5.311 as follows:
  - The exclusion of VAWG offences might be perceived as denying the potential for these offences to be understood as misogynistic;
  - It may be tokenistic for the law to apply only in certain contexts such as harassment and online abuse;
  - It would create added complexity in hate crime laws, when greater simplicity has been one of the key calls for reform; and
  - It would undermine the wider aim of treating protected characteristics consistently in hate crime laws.
- Whilst including sex or gender for aggravated offences only (Option 2b) would eliminate the need for statutory exclusion of sexual offences, FGM, forced marriage, and specific domestic abuse offences, it would require non-statutory guidance to exclude other offences, such as assaults and criminal damage, that occur in the domestic abuse context. We are concerned about the potential operational uncertainty that the exclusion of offences that occur in the domestic abuse context could bring, particularly in relation to the assault offences, which may frequently arise in that context. It would also retain many of the concerns around tokenism and dividing up VAWG offending that inhere in Option 2a, and exclude online abuse offences from its ambit (as aggravated versions of these offences do not exist), despite these being a major source of concern in relation to harassment and abuse that is directed against women.
- Option 2c represents a targeted solution, only applying sex or gender hate crime in the contexts in which it is most suitable, namely harassment and abuse. In this light, we think it is perhaps the strongest of the partial recognition options. However, we also note that it would significantly reduce the scope of sex or gender-based hate crime, particularly when compared with full recognition (Option 1), the more expansive partial recognition options (2a and 2d), and the protection afforded to other characteristics. We are therefore concerned that Option 2c would most starkly undermine our overarching aim of parity. Given its notably reduced scope, it is most vulnerable to criticisms that it is a tokenistic reform or that offending

involving hostility towards the victim's sex or gender is regarded as less important than offending involving hostility towards other protected characteristics. Option 2c's targeted nature could add to the complexity of the laws in this area, and we are conscious that the already complex nature of existing hate crime laws was a prominent criticism amongst stakeholders in our previous 2014 review and in this review.

- We did not feel that recognising sex or gender for enhanced sentencing but excluding it from aggravated offences (Option 2d) sufficiently engaged with the range of identified suitability concerns because it would apply sex or gender-based hate crime to all criminal law offences (including sexual offences) and offence contexts (including domestic abuse).

(3) *The benefits that some consultees have cited in support of sex or gender-based hate crime are, at this stage, limited or unproven.*

Whilst the prevalence of offending linked to prejudice or hostility towards women is an important consideration, it does not explain why hate crime would be an effective, efficient or appropriate way to tackle the identified volume of relevant crime – something we explore in our analysis of the suitability criterion in this context. Whilst some stakeholders cited the ability of sex or gender-based hate crime to increase reporting in the VAWG context, evaluation of the Nottingham Misogyny Hate Crime initiative has not shown this to be the case. We further noted that reporting barriers in this area are deeply embedded,<sup>78</sup> and the extent to which hate crime recognition has the capacity materially to change this remains unclear.

We acknowledge that this point is something which might change in the future. National police recording of sex or gender-based hate crime, which was due to commence in Autumn 2021, may provide a stronger evidence base, and an opportunity to illustrate the purported benefits more clearly. However, until these benefits have been demonstrated, we are reluctant to recommend the introduction of an approach that some consultees, particularly those who have considerable expertise in the VAWG sector, have warned could cause more harm than good in the field of violence against women and girls.

(4) *Overall, consultation did not support the addition of sex or gender as a protected characteristic in hate crime laws.*

Even amongst those who supported hate crime recognition in this area, there was very little consensus as to what form it should take.

Whilst many supportive stakeholders were very clear that a carve out for the listed offences was necessary, they were keen not to underestimate the negative consequences it might bring. Some felt the operation of a partial recognition option would cause significant problems. Others argued that if the

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<sup>78</sup> Centre for Women's Justice, End Violence Against Women Coalition, Imkaan and Rape Crisis England and Wales, *The Decriminalisation of Rape: Why the justice system is failing rape survivors and* (November 2020), available at <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisation-of-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf>.

ability to recognise sex or gender-based hostility were to be available in relation to some crimes and criminal contexts, it should be available in all.

Reflecting on these parallel concerns, some stakeholders noted that they encapsulated a dilemma that could not be resolved. Rape Crisis England & Wales said:

That there is a need to exclude some serious VAWG offences arguably adds evidence to the argument that a hate crime framework is not suitable for VAWG.

This sentiment was echoed and expanded upon by academics and third sector practitioners in consultation discussions.

Further, there was no consensus surrounding the way in which hate crime recognition in this context should be framed. Many organisational stakeholders who were supportive of recognition were clear that a large proportion of its benefits were contingent upon a women-only approach, advocating the use of the terms “women” or “misogyny”. Women’s Aid resolutely said they would not support hate crime recognition in this area if a sex or gender-neutral approach were adopted, noting its potential to cause more harm than good.

Having reflected on the consultation responses, we do not think a women-only approach is a feasible way forward. A majority of individual and organisational consultees thought that both women and men should be included in the relevant hate crime characteristic (or that the category should not be restricted to women only). Several organisations supporting male victim-survivors of crimes such as sexual offences and domestic abuse expressed serious concerns about the message that a women-specific approach would send to male victim-survivors of these offences. They felt this message would be particularly acute if sexual offences and domestic abuse were not excluded.

We also note that there was significant disagreement surrounding whether “sex” alone should be included in legislation, or whether the broader term “sex or gender” should be adopted.

Consultation responses therefore revealed a wide range of contrasting arguments, and a distinct lack of consensus in relation to sex or gender-based hate crime. It is difficult to argue that any of the models for reform that we have considered in this chapter carry significant stakeholder support.

5.380 In light of these four key reasons, we do not recommend that sex or gender should be added as a protected characteristic in hate crime laws.

#### **Recommendation 8.**

5.381 We recommend that sex or gender should not be added as a protected characteristic for the purposes of aggravated offences and enhanced sentencing.

## **Our preferred option, if sex or gender-based hate crime were to be introduced**

5.382 Our view is that hate crime legislation is not the right way to approach the issue of violence against women and girls. However, given the need to proceed with caution in this area, we think it is important to identify the most suitable approach if Government were to decide to add sex or gender as a hate crime characteristic. We are concerned that simply adding sex or gender to current hate crime laws – such that these laws would apply to sex or gender in the way they apply to the existing characteristics of race and religion – could have significant negative consequences.

5.383 It is our view that only applying sex or gender hate crime in the contexts in which it is most suitable, namely harassment and abuse (Option 2c) raises the least serious challenges out of those we have considered. The key benefit of Option 2c is that it is very targeted, strengthening the law’s response in areas that are less susceptible to the range of suitability concerns identified in our consultation paper and by consultees. These areas include misogynistic online abuse and harassment in offline public spaces – the scale of which has largely been highlighted in relation to women.

5.384 These represent two of the contexts upon which “misogyny hate crime” proponents have focused most heavily and are the contexts where comparisons between misogynistic hatred and other forms of hate crime are perhaps most obvious. Therefore, if Government were to introduce sex or gender-based hate crime, we recommend that limiting it to public order, harassment and communications offences (Option 2c) would be the best approach.

5.385 We are also persuaded that legislation which incorporates sex or gender-based hate crime should use the most inclusive term in this context, namely “sex or gender”.

## **Beyond hate crime legislation**

### **Online and offline harassment directed towards women**

5.386 Despite our view that hate crime is not a suitable way to approach violence against women and girls, it is very clear to us, from the evidence we have encountered during our pre-consultation and consultation period, that violence against women and girls is extremely prevalent and deeply harmful.

5.387 Questions about the role that the law can or indeed should play in responding to violence against women and girls are inevitably broad, complex and go beyond our terms of reference. However, this review has highlighted the need for further work on whether various forms of violence against women could also be addressed by other legal mechanisms.

5.388 One of the leading concerns that proponents of “misogyny hate crime” have cited is harassment and abuse of women – both online and offline. We recognise that this is a serious and prevalent problem. Our consultation paper on “harmful online communications” noted the scale and impact of online abuse against women in particular:

Before starting our work on abusive and offensive online communications, we engaged in a public consultation to ask whether it was a suitable project for us to



undertake. During this consultation, one concern repeatedly raised was that women are disproportionately likely to be affected by online abuse.<sup>79</sup>

In 2017, Amnesty International reported that nearly a quarter (23%) of the women surveyed across eight countries said they had experienced online abuse or harassment at least once, and 41% of these said that these online experiences made them feel that their physical safety was threatened.<sup>80</sup>

The online abuse received by women is qualitatively distinct. For example, Laura Thompson, a PhD researcher at City, University of London, has found that abuse of women on dating apps displays two misogynistic themes. The first of these themes is the “not hot enough” discourse: many men used appearance-related insults to suggest that those women who had rejected them were “fat” and “ugly” with resulting inferior “value” in the online sexual marketplace. The second theme is the “missing discourse of consent”: “pickup lines” used by men often took the form of aggressive sexual invitations, and messages from men to women often escalated to include threats of sexual violence and victim-blaming sentiments.<sup>81</sup>

The scale and qualitative nature of abuse received by women, especially high-profile women, can combine to produce acutely harmful impacts. In their report, Amnesty International included testimony from Laura Bates, founder of the Everyday Sexism Project and author of the book *Everyday Sexism*, who said that she received around 200 abusive online messages per day, even before she became high-profile:

The psychological impact of reading through someone’s really graphic thoughts about raping and murdering you is not necessarily acknowledged. You could be sitting at home in your living room, outside of working hours, and suddenly someone is able to send you an incredibly graphic rape threat right into the palm of your hand.<sup>82</sup>

5.389 For the reasons we have presented, we do not think that hate crime laws are the best way to respond to this behaviour. Although partial recognition limited to public order, harassment and communications offences (Option 2c) would be specifically targeted towards this conduct, it is not without problems. Option 2c is vulnerable to criticisms that adding sex or gender to hate crime laws is tokenistic, or that the protection of sex

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<sup>79</sup> Abusive and Offensive Online Communications: Scoping Report (2018) Law Com No 381, at paragraph 1.48.

<sup>80</sup> Amnesty International UK, *Amnesty reveals alarming impact of online abuse against women* (20 November 2017), available at <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/>.

<sup>81</sup> L Thompson, “I can be your Tinder nightmare”: Harassment and misogyny in the online sexual marketplace (2018) 28(1) *Feminism and Psychology* 69.

<sup>82</sup> Amnesty International UK, *Amnesty reveals alarming impact of online abuse against women* (20 November 2017), available at <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/>. 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. This reform has not yet been implemented. In our 2021 report on Modernising Communications Offences we recommended that a specific offence of sending a threatening communication be created, which included threats to rape: see *Modernising Communications Offences: A Final Report* (2021) Law Com No 399, p 226.



or gender is somehow lesser, because it only extends to a very small number of offences. Its selective nature makes it more complicated than other hate crime models and the fact that Option 2c looks very different to other forms of hate crime recognition might damage understandings about existing hate crime laws, and the conduct it seeks to address.

- 5.390 More fundamentally, a hostility-based hate crime model would not cover much of the wrongful and harmful conduct identified in these contexts. For example, the use of aggressive sexual invitations or messages from men to women online.<sup>83</sup> If abuse of this nature did not include an explicit gendered slur, it is unlikely that a sex or gender-based hate crime aggravation would be applied.<sup>84</sup>
- 5.391 In our view, it is worth considering whether a bespoke public sexual harassment offence could represent a better targeted response to such conduct than hate crime legislation via Option 2c.
- 5.392 Existing offences which currently apply to abuse and harassment of women in public spaces are quite heavily focused on threatening and abusive words, and disorderly behaviour.<sup>85</sup> Any hate crime approach would rely upon these existing offences, and the hostility test and the preference for the demonstration limb compound the focus on a specific form of insulting words being used.
- 5.393 By contrast, a specific offence addressing public sexual harassment might be crafted in a way that better captures the degrading and sexualised nature of the behaviour that frequently occurs in these online and offline contexts.
- 5.394 In this regard we note that the Government's recent VAWG strategy stated:
- We are looking carefully at where there may be gaps in existing law and how a specific offence for public sexual harassment could address those. This is a complex area, and it is important that we take the time to ensure that any potential legislation is proportionate and reasonably defined.<sup>86</sup>
- 5.395 Such an offence goes beyond our terms of reference, and we therefore have not given it detailed consideration, nor consulted on its potential scope. We agree with the Government that it is important that care is taken to ensure that any such offence is proportionate and well-defined. Establishing the content of an offence of this nature would require further analysis of a range of questions. For example, we have heard from stakeholders that sexual harassment of girls in the street starts at a very young age. Therefore, one issue would be whether sexual harassment of children requires

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<sup>83</sup> The specific problem of threats of sexual violence is discussed below at paragraph 5.399.

<sup>84</sup> In Chapter 9 we discuss the legal test for hate crime laws in more detail and note that the "demonstration of hostility" test is far more commonly relied on by the prosecution.

<sup>85</sup> Existing offences includes those contained in the PHA 1997, the POA 1986, the Malicious Communications Act 1988 and the Communications Act 2003 (noting that our report on 'Modernising Communications Offences' recommends a general harm-based communications offence to replace section 1 of the Malicious Communications Act 1988 and section 127(1) of the Communications Act 2003. See *Modernising Communications Offences: A Final Report (2021) Law Com No 399, Chapter 6.*)

<sup>86</sup> Home Office, *Tackling violence against women and girls strategy* (July 2021) p 70, available at <https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy>.

different legal treatment to sexual harassment that is directed towards adults. It would also be necessary to consider the threshold at which conduct should be criminalised. For example, should it be necessary to prove that the defendant intended to cause the victim to experience sexual harassment, or should it be sufficient that the conduct was such that a reasonable person in the position of the victim would have experienced it as such?

5.396 These are important questions that warrant careful consideration. Given the obvious concern about the effectiveness of the current law in this area, we recommend that government take this issue forward by way of a further review of whether there is a need for a specific offence of public sexual harassment, and what form it should take.

### **Recommendation 9.**

5.397 We recommend that Government undertake a review of the need for a specific offence of public sexual harassment, and what form any such offence should take.

### **Other Law Commission projects that relate to violence against women and girls<sup>87</sup>**

5.398 The conduct captured by Option 2c and discussed above, i.e. online abuse and harassment, only forms part of the spectrum of crime that is associated with violence against women and girls.

5.399 When it comes to improving the law's response in other areas, such as sexual or domestic violence, we think this can also be better addressed through reforms outside hate crime legislation. Examples of Law Commission work in this area include:

- Our recent recommendation to introduce a specific offence of cyberflashing<sup>88</sup> as part of our wider project considering reforms to communications offences;<sup>89</sup>
- Our accompanying suggestion in relation to in-person or live online "flashing" "that there may be reason to revisit the relatively restricted fault element of the original exposure offence" in section 66 of the Sexual Offences Act 2003;<sup>90</sup>
- Our recent recommendation to introduce a specific offence of sending a threat of serious harm, where "serious harm" is defined to include rape.<sup>91</sup> We also draw

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<sup>87</sup> We note that offences associated with violence against women and girls, such as sexual offences and domestic abuse, also impact male victim-survivors, and victim-survivors of all gender-identities.

<sup>88</sup> The unsolicited sending of sexual images using digital technology.

<sup>89</sup> Modernising Communications Offences: A Final Report (2021) Law Com No 399, Chapter 6. In Recommendation 8 at para 6.133, we recommended two alternative additional fault elements, requiring the prosecution to prove either: that the defendant intended to cause alarm, distress or humiliation; or that the defendant acted for the purpose of obtaining sexual gratification and was reckless as to whether the victim would be caused alarm, distress or humiliation.

<sup>90</sup> Modernising Communications Offences: A Final Report (2021) Law Com No 399 at para 6.126. The existing exposure offence requires the prosecution to prove that the defendant intended to cause alarm or distress.

<sup>91</sup> Modernising Communications Offences: A Final Report (2021) Law Com No 399, para 3.135, Recommendation 5.

attention to our 2015 report on Offences Against the Person, in which we recommended that the offence of threats to kill under the Offences Against the Person Act 1861 should be extended to cover threats to rape.<sup>92</sup>

- Our current project which is considering ways to strengthen the criminal law concerning the making, taking and sharing of intimate images without consent;<sup>93</sup> and
- Our forthcoming project that will be considering the use of evidence in rape and sexual offence proceedings.

### The Government's VAWG strategy

5.400 More widely, the Government has recently introduced the Domestic Abuse Act 2021, announced a review into sentencing for domestic homicide,<sup>94</sup> and published its tackling violence against women and girls strategy in July 2021.<sup>95</sup> The key initiatives in support of this wider strategy are as follows:

- Prioritising prevention: a national communications campaign focused on raising awareness of VAWG, investing £3 million into research of prevention strategies, launching a £5 million Safety of Women at Night Fund focused on the prevention of VAWG in public spaces and piloting a tool, StreetSafe, to enable the public to report unsafe areas anonymously.
- Supporting victims: the Government is set to launch a Victims' Bill consultation and will publish a new Victim Funding Strategy to improve the management of resources. The Home Office will also provide £1.5 million funding to increase 'by and for' services, set up by and for sexual trauma survivors, and specialist services such as the 'revenge porn' helpline. It will work alongside the Department of Education on the issue of sexual harassment in higher education, and NHS England in its project to develop local 'pathfinder' projects to help support trauma-informed mental healthcare.
- Pursuing perpetrators: the Home Office has undertaken to appoint an independent reviewer to review the management of registered sex offenders by the police and to invest in the National Crime Agency to develop new methods of identifying serial sexual offenders. The government intends to criminalise 'virginity testing' (and recently introduced such an offence at clause 36 of the Health and

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<sup>92</sup> Reform of Offences Against the Person, Final Report (November 2015) Law Com No 361 at paras 8.11 to 8.12.

<sup>93</sup> Intimate image abuse: A consultation paper (2021) Law Com Consultation Paper No 253, available at: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf>.

<sup>94</sup> See Ministry of Justice, "Spotlight on domestic homicides as independent reviewer appointed" (9 September 2021), available at <https://www.gov.uk/government/news/spotlight-on-domestic-homicides-as-independent-reviewer-appointed>.

<sup>95</sup> Home Office, *Tackling violence against women and girls strategy* (July 2021), available at <https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy>.

Care Bill) and to create strategies for the police on effective ways to respond to street harassment and stalking.

- Strengthening the system: the Government has undertaken to introduce a National Policing Lead for Tackling Violence Against Women and Girls. The appointment of a new Violence Against Women and Girls Transport Champion and an extensive review of the disclosure and barring regime aims to make public transport as well as recruitment decisions safer for women and girls.

5.401 Just before publication of this report the government also announced that a new Serious Violence Duty in relation to domestic abuse and sexual offences will be introduced via an amendment to the Police, Crime, Sentencing and Courts Bill. The government stated that this “will make clear that a new legal duty requiring public bodies to work together to tackle serious violence can also include domestic abuse and sexual offences.”<sup>96</sup>

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<sup>96</sup> Home Office, Domestic abuse and sexual offences to be treated as seriously as knife crime (2 December 2021), available at <https://www.gov.uk/government/news/domestic-abuse-and-sexual-offences-to-be-treated-as-seriously-as-knife-crime>.

# Chapter 6: Recognition of age in hate crime laws

## INTRODUCTION

- 6.1 Age is not currently recognised as a hate crime characteristic in England and Wales. Our terms of reference ask us to consider specifically whether “hatred of older people” should form part of hate crime.
- 6.2 The non-inclusion of age as a hate crime characteristic can be contrasted with its inclusion as one of the nine characteristics protected for the purposes of civil discrimination laws under the Equality Act 2010.<sup>1</sup>
- 6.3 In this chapter we consider the case for the recognition of age in hate crime laws in England and Wales. We do this primarily by reference to the criteria we outlined in Chapter 3, and the responses we received from consultees on this subject.
- 6.4 Ultimately, we conclude that the characteristic of age does not meet the criteria for inclusion that we set out in chapter 3. While we recognise the real concerns that exist in relation to the criminal abuse and exploitation of older people, and also younger people, we consider that there is a lack of evidence that these crimes directly involve hostility or prejudice towards the age of the victims. Our criterion of demonstrable need for addition of this characteristic to hate crime laws is therefore not satisfied.
- 6.5 However, as we have emphasised throughout this report, our conclusion that age should not be added to hate crime laws should not be interpreted to mean that the Commission does not consider crimes committed against older and younger people to be serious and worthy of a robust criminal justice response. Elder abuse is a very serious concern in our society, and the CPS has rightly developed specific policies for prosecuting crimes committed against older persons,<sup>2</sup> including the following guidance for prosecutors:

If there is evidence that the victim was deliberately targeted for their vulnerability, this will still make an offence more serious for sentencing purposes.

In such cases, evidence should be gathered and presented in such a way to ensure that the judge is able to properly reflect the seriousness of the offence when passing sentence.
- 6.6 Courts take into consideration a wide range of aggravating and mitigating factors in sentencing offenders, and the non-inclusion of “age” within the regime of hate crime laws does not preclude them from recognising specific harms that may be associated with instances of criminal exploitation and abuse of older and younger persons.

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<sup>1</sup> Equality Act 2010, s 5.

<sup>2</sup> 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>.

## Recognition of age in hate crime laws in other jurisdictions

- 6.7 Age is given hate crime protection in some other jurisdictions. In the US state of Florida, “advanced age” forms part of the state’s hate crime provisions,<sup>3</sup> while 10 other US jurisdictions protect the wider term of “age”.<sup>4</sup> Canada<sup>5</sup> and New Zealand<sup>6</sup> also recognise the wider term of “age” for the purposes of their hate crime laws.
- 6.8 In Scotland, “age” was recently added as a hate crime characteristic in the Hate Crime and Public Order (Scotland) Act 2021.<sup>7</sup> This followed an extensive review of its hate crime laws which reported in May 2018.<sup>8</sup> The final report to government that emerged from this review recommended a new statutory aggravation based on age hostility.<sup>9</sup> However, in making this recommendation, the report also recognised that this approach “is likely to capture a relatively small proportion of the offences committed against elderly persons.”<sup>10</sup>
- 6.9 The Hate Crime and Public Order (Scotland) Act 2021 also created a new offence of stirring up hatred against a group defined by reference to age.<sup>11</sup>
- 6.10 An independent review of hate crime legislation in Northern Ireland was carried out in 2019/20. The final report recommended that the characteristic of age should be protected,<sup>12</sup> though this and other recommendations are yet to be implemented.

## Current approach to age in law enforcement and sentencing in England and Wales

- 6.11 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:
- (1) The Sentencing Guidelines Council recognised that the culpability of the offender will be greater if they target a vulnerable victim because of the victim’s old age or youth.<sup>13</sup> Sentencing guidelines for specific offences also

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<sup>3</sup> Florida Statute 775.085 (1)(a). Florida Statute 775.085 (1)(b) clarifies that “advanced age” means that the victim is older than 65 years of age.

<sup>4</sup> District of Columbia, Iowa, Louisiana, Minnesota, Nebraska, New Mexico, New York, Texas and Vermont. Oregon protects “disability” which is defined to include “age”, see section 3, Senate Bill No. 577 of 2019, Oregon State Legislature.

<sup>5</sup> Canadian Criminal Code s 718.2.a.i.

<sup>6</sup> Sentencing Act 2002, s 9(1)(h).

<sup>7</sup> Hate Crime and Public Order (Scotland) Act 2021, s 1(2)(a).

<sup>8</sup> 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/>.

<sup>9</sup> Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49.

<sup>10</sup> Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49 at para 4.70.

<sup>11</sup> Hate Crime and Public Order (Scotland) Act, s 4(2).

<sup>12</sup> Hate crime legislation in Northern Ireland, *Independent Review, Final Report* (December 2020) Recommendation 9, p 19.

<sup>13</sup> 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>.

acknowledge that the targeting of a victim obviously vulnerable due to age is a high-culpability factor. The Sentencing Council recently published revised sentencing guidelines for assault offences,<sup>14</sup> including common assault, which included a revised high-culpability factor of “victim obviously vulnerable due to age, personal characteristics or circumstances”.<sup>15</sup>

- (2) The CPS records the incidence of crimes against older people and publishes legal<sup>16</sup> and policy<sup>17</sup> guidance for prosecuting these crimes.
- (3) 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<sup>18</sup> refers to offences such as causing or allowing the death of (or serious harm to) a child,<sup>19</sup> offences relating to child cruelty, neglect, and violence,<sup>20</sup> and offences relating to child abduction.<sup>21</sup> The Sexual Offences Act 2003 also contains various sexual offences where the victim is a child.<sup>22</sup>

## THE CASE FOR RECOGNISING AGE IN HATE CRIME LAWS

6.12 In Chapter 13 of the consultation paper, we applied the three criteria that we proposed in Chapter 10 of that paper (and recommend in Chapter 3 of this report) to assess the principled and practical case for recognising age as a hate crime characteristic in England and Wales. These are:

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- <sup>14</sup> See Courts and Tribunals Judiciary, “Revised sentencing guidelines for assault offences and attempted murder” (21 May 2021), available at <https://www.judiciary.uk/announcements/revised-sentencing-guidelines-for-assault-offences-and-attempted-murder/>.
  - <sup>15</sup> See the sentencing guidelines for assault occasioning actual bodily harm / Racially or religiously aggravated ABH, Crime and Disorder Act 1998, s.29, Offences against the Person Act 1861, s.47 (effective from 1 July 2021), available at <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>.
  - <sup>16</sup> 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>.
  - <sup>17</sup> 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>.
  - <sup>18</sup> 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>.
  - <sup>19</sup> Section 5 of the Domestic Violence, Crime and Victims Act 2004 (2004).
  - <sup>20</sup> Section 1 of the Children and Young Persons Act 1933.
  - <sup>21</sup> Sections 1 and 2 of the Child Abduction Act 1984.
  - <sup>22</sup> 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 of taking, distributing, possessing and publishing 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>.



- (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.

6.13 We considered these elements first in the context of older people and then in the context of younger people.

### Applying the demonstrable need criterion to older people

6.14 We began by considering definitions of “older people”. 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 person.<sup>23</sup> In England and Wales, the CPS currently records prosecutions of crimes against older people, defined as follows:

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.<sup>24</sup>

6.15 Unless otherwise stated, use of the term “older” in this chapter will refer to people aged 65 or above.

### The context of elder abuse

6.16 We first considered the context of elder abuse. We noted that 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. This type of violence constitutes a violation of human rights and includes physical, sexual, psychological, and emotional abuse; financial and material abuse; abandonment; neglect; and serious loss of dignity and respect.<sup>25</sup>

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<sup>23</sup> World Health Organisation, *Proposed working definition of an older person in Africa for the MDS Project*, see [https://www.who.int/healthinfo/survey/ageing\\_mds\\_report\\_en\\_daressalaam.pdf](https://www.who.int/healthinfo/survey/ageing_mds_report_en_daressalaam.pdf).

<sup>24</sup> Crown Prosecution Service, *Older People: Prosecuting Crimes Against* (updated 30 April 2020), available at <https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-Annual-Data-Tables-Year-Ending-March-2021.xlsx>.

<sup>25</sup> World Health Organisation, *Elder abuse* (updated 15 June 2021), available at <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.



6.17 We observed that some forms of elder abuse 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.<sup>26</sup>

6.18 We cited data that illustrates the incidence of elder abuse:

- (1) 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,<sup>27</sup> by a family member, close friend or care worker.
- (2) The WHO estimates that one in six people 60 years and older experienced some form of abuse in community settings during the past year.<sup>28</sup>
- (3) Since our consultation paper was published, Hourglass, a UK safer ageing charity, commissioned a survey, “Growing old in the UK 2020”, to discern public knowledge and understanding of elder abuse. Of the 2500 adults surveyed, one in five respondents either had personal experience of abuse as an older person (aged 65 years or older) or knew an older person who had been abused.<sup>29</sup>

### Criminal targeting in other contexts

6.19 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,<sup>30</sup> estimating that 11.2% of people over the age of 75 experienced crime in the year ending March 2020.<sup>31</sup> The 65-74 age group were the second least likely to experience crime, with 15.3% of adults in this age group estimated to have experienced crime in the same

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<sup>26</sup> Mental Capacity Act 2005, s 44.

<sup>27</sup> 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) 19(8) *Nursing Older People* 24.

<sup>28</sup> World Health Organisation, *Elder abuse* (updated 15 June 2021), available at <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

<sup>29</sup> Hourglass, “Abuse of older people at ‘unprecedented levels’ as 2.7 million over 65s revealed to be affected, warns charity” (2020), available at [https://wearehourglass.org/sites/default/files/inline-files/Safer%20Ageing%20Week\\_polling%20release%20-%20Wales\\_V1.pdf](https://wearehourglass.org/sites/default/files/inline-files/Safer%20Ageing%20Week_polling%20release%20-%20Wales_V1.pdf).

<sup>30</sup> This includes “all CSEW crime types (including fraud and computer misuse).”

<sup>31</sup> Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2021) Table D1, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesannualtrendanddemographicstables>.

year.<sup>32</sup> By contrast the figure exceeded 24% for all of the adult brackets up to age 54, and was 20.9% for those aged 55-64.<sup>33</sup>

- 6.20 In 2020-21, the CPS prosecuted 1732 crimes against older people – 1416 of these resulted in conviction.<sup>34</sup>
- 6.21 Although the available evidence indicates that older people experience less crime than other age groups, “doorstep crimes”<sup>35</sup> are an 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.<sup>36</sup>

### Violence against older women

- 6.22 We noted that older women<sup>37</sup> can also experience distinct targeting in the form of sexual and domestic violence. Dr Hannah Bows has conducted extensive research in this area and has found that women constitute around 67% of older domestic homicide victims and men make up 81% of perpetrators.<sup>38</sup> Older women also experience notable rates of sexual violence, usually by younger perpetrators.<sup>39</sup>

### Is this criminal targeting linked to hostility or prejudice towards old age?

- 6.23 We then considered the second question; whether criminal targeting of older persons is linked to hostility or prejudice towards old age.
- 6.24 We noted that there is some support for the view that criminal targeting against older people is linked to prejudice or hostility towards old age. Notably, in Scotland, Lord Bracadale found that there is “sufficient evidence of hostility-based offences against

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<sup>32</sup> Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2021) Table D1.

<sup>33</sup> Office for National Statistics, *Crime in England and Wales: Annual Trend and Demographic Tables* (July 2021) Table D1.

<sup>34</sup> Crown Prosecution Service, *Hate Crime Annual Data Tables Year Ending 2020-2021* (updated 22 July 2021), available at <https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-Annual-Data-Tables-Year-Ending-March-2021.xlsx>.

<sup>35</sup> 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](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).

<sup>36</sup> Age UK, *Only the tip of the iceberg: Fraud against older people* (April 2015), 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](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).

<sup>37</sup> Older men may also experience domestic abuse and sexual violence, however as outlined in Chapter 5, this is a context that disproportionately impacts women.

<sup>38</sup> H Bows, *Durham Law School Research Briefing 2018-12, Domestic Homicide of Older People in the UK* (2010-2015) (2018) p 2, available at <https://aafda.org.uk/wp-content/uploads/2019/04/Hannah-BowsHomicide-Briefing-Note.pdf>.

<sup>39</sup> H Bows and N Westmarland, “Rape of Older People in the UK, Challenging the ‘real rape’ stereotype” (2017) 57 *British Journal of Criminology* 1.

the elderly”.<sup>40</sup> In his report, Lord Bracadale drew upon information provided by Action for Elder Abuse:<sup>41</sup>

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.<sup>42</sup>

6.25 We also referred to CSEW data which records victims’ perceptions of why they were targeted for personal and household crime. 81,000 people felt they had been targeted for personal crime based upon their age, with a roughly equal division between the sexes.<sup>43</sup> An estimated 97% of the personal hate crime committed against victims aged 75+ was perceived to be targeted at the victim’s age.<sup>44</sup> This survey therefore provides some support for the view that offenders are motivated to target a victim because of their age.

6.26 Whilst these arguments provide support for the view that crimes against older people are linked to prejudice or hostility towards age, we noted the following contrary arguments.

#### Lack of clear data

6.27 Although we thought the CSEW data was useful, we noted 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 accounts 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.

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<sup>40</sup> Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.66.

<sup>41</sup> The Bracadale Review engaged with the Scotland office of Action on Elder Abuse. When we met with Action on Elder Abuse, 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.

<sup>42</sup> Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) para 4.56.

<sup>43</sup> 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/009335numberofcsewincidentsofhatecrimesper12monthsendlandandwales2015to2018/csewestimatesofhatecrimemarch20162018.xls>.

<sup>44</sup> Office for National Statistics, *Number of CSEW incidents of hate crime per twelve months, England and Wales aggravated England and Wales: years ending March 2016 and March 2018*, Appendix Table 2.

6.28 We also acknowledged that in the US state of Florida, where “advanced age” forms part of the state’s hate crime provisions, the provisions are rarely used.<sup>45</sup> The latest data shows that in 2019, there were no reports of crime based on prejudice towards “advanced age”. However, hate crime reporting is low across the protected characteristics; in 2019, only 134 hate crimes were reported across the whole state of Florida.<sup>46</sup> The jurisdiction of New York, which protects “age” under its hate crime laws, also publishes annual data on police-recorded hate crimes. The latest data from 2020 reveals that there was only one age-based incident complaint and arrest that year.<sup>47</sup>

#### Link between elder abuse and other interpersonal abuse

6.29 We then considered whether hostility or prejudice towards age is present in the context of elder abuse.

6.30 We noted that Bows has drawn parallels between the definition(s) of elder abuse and domestic abuse,<sup>48</sup> and has argued that the vast majority of interpersonal violence or abuse against older people is caused by the same issues as violence or abuse towards people of other ages,<sup>49</sup> 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.<sup>50</sup>

6.31 We also observed that research 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.<sup>51</sup>

#### Exploitation of actual or perceived vulnerability

6.32 We noted that it has been argued that elder abuse and other crimes against older people exploit the actual or perceived vulnerability of older people.

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<sup>45</sup> Florida Statute 775.085 (1)(a). Florida Statute 775.085 (1)(b) clarifies that “advanced age” means that the victim is older than 65 years of age.

<sup>46</sup> Attorney General for Florida, *Hate Crimes in Florida* (2019), available at [http://myfloridalegal.com/webfiles.nsf/WF/SSWN-BWSRK6/\\$file/2019+Hate+Crimes+Report\(Final+Version\).pdf](http://myfloridalegal.com/webfiles.nsf/WF/SSWN-BWSRK6/$file/2019+Hate+Crimes+Report(Final+Version).pdf).

<sup>47</sup> New York Police Department, *Hate Crime Reports* (2020), available at <https://www1.nyc.gov/site/nypd/stats/reports-analysis/hate-crimes.page>.

<sup>48</sup> H Bows and P Bridget, “Editorial: Elder Abuse and Social Work: Research, Theory and Practice” (2018) 48 *British Journal of Social Work* 873, p 879.

<sup>49</sup> H Bows, *Submission from Dr Hannah Bows to the Justice Committee, Prosecution of Elder Abuse* (February 2019), available at [https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/EA-Bows.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-Bows.pdf).

<sup>50</sup> H Bows, *Submission from Dr Hannah Bows to the Justice Committee, Prosecution of Elder Abuse* (February 2019).

<sup>51</sup> 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.

- 6.33 However, we acknowledged that the possible connection between crimes against older people and the exploitation of vulnerability presents two issues when considering whether this form of offending involves “hostility or prejudice towards old age”. The first is whether exploitation of age-based vulnerability might be due to hostility or prejudice. The second is whether the actual or perceived vulnerability of older victims is age-based, i.e. whether it is caused or informed by the characteristic of age, rather than other characteristics or situational factors.
- 6.34 We noted that, in relation to the first issue, the exploitation of age-based vulnerability might fall short of “hostility” towards old age. In the consultation paper, we asked whether the legal test should be amended to include “prejudice”<sup>52</sup> – an issue we consider again in Chapter 9 of this report. We considered whether the targeting of a victim because of the perpetrator’s age-based assumption of their vulnerability would meet the legal test, if the legal test were amended to include “prejudice”. We thought that this form of offending might constitute criminal targeting based on prejudice towards age because the assumption that a victim 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.
- 6.35 However, this led us to consider the second issue; 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 – whether the perpetrator’s assumption of the victim’s vulnerability is informed by the victim’s old age or some other factor.
- 6.36 We noted that the CPS’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 than in younger people.<sup>53</sup>

- 6.37 We went on to acknowledge that 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:
- (1) Mobility or movement may be reduced or slower in older people than in younger people.<sup>54</sup> This might make a person appear vulnerable to a perpetrator,

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<sup>52</sup> Consultation Question 23.

<sup>53</sup> 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>.

<sup>54</sup> Crown Prosecution Service, *Older people: Prosecuting Crimes against* (updated 30 April 2020).

particularly in the context of crimes such as burglary.<sup>55</sup> However, this factor is more directly linked to disability than it is to age.<sup>56</sup>

- (2) In 2014, it was estimated that in the UK, 7.1% of people over the age of 65 have dementia,<sup>57</sup> a rate which is significantly higher than among the rest of the population.<sup>58</sup> The Social Care Institute for Excellence notes that “people with dementia can be extremely vulnerable due to the nature of their condition”.<sup>59</sup> However, we did note that, 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, dementia is not necessarily limited to those in the older age bracket.
- (3) Situational or relationship<sup>60</sup> factors such as an older person’s dependence on a carer or the fact they are living in a care home,<sup>61</sup> 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.<sup>62</sup>

6.38 We concluded that, 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 targeted because of prejudice or hostility towards age, or even by reason of their age.

### Violence against older women

6.39 We noted that although older women might be disproportionately targeted in the context of sexual offences and domestic violence when compared with similar

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<sup>55</sup> 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.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf>.

<sup>56</sup> 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.

<sup>57</sup> 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](https://www.alzheimers.org.uk/sites/default/files/migrate/downloads/dementia_uk_update.pdf).

<sup>58</sup> M Prince et al, *Dementia UK: Update* (King’s College London and the London School of Economics, 2014).

<sup>59</sup> 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>.

<sup>60</sup> J Manthorpe, J N Perkins, B Penhale, L Pinkney, P Kingston, “Select questions: considering the issues raised by a Parliamentary Select Committee Inquiry into elder abuse” (2005) 7 *Journal of Adult Protection* 19.

<sup>61</sup> 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.

<sup>62</sup> 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>.



targeting against older men, it is not disproportionate when compared with women of other ages. In Chapter 12 of the consultation paper we outlined in detail the ways in which women and girls are disproportionately targeted for sexual and domestic violence throughout their life course. We concluded that it is difficult to argue that the same crimes are perpetrated against older women for different reasons, i.e. because of prejudice or hostility towards their age.

- 6.40 We concluded that, overall, there is only mixed support for the view that crimes against older people are linked to prejudice or hostility towards their old age.

### Crimes against young people

- 6.41 We noted that child abuse is a recognised criminal context in the UK, which can take various forms, including neglect, emotional abuse, physical abuse, or sexual abuse. The CSEW estimated that one in five adults aged 18 to 74 had experienced 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).<sup>63</sup>
- 6.42 Beyond the child abuse context, we observed that Victim Support notes that children and young people disproportionately experience more crime than adults and are significantly overrepresented in the most serious crime statistics.<sup>64</sup>
- 6.43 CSEW data also indicates that older children and young 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.<sup>65</sup> This has been especially apparent in the case of knife crime, which, notably affects older children and young adults, particularly those who are black.<sup>66</sup> In 2018/19, of those admitted to hospital for assault by sharp object, 16.5% were aged 18 or younger.<sup>67</sup>

### Is this crime linked to prejudice or hostility towards young age?

- 6.44 We noted that child abuse is a wide term and can take a variety of forms. We observed that the causes of child maltreatment in this wide sense are complex,<sup>68</sup> and

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<sup>63</sup> 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>.

<sup>64</sup> Victim Support, Policy Statement, *Children and young people affected by crime* (April 2017).

<sup>65</sup> 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>.

<sup>66</sup> Mayor of London, *The London Knife Crime Strategy* (2017) p 11, available at [https://www.london.gov.uk/sites/default/files/mopac\\_knife\\_crime\\_strategy\\_june\\_2017.pdf](https://www.london.gov.uk/sites/default/files/mopac_knife_crime_strategy_june_2017.pdf).

<sup>67</sup> 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>.

<sup>68</sup> World Health Organization, *Child maltreatment* (8 June 2020), available at <https://www.who.int/newsroom/fact-sheets/detail/child-maltreatment>.

were not aware of arguments which attribute these causes to age-based prejudice or hatred.

- 6.45 Although we noted above that younger age groups are more likely to be victims of violent crimes, we concluded that 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 2020, 16 to 24-year olds were the second-most likely to be perpetrators of violent crime (28% of perpetrators), behind the 25 to 39 age range (42% of perpetrators).<sup>69</sup>
- 6.46 Finally, we noted a consultation response from Together (Scottish Alliance for Children's Rights) cited in the Bracadale Report, which suggested 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.<sup>70</sup>

### Prevalence of crime that is based on hostility or prejudice towards young age

- 6.47 We concluded that it is difficult to make an accurate assessment of prevalence. 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. Therefore, it is far from clear that this criterion is met.

### Additional Harm

- 6.48 In relation to the additional harm criterion, we considered evidence that criminal targeting based on hostility or prejudice towards age causes additional harm to the victim, members of the targeted group, and society more widely. Although there is mixed support for the idea that the criminal targeting of older people is linked to prejudice or hostility towards their age, we applied the additional harm criterion on the grounds that consultees may consider some of the crimes directed towards older people to be based on prejudice or hostility towards their age.

### Additional harm to the primary victim

- 6.49 We concluded that it is plausible that additional harm might result if an older or younger person were to be targeted for crime because of prejudice or hostility towards their old age.
- 6.50 We noted a number of arguments and research that indicate that there are particular factors that make older people more vulnerable to the effects of crime, such as 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.<sup>71</sup> For example, we cited

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<sup>69</sup> Office For National Statistics, *Nature of crimes tables: violence, Year ending March 2020* (2020) Table 8a, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/natureofcrimetablesviolence>

<sup>70</sup> Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 47, para 4.61.

<sup>71</sup> 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/onlineolderadults-crime-report-northireland\\_2019may.pdf](https://cnpea.ca/images/onlineolderadults-crime-report-northireland_2019may.pdf).



research by Age UK which indicates that people defrauded in their own homes are 2.5 times more likely to die or go into residential care within a year.<sup>72</sup> This situation (living alone) disproportionately impacts people above the age of 75, with over half of people 75+ years old living alone.<sup>73</sup>

- 6.51 We noted research commissioned by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services ("HMICFRS") which 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.<sup>74</sup>

- 6.52 We further observed that the WHO notes that elder abuse can result in serious, sometimes long-lasting psychological consequences, including depression and anxiety and that the consequences of abuse can be especially serious, and the recovery time can be longer.<sup>75</sup>
- 6.53 We noted that this long-lasting impact has also been observed in the context of child abuse and that 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.<sup>76</sup> 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

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<sup>72</sup> 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](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).

<sup>73</sup> Age UK, *Older People, Fraud and Scams* (October 2017) p 1, citing Office for National Statistics, Labour Force Survey, 2015.

<sup>74</sup> 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-peopleresearch.pdf>

<sup>75</sup> World Health Organization, *Elder abuse* (October 2021), available at <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

<sup>76</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602148/Childhood_neglect_and_abuse_comparing_placement_options.pdf).

noting that for victims and survivors, the serious and wide-ranging consequences of child sexual abuse can endure throughout adult life.<sup>77</sup>

- 6.54 We concluded that arguments we considered in this section indicate that crimes committed against older or young people (including criminal contexts such as elder abuse or child abuse) might cause increased harm to primary victims that is commensurate with 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

- 6.55 We noted that hate crime can have a collective impact on others who share the targeted characteristic, beyond harm to the primary victim. We observed that it has been shown that fear of being a victim of crime collectively applies to older people.
- 6.56 However, we noted that this collective fear of crime amongst older people is not obviously connected to the actual prevalence of crimes directed towards older people.<sup>78</sup> Rather than prevalence of crime against older people, or criminal targeting linked to prejudice or hostility towards age, we considered whether this fear of crime amongst older people might be linked to other situational factors – such as loneliness and reduced social participation.<sup>79</sup>
- 6.57 We recognised, however, that 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.

### Harm to society more widely

- 6.58 We noted that research indicates that older people experience elevated fear of crime, which in turn causes them to avoid certain spaces.<sup>80</sup> We considered that this may be an example of their equal participation in society being undermined. However, it is not clear that this increased fear of crime occurs as a result of crimes which are linked to prejudice or hostility towards older people. Therefore, we concluded that 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.

### Suitability

- 6.59 In relation to the suitability criterion, we considered whether age-based hate crime would fit logically within the broader offences and sentencing framework and prove workable in practice. We also assessed whether this would produce any harmful

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<sup>77</sup> 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-impactschild-sexual-abuse-rapid-evidence-assessment-full-report-english.pdf>.

<sup>78</sup> 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. See W Greve, “Fear of crime among the elderly: foresight not fright” (1998) 5 *International Review of Victimology* 277.

<sup>79</sup> 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.

<sup>80</sup> 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/onlineolderadults-crime-report-northireland\\_2019may.pdf](https://cnpea.ca/images/onlineolderadults-crime-report-northireland_2019may.pdf).

consequences, whether it would be an efficient use of relevant resources and whether the characteristic or group is compatible with the fundamental rights of others.

### Difficulties in proving the aggravation

6.60 We concluded that satisfying the legal test for hate crime is likely to be very difficult in the context of crimes against older people.

6.61 We noted that it would likely be a struggle to fit the vast majority of crimes targeted towards older people within the existing “hostility” test used for the application of hate crime laws.<sup>81</sup> We considered that this would be the case even if the legal test were expanded to capture crimes “motivated by prejudice” towards the protected characteristic. As discussed above, crimes that involve the exploitation of vulnerability are the most likely form of criminal targeting in this context that would constitute prejudice. However, we concluded that it is not clear that this form of targeting would constitute a prejudice, nor is it clear that actual or perceived vulnerability arises as a result of old age itself.

### The potential for double counting

6.62 We noted that sentencing guidelines in England and Wales often include the “deliberate targeting of vulnerable victim(s)”<sup>82</sup> as an aggravating factor which indicates a higher degree of offender culpability. This sentencing aggravation has been used in relation to older people.<sup>83</sup> We concluded that if a statutory aggravating factor based on hostility towards older people was also created, there is a small risk of double counting, if the sentencer were to take both aggravating factors into account, and fail to acknowledge the overlap in reaching a final sentence.

### Potentially harmful consequences

#### *Disrupting existing child abuse frameworks*

6.63 We acknowledged that the recognition of age-based hate crime could have harmful consequences in the context of child abuse as it risks disrupting existing child abuse frameworks. Victim-survivors require specialist support, and children are always approached from a safeguarding perspective in law and policy. Introducing an additional hate crime element could disrupt or complicate what is already a multi-agency response.<sup>84</sup>

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<sup>81</sup> As we note at paragraph 6.24, a similar conclusion was reached by the review of hate crime laws in Scotland. See Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) p 49 at para 4.70.

<sup>82</sup> Sentencing Council, Aggravating and mitigating factors, available at <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-andmitigating-factors/>.

<sup>83</sup> See *R v Gaskin (Arthur)* [2019] EWCA Crim 1048; 6 WLUK 371.

<sup>84</sup> From the public sector (e.g. schools, social services, Local Authorities), third sector (see for example, the work of The Lighthouse, London, available at <https://www.thelighthouselondon.org.uk/>) and the criminal justice system (see 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-childsexual-exploitation-operating-protocol.pdf>).

### *Stereotyping based on vulnerability*

6.64 We noted that making a blanket connection between vulnerability and a specific age group has been viewed as paternalistic and potentially damaging.<sup>85</sup>

### *Whether hate crime is an appropriate way to characterise the offending*

6.65 We observed that the hate crime framework may fail to capture the nuances surrounding elder abuse and its causes, and that it may be too reductive to characterise elder abuse as crime which targets older people based on prejudice or hostility towards old age.

## **CONSULTATION**

6.66 In our consultation paper we asked the following consultation questions in relation to the recognition of age as a hate crime characteristic:

- (1) Consultation Question 15: We invite consultees' views on whether age should be recognised as a protected characteristic for the purposes of hate crime law.
- (2) Summary Consultation Question 4: Should the characteristic of "age" be added to the characteristics protected by hate crime laws?
- (3) Consultation Question 16: 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.

6.67 A significant majority of personal responses, and a majority of responses overall, responded negatively to these questions. Many expressed a fundamental objection to hate crime laws.

6.68 Examples of these negative responses are as follows:

- (1) "Hate crime laws must be abolished".
- (2) "No. I don't think there should be any laws on 'Hate Crime', I believe in Free Speech for everyone and that people do not have the right to shut down debate, discussion or conversation on the basis that it might cause offence."
- (3) "The existence of special groups with 'protected characteristics' is at odds with the principle of equality before the law."

6.69 Of those consultees who engaged more directly with the question of whether age should be recognised as a hate crime characteristic – Consultation Question 15 and Summary Consultation 4 – a variety of views were expressed. We have categorised

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<sup>85</sup> H Bows, *Is more law the answer? A review of proposed reforms to address the victimisation of older adults* (2020) pp 25 to 26, available at [https://archive2021.parliament.scot/S5\\_JusticeCommittee/Inquiries/H\\_Bows\\_SPICe\\_ReportAddressing\\_older\\_victimisation.pdf](https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/H_Bows_SPICe_ReportAddressing_older_victimisation.pdf); M.A. Walters and J. Tumath, "Gender 'hostility', rape, and the hate crime paradigm" (2014) 77 *The Modern Law Review* 563, p 577.

consultation responses in line with the criteria we used to determine the case for recognising age in hate crime laws.

## Demonstrable need

### Crimes against older people

6.70 The strongest evidence provided by consultees was in relation to the demonstrable need criterion. A number of consultees were of the view that there is sufficient evidence of criminal behaviour targeted at older people to warrant recognition of age as a hate crime characteristic. This criminal behaviour includes harassment, anti-social behaviour, criminal abuse and neglect, theft, domestic violence and frauds and scams.

6.71 Nottingham City Council noted that older people experience harassment and anti-social behaviour in particular:

Yes. Older people experience a range of behaviour targeted at them seemingly because of their age specially harassment and what would constitute as anti-social behaviour. Some of this behaviour is explicitly targeted at their age while other may be linked to vulnerabilities posed by age. From a practical perspective, age as a protected characteristic would enable more support to be put in place and a way for people to receive protection from these behaviours.

6.72 Age UK provided anecdotal evidence of criminal targeting of older people:

We hear regularly via our helpline from older people who feel discriminated against, verbally abused or harassed and bullied because of their age.

In addition to the loss of life, it is also clear that older people have faced significant age discrimination, ageism and hostility throughout the pandemic including:

- The use of 'blanket' policies being applied to older people, including DNAR orders for care home residents or policies around hospital transfer and admission.
- Access to the help, care and support that many older people need to sustain their health and wellbeing with specific challenges faced by older people in residential care settings, those who live alone and older people who receive care at home.
- With lockdown measures in place, older people have been increased risk of domestic and institutional abuse, and the use of restrictive measures that deprive them of their liberty.

6.73 Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood pointed to studies cited by WHO which look at elder abuse in both

institutional<sup>86</sup> and community<sup>87</sup> settings based on self-reporting by older adults. These studies suggest that the rates of abuse are much higher in institutions than in community settings. These are set out in the below table, where the percentage figures reflect the number of older people who reported crimes that they were targets of, compared against the total number of elderly inhabitants:

	Elder abuse in community settings	Elder abuse in institutional settings	
Types of abuse	Reported by older adults	Reported by older adults and their proxies	Reported by staff
<b>Overall prevalence</b>	<b>15.7%</b>	<b>Not enough data</b>	<b>64.2% or 2 in 3 staff</b>
Psychological abuse	11.6%	33.4%	32.5%
Physical abuse	2.6%	14.1%	9.3%
Financial abuse	6.8%	13.8%	Not enough data
Neglect	4.2%	11.6%	12.0%
Sexual abuse	0.9%	1.9%	0.7%

6.74 Dr Fitzgerald *et al*<sup>88</sup> argued that, due to reporting barriers, the number of prosecutions for crimes targeted at older people do not reflect the actual extent of this type of offending:

The number of crimes against older people that reach the attention of the police, and are subsequently prosecuted, are likely to represent only a small percentage of the reality facing older people.

Dr Fitzgerald *et al*<sup>89</sup> concluded that this is because:

[M]any crimes are 'social worked' and are diverted down a non-criminal adult safeguarding route, and these include criminal actions in care homes and hospitals.

<sup>86</sup> Y Yon, M Ramiro-Gonzalez, C Mikton, M Huber, D Sethi, *The prevalence of elder abuse in institutional settings: a systematic review and meta-analysis* (2018), available at <https://pubmed.ncbi.nlm.nih.gov/29878101/>.

<sup>87</sup> Y Yon, CR Mikton, ZD Gassoumis, KH Wilber, *Elder abuse prevalence in community settings: a systematic review and meta-analysis* (2017), available at <https://pubmed.ncbi.nlm.nih.gov/28104184/>.

<sup>88</sup> Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood.

<sup>89</sup> Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood.

The authors went on to acknowledge concerns that:

Adult Safeguarding may be reinforcing an attitude that abuse of older people does not constitute 'real crime' and can therefore be dealt with by the social care sector without criminal justice involvement.<sup>90</sup> As few as 6% of older victims report abuse to the police. In 2013/14 there were 28,000 substantiated adult protection referrals regarding elder abuse and yet there were only 3,317 referrals by police to the CPS in England and Wales. In 2013/14 18,932 crimes against people aged 60+ were recorded in Wales and yet there were only 194 successful convictions.<sup>91</sup>

- 6.75 The Police and Crime Commissioner for Cheshire noted that there are crimes that disproportionately affect older people. The Commissioner acknowledged that crime reporting amongst older people is relatively low compared to other age groups but argued that this is due to existing barriers that prevent reporting:

There are certain crimes which disproportionately affect older people including abuse committed by a loved one or carer, cybercrime or theft from a residential dwelling. These crimes are often targeted towards older people because of their age or perceived vulnerability. Although crime reporting in the over 75s and 65-64 year-olds age groups is relatively low compared to other age category, there is evidence that there is a reluctance amongst older people to report crime.

Furthermore, a relatively low number of crimes against older people are prosecuted when compared to other protected characteristics. As outlined in the Her Majesty's Inspectorate of Constabularies and Fire & Rescue Services (HMICFRS) The Poor Relation Report from 2019, this is due to existing barriers.

- 6.76 The Older People's Commissioner for Wales and members of the Abuse Action Group<sup>92</sup> provided a joint response. They stated that:

There is evidence that older people can be particularly targeted by criminals on the basis of their age, for example financial crimes.

Many thousands of older people experience abuse which may include physical abuse; domestic violence; sexual abuse; psychological or emotional abuse; financial or material abuse; organisational or institutional abuse; neglect or acts of omission; and coercive control.

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<sup>90</sup> Action on Elder Abuse, *A Patchwork of Practice* (2017), available at <https://www.rbsab.org/UserFiles/Docs/Patchwork-of-PracticeDEC2017.pdf>.

<sup>91</sup> Action on Elder Abuse, *The Need for a Criminal Offence of Elder Abuse* (2016), available at <http://btckstorage.blob.core.windows.net/site13049/Website%20stuff/2016-Criminal-Offence-briefing-paper.pdf>.

<sup>92</sup> Co-signatories included the Association of Directors of Social Services Cymru; Age Cymru; BASW Cymru; British Association of Social Workers; Both Parents Matter; Care Inspectorate Wales; Church in Wales; DEWIS Choice; EROSH; Hourglass Cymru; National Independent Safeguarding Board Wales; National Trading Standards Scams Team; Neighbourhood Watch; NHS Wales Safeguarding Network; Public Health Wales; Royal College of Nursing Wales; Shared Regulatory Services; Trading Standards (Wales representative); Wales Violence Prevention Unit; Welsh Ambulance Service Trust; Wales Council for Voluntary Action (WCVA); Welsh Women's Aid; West Wales Domestic Abuse Services; Welsh Local Government Association.



They went on to cite data from a survey carried out for the Commissioner, which found that:

almost 1 in 8 older people in Wales (12% aged 60+) feel that they have been discriminated against because of their age.

6.77 iSEA / UKFCP (Interconnecting South East and East Asians in the UK / The UK Federation of Chinese Professionals) stated:

There is potential for abuse or neglect towards older persons due to their vulnerability as being less mobile or alert, among other traits they exhibit. Due to this, there is also potential for criminals to target them for incidents like robbing.

[Is this criminal targeting linked to hostility or prejudice towards old age?](#)

6.78 Only a few consultees argued that criminal behaviour targeted at older people is linked to hostility or prejudice towards old age. Many consultees acknowledged that this criminal targeting is often due to vulnerabilities that arise from old age.

6.79 Trading Standards Wales provided anecdotal evidence indicating that it deals with cases of financial abuse, where the victim is an older person, on a regular basis and that this typically takes the form of scams or frauds. It argued that this criminal targeting amounts to prejudice towards old age:

Whilst we accept that there is a certain degree of 'situational vulnerability' that leaves some people more susceptible to becoming a victim of fraud, there is also evidence that criminals; including organised crime groups, specifically target known properties as a result of them being older (and/or isolated, alone, lacking capacity).

They are further at risk of becoming repeat victims due to their age, as well as any other factors that may be present.

We would argue that there is a definite prejudice to commit these crimes against older people.

6.80 Similarly, Dr Fitzgerald *et al*<sup>93</sup> argued that there are some cases of age-based abuse where the motivation cannot be solely attributed to the victim's perceived or actual vulnerability:

Motivation cannot be explained on the basis of vulnerability alone. Vulnerability may create dependency circumstances, but it cannot explain premeditated cruelty with regard to some crimes against older people, any more than it can in relation to disability hate crime. There are many examples of cruelty and callousness in relation to older people, where vulnerability or opportunism alone cannot provide a satisfactory explanation of motivation. Hostility often manifests as an attitude of contempt coupled with a conscious intention to do harm. This intention manifests in different ways. For instance, a person might express it covertly or through gossip and slander or more explicitly through verbal or physical attacks.

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<sup>93</sup> Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood.



6.81 The majority of consultees were of the view that this criminal behaviour is not linked to hostility or prejudice towards old age. Many expressed the view that the exploitative nature of the offending would be better addressed through sentencing aggravations.

6.82 The Equality and Human Rights Commission stated:

While we recognise that debates around intergenerational fairness, for example, have become more common, there is currently little evidence of prejudice or hostility towards older or younger people because of their age specifically. We acknowledge that hate crimes against younger people are conceivable, but the evidence suggests that this is motivated by other protected characteristics, such as race or sexual orientation.

We recognise the issue of offending based on the exploitation of the perceived vulnerability of older people, where there is arguably no hostility but where the identity of the victim is relevant. We believe that the exploitative nature of this offending would be more appropriately addressed separately from hate crime through vulnerability sentencing aggravations. We would encourage the UK Government to consider the effectiveness of an 'exploitative crime aggravation' as to prove this a prosecutor would not need to prove that the victim were indeed 'vulnerable' or 'vulnerable in the eyes of the accused'.

6.83 The Law Society were similarly of the view that crimes targeted towards older people often exploit the victim's vulnerability and would therefore not satisfy the hostility test:

Offences against elderly people, in the experience of our members, are often not motivated by hostility to the elderly but by the cynical targeting of elderly people because they are vulnerable. We agree that a large number of crimes targeted toward older people would therefore struggle to fit within the existing hostility test and satisfying this legal test will be very difficult.

A focus on the exploitation of an elderly person's vulnerability may therefore be better captured by existing sentencing guidelines, rather than a statutory aggravation based on age. As the consultation paper notes, the Sentencing Guidelines 'overarching principles: seriousness' states that targeting a vulnerable victim because of their old age or youth makes the offender more culpable and the offence more serious. Most guidelines for specific offences (e.g. assault) include an aggravating factor where the offence is motivated by, or demonstrating, hostility based on the victims' age (be it old or young).

6.84 The Magistrates Association agreed that proof of hostility may be more difficult in the context of older age, but argued that this did not necessarily mean that older people should not enjoy hate crime protection:

We agree that it may be challenging to prove motivation due to hostility towards older people rather than targeting of an older person due to perceived vulnerability. We also agree that exploitation of vulnerability is better addressed through existing provisions in sentencing guidelines. However, that does not mean that the protection for older people should not be available under hate crime laws.

6.85 The Office of the Police and Crime Commissioner for Northumbria outlined the current CPS policy on prosecuting crimes against older people and concluded that this policy, so long as it is translated into practice, adequately captures the reality of crimes against older people and reflects the exploitation of vulnerability and/or hostility motivating these crimes:

Although we recognise that 'elder abuse' and crimes against children and young people are important concepts that should be given due attention and consideration, we are unsure whether 'age' or 'older people' should become a protected characteristic under hate crime legislation. This is primarily due to considerations of the presence of hostility in crimes against older people/people due to their age. We do not feel that the available evidence demonstrates that crimes against older people are motivated by hostility towards age, but rather are motivated/facilitated by the defendant's consideration of the victim as vulnerable. This applies to crimes committed against younger people and children too.

The police and CPS already acknowledge the vulnerability inherent in crimes against older people. The Northumbria Police and Crime Commissioner's Office fed into the current CPS policy 'Older People: Prosecuting Crimes against'. This defines crime against an older person 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 victims vulnerability through age or presumed vulnerability through age.'

The policy explicitly recognises that the older people are targeted because of their vulnerability, rather than hostility towards them as a group. The seriousness of targeting vulnerable older people is acknowledged and reflected in the CPS guidance to investigators and prosecutors both pre- and post-charge.

At the charging stage, the CPS are advised to consider vulnerability as part of their assessment of whether it is in the public interest to charge a crime. As per the Victims Code of Practice, where the offence was motivated by any form of prejudice, including against the victims age or the suspect targeted or exploited the victim or demonstrated hostility towards the victim based on their age, it is more likely that prosecution is required. Prosecutors are also advised to review crimes against older people to determine whether disability was an aspect of the crime. If so, a disability hate crime charge/enhanced sentence can be pursued.

Post-charge, investigators and prosecutors are advised to gather evidence of the victim deliberately being targeted for their vulnerability, to present to a judge at sentencing. This will make an offence more serious for sentencing purposes.

Providing this guidance is routinely translated into practice, we feel that this current approach is sufficient to capture the reality of crimes against older people and the motivations behind them, as well as reflecting the abuse of vulnerability and/or hostility attached to such crimes. We therefore do not believe that it is necessary to add age as a protected characteristic under hate crime legislation.

6.86 Dr Hannah Bows was of the view that there is limited evidence of criminal targeting of older people based on prejudice or hostility towards their age:

There is very limited evidence that older people are routinely targeted based on prejudice or hostility towards them as a group. It has been suggested that (some of the) criminal victimisation of older people share many of the core elements of hate crimes: for example, there is some evidence that older people are sometimes specifically targeted, particularly through scamming and door-stop fraud and the attacks can cause fear and apprehension within the elderly community. However, there are several important distinctions between elder abuse and targeted criminal offending against older people, and hate crime.

Bows noted that national data indicates that older people are the least likely age group to experience crime. Bows acknowledged that there is some data that suggests older people are more likely to be subject to particular types of scams, such as doorstep scams, but argued that this may be due to the lifestyles of older individuals:

National data shows older people experience less personal crime (violence and property) than younger groups. This is also true of economic crime: national data indicates older people experience fraud less frequently than younger groups and that those aged 75 and over experience the least fraud of all age groups. For example, mass marketing fraud (emails, texts, letters or phone calls from individuals or companies requesting money) is experienced most frequently by those aged 25-44 – those aged 75 and over are the least likely to experience such communications. Several studies outside of the UK have also found that younger people are more at risk of fraud overall than older people. Consequently, there is currently insufficient evidence that older people are, in general, being targeted because of actual or perceived vulnerability based specifically on age. There is some limited data that indicates older people may be more likely to be victims of particular types of scams, for example doorstep scams, although the lifestyles of older individuals (at home more and therefore more likely to answer the door) may contribute to this. Doorstep scams form a small proportion (17%) of all scams, and for people aged 65 and over only 3% of the scams they experience are doorstep crimes, compared with 5% of those aged 18-24, thus the relative risk for older people remains low. Moreover, as most fraud is experienced by younger people, the (potential) higher rates of victimisation for one particular type of fraud (e.g. scams) does not justify an overall widening of substantive laws based on older age, particularly when the existing fraud legislation already captures these offences.

Bows went on to note that some small exploratory projects into older people's attitudes and beliefs around their victimisation indicate that older victims do not think their victimisation was because of hostility towards their age:

Furthermore, although there is limited research exploring older people's attitudes and beliefs around their actual or perceived victimisation, some small exploratory projects have indicated that older victims do not believe their victimisation was because of hostility or hatred of older people. Similarly, professionals working in the criminal justice system have warned that the introduction of age-based hate crimes would be futile on the basis that few cases involve hatred or hostility and prosecutions would therefore be infrequent. A further problem can be identified here: proving the motivator for the offence. This was noted by the Law Society in Scotland, who have pointed out the difficulty with incorporating age into the hate crime framework centres on proving the motivation for the offence was "hostility

based on age”, rather than vulnerability. Lord Bracadale conducted an independent review of hate crime legislation and similarly concluded elderly people are generally targeted for hate crime because of their age but rather that they may be targeted based on criminal opportunism due to actual or perceived vulnerability.

Bows acknowledged arguments that the deliberate targeting of older people because of their actual or perceived vulnerability provides justification for the recognition of age as a hate crime characteristic, because this deliberate targeting is akin to the targeting of groups currently protected by hate crime laws. However, Bows concluded:

However, such claims are not supported by data on criminal victimisation – both the crime survey and police data reported by the Office for National Statistics report those aged 60 and over experience less crime than any other age group. Similarly, independent and academic research into different crime types finds older people are generally lower risk, as described earlier in this section. There is, consequently, insufficient evidence of criminal targeting of older people based on prejudice or hostility, or vulnerability.

- 6.87 A few consultees were of the view that elder abuse is a domestic abuse issue and that hate crime laws are therefore not the appropriate framework to deal with this offending. For example, London Mayor's Office for Policing and Crime (“MOPAC”) stated:

Our view is that elder abuse is a domestic abuse issue. This is supported by the evidence of the nature of the abuse and who the perpetrators are. The evidence also supports that often the abuse is because the individual's circumstances make them more 'vulnerable'. It is their 'vulnerability' that makes them the target, rather than their age. Also, there are circumstances where the victim has been subjected to abuse over many years and the abuse has only been brought to the attention of the CJS later in the individual's life. So, the abuse is being dealt with when they are old and is not committed because they are old.

### Crimes against younger people

- 6.88 There was little evidence provided by consultees in support of age-based protection being extended to younger people.

- 6.89 One example was provided by Protection Approaches:

We support the inclusion of age as a protected characteristic. Older people appear to be facing higher levels of discrimination, marginalisation, exclusion, and also hate-based attacks. Young people and youths are also discriminated against in many ways. Both older and younger people are likely to experience degrees of prejudice and discrimination when seeking recourse after identity-based attacks by those tasked with implementing hate crime laws, namely but not only the police, CPS, and the wider justice system. It is therefore important for those targeted because of their age, for those charged with their protection and with implementing hate crime laws, and for wider society to comprehend and recognise that these groups are protected. For groups and communities who face high levels of discrimination and prejudice, enshrining this characteristic directly contributes to

embedding normatively as well as through legislation, their equal access to the law and its protections.

Our work in and with local communities in England has found that many elder people have experienced hate-based incidents where hostility and prejudice towards their age was a factor. We have also found that it is common for older people with a visible disability are particularly vulnerable to an attack.

6.90 Stonewall also argued that both younger and older people are victimised:

LGBT+ older people routinely face discrimination across many areas of life. Stonewall's research, *LGBT in Britain: Home and Communities* (2018) found that 42 per cent of LGBT+ people aged 55-64 and 35 per cent of LGBT+ people aged 65+ do not feel comfortable walking down the street while holding their partner's hand.

*LGBT in Britain: Hate Crime and Discrimination* (2017) found that LGBT+ young people are at higher risk of experiencing an anti-LGBT+ hate crime than any other age groups. Findings revealed that 33 per cent of LGBT+ people aged 18-24 – including 55 per cent of those who are trans – had experienced a hate crime or incident based on their sexual orientation and/or gender identity in the year preceding the survey. The report also highlighted how LGBT+ young people were particularly unlikely to report hate crime to the police, with only 12 per cent doing so.

6.91 iSEA / UKFCP stated:

Recently, there has also been a surge of hostility towards younger generations due to the COVID pandemic and their supposed role in spreading it. Thus, even if the level of hate crime is not as drastic as other protected groups, age should be recognised as a protected characteristic.

## **Additional harm**

### **To the primary victim**

6.92 Fitzgerald *et al*<sup>94</sup> argued that crimes against older people have a potentially greater impact on individuals' physical and mental wellbeing than those experienced by other age groups. They said that high levels of incidence of death follow crimes such as theft or fraud – an outcome that rarely happens with younger people unless serious physical assault also occurred.

The Think Jessica charity reports that the impact of scams can include depression, withdrawal and isolation from family and friends and the deterioration of physical and mental health. People defrauded in their own homes are 2.5 times more likely to either die or go into residential care within a year, and in some cases, victims have considered, attempted or committed suicide.<sup>95</sup>

6.93 However, Bows questioned whether the harms experienced by older people were necessarily worse than for other victims:

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<sup>94</sup> Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood.

<sup>95</sup> Think Jessica, *Shocking Facts*, available at <https://www.thinkjessica.com/shocking-facts/>.

There is compelling evidence that the impacts of fraud, and other offences, may be severe for (some) older people, including increasing the risk of the victim going into a care home. However, impacts vary by individuals and it is not universally the case that older people will experience more adverse effects than younger victims. For example, a study commissioned by Citizens Advice Scotland found younger people were twice as likely to feel embarrassed or ashamed about scams as older people. Thus, if age were to be included, it would need to incorporate both young and old in order to accurately capture the groups who are 'vulnerable' to experiencing crime and being specifically targeted. In doing that, however, we essentially include everyone as a potential victim of hate crime and thus there is nothing to distinguish crimes from hate crimes.

### To members of the wider group

- 6.94 Fitzgerald *et al* argued that criminal targeting of older people causes harm to the wider group because it reinforces a negative stereotype of older people:<sup>96</sup>

Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community. Ageism is endemic within our society, it creates a stereotype of older people who are collectively perceived as frail and vulnerable, an economic and health burden, and a reminder of mortality. It is of concern that 'age-based discriminatory practices can be found throughout society ... pervading the fields of culture; physical appearance; public image; language; media and advertising; work; and healthcare'.<sup>97</sup>

- 6.95 Age UK argued that:

There would be value in highlighting that both crime itself, and the fear of crime can increase feelings of isolation and decrease community involvement.

## Suitability

### Difficulties in proving the aggravation

- 6.96 A number of operational stakeholders expressed concern that there would be practical difficulties in proving that the victim was targeted because of hostility towards their age, rather than their actual or perceived vulnerability.

- 6.97 The CPS stated:

We have no comment on this proposal. However, if the existing two-limbed hostility test were to be retained we consider that there would be practical difficulties in proving 'age-based' hate crime in cases where the victim was targeted because of their actual or perceived vulnerability, rather than because of hostility towards older people. In this respect the same difficulties which are currently experienced in prosecuting crimes against disabled people who are targeted for their actual or perceived vulnerability, rather than because of 'disablist hostility', would apply.

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<sup>96</sup> Dr Gary Fitzgerald, Bridget Penhale, Jayne Connery, Ian Cranefield, Steve James and Paul Greenwood.

<sup>97</sup> Ray S, Sharp E and Abrams D, *Ageism: A Benchmark of Public Attitudes in Britain* (2006, Age Concern Reports).

- 6.98 The Welsh Government were of the view that old age satisfied our criteria for deciding whether a characteristic should be recognised as a hate crime characteristic, but acknowledged that it would be very difficult to prove hostility or prejudice towards age:

We note the Law Commission's point that available data indicates that older people experience less crime. We also acknowledge the Crime Survey for England and Wales (CSEW) data which recorded 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. The data showed that 81,000 people felt they had been targeted for personal crime based upon their age.

We feel that the tests for including 'Older People' within the hate crime regime have been met by the law commission review, however, it would be very difficult to prove hostility or prejudice towards age, rather than exploitation on the basis of vulnerability of older people. It should be noted that the UK has an ageing population and hate crime motivated by age is potentially an issue that could grow in prevalence over time. Any change to the legislation needs to be more than symbolic and actually be able to lead to prosecutions. More work needs to be undertaken to assess the likelihood of a sufficient number of successful prosecutions would be.

- 6.99 In contrast, the Office of the Police and Crime Commissioner for Hampshire thought that age fails to satisfy the suitability criterion because age-related hate crimes would be difficult to prove:

Similar to the previous answer, age would fail the suitability criteria test, as policing age-related hate crimes would be difficult to police and prove. For example, if a young person in their first job, is called a whipper snapper, is that a hate crime? Would we expect the police service to investigate this as a hate crime and redirect resources from investigating other hate crimes?

The equality of the offence should also be considered, older persons are more likely to be considered victims of age-related hate crime than younger people.

The case for including age as a hate crime characteristic is yet to be proven, an evidence base needs to be accumulated before even discussing age as a hate crime characteristic, which does not exist yet.

- 6.100 The Association of Police and Crime Commissioners stated:

As we have heard from one of our members that considering age as a defining characteristic in terms of vulnerability in regard to hate crime could be challenging to operationalise in practice, we do not currently have a response to this question.

- 6.101 Bows noted, as we did in the consultation paper, that data from jurisdictions where age is recognised as a hate crime characteristic suggests that the aggravation is rarely used.

### Potentially harmful consequences

- 6.102 West Sussex County Council Community Safety and Wellbeing were concerned that broadening hate crime laws to protect age could dilute protection for currently protected groups:

There is concern that broadening the characteristics to include age may dilute what the people in the currently protected groups are experiencing. The scale of referrals must be considered and whether Police and support agencies would have the capacity to deal with the rise in reports that including this characteristic may produce. We are aware that our commissioned Hate Incident Support Service would be unable to cope with the potential demand these additional cases may bring.

6.103 The Law Society agreed with the concerns that we expressed in the consultation paper, that recognition of age-based hate crime could have harmful consequences in the context of child abuse as it risks disrupting existing child abuse frameworks:

As the consultation paper also notes, there are of course a number of criminal laws specifically related to offending against children. While the consultation does not envisage that age related hate crime law would be applied to those offences, if they were to be, they could be unhelpful and disrupt the support specialist agencies are able to give victims of child abuse (para 13.109). In our view, this risk militates against including age as a characteristic in the hate crime legislation.

#### Is hate crime an appropriate way to characterise the offending?

6.104 Bows argued that, even if older people as a group are more vulnerable to particular crimes compared with other groups, recent research has indicated that older people are targeted because of their perceived or actual vulnerability, or because they are an easy target, rather than because of hostility or hatred towards their age. Bows concluded that such offending does not fall within the scope of the existing hate crime framework.

6.105 Bows went on to express concern that broadening the scope of hate crime laws to include vulnerability could dilute the purpose and meaning behind such laws, and risk removing the special status that currently attaches to hate crimes:

As well as the issues with defining and conceptualising vulnerability discussed in this submission, there are broader concerns that widening the scope of hate and hostility to include vulnerability will essentially dilute the purpose and meaning which underpinned the core objectives for introducing hate crimes. By widening hate crimes to include those deemed vulnerable, the range of victims that could be included could potentially be so wide that almost everyone can be a victim of hate crime, rendering the legislation meaningless and removing the special status that currently attaches to these crimes and in essence making hate crimes indistinguishable from the more general versions of the offences (for example assault).

6.106 Bows argued that even if hate crime laws are extended to include vulnerability, it does not necessarily follow that older people should be perceived as being inherently vulnerable:

It is of course true that older people can be vulnerable (as can younger people) and that older age may create particular vulnerabilities. However, it is also true that young(er) age can create vulnerabilities, and that other demographics, environments and lifestyles can independently and collectively render individuals and groups more vulnerable to violence and abuse (as well as other crime). For example, in the



context of 'elder abuse', scholars have concluded that vulnerability is as much a product of a situation or relationship as it is a characteristic of an individual per se.

6.107 Bows noted that supporters of introducing new criminal laws to tackle "elder abuse" have argued that age creates particular vulnerabilities such as dementia, disease or chronic conditions resulting in poor mobility, dependency and care needs and social isolation. However, Bows argued that while some older people are affected by these issues, they are not universally experienced. Bows also argued that many younger people also experience these conditions.

6.108 Bows went on to argue that designating older people as inherently vulnerable may actually reinforce prejudicial conceptualisations of older age. She noted that, if the hostility test were extended to include prejudice it would go against what hate crime laws would aim to address:

The application of age-based policies and legal reform based on vulnerability theory has been sharply criticised for being paternalistic and disempowering. Roulstone and colleagues state that "as a term, 'vulnerable' has connotations of weakness and is generally applied by members of a powerful majority to oppressed groups. There is arguably something inherently paternalistic in the act of designating another as 'vulnerable'". 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.

6.109 Bows also noted that older people may be protected under hate crime laws if they have a characteristic that is already protected, such as a disability.

#### **"Older people" or people of all ages**

6.110 There was no consensus amongst consultees in response to Consultation Question 16.

6.111 A number of consultees noted that legislation already exists to provide protection for younger people.

6.112 Nottingham City Council stated:

We are of the view that age-based protection should be limited to 'older people' since they are most likely to be targeted for their age. While it can be argued that young people are also victims of crime in different ways and are targeted, this is not necessarily due to prejudice. It can also be argued that certain prejudice experienced by young people (e.g. prejudice and perceptions about young people as 'troublemakers') is often linked to other types of prejudice namely race and class, rather than age specifically. Additionally, protection for young people exists in other parts of the law and children are treated differently by the law, due to which inclusion here would create more complexity.

6.113 Emma Foody, Deputy Police and Crime Commissioner for Nottinghamshire also argued that issues concerning children were quite distinct, and should be addressed in other ways:

I would support any age provision being limited to older people as children as already legally defined are subject to a differing range of legal provisions and support. I would also suggest that this may not meet the criteria of demonstrable need. Child protection is a vital component of our policing and safeguarding landscape but I would not suggest its inclusion within a specific future hate crime act.

6.114 West Midlands Police and Crime Commissioner was also of this view:

Certain age groups are deemed more vulnerable, for example, the elderly and children. Children, however, are protected through various legislation and statutory duties to be upheld by statutory agencies etc.

6.115 The Magistrates Association noted that the inclusion of younger people within age-based hate crime protection could negatively impact existing child abuse frameworks:

We also agree that it is unlikely for age-based hate crime laws to be applied for child abuse crimes, but it is still important that the existing frameworks are not diminished due to the introduction of new protections. It may be that limiting the age-based hate crime protection to older people could be helpful in this.

6.116 Some consultees supported age-based hate crime protection including all ages.

6.117 Protection Approaches stated:

We believe age-based hate crime protection should include people of all ages. Our work in and with local communities in England found instances where older and younger people have experienced offences where they believed their age was a factor.

6.118 Age UK drew on the example of the Equality Act 2010:

It should include people of all ages so there is parity with the Equality Act 2010.

6.119 Government Independent Advisory Group on Hate Crime argued that the lower likely number of cases involving young people should not be a barrier to a broad approach:

It should include all age ranges to retain the Human Rights and inclusive nature of the legislation while recognising that there are unlikely to be a significant number of offences focused on young people.

6.120 The Older People's Commissioner for Wales and members of the Abuse Action Group supported the inclusion of all ages, but thought that any law reform should explicitly state that older people are covered:

As discussed with the Law Commission and referred to in the consultation document, limiting age-based hate crime to older people would be a powerful statement about the discrimination and abuse that older people can face, and it would make it clear that older people were protected by hate crime law. However, we believe it would be right for people of all ages to be included but that in communications about the changes to the law older people should be explicitly referenced as a group covered by the legislation.

## CONCLUSIONS FOLLOWING CONSULTATION RESPONSES

- 6.121 The issues that we raised in the consultation paper were widely reflected in consultation responses.
- 6.122 Several consultees provided persuasive evidence of criminal targeting of older people, and evidence that this targeting causes significant additional harm to the victim and members of the wider group. These consultees also outlined numerous benefits that would flow from the recognition of age as a hate crime characteristic, including allowing for greater awareness, understanding and reporting of age-based crimes and having a symbolic and deterrent effect.
- 6.123 However, in the context of older people, a significant number of consultees raised compelling concerns in relation to the suitability criterion. The most cited concerns related to the applicability and appropriateness of extending the hate crime framework to cover vulnerability, and the potential impact that this could have on hate crime resources.
- 6.124 Only a few consultees were explicitly in support of including younger people within any age-based hate crime protection. These consultees were of the view that younger people are subject to abuse and discrimination, such that the demonstrable need criterion is satisfied.
- 6.125 However, a number of consultees raised concerns about the suitability of extending hate crime protection to younger people. Many were mindful that this could result in harmful consequences, and in particular could risk disrupting the support specialist agencies are able to give to victims of child abuse.

## RECOMMENDATIONS FOR REFORM

### Younger people

- 6.126 We recognise that younger people experience abuse and discrimination; in fact, in the consultation paper we observed that the most recent CSEW data indicates that the 16-24 age group is most likely to experience crime.<sup>98</sup> However, in the consultation paper we also noted that there is no evidence that this victimisation is linked to age-based hostility or prejudice.<sup>99</sup> We thought that this was particularly illustrated by the fact that 16 to 24-year olds were the second-most likely to be perpetrators of violent crime.<sup>100</sup> Consultation responses also highlighted the age-based discrimination that younger people experience. However, the number of consultation responses we received on this particular issue were limited, and those that directly engaged with this

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<sup>98</sup> 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>.

<sup>99</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 13.68.

<sup>100</sup> 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>.

issue failed to establish convincingly that this conduct is linked to hostility or prejudice towards young age.

6.127 In the consultation paper we noted that child abuse is already a recognised criminal context in the UK. We raised concerns that if age-based hate crime laws were applied in this context, serious suitability issues could arise. We do not want to propose the introduction of an additional hate crime element that could potentially disrupt or complicate existing pathways for young victims who require specialist and dedicated support, and which already involve a multi-agency response. These concerns were echoed by a number of consultees in their consultation responses, who concluded that the risk of disrupting the support specialist agencies are able to give victims of child abuse outweighed the arguments in favour of including younger people within any age-based hate crime protection.

6.128 We therefore do not consider that any age-based hate crime protection should be extended to younger people.

### Older people

6.129 We recognise that criminal targeting and abuse of older people occurs in England and Wales. Consultation responses highlighted the unacceptable reality of age discrimination and the types of criminal behaviour that are typically perpetrated against older people, including harassment, anti-social behaviour, abuse and neglect, theft, domestic violence and frauds and scams.

6.130 We understand the strongly held desire amongst many older victims of crime and organisations that support older people to have age explicitly protected in hate crime laws. We acknowledge that the criminal targeting of older people shares similarities with the deliberate targeting of groups that are currently protected by hate crime laws, in particular those who are disabled. We also recognise that some forms of exploitative crime might be linked to age, even if this does not appear to be founded on hostility.

6.131 However, a number of issues arise in relation to the applicability and appropriateness of the hate crime framework to deal with this offending.

6.132 The first issue arises in relation to the demonstrable need criterion, specifically whether the criminal targeting of older people can be linked to prejudice or hostility towards the victim's age. Consultees were widely of the view that this criminal targeting is rarely motivated by hostility or prejudice towards the victim's age. Therefore, only a small proportion of this offending would fall within this criterion.

6.133 This is linked to the second concern, proving the aggravation of the offence, which arises in relation to the suitability criterion. Under the current hostility test, the prosecution would be required to prove that the offence was motivated by or the defendant demonstrated hostility towards the victim because of their age. However, consultees were of the view that a large proportion of crimes against older people are in fact motivated by criminal opportunism due to the victim's perceived or actual vulnerability, rather than hostility towards the victim's age. We agree with operational stakeholders, such as the CPS, that if the current hostility test is retained, it would be difficult to prove the aggravation in cases where the victim was targeted because of

their actual or perceived vulnerability. This suggests again that hate crime laws are unlikely to be an effective response to the vast majority of crimes against older people, and existing sentencing guidance that reflects other factors – such as the increased culpability of the defendant in targeting a vulnerable victim, are likely to be more suitable and effective in these circumstances.

6.134 It is arguable that if the hostility test is amended to include prejudice, as we outlined in the consultation paper and recommend in Chapter 3 of this report, a greater proportion of offending could meet the revised legal test. This is because it can be argued that where a victim has been selected because of their perceived age-based vulnerability, this is identity-based prejudice. This approach would be consistent with that taken by Lord Bracadale in Scotland, who concluded that the perceived vulnerability of older people is based on a prejudice that the offender holds towards the victim. By this reasoning, the issue identified in relation to the suitability criterion, i.e. that the aggravation would be difficult to prove, would be addressed.

6.135 However, this reasoning requires evidence that the defendant's exploitation of the vulnerability of the older victim is based on a prejudice that the offender holds specifically in relation to the victim's age. As we have indicated, vulnerability does not necessarily derive from age itself. Vulnerability can be attributed to a number of factors that are sometimes correlated with older age, such as disability, and circumstances such as physical and social isolation, but are not necessarily inherent in older age itself. Therefore, even if the exploitation of vulnerability of older persons is considered to be a form of prejudice, it may be difficult to prove that the victim was targeted because of their age, rather than other age-correlated circumstances that may have put them in a more vulnerable position.

6.136 A further issue arises out of this reasoning; whether hate crime is an appropriate way to characterise this offending. Consultees acknowledged that a large proportion of offending targeted at older people constitutes exploitation of their perceived or actual vulnerability. Extending the hate crime framework to cover vulnerability could fail to capture the nuances surrounding elder abuse and crimes against older people and their causes. A number of consultees thought that this offending may be better addressed through sentencing guidelines, which are able to recognise and appropriately characterise the nature of the offending.

6.137 Due to these complex issues, we recommend that older age should not be recognised as a protected characteristic in hate crime laws. We consider that existing sentencing guidelines more accurately capture the nature of the offending. As discussed at paragraph 6.11, existing sentencing guidelines recognise that the culpability of the offender will be greater if they target a vulnerable victim because of the victim's old age or youth.<sup>101</sup> Sentencing guidelines for specific offences also acknowledge that the targeting of a victim obviously vulnerable due to age is a high-culpability factor.<sup>102</sup>

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<sup>101</sup> 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>.

<sup>102</sup> See the sentencing guidelines for assault occasioning actual bodily harm / Racially or religiously aggravated ABH, Crime and Disorder Act 1998, s.29, Offences against the Person Act 1861, s47 (effective from 1 July 2021), available at <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>.

6.138 We note that the CPS already flags and monitors crimes against older people alongside the legally recognised protected hate crime characteristics (race, religion, sexual orientation, disability and transgender identity). We consider that there may be benefit in the CPS working with police forces to pilot the additional recording of crimes against older people which involve hostility towards the victim's age. This could provide a more accurate picture of the extent of hostility-motivated crime on the basis of age than the current data available. If concerning trends were to emerge, the inclusion of age in hate crime laws could be reconsidered; at present, however, the evidence base does not justify the inclusion of older age as a protected characteristic.

**Recommendation 10.**

6.139 We recommend that age should not be added as a protected characteristic in hate crime laws.

# Chapter 7: Recognition of other groups and characteristics

## INTRODUCTION

- 7.1 Our terms of reference ask us to “consider whether crimes motivated by, or demonstrating, hatred based on... other potential protected characteristics should be hate crimes.” In this chapter we consider the case for the inclusion of sex workers, people experiencing homelessness, alternative subcultures and philosophical beliefs. Some of these groups – sex workers and alternative subcultures – have been recognised for recording and monitoring purposes by various police forces across England and Wales.<sup>1</sup> Philosophical beliefs are recognised for the purposes of anti-discrimination law under the Equality Act 2010. Homelessness is recognised in various North American jurisdictions, but not in any jurisdiction in the United Kingdom.
- 7.2 We considered the case for inclusion of each of these groups in Chapter 14 of our consultation paper<sup>2</sup> in light of the criteria we proposed in Chapter 10 of our consultation paper. These criteria, which we affirmed in Chapter 3 of this report, 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, represent an efficient use of resources and is consistent with the rights of others.
- 7.3 The four groups we consider in the chapter are not the only ones that have been proposed for inclusion. For example, Changing Faces have advocated the inclusion of a characteristic of “visible difference” in recognition of the fact that individuals who experience abuse on the basis of a visible difference or disfigurement do not necessarily identify with the characteristic of “disability” – which is the main basis on which such criminal hostility would currently be prosecuted. “Class” has also been proposed.<sup>3</sup> However, given there is very limited precedent for recognition of these

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<sup>1</sup> Police recording of hate crimes and hate incidents for statistical and monitoring purposes is distinct from a determination as to whether a hate crime has in fact been committed. Recording is perception-based and has no implications for how the case will be treated if it is prosecuted in court. We discuss this distinction further in our introduction at Chapter 1.

<sup>2</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250.

<sup>3</sup> See A Benn, “Classism as hate crime: proposing class as a protected ground in criminal law” [2021] (10) *Criminal Law Review* 809.

characteristics in either hate crime or equality law, we did not consider these characteristics in our consultation paper.

- 7.4 In this chapter we reassess the case for each of the four groups we canvassed in the consultation in light of our selection criteria and the consultation responses we received.
- 7.5 We conclude that none of these characteristics should be included in hate crime laws at the present time. However, in doing so, we do not suggest that crimes targeted towards any of these groups should not be considered serious and harmful. We also do not wish to suggest that current efforts of certain police forces in recording and monitoring hate crimes against alternative subcultures and sex workers should be abandoned. Though related, the considerations that guide police hate crime recording policy and practice are wider than those of the criminal law itself, in that they are connected to the common law duty of the police to keep the peace and prevent crime.<sup>4</sup>
- 7.6 College of Policing professional practice guidance describes the discretion police forces have in this regard as follows:<sup>5</sup>

The five strands of [monitored hate crime](#) are the minimum categories that police officers and staff must record and flag. There are, however, other groups and individuals who may be targeted due to their personal characteristics. Forces, agencies and partnerships can extend their local policy response to include hostility against other groups or personal characteristics, they believe are prevalent in their area or that are causing concern to their community.

- 7.7 We consider that the College of Policing and police forces are best placed to develop appropriate policies regarding the prevention and detection of community tensions and hate crime. However, as we observe later in this chapter, some of the evidence we have heard in the course of this review points towards a need also to consider the monitoring of hate crimes against homeless victims.

## SEX WORKERS

### Background

- 7.8 The term “sex work” broadly refers to provision of sexual or erotic acts or sexual intimacy in exchange for payment or other benefit.
- 7.9 The term “prostitution” is also used – particularly in relation to contact-based sexual activity, though it can be considered to have negative connotations and be derogatory.<sup>6</sup> Those who advocate for the abolition of sex work/prostitution typically

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<sup>4</sup> See *Miller v College of Police and the Chief Constable of Humberside* [2020] EWHC 225 (Admin) 261, [162].

<sup>5</sup> College of Policing, *Authorised Professional Practice: Hate Crime* (20 October 2020), Responding to Hate. Available at <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/responding-to-hate/#non-monitored-hate-crime>.

<sup>6</sup> Stella, *Language Matters: Talking About Sex Work* (April 2013) p 3, available at <https://www.nswp.org/sites/nswp.org/files/StellaInfoSheetLanguageMatters.pdf>.



reject the term “sex worker” as normalising a practice they consider to be inherently harmful.

7.10 In this paper we use the term “sex worker” as we consider it to be the most respectful to those engaged in this conduct. However, we recognise it is a contested term.

7.11 The exchange of sexual services for payment is not in itself illegal in England and Wales, though there are a range of offences related to forms of sex work that are criminalised. These include:

- (1) Loitering or soliciting for purposes of prostitution.<sup>7</sup>
- (2) “Kerb crawling”.<sup>8</sup>
- (3) Owning or managing a brothel.<sup>9</sup>
- (4) Causing or inciting prostitution for gain<sup>10</sup> or controlling prostitution for gain.<sup>11</sup>
- (5) Trafficking for sexual exploitation.<sup>12</sup>

7.12 It is also an offence to pay for sex with a sex worker who has been “subjected to force”,<sup>13</sup> and it is illegal to pay for sex from a person under the age of 18.<sup>14</sup>

7.13 The Crown Prosecution Service has published guidance in relation to “Prostitution and Exploitation of Prostitution” which states that:

The CPS focuses on the prosecution of those who force others into prostitution, exploit, abuse and harm them. Our joint approach with the police, with the support of other agencies, is to help those involved in prostitution to develop routes out.<sup>15</sup>

7.14 The guidance further states that:

Those who sell sex should not be routinely prosecuted as offenders. The emphasis should be to encourage them to engage with support services and to find routes out of prostitution.<sup>16</sup>

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<sup>7</sup> Street Offences Act 1959, s 1.

<sup>8</sup> Sexual Offences Act 2003, s 51A.

<sup>9</sup> Sexual Offences Act 1956, ss 33 to 36.

<sup>10</sup> Sexual Offences Act 2003, s 52.

<sup>11</sup> Sexual Offences Act 2003, s 53.

<sup>12</sup> Modern Slavery Act 2015, s 2.

<sup>13</sup> Sexual Offences Act 2003, s 53A.

<sup>14</sup> Sexual Offences Act 2003, s 47. The age of consent to sex is ordinarily 16 in England and Wales.

<sup>15</sup> Crown Prosecution Service, *Prostitution and Exploitation of Prostitution* (4 January 2019), available at <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> .

<sup>16</sup> Crown Prosecution Service, *Prostitution and Exploitation of Prostitution* (4 January 2019).

7.15 The legality or otherwise of sex work does not fall within the terms of reference of this review. However, many consultees considered it to be a relevant consideration in determining whether sex workers should be included in hate crime laws.

### Consultation paper

7.16 In our consultation paper, we applied our three criteria to the potential recognition of sex workers in hate crime legislation.<sup>17</sup>

7.17 In relation to demonstrable need, we found evidence that crime based on prejudice or hostility towards sex workers is prevalent.<sup>18</sup>

7.18 We cited a range of different studies that have demonstrated the disproportionate violence and abuse that sex workers face – including physical violence and abuse, theft and fraud and stalking and harassment, rape and sexual assault. We also noted that 184 sex workers were murdered in the UK between 1990 and 2019.<sup>19</sup>

7.19 In relation to additional harm, we found that:<sup>20</sup>

- (1) Targeted crime against sex workers has 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.
- (2) Evidence and research into collective harm was limited, although plausible.
- (3) Motivations for crimes against sex workers have been strongly linked to stigma. Targeted violence against sex workers might further entrench the extent to which they are stigmatised in society and in turn reinforce the marginalisation of sex workers and their outsider status. Ultimately this could cause social harm, undermining their “equal” social status.

7.20 In relation to suitability,<sup>21</sup> we recognised that some have expressed concern that:

- (1) Sex work is harmful for participants and constitutes an inherent form of violence against women.
- (2) Sex work indirectly causes harm to all women, by entrenching the objectification of women’s bodies.

7.21 Under this view, the protection of “sex workers” in hate crime laws would be harmful in that it would entrench and normalise an inherently harmful practice.

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<sup>17</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 307 to 320.

<sup>18</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 309 to 315.

<sup>19</sup> 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/>.

<sup>20</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 315 to 318.

<sup>21</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 317 to 319.

- 7.22 We also recognised that there are contrary views that do not view sex work as harmful in itself, or take a harm minimisation approach – arguing that legal protection is necessary to ensure that (predominantly, but not exclusively female) participants are protected from abuse, violence and exploitation.

### The “Merseyside Approach” to treating attacks on sex workers as hate crimes

- 7.23 In our consultation paper we drew on the experience of Merseyside Police as an important evidence base for the consideration of this group for hate crime recognition.<sup>22</sup>
- 7.24 In 2006, Merseyside Police became the first force in the UK to treat crimes and incidents motivated by the victim’s sex worker status as hate crimes. This followed concerns about high levels of unreported violent and other crime against sex workers, and a number of murders of women involved in street sex work.<sup>23</sup>
- 7.25 Dr Rosie Campbell, who has conducted extensive research in this area, has observed “a range of positive outcomes” associated with the Merseyside approach:

Between 2005 and 2009 there was a 400% increase in the proportion of sex workers reporting to the project Ugly Mugs Scheme making formal reports to police, while the conviction rate for crimes against sex workers in Merseyside that made it to court between 2007 and 2011 was 83%. The rate for cases involving rape and sexual offences was 75%, compared to the national ‘generic’ rate of 58%. As of the end of 2011, 32 victims were known to have received justice, with 25 offenders convicted, an unprecedented number in the UK.<sup>24</sup>

- 7.26 In 2019, North Yorkshire Police also announced that they had adopted sex workers into their official policy for tackling and dealing with hate crime.<sup>25</sup>

### Consultation responses

- 7.27 In our consultation paper we asked the following questions relating to the potential recognition of sex workers within hate crime law:

#### Consultation Question 17

We invite consultees’ views on whether “sex workers” should be recognised as a hate crime category.

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<sup>22</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 308 to 309.

<sup>23</sup> R Campbell, “Not getting away with it: Linking sex work and hate crime in Merseyside” in N Chakraborti, J Garland (eds) *Responding to Hate Crime: The Case for Connecting Policy and Research* (1<sup>st</sup> ed, 2014) p 55.

<sup>24</sup> R Campbell, “Not getting away with it: Linking sex work and hate crime in Merseyside” in N Chakraborti, J Garland (eds) *Responding to Hate Crime: The Case for Connecting Policy and Research* (1<sup>st</sup> ed, 2014) p 60.

<sup>25</sup> North Yorkshire Police, “Crimes against sex workers added to hate crime policy” (2019), available at <https://www.northyorkshire.police.uk/staying-safe/hate-crime/crimes-against-sex-workers-added-to-hate-crime-policy/>.

## 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)

7.28 Most of the personal responses to Consultation Question 17 were opposed to recognition of sex workers. The personal responses to Summary Consultation Question 4 that related to sex workers were somewhat more positive. For instance, numerous responses suggested that there was a stronger case for the protection of sex workers (and homeless people) than there was for alternative subcultures and philosophical beliefs. However, the personal responses to Summary Question 4 remained largely negative about new hate crime additions, providing general objections to the limitations these laws place on freedom of speech.

7.29 There was confusion evident in some responses, which seemed to be informed by the belief that we were seeking to:

- Make it a hate crime to mentor somebody out of sex work or to suggest that sex work is not the right way forward.
- Make it a hate crime to criticise the “sex industry”.
- Make involvement in sex work a hate crime based on its “illegality”.

7.30 None of these outcomes were contemplated by our proposals, nor would they result from inclusion of “sex workers” as a protected group within hate crime laws.

7.31 Organisation responses were more mixed on the proposal to include sex workers in hate crime laws.<sup>26</sup> We discuss these arguments in more detail in the section that follows.

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<sup>26</sup> Organisational stakeholders who responded positively to possible inclusion of sex workers within hate crime laws included: The Sex Worker Research Hub, Galop, Inclusion London, Trans Actual UK, National Aids Trust, One25, Manchester City Council, GIRES, Islington City Council, VAWG and Hate Crime Team, London Borough of Tower Hamlets, Welsh Women’s Aid (cautiously agree), Nottingham Women’s Centre, UCLan Students Union (University of Central Lancashire), JustUS, Office of the Police and Crime Commissioner for Gwent, SWGfL’s helplines (this includes the Revenge Porn Helpline, Professionals Online Safety Helpline, Report Harmful Content Helpline), Magistrates Association, Government Independent Advisory Group on Hate Crime.

Organisational stakeholders who responded negatively included: Labour Women’s Declaration Working Group, Equality and Inclusion Partnership, Nottingham City Council, Christian Concern, LGB Alliance, MOPAC, English Collective of Prostitutes, APCC, Woman’s Place UK, Birmingham & Solihull Women’s Aid,

## The term “sex work”

7.32 Several personal responses and some organisational responses opposed the term “sex work”. This included one organisation who otherwise supported the recognition of sex workers. Examples of this include:

- (1) The VAWG and Hate Crime Team, London Borough of Tower Hamlets (who responded positively) said that the term sex “work” would not be appropriate for use in hate crime protection because “it does not consider the frequency and severity of violence and sexual assault that women involved in prostitution experience”.
- (2) Woman’s Place UK (who responded negatively) opposed the use of the term “sex work” and said that WPUK takes the view that “prostitution is inherently exploitative and constitutes a form of violence against women and girls”.
- (3) LGB Alliance (who responded negatively) did not support use of the term “sex work” because it is a very broad term.

## Arguments made by sex work-specific stakeholders

7.33 One25, who support women involved in street sex work, argued that sex workers ought to be protected in hate crime laws, noting that it would be “a progressive step to challenge the negative stereotypes, stigma and hostility which they currently face,” and that it “would send a clear and emphatic message that violence against these women is not ok, is not ‘part of the job’ and is deserving of justice.”

7.34 One25 highlighted four reasons why hate crime protection was necessary:

- (1) Women who perform street sex work experience high levels of violence.
- (2) Many street sex-working women experience violence and criminal behaviour where the perpetrator is motivated by hostility or demonstrates hostility towards the victim's status as a street sex worker.
- (3) Street sex-working women find it difficult to report violence.
- (4) More generally, women who perform street sex work face notable societal disadvantages.

7.35 They provided specific testimony and evidence from their work to support these points, for example:

From November 2019 - October 2020, 53 women reported violence to One25, but only 29 reported violence to the police, and 9 chose to make Ugly Mug reports.<sup>27</sup> One woman reported 3 rapes within 6 weeks. This is a fairly typical pattern over the

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OBJECT, Nordic Model Now!, Laughing at Feminists, CEASE UK (Centre to End All Sexual Exploitation), Fair Cop, Safe Schools Alliance UK, The Muslim Council of Britain.

<sup>27</sup> This refers to reports made to charity “National Ugly Mugs”, which describes itself as “a UK-wide charity working with sex workers to do research, design and deliver safety tools and to provide support services to people in adult industries.” See further <https://nationaluglymugs.org/>.

past 5 years, though exacerbated by COVID-19 removing private, discrete spaces for women to report formally.

Women are also frequently publicly shamed in relation to their street sex work. One service user recently had 'prostitute' graffiti put up across the outside wall of her house. She had been having issues with neighbours and experienced verbal assaults in relation to this too. Another service user has been the victim of a poster campaign labelling her as a 'junkie whore' in the local community. In both instances this abuse is undeniably linked to the women's involvement in street sex work.

7.36 Dr Belinda Brooks-Gordon responded on behalf of the Sex Worker Research Hub (SWRH). The response made the following points:

- (1) Violence against sex workers should be recognised as hate crime.
- (2) Hate crime recognition must sit alongside other reforms, such as improving the economic conditions of sex workers and removing laws that put sex workers at risk and have the effect of criminalising and stigmatising them.
- (3) Notwithstanding the above, the SWRH's response acknowledged that decriminalisation was not in the remit of our review.
- (4) To develop our policy in this area, we should work with sex workers and grassroots organisations, as they are best placed to represent the voices of those with lived experience. Accounts of diverse lived experience are particularly important in sex work debates, "due to the currently complex nature of legality, reasons for entering the industry, and experiences therein".
- (5) A "clear difference must be made in the hate crime laws for those in consenting sex work to ensure that exploitation and harm of sex workers can be recognized as such when it occurs. Anything less than this is a route towards policy that fails sex workers and fails to address violence and crimes committed against them".<sup>28</sup>

7.37 The English Collective of Prostitutes raised the following reservations regarding the effectiveness of sex workers being added to hate crime laws:

- (1) It is unclear whether hate crime legislation is useful/effective in general.
- (2) It is also unclear whether the Merseyside data indicated a real improvement in the circumstances of sex workers in that area.
- (3) New laws are not needed when it comes to tackling the horrifyingly high level of violence against sex workers. Existing laws should be vigorously implemented, in the context of incredibly low reporting and conviction rates for rape and domestic violence, which "have de facto been decriminalised".

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<sup>28</sup> J Pilcher and M Wijers, "The impact of different regulatory models on the labour conditions, safety and welfare of indoor-based sex workers" (2014) 14(5) *Criminology & Criminal Justice* 549.

7.38 An expert responding in a personal capacity who wished to remain anonymous made the following points:

- (1) It is not clear if sex workers have been consulted on this.
- (2) Whilst Merseyside police and North Yorkshire have introduced hate crime models for crimes against sex workers, it is unclear whether there is any reduced criminalisation or material improvements in the lives of sex workers or their relationships with the police.
- (3) Merseyside have said that treating crimes against sex workers as hate crimes makes crimes against them a police priority and shifts police practice away from treating sex workers as offenders. It would be useful to further explore whether applying hate crime approaches to sex work is linked to higher reporting and conviction rates and more sharing of information with the police.
- (4) It would be useful to consider which populations of sex workers benefit from a hate crime approach. Do minority groups in other protected categories, such as race have better interactions when accessing the police as victims under this policy?
- (5) In terms of the three criteria, offenders who commit crimes against sex workers are often serial predators. Crimes against sex workers are likely to cause additional harm to the primary victim(s), to sex working communities and to society more broadly.
- (6) Defining crimes against sex workers as hate crimes may match with sex workers' own experiences and perceived motivations for their victimisation.
- (7) It is important to note that perpetrators of hate crime against sex workers include state actors. This must be considered particularly because sex workers do not always experience police as a protective force. Their work is criminalised, and they are subject to stigma, harm from residents, displacement and discrimination. Some believe that they are responsible for the (sexual) violence that they experience at work. Providing police extra authority to 'intervene' in the lives of sex workers through hate crime initiatives must be based in lived experience with sex workers evaluating and contributing to the formulation of laws and policies intended to provide them greater protection.

### LGBT groups

7.39 Several LGBT groups observed the significant overlap between LGBT+ and sex worker communities, and many responded on this basis.

7.40 GIRES (Gender Identity Research and Education Society) supported sex workers being protected, and highlighted the intersectional nature of violence against trans sex workers, stating that “of the trans people murdered worldwide in the year to November 2020, 62% of those whose occupation is known were sex workers”.

7.41 Trans Actual UK also supported the protection of sex workers. They highlighted the increased likelihood of violence against trans sex workers, particularly black trans sex

workers. They argued that our three criteria “are clearly and strongly met for the category of sex workers”. They included testimony to support this:

"Oh I've had a few instances with work, I once had two guys try and push their way into my apartment, I screamed my head off and managed to push the door closed, another time a client paid then after took out a knife and told me if I didn't give the money back he would stab me, I'm extremely selective with who I see these days because of it" - Transgender Woman, 42, London

“Yes- [hate crime against trans sex workers] happens all the time... I know a girl who was beaten up by two [men] and they tried to hold her down and cut her down below. I also know another girl who was held at gunpoint in south east London in her apartment by a young man. He tied her up with electrical cables and asked her for all her money. Her friend came inside and hit the guy over the head with a baseball bat. Luckily, he didn't shoot or anything, he just ran away” - Transgender Woman, 26, London

- 7.42 Stonewall offered conditional support for inclusion, if it was supported by sex worker communities. They added that they were opposed to the incorporation of sex workers (and other groups) by way of a flexible enhanced sentencing approach (an issue discussed in Chapter 8), if this was not also accompanied by equivalent aggravated offences. This was because such an approach would be contrary to their wider aim of parity and the elimination of hierarchies in hate crime protection.

#### Law enforcement stakeholders

- 7.43 The National Police Chiefs' Council (“NPCC”) did not reach consensus on this matter, but their response highlighted the high prevalence of violence against sex workers, and the barriers to police reporting that sex workers face. For example, they noted that

based on data from 1991 to 2000, working as a sex worker in the UK carried the absolute greatest risk of occupational homicide for women. Five times as many female sex workers were murdered compared to female bar staff in the period.

- 7.44 They also added that “perhaps the most important view comes from ACC Dan Vajzovic, the national policing lead for matter relating to Sex Work, who says”:

As the NPCC lead for Sex Work, I believe that there is merit in recognising the vulnerability of sex workers, the inherent reticence of the sex work community to report crimes to the relevant authorities and the propensity of offenders to target sex workers in both sexual and violent crimes. I believe that it is necessary for public policy to disambiguate between sex work and sexual exploitation/criminality... and that one way in which this can be achieved is to provide enhanced protections where offenders are shown to have targeted criminality against a sex worker because of their occupation.

- 7.45 The Association of Police and Crime Commissioners did not support the recognition of sex workers in hate crime laws saying that “one of their members had highlighted that a number of individuals may have entered sex work due to pre-existing vulnerabilities (e.g. coercion, exploitation, alcohol and/or substance misuse)”. Therefore, “public



agencies should focus on tackling these pre-existing vulnerabilities that led to the individual entering sex work; hate crime laws which protect individuals specifically as “sex workers” could arguably distract public agencies from this focus”.

### Academic responses

7.46 Dr Seamus Taylor was of the view that sex workers satisfied our three criteria, although there was perhaps a question mark over the suitability criterion:

there is an issue of suitability as to whether essential protections [for sex workers] should be reflected in hate crime law or in a separate law which gives parity of consideration to these issues.

7.47 However, Taylor also added that “of the additional characteristics identified for recognition as a hate crime category the case may be strongest in respect of sex workers”.

7.48 Dr Lee Hansen supported inclusion if it was supported by sex workers themselves:

It is important that the voice of sex workers is heard on this question. Do sex workers themselves believe that are in need of hate crime protection? Subject to consideration of such views, it is my preliminary view that sex workers should be a protected class under the hate crime law.

7.49 Professor Mark Walters argued that hate crime recognition was not the right way to address the vulnerabilities of sex workers:

Sex workers remain one of the most vulnerable groups of people to experience violence and abuse. Much more needs to be done at the policy and legislative level to provide better protection and to enhance the rights of individuals who work in this sector. I remain unconvinced that the inclusion of "sex workers" in hate crime legislation will achieve these protections. I am left uncertain that work or trade is a characteristic that is central to group identity.

### Summary of arguments in favour of recognition offered by organisations and professionals

7.50 In summary, arguments in favour of recognising sex workers offered by organisational and professional stakeholders were as follows:

- (1) Sex workers satisfy the three criteria;<sup>29</sup>
- (2) Sex workers face a greater risk of being targeted for crime, particularly violent crime;<sup>30</sup>
- (3) Recognition would tackle the stigma faced by sex workers.<sup>31</sup>

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<sup>29</sup> Galop, One25, TransActual UK, Magistrates Association.

<sup>30</sup> Islington City Council, Manchester City Council, The Sex Worker Research Hub, Stonewall, Trans Actual UK, The VAWG and Hate Crime Team, London Borough of Tower Hamlets.

<sup>31</sup> National Aids Trust, The Sex Worker Research Hub, One25 and SWGfL, who host three helplines: the Revenge Porn Helpline, Professions Online Safety Helpline and Report Harmful Content Helpline.

## Arguments in favour of recognition offered by individuals

7.51 Arguments in favour of recognising sex workers in hate crime laws offered by personal responses were as follows:

- Sex workers are a highly vulnerable group in need of protection.
- Sex workers as a group are stigmatised and discriminated against.
- Sex workers satisfy the three criteria.

7.52 Some consultees were of the view that there was a need for protection but in their support for the addition of sex workers, added caveats such as:

- Providing it would not become a hate crime to counsel or mentor somebody out of sex work or to suggest that sex work is not the right way forward.
- Providing hate crime recognition would not have the effect of legalising sex work.
- Providing people would still be able to criticise the “sex industry”.
- Providing sex workers who have lived experience of violence also agree that protection is necessary.
- Providing an appropriate definition of “sex workers” is reached in the legislation.
- A need for clarity as to how laws would operate, for example, would any attack on a sex worker constitute a hate crime?

7.53 Examples of supportive personal responses included:

- “Yes. Sex workers in particular are often targeted for abuse in their capacity as sex workers, but they are also targeted in the media, by commentators, and in popular culture for ridicule and derision. Such disparaging and dehumanising activity undermines their safety.”
- “Yes, as they are often seen as disposable in our media and are marginalised by society (by a lack of access to financial support, for example), leaving them vulnerable to sex crimes and physical attacks they would not face if they weren't sex workers.”
- “I think the top two (sex workers and homeless people) may be appropriate to be included in hate crime legislation, as both groups are extremely vulnerable and often subjected to assaults and abuse by men who take advantage of their vulnerability and circumstances (for example, look at murders of sex workers by Peter Sutcliffe, Steve Wright and the "Crossbow Cannibal" guy in Bradford and so on - all of these men loathed women and chose to target prostitutes). I think more should be done to keep vulnerable people safe, so I think this would be appropriate.”

## Arguments against recognition offered by organisations

7.54 Arguments against recognising sex workers offered by organisational stakeholders were as follows:

- (1) There should be other priorities in this context such as:
  - Tackling pre-existing vulnerabilities (eg coercion, exploitation, alcohol and/or substance misuse).<sup>32</sup>
  - Ensuring service provision is more inclusive of sex workers.<sup>33</sup>
  - Securing financial support, ensuring access to healthcare and education, providing routes out of “prostitution” and the means of seeking employment without past criminal convictions acting as a barrier.<sup>34</sup>
- (2) Specific protection for sex workers is not necessary if hate crime law adds ‘sex or gender’, alongside existing characteristics.<sup>35</sup>
- (3) Sex work is not an identity characteristic.<sup>36</sup>
- (4) Recognition would normalise “prostitution”.<sup>37</sup>
- (5) Recognition would prevent criticism of the ‘sex industry’/work being done to help people exit prostitution.<sup>38</sup>
- (6) Expansion to other groups beyond the core protected characteristics may risk diluting hate crime laws.<sup>39</sup>
- (7) Rather than new hate crime recognition, there is a need to utilise and strengthen existing sentencing laws.<sup>40</sup>

## Arguments against recognition offered by personal responses

7.55 Several themes were identified in the negative personal responses, such as:

- Recognising “misogyny”/ “sex or gender” in hate crime laws would also provide sex workers with protection, such that a separate sex worker category would not be necessary.

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<sup>32</sup> Association of Police and Crime Commissioners.

<sup>33</sup> London Mayor’s Office for Policing and Crime (“MOPAC”).

<sup>34</sup> A Woman’s Place UK.

<sup>35</sup> Birmingham & Solihull Women’s Aid, The Equality and Inclusion Partnership, Labour Women’s Declaration Working Group.

<sup>36</sup> Nottingham City Council, Christian Concern.

<sup>37</sup> Christian Concern, Nordic Model Now.

<sup>38</sup> LGB Alliance and Christian Concern.

<sup>39</sup> LGB Alliance and Christian Concern.

<sup>40</sup> Nordic Model Now.

- Sex workers might also be protected under existing categories like “transgender”.
- A job is not an immutable characteristic, and discrimination based on a profession is fundamentally different to hatred based on race, gender or sexuality.
- There are other examples of targeted professions such as “traffic wardens”, “police officers” or “bankers”.
- Sex work is largely illegal. It is therefore not appropriate for protection to be based on this characteristic.
- Protection of sex workers in hate crime could be used to prevent people suggesting that sex work is not a legitimate job.
- Protection of sex workers in hate crime could be used to criminalise people who are campaigning against sexual exploitation of women or who are helping women to exit sex work.
- The definition of sex work is not clear, and it could be a vague term if used in legislation.
- Protection could have the effect of “normalising” or “legitimising” sex work.
- Even though sex workers are a vulnerable group who need protection, hate crime is not the way to go about providing this protection.
- Hate crime protection that is based on a situational characteristic could dilute hate crime laws.
- It would be better to make use of the existing sentencing regime (eg aggravating factors in sentencing) rather than create a new hate crime category.

7.56 Other examples of individual comments opposing the inclusion of sex workers included:

- “Sex work is largely illegal and it is therefore not appropriate for protection to be provided based on this characteristic.”
- “Sex workers are overwhelmingly women. Get the protection of women right, and you get the protection of sex workers right.”
- “No. Being a sex worker is not an immutable characteristic, it's a job that can be changed. If you include sex workers as a protected characteristic, then you must include all other job categories. A lot of people hate call centre workers calling them at dinnertime. Perhaps they deserve protection? Or what about business owners who recently are bearing the brunt of anti-capitalist sentiment and associated looting? Surely a hate crime against their perceived wealth? Not to mention pilots who are getting it in the neck about their carbon footprint. Need I go on?”

- “Adding more and more expanded categories serves no-one. Would Peter Sutcliffe get an enhanced sentence for a hate crime? One would hope so - the motivation and intent are the important issue. This can already be dealt with in law as the Sophie Lancaster case demonstrates.”

7.57 A number of negative responses rejected the existence and expansion of hate crime laws in general, largely because of concerns surrounding the impact of these laws on freedom of speech.

### Conclusion following consultation

7.58 As we indicated in our consultation paper, there are significant concerns about the extent of abuse and violence that is directed at sex workers.

7.59 Many groups who opposed recognition, for example a number of women’s organisations who responded to the consultation, did not dispute the degree of violence and abuse directed towards sex workers (indeed, this was often connected to their broader concerns around the legalisation or legitimisation of sex work more generally).

7.60 It is arguable that at least some of the abuse experienced by sex workers occurs partly because offenders perceived sex workers as easy targets. This is particularly the case for street sex workers because they are often working in relative isolation with limited protections. Offenders may also assume sex workers as a group wouldn’t report a crime they had experienced to the police, or if they did they would not be taken seriously. One participant in Campbell’s research noted: “They do it because they think it’s easy, they’ll get away with it and they think we’re scum’ (Jackie, 43)”.<sup>41</sup>

7.61 In the context of our consideration of the characteristic of age in chapter 6, we noted that for the purposes of the demonstrable need criterion, targeting due to vulnerability is potentially distinct from targeting based on hostility (or prejudice). However, the available evidence surrounding the societal prejudice that undoubtedly exists towards older people suggests that it is quite different in character to the explicit stigma and hostility that exists towards sex workers. The testimony of victims outlined in this chapter indicates that the stigma and hostility towards sex workers has been expressly demonstrated by perpetrators of crime. Similar evidence does not exist in relation to crimes against older people.

7.62 In terms of additional harm suffered by sex workers, while we have only limited direct evidence of this, the testimony provided indicates that sex workers change their behaviour as a result of their experiences of crime at work. Several consultation responses also note the deep-rooted stigma that exists towards sex workers. As we observed in our consultation paper, this makes additional harm to primary victims and society more likely to occur. The crime compounds existing stigma and prejudice towards sex workers.

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<sup>41</sup> R Campbell, “Not getting away with it: Linking sex work and hate crime in Merseyside” in N Chakraborti, J Garland (eds) *Responding to Hate Crime: The Case for Connecting Policy and Research* (1<sup>st</sup> ed, 2014) p 55.

7.63 However, while we consider the case for recognition on the basis of our first two criteria to be relatively strong, we do not consider recognition of sex workers in hate crime laws to be a suitable policy course. The primary bases for this conclusion are a general lack of support for inclusion amongst consultees, and more specific concerns about whether a criminal justice-based response would be a suitable way to approach the difficulties sex workers face. In particular we note the following outcomes of our consultation:

- (1) Consultation responses were largely against the addition of sex workers. This reflects the more general opposition to the expansion of hate crime laws that we have seen in response to all consultation questions.
- (2) Those who cited positive benefits emphasised the need to implement hate crime recognition alongside other reforms for any potential positive impacts to be properly realised. This included full decriminalisation of sex work – an issue which is well beyond the scope of this review to consider.
- (3) Those who engage with and support sex workers on a professional basis expressed concerns about locating the solution to violence against sex workers in police practices and the criminal law. These groups argued that sex workers do not necessarily experience police as a protective force, especially as the criminal law also criminalises their work. Therefore, they did not consider hate crime recognition as a particularly helpful move
- (4) Related to the third point, and in contrast with most other characteristics under consideration in this review, there was no strong call for recognition from sex worker organisations or sex worker communities. This suggests a lack of community buy in that would be needed for recognition to be effective.

7.64 As we have noted, some consultation responses also indicated concerns about the legal legitimisation of sex work in any form given their view that it is inherently exploitative and damaging. We do not express a view either way in relation to this contentious subject other than to note it was another basis on which recognition was opposed.

7.65 Given a lack of clear support in consultation for inclusion of this characteristic, we do not consider it appropriate to recommend its formal inclusion in hate crime laws. In reaching this conclusion, we do not wish to detract in any way from the efforts of police forces such as Merseyside and North Yorkshire who have sought to use hate crime recording and monitoring as a means of protecting vulnerable individuals, and encouraging reporting of crimes against them. As we note at paragraphs 7.5 and 7.6, police forces may have wider reasons – principally connected to preventing and detecting crime and maintaining community safety – for monitoring other forms of hate crimes and incidents, and are likely to be best placed to make judgments about these law enforcement considerations.

## **ALTERNATIVE SUBCULTURES**

7.66 Since 2013, Greater Manchester Police (GMP) have recorded hate crimes against members of “alternative subcultures” – in particular, 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 (her boyfriend Robert Maltby was also left for dead but survived). 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.<sup>42</sup>

7.67 Seventeen UK police forces have now followed GMP in recording hate crime against members of alternative subcultures.<sup>43</sup>

7.68 The Sophie Lancaster Foundation defines "alternative subculture" as follows:

Alternative Subculture means a discernible group that is characterised 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).

7.69 In our consultation paper<sup>44</sup> we reviewed the case for inclusion of alternative subcultures in hate crime laws as follows.

### **Demonstrable need**

7.70 In relation to the demonstrable need criterion, we considered three elements:

- (1) Crime experienced by members of alternative subcultures.
- (2) Whether this criminal behaviour is linked to hostility or prejudice towards membership of an alternative subculture.
- (3) The prevalence of crimes based on hostility or prejudice towards alternative subcultures.

7.71 We noted the high-profile examples of criminal targeting of members of alternative subcultures. The murder of Sophie Lancaster and assault of Robert Maltby was a shocking and widely reported case that involved two people who were clearly targeted for violent crime because of their goth appearance.<sup>45</sup>

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<sup>42</sup> *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 Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 1.20.

<sup>43</sup> Sophie Lancaster Foundation submission.

<sup>44</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 320 to 327.

<sup>45</sup> *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051 at [20].

- 7.72 We also noted a violent attack upon two emo teenagers in Folkestone, Kent in 2009<sup>46</sup> and a brutal gang attack launched against Paul Gibbs, a 26-year old goth in Leeds, whose ear was sliced off in the attack.<sup>47</sup>
- 7.73 We cited research by Garland and Hodkinson which suggests that those who belong to alternative subcultures experience harassment and abuse which has the effect of othering them.<sup>48</sup> Drawing on qualitative interviews with 21 respondents, mostly affiliated to the goth scene, Garland and Hodkinson observed that abuse took the form of insults such as “freak!”, derogatory forms of humour, direct accusatory questions, demands, threats<sup>49</sup> and one incident where a goth was told to go “slit their wrists and die”.<sup>50</sup>
- 7.74 However, we noted that this topic is under-researched and so concrete evidence of the victimisation of members of alternative subcultures is limited. Garland, writing about alternative subcultures in the context of hate crime recognition, 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.<sup>51</sup>
- 7.75 As noted at paragraph 7.66, GMP records crimes against members of alternative subcultures as hate crime. The latest full year of reported data, from July 2018 to June 2019, indicates that GMP recorded 104 hate crimes and incidents that were perceived by victims to be based on their membership of an alternative subculture.<sup>52</sup>

### Are these crimes linked to prejudice and hostility towards membership of an alternative subculture?

- 7.76 Judge Russell QC, commenting on the attack that was launched upon Sophie Lancaster and Robert Maltby, said:

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<sup>46</sup> “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/>.

<sup>47</sup> 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, p 169.

<sup>48</sup> 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.

<sup>49</sup> 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, p 618.

<sup>50</sup> 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, p 619.

<sup>51</sup> 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, p 168.

<sup>52</sup> 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/greatermanchester/stats-and-data/hate-crime/hate-crime-and-incident-data-for-april-2019-to-june-2019.pdf>.



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.<sup>53</sup>

7.77 In relation to the attack launched against Paul Gibbs, 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”.<sup>54</sup> And 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?”<sup>55</sup>

7.78 We also observed that Garland and Hodkinson 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”.<sup>56</sup>

7.79 We concluded that there is 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

7.80 The data we cited in relation to the first criterion did not indicate a high level of absolute prevalence. Whilst 104 hate crimes or incidents directed towards members of alternative subcultures were recorded by GMP in 2018-2019, GMP recorded 7483 racist hate crimes and incidents during the same period.<sup>57</sup>

7.81 However, we thought that the relative prevalence of crimes based on prejudice or hostility towards alternative subcultures may be significantly higher than the absolute prevalence. We noted that alternative subcultures are a relatively small group, and that the number of recorded incidents and crimes in Greater Manchester was broadly comparable to those for transgender individuals, for which 150 hate crimes and incidents were recorded by GMP over the same period.

7.82 We also noted 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

7.83 In relation to the additional harm criterion, we considered evidence that criminal targeting based on hostility or prejudice towards membership of an alternative

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<sup>53</sup> Quoted in *R v Herbert, Harris, Hulme, Hulme and Mallet* [2008] EWCA Crim 2051 at [20].

<sup>54</sup> J Garland, “‘It’s a moshers just been banged for no reason’, Assessing targeted violence against goths and the parameters of hate crime” (2010) 17 *International Review of Victimology* 169.

<sup>55</sup> “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/>.

<sup>56</sup> 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.

<sup>57</sup> See Greater Manchester Police, *Hate Crime* (2019) available at: <https://www.gmp.police.uk/police-forces/greater-manchester-police/areas/greater-manchester-force-content/sd/stats-and-data/hate-crime/>.

subculture causes additional harm to the victim, members of the targeted group, and society more widely.

#### Additional harm to the primary victim

7.84 We noted that Garland and Hodgkinson have argued 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.<sup>58</sup>

7.85 In Chapter 14 of the consultation paper we noted that Garland has argued that attacks on alternative subculture participants hurt more than other comparable crimes, commensurate with the increased harm caused by hate crime. According to Garland, this may be because targeted crimes against alternative subcultures can constitute “an attack upon the victim’s core identity”.<sup>59</sup> The idea that membership of a subculture is central to a person’s identity has also been supported by other academics.<sup>60</sup>

7.86 We concluded that it is plausible that additional harm might result if a victim was targeted for crime because of prejudice or hostility towards their membership of an alternative subculture.<sup>61</sup>

#### Secondary harm to others who share the characteristic

7.87 We cited arguments that the criminal targeting of members of alternative subcultures has a significant impact on the feelings of safety and security of the victim’s wider group, and that this causes members of alternative subcultures to avoid certain venues or areas where they feel they might be at a higher risk of being targeted.

7.88 We concluded that the impact on the wider community appears consistent with the secondary impacts of hate crime detailed in Chapters 3 and 10 of the consultation paper.<sup>62</sup>

#### Harm to society more widely

7.89 We concluded that it could be argued that criminal targeting based on hostility or prejudice towards members of alternative subcultures undermines their equal participation in economic, social, political and cultural life.<sup>63</sup>

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<sup>58</sup> J Garland and P Hodgkinson, “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.

<sup>59</sup> J Garland, “‘It’s a moshers just been banged for no reason’, Assessing targeted violence against goths and the parameters of hate crime” (2010) 17 *International Review of Victimology* 159, p 170.

<sup>60</sup> See, eg, P Hodgkinson, *Goth: Identity, Style and Subculture* (1<sup>st</sup> ed, 2002).

<sup>61</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 325.

<sup>62</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 325 to 326.

<sup>63</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 327.

## Suitability

- 7.90 In relation to the suitability criterion, we considered whether recognising membership of an alternative subculture as a hate crime category would prove workable in practice.
- 7.91 In particular, we assessed whether practical issues may arise in connection with the definition of “alternative subculture”. We observed that the Sophie Lancaster Foundation and GMP both use 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 7.68.
- 7.92 In light of the broad nature of this definition, we noted that Garland and Hodkinson have argued that it is unclear which groups would in practice be included, and why.<sup>64</sup> They point out that it is not clear what level of connection a person might be required to show in order to acquire protection under an “alternative subculture” label, and how this connection would be measured. Finally, they argue that there are further questions about which groups count as “alternative”.<sup>65</sup>
- 7.93 We further observed that the non-exhaustive nature of the definition may create future issues when it comes to determining whether their protection is consistent with the rights of others.<sup>66</sup>

## Consultation responses

- 7.94 In our consultation paper we asked the following consultation questions in relation to the recognition of alternative subcultures in hate crime laws:

Consultation Question 18: We invite consultees’ views on whether “alternative subcultures” should be recognised as a hate crime category.

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)

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<sup>64</sup> 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.

<sup>65</sup> 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.

<sup>66</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 327.

- 7.95 A significant majority of personal responses, and a majority of responses overall, were against the recognition of alternative subcultures in hate crime laws.

#### Demonstrable need

- 7.96 Of those consultees who engaged with the questions substantively, some argued that there is evidence that suggests that the demonstrable need criterion is met.

- 7.97 The Sophie Lancaster Foundation acknowledged that “concrete evidence of the precise nature and frequency of the victimisation of people from alternative subcultures is hard to come by, as it is an under-researched topic”. The Foundation also noted that because “hate crimes against alternative subcultures are not currently recorded as a part of the monitored strands, it is difficult to find national statistical evidence.”

- 7.98 However, the Foundation pointed to the high profile targeted and violent attacks on members of alternative subcultures as evidence of a demonstrable need. The Foundation also provided anecdotal evidence:

[A]t every festival and alternative event we go to, people come to talk and sympathise with us for Sophie’s loss, and the strength of the feeling they express is frequently prompted by their fear that they could have shared Sophie’s fate as they too had been victims of unprovoked assaults.

- 7.99 The Foundation attributed the low level of reporting of targeted crimes towards members of alternative subcultures to a lack of confidence in the police to adequately respond:

In fact, Sophie and Robert had been assaulted twice before, and similarly to the responses of those in other demonised groups, had no confidence in how the police would respond and so had not reported it.

- 7.100 The Foundation also asserted that:

The disinclination of alternative people to report hate crime is no surprise when you consider the lack of seriousness that such crimes are frequently treated with by the police, even when repeated violence is involved.

- 7.101 Professor Jon Garland acknowledged that “[u]ntil relatively recently there has been little in the way of firm evidence regarding the nature and extent of the targeted victimisation of alternative subcultures.” However, Garland went on to argue that, from the work he has undertaken in this area, it appears that there is a significant problem relating to the targeting of members of alternative subcultures. Garland further argued that this targeting occurs so often that it becomes normalised:

[I]f you’re a goth, or a metallor or an emo, for example, you are targeted so often that it becomes almost normalised – for many in these groups it’s part and parcel of the way they live their lives. Most of this harassment is so-called low-level verbal abuse, which can occur regularly, with violent assault thankfully rare.

7.102 Garland further argued that the targeting of members of alternative subcultures shares similarities with the targeting experienced by groups currently protected under hate crime laws:

Research has also shown that the targeting of alternative subcultures shares many aspects with that of the targeting of the recognised hate crime victim groups. By that, I mean that the patterns of victimisation – how often it happens (discussed above) and its forms (verbal abuse, harassment/bullying, violent assault) – appear to resemble, broadly speaking, those of the recognised groups. This is important as it indicates that we are probably talking about the same type of crime, but just in a different form.

7.103 On the issue of whether this targeting is linked to a prejudice or hostility that the perpetrator holds towards the victim, Garland argued that:

What evidence there is seems to indicate that these crimes are enacted due to hostility towards visible difference, with the victim ‘othered’ and ‘dehumanised’ in the eyes of the perpetrator. This again seems to resemble the case for the recognised types of hate crime victimisation, broadly speaking, although motivation can vary to a degree between the strands.

7.104 Greater Manchester Deputy Mayor for Police, Crime, Criminal Justice and Fire noted that GMP has recorded crimes against “alternative subcultures” for a number of years and that: “there is, therefore, an evidence base in existence for the need for this characteristic and we would provide support for this characteristic being included”.

7.105 Manchester City Council acknowledged the low numbers of recorded crimes against alternative subcultures, but noted that monitoring of this strand has positively impacted the confidence that alternative subculture groups have in the police:

Greater Manchester Police has been monitoring this strand since 2013, this has supported work with alternative subculture groups and increased confidence from this group. Although numbers of this type of hate crime reports are relatively low the feedback has been that it is a positive inclusion for this group and well received.

7.106 Protection Approaches noted that people who are members of alternative subcultures “face disproportionately higher levels of discrimination, marginalisation, exclusion, and hate-based attacks”. They also observed that alternative subcultures are more likely to face prejudice and discrimination by the criminal justice system when seeking recourse following an identity-based attack.

7.107 Although Index on Censorship were ultimately against the inclusion of alternative subcultures in hate crimes, for reasons explained at paragraph 7.119, they were of the view that there is sufficient evidence of targeting of members of alternative subcultures to establish a demonstrable need:

[W]hilst evidence about the precise nature and frequency of victimisation of alternative subculture groups is limited and largely anecdotal, there is enough to support the idea that members are being targeted for having particular characteristics and cultural preferences. Indeed, the testimony of various members of ‘alternative subcultures’ relating to regular verbal insults and bullying is troubling

and it speaks to a culture in which such members feel othered from the main body of society. In future, Index on Censorship would suggest a concerted effort, across the UK, is made to record and report evidence of such behaviour so that there are more tangible numbers to review on the matter. That said, we are satisfied that 'alternative subcultures' satisfy this criteria as proposed by the Law Commission.

7.108 A number of personal responses cited high profile cases as evidence of targeting of members of alternative subcultures, such as the murder of Sophie Lancaster, and some consultees provided personal experiences in support of inclusion. For example, Kerry Green said:

Yes. As someone who has been part of an alternative subculture, I can confirm I have been subject to verbal abuse and discrimination. I also know several people who have been attacked and physically abused based on their subculture.

7.109 However, some consultees were of the view that there is insufficient evidence to establish a demonstrable need for adding alternative subcultures in hate crime laws.

7.110 The Deputy Police and Crime Commissioner for Nottinghamshire was supportive of "the consideration for inclusion of subcultures" but added that "the local recording of hate crime in Nottinghamshire does not currently provide a suggested demonstrable need."

7.111 London Mayor's Office for Policing and Crime ("MOPAC") did not support the addition of alternative subcultures, noting that:

hate crime legislation should be based on protected characteristics not lifestyle choices. There should be strong penalties for bullying in these cases, but this is not hate crime.

7.112 Nottingham City Council also expressed doubt:

While Nottinghamshire Police does recognise 'alternative subcultures' as a category of hate crime, we have not seen enough use of this to indicate that this meets the criteria set out by the Law Commission. Our extensive consultation on the local Hate Crime Strategy also did not raise any issues relating to this.

#### Additional harm

7.113 The Sophie Lancaster Foundation focused on the idea that targeted crimes against alternative subcultures can constitute an attack upon the victim's core identity, and thus cause additional harm to the primary victim:

People who belong to alternative subcultures are just being themselves. They are not 'adopting' fashion or behaviours, they are living their life in a law-abiding way, dressing in a way that feels right to them and just being who they are. Hate crime is considered to have greater psychological impact and do more harm to the victim than other forms of crime, because it strikes at the heart of who you are.

7.114 Similarly, Professor Mark Walters noted that:

There is some cogent evidence to suggest that many of those who belong to an alternative subculture hold a group characteristic which is central to how they see and experience their identity. There is also evidence that certain subcultures are the targets of disproportionate levels of violence which is likely to have additional (distinct) harms. For these reasons, I believe that alternative subculture could legitimately be added to the list of characteristics under hate crime legislation.

7.115 The Sophie Lancaster Foundation argued that targeting of members of alternative subcultures causes additional harm to the wider group because it impacts their feeling of safety and results in them altering their behaviours in order to avoid such targeting:

It is undeniable that hate incidents and crime have a collective impact on others who share the targeted characteristic and therefore commit a secondary harm. Sophie's murder significantly impacted on the feelings of safety in alternative subcultures, particularly in the Goth community. It also acts a reminder to those in the community who have suffered from unprovoked assaults that what happened to Sophie could have happened to them. This fear plays a part in changing behaviours or at the very least takes away feelings of security.

We frequently hear at events or from emails or from posts on our social media, that people have had to change their dress or behaviour since they were too afraid to be themselves. When you actually weigh up the importance of what is being said, we are living in a society where you can't dress in certain clothes or have a certain hairstyle or a certain 'look' without the fear, or reality, of attack. When you feel the only option to keep safe is to persistently reject who you are, psychologically that denial of self and the subordination of identity characteristics, is very damaging.

7.116 Garland also noted this "ripple effect" that spreads to the wider targeted group when a hate crime is committed, which can cause concern and fear in that community:

From the research into the targeting of alternative subcultures it seems as though there is the same ripple effect in these communities too, with, for example, the murder of Sophie Lancaster causing widespread shock and distress among them.

7.117 The Sophie Lancaster Foundation argued that targeting of members of alternative subcultures also causes additional harm to society more widely because prejudicial assumptions about these groups can impact their education and careers:

There are constant assumptions about people, based on how they look: they are drug users, alcoholics, criminals. They have no morals. When society judges in this way, how can it not affect a person's education, career and life prospects when people with these views are making decisions that affect your life?

7.118 Index on Censorship agreed that there is evidence to suggest that membership of an alternative subculture forms a central part of an individual's identity and that they therefore experience additional harm when subject to targeted crime:

Index on Censorship agrees that there is persuasive evidence, from both members and academics, that membership of a subculture is central to the identity of the

individual. As such, attacks on the specific characteristics of that subculture may be felt as attacks on identity and affect self-worth and self-confidence.

7.119 However, Index on Censorship were of the view that members of alternative subcultures do not experience the same additional harm experienced by groups who are currently protected under hate crime laws because they have not experienced the systematic or historic marginalisation that most of the current or proposed protected characteristics have.

It is difficult, however, to argue that ‘alternative subcultures’ are the subject of additional harm in the sense of systematic or historic marginalisation in the same way that most of the current or proposed protected characteristics have been. This is particularly true when considered against historic racial, religious, transphobic and homophobic persecution or violence and prejudice against sex workers and the homeless.

### Suitability

7.120 The Sophie Lancaster Foundation acknowledged “the issues around the practical considerations that might arise in connection with the definition of ‘alternative subculture’” but ultimately said that they “find it difficult to believe that a workable and comprehensible definition could not be developed.”

7.121 Garland noted that “[t]here is certainly evidence that alternative communities are indeed communities, in the sense of them being clearly-defined, tight-knit and sharing cultural lifestyles (in terms of clothes & appearance, preferred music and social venues, and indeed perhaps a shared ‘life philosophy’ too)”. However, Garland acknowledged the practical issues that may arise when defining “alternative subculture” for the purposes of hate crime laws:

what’s less clear is the where we draw the line with regards to what qualifies as an ‘alternative subculture’ and what doesn’t. While I can see that goths, emos, punks and metallers – the four that are often listed as typifying such subcultures – should be included in the list, there is also an argument that others (especially as there is some evidence that that they have a history of being targeted due to their identity too), such as mods, who while not looking ‘strikingly different’, should nevertheless be included too. If that were to happen then we once more have to face the ‘age old’ debate that blights the concept of hate crime more broadly, which concerns where we can draw these fairly arbitrary lines that include some and exclude others, the ethics of doing so, and who has the moral authority to do this anyway.

7.122 Despite these practical issues, Garland was ultimately of the view that alternative subcultures should be protected under hate crimes laws:

I nevertheless think that alternative subcultures should be recognised as a hate crime victim group – if perhaps for no other reason than everyone has the right to live their life free from harassment and abuse, and if their victimisation matches that of the recognised groups and the group fits the ‘moral framework’ of a hate crime victim group too, then they should be included.



7.123 In contrast, Index on Censorship were of the view that the suitability criterion was not satisfied, and they expressed particular concern with whether extending protection of alternative subcultures would be workable in practice:

Any definition of 'alternative subculture' would, by its very nature, have to be broad enough to include any group that shares similar traits. Indeed, the Sophie Lancaster Foundation adopts a non-exclusive definition that is focused on groups with 'a strong sense of collective identity'. This definition, and any other like it, is likely to cause ambiguity and confusion as to the law. If the public is unsure about what is considered an 'alternative subculture' by the courts, they are more likely to avoid expressing opinions and partaking in legitimate dialogue. This would result in an unacceptable chilling effect on freedom of speech.

In terms of enforcement, a broad definition raises difficult questions about what level of connection to an alternative subculture a person would need to have to be considered a member, how this connection would be measured in reality and how the police and courts will identify and categorise such membership. Such questions only serve to augment the ambiguity surrounding the definition of 'alternative subcultures'.

7.124 Personal responses that were against the inclusion of alternative subcultures in hate crime laws expressed the following arguments:

- (1) Being a member of an "alternative subculture" is a "lifestyle choice". For example:

No, this is a lifestyle choice. As a former goth and emo, I never expected everyone to be kind to me or accept my identity or appearance for work I would clean/scrub up to a more neutral look.

- (2) Being a member of an alternative subculture can be transient.
- (3) The addition of "alternative subcultures" would be too broad.
- (4) The addition of "alternative subcultures" would dilute hate crime laws. For example:

There is academic literature that critiques the expansion of hate crime and some that supports this. If hate crime expands too broadly then it's no longer distinct from other crimes.

- (5) The term "alternative subculture" is too vague and would be impossible to define. For example:

No. Subcultures change over time and space and cannot be easily defined. We have existing laws against committing crimes that need to be upheld and enforced, rather than adding ever more categories.

- (6) There is a risk that violent or illegal groups might be covered under the rubric of "alternative subculture", such as paedophile groups. For example:

This risks the ludicrous situation of criminally based lifestyles falling under these laws. For example, paedophilia loving groups could say they are a subculture and be covered. Violent admiration groups, violent football supporters could all legitimately argue they are a subculture etc

and:

I think consideration would be needed for each alternative sub-culture, rather than a mass approval. For example, neo-nazism or extremist subgroups should not be protected.

- (7) Existing sentencing law is sufficient to respond to cases such as the murder of Sophie Lancaster.

7.125 Several organisations expressly noted that they were conflicted or unsure on the addition of alternative subcultures.

7.126 SARI said:

As a partnership we have mixed views on this one. Some say ‘no’ because it is something that a person chooses, and it may be an identity that can be changed at some point and may well be temporary. Others felt it is like Religion and Belief and that it is really fundamental to their identity. We remain undecided. We also feel it could difficult to prove. Again, it could dilute the purpose of this legislation which is to protect fundamental identities that people have no choice over.

7.127 TransActual UK were in principle in favour of widening protection but expressed concern that a broad definition of “alternative subculture” could result in groups with harmful views being protected under hate crime laws. TransActual UK pointed to New South Wales, where it has been held that paedophiles fall under the protection of their hate crime laws,<sup>67</sup> which they described as “a clearly perverse result and entirely against the spirit of the law.” They added:

We would suggest in particular that no group or individual should be protected if they discriminate against or cause harm to others, as this could allow them to then seek enhanced legal protection themselves. As such, any right to a certain subculture being protected by law should stop at the point where the individual or the subculture seeks to or in fact does inflict harm on others.

7.128 The Welsh Government also raised concerns about the implications of an expansive definition of “alternative subculture”:

A clear definition would need to be developed as part of any recommendation going forward. The definition included in 14.68 may unintentionally include many other groups which could even include common perpetrators of hate crime. This needs careful consideration before any proposals for inclusion in the hate crime legislative regime.

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<sup>67</sup> Discussed at paragraph 3.11 of Chapter 3.

## Conclusion following consultation

- 7.129 We recognise that criminal targeting of members of alternative subcultures occurs in England and Wales, and that in many cases this is motivated by hostility or prejudice towards the victim's membership of that group.
- 7.130 We understand the strongly held desire amongst victims and their supporters to have membership of an alternative subculture explicitly protected in hate crime laws and we acknowledge that the criminal targeting of members of alternative subcultures shares similarities with the deliberate targeting of groups that are currently protected by hate crime laws.
- 7.131 We therefore accept that the "additional harm" criterion is met in respect of alternative subcultures. The work of academics such as Garland, the testimony we have heard from the Sophie Lancaster Foundation and other individual responses powerfully demonstrate the way in which members of alternative subcultures experience these crimes as an attack on their core identity, and this in turn causes wider fear amongst the affected community.
- 7.132 However, we are of the view that the available evidence of this criminal targeting does not establish a strong demonstrable need to extend protection to this group. A number of consultees acknowledged that there is a lack of concrete evidence that this criminal targeting is prevalent, despite 18 police forces now recording hate crimes and incidents perpetrated against members of alternative subcultures. For example, the Deputy Police and Crime Commissioner for Nottinghamshire and Nottingham City Council noted that local recording of such crimes and incidents by Nottinghamshire Police does not indicate that the demonstrable need criterion is met.
- 7.133 A number of issues also arise around the applicability and appropriateness of the hate crime framework to deal with this offending.
- 7.134 We are mindful of the significant concerns that have been raised in relation to the suitability criterion. In particular, that a definition that is sufficiently broad to capture the intended groups could result in potentially harmful consequences. As noted by some consultees, groups such as paedophiles or extremist groups could plausibly fall within a broad definition of "alternative subcultures".
- 7.135 Finally, a clear majority of responses were against the inclusion of alternative subcultures in hate crime laws, suggesting there is a lack of clear community support for the inclusion of this group.
- 7.136 We therefore do not recommend that alternative subcultures be recognised in hate crime laws. We consider that existing sentencing guidelines can adequately reflect the nature and severity of the offending. We also recognise the efforts that police are already undertaking to record and monitor crimes that are targeted at members of alternative subcultures.

## HOMELESSNESS

7.137 Homelessness charity Crisis describe three main types of homelessness in England and Wales – rough sleeping, statutory homelessness and hidden homelessness.<sup>68</sup> 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. There are also people who are at risk of homelessness, including people with low paid jobs, those living in poverty and people living in poor quality or insecure housing.

7.138 As with sex work, being homeless is not a criminal offence in itself. However, there are offences in the Vagrancy Act 1824 that criminalise forms of conduct associated with homelessness and rough sleeping. These include:

- Begging, contrary to section 3, which carries a maximum fine of £1000; and
- Forms of “sleeping out” and “being on enclosed premises for an unlawful purpose” may be criminalised by section 4.

7.139 The trend has been for declining numbers of prosecution of these offences in recent years.<sup>69</sup>

7.140 The Anti-Social Behaviour, Crime and Policing Act 2014 also provides local councils and public bodies the right to challenge rough sleeping and anti-social behaviour. through measures such as criminal behaviour orders, dispersal powers, and civil injunctions.

7.141 The National Police Chiefs’ Council and Crisis recently developed guidance for police forces on practical alternatives to the use of enforcement measure against people experiencing homelessness.<sup>70</sup>

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<sup>68</sup> Crisis UK website, *About Homelessness* (2021), available at <https://www.crisis.org.uk/ending-homelessness/about-homelessness/>.

<sup>69</sup> See House of Commons Library, “Rough Sleepers: Enforcement Powers (England)” (9 April 2021) *Briefing Paper Number 07836*, p 3, available at <https://researchbriefings.files.parliament.uk/documents/CBP-7836/CBP-7836.pdf>.

<sup>70</sup> National Police Chiefs’ Council and Crisis, *From enforcement to ending homelessness: How polices forces and local authorities and the voluntary sector can best work together* (2021), available at: <https://www.crisis.org.uk/media/245310/from-enforcement-to-ending-homelessness-full-guide.pdf>

7.142 No police force in England and Wales currently recognises homelessness as a hate crime characteristic. However, the United States jurisdictions of District of Columbia,<sup>71</sup> Florida,<sup>72</sup> Maine,<sup>73</sup> and Maryland<sup>74</sup> have done so.

7.143 In the consultation paper, we applied our three criteria to the potential recognition of people experiencing homelessness in hate crime legislation.

7.144 In relation to demonstrable need, we found evidence that crime based on prejudice or hostility towards people experiencing homelessness is prevalent in that there is evidence that homeless people are highly disproportionately targeted for certain forms of crime.<sup>75</sup> We noted in particular a 2016 study published by Crisis which focused on rough sleepers' experience of criminal targeting in England and Wales. This study showed very high levels of abuse and violence experienced by participants in the study.<sup>76</sup>

7.145 In relation to additional harm,<sup>77</sup> we found that –

- (1) The harm caused by crime based on prejudice/hostility towards people experiencing homelessness is consistent with the increased harm associated with other primary victims of hate crime.
- (2) Collective harm might be caused to people experiencing homelessness by individual criminal targeting against members of this group.
- (3) Societal harm might be caused because crime based on prejudice or hostility towards people experiencing homelessness might entrench the stigma that this group already experiences. As with sex workers, this might serve to reinforce the outsider status of this group and cause further isolation and withdrawal – undermining their equality in society

7.146 In relation to the suitability criterion,<sup>78</sup> we identified three possible concerns:

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<sup>71</sup> Code of the District of Columbia § 22-3701(1).

<sup>72</sup> Florida Statutes, § 775.085.

<sup>73</sup> Maine Revised Statutes Title 17A § 1151(8).

<sup>74</sup> Maryland Code, Criminal Law § 10-30.

<sup>75</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 329 to 332.

<sup>76</sup> See 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. This study included 458 homeless people, three quarters of whom had experienced anti-social and criminal behaviour on the streets. More specifically, 30% of reported being deliberately hit or kicked in the past 12 months; 45% had been threatened or intimidated with (potential) violence in the last year; 31% had experienced things being thrown at them; 6% disclosed that they had been sexually assaulted, interfered with or attacked in the last 12 months; 7% said they had been urinated on in the past year; More than half (51%), reported having had things stolen from them when sleeping out; 20% had their belongings deliberately damaged or vandalised; More than half (56%) had experienced some form of verbal abuse or harassment in the past 12 months.

<sup>77</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 332 to 336.

<sup>78</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 336 to 337.

- (1) Hate crime recognition might contribute to the normalisation of homelessness as a permanent or inevitable feature of society (Crisis had noted this concern in our meetings with them).
- (2) The risk of homeless people who have perpetrated a crime against another homeless victim being caught by this legislation – potentially compounding the issues homeless people face, rather than addressing them.
- (3) Double counting concerns in sentencing - since vulnerability is already an aggravating factor, and it has been observed that people experiencing homelessness can be targeted on this basis, and judges already reflect this as aggravating feature in sentencing.

7.147 We did not make a provisional proposal on the inclusion of people experiencing homelessness in hate crime laws, and instead invited consultees' views.

### Consultation responses

7.148 We asked the following questions of consultees:

#### Consultation Question 19

We invite consultees' views on whether "people experiencing homelessness" should be recognised as a hate crime category.

#### 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)

7.149 There was more support for recognising homeless people in hate crime laws than for recognising sex workers, alternative subcultures or philosophical beliefs.

7.150 Nonetheless, there were still some specific objections to the recognition of homeless people in hate crime legislation, and a significant number of general objections to hate crime laws and their possible expansion.

7.151 Organisational responses were mixed in their responses, and we outline the key issues they raised from paragraph 7.155 onwards.<sup>79</sup>

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<sup>79</sup> Organisational stakeholders who responded positively to the inclusion of people experiencing homelessness in hate crime laws included: Crisis, Inclusion London, Galop, The Government Independent Advisory Group

7.152 Though not submitted as part of our consultation, law firm Hodge Jones & Allen published a blog on their website, referencing our consultation and expressing support for the protection of homeless people in hate crime legislation, noting:

It is our experience at Hodge Jones & Allen that the homeless are deprived of the very basic protection of having a home and are more likely to be targeted for being homeless and accordingly as a minimum we consider that offences against the homeless ought to be protected by hate crime law.<sup>80</sup>

7.153 Following publication of our consultation paper, Andrew Arden QC and Justin Bates wrote an article considering the question we raised in the *Journal of Housing Law*.<sup>81</sup> In it, they noted that homeless people already underreport crime and that hate crime protection is unlikely to change that.<sup>82</sup>

7.154 They expressed concern about protecting homeless people in hate crime laws on the one hand, and criminalising rough sleeping under section 4 of the Vagrancy Act 1824 on the other. They argued that this was particularly inconsistent, because hate crime protection was being proposed with “rough sleepers uppermost in mind”. They concluded:

Would making attacks on rough sleepers or other homeless people [hate crimes] do anything to eradicate homelessness? It is highly unlikely to do so on its own – consider that the first Race Relations Act was in 1965 and look at where we are(n’t) – but it might be a small step in the right direction, it might do some amount of good for those who have to dine on scraps rather than choice dinners, and it is worth doing for all that, even if, as housing practitioners, we have considerable cause to doubt that any such Law Commission recommendation will be adopted by government.<sup>83</sup>

### Organisations working with people experiencing homelessness

7.155 Two organisations that work directly with homeless people – Crisis and Expert Link – provided detailed responses which are summarised below.

7.156 Crisis argued that homeless people should be protected in hate crime laws. This represented somewhat of a shift from their previously expressed view, which was

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on Hate Crime, Expert Link, Manchester City Council, Islington City Council, Bent Behind Bars, iSEA, the Welsh Government, Magistrates Association.

Organisational stakeholders who responded negatively included: SARI, Deputy Police and Crime Commissioner for Nottinghamshire, Office for Police and Crime Commissioner for Northumbria, Christian Concern, APCC, Resolve West, Nottingham City Council, MOPAC (GLA).

<sup>80</sup> Hodge Jones & Allen, “Should the homeless be protected by hate crime law?” (October 2020), available at <https://www.hja.net/expert-comments/opinion/housing-rights/should-the-homeless-be-protected-by-hate-crime-law/>.

<sup>81</sup> A Arden and J Bates, “Homelessness and Hate Crime” (2021) 24(1) *Journal of Housing Law* 1.

<sup>82</sup> A Arden and J Bates, “Homelessness and Hate Crime” (2021) 24(1) *Journal of Housing Law* 1, 3.

<sup>83</sup> A Arden and J Bates, “Homelessness and Hate Crime” (2021) 24(1) *Journal of Housing Law* 1, 4 to 5.

more equivocal. Crisis cited recent consultations held with people with lived experience of homelessness as one of the key reasons for this change.<sup>84</sup>

7.157 Some of the key issues that Crisis drew out in their response were:

- (1) Experiences of violence: Half of the participants (8 people) had experienced violence and abuse which they perceived as being a result of their homelessness. The remaining participants had witnessed or supported people who had been victims of such attacks. One participant described how a group of young adults set fire to someone who was sleeping rough because they 'didn't like a homeless man'. Another participant described a conversation with someone sleeping rough, saying;

“...he was showing me the marks on his body and he said he was being attacked for being homeless. And his words were, why do they attack us, why do they think homeless people are scum?”

Crisis noted that this “further corroborates the existing evidence of the prevalence of targeted attacks on people who are homeless from members of the public”.

- (2) The dehumanisation of homeless people: Crisis noted that participants drew parallels between their experiences and those of other characteristics currently included in hate crime laws. There was a feeling that, because misconceptions surrounding people who are homeless are so prevalent amongst members of the general public, homelessness was already perceived as an aspect of identity.

They felt that people saw 'homelessness' when they saw a person who was homeless, rather than an individual's identity. This perception they argued, ultimately leads to it being deemed acceptable to harm someone in that situation. The response said this has wider implications for anyone who is perceived to be homeless, leading to an increased likelihood of additional harm to anyone in this situation.

- (3) Support for the proposal amongst participants: Of the 15 people with whom Crisis and Cardboard Citizens consulted, 12 participants directly stated that they would support changes in the law to this effect. Just one participant said they did not support the change because it does not tackle the root causes of attacks against people who are homeless but rather seeks to “alleviate” the symptoms.

For those participants that supported changing the legislation, their justifications were largely based on the factors motivating abuse and violence against people

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<sup>84</sup> Between November 2020 and January 2021, Crisis and Cardboard Citizens spoke to 15 people with lived experience of homelessness in England over six separate sessions. Four participants were Crisis staff members from the Crisis lived experience staff network. Participants had experienced different types of homelessness including rough sleeping, sofa surfing, and living in hostels. Half of the participants across the groups had experienced abuse or violence from members of the public when homeless. Of the remaining participants, some had witnessed other people being attacked or abused when homeless, and the Crisis staff network members had all also supported Crisis clients with similar experiences.



who are homeless. The dehumanisation of people facing homelessness, and the power disparities experienced, led participants to feel that extending hate crime categories would be a step towards redressing these factors.

Most participants felt that the inclusion of homelessness as a hate crime category would give a sense of empowerment to individuals. This was felt both in that an individual could defend themselves in the case they were a target of a hate crime, and in the wider sense that a change in the law would facilitate cultural change over time by challenging the perception and status of people who are homeless in society.

Crisis noted that participants recognised the limits of hate crime laws and the fact that they “were not a panacea”, but that “even with hesitations about the extent of their impact, they (participants) still argued that extending hate crime categories to people who are homeless would be an important step forward in establishing rights and protections for them”.

According to Crisis, this indicates that the value of hate crime laws in recognising unequal treatment can outweigh the known limitations of the laws. Crisis said that participants expressed genuine hope that the changes would result in meaningful impact in several ways, including the fact that it would be a requirement for hate crimes against people who are homeless to be recorded. There was a hope that this would then lead to a better understanding of what people experienced and efforts to reduce hate crimes. One participant stated: “I guess the other side of the coin would be if these crimes were recorded, if it was monitored, then I expect there should be some kind of effort to try to reduce them and so that could be a trigger to some sort of process to look at homeless, or homelessness, in a more thorough way”.

- (4) Wider legal context: Crisis also emphasised homeless people’s access to wider rights-based laws, saying that:

People who are homeless should therefore still be entitled to be protected from discrimination and to enjoy where they live peacefully, in accordance with the Human Rights Act (1998), even if where they live is a public or shared space, given the interplay of structural barriers which detracts from homelessness being a ‘choice’.

As set out in this submission, extending hate crime law categories was felt by participants in the consultation to be a significant way in which people who are homeless could access rights to not be discriminated against.

- (5) Further steps: Crisis’s response highlights that participants were also mindful of the fact that a change in the law would require practical implementation, which could introduce several opportunities to help progress change.

Participants thought that training and education of the police to better understand homelessness was of paramount importance to make hate crime laws effective. Two participants also highlighted that this would be needed for staff in homelessness services, including hostels.

Crisis emphasised that alongside extending hate crime categories to people experiencing homelessness, Crisis is calling on the Government to repeal the Vagrancy Act 1824 to ensure no one is criminalised and treated inhumanely for sleeping rough.

7.158 Crisis also drew attention to the impact that the pandemic has had on increased levels of homelessness, and therefore emphasised the need for pragmatism. In this sense, their pre-consultation policy position has shifted slightly:

It is therefore right that, whilst Crisis continues to campaign for the policy changes to end homelessness in Great Britain altogether, we are alert and responsive to immediate measures that can make a difference to the lives of people who are experiencing homelessness now. For this reason, we made the decision to consult with people with experience of homelessness regarding the proposed extension to hate crime categories, to understand if the change was something that people felt would make a difference to the lives of people facing homelessness, particularly given previous Crisis research showing that people sleeping rough experience violence and abuse as a matter of course.

7.159 Crisis added that the “homelessness” hate crime category could use the existing legal definition of homelessness under Section 175 of the Housing Act 1996 in England and Section 55 of the Housing (Wales) Act 2014.

7.160 Expert Link identified themselves as a “peer led organisation championing the voice of people with lived experience of multiple disadvantages, including homelessness, mental health issues, substance misuse, offending and domestic violence and abuse.” Their submission was developed by their National Expert Panel, made up of people with lived experience of disadvantages from across England, all of whom are closely linked to the communities that Expert Link serve. Their membership spans across Bedford, Blackpool, Croydon, Durham, Hertfordshire, Leeds, London and Sheffield.

7.161 Their response argued that people experiencing homelessness should be recognised as a hate crime category, because they satisfy the three criteria we outline in the paper.

7.162 Expert Link also note that evidence around this area can be difficult for organisations to gather. The evidence they have pertains specifically to people experiencing rough sleeping, although they said it should be noted that locations surrounding supported housing projects or temporary accommodation can often be targets of crime.

7.163 Expert Link’s response includes testimony from those with lived experience of homelessness and targeted crime. Quotes from members of the panel, and their discussion in relation to the criteria is summarised below.

7.164 In relation to demonstrable need, Expert Link stated that it is difficult to demonstrate the prevalence of crime based on prejudice towards people experiencing homelessness, given that police do not routinely collect this information.

7.165 Expert Link argued that because of the nature of some of the crimes directed at homeless people, there is likely to be a large number of victims who do not discuss incidents, let alone report them to the police. One participant with lived experience

said “I’ve never told anyone. It was only when I spoke to Dr [PSYCHIATRIST]. Who you going to tell? No-one.”

7.166 Expert Link’s National Advisory Panel highlighted several examples of crimes based on hostility or prejudice towards people experiencing homelessness, either directly experienced or otherwise. Crimes outlined included violence, assault, rape and murder. Some people shared stories of when they had been targeted and kidnapped. It was also noted that incidents relating to sexual violence are likely prevalent and under-reported to police:

“Three people were killed in the city because they were homeless. They were targeted because they were rough sleeping. There’s no doubt about it. And there’s been loads of other beatings and that kind of stuff.”

“The amount of people who have been convicted for assaulting or doing whatever to people on the streets, I don’t see how it’s in question really. Everything ranging from throwing litter at people, urinating on them, it’s just well known. I don’t think there can be any doubt.”

“I remember when I was on the street, I just got kicked while I was rough sleeping. That’s all.”

“I know one bloke got smashed, he slept on the [LOCATION] with his friend. I asked where his friend was, he got beaten up with a four by two.”

“When I was on the street I was kidnapped by Travellers and forced to work for a few weeks. I know a lot of people that’s happened to, a hell of a lot of people, and I know it still happens. One of the blokes I was with had been there for 9 years.”

“I was kidnapped off the street ... And I was kept in a place for about 5 days and raped by a lot of different men ... That’s probably because I was homeless. They might have been abducting other people, I don’t know, but I suspect it was because I was homeless.”

“A lot of the women I work with, they report men going up to them, exposing themselves, telling them to touch it. ‘If you touch it, I’ll give you a fiver.’ I don’t think if they weren’t homeless that would happen.”

“Other women, waking up, and the same man that is stalking, being at the end of where they are sleeping, intimidating them. It’s creepy. I think there’s a lot of sexual violence.”

7.167 Expert Link said it was clear that as well as there being a high prevalence of crimes committed towards people experiencing homelessness, and in particular rough sleeping, these crimes are motivated by prejudice and hostility. For example, an individual stated:

“When we talk about somebody sleeping in a doorway and someone pissing on them, or kicking them or setting fire to tents, that doesn’t happen in everyday life. If you see a fight in the bar someone doesn’t just walk up to someone and punch them or kick them, there’s usually been an altercation or something to upset the other

person. When we're talking about hate crime, if somebody has a belief in regards to race what I've perceived when I've received hate crime due to my ethnicity, it's not been because I've said something to upset them or offend them, it's been purely because of the colour of my skin, and that's how I've perceived it, there's been nothing to trigger why somethings occurred. And that's what's happening with rough sleeping."

7.168 Expert Link noted that for some people, tents are a symbolic representation of homelessness. Where these are targeted, it is clear that this is based on prejudice or hostility towards people rough sleeping. Quotes they provided in support of this included:

"We went through a phase, where a lot of service users we worked with, people had tried to set their tents on fire. That tent symbolises homelessness and rough sleeping, and someone's setting fire to it."

"It is rough sleeping. It's there. It's very easy to identify someone that's rough sleeping. When someone sets fire to tents, hits people, calling names to someone when they're walking past because they're sat on the floor begging, that is targeting someone purely because they are homeless, but in essence homeless on a street level. It's not because they've been offending, it's because of that person's circumstance."

7.169 Expert Link further argued that prejudice is likely to be manifested by people perceiving people experiencing homelessness as an easy target of crime, with little ramifications for any actions:

"Society sees homeless people or rough sleepers as low lives and [they] are vulnerable, and easy to target, because they have got no network to support them in society's eyes. They haven't got a network to support them or guard them or protect them because they're a loner sat in a tent or begging."

"When you're homeless you're an easy target. Because it's not like you're husbands going to miss you coming home and report you missing. No-one's going to know. And I think it is done on purpose."

7.170 In relation to additional harm, Expert Link argued that in addition to the direct and instant harm caused to an individual who is the victim of hate crime, people experiencing homelessness suffer additional, compounding harms. Similar to hate crimes based on other protected characteristics, the existence of crimes against people experiencing homelessness can lead to that person experiencing shame:

"One of the issues is shame, when you suffer it, whether it be your gender, your sexuality, your age, your race, everything."

7.171 Expert Link said that the clearest, long-term impact is the effect hate crimes can have on people's mental health:

"I was diagnosed with complex post-traumatic stress disorder. Until I got diagnosed, my life was totally chaotic. Since I've been diagnosed I've worked out why I don't like strangers, why I'm scared if the door goes, why if someone who looks like that

person comes close I get all panicky. So even though it was years ago, it has had a huge effect on how I relate to other people, and I wouldn't want to go out of the house. I don't like talking to people, and being depressed... It's a lasting impact."

7.172 Expert Link argued that beyond the direct effect on an individual, the pattern of violence against people experiencing homelessness can lead to other homeless people taking actions to avoid similar experiences. For example, people's sleep patterns can be affected if they avoid particular areas due to fear of violence:

"People start travelling on public transport. Thus they could be nicked for travelling on public transport plus they're sleeping patterns could be worse, they won't be getting as much sleep as they would get, and thus that impacts on their mental health."

"There was one guy I knew, he would walk all night, and then sleep in the day when he could. It is that fear factor, of violence especially."

7.173 In relation to suitability, Expert Link felt the extension to homeless people would be suitable and that the logic underpinning the inclusion of existing protected characteristics also applies to people experiencing homelessness:

The mechanisms that underpin how homeless people are treated are almost exactly the same as other things like race. I know it's an extreme thing, but I've known people who have been beaten to death in [CITY]. It's an extreme thing. Racism is a thing and things are moving with it, and I think the law is a part of that. Changes in the law is part of society's views changing on a theme.

7.174 Expert Link observed that the consultation raised the concern that including people experiencing homelessness as a category may inadvertently lead to the criminalisation of people experiencing homelessness themselves. However, they felt that the risk of this was low because of the high evidence threshold in hate crime, and the investigative work conducted in individual cases to support this threshold:

If we have an individual that's homeless that attacks another individual that's homeless, there'd need to be significant evidence to convict somebody on that hate crime, rather than just because this person is homeless it's a hate crime.

7.175 In relation to potential benefits of recognition, Expert Link noted that additional legal protections were likely to reduce the prevalence of hate crime and increase the self-esteem of individuals who know that the law is 'on their side.'

"It will make people feel safer to know that the law is on their side."

"I'd feel like the law is on my side. Rather than day in, day out, feeling criminalised due to me drug use, due to sleeping in doorways, due to this and that."

#### Responses from law enforcement agencies

7.176 The NPCC expressed no clear view on the addition of people experiencing homelessness, noting a lack of data:

There is no consensus between chief officers on this question so we would remain neutral. We do not know of any force that records homelessness hate crime. It would be helpful to include any data on the number of crimes or research on such victims. No force had local data although some would be open to including such reported crimes in an open 'Other' category that they include. We would recognise that homeless people do suffer hostility but are very unlikely to turn to authorities when they do.

7.177 The APCC response suggested that addressing the underlying causes of homelessness would be a better focus for government:

APCC members who got in touch with us with regard to this Review believe that public agencies should focus on the pre-existing vulnerabilities that cause individuals to become homeless, with a view to enabling them to escape homelessness. It may therefore not be helpful for individuals to be protected in law specifically as people experiencing homelessness. It has been suggested to us by one of our members that where a defendant has been found to have targeted an individual due to a specific vulnerability, this could be reflected by flexibility in sentencing.

#### Arguments in favour of recognition offered by organisations and professionals

7.178 Beyond the supportive responses of Crisis and Expert Link, the following positive arguments were identified in organisational responses:

- (1) Homeless people are often excluded from society.<sup>85</sup>
- (2) LGBT+ people are particularly at risk as homeless people and research has indicated that homeless LGBT+ young people are more likely to experience violence, sexual exploitation, substance misuse and physical and mental health problems than other homeless young people.<sup>86</sup>
- (3) People are not homeless through choice.<sup>87</sup>
- (4) Although homelessness is (hopefully) a temporary phase in an individual's life, it is an intrinsic part of their identity for that period.<sup>88</sup>
- (5) Concerns about criminalising homeless people are unlikely to materialise. For example, the Welsh Government stated:

The consultation paper raises concerns about re-criminalising homeless people who may commit crimes against other homeless people due to the extension of the hate crime regime. However, it appears unlikely that a court would apply a hate crime sentencing uplift relating to the homelessness characteristic if both the victim and perpetrator are homeless.

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<sup>85</sup> Manchester City Council.

<sup>86</sup> Stonewall.

<sup>87</sup> Welsh Government.

<sup>88</sup> Welsh Government.

- (6) The three criteria highlight the need for protection of people experiencing homelessness.<sup>89</sup>
- (7) The Magistrates Association argued that concerns about double counting were not necessarily serious ones:

we note concerns about double counting, but sentencers are confident in ensuring factors are not double counted in respect of aggravating a sentence.

#### Arguments in favour of recognition offered by personal responses

7.179 Those who expanded on the reasons for their support tended to focus on:

- (1) The fact that homeless people are a vulnerable group:

“Homeless people, especially when asleep, are particularly vulnerable and so should be protected. The law would then show respect and inclusion to such vulnerable people.”
- (2) The fact that people do not usually become homeless by choice:

“I believe that this is a characteristic over which a person (usually) has no control and therefore should be protected.”
- (3) Homeless people are a marginalised group:

“Yes, as, like sex workers, they are widely marginalised and devalued. Rough sleepers in particular face a risk of exposure to crime that the rest of us don't face. Anyone working with the homeless will be able to tell stories of rough sleepers being attacked by someone looking for a fight who believed that they could attack this person without consequence because they were sleeping rough. All attacks motivated by the victim being homeless makes the wider homeless community feel less safe. At the very least, rough sleepers, the most vulnerable homeless people, should be protected by the act.”
- (4) Homeless people are targeted for crime:

“Yes, 100%. Having slept rough a few times in my late teens and early twenties, I have been very afraid for my life. One time, a group of adults in their late twenties tried to set me alight while I was sleeping. I was woken by their laughter. It is my firm belief that they saw me as less than human - and that is very much what hate crime laws are designed to protect against. From the testimonies of other homeless people which can be found online and on YouTube, it's a common strand that they feel dehumanised, and they are at extreme risk. I mention at the start that I fall within multiple protected groups. My few nights on the streets were more vulnerable than my membership of those groups ever made me.”

“People experiencing homelessness are regularly victims of violent crime due to their homelessness and the recognition of the harm these crimes do is

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<sup>89</sup> The Magistrates Association.

negligent given that people who are homeless are often invisible within mainstream society. Including people experiencing homelessness would provide further protection to people who are often desperate and experiencing trauma, mental health and addiction problems and might otherwise receive no protection or recognition in law. People who are homeless have a right to life free from violence and abuse, but in town centres on weekend evenings that right disappears.”

“I absolutely support 'people experiencing homelessness' to be recognised as a hate crime category. This is one of the most vulnerable groups in society and people are frequently stigmatised and targeted. Working with various police forces, I have encountered frequent problems with violence against and exploitation of people who are rough sleeping. One incident which emphasised the need for 'hate crime' to be considered was when a group of university students drank champagne in front of a person who was rough sleeping and poured part of the drink on to him and his bedding. Better protection is urgently needed for this group. It could also be an important tool against those organised criminals who exploit people experiencing homelessness in order to sell drugs.”

#### Arguments against recognition offered by organisations and professionals

7.180 The two key reasons provided against the recognition of homelessness by organisational stakeholders were:

- (1) Homelessness is not an intrinsic identity characteristic;<sup>90</sup>
- (2) Hate crime legislation is not the best way to respond to crimes against homeless people or the disadvantage experienced by homeless people.<sup>91</sup>

7.181 For example, in relation to identity, Professor Mark Walters stated:

As with other characteristics outlined in the paper, I am uncertain that homelessness is a group characteristic that is central to someone's identity.

7.182 Walters linked this to his wider concern that hate crime recognition was not necessarily the correct policy response for this group:

Homeless people are one of the most vulnerable groups in society to experience violence and abuse. Abuse against homeless people is particularly egregious conduct. The government must do much more to protect homeless people from violence, and to reduce the number of individuals who sleep on our streets. I do not believe that inclusion of homelessness in hate crime legislation will achieve this.

7.183 Dr Abenaa Owusu-Bempah echoed this concern:

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<sup>90</sup> Resolve West, SARI, The Deputy Police and Crime Commissioner for Nottinghamshire, Nottingham City Council, The Office for Police and Crime Commissioner for Northumbria.

<sup>91</sup> MOPAC.



I do not have a strong view on whether homelessness should be recognised as a hate crime category. However, the fact that homelessness is situational, along with concerns that including homelessness could affirm its position as a permanent feature of society, weigh against inclusion.

### Arguments against recognition offered by individuals

7.184 Many personal responses also emphasised the need to tackle the root causes of homelessness:

“Rather than looking for more laws, something should be done about finding them homes. Nobody should be homeless in this country!”

“Homelessness is a social situation which should be addressed by politics. Mental health services, social services, child protection etc are the ways to solve this problem.”

“No. They should not be included as a category. Housing policies and reform is the way to deal with homelessness in the UK. This type of proposal risks becoming a distraction whereby homelessness is accepted as a fixed status in the UK.”

7.185 Another response raised the prospect of homeless people themselves being drawn into criminalisation:

“I'm concerned this could be used against homeless people who commit crimes against other homeless people.”

7.186 The wider criminal context (whereby rough sleeping is criminalised) was also raised:

“Homeless populations and the poor more generally experience crime and harm by virtue of their occupation of public space. I think we should eliminate housing discrimination. Here again, expanding who is included under hate crimes may make the category ineffectual. More research is needed among homeless people to capture their views on this. Will such legislation prevent harassment by police and the public? How will this interact with fines and other enforcement that displace homeless people from 'commercial' public spaces?”

7.187 There were three negative responses from people who had personal experience of homelessness. One elaborated their view as follows:

“No. I have been homeless and there is nothing to quantify homeless people as a group as even this shared 'characteristic' is hotly debated even among rough sleepers.”

7.188 Several responses also rejected the existence and expansion of hate crime laws in a general sense and raised freedom of speech concerns.

### Conclusion following consultation

7.189 As we have noted, recognition of “homelessness” in hate crime laws enjoyed the greatest support amongst the groups and characteristics under consideration in this chapter.

- 7.190 Though data sources are limited, it does seem clear that people experiencing homelessness – and particularly rough sleepers – experience highly disproportionate levels of violence and abuse, and the targeting of victims in these circumstances can cause additional harm over and above that which might otherwise be anticipated.
- 7.191 We are grateful to Crisis and Expert Link for their detailed and thoughtful submissions that highlighted the extent of mistreatment that people experiencing homelessness experience. These responses demonstrate that contempt and hatred towards homeless people does sadly exist in our society, and that it can manifest in the form of criminal exploitation, abuse and violence.
- 7.192 We are also cognisant that while these organisations (and many others who responded) see ending homelessness as the main policy goal that government and society should be striving to achieve, they also recognise the importance of addressing the criminal harm that is being experienced right now.
- 7.193 In terms of our suitability criterion, responses largely allayed our concerns about the potential for undesirable over-criminalisation of homeless people themselves as respondents considered that the applicable legal test should work to exclude most instances of criminality that occurs between homeless persons.
- 7.194 In relation to the risk of double counting at sentencing, we agree that sentencers can and do already take into account factors such as vulnerability and exploitation without double counting. We therefore consider that it is a risk that can be managed with appropriate guidance for sentencers. However, this again highlights that hate crime recognition is not the only means through which the criminal law can recognise the wrongdoing and harm that is experienced by victims in these circumstances.
- 7.195 Some respondents again questioned the appropriateness of hate crime laws in addressing a social condition – such as homelessness – rather than a more obvious attack on immutable identity – such as racist or homophobic abuse. Against this, Crisis noted that perpetrators do behave in a way that targets the victim as having a “homeless” identity. In this way, whether or not the victim strongly identifies as “homeless”, this identity is forced upon them in a way that degrades and dehumanises them.
- 7.196 Although we can see a strong case in principle for recognition of people experiencing homelessness in hate crime laws, a lack of raw data on hate crimes against homeless people, and a lack of experience in understanding the impact of such a reform, makes us reticent to recommend the inclusion of this group. Whereas with other groups considered in this chapter – notably sex workers and alternative subcultures – there is some practical experience of police recording and monitoring to draw on, we lack a similar evidence base in respect of people experiencing homelessness. This lack of data and experience was highlighted by the NPCC, who were therefore unclear as to whether inclusion of homelessness was an appropriate course.
- 7.197 Although there is a lack of clear empirical data in relation to the extent of hate crimes against people experiencing homelessness, Crisis and Expert Link have provided powerful – and shocking – testimony that leads us to the view that this kind of offending is far too prevalent, and is hugely damaging to its victims. In our view, the demonstrable need and additional harm criteria are met.

- 7.198 We are, however, less certain that hate crime recognition would be an effective solution to this problem, and therefore that our suitability criterion is satisfied. For example, it is unproven whether recognition would improve the confidence of victims in reporting crimes to police. Arden and Bates questioned whether this would be the case,<sup>92</sup> though we recognise that both Crisis and Expert Link have indicated it could.
- 7.199 Due to the unproven benefits of hate crime recognition for homeless victims of violence and abuse, we consider that to recommend immediate incorporation of “homelessness” into hate crime laws would be premature. More work needs to be done to understand whether such recognition would, in fact, encourage greater reporting and confidence in the police, lead to better outcomes for victims, and ultimately help to prevent such abuse occurring.
- 7.200 In this regard and recognising the current need to address the disproportionate violence and abuse experienced by homeless people, one option that we believe should be seriously considered by the police is the implementation of police recording of hate crime directed at homeless persons. As with the “Merseyside approach” discussed earlier at paragraphs 7.23 to 7.25, this would optimally be accompanied by specific training for police in relation to homeless victims of hate crime, and enhanced community outreach. As we have emphasised, this would ultimately be a matter for the College of Policing and individual police forces to consider further in line with their broader responsibilities for crime prevention and community safety.

## PHILOSOPHICAL BELIEFS

- 7.201 “Belief”, referred to here as “philosophical belief”, and also sometimes described as “non-religious belief” is the only group or characteristic discussed in this chapter that is already protected under civil equality law.
- 7.202 “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”.<sup>93</sup> The explanatory note to the 2010 Act further defines “philosophical belief”. It states that philosophical beliefs fall within the broader definition of Article 9 of the European Convention on Human Rights (“ECHR”),<sup>94</sup> 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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<sup>92</sup> A Arden and J Bates, “Homelessness and Hate Crime” (2021) 24(1) *Journal of Housing Law* 1, pp 4 to 5.

<sup>93</sup> Equality Act 2010, s 10(2).

<sup>94</sup> Equality Act 2010, Explanatory Notes, para 51.

7.203 The explanatory notes to the Equality Act 2010 also expressly exclude “any cult involved in illegal activities” and also support of a football team.<sup>95</sup>

7.204 The employment law case of *Grainger v Nicholson*<sup>96</sup> 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.

7.205 *Grainger* and subsequent cases have further defined “philosophical belief” for the purposes of the Equality Act 2010. The following categories have been recognised as protected philosophical beliefs:

- Humanism and Atheism;<sup>97</sup>
- Ethical veganism<sup>98</sup> but not vegetarianism;<sup>99</sup>
- A belief that the use of carbon emissions must be cut to avoid climate change;<sup>100</sup>
- A belief that biological sex is binary and immutable.<sup>101</sup>

### Political beliefs

7.206 The Employment Appeal Tribunal (“EAT”) in *Grainger* provided guidance on whether political beliefs could be protected under philosophical beliefs. The EAT stated that

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<sup>95</sup> Equality Act 2010, Explanatory Notes, paras 52 to 53.

<sup>96</sup> *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311.

<sup>97</sup> Equality Act 2010. Explanatory Notes, para 53. Humanism and Atheism are protected as beliefs under the Equality Act. Atheism is also protected under “lack of religion”.

<sup>98</sup> *Casamitjana Costa v The League Against Cruel Sports* [2020] ET 3331129/2018.

<sup>99</sup> *Conisbee v Crossley Farms Ltd & Others* [2019] ET 3335357/2018. The Employment Tribunal 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.

<sup>100</sup> *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311. The Employment Appeal Tribunal 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.

<sup>101</sup> *Forstater v CGD Europe and Others* [2021] UKEAT 0105/20/JOJ. The EAT found that gender-critical beliefs were capable of being protected as a philosophical belief under the Equality Act 2010. The EAT overturned the ET’s decision that Forstater’s gender-critical belief did not pass the fifth element of the test set out in *Grainger*, that the belief is worthy of respect in a democratic society.

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.”<sup>102</sup>

7.207 The Employment Tribunal (“ET”) and EAT have found that political beliefs in democratic socialism,<sup>103</sup> Scottish independence,<sup>104</sup> republicanism and antimonarchism,<sup>105</sup> were protected under the Equality Act 2010. In contrast, political, or quasi-political beliefs not protected have included: a belief in wearing poppies on Remembrance Sunday;<sup>106</sup> objection to same sex couples’ adoption of children;<sup>107</sup> and a belief that public service is an improper waste of money.<sup>108</sup>

7.208 *Grainger* held that to be protected a belief must be “worthy of respect in a democratic society and not incompatible with human dignity or in conflict with the fundamental rights of others”.<sup>109</sup> This necessarily excludes “objectionable” political philosophies.<sup>110</sup> The ET stated this criterion would exclude protection of “racist or homophobic political philosophy”. However, in the recent case of *Forstater v CGD Europe*,<sup>111</sup> the Employment Appeal Tribunal ruled that “gender critical” beliefs (that is, broadly, a belief that sex is binary and immutable and that a person cannot change their sex) were “worthy of respect in a democratic society”.

7.209 While not addressing “political belief” as such, in its recent Elections Bill the government has introduced clauses<sup>112</sup> that would disqualify persons from standing for elected office for up to 5 years if they committed a specified criminal offence,<sup>113</sup> that was motivated by, or demonstrated hostility towards the victim being a candidate, holder of elected office or campaigner. Specifically:

- (a) if 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 the victim being (or being presumed to be) a person falling within any of sections 28 to 30 [a candidate, holder of elected office or campaigner]; or

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<sup>102</sup> *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219/09/0311, para 28.

<sup>103</sup> *Olivier v Department for Work and Pensions (DWP)* [2013] ET 1701407/2013.

<sup>104</sup> *McEleny v Ministry of Defence* [2017] ET (Scotland) 4105347/2017.

<sup>105</sup> *Gibbins v British Council* [2017] ET 2200088/2017.

<sup>106</sup> *Lisk v Shield Guardian Co Ltd and others* [2011] ET 3300873/112011.

<sup>107</sup> *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

<sup>108</sup> *Harron v Chief Constable of Dorset Police* [2016] UKEAT 0234/15/DA.

<sup>109</sup> 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.”

<sup>110</sup> *Grainger plc and Ors v Nicolson* [2009] UKEAT 0219 09 0311, para 28.

<sup>111</sup> *Forstater v CGD Europe*, Appeal no. UKEAT/0105/202/JOJ (10 June 2021).

<sup>112</sup> Elections Bill, clauses 26 to 30.

<sup>113</sup> Elections Bill, schedule 8.

- (b) the offence was motivated (wholly or partly) by hostility towards persons falling within any of those sections in their capacity as such.<sup>114</sup>

7.210 The specified offences in Schedule 8 of the Bill include a wide array of offences against the person, and also public order, harassment and communications offences.

7.211 While these clauses focus specifically on the identity of the person as a candidate, holder of elected office or campaigner, it is conceivable that any such hostility might also be closely connected to the political beliefs and affiliations of the victim.

7.212 In October 2021 MP Sir David Amess was fatally stabbed while conducting a constituency surgery in Leigh-on-Sea, Essex.<sup>115</sup> This followed the fatal shooting and stabbing of Jo Cox MP in 2016, which occurred outside a library in Birstall, West Yorkshire, where she was about to hold a constituency surgery.<sup>116</sup> These incidents, together with the near fatal stabbing of Stephen Timms MP<sup>117</sup> have heightened concerns about MP safety. The Home Office has asked all police forces to review MP safety measures.<sup>118</sup>

### Demonstrable need

7.213 In our consultation paper we began by considering evidence of crimes targeted towards individuals on the basis of their philosophical beliefs. We noted that there is some evidence of crimes targeted towards individuals on this basis, and cited anecdotal evidence provided by British Naturism and Humanists UK. However, we acknowledged that this evidence is often sporadic and largely anecdotal, and that the frequency of criminal targeting is likely to vary considerably between different philosophical groups.<sup>119</sup>

7.214 We observed that a significant amount of abuse, particularly online, is directed towards people's political beliefs. Increasing political divisiveness in recent years has led to the bullying and harassment of politicians, and we cited the large-scale abuse received mainly by women in politics, including Jess Phillips MP and Diane Abbott MP, as evidence of this.<sup>120</sup> As noted at paragraph 7.212, there have also been some instances of serious violence and murder of MPs, which have shocked the country .

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<sup>114</sup> Elections Bill, clause 26(4).

<sup>115</sup> Joseph Lee, "Sir David Amess: Ali Harbi Ali charged with murder of MP" (21 October 2021) *BBC News*, available at <https://www.bbc.co.uk/news/uk-58997590>.

<sup>116</sup> BBC, "Jo Cox MP dead after shooting attack" (16 June 2016), available at <https://www.bbc.co.uk/news/uk-england-36550304>.

<sup>117</sup> The Times, "Labour MP Stephen Timms 'was stabbed by woman over Iraq war vote'" (2 November 2010), available at <https://www.thetimes.co.uk/article/labour-mp-stephen-timms-was-stabbed-by-woman-over-iraq-war-vote-txt86b06j27>.

<sup>118</sup> Emily Ashton and Joe Mayes, "U.K. MP's Murder Called Terrorism, Safety Review Ordered" (15 October 2021) *Bloomberg*, available at: <https://www.bloomberg.com/news/articles/2021-10-15/u-k-politician-s-slaying-sparks-calls-for-safety-review-for-mps>.

<sup>119</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 341 to 342.

<sup>120</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, Chapters 12 and 18. See also *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.

## Are these crimes linked to prejudice and hostility towards membership of a philosophical belief group?

7.215 We then considered whether the criminal targeting is linked to hostility or prejudice towards the victim's philosophical beliefs and concluded that there is some evidence of this.

## The prevalence of crimes based on hostility or prejudice towards philosophical beliefs

7.216 We observed that the assessment of prevalence of criminal targeting of philosophical beliefs will vary between groups. We also noted that it is difficult to assess prevalence with accuracy because of the lack of recording of hate crime toward these groups.

## Additional harm

7.217 In relation to the additional harm criterion, we considered evidence that criminal targeting based on hostility or prejudice towards philosophical beliefs causes additional harm to the victim, members of the targeted group, and society more widely.<sup>121</sup>

## Additional harm to the primary victim

7.218 We noted that 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.

7.219 We observed that 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.<sup>122</sup> For example, we cited Soifer, who has argued that ethical veganism is "a belief, a moral code, a guiding principle, and to some, a religion".<sup>123</sup>

7.220 We also considered arguments about whether philosophical beliefs are as difficult to change as faith. For example, we cited Pinto, who has 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.<sup>124</sup>

7.221 We considered that the impact of philosophical beliefs on various aspects of a person's life provides further evidence of their centrality to identity. We acknowledged that this reasoning may also extend to political beliefs, and cited Brown, who has argued that people are socialised into political beliefs, which then form a central part of their identity.<sup>125</sup>

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<sup>121</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 345 to 347.

<sup>122</sup> 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, p 306.

<sup>123</sup> S Soifer, "Vegan Discrimination: An Emerging and Difficult Dilemma" (2003) 36 *Loyola of Los Angeles Law Review* 1709, pp 1712 to 3.

<sup>124</sup> 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, pp 716, 719 to 720.

<sup>125</sup> 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, p 306.

7.222 We concluded that 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

7.223 We cited anecdotal evidence provided by British Naturism and Humanists UK which suggests that there is a collective impact on those who share the targeted characteristic of philosophical beliefs. For example, Humanists UK told us in a pre-consultation meeting about the social exclusion faced by members of their group in conjunction with the criminal targeting they faced.

7.224 We acknowledged that 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.

#### Harm to society more widely

7.225 We noted that criminal hostility directed towards a victim on the basis of their belief could cause harm to wider society. We observed that politically motivated abuse and violence could pose a real threat to democratic values and the ability of individuals to participate in political life.

#### Suitability

7.226 We identified several potential suitability issues in relation to philosophical belief.<sup>126</sup>

#### Compatibility with the rights of others

7.227 We observed that the breadth 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.

7.228 An important limitation on this potential is the *Grainger* test, which states that in order to be recognised as a protected philosophical belief, the belief must be “worthy of respect in a democratic society and not incompatible with human dignity or the fundamental rights of others”. The recent case of *Forstater* clarified that this is a high threshold:

only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society.<sup>127</sup>

7.229 More specifically, only if the belief is so destructive to the rights of others (as envisaged by Article 17 of the European Convention on Human Rights (“ECHR”)) such that it fell outside the protection afforded to freedom of thought, conscience and religion afforded by Article 9 ECHR, should it be considered to fail the *Grainger* test.

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<sup>126</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 347 to 348.

<sup>127</sup> *Forstater v CGD Europe*, Appeal no. UKEAT/0105/202/JOJ (10 June 2021, [62]).



## Potentially harmful consequences

7.230 We noted that the inclusion of philosophical beliefs in hate crime laws may raise free speech issues, particularly in the prosecution of public order and communications offences, which already tend to engage these concerns. For example, people may be reluctant to express their political views during an election. In this sense the inclusion of philosophical belief could risk creating an undesirable “chilling effect” on political debate, which would run counter to the wider interest of a free and democratic society.

## Workable in practice

7.231 We noted a concern that the list of philosophical beliefs is non-exhaustive and the continual assessment of suitability on a case-by-case basis could be impractical. As we explained at paragraphs 7.204 to 7.205, recent EAT and ET decisions suggest that “philosophical belief” is an evolving concept and we have seen that it has been held to include less traditionally recognised beliefs such as ethical veganism.

7.232 We also observed that the non-exhaustive nature of philosophical beliefs may lead to confusion in practice and in police officers being unable to recognise and record the targeted characteristic accurately.

## Consultation responses

7.233 In our consultation paper we asked the following consultation questions in relation to the recognition of philosophical beliefs in hate crime laws:

Consultation Question 20: We invite consultees’ views on whether “philosophical beliefs” should be recognised as a hate crime category.

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)

7.234 A significant majority of personal responses, and a majority of responses overall, were against the recognition of philosophical beliefs as a hate crime category. Many expressed a fundamental objection to hate crime laws. Examples of these responses included:

- (1) “No. The categories just get more and more ridiculous. Where is the evidence that a person's 'philosophical beliefs' have any linkage with crimes against them. All that means is that humanists can prosecute Christians when they evangelise them. This is what the proposal is meant to stop.”
- (2) “No. An idiotic idea. How much of the Courts' time do you want to be taken up discussing philosophy? Show me one person who hates humanists!”

- (3) “Absolutely not! In a free society, it is vital that philosophical beliefs, as religious and political beliefs, should be subject to criticism and robust debate. Only if such debate becomes intimidatory or threatening should the law get involved and existing legislation is sufficient to deal with this.”

7.235 In addition to these clear overall rejections of the proposal, some consultees engaged more directly with the question of how philosophical belief accords with our selection criteria.

#### Demonstrable need

7.236 Protection Approaches noted that “people with certain philosophical beliefs face proportionately higher levels of discrimination, marginalisation, exclusion, and hate-based attacks”, and that “people with certain philosophical [beliefs] are likely to experience disproportionate levels of prejudice and discrimination when seeking recourse after identity-based attacks by those tasked with implementing hate crime laws, namely but not only the police, CPS, and the wider justice system”.

7.237 The Hate Crime Unit said that there is empirical evidence that indicates a need to protect philosophical beliefs under hate crime laws. They pointed to Pew Research which has “identified a rise in the harassment of religiously unaffiliated people in recent years.” They also highlighted research by The Times which they said has suggested that there have been “172 crimes associated with vegans in the past five years.”<sup>128</sup>

7.238 British Naturism said that: “Persecution of Naturists has grown over the last few years with larger Naturist gatherings now requiring a significant police presence, including Police Liaison Officers, to deal with attempts by hate groups to cause criminal damage and assault Naturists.”

7.239 However, some consultees were of the view that there is a lack of evidence of hostility targeted at people who hold philosophical beliefs. For example, Professor Kathleen Stock stated that she is “unaware of any convincing evidence that there is a significant pattern of hostility against such people; the exception seems to be those already covered under religious belief.”

#### Additional harm

7.240 A few consultees noted the comparisons that can be drawn between religion and philosophical beliefs, which we discussed under the “additional harm” criterion at paragraphs 7.218 to 7.221.

7.241 The Naturist Action Group focused on the fact that:

a philosophical belief is not far removed in practical application from a religious belief in that it regulates behaviour, and in so far as that behaviour is legal and not harmful to others it should be allowed and protected.

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<sup>128</sup> See Arthi Nachiappan, “Experts get their teeth into idea of vegan hate crime” (8 August 2020) *The Times*, available at <https://www.thetimes.co.uk/article/experts-get-their-teeth-into-idea-of-vegan-hate-crime-65nsf6c02>.

- 7.242 The Hate Crime Unit noted the lack of inherent distinction between philosophical and religious belief. They were of the view that, where a belief is “genuinely held” and attains “a certain level of cogency, seriousness, cohesion and importance” and is “compatible with human dignity and not in conflict with the fundamental rights of others”, there is no reason the belief should not be offered the same protection as religion. They added that “deeply-held ethical positions may be of equal significance to an individual’s identity and way of life as religious beliefs. Consequently, there are strong moral grounds for the protection of philosophical beliefs in any reform of hate crime law.”
- 7.243 British Naturism argued that the effect of criminal targeting on adherents of a religion or philosophical belief are similar, in that they pressure an individual to abandon or conceal their belief. They noted that “[i]t is the history of oppression that necessitated the protection of religion under existing hate crime legislation.”
- 7.244 British Naturism also focused on the characterisation of naturism as a “way of life” by the International Naturist Federation, which they argued was key. They argued that:
- Naturism is a weighty belief that for many Naturists has a substantial influence over their behaviour, with individuals choosing to live their lives according to the Naturist philosophy to the extent that it defines their identity.
- 7.245 A number of consultees argued that not recognising philosophical beliefs in hate crime laws would be out of line with equality and human rights law.
- 7.246 The Hate Crime Unit said: “To ignore the recognition of philosophical belief as part of one’s identity to the extent that it ought to be protected, would be for hate crime law to be unusually out of step with equalities and human rights legislation - as well as case law”. The Naturist Action Group said that “freedom of belief is a basic human right which is enshrined in the 1948 United Nations Declaration of Human Rights (Article 18).”
- 7.247 British Naturism noted that Article 9 of the European Convention on Human Rights makes no distinction between religion and belief and the Equality Act 2010 already groups religion and belief together. They noted two concerns that arise from the disparity between the protection of philosophical beliefs under Equality Act 2010, and the lack of protection for this category in hate crime laws. First, the variation in the definitions of what constitutes a protected characteristic creates obstacles to the practical application of the law. Second, the protection of beliefs under the Equality Act 2010 and lack of protection for beliefs under the aggravated offences and enhanced sentencing regimes has the potential to encourage more severe discriminatory behaviour and promote criminal activity.
- 7.248 The Welsh Government were of the view that the definition of “religion” under hate crime laws should be aligned with the definition of “religion or belief” used in the Equality Act 2010 and Article 9 of the ECHR. They argued that “[i]f someone with a non-religious belief (such as Humanists) can be discriminated against under the Equality Act 2010, it stands to reason that they should be able to bring a case to remedy any hate crime which might be experienced in extreme cases.” The Welsh Government argued that amending the definition of religion under hate crime laws in this way would avoid the need to create an additional category of philosophical beliefs.

7.249 Humanists UK argued that under “section 3 of the HRA 1998 it is already the case that the existing law has to be read in a way as to protect non-religious worldviews that are analogous to religions, for example humanism.” Therefore, hate crime laws should be drafted in a way that explicitly includes such non-religious worldviews.

7.250 However, the Deputy Police and Crime Commissioner for Nottinghamshire was not supportive of the inclusion because they do not consider “philosophical beliefs to have the same cultural and societal nature as say religion.”

7.251 A personal response also shared this concern:

I think it should not. Stick to religion and the absence of religion, ie agnosticism and atheism.

I have sympathy to non- formal religious belief systems and philosophical beliefs but there are so many and constructing a definition that encompasses them would be unworkable if it were attempted.

7.252 Another personal response also suggested that religion was more akin to the existing, more immutable characteristics, whereas philosophical belief could be considered different:

People generally cannot help their race/sex/sexual orientation/religion, and in going peaceably about their daily lives, cannot help these "different" characteristics being obvious to others. Philosophical/political beliefs are a bit different in that other people only know you have them if you speak out about them, and if you have the courage to do that, do you need protection?

#### Concerns surrounding breadth of recognition

7.253 Index on Censorship noted the range of examples we cited in the consultation paper, such as veganism and naturism, and concluded that “this breadth leads us to be concerned about whether adding it to the list of protected characteristics and, crucially, enforcing it would be practical.”

7.254 The National Police Chiefs Council stated that “most chief officers felt that such a provision was not appropriate and some claimed it would be difficult to draw effective parameters to the provision.”

7.255 Legal Feminist described the category as too uncertain for hate crime laws, concluding that “broadening hate crime to such an extent would be undesirable.”

7.256 Similarly, Galop did not think philosophical beliefs was a suitable category for inclusion “due to its breadth, uncertainty over which groups would be included and lack of compelling evidence of hostility or prejudice toward groups within it.”

7.257 CARE also rejected the addition of “philosophical beliefs” as a protected characteristic because its “breadth risks the over-criminalisation of speech and introduces a lack of legal certainty as it is likely that the effective meaning of philosophical belief will continue to expand.”

7.258 The Magistrates Association also noted the difficulties that could arise “in clearly defining [who] would be included within this group”, but acknowledged that “there are some groups (such as Humanists) who would clearly come within this definition and it is important they are not left unprotected, purely on the basis that other groups are more difficult to define.”

7.259 Although Humanists UK were ultimately in favour of recognising philosophical beliefs in hate crime laws, as we noted in Chapter 4, they did acknowledge concerns relating to the breadth of philosophical beliefs:

We understand that there is a desire to prevent this legislation becoming amorphous and offering legal protection to a wide range of beliefs, such as has been seen in some UK employment tribunal decisions based on the Equality Act 2010 (where for example opposition to foxhunting and support for public service broadcasting have come under protection), as this could undermine the symbolic and normative power of hate crime legislation. However, inclusion of just non-religious worldviews that are analogous to religions would be limited almost exclusively to humanism. As far as we know, the only other examples of analogous beliefs found in case law are atheism and agnosticism – both of which are only narrow views on the existence of a god or gods, and as such are already unambiguously covered through the provision related to a lack of religious belief.

7.260 Some consultees were concerned that recognising philosophical beliefs as a hate crime characteristic could result in protection for groups with harmful views.

7.261 Nottingham City Council stated:

We are concerned about the risk this would create of protection being provided to groups with potentially very harmful views and from a practical perspective, this may be too broad to implement and communicate.

7.262 The Magistrates Association also noted this concern, and argued that

it would be important for courts to be given clear guidance so they can use their discretion appropriately to ensure harmful philosophical beliefs are not protected.

### Freedom of speech concerns

7.263 A large number of consultees raised free speech concerns.

7.264 The Christian Institute said

in a democratic society robust debate about ideas and beliefs is essential. A stirring up hatred offence on this ground would jeopardise this free exchange of views and risk infringing expression rights, as it has done in relation to religious discussion already.

7.265 It added that

adopting this new category would also introduce uncertainty in the law. The public would not be easily able to discern what viewpoints amount to protected beliefs and what do not. As with other hate crime laws, it would lead to a hierarchy where some

beliefs are favoured with protection and others are not. It would further politicise the law, the police and the judiciary to require them to adjudicate on whose philosophical beliefs deserve protection.

7.266 The English Democrats were also concerned that protecting philosophical beliefs under hate crime laws would present a risk to freedom of expression and robust debates about ideas.

7.267 Index on Censorship argued that adding philosophical beliefs to the list of protected characteristics

runs the risk of devaluing the symbolism of hate crimes. Hate crime laws serve a critical symbolic function in combatting and outing bigotry and a significant part of what makes hate crime laws effective is the visceral, societal reaction against those who break them. By extending the same protection to characteristics such as veganism and nudism, the law runs the risk of undermining the historical gravity of hate crime and, crucially, diminishing the reaction against it. This is particularly true of a political climate in which a significant number of the population may dismiss and deride such an expansion of protections as evidence of 'political correctness' and 'cancel culture'. This could have serious, negative effects on those members of society that are currently protected by the hate crime laws.

### Conclusion following consultation

7.268 We understand the desire amongst victims and their supporters to have philosophical beliefs explicitly protected in hate crime laws. A few consultees provided evidence of a demonstrable need, although this was largely anecdotal. For example, British Naturism asserted that there has been an increase in recent years of criminal damage and assaults targeted at Naturists. The Hate Crime Unit also noted that there is research to suggest that there has been a rise in the harassment of religiously unaffiliated people in recent years (though as we have noted, lack of religious belief is protected under current hate crime laws). This echoed the evidence Humanists UK provided earlier in the review about the wider global threat that humanists and apostates face, and specific examples such as fake “anthrax” powder being sent to their offices.<sup>129</sup>

7.269 However, overall evidence of criminal targeting on the basis of philosophical belief remains sporadic and inconclusive. We are therefore not persuaded that the “demonstrable need” criterion has been satisfied in relation to philosophical belief.

7.270 We acknowledge that violence against MPs has emerged as a serious concern in recent years. In the case of Jo Cox MP, the murderer was charged and dealt with as a terrorist.<sup>130</sup> The suspect in the murder of David Amess MP was held under section 41 of the Terrorism Act 2000, and the CPS has authorised murder charges and announced that they “will submit to the court that this murder has a terrorist

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<sup>129</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 14.173.

<sup>130</sup> See CPS, *Terrorism* (2017), available at: <https://www.cps.gov.uk/crime-info/terrorism>.

connection, namely that it had both religious and ideological motivations.”<sup>131</sup> This demonstrates that there are ways of dealing with such ideological offending – namely terrorism legislation – that do not require the inclusion of philosophical or political belief in hate crime law.

- 7.271 In relation to additional harm, consultees in favour of recognising philosophical beliefs as a hate crime category drew comparisons between philosophical beliefs and religion. British Naturism, for example, argued that the effects of hate crime on adherents of a philosophical belief are very similar to those suffered by adherents of religion.
- 7.272 We accept that for at least some philosophical beliefs – Humanism and Naturism perhaps being two examples – criminal targeting may cause individual victims significant additional harm, and also cause wider harm to the affected group and society more widely. It is less obvious that this logic can be applied across all groups that may fall within the broad category of philosophical belief. However, for these purposes we accept that there is at least a strong argument that this criterion is satisfied.
- 7.273 The criterion of suitability arguably raises the greatest concerns. The issues we explored in our consultation paper were reiterated by a significant number of consultees. Indeed, a significant majority of consultation responses were opposed to the addition of philosophical beliefs as a hate crime category.
- 7.274 The first suitability issue relates to whether the extension of hate crime protection to philosophical beliefs is workable in practice. A number of consultees expressed concern that the concept of “philosophical beliefs” is too broad and thus it would be difficult for law enforcement agencies to draw effective parameters.
- 7.275 The second suitability issue also arises in relation to the broad nature of the concept of philosophical beliefs. Some consultees were concerned that extending protection to philosophical beliefs could risk providing protection to groups who hold views that are very harmful to society.
- 7.276 Finally, the third suitability issue relates to free speech concerns that may arise from the inclusion of philosophical beliefs. Consultees such as the Christian Institute and English Democrats were of the view that it could jeopardise the free exchange of ideas.
- 7.277 Due to these complex suitability issues, and a lack of concrete evidence of criminal targeting of individuals based on their philosophical beliefs, we do not recommend that philosophical beliefs should be recognised as a protected characteristic in hate crime laws. Although some consultees provided anecdotal evidence of their members being targeted because of the philosophical beliefs they hold, there is an overall absence of tangible data to establish a strong demonstrable need for protection to be extended to this group. We also find the suitability concerns persuasive. In particular the definitional concerns; a definition that is sufficiently broad to capture the intended groups could result in potentially harmful consequences, such as having a chilling

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<sup>131</sup> CPS, “CPS authorises murder charge over death of MP Sir David Amess” (21 October 2021), available at: <https://www.cps.gov.uk/cps/news/cps-authorises-murder-charge-over-death-mp-sir-david-amess>.

effect on the expression of legitimate views and beliefs, and the protection of views and beliefs that are in themselves harmful.



# Chapter 8: Aggravated offences and enhanced sentencing

## INTRODUCTION

8.1 One of the key issues that we have been asked to consider in the course of this review is the form that hate crime laws should take. Our terms of reference ask us to review:

... the current range of specific offences and aggravating factors in sentencing, and [to] mak[e] 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.

8.2 In Chapter 2 of this report we described how hate crime laws currently work. We outlined the dual approach of aggravated offences and enhanced sentencing that operates in England and Wales. Specifically:

- (1) the specification of racially and religiously aggravated forms of certain existing criminal offences, which have higher maximum penalties than their non-aggravated counterparts (“aggravated offences”); and
- (2) the availability of enhanced sentencing for all other criminal offences, which requires that sentencers increase the severity of the penalty (within the existing maximum), if the hostility element is proven (“enhanced sentencing”).

8.3 In Chapters 16 and 17 of our consultation paper<sup>1</sup> we considered these two models. We asked whether each was appropriate, and also whether the “dual” approach – the use of both models – should be retained. We provisionally considered that despite some flaws in this approach – notably its relative complexity – the current models and the dual approach should be retained.

8.4 As an alternative, we also considered whether a more streamlined singular approach might be preferable, especially having regard to concerns about the complexity of hate crime laws.

8.5 In this chapter we consider the responses of consultees to our questions and proposals. We ultimately recommend the retention of the dual approach.

8.6 On the basis that both these models will continue, we then consider a number of further, more detailed issues that arise.

- (1) Should aggravated versions of any further offences be created?
- (2) Should any adjustments be made to the increased maximum penalties?

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<sup>1</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250.

- (3) How can the law best deal with prosecutions involving the targeting of more than one characteristic?
- (4) Should there be a more flexible approach to characteristic protection for enhanced sentencing?
- (5) The relationship between aggravated offences, enhanced sentencing and the base offences to which they relate.

## CURRENT LAW

8.7 Below we briefly recap the key elements of aggravated offences under the Crime and Disorder Act 1998 (“CDA 1998”) and enhanced sentencing under the Sentencing Code (“SC”).

### Aggravated offences

8.8 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.

8.9 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
<p><b>Key:</b></p> <p>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</p>			

8.10 The prosecution must prove not only that the underlying or “base” offence was committed, but also that in committing the offence the defendant demonstrated, or the offence was motivated by, racial or religious hostility.

### Enhanced sentencing

8.11 The enhanced sentencing provisions can be found in section 66 of the SC, which provides as follows:

- (1) This section applies where a court is considering the seriousness of an offence which is aggravated by—
  - (a) racial hostility,
  - (b) religious hostility,
  - (c) hostility related to disability,
  - (d) hostility related to sexual orientation, or
  - (e) hostility related to transgender identity.

This is subject to subsection (3).

- (2) The court—
  - (a) must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and

- (b) must state in open court that the offence is so aggravated.
- (3) So far as it relates to racial and religious hostility, this section does not apply in relation to an offence under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated offences).
- (4) For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—
  - (a) 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 victim's membership (or presumed membership) of a racial group,
    - (ii) the victim's membership (or presumed membership) of a religious group,
    - (iii) a disability (or presumed disability) of the victim,
    - (iv) the sexual orientation (or presumed sexual orientation) of the victim, or (as the case may be)
    - (v) the victim being (or being presumed to be) transgender, or
  - (b) the offence was motivated (wholly or partly) by—
    - (i) hostility towards members of a racial group based on their membership of that group,
    - (ii) hostility towards members of a religious group based on their membership of that group,
    - (iii) hostility towards persons who have a disability or a particular disability,
    - (iv) hostility towards persons who are of a particular sexual orientation, or (as the case may be)
    - (v) hostility towards persons who are transgender.
- (5) For the purposes of paragraphs (a) and (b) of subsection (4), it is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

8.12 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.<sup>2</sup> However, there may be circumstances where an enhanced

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<sup>2</sup> *R v McGillivray* [2005] EWCA Crim 604, [2005] 1 WLUK 369.

sentence can be passed where the prosecution has not pursued an aggravated version of the offence.<sup>3</sup> We discuss this issue further at paragraphs 8.239 to 8.255.

- 8.13 For 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. Under the enhanced sentencing provisions in section 66 of the SC, hostility is a question of fact for the sentencer, post-conviction. However, the prosecution must still prove that the hostility test is met to the criminal standard.
- 8.14 If sufficient evidence of hostility has not been introduced at trial,<sup>4</sup> or if the defendant has pleaded guilty to the offence but rejects the allegation that he or she demonstrated or the offence was motivated by hostility, then a “Newton hearing” may take place.<sup>5</sup> 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.<sup>6</sup> Newton hearings are only necessary where there is likely to be a significant impact on the sentence.
- 8.15 In a Newton hearing the judge or magistrates act as the tribunal of fact, applying the criminal burden and standard of proof. The court will normally hear evidence from witnesses, but the matter may be dealt with solely on the basis of the parties’ submissions if the evidence itself is unchallenged.

#### **Key differences between aggravated offences and enhanced sentencing**

- 8.16 To summarise, there are four key differences between enhanced sentencing under the SC and the aggravated offences regime under the CDA 1998.
- (1) The CDA 1998 applies only to the characteristics of race and religion, whereas the SC applies to race, religion, sexual orientation, disability and transgender identity.
  - (2) The CDA 1998 increases the maximum penalty for each of the offences if aggravated, whereas the SC 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 (jury or magistrates) at the liability stage, whereas under the SC the hostility element will be determined by the sentencer (judge or magistrates) at the sentencing stage.
  - (4) Under the CDA 1998, the aggravation forms part of the label of the offence. Previously it was also the case that the fact of the offence being a hate crime only appeared on an offender’s criminal record if it was racially or religiously aggravated under the CDA 1998. However, this is no longer the case, and since 2021 enhanced sentencing under section 66 of the SC is now also recorded on

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<sup>3</sup> See *R v O’Leary* [2015] EWCA Crim 1306; [2016] 1 Cr App R (S) 11.

<sup>4</sup> *R v Finch* [1992] 7 WLUK 270, (1993)14 Cr App R (S) 226.

<sup>5</sup> See Archbold (2020) para 4-537; *R v Newton* (1983) 77 Cr App R 13; *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13.

<sup>6</sup> See *R v Newton* (1983) 77 Cr App R 13.

the Police National Computer and therefore appears on the offender's criminal record. This includes details of the characteristic(s) to which the court's hostility finding relates.

8.17 Although there are only 11 offences that have aggravated versions, and they apply in relation to only two of the five characteristics, the statistical analysis we outlined in our consultation paper suggests that approximately half of all hate crime prosecutions are for aggravated offences.<sup>7</sup> This likely reflects the fact that race-based hate crime remains by far the most common strand, and that some of the 11 specified offences – notably the public order and assault offences – are among the most commonly prosecuted in the hate crime context.

## RETENTION OF THE DUAL MODEL

### Consultation paper proposals

8.18 In our consultation paper we outlined some of advantages and disadvantages of the aggravated offences and enhanced sentencing models.

8.19 In relation to aggravated offences, we argued that their main advantages are:<sup>8</sup>

- (1) The higher maximum penalties are perceived to have a more powerful symbolic and deterrent effect.
- (2) The “fair labelling” of the offence as “aggravated” in relation to hostility towards a protected characteristic.
- (3) The requirement to prove the hostility as an element of the offence may incentivise police and prosecutors to gather all the necessary evidence and build the case more squarely around the hostility, and proof before a jury or bench of lay magistrates may be seen to add greater legitimacy to the finding.
- (4) It is arguably fairer to the defendant to have such an important aspect of the allegations against him or her charged as such and (when tried on indictment in the Crown Court) determined by a jury.
- (5) The elevation of many trials to the Crown Court (as a result of the higher available maximum penalties for the aggravated versions of an offence) might be seen as a more appropriate forum for dealing with the added gravity and impact of hate crime offending (though there are conflicting views on this – with others arguing that it can be disproportionately expensive and time consuming).

8.20 Arguments we noted against the use of aggravated offences include:<sup>9</sup>

- (1) Some of the increased maximum penalties are considerably higher than their base equivalent, which might be argued to be disproportionate. It is also rare

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<sup>7</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 16.13 to 16.14.

<sup>8</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 16.23.

<sup>9</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 16.24.

that these increased maximums are needed, in the sense that almost all sentences for aggravated offences fall within the maximum available for the base version of the offence.

- (2) The increased time and cost associated with the elevation of some offences to Crown Court trials. Current delays in the Crown Courts associated with the COVID-19 pandemic make this concern particularly acute at present, and the backlog may persist for some time.
- (3) A concern that some juries are more reluctant than judges to find that a person was, for example, “racist” merely because certain language was used at the time of the offending. This can be so even in circumstances where the evidence clearly points to the demonstration limb of the legal test having been met – for example through the use of a nasty racial slur.
- (4) Anecdotal concern that 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.

8.21 In respect of enhanced sentencing, we noted:<sup>10</sup>

- (1) it is the more common approach to hate crime laws internationally;
- (2) it is more flexible in its application across a wide array of offences;
- (3) it is potentially less costly and time consuming for the aggravation to be dealt with at the sentencing stage;
- (4) sentencers are already well accustomed to identifying aggravating and mitigating circumstances in offending, and deciding the appropriate sentence in all the circumstances; and
- (5) the increased maximum penalties for aggravated offences appear to be unnecessary in most cases.

8.22 However, we also noted that many consultees – particularly those representing LGBT and disabled people – saw enhanced sentencing as an inferior model for addressing hate crime. It was argued that compared with aggravated offences, enhanced sentencing was often pursued more as an after-thought, whereas aggravated offence prosecutions tended to focus more squarely on this aspect of the harm caused.

8.23 With regard to the “dual” approach, we noted that having two parallel legal mechanisms running alongside each other increased the complexity of the law, and that complexity was one of the key concerns that many had with the current state of hate crime laws. However, arguably the greater source of complexity was the disparity in the way different characteristics are treated in law; an issue we have recommended

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<sup>10</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 17.49 to 17.71.

at paragraphs 8.56 to 8.70 be resolved through consistent treatment of all characteristics.

- 8.24 Further, we acknowledged that it was not entirely clear to many why certain offences were chosen to have aggravated forms while others were not. In Chapter 16 of the consultation paper we looked at possible rationales for the choice of aggravated offences and noted that some of the existing aggravated offences are among the most commonly prosecuted in the context of characteristic-based hostility.
- 8.25 We also acknowledged that the dual approach has been in operation for more than 20 years, and that any reductions in maximum sentences consequent upon the removal of the aggravated offences regime might be received negatively by race and faith communities who are currently protected by these laws.
- 8.26 We provisionally proposed the retention of the dual approach primarily for the following reasons:
- (1) The symbolic and deterrent effect of aggravated offences with increased maximums remains an important component of hate crime laws, and to remove this would send a negative message to the communities they currently protect.
  - (2) The flexibility and expediency of enhanced sentencing across all remaining criminal offences is a proportionate way to deal with other forms of hate crime offending.
- 8.27 In the alternative, we also noted that there could be benefits to a singular approach, adopting either one of these models, or a hybrid approach incorporating aspects of both.
- 8.28 We looked in detail at a law reform model proposed by authors of a Sussex University report, which resembles current hate crime laws in Scotland.<sup>11</sup> This “hybrid” approach would adopt many of the core elements of aggravated offences: specification of a separate offence; and a requirement of proof before the jury/bench of lay magistrates. However, unlike aggravated offences (and more like enhanced sentencing) it would apply across all offences, and not increase the maximum penalty available. This approach was recently recommended as the preferred model for reform of hate crime laws in Northern Ireland.<sup>12</sup> By contrast, the Republic of Ireland has recently announced that it will introduce hate crime laws that adopt a “dual” approach resembling that of England and Wales.<sup>13</sup>

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<sup>11</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 16.157 to 16.179.

<sup>12</sup> See Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020), Recommendation 3, p 10. Though in Northern Ireland the situation is somewhat unique again. The eleven offences that are aggravated in England and Wales have already had their maximum penalties increased to the aggravated maximum equivalents in England and Wales. These increases apply to all offending, not just hate crime, but were implemented at the same time as the Northern Ireland hate crime provisions.

<sup>13</sup> We describe the Irish proposals in more detail in Chapter 2 from paragraph 2.203.



## Consultation responses

8.29 In our consultation paper we asked a number of questions relating to the preferred model of hate crime laws.

Consultation question 24: We provisionally propose that the model of aggravated offences with higher maximum penalties be retained as part of future hate crime laws. Do you agree?

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?

Consultation question 35: 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.

Consultation question 36: 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. Do consultees agree?

8.30 Consistent with responses to other questions in the consultation paper, a significant majority of personal responses, and a majority overall, responded negatively to these proposals, with many indicating a fundamental objection to hate crime laws.

8.31 Examples of these negative responses are as follows.

- (1) "Both aggravated offences and enhanced sentencing are fundamentally unjust: they grant legal privileges to one group and not to another."
- (2) "There should be no higher penalties for what people think or feel."
- (3) "Yes to higher maximum sentences for violent crime, no to basing them on Hate Crime laws and identity politics."
- (4) "No to both. Less hate crimes not more."
- (5) "In my view Hate Crime laws have no place in a liberal society and the existing Hate crime laws should be scrapped, not expanded. Anyone arguing in favour of these laws wants to create a less free, less liberal society, which goes against the culture and history of this country."
- (6) "The expression of someone's opinions should never be a matter for legal enforcement and freedom of speech and expression is required in a free society."

8.32 As we have noted elsewhere in this report, the abolition of hate crime laws was not within the scope of the terms of reference for this project, nor in our view is it justified, having regard to the ongoing prevalence of hate crime, and the damage it causes to the community.

8.33 However, we also cannot ignore the obvious concern that some members of society have with these laws, which was emphasised in the hundreds of consultation responses we received to this effect. This concern has influenced our recommendations later in this chapter – where we move away from our provisional proposals to expand the number and types of offences that have aggravated versions.

8.34 Amongst consultees who did not seek the abolition of hate crime laws but engaged more directly with the preferred model for these laws, a variety of views were expressed.

8.35 Criminal justice agencies were broadly supportive of our provisional proposal to retain the existing “dual” approach.

8.36 The CPS supported the retention of aggravated offences:

The existence of specific aggravated offences with higher maximum penalties sends out a powerful message to victimised communities and to wider society that hate crime offences are of a higher level of seriousness and will be treated more severely by the criminal justice system. A conviction for a specific aggravated offence is also a highly effective way of labelling an offender as a hate crime perpetrator, with corresponding benefits in respect of deterrence and monitoring. We therefore agree that the model of aggravated offences with higher maximum penalties should be retained.

8.37 The Magistrates Association similarly considered that aggravated offences should be retained:

We note the benefits to the current model of aggravated offences, and agree that the higher maximum penalties can have a positive impact on perceptions of how seriously these offences are treated. We also note the importance of moving certain summary only offences to either-way offences, which allows elevated sentences.

Although we agree with some of the points noted in the consultation paper which illustrate moving a case from magistrates' court to Crown Court can have negative impacts, especially in relation to delays, we would note that if magistrates' court were to have increased jurisdiction, so they could deal with cases that engage a custodial sentence of up to 12 months, this would help resolve this problem.

8.38 The Welsh Government said:

The consultation paper puts forward a strong case to retain the model of aggravated offences with higher maximum penalties, while acknowledging in doing so it also retains the complexity of a dual system of hate crime laws, comprising both aggravated offences and enhanced sentencing. It is significant that consultees saw this mechanism as a core component of hate crime laws, and telling that stakeholder groups not already protected by aggravated offences wanted these mechanisms to cover their characteristics.

8.39 The Association of Police and Crime Commissioners (APCC) provided a mixed response, noting the costs and benefits of each approach:

The APCC believes that the Sussex Report's proposed "hybrid" approach could be considered in further detail. Provisionally, we would support a move towards providing greater simplicity and coherence in the law through having one single mechanism with regard to aggravated offences.

However, we would be concerned about the requirement that the aggravation be proven before a jury in all cases; in particular, the impact that this could have on victims, and delays that this could cause in the Crown Court.

- 8.40 The Bar Council indicated its support for the retention of aggravated offences, noting that "the benefits of this model include fair labelling and the possibility of a sentence that exceeds the statutory maximum for the base offence." However, they proposed a novel alternative approach, which they outlined as follows:

There would only need to be one new offence – "section 1 of the Hate Crime Act 2021". This could be bolted on to any base offence for which it was appropriate. The maximum for this offence could be set at, say, 4 years' imprisonment for indictable base offences and 2 years' imprisonment for summary-only base offences, which would broadly mirror the current level of aggravation. Any concern that the uplift resulting from a conviction for the aggravated offence could disproportionately exceed the sentence for the base offence, could be addressed in the legislation or by Sentencing Guidelines. There would be an expectation that upon conviction there would be consecutive sentences – one for the base offence and the second for the bolt-on. Fair labelling would be ensured. It would result in criminal records unambiguously reflecting the aggravation of the targeting of a protected characteristic. And the jury would not be diverted from the task of focusing on the base offence, for which they would first have to convict before considering the aggravated form. No-one could be convicted of the aggravated form without being convicted of the base offence – it would be a parasitic offence. So it cannot properly be criticised on the basis that it creates a new category of "thought crime" where there is no underlying criminality.

- 8.41 We are grateful for the thought and effort that has gone into this proposal, and we have given it serious consideration. As the Bar Council has noted, there are a number of potential advantages to it, chiefly:

- there would be a clear label and criminal record to reflect the hostility aggravation; and
- it is potentially quite simple for a jury to understand this separate offence, and for a judge to give clear directions.

- 8.42 However, we have a number of concerns about it. First, it would represent a considerable departure from the current law. We have not consulted on this proposal, and there is also no clear comparable approach within the United Kingdom or internationally to draw from. It would therefore be somewhat untested. Against this, the existing "dual" approach has been operating for over 20 years. While it is not without criticism, it has been operating reasonably effectively, and its advantages and disadvantages are well understood.

- 8.43 Second, we consider that many in the community may have particularly strong objections to the idea of a free-standing offence of committing a hate crime (even if it is entirely parasitic on the commission of a base offence). While in legal terms the operation of this provision may resemble the aggravated offence model, it would result in one act (such as an assault) being punished as two distinct offences, artificially separating out the act from the hostility proven to be associated with it. The separate punishment associated with that hostility could be seen by some as punishing the defendant purely for their thoughts or words. This could distract from the real purpose of hate crime laws, which is to recognise the added harm caused by and increased culpability of the perpetrator in the commission of an existing criminal offence.
- 8.44 Finally, the setting of a single maximum penalty across all possible scenarios arguably does not provide sufficient guidance and clarity to sentencers. The proposed universal maximum does not differentiate sufficiently between aggravation of already severe offending, such as serious assaults, and less serious offending, such as public order harassment offences. For example, if the hate crime offence were to have a maximum of 2 years when tried summarily (as the Bar Council provisionally suggests), when prosecuted alongside the base offence of causing harassment alarm or distress contrary to section 5 of the Public Order Act 1986, this would be well in excess of the £1000 fine maximum for that offence. Sentencing guidance could mitigate this to some extent, by providing clear upper limits in such contexts. However, we still consider its operation with regard to sentencing to be potentially too uncertain. It is also arguably quite intimidating and oppressive for an offender charged with a lower level public order offence to face a theoretical custodial penalty of up to two years' imprisonment, even if this is unlikely to occur in practice.
- 8.45 A further thoughtful and extremely helpful contribution was provided by Dr Abenaa Owusu-Bempah, one of the authors of the Sussex report referred to at paragraph 8.28. In it she cogently presented the main arguments for the adoption of the Sussex proposals, but also suggested as a compromise that the increased maximum penalties could be retained for those offences that already have them:

The dual system of aggravated offences for some crimes and enhanced sentencing provisions for others is overly complex and causes unnecessary confusion for both the public and legal professionals. As recognised at para 9.17 of the consultation paper (and elaborated on from para 9.28), the “two separate, at times overlapping, mechanisms for increasing the applicable sentence for hate crimes” is a main criticism of the current law.

The "hybrid" approach proposed in Walters, Wiedlitzka, Owusu-Bempah and Goodall, “Hate Crime and Legal Process: Options for Law Reform”, is, therefore, the preferred approach. Abolishing the enhanced sentencing provisions and allowing for any offence to be prosecuted as an aggravated offence ensures that all offences can be sentenced on the basis of being aggravated, while eliminating much of the complexity and uncertainty within the current law. As long as each offence does not come with a higher maximum sentence (and subject to specific concerns that might arise from the inclusion of new characteristics – eg gender), this is a workable solution which does not reduce or remove existing protections.

It is rare that increased maximum sentences are required for aggravated offences. Indeed, there are several reasons why increased maximum sentences are undesirable, as identified in the consultation paper. In particular, “harsher” sentences do not adequately address the root causes of hate crime and are often not desired by victims of hate crime. Also, absent higher maximum sentences, aggravated offences are still capable of expressing denunciation and messages of support to targeted communities, while the “hate crime” label further stigmatises offenders, with the offence being recorded on the offender’s record as an aggravated offence. Thus, in place of higher maximum sentences for every criminal offence, it would be sufficient that the offender has been convicted of an “aggravated offence”, and the sentencing judge must treat the hostility element of the offence as a specific and important aggravating factor.

The consultation paper expresses concern about “rolling back the additional maximum penalties that currently apply in respect of various forms of racially and religiously aggravated hate crime” and that “this is likely to send the wrong message to these and other communities, and undermine the overall deterrent effect of hate crime laws”. Yet, the consultation paper acknowledges the lack of evidence as to the deterrent effect of hate crime laws, and that many victims do not see the value in harsh sentences. Moreover, where the aggravated element constitutes an aspect of the offence, it is more likely that the offence will be flagged as a hate crime and evidence of hostility will be gathered at an early stage. The hate crime “label” may be applied more often, thus expressing a stronger commitment to protecting targeted communities.

For the reasons stated in the consultation paper, and elaborated on in Walters, Wiedlitzka, Owusu-Bempah and Goodall, “Hate Crime and Legal Process: Options for Law Reform” (University of Sussex, 2017), I am in favour of the “hybrid” approach.

It should be noted that, while some jurors may too readily dismiss the prosecution case in respect of racial or religious hostility, empirical research revealed concern that some judges too readily accept the prosecution version of events. Walters’ proposed “refined demonstration of hostility test” (set out in response to question 22) could help juries to understand that the purpose of the “demonstration of hostility” test is not to find guilt of racist or anti-religious beliefs (ie, beliefs that underpin motive), but to find criminal fault for an expression of hostility that is connected to a basic offence.

As argued throughout this response, higher maximum sentences are not necessary for punitive or symbolic reasons. I share concerns that removing the current increased sentences would not be received well by some. A compromise could be to retain the higher maximum for the offences currently included in the Crime and Disorder Act 1998, so as not to send the wrong message, but not to introduce new maximum sentences for other offences. Alternatively, it could be communicated clearly to the public that increased maximum sentences have proven unnecessary (and, at least to some extent, undesirable), and that sentences will continue to reflect the aggravated element in the usual way.

8.46 This amended form of the Sussex proposals would still arguably be simpler in that there would be only one way in which hate crimes could be established – as an element of the offence, rather than at the sentencing stage.

### **Conclusions following consultation responses on the “dual approach”**

8.47 In broad summary, the extensive responses we received on this question revealed:

- (1) It was again clear that there are many individuals who are vehemently opposed to the existence of hate crime laws, and consequently to any proposal to expand their scope.<sup>14</sup>
- (2) Accepting (as our terms of reference do) that hate crime laws will be retained, there was no clear consensus on which model is preferred.
- (3) Some individuals and groups saw an opportunity to improve on what they saw as a flawed and overly complex “dual” model. Others indicated that were relatively content with the current model provided that parity of treatment across all protected characteristics was introduced.
- (4) The Bar Council suggested an innovative alternative proposal.<sup>15</sup>

8.48 On balance, where the alternatives were weighed against each other by consultees, there was somewhat more support for retention of the current dual approach compared with the hybrid alternative, though legitimate concerns were raised with the dual approach – notably its complexity.

8.49 Given that consultation responses did not strongly prefer an alternative approach, we consider the retention of the current dual model to be the most prudent approach.

8.50 In this regard, we note that the model used in England and Wales is already well established. Indeed, in recommending a single, Scotland-style approach in the recent Northern Ireland hate crime review, Judge Marrinan acknowledged that:

In England and Wales the matter is complicated by the fact they that have been operating both models side-by-side for different purposes and for different protected characteristics for many years. This historical context makes it difficult or more difficult to consider abandoning one model in favour of the other.<sup>16</sup>

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<sup>14</sup> This has informed some of our conclusions later in this chapter – particularly our decision not to recommend the addition of new aggravated offences (contrary to our provisional proposals in the consultation paper). However, as we have emphasised, the repeal of existing hate crime laws was not within our terms of reference.

<sup>15</sup> For the reasons outlined at paragraphs 8.42 to 8.44 we do not consider this to be a preferable approach.

<sup>16</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) p 124, para 5.46. Additionally, in Northern Ireland, the base versions of the offences that have equivalent aggravated versions in England and Wales have also already had their maximum penalties increased to the level of the aggravated versions of the same offences in England and Wales. These increases applied to all offending, not just hate crimes, but the already higher maximum penalties further reduce the call for a distinct set of aggravated offences in that jurisdiction.

- 8.51 We have seriously considered – as a viable alternative – the proposed compromise model suggested by Owusu-Bempah. This would essentially involve retaining the increased maximum penalties for the currently specified aggravated offences, and moving to a model where for all other offences the hostility element of the offending would be included on the indictment, and proved as an element of the offence (with the base offence available as an alternative). However, we have ultimately been persuaded by the CPS that in the absence of an increased maximum sentence, the requirement of separate proof of hostility as an element of the offence (rather than at the sentencing stage) is not proportionate. In particular, it would entail additional time and resources in the conduct of criminal trials, without the justification that the defendant was facing a more serious maximum penalty. In the context of the current resourcing constraints on the criminal justice system – which have been exacerbated by the COVID-19 pandemic – we do not think such additional resources are justified.
- 8.52 It is relatively unusual in the criminal law of England and Wales for there to be an ostensibly more serious version of an offence that has the same maximum penalty as its equivalent “base” offence. One example is the offence of assault on constables under section 89 of the Police Act 1996, which has the same maximum penalty (6 months) as common assault under section 39 of Criminal Justice Act 1988. However, these are not offences that are charged in the alternative; the prosecution will simply pursue one or the other. It is also noteworthy that there is now an offence of assaulting an emergency worker (which includes police) contrary to section 1 of the Assaults on Emergency Workers (Offences) Act 2018, which has a higher 12 month maximum penalty, and this will be further increased to 2 years if clause 2 of the Police, Crime, Sentencing and Courts Bill 2021 is enacted.
- 8.53 While there remain some criticisms about the enhanced sentencing model, it is also important to note that the CPS has significantly improved its performance in achieving recorded sentence uplifts for hate-flagged prosecutions in recent years.<sup>17</sup> This suggests that it is a model that can be made to work effectively. The recent introduction of recording of these sentence enhancements on the Police National Computer has further narrowed the distinction between the two models as far as recognition and labelling is concerned.
- 8.54 If government were to prefer the option of moving to a singular approach along the lines of the compromise model suggested by Owusu-Bempah, we consider that this approach would also be viable. However, there would likely be a greater cost associated with this, which may be particularly unwelcome given the current constraints on the criminal justice system.

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<sup>17</sup> See Crown Prosecution Service, *Hate Crime Strategy 2017-20* (2018) p 3, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Hate-Crime-Strategy-2020-Feb-2018.pdf>.

### **Recommendation 11.**

- 8.55 We recommend that the current dual approach of aggravated offences and enhanced sentencing be retained in England and Wales.

## **PARITY OF CHARACTERISTIC PROTECTION FOR AGGRAVATED OFFENCES**

- 8.56 At present there is significant disparity between the treatment of race and religion, for which aggravated offences exist, and the protection of the other three currently protected characteristics: sexual orientation, disability and transgender, for which only enhanced sentencing is applicable.
- 8.57 Disparity also arises in the context of the offences of stirring up hatred under Parts 3 and 3A of the Public Order Act 1986 (chapter 10) and the offence of racist chanting at a designated football match contrary to section 3 of the Football (Offences) Act 1991 (chapter 11). We consider these contexts in more detail in those chapters. In summary, in Chapter 10 we recommend that a consistent approach be taken to stirring up offences across all five characteristics. In Chapter 11 we consider a similar extension is not necessary in respect of the racist chanting offence because this context can be adequately addressed through existing public order offences – including the aggravated versions of these offences that we recommend at paragraph 8.70 should be extended to cover sexual orientation, disability and transgender identity, in addition to race and religion.
- 8.58 The importance of parity of protection was one of the strongest themes that emerged out of our pre-consultation meetings. It was also a concern that we considered in our 2014 review of hate crime laws, where a majority of stakeholders supported such an approach in relation to aggravated offences.<sup>18</sup> In that report we found that:

The public should be able to have confidence that hate crime will be taken equally seriously and investigated and prosecuted equally robustly, whichever of the five characteristics is the object of hostility. It is undesirable for the current law to give the impression of a “hierarchy” of victims ...

Unless there is some good reason (as to the nature of the offending, its seriousness, its prevalence or otherwise) for the law to provide the further protection that may derive from the “aggravated” label, in relation to racial and religious hostility only, it is unacceptable for the same system not to apply to all five characteristics.

- 8.59 In our 2020 consultation paper we noted that the jurisdiction of England and Wales is quite anomalous in its differential treatment of different characteristics in hate crime laws; almost all other comparable jurisdictions treat the characteristics that are recognised in that jurisdiction in the same way. We also noted that LGBT+ and disabled victims of hate crime felt like the law treated them like second class citizens because of this disparity, and that there were also practical consequences, such as

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<sup>18</sup> Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348, p 81.



police confusion around which offences might be available for prosecution for LGBT+ and disability hate crimes.

## Consultation

- 8.60 We asked about the extension of aggravated offences to all five existing characteristics at consultation question 25 and summary consultation question 8, which were as follows:

### Consultation Question 25

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).

Do consultees agree?

### 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?

- 8.61 There was very strong support for a consistent approach amongst organisational stakeholders. Many of these responses considered this to be a fundamental reform needed in order to make the law fair and to remove the current “hierarchy” in hate crime laws. In general, these responses did not elaborate their reasoning in great detail. For example, The Bar Council simply said:

Yes. There would not appear to be any good reason to withhold parity of protection across the range of protected characteristics.

- 8.62 The National Aids Trust commented:

Yes, we agree. We firmly believe that all 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. This would make the law more clear, accessible and fair for people with all protected characteristics.

- 8.63 The Greater Manchester Deputy Mayor also agreed:

[T]his has been a long-standing criticism by victims, that there is a clear lack of parity across the protected characteristics within existing hate crime laws. It makes a lot of sense that aggravated offences should apply to all current characteristics equally, and to any further characteristics that are added in the future. This would prevent the victims of hate crimes receiving a different response / outcome due to the characteristic that was recorded.

8.64 The majority of the negative responses were personal responses. Where reasoning was provided it was very often because of a fundamental objection to hate crime laws, or their expansion in any way. Consistent with some of the responses outlined at paragraph 8.31 earlier in this chapter, many considered these laws to be an affront to free speech and to offend the principle of equality before the law. For example:

- (1) “Hate crime legislation has already been applied unequally, and so expanding this even more would be irresponsible and reckless.”
- (2) “No, this may impinge on freedom of speech.”
- (3) “There should be no hate crime laws.”

8.65 Some also objected to the omission of women, misogyny or sex in the question, an issue we considered separately in another part of the consultation paper, and in Chapter 5 of this report.

8.66 In a smaller number of responses the objection was to a more specific group such as “intersex”, “non-binary” or “transgender”.

8.67 Several responses stated “only disability”.

### **Conclusion following consultation**

8.68 While we again recognise the opposition to hate crime laws in some parts of the community, as we have indicated, the repeal of existing hate crime laws was not within the scope of this review.

8.69 We remain of the view that we expressed in our 2014 report that the current hierarchy of protection is unfair and sends a distinctly negative message to victims of hate crimes on the basis of disability, sexual orientation and transgender identity. We therefore recommend parity of protection for aggravated offences across all five characteristics.

### **Recommendation 12.**

8.70 We recommend that aggravated offences be extended to cover all existing characteristics in hate crime laws: race, religion, sexual orientation, disability and transgender identity.

## **CHOICE OF AGGRAVATED OFFENCES**

8.71 The current range of offences that have aggravated forms are outlined in the table at paragraph 8.9. With the exception of the stalking offences which were created and added in 2012,<sup>19</sup> these offences were originally selected in respect of racial aggravation only.

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<sup>19</sup> Protection of Freedoms Act 2012, s 111 and Sch 9, Pt 11, para 144.

- 8.72 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.”<sup>20</sup>
- 8.73 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.<sup>21</sup>
- 8.74 In our consultation paper we considered the issue of whether any further offences should be added to those currently specified. We provisionally proposed that the criteria for deciding whether an aggravated version of an offence should be created should be:<sup>22</sup>
- the overall numbers and relative prevalence of hate crime offending as a proportion of the 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; 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.
- 8.75 We then considered a range of possible offences for which aggravated versions could be created. On the basis of the criteria outlined above, we provisionally proposed that aggravated versions of the following offences should be created.
- The “communications offences” – offences contrary to sections 127(1) or (2) of the Communications Act 2003 (“CA 2003”) and section 1 of the Malicious Communications Act 1988 (“MCA 1988”).
  - Two offences which already had a life maximum penalty specified:
    - grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861 (“OAPA 1861”); and
    - arson with intent to endanger life or reckless as to whether life is endangered contrary to sections 1(2) and 1(3) of the Criminal Damage Act 1971.
- 8.76 We further asked whether any fraud or property offences might also be appropriate for inclusion, given particular concerns about this type of offending in the context of disability hate crime.

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<sup>20</sup> Home Office, *Racial Violence and Harassment: A Consultation Document* (Sep 1997) [3.1], available at <https://webarchive.nationalarchives.gov.uk/+/https://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/rvah.htm>.

<sup>21</sup> *Hansard* (HL), 12 Feb 1998, vol 585, cols 1280 to 1284.

<sup>22</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 386.

- 8.77 We considered a number of other possible offences of threats and violence, but suggested that it was not necessary to create aggravated versions of the following:
- (1) maliciously administering poison so as to endanger life or inflict grievous bodily harm (section 23, OAPA 1861);
  - (2) maliciously administering poison with intent to injure, aggrieve or annoy any other person (section 24, OAPA 1861);
  - (3) threats to kill (section 16, OAPA 1861); and
  - (4) threatening with an offensive weapon or article with a blade or point (section 1A Prevention of Crime Act 1953, section 139AA(1) Criminal Justice Act 1988).
- 8.78 Finally, we looked at sexual offences and noted that while these are sometimes committed in the context of hate crime, we did not consider them suitable candidates for aggravated versions primarily because:
- (1) existing penalties are substantial and provide sentencers adequate scope to reflect any additional seriousness that a hate component might add to offending; and
  - (2) the prosecution of sexual offences is already very challenging, and the imposition of an additional burden on the prosecution in proving the case before a jury may prove unduly burdensome.

### Consultation responses

- 8.79 We asked about the inclusion, or non-inclusion of the various offences outlined at paragraphs 8.75 to 8.78. This formed Consultation Questions 27 to 31.
- 8.80 As we noted at paragraph 8.31, there were a large number of personal consultation responses that indicated strong opposition to any expansion of hate crime laws. We have been keenly aware of these concerns in considering the creation of any additional aggravated offences.

### Creation of aggravated communications offences

- 8.81 Consultation Question 27 was as follows:

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

Do consultees agree?

- 8.82 Although in our consultation paper we argued that the strongest arguments for the creation of aggravation versions lay with the communications offences, this proposal generated the strongest opposition.

- 8.83 The Free Speech Union stated:

We are unhappy about this. If a communications offence is particularly serious, it should in our view be prosecuted as a stirring-up offence

8.84 Examples of personal responses in opposition were:

- (1) “Communications, whether private or public should be protected as a matter of free speech. Nobody had the right not to be offended.”
- (2) “Abuse should be a punishable offence. It does not need to be a hate crime.”
- (3) “Unless it's a direct threat/ call for violence then freedom of speech should be the driving factor.”
- (4) “We should be careful not to stifle free speech through rejecting opinions which differ from our own. Increasing maximum penalties speak of hatred and inability to accept contrary views. Hatred may be in the heart of the beholder, while far from the intention of the communicator.”

8.85 Though we accept the force of these concerns, it is noteworthy that many of these responses indicated a more fundamental objection to the communications offences. Indeed, in our recent report *Modernising Communications Offences*, we expressed concern about the vague nature of the current offences, and their potential to over-criminalise in certain circumstances.<sup>23</sup>

8.86 By contrast, organisational responses were generally more in favour of the proposal.

8.87 The CPS stated:

Yes. Most prosecutions for hate crime committed online are under section 1(1) Malicious Communications Act 1988 and section 127 Communications Act 2003. For this reason and for the reasons set out in the consultation paper, we agree that these should be added to the list of specifically aggravated offences

8.88 The Bar Council similarly agreed with our proposal:

The criteria set out in question 26 above appear to be met. In addition, we take the view that fair labelling further justifies communication offences to be included as ... aggravated offences.

8.89 Community Security Trust (CST) expressed concern about rising levels of antisemitism online:

As society has moved online, online antisemitism has increased. CST records online antisemitic incidents that have been actively reported to CST, and where the offender and victim (or both) are based in the UK. Within these limited parameters, which pick up a fraction of antisemitic posts and content online, antisemitic incidents recorded by CST have steadily increased to a significant proportion of all antisemitic incidents recorded by CST in the UK.

8.90 The Equality and Human Rights Commission (EHRC) indicated qualified support for the proposal, noting that there was an important balance of rights that must be struck:

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<sup>23</sup> *Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399.*

We tentatively agree with proposals that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws. The EHRC notes the concerns raised by UN [Convention on the Elimination of Racial Discrimination] in relation to online hate speech and its concluding observation that the UK Government should “adopt comprehensive measures to combat racist hate speech and xenophobic political discourse, including on the Internet, particularly with regard to the application of appropriate sanctions”.

In light of that recommendation, but also taking into consideration the importance of safeguarding freedom of expression in private as well as public discourse, we recommend any changes are informed by the outcome of the Law Commission’s current review of the provisions of section 127 of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 as these pre-date, in great part the advent of social media as a mainstream medium for general communication.

Any consideration of the need for aggravated versions of further offences should be informed by the criteria proposed in the consultation paper.

### Conclusions following consultation

- 8.91 As we indicated in our consultation paper, there are a number of factors that would suggest these offences are suitable candidates for aggravated versions: they are prosecuted relatively frequently in the context of hostility towards a protected characteristic; the additional requirements of proof are unlikely to be onerous given the hostility element is generally quite explicit in the offending conduct; and the fact that there are aggravated versions of the broadly equivalent “in person” public order offences, might suggest that that it would be consistent to have aggravated versions of these (largely online) communications offences.
- 8.92 However, two considerations make us reticent to recommend aggravated versions. The first is the considerable opposition that was expressed in consultation. The second is that our proposed reforms of these offences – which at the time of publication appear likely to be implemented by the government – would entail a sufficiently high maximum penalty that is likely to reduce the need for any additional aggravated version.
- 8.93 The communications offences contrary to section 127 of the Communications Act 2003 are summary offences and currently have a maximum penalty of six months’ imprisonment, whilst the offence contrary to section 1 of the Malicious Communications Act 1988 is an either-way offence and has a maximum penalty of two years’ imprisonment when tried on indictment.
- 8.94 As noted at 8.85, our recent report into the communications offences<sup>24</sup> recommended that a new, and more tightly defined “harm-based” communications offence should be created that would replace the offence in section 127(1) of the CA 2003 and most of the conduct covered by the offence in section 1 of the MCA 1988. We further recommended that a number of separate offences be created to replace the remaining offences in section 127(2) CA 2003 and section 1 MCA 1988 of sending knowingly false or threatening messages or making persistent use of a public electronic

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<sup>24</sup> Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399.

communications network – specifically offences of sending knowingly false communications, threatening communications, and making hoax calls to the emergency services.<sup>25</sup>

- 8.95 We have recommended that the maximum penalty available for the harm-based offence should be similar to that currently in place for section 1 of the MCA 1988: two years' imprisonment.<sup>26</sup> Similarly, we have recommended that the offence of sending a threatening communication be an either-way offence. If these recommendations for either-way offences are implemented, then we consider that these two replacement offences – which are the offences most directly relevant to the hate crime context – will contain sufficient scope to reflect the seriousness of the hostility enhancement within the available maximum penalties.
- 8.96 However, if the offences remain in their current form, and the offences contrary to section 127 of the CA 2003 remain summary offences, then we consider that a strong case remains for aggravated versions of these offences. Such an argument does not apply in respect of the offence contrary to section 1 of the Malicious Communications Act 1988, as the two-year maximum penalty for this offence is already sufficient. In this regard, we have been persuaded by the concern expressed by the CPS that the essence of an aggravated offence is that it has a higher maximum penalty, and that to create an aggravated version of the section 1 MCA 1998 offence without a higher penalty would create undue complexity in the law.<sup>27</sup>

### **Recommendation 13.**

- 8.97 We recommend that aggravated versions of reformed communications offences should not be created if the replacement “harm-based” and sending a threatening communication offence are created as either-way offences.
- 8.98 If the replacement offences are summary offences, or if the offences contrary to section 127 of the Communications Act 2003 are retained in their current form, we recommend that aggravated versions of these offences should be created.

### **Creation of aggravated versions of other offences**

- 8.99 Below we review responses to the other possible offences for inclusion that we considered in the consultation paper. While personal responses were again more opposed than in favour of adding these offences, the divide was not as stark as with the communications offences.

### **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**

- 8.100 Consultation Question 28 was as follows:

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<sup>25</sup> Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399, pp 99, 111.

<sup>26</sup> Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399. p 71.

<sup>27</sup> See further paragraph 8.102.

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

We do not propose that aggravated versions be created in respect of any other offences with a life maximum penalty.

Do consultees agree?

8.101 Following helpful representations from legal and prosecution bodies, we have reconsidered our provisional proposal to create aggravated versions of the offences of causing grievous bodily harm with intent contrary to section 18 of the OAPA 1861 and arson with intent to endanger life or reckless as to whether life is endangered contrary to sections 1(2) and 1(3) of the Criminal Damage Act 1971.

8.102 The CPS responded:

No. The essence of an aggravated offence is that it has a higher maximum penalty than that for the “basic” offence. Section 18 GBH with intent and arson endangering life already carry a maximum sentence of life imprisonment and therefore the element of hate crime aggravation can only be reflected within enhanced sentencing. This proposal would create a third “hybrid” hate crime offence: ie a specific aggravated offence with enhanced sentencing requirements. This would create unnecessary and undesirable complexity and make the offences harder for the prosecution to prove.

8.103 Mishcon de Reya also argued that it would not benefit the state of the law:

The proposal will not necessarily improve the position in terms of jury directions. For example, a single count of the proposed racially aggravated section 18 offence could lead to a complex range of alternatives, including (but not limited to):

- the indicted offence;
- section 18, with intent, but without the hate crime element;
- an aggravated section 20 offence; or
- a simple section 20 offence.

#### Other violent offences

8.104 Consultation Question 29 was as follows:

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).

Do consultees agree?

8.105 By contrast, in relation to some of the other violent offences for which we had not proposed aggravated versions, there was more support for inclusion.

8.106 In particular, the CPS noted that the two threat offences we considered might be appropriate for inclusion:

If specific aggravated offences are to be retained within a new hate crime legal framework, we see merit in threats to kill (section 16 OAPA 1861) and threatening with an offensive weapon/bladed article being included in that list. Both of these offences may be encountered in a hate crime context and it would be logical and consistent for them to exist in aggravated form (with higher maximum penalties) alongside other aggravated public order offences and offences of violence. Section 23 and section 24 OAPA 1861 are so rarely used in a hate crime (or any other context) that we see no merit (apart from consistency) in including them in the list of aggravated offences.

8.107 The Bar Council also considered that threatening with an offensive weapon/bladed article might be suitable for an aggravated version:

... in respect of (d) (threatening with an offensive weapon/bladed article) the relatively low maximum, combined with the circumstances in which this offence is likely to be committed, and the relatively straightforward mental element, all suggest to us that the offence might properly be included in the list of aggravated offences.

8.108 However, considered in the context of wider opposition to the creation of further aggravated offences, we consider that consultation did not reveal sufficient support for such a reform.

8.109 Examples of negative personal responses in relation to this question included:

- (1) "In principle I do not believe that any aggravated versions of an offence should be created."
- (2) "I believe the law commission has made an error in these proposals. We need fewer hate crime laws, not more."
- (3) "People are entitled to be as hostile as they think appropriate. The question should be, is there a threat of violence? If so, then this is covered by existing laws."

8.110 We also note that the maximum penalties for these offences – 10 years in the case of threats to kill, and 4 years in the case of threatening with an offensive weapon in public – are already substantial. It is likely, therefore, that there is already sufficient scope to reflect the hostility element of the offending within the existing penalty, meaning that the case for creating aggravated versions of these offences is less compelling.

### Property or fraud offences

8.111 Consultation Question 30 was as follows:

We invite consultees' views on whether any property or fraud offences should be included within the specified aggravated offences.

8.112 There were a much lower number of responses in relation to this question. However, the majority of responses were still largely opposed to the idea.

8.113 A number of groups concerned with disability hate crime did support the idea. Dimensions UK, who support learning disabled people, stated:

We also recommend that the range of aggravated offences that can be charged in relation to a crime against a disabled person include offences that are particularly prevalent. In particular, property and fraud offences and the criminalisation of coercive behaviour or exploitation involving a person who has a learning disability and/or autism. This may enable a better response to the specific issue of so-called 'mate crime',<sup>28</sup> which is one of the most prevalent and sinister modes in which people who have a learning disability and autism are targeted for crime and abuse.

8.114 Stand Against Racism & Inequality (SARI) echoed this view:

Yes – this is Mate Crime very often and needs proper recognition in hate crime legislation.

8.115 Dr Seamus Taylor, an academic expert in disability hate crime commented:

I consider that some property and fraud offences should be included within the specified aggravated offences as they are disproportionately represented in hate crimes which target disabled people

8.116 The CPS indicated that their view was that addition would achieve little if it was not accompanied by reform to the legal test (an issue we consider in Chapter 9):

If the existing two limb 'demonstration of hostility/motivated by hostility' definition of hate crime offences is to be retained within a new legal framework, then only rarely will property offences involving dishonesty or fraud fall within that definition (although they may be linked to other offences which clearly do fall within the definition). However, if the definition is amended or broadened so as to encompass, for example, the targeting of disabled people (or elderly people, if age is added as a

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<sup>28</sup> "Mate crime" is used to describe circumstances in which a perpetrator befriends a vulnerable person (often with a learning disability) with the intention of then exploiting the person financially, physically or sexually.

protected characteristic) then we consider that such offending should be included in the list of specific aggravated offences.

8.117 A significant proportion of those who responded negatively simply stated “no” without further explanation.

8.118 Many individuals also repeated their general opposition to hate crime laws in their answer, for example:

Absolutely not. What would possess you to imply, as this would, that you consider some people's right to property to be more important, more sacrosanct, than others?

8.119 A number of responses also indicated that they considered property offences were adequately dealt with within existing laws, without necessarily opposing hate crime laws more generally:

No, hate crimes are concerning individuals rather than their assets

8.120 Some indicated their view that hate or hostility are typically not present in these contexts:

- (1) “I would be very surprised if perpetrators of fraud etc are in any way motivated in a “hateful” way as regards their victims. Victims are most likely to be targeted based on either their vulnerability, gullibility, stupidity or all three.”
- (2) “No the link to hostility in these cases appears weak. While deplorable to take advantage of vulnerability this does not constitute hate.”

8.121 Given a lack of clear support for inclusion, we do not consider that a sufficient case has been made for the creation of aggravated versions of fraud or property offences. In particular, while we accept that there are some cases of fraud and property offences that are motivated by hostility – particularly in the context of disability hate crime – the overall numbers of these offences are not sufficiently great so as to justify the creation of new aggravated offences. Where these do occur, existing enhanced sentencing provisions can be applied in recognition of the additional harm caused.

### Sexual offences

8.122 Finally, we proposed that sexual offences were not appropriate candidates for aggravated offences given the already challenging nature of these prosecutions.

8.123 Consultation Question 31 was as follows:

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).

Do consultees agree?

8.124 A number of stakeholders agreed with this suggestion.

8.125 The Association for Police and Crime Commissioners stated:

We agree with this point, and particularly that made at paragraph 16.104(4) [of the consultation paper]: requiring the prosecution to prove an additional aggravated element is likely to make successful prosecutions harder, when sexual offences are already amongst the most difficult offences to prosecute.

Requiring an extra element for the prosecution to prove could prolong the court experience and create even more distress for victims.

8.126 The CPS similarly agreed that already complicated prosecutions may become even more difficult:

Yes. We consider that it would be undesirable to add extra elements to prove in respect of sexual offences. We therefore agree that where a sexual offence falls within the definition of hate crime it would be better dealt with by means of enhanced sentencing.

8.127 The National Police Chiefs' Council echoed this view:

We would agree recognising that such offences could be dealt with through enhanced sentencing.

8.128 For Women Scotland noted the broader concerns around low prosecution rates for sexual offences against women, and indicated that they did not consider that any further hate crime recognition would improve this situation:

Sexual offences are directed principally against people of the female sex. The prosecution rate is already very low for these offences while the conviction rate is abysmal. This shows the disregard with which women (females) are already treated by the justice system. This should be dealt with as a matter of urgency. Whether this should be dealt with through the hate crime legislation is not clear to us. There is little evidence that enhanced sentencing acts as a deterrent.

8.129 Some responses indicated a degree of misunderstanding as to the current law – thinking that the proposal was for sexual offences never to be capable of being considered a hate crime (i.e. through enhanced sentencing), rather than the more specific question of whether aggravated offences should be created.

8.130 Others indicated that they did not see why sexual offences should be excluded when other offences are included. For example, Stand Against Racism & Inequality (SARI) responded:

We see hate motivated sex offences – including rapes and this needs to have equal treatment by the criminal justice system. Hate motivated sexual offences such as rape or someone believing they have the right to sexually assault someone because of their protected characteristic is an extremely serious hate crime. We cannot understand why it cannot be made an aggravated offence.

8.131 Some personal responses argued that rape is not taken seriously enough and creating an aggravated offence would assist:

- (1) “Most sexual crimes are misogynist. The current sexual offences laws do not recognise these crimes as being hate inspired and are treated leniently in court or are not prosecuted at all, hence rape prosecutions being miniscule compared with number of offences. Women don’t report due to victims being held responsible for perpetrators hatred and violence.”
- (2) “Rape is hardly prosecuted these days so the law needs to be strengthened”.

8.132 The Magistrates Association did not agree that aggravated versions of sexual offences would make prosecution more difficult:

Although we note there is not clear evidence of prevalence, it is highly possible that sexual offences that are motivated by hostility to disabled and LGBT victims are not currently being recorded as hate crimes, which makes prevalence hard to prove. We acknowledge the challenges already faced in relation to prosecuting such offences, it is important to remember that the Crown Court can return an alternative verdict of guilty of the non-aggravated version of the offence. The additional point of concern about introducing a hierarchy of victims is pertinent, but it could be considered as relevant for all aggravated offences.

We therefore do not feel they are strong arguments against introducing aggravated versions of sexual offences when balanced with the need to protect victims targeted due to their protected characteristics.

8.133 Some personal responses supported any proposal that would create scope for sexual offences to be dealt with more severely:

- (1) “There is a demonstrable need for tougher sentencing of sex crimes.”
- (2) “Surely sexual offences are the most serious and deserve an[] additional aggravated level?”

8.134 While many of those in favour of aggravated versions of sexual offences believed this might result in sexual offences generally being taken more seriously, we are not convinced that this would necessarily follow. As For Women Scotland noted, this a distinct issue, for which hate crime laws are unlikely to prove the remedy. Given our concerns about the potential negative impact on sexual offence prosecution – which several key criminal justice stakeholders shared – we remain of the view that sexual offences are not appropriate candidates for aggravated offences.

#### **Recommendation 14.**

8.135 We recommend that no further aggravated versions of existing criminal offences should be created.

### **CHANGES TO MAXIMUM PENALTIES FOR AGGRAVATED OFFENCES**

8.136 The table at paragraph 8.9 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.

8.137 As we noted in the consultation paper,<sup>29</sup> in the case of racially or religiously aggravated harassment, alarm or distress,<sup>30</sup> 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 highlighted that there is a significant gap between this offence and 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, either a section 5 or section 4A (intentional harassment, alarm or distress) offence can be charged. Prosecutors have told us that there is 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.

### Consultation responses

8.138 In the consultation paper we asked the following general question in relation to maximum penalties:

Are the maximum sentences for the aggravated offences in the CDA 1998 appropriate?

8.139 There were only 480 responses to this question, which was low compared to many others.

8.140 Of those who did respond, only a few responded in detail, and there were not many consistent themes across the responses.

8.141 The Antisemitism Policy Trust expressed the view that the current maximum penalties were adequate, but argued that in practice the sentences handed down were weak:

The Antisemitism Policy Trust believes that the current maximum sentences for aggravated offences, namely racial and religious offences, are sufficient in terms of length of time for a custodial sentence or the maximum fine which can be given, as prescribed by law. However, the actual sentences handed down to offenders, on average for 2018, were weak. Although the uplifted sentences are marginally more substantial than those handed down for the basic offence, they arguably do not deter offenders.

8.142 The CPS again reiterated the concern that we had outlined on their behalf in the consultation paper – namely the large gap between the maximum penalty for the racially or religiously aggravated version of section 5 POA 1986, and its section 4A equivalent.

Racially or religiously aggravated section 5 POA 1986 is a summary only offence and the maximum sentence is a fine of £2500. However, racially or religiously

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<sup>29</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 406.

<sup>30</sup> Crime and Disorder Act 1998, s 31(1)(c). The base offence is Public Order Act 1986, s 5.

aggravated section 4/4A POA 1986 is an either-way offence and the maximum penalty is two years imprisonment. This wide gap in sentencing power causes difficulties for prosecutors in selecting the appropriate charge because there is a clear overlap between the most serious aggravated section 5 offences and the less serious section 4/4A offences. There are a significant number of cases where aggravated section 5 would not give the court adequate sentencing power, whilst charging aggravated section 4/4A would be disproportionate and might result in the defendant electing to have the case tried in the Crown Court. Also, the fact that aggravated section 5 is currently non-imprisonable causes difficulties when the defendant is sentenced to imprisonment for other offences. In these cases, the court cannot impose a consecutive or concurrent sentence for the aggravated section 5 offence and a fine would not be appropriate due to the imposition of an immediate custodial sentence. The result is that the court has no alternative but to impose “no separate penalty.” All of these difficulties could be resolved by making aggravated section 5 POA 1986 an imprisonable offence.

8.143 The NPCC also echoed this view:

One chief officer felt that it was important to consider changes in relation to increase in the available sentence for aggravated section 5 of the Public Order Act 1986.

The view the fact that it is only punishable by a fine, sends an incredibly negative message to victims. We believe that the option to impose a custodial sentence should be left open to the Court.

8.144 However, few other stakeholders engaged on this topic, with some such as the Bar Council and Magistrates Association indicating that they did not wish to comment on matters of sentencing policy.

### **Conclusion following consultation**

8.145 This lack of broad support for change to the section 5 POA 1986 aggravated maximum penalty, combined with broader opposition to expansion of hate crime laws already canvassed in this chapter, suggests to us that there is no consensus around reform in this area. We therefore do not make any recommendations for reform of the maximum penalties for the existing aggravated offences.

### **HOSTILITY TOWARDS MORE THAN ONE CHARACTERISTIC**

8.146 One of the major concerns of many hate crime victims to whom we spoke was the capacity of the law to recognise that they had experienced hostility based on more than one characteristic. This phenomenon is sometimes referred to as “intersectional” hate crime.

8.147 For example, 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 assumed to be, both Muslim *and* of South Asian or Middle Eastern origin.

8.148 In addition to explicit hostility towards multiple characteristics, there may be circumstances where the defendant was clearly motivated by hostility on the basis of a

protected characteristic, but it is unclear which. This is most likely to occur with regard to characteristics that are commonly associated with each other, for example race and religion in the example referred to at paragraph 8.147, or sexual orientation and transgender identity in the example we outline at paragraph 8.178. Many considered that in practice, the law and law enforcement agencies often only recognised or prioritised one aspect of the hostility they had experienced.

8.149 In our consultation paper we noted a number of possible reasons for this:<sup>31</sup>

- (1) The disparity in legal treatment between racial and religious hate crime, and other forms of hate crime, may incentivise law enforcement to focus on the former if a racially or religiously aggravated offence with a higher maximum penalty can be charged.
- (2) Some forms of hate crime – notably racial hate crime – may be better understood by police and prosecutors than others, such as disability hate crime.
- (3) In its present form, the legal mechanism of aggravated offences does not easily lend itself towards recognising the targeting of more than one characteristic within a single criminal offence.

8.150 In relation to the first of these concerns, our recommendation to equalise protection across all recognised characteristics (see paragraph 8.70) should remove these incentives. Similarly, in relation to the second, we anticipate that parity of treatment in law may facilitate further improvement in the recognition of hate crime across all protected groups; a trend that already appears to be occurring.

8.151 However, the third of these concerns – the relative inflexibility of aggravated offences – could be exacerbated by our parity proposals. This is because the extension of aggravated offences to all hate crime characteristics would create many more possible combinations of characteristic targeting within these offences. By contrast, enhanced sentencing – which is currently used for all hate crime involving hostility on the basis of sexual orientation, transgender status and disability – does not present the same procedural challenges as aggravated offences, as the enhancement is not specified on the indictment. Under this model, the hostility towards multiple characteristics can be recognised and considered by the sentencer in the exercise of their discretion.

8.152 The particular challenge the current formulation of aggravated offences creates is that if two forms of hostility are specified on a single count, *both* need to be proven in order to secure the aggravated conviction. For this reason, the CPS does not prosecute aggravated offences involving both racial and religious hostility (the only characteristics for which aggravated offences are currently available) in this way, as it heightens the risk of the prosecution failing. Instead, the CPS may prosecute the two alternatives separately, but this opens up the risk of overloading the indictment. Alternatively, the CPS may drop one version if the evidence is significantly weaker in relation to that protected characteristic.

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<sup>31</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 399 to 400.



## Consultation in relation to aggravated offences involving “one or more” protected characteristics

- 8.153 In our consultation paper we considered a reform that would provide for the recognition of hostility based on “one or more” protected characteristics.<sup>32</sup>
- 8.154 For an aggravated offence, the characteristics could be specified in the charge or count on the indictment, but conviction would only require the jury to be satisfied that hostility towards at least one had been proven by the prosecution.
- 8.155 For example, in the case of an assault against a person of visibly Muslim and South Asian appearance, where the perpetrator had called the victim a “p\*\*i terrorist” the charge could specify 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 of the aggravated offence.
- 8.156 We argued that the advantages of this approach from the perspective of prosecutors and victims would be that charges for aggravated offences could better reflect the true nature of the offending in a single charge, rather than offering multiple alternatives and complex routes to verdict which may confuse a jury. It may also encourage more accurate recording of prosecution and conviction statistics in respect of different characteristics.
- 8.157 From the perspective of the defendant, the prosecution would still be required to set out their case and the characteristics on the indictment, so 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 victim and any witnesses. However, we recognised 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 on which the jury is asked to decide.

- 8.158 We asked the following question of consultees:

### Consultation Question 32

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.

- 8.159 Responses to this question were mixed.
- 8.160 Negative personal responses generally indicated significant hostility to the idea of “intersectionality”. This was usually connected to a wider antipathy towards the notion of hate crime laws. Ten responses described the notion of intersectionality as “Marxist.” Some examples of these negative responses were as follows:

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<sup>32</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 399 to 404.

- (1) “No. Intersectionality is a ridiculous theoretical concept. Every human being is individual. Everybody should be treated with respect, and there should not be a points scoring exercise for who is most oppressed and therefore offences against should attract a harsher punishment.”
- (2) “The law should not waste its time and resources with absurdities such as hate crimes or intersectionality.”
- (3) “Intersectionality is a garbage academic term which is bringing more division and hatred than anything. Rid legal discourse of all such regressive nonsense.”

8.161 By contrast, a significant majority of organisational stakeholders responded more positively.

8.162 The CPS welcomed the suggestion:

Yes. For the reasons set out in the consultation paper we agree that this would be a workable and fair way of dealing with the complexities of charging/indicting intersectional hate crime.

8.163 The Magistrates Association also supported the suggestion:

We believe the proposed approach would be workable. As noted in the consultation paper, sentencers will have discretion to respond to the circumstances of the case to decide how the sentence should be increased, if there is hostility relating to more than one characteristic.

8.164 Groups representing victims of hate crime also generally welcomed the idea.

8.165 SARI stated:

This is a sensible idea, e.g. with race and religion or race and disability. We are seeing quite a number of such cases and would welcome recognition that people can be target[ted] for more than one characteristic.

8.166 The Government Independent Advisory Group on Hate Crime agreed:

We support this. A significant percentage of all forms of hate crime are intersectional.

8.167 The Bar Council responded in some detail, noting that there was not unanimity of views amongst its members:

We agree as a matter of law that it is likely that the aggravated offences as currently drafted do not permit both characteristics to be included in one count/charge. ...

Opinion amongst those who have contributed to this response on behalf of the Bar Council is divided as to whether the determination of which protected characteristic had been proved should be made by the jury, by way of separate counts for each characteristic, or by the judge, by way of interpreting the verdict on a single “rolled up” count....

8.168 The Bar Council response saw the advantages of the current approach as follows:

Where the aggravation can significantly impact upon the available maximum penalty, this is a decision that the accused is entitled to require be determined by a jury in the same way as he is entitled to require the jury to return a verdict on the underlying conduct. And written routes to verdict – which are nowadays very much the rule rather than the exception – help to allay any concern that indictments may become unwieldy if individual protected characteristics are required to be pleaded separately.

8.169 However, the Bar Council also recognised the following practical problems with attempting to charge the hostility towards each characteristic separately:

(a) It may lead to the overloading of an indictment;

(b) If a defendant pleads guilty to the base offence and, say, one aggravated offence but maintains not guilty pleas to the remaining counts, judges will inevitably be reluctant to countenance a jury trial to resolve whether a few additional words were said;

(c) That will place pressure on the prosecution to “plea bargain”, with the unenviable prospect of deciding, in a particular case, a hierarchy between the characteristics to enable the prosecutor to determine which are “important enough” to require resolution by jury trial despite a guilty plea to a count relating to another characteristic, and which counts will not be proceeded with – which in turn may lead to the dissatisfaction of victims; [and]

(d) If the sentencing judge is required to pass a consecutive sentence for each aggravated offence, then the totality principle will swiftly be engaged, leading to a need to then reduce the sentence to reflect the overall level of criminality. Alternatively, if the expectation is that a conviction for an aggravated offence will lead to a consecutive sentence, save in truly exceptional circumstances, it will be significantly devalued if concurrent sentences are passed for what was an entirely predictable and unexceptional outcome of the charging decision.

8.170 Our consultation paper proposal was also considered by the Northern Ireland review of hate crime laws, which supported the proposal:

There is strong evidence to suggest that seeking to incorporate the notion of intersectionality into a new statutory aggravation model would create challenges in attempting to reflect more than one protected characteristic in prosecuting aggravated offences. For example, in England and Wales, if the prosecution has to deal with a case involving racial and religious hostility, this can create real difficulties.

The Law Commission provisionally suggests a novel approach to this by the inclusion of a provision allowing for the recognition of hostility based on “one or more characteristics”. Thus, 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 met on the evidence given by the prosecution.

I agree with the approach of the Law Commission in England and Wales on this important issue.<sup>33</sup>

### Conclusion following consultation responses

8.171 It is clear that many personal responses were hostile to the notion of “intersectionality”. This appears to be linked to broader concerns about hate crime laws generally, and specifically the view that these laws are divisive because they treat some groups in society differently from others.<sup>34</sup>

8.172 However, if hate crime laws are to persist, we can see no principled reason why the law should not recognise hostility on the basis of more than one characteristic if this is borne out by the facts of the case.

8.173 The real issue that we consider needs to be addressed is whether the practical challenges to achieving this in the context of aggravated offences can be overcome, without infringing the defendant’s right to a fair trial.

8.174 Three main considerations arise in this regard:

- The defendant’s right to a fair trial under Article 6(3) of the European Convention on Human Rights;
- The rule against duplicity; and
- The principle of “fair labelling” of the offence.

### The defendant’s right to a fair trial

8.175 Article 6(3)(a) of the ECHR states that a defendant to a criminal proceeding has the right

to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

8.176 The content of this right was elaborated by the European Court of Human Rights as follows.<sup>35</sup>

- (1) The defendant must be notified of the particulars of the offence. He must be put on notice of the actual and legal basis of the charges against him.<sup>36</sup>
- (2) For the proceedings to be fair, “full, detailed information concerning the charges against a defendant is essential”.<sup>37</sup>

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<sup>33</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) p 18, para 80.

<sup>34</sup> We discuss this concern further in the introduction to this report at paragraph 1.5.

<sup>35</sup> *Mattocia v Italy* (2000) ECHR (Application no. 23969/94).

<sup>36</sup> *Mattocia v Italy* (2000) ECHR (Application no. 23969/94) at [59].

<sup>37</sup> *Mattocia v Italy* (2000) ECHR (Application no. 23969/94) at [59].

- (3) The requirement of “detailed information”, can vary according to the particular circumstances of the case but the accused must “be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence”.<sup>38</sup>

8.177 We consider that each of these requirements would be satisfied by our proposal, as the indictment would still contain all the necessary information concerning the legal basis of the charge, and the information the defendant would require (specifically the detail of the conduct and the forms of hostility alleged) to prepare an adequate defence.

8.178 For example, consider the hypothetical case of a protestor at a pride parade who is alleged to have shouted “you’re all freaks and perverts and I hope you fucking die”. In this case, the prosecution may consider that a harassment offence contrary to section 5 or 4A of the Public Order Act 1986 has been committed, and that in doing so the offender has demonstrated hostility towards the LGBT+ members of the parade. If our recommendations to include the characteristics of “transgender” and “sexual orientation” within the aggravated offences regime are implemented (see paragraphs 8.56 to 8.70), then the prosecution would need to consider which characteristics should be included on the indictment. If “hostility related to sexual orientation and / or transgender identity” were included, the defendant would be on notice as to the precise nature of the charges against them, and able to prepare their defence accordingly.

#### The rule against duplicity

8.179 The rule against duplicity states that no single count on an indictment should charge a defendant with two or more separate offences.<sup>39</sup>

8.180 However, the rule is not absolute, and the “course of conduct” exception to this rule has now been codified in rule 10.2(2) of the Criminal Procedure Rules 2020 which states:

More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.

8.181 This is relevant in the context of targeting of more than one characteristic in the course of, for example, a single assault. The existence of multiple motivations, or multiple demonstrations of hostility, could fall within this exception. A concern that remains, however, is the risk of uncertainty as to the exact nature of the finding of a jury where they are presented with an “or” option. In a case involving allegation of both racial and homophobic hostility, for example, members of the jury may be persuaded that there was racial hostility, but not homophobic hostility, or half the jury may be persuaded that there was racial but not homophobic hostility, while the other half reach the reverse conclusion. It is possible that these concerns may be allayed to some extent by the provision of clear routes to verdict to the jury. Routes to verdict – a

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<sup>38</sup> *Mattocia v Italy* (2000) ECHR (Application no. 23969/94) at [60].

<sup>39</sup> *R v Greenfield* [1973] 1 WLR 1151.

written sequential list of questions for the jury to consider in reaching its conclusion – have become standard practice, particularly in more complex cases.

8.182 It is clear that where a case is presented in such a way that it is possible that half the jury are sure that one incident occurred, and the other half are sure that another incident occurred, it should not be possible to convict the defendant on either count.<sup>40</sup>

8.183 However, we consider the present case can be distinguished. The jury would have to be sure that the base offence – for example – an assault, had occurred, and that the assault was motivated by, or the defendant had demonstrated, hostility towards a protected characteristic. The ambiguity would rest solely in relation to which characteristic(s) the jury had determined was targeted.

8.184 The case of *R v Robert K*<sup>41</sup> demonstrates the potential for some factual ambiguity in the finding of the jury, where this ambiguity is not central to a finding as to whether the offence has or has not been committed. In this case, which involved the rape of a child, there was some evidential uncertainty as to whether the rape had occurred anally or vaginally. The trial judge directed the jury that in order to convict K, they all had to be sure that he had intentionally penetrated either the vagina or the anus, but that it was not necessary for there to be a consensus on which had been penetrated. On appeal, this direction was upheld, with the court finding that the rule in relation to duplicity was intended to ensure fairness to a defendant, in terms of being able to know and understand what the case was against him, and to enable a jury's verdict to be clear and understandable for sentencing purposes. In this case, the jury would have inevitably agreed that, whatever the conclusion as regards the orifice penetrated, the offence of rape had been committed.

8.185 However, we acknowledge that the factual ambiguity in the *Robert K* case is less significant than a finding as to which form of hostility was present in a hate crime prosecution. For example, an accused person may be willing to accept a finding that he or she had said or done something arguably homophobic in the heat of the moment, but may vehemently reject the notion that his or her conduct was in any way racist. We consider this to be an imperfect potential consequence of our proposal. However, as with the *Robert K* case, there would be no doubt that an aggravated offence had been committed; the ambiguity would be the precise factual finding of the jury as to how this occurred. The sentencing judge would also have access to all the relevant evidence necessary on which to evaluate the appropriate sentencing uplift.

8.186 In summary:

- (1) the defendant would be able to know and understand what the case was against him or her; and
- (2) the jury's verdict would be clear and understandable for sentencing purposes, in the sense that they would determine that the aggravated version of the offence had indeed been committed.

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<sup>40</sup> *R v Hobson* (Andrew Craig) [2013] EWCA Crim 819.

<sup>41</sup> *R v Robert K* [2008] EWCA Crim 1923, [2008] 7 WLUK 695.

## Fair labelling

8.187 The principle of fair labelling also arises as a consideration with this potential reform.

8.188 Unlike the right to a fair trial and the rule against duplicity, fair labelling is not a legal requirement, but rather a theoretical concept, albeit one that has considerable judicial support.<sup>42</sup> The principle asserts that merely convicting an offender of something is insufficient; what matters is what the defendant has been convicted of.<sup>43</sup> According to this principle, offences should be drafted to distinguish differences in harmfulness, wrongdoing and culpability.<sup>44</sup> The offence ought to be labelled in a way which conveys accurately the nature and seriousness of the conduct, ensuring the label does not mislead through vagueness or over-generalisation.<sup>45</sup>

8.189 In order to ensure fair labelling in these circumstances, the sentencer (judge or magistrates) would have to make a clear determination as to the nature of the hostility which motivated the offence or was demonstrated by the defendant, which could then be recorded as an element of the defendant's criminal record. This is consistent with normal sentencing practice, whereby if the prosecution's evidence is such that two or more views of the facts could correspond with the finding of guilty, then it is the judge's responsibility to decide what the circumstances were for the purpose of sentencing.<sup>46</sup>

8.190 As we noted in our consultation paper,<sup>47</sup> this approach is similar to the one taken in considering inchoate offences under section 46 of the Serious Crimes Act 2006. This offence – of encouraging or assisting offences believing one or more will be committed – 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
- (2) he believes 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.

8.191 In drafting the indictment for the section 46 offence, the prosecution will specify each possible offence that the defendant is accused of encouraging or assisting. The jury are not required to agree on whether each individual offence listed on the indictment satisfied the requirements of section 46, but rather whether the defendant believed at least one of the specified offences was committed. The Court of Appeal has held that

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<sup>42</sup> See *R v Jogee; Ruddock v The Queen* [2016] UKSC 8 at para [74].

<sup>43</sup> J Horder, "Rethinking Non-Fatal Offences Against the Person" (1994) 14(3) *Oxford Journal of Legal Studies* 335, p 351.

<sup>44</sup> AP Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart: Oxford, 2014) p 204.

<sup>45</sup> AP Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart: Oxford, 2014) p 204.

<sup>46</sup> *Solomon* (1984) 6 Cr App R (S) 120; *Stosiek* (1982) 4 Cr App R (S) 205.

<sup>47</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 16.128.

an indictment drafted in this form is not bad for duplicity, nor defective for uncertainty.<sup>48</sup> It gives sufficient indication to the accused of the criminal conduct alleged against him or her. 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.

8.192 Ordinarily it should be the case that the judge should be sufficiently clear as to the finding of the jury as to which characteristics the hostility relates. In the rare case that it is not it may be appropriate for the judge to consider asking the jury to deliver a special verdict outlining their findings as to the nature of the hostility which motivated the offence or was demonstrated by the defendant.<sup>49</sup> However, the judge does not have the power to compel this,<sup>50</sup> and it is not common practice.<sup>51</sup>

## Conclusion

8.193 We have concluded that the proposal to allow for the charging of an aggravated offence based on hostility towards “one or more” protected characteristics is the best compromise available to ensure that the totality of circumstances can be put before the court, while preserving the defendant’s right to a fair trial.

8.194 At present, it is essentially unworkable to seek to charge circumstances of *both* racially and religiously aggravated hostility connected to the same criminal act, which is unsatisfactory.

8.195 For the reasons outlined at paragraph 8.177, we consider the proposal to be consistent with the defendant’s right to a fair trial, and the rules of criminal procedure. We also consider that the requirements of fair labelling can be satisfied through the sentencer making a determination as to the nature of the hostility which motivated the offence or was demonstrated by the defendant, once the fact of an aggravated offence has been determined by the jury. We therefore recommend that it should be possible for a conviction for an aggravated offence to be based on proof that the offence was motivated by or the defendant demonstrated hostility towards “one or more” protected characteristics.

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<sup>48</sup> *R v Sadique* [2011] EWCA Crim 2872, [2012] 1 Cr. App. R. 19; at [36].

<sup>49</sup> Archbold Criminal Pleading Evidence and Practice 2021 Ed., 4-534.

<sup>50</sup> *Allday* (1837) 8 C. & P. 136 (see forms of special verdict in *Dudley* (1884) 14 Q.B.D. 273; *Staines Local Board*, 52 J.P. 215).

<sup>51</sup> *Bourne* (1952) 36 Cr. App. R. 125, CCA.



### **Recommendation 15.**

8.196 We recommend that a conviction for an aggravated offence should be possible where the prosecution proves that the offence was motivated by or the defendant demonstrated hostility towards “one or more” protected characteristics.

8.197 However, the court should make a clear determination as to the characteristics that have formed the basis for sentencing, and these should be specified on the Police National Computer.

### **SHOULD THERE BE A MORE FLEXIBLE APPROACH TO CHARACTERISTIC PROTECTION FOR ENHANCED SENTENCING?**

8.198 In Chapters 4 to 7 of this report we considered the challenging question of which characteristics should be specified in hate crime laws and how they should be defined.

8.199 An issue that we considered in Chapter 17 of our consultation paper was whether, beyond these defined characteristics, there may be scope for a more flexible approach to characteristic recognition in the context of enhanced sentencing.<sup>52</sup> We suggested that this might be a way of recognising specific occurrence of characteristic targeting that did not fall within one of the currently defined groups, and for which there may not be such widespread evidence.

8.200 However, we also noted that there were potential problems with this suggestion:

- (1) it would create a new disparity in the way that different groups are protected under law;
- (2) an overly expansive approach risks diluting the impact and utility of hate crime laws in addressing the most serious, and socially damaging forms of hate; and
- (3) it would be difficult to define the boundaries of when the enhancement should apply. This could create legal uncertainty, lead to undesirable outcomes, and could place sentencers in a difficult situation if they are forced to decide whether an individual characteristic should be recognised.

8.201 If a more flexible approach were to be considered, the options that we considered most viable were:

- (1) the use of a “residual category” in addition to specified characteristics, an approach that has been adopted in Canada, New Zealand and some Australian jurisdictions; or
- (2) a set of criteria for a judge to determine whether a hate crime should be recognised (possibly in combination with the residual category referred to above).

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<sup>52</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 429 to 433.

8.202 As a non-statutory alternative, we also considered whether the Sentencing Council might consider developing more explicit sentencing guidance in relation to characteristic-based hostility.

## Consultation

8.203 We asked for consultees' views at consultation question 38 and summary consultation question 11.

### Consultation Question 38

We invite consultees' views on whether a more flexible approach to characteristic protection would be appropriate for the purposes of enhanced sentencing.

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.

### 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?

8.204 While there was some support for the possibility of recognising wider categories of hostility in principle, many stakeholders expressed reservations about the potential consequences – including the creation of a new hierarchy, and a lack of precision and certainty in the law.

8.205 Amongst consultees who supported a more flexible approach, the most popular method was the use of sentencing guidelines.

8.206 Equally Ours and Office of the Police and Crime Commissioner for Gwent supported flexibility in principle but did not prefer a particular model. Equally Ours said:

We agree that a reformed law should have the flexibility suggested. This would help respond to the realities of hate crime and social developments over time, which to date have led to a confusing patchwork of protection.

We do not have specific views on the best way to achieve this, but it must ensure that the flexibility is exercised in a manner consistent with human rights standards

and that sufficient guidance is available on the situations in which it is likely to become relevant and how it will be applied when it is.

8.207 The Bar Council and British Transport Police supported a statutory residual category, underpinned by criteria for assessment. British Transport Police said:

It is submitted there should be more flexible approach to sentencing when examining the harm done to those with protected characteristics. A combination of the proposed approaches, especially a combination of proposal (a) and (b), would be best. The recognition of additional characteristics in sentencing guidelines is likely to be of least use out of those proposals, though they should still be considered to achieve an optimal amount of sentencing flexibility.

8.208 The Bar Council commented:

Whilst legal certainty may be more easily achieved through identifying individual characteristics in statute, we agree that a more flexible approach is justified. The desirability of certainty in sentencing practice and the consistent application of any enhanced regime leads us to reject the open-ended “residual category” in preference for a set of criteria by which a court could recognise the targeting of a characteristic as a hate crime. This would enable a sentencer to treat hostility towards a non-listed characteristic as an aggravating factor in the appropriate circumstances. Based on the available evidence, the sentencer is well placed to assess whether, in the case before them, additional harm was caused to the victim because of hostility towards a characteristic of the victim: whether the characteristic was core to the identity of the victim, and whether the characteristic group is one which faces systemic disadvantage in society. We understand the reluctance of the Sentencing Council to propose certain characteristics (not set out by Parliament) which would oblige a sentencer to impose an enhanced sentence.

8.209 British Naturism also supported a more flexible approach, but not as an alternative to the inclusion of alternative subcultures and philosophical beliefs as protected characteristics.

8.210 Changing Faces – a charity that supports people with a scar, mark or condition that makes them look different – similarly supported a more flexible approach, but also emphasised their primary objective was to see visible difference as a distinct category:

[W]e believe that anyone experiencing a hate crime because of their visible difference, should be able to have this recognised, and protected through the introduction of a standalone characteristic. Alternatively, the definition of disability could be expanded to explicitly reference visible difference.

If visible differences aren't protected as a standalone characteristic, or explicitly recognised via the definition of disability, then Changing Faces believes that a more flexible approach to characteristic protection through enhanced sentencing could allow some recognition for victims.

8.211 The Office of Police and Crime Commissioner Hampshire preferred sentencing guidelines as the method of achieving greater flexibility:

We believe a wider group of characteristics should be afforded the same equal treatment as the existing five hate crime characteristics through the process of sentencing. Providing any new characteristics pass the criteria test as stated above.

This should be achieved by way of sentencing guidelines rather than the residual category. This approach will prevent courts from recognising additional characteristics that haven't passed the hate crime characteristic criteria test.

8.212 Consistent with other responses to our questions, a significant majority of personal responses indicated opposition towards hate crime laws altogether, and this suggestion to expand them more specifically. Some examples of responses expressing this view were:

- (1) "No. We are all equal and you are cherry picking a range of characteristics / "identities" and it is divisive and will result in less respect for police and the criminal justice system and unfair outcomes for victims."
- (2) "No, the existing law is more than adequate, in fact we should reduce the number of protected characteristics."
- (3) "No. In an age of identity politics, we are at risk of multiplying the number of characteristics. While age, sex, race etc are already established categories, we need robust general laws that safeguard citizens across a multiplicity of identities without having to list every possible identity individually."

8.213 However, even amongst those who are more broadly supportive of hate crime laws, there were stakeholders who had particular concerns with this proposal.

8.214 The UK Lawyers For Israel (UKLFI) Charitable Trust,<sup>53</sup> for example, stated:

We are not persuaded that there should be a more flexible approach to characteristic protection for the purpose of enhanced sentencing, since this would tend to devalue the concept of hate crime. Additional circumstances can always be taken into account in the sentencing.

8.215 The CPS noted concerns around the dilution of current laws, the practicability of a more flexible approach, and potential confusion it might cause:

If characteristic protection is extended, we have no comment on how such characteristics should be selected or recognised. However, depending upon the nature of any additional characteristic, there may be practical difficulties in proving the hate crime element if the existing two-limbed hostility test is retained. Furthermore, the greater the number of protected characteristics, the greater the risk of diluting the essence of hate crime which is the requirement for extra protection within the criminal law for historically victimised communities. The expansion of the number of protected characteristics risks further complicating the hate crime legal framework, and a 'flexible approach' to the list of protected characteristics is likely to

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<sup>53</sup> A UK charity set up to advance legal education on Israel and antisemitism and to provide legal support to victims of antisemitism, particularly antisemitism which manifests itself with regard to Israel. See: <https://uklficharity.com/>.

lead to a lack of clarity and confusion about hate crime amongst practitioners and within wider society.

8.216 Stonewall expressed concerns about the creation of further hierarchies in law:

Stonewall recognises that there may be benefits to establishing a more flexible approach to characteristic protection, such as the ability to recognise new characteristics in hate crime legislation. Nevertheless, the Commission has stated that their priority in conducting this hate crime review is parity. We are concerned that proposals putting forward a flexible approach may have the unintended consequence of creating a new hierarchy in law: where new protected groups which emerge in relation to enhanced sentencing do not have access to the protection afforded to other protected characteristics under the aggravated offences model.

### **Conclusion following consultation**

8.217 Following the strong opposition expressed by many individuals, and only weak support from some individuals and organisational stakeholders, we do not consider a more flexible statutory approach to characteristic recognition for enhanced sentencing to be a desirable reform. We particularly note the following concerns:

- (1) it would create new hierarchies of characteristics and an added layer of complexity in hate crime laws;
- (2) guidance governing such a residual category would be difficult to formulate;
- (3) it would not be an easy or comfortable task for a sentencer to decide when such a provision should be applied; and
- (4) it could dilute the recognition of the characteristics which are targeted most intensely.

8.218 We therefore do not recommend this option be implemented in hate crime laws in England and Wales.

## **THE RELATIONSHIP BETWEEN AGGRAVATED OFFENCES, ENHANCED SENTENCING AND THE BASE OFFENCES TO WHICH THEY RELATE**

8.219 As we noted in our consultation paper, there is some complexity that arises from the co-existence of two models of hate crime laws: aggravated offences and enhanced sentencing.

8.220 Below we consider two issues that arise in this context: the availability of alternative verdicts for aggravated offences; and whether enhanced sentencing should be available where it was open to the prosecution to pursue an aggravated version of the offence, but this has not occurred.

### **Aggravated offences and alternative verdicts**

8.221 There is currently no power for a magistrates' court to deliver an alternative verdict for a base offence where the court considers that the elements of the base offence have

been proven, but is unpersuaded that the prosecution has proven the racial or religious aggravation beyond reasonable doubt.

8.222 Such 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.

8.223 However, this power is limited to offences which fall within the jurisdiction of the Crown Court.<sup>54</sup> 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 less serious than summary offences.

8.224 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.<sup>55</sup>

8.225 In our consultation paper we noted that this was a logical response to the current legal position, but the requirement to include both charges on the indictment is arguably rather cumbersome.<sup>56</sup>

8.226 We considered the approach 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 (including in the magistrates' court).

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<sup>54</sup> 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.

<sup>55</sup> Crown Prosecution Service, *Racist and Religious Hate Crime - Prosecution Guidance* (21 October 2020), available at <https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>.

<sup>56</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 407 to 409.

8.227 We asked whether a similar approach might be appropriate in the context of hate crime laws as follows:

#### Consultation Question 34

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.

#### Consultation responses

8.228 As this question was more technical than others, it was not well understood by individuals who were unfamiliar with the detail of criminal procedure.

8.229 Some individual responses reiterated their broad opposition to hate crime laws:

- (1) "The base offence is all that really matters and sentencing should reflect that."
- (2) "This presumes there should be "hate crime" laws. There should not."

8.230 Some saw the approach as threatening the presumption of innocence:

- (1) "Absolutely not. If the police and prosecutors do not have the evidence to convict, the defendant is presumed innocent. you can't just have a back up charge waiting in the background. That's not justice. Innocent people could be tried and tried again. That's inhumane."
- (2) "No, the defendant should only be tried for the crime they are charged with. Defaulting to a base offence if the aggravated offence is not proven is unnecessarily punitive."

8.231 However, it is important to emphasise that the suggested approach would still require the base offence to be proven to the criminal standard. For example, in the case of an alleged assault, it may be that the court is persuaded that the assault occurred, just not that it was racially aggravated. Indeed, some who opposed hate crime laws generally saw this an important protection:

- (1) "Absolutely yes, as noted I am very much against the entire concept of hate crime legislation. I have no doubt that my views will in the main be ignored as they do not sit well in the current political climate however allowing a court to step down a charge will provide some protection to those who had no intent to commit a hate crime but were caught up in the heat of any prevailing circumstances."
- (2) "In general I would be in favour of this, however my views on the inequitable nature of hate crime legislation still stand."

8.232 Another personal response agreed:

They certainly should be empowered to find a defendant guilty of the base offence should the aggravated element not be considered proven beyond reasonable doubt.

8.233 Organisations with expertise in criminal justice were generally supportive of our proposal suggestion. The CPS stated:

This would be a positive and helpful change, particularly in respect of cases in the magistrates' courts where alternative verdicts are not available. It would also not preclude the prosecution from continuing to follow good practice by charging/indicting the aggravated offence and the alternative "basic" offence in all appropriate cases.

8.234 The Magistrates Association also agreed:

Yes. We think this power will provide greater flexibility to magistrates' courts. However, as noted in the consultation paper, it would be important for clear guidance to be provided to ensure the prosecution clearly sets out the alternative available to the court.

8.235 The Antisemitism Policy Trust supported the proposal "with caution", but noted that:

One unintended consequence of this is charge bargaining, in which prosecutors might be willing to accept a guilty plea to the basic offence, provided that the aggravated charge is dropped....

#### Conclusion following consultation

8.236 Amongst the small number of responses that engaged with this question, there was more support than opposition. We consider it particularly significant that both the CPS and Magistrates Association supported the proposal.

8.237 Allowing for alternative verdicts would be a procedurally helpful change and cause no unfairness to the accused.

#### **Recommendation 16.**

8.238 We recommended that for all aggravated offences, both the Magistrates' Court and the Crown Courts should always be empowered to find the defendant guilty of the base offence in the alternative.

#### **Availability of enhanced sentencing where the aggravated version of the offence has not been pursued**

8.239 In our consultation paper we considered the interaction between aggravated offences and enhanced sentencing.<sup>57</sup> We noted that, particularly where an aggravated version of an offence existed, confusion could arise as to which offence should be charged and prosecuted. Galop advised us that this confusion was compounded in the context of LGBT+ hate crime, as police sometimes (wrongly) presumed that an aggravated version of the relevant offence existed (when in fact aggravated offences currently

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<sup>57</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 434 to 435.



only exist in relation to the characteristics of race and religion). Parity of treatment across characteristics may reduce some of this confusion.

8.240 We also considered the circumstance of a prosecution with racially or religiously aggravated features, which could have been charged as an aggravated offence, but was not. Enhanced sentencing cannot be applied where an aggravated offence in respect of the relevant characteristic has been prosecuted and failed. However, following *R v O'Leary*, there are circumstances where a court can apply the enhanced sentencing provisions where an aggravated offence has not been prosecuted (but could have been).<sup>58</sup> In the consultation paper we argued that this was somewhat unsatisfactory from the perspective of the defendant. To provide greater certainty and fairness to the defendant, we proposed that it should be clear that a judge may not impose an enhanced sentence where an aggravated offence could have been charged but was not pursued by the prosecution. We asked whether consultees agreed with this approach:

Consultation Question 39

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.

Do consultees agree?

#### Consultation analysis

8.241 There were a low number of responses to this question, which perhaps reflects its technicality, and the fact that it dealt with a somewhat peripheral issue.

8.242 In purely numerical terms, responses were fairly evenly split between yes and no.

8.243 The CPS were in favour of the proposal:

Yes. This is a logical approach and removes any doubt as to whether the prosecution is able choose whether to charge an aggravated offence or (for the sake of expediency) charge a basic offence and seek an enhanced sentence.

8.244 This is significant, because it is not necessarily advantageous to the prosecution to have their options limited in this way.

8.245 The Bar Council said:

Yes. Otherwise prosecutors may simply choose not to charge an aggravated offence and “leave it to the judge”, on the basis that without the burden on the Crown to prove the hostility as an element of the offence, it could still be recognised at sentence. Where the aggravation is serious enough to justify the enactment of a bespoke offence, the conduct [at] issue should be subject to a separate count. That is consistent with the general approach to sentencing. In *O'Leary* the [Court of Appeal (Criminal Division)] concluded that in the particular circumstances of that

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<sup>58</sup> See *R v O'Leary* [2015] EWCA Crim 1306, [2016] 1 Cr App R (S) 11.

case, ... the sentencing judge was justified in applying the enhanced sentencing provisions where an aggravated offence has not been prosecuted. However the Court observed:

“Our conclusion upon this issue should not be taken as any endorsement for the view that the prosecution are thereby relieved of their duty to consider the indictment with care. On the contrary, in the majority of cases where the evidence supports an aggravated form of assault, then it should be placed upon the indictment. However we can understand in the particular circumstances of the present case, where another set of alternative offences had already been placed on the indictment for the jury to consider, adding further alternatives under section 29 of the Crime and Disorder Act 1998 would have had the effect of overloading the indictment and overly complicating the jury’s task.”

The risk of overloading the indictment is ever present when addressing aggravated offences (see for example our response to question 32 above), but the fact that there may be rare cases where even the presence of one additional count would “overly complicate” the jury’s task and lead to a difficult charging decision, is not, on this issue, a justification in our view to abandon the principles of certainty and fairness to the defendant.

8.246 The Magistrates Association also agreed:

We agree that if there has been insufficient evidence to prove an aggravated version of an offence, it is unlikely that a sentence should be enhanced under hate crime provisions. Of course, sentencers have the discretion to aggravate a sentence using other factors, as appropriate.

8.247 However, there were also some personal responses that disagreed with this proposal:

I very much agree with the approach in *R v O’Leary*... It is exactly the approach needed to demonstrate a fair and just criminal justice system. I say this also in the context that I would dispense entirely with all aggravated offences.

8.248 The UKLFI Charitable Trust also disagreed: “We would support the approach in *R v O’Leary*.”

### Conclusion following consultation

8.249 The fact that the key prosecution agency is in favour of a reform that largely favours the defendant strongly supports the conclusion that this is a worthwhile reform. This view was bolstered by the criminal justice expertise of the Bar Council and the Magistrates Association.

8.250 However, one further issue requires consideration: assaults on emergency workers<sup>59</sup> that also involve hostility on the basis of a protected characteristic. For example, if an Asian paramedic were assaulted in the course of his or her duties, and the perpetrator

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<sup>59</sup> We discuss these provisions in Chapter 2 at paragraphs 2.83 to 2.87.

of the assault also demonstrated hostility on the basis of the victim's race. We did not cover this issue in our consultation paper.

8.251 Here there are two distinct aggravated offences that may apply: racially or religiously aggravated assault contrary to section 29(1)(c) of the Crime and Disorder Act 1998 or an assault on an emergency worker contrary to section 1 of the Assaults on Emergency Workers (Offences) Act 2018 (AEWA 2018). There are no aggravated versions of the latter offence.

8.252 Additionally, section 67 of the Sentencing Code contains a provision for a sentence uplift that requires the court to increase the sentence (within the available maximum) for a range of offences relating to assaults and threats against a person.<sup>60</sup> This operates in a similar way to the enhanced sentencing regime.

8.253 Assaults on emergency workers that also target a protected characteristic – particularly race – are not uncommon. Indeed, the CPS has developed specific guidance on this issue:

Where an emergency worker is subject to a racially/religiously aggravated assault, section 29(1)(c) of the Crime and Disorder Act 1998 should be charged, as otherwise emergency workers would have less legal protection from racial/religious assaults than ordinary members of the public. A trial alternative under section 1(2) of the [AEWA 2018] should be laid to allow the court to convict the defendant if they are not satisfied that the element of racial or religious aggravation is proved. Further, a sentence uplift should be sought under section 2(6) of the 2018 Act to reflect the statutory aggravating factor of the victim being an emergency worker.<sup>61</sup>

8.254 However, the conclusion that the aggravated assault offence should be charged “otherwise emergency workers would have less legal protection from racial/religious assaults than ordinary members of the public” seems to be based on the fact that the section 1 AEWA 2018 offence currently has a 12 month maximum penalty, compared with the 2 year maximum for the racially aggravated assault offence. The government is proposing to increase the maximum penalty for the section 1 AEWA 2018 offence to two years imprisonment in section 1 of the Police, Crime, Sentencing and Courts Bill 2021 that is currently before Parliament. If this provision is passed, it would make the charging decision for prosecutors less obvious. Indeed, it is quite possible that there would be a scenario where an emergency worker was assaulted while clearly acting in the exercise of the functions of that role, but the allegation of a racial component is more contested. The CPS may wish to put the racial allegation before the court, but consider the best prospect of conviction would be for the section 1 AEWA 2018 assault offence, not the racially aggravated offence. In this scenario it would seem more reasonable for the prosecution to pursue the AEWA 2018 Act offence on the indictment, and then seek an enhanced sentence uplift in addition. Should the court fail to accept the section 1 AEWA 2018 aggravation had been proven, but find the defendant guilty of the base offence (assault), it would also seem reasonable for the

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<sup>60</sup> Prior to the enactment of the Code, this provision was found in section 2(6) of the AEWA 2018.

<sup>61</sup> Crown Prosecution Service, *Assaults on Emergency Workers (Offences) Act 2018* (11 August 2021) available at <https://www.cps.gov.uk/legal-guidance/assaults-emergency-workers-offences-act-2018>.

prosecution to seek a sentence enhancement for the base offence on the basis of the hostility element, and for the court to apply it if satisfied to the criminal standard.

8.255 We consider therefore that our original proposal should be adjusted to allow a narrow window of flexibility for circumstances such as the offence of assaulting an emergency worker, while generally removing the possibility of multiple routes to prosecute the same allegation of characteristic-based hostility. We recommend that this is achieved through a specific exception.

**Recommendation 17.**

8.256 We recommend that a court should ordinarily not be permitted to apply an enhanced sentence to a base offence where an aggravated version of that same offence could have been charged.

8.257 We recommend that an exception should exist where the prosecution has chosen to pursue an alternative aggravated form of the offence, which closed off the possibility of pursuing the hate crime aggravation; notably, the offence of assault on an emergency worker contrary to section 1 of the Assaults on Emergency Workers (Offences) Act 2018. In this scenario, a finding that a sentence enhancement should be applied should be open to the court, either in relation to the offence in section 1 of the Assaults on Emergency Workers (Offences) Act 2018, or in relation to the base offence of assault, if the additional elements of the emergency worker offence are not proven.

# Chapter 9: The legal test for aggravated offences and enhanced sentencing

## INTRODUCTION

- 9.1 The legal test that should apply in respect of hate crime laws is one of the key issues that we have considered in this review. We discussed this issue in Chapter 15 of our consultation paper.<sup>1</sup>
- 9.2 Under the current law (explained in more detail below), proof of hostility is required for either an aggravated offence or an enhanced sentence.<sup>2</sup> Two limbs of the hostility test exist. The motivation limb will be satisfied by proof that the offence was motivated by hostility towards the victim’s membership (or presumed membership) of a protected group. The demonstration limb will be satisfied by proof that the defendant demonstrated such hostility at the time of committing the offence, or immediately before or after doing so. As we discussed in the consultation paper, the demonstration limb is one of the distinctive features of hate crime laws in the United Kingdom.<sup>3</sup>
- 9.3 In this chapter we consider whether changes should be made to the current legal test. In particular, we consider the following three issues that we highlighted in the consultation paper.
- (1) Should the legal test be the same for both aggravated offences and enhanced sentencing?
  - (2) Should the demonstration limb of the legal test be retained?
  - (3) Should the motivation limb of the test be reformed due to concerns it is ineffective in the context of disability hate crime?
- 9.4 We first outline the current legal test based on hostility and criticisms of it, and then consider each of these three issues in order below.

## CURRENT LAW

- 9.5 “Hostility” is not defined in either of the relevant statutes, the Crime and Disorder Act 1998 (“CDA 1998”) or the Sentencing Code (“SC”), and there is no standard legal definition. Crown Prosecution Service (“CPS”) guidance states that “consideration

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<sup>1</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250.

<sup>2</sup> 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 (POA 1986). We discuss these further in Chapter 10.

<sup>3</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, p 352.

should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.”<sup>4</sup>

- 9.6 Ultimately, it will be a matter for the tribunal of fact (a jury in the Crown Court or a District Judge or bench of magistrates in a magistrates’ court) to decide whether a defendant has demonstrated, or the offence was motivated by, hostility.

### The Crime and Disorder Act 1998

- 9.7 For an aggravated offence, the prosecution must prove that it falls within one 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 that the defendant demonstrated hostility towards the victim based on their membership (or presumed membership) of a protected group “at the time of committing the offence, or immediately before or after doing so.” It is an objective test; proof of subjective intent or motivation of the defendant is not required. The courts have been clear that when considering the demonstration limb, it is an error of law to look beyond the outward manifestation of hostility and attempt to discern the defendant’s actual motivation.<sup>5</sup> However, it is arguable that the fault 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 individuals as demonstrating racial or religious hostility.<sup>6</sup>
- 9.8 Limb (b) – motivated by hostility – requires proof of the defendant’s subjective motivation for committing the offence.<sup>7</sup> Specifically it asks whether “the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.”<sup>8</sup> It is considered more difficult to mount a prosecution on the basis of this limb.
- 9.9 The prosecution should make clear on which of the two limbs it is relying.<sup>9</sup> If evidence is available to support both limbs, the prosecution is free to rely on both.<sup>10</sup>
- 9.10 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.
- 9.11 Section 28(1)(a) refers explicitly to “hostility based on the victim’s membership (or presumed membership)”<sup>11</sup> 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)

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<sup>4</sup> 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>.

<sup>5</sup> *R v SH* [2010] EWCA Crim 1931, [2010] 8 WLUK 9 at [29].

<sup>6</sup> 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.

<sup>7</sup> *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] and [20].

<sup>8</sup> Crime and Disorder Act 1998, s 28(1)(b).

<sup>9</sup> *DPP v Dykes* [2008] EWHC 2775 (Admin), (2009) 173 Justice of the Peace 88 at [20] by Calvert Smith J.

<sup>10</sup> *Jones v DPP* [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.

<sup>11</sup> Presumed by the offender: Crime and Disorder Act 1998, s 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.<sup>12</sup>

- 9.12 A noteworthy distinction between the demonstration and motivation limbs is that the demonstration limb requires the identification of a victim who must be the person towards whom the hostility is directed. The motivation limb does not require such an explicit link, meaning the offence may be motivated by hostility towards members of the protected group generally, whether or not this includes the victim(s) of the offence.
- 9.13 For the purposes of the offence of causing harassment, alarm, or distress, contrary to section 5 of the Public Order Act 1986 (POA 1986), the CDA 1998 specifically provides that the victim should be understood as “the person likely to be caused harassment, alarm or distress” within the terms of that offence.
- 9.14 However, in other contexts, the availability of the demonstration limb may depend on whether a victim can be identified. For example, for the offence of criminal damage, the “victim” must be the owner of the property that is damaged. If the “victim” for the purposes of the offence is not the same as the person or group towards whom the hostility is directed, then only the motivation limb will be available to the prosecution. Therefore, if anti-Asian graffiti is painted on an Asian-owned shop, it may be arguable (depending on the facts) that the perpetrator demonstrated racially hostility towards that owner. If the same graffiti is painted on a council-owned wall, only the motivation limb will be available to the prosecution.

### The Sentencing Code

9.15 Section 66 is the relevant provision for the purposes of enhanced sentencing. The section consolidated provisions that were previously found in sections 145 and 146 of the Criminal Justice Act 2003, and sets out a legal test that is almost identical to the test for aggravated offences found in section 28 of the CDA 1998. Section 66 of the SC applies to all five protected characteristics, though as we note at paragraph 9.16 there are some subtle differences in its application to race and religion compared with the other three characteristics. The legal test is set out in section 66(4) as follows:

- (4) For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—
- (a) 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 victim’s membership (or presumed membership) of a racial group,
- (ii) the victim’s membership (or presumed membership) of a religious group,

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<sup>12</sup> 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] EWHC 656 (Admin) at [13] by Simon Brown LJ.

- (iii) a disability (or presumed disability) of the victim,
  - (iv) the sexual orientation (or presumed sexual orientation) of the victim, or (as the case may be)
  - (v) the victim being (or being presumed to be) transgender, or
- (b) the offence was motivated (wholly or partly) by—
- (i) hostility towards members of a racial group based on their membership of that group,
  - (ii) hostility towards members of a religious group based on their membership of that group,
  - (iii) hostility towards persons who have a disability or a particular disability,
  - (iv) hostility towards persons who are of a particular sexual orientation, or (as the case may be)
  - (v) hostility towards persons who are transgender.

9.16 While the test is essentially the same test as that used for aggravated offences, there is one difference between the treatment of race and religion in section 66 of the SC compared with the other three characteristics. Section 66(6)(c) states that:

“membership” in relation to a racial or religious group, includes association with members of that group;

9.17 No such “association” provision applies in relation to the other three characteristics. The scope of the protections under section 66 therefore arguably do not apply to hostility based on “association” with LGBT+ or disabled persons, though we are not aware of this issue being tested in court. We consider this issue further in Chapter 4 of this report where we recommend that the “association” approach apply equally to all characteristics.<sup>13</sup>

9.18 In relation to the demonstration limb, unlike the aggravated offences provisions in the CDA 1998, there is no provision in the Sentencing Code that specifies that the “victim” for the purposes of the offence of causing harassment, alarm or distress contrary to section 5 of the POA 1986 should be understood as the “person likely to be caused, harassment, alarm or distress” by the conduct.<sup>14</sup> However, the CPS advise that in practice, it appears to be interpreted by the courts in this way.

9.19 The situation is also more complicated in the context of other crimes, where a specified “victim” may not be clear. For example, the offence of improper use of a

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<sup>13</sup> See paras 4.280 to 4.284.

<sup>14</sup> See paragraph 9.13.



public electronic communications network contrary to section 127(1) of the Communications Act 2003 criminalises the sending:

by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character[.]<sup>15</sup>

- 9.20 This offence does not require a direct victim of the offending; for example, a public post on a social network may be considered “grossly offensive or of an indecent, obscene or menacing character” without being directed at anyone in particular. However, it could also be that the content is directed at a specific victim. In the former case (no specific victim), the prosecution would only be able to rely on the motivation limb of the test if they wished to argue that enhanced sentencing should also apply, whereas in the latter case (victim targeted) the demonstration limb could also be used in making a case for the application of an enhanced sentence.

## THE HOSTILITY TEST AND OTHER LEGAL MODELS

- 9.21 The two-limbed hostility-based test has now been in place for over 20 years in England and Wales. While a legal test requiring evidence of a subjective motivation of hostility (or a comparable form of animus such as “hatred” or “prejudice”) 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.
- 9.22 The hostility test falls 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 towards the victim group.
- 9.23 This approach is distinct from the “discriminatory selection” model of hate crime laws adopted in several jurisdictions of the United States. A discriminatory selection model focuses on whether the victim has been selected by the defendant because of their membership of a protected group.
- 9.24 The important distinction between the two models is that under a discriminatory selection model there is no need for evidence that the perpetrator had any particular negative views towards people who share the victim’s characteristic (though this may well be the case).

## SHOULD THE LEGAL TEST BE THE SAME FOR ENHANCED SENTENCING AND AGGRAVATED OFFENCES?

- 9.25 One of the first issues we considered in our consultation paper was whether the same legal test should continue to be applied for both aggravated offences and enhanced sentencing.<sup>16</sup> At present this is the two-limbed hostility test described at paragraph 9.7.

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<sup>15</sup> Communications Act 2003, s 127.

<sup>16</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 353 to 354.

9.26 We noted that there may be some argument that a more stringent test should apply in relation to aggravated offences given their higher maximum penalties. However, we suggested that this would exacerbate the existing complexity in the law and would likely lead to errors and confusion in practice.

## Consultation

9.27 We asked consultees the following question:

### Consultation Question 21

We provisionally propose that the legal test that applies in respect of enhanced sentencing should be identical to that which applies to aggravated offences.

Do consultees agree?

9.28 Responses to this question were split fairly evenly between “yes” and “no”.

9.29 Many of those who responded “no” did not engage with the question directly but reiterated their fundamental opposition to hate crime laws. An example of this view was the following personal response:

In my view Hate Crime laws have no place in a liberal society and the existing Hate crime laws should be scrapped, not expanded. Anyone arguing in favour of these laws wants to create a less free, less liberal society, which goes against the culture and history of this country.

The expression of someone's opinions should never be a matter for legal enforcement and freedom of speech and expression is required in a free society.

You cannot reasonably legislate against speech or expression on the basis of causing offense and this is arbitrary and purely subjective.

These laws should be repealed, not expanded.

9.30 Further responses in this vein included:

- (1) “I fail to understand why someone's sentence should be more harsh if their crime was motivated by hatred. Yes we shouldn't ignore the hatred and we should analyse the cultural context of it, but why does it make someone need a more harsh sentence?”
- (2) “I do not believe that there should be a category of aggravated offence; therefore there should be no legal test applying in respect of enhanced sentencing.”

9.31 Most organisational stakeholders agreed with our proposal to maintain consistency. Few responded in much detail, but those who did argued it was a logical continuation of the present position. The CPS said that, “[t]o have different tests for enhanced sentencing and aggravated offences would create unnecessary complication and inconsistency”.

9.32 The Welsh government also agreed:

We agree that the legal test applying to both enhanced sentencing and aggravated offences should be identical. This would increase understanding and minimise confusion. There appears to be no convincing argument in favour of retaining distinctive tests for each.

9.33 Dr Seamus Taylor argued that “[h]aving the same legal test between both legal provisions provides for greater, clarity, simplicity and parity”.

### Conclusion following consultation

9.34 We consider that the case to retain the same legal test for both aggravated offences and enhanced sentencing is compelling. Different tests would significantly increase the complexity of the law and reduce its efficacy.

9.35 Consultees who engaged directly with this question agreed with our proposal to retain the consistent approach. We acknowledge that some consultees would prefer that hate crime laws not exist at all, but as we have noted earlier in this report, abolition was not within the scope of this review.

### Recommendation 18.

9.36 We recommend that the legal test for the application of hate crime laws should be the same for aggravated offences and enhanced sentencing.

## THE DEMONSTRATION LIMB

9.37 Another issue that we considered in our consultation paper was the ongoing use of the demonstration limb of the hate crime test.<sup>17</sup>

9.38 This limb of the test is unique to the nations of the United Kingdom, and is sometimes criticised on the basis that it equates words or conduct that demonstrate hostility with proof of a hostile motivation.<sup>18</sup> 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.

9.39 The reason the government included 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

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<sup>17</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 354 to 358.

<sup>18</sup> 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.

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.

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.<sup>19</sup>

- 9.40 However, 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 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.<sup>20</sup>

- 9.41 This question was carefully considered in the Bracadale review of hate crime laws in Scotland. At the time of the review, Scotland had a functionally equivalent legal test that asked whether the defendant "evinced... malice and ill-will."<sup>21</sup> 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

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<sup>19</sup> 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>.

<sup>20</sup> New South Wales Law Reform Commission, *Sentencing* (Report 139, 2013) para 4.183.

<sup>21</sup> Crime and Disorder Act 1998, s 96(2).

message that this will not be tolerated or shrugged off as “mere banter”. To do that risks undermining the principles of equality and respect.<sup>22</sup>

- 9.42 The Hate Crime and Public Order (Scotland) Act 2021 retains the dual approach, but limits the application of the “evinces malice or ill-will” limb to contexts where there is a specified victim,<sup>23</sup> as is the case for the demonstration limb in England and Wales.<sup>24</sup>

## Consultation

- 9.43 We asked consultees the following question in relation to this issue:

Consultation Question 22 and Summary Consultation Question 5

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.

Do consultees agree?

- 9.44 Responses to this question were weighted fairly evenly – at approximately a ratio of three “yes” to every four “no” responses. Again, a similar pattern emerged with the majority of organisational responses in favour, while more personal responses were against the provisional proposal.

- 9.45 Legal and law enforcement stakeholders strongly supported the provisional proposal, with the Association of Police and Crime Commissioners (APCC), CPS, NPCC (National Police Chiefs’ Council) and the Bar Council all in favour.

- 9.46 The CPS stated:

Yes. The majority of hate crime cases involve the demonstration of hostility towards the victim immediately before, during or after the commission of the offence.

- 9.47 The APCC stated:

Whilst the demonstration test does not require any causal link between the demonstration and the perpetration of the offence, we agree with Goodall’s line of reasoning as described by the Commission in paragraph 15.32 [of the consultation paper]: the offender who turns to abusive slurs based on protected characteristics during the conduct of the offence is capable of understanding the purport of their words.

Additionally, we recognise the harmful “subjugating effect” the words will have on the victim, as described by Walters in paragraph 15.33 [of the consultation paper].

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<sup>22</sup> 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/>.

<sup>23</sup> Hate Crime and Public Order (Scotland) Act 2021, s 1.

<sup>24</sup> See paragraph 9.14.

Maintaining the demonstration effect will enable the police and criminal justice agencies to continue recognising this harm.

9.48 The Welsh government also agreed;

Yes, we agree that this “demonstration of hostility” proof should be maintained. Hate crimes already receive unsatisfactory prosecution and removing this method of proof would further undermine this and the confidence of victims to pursue legal remedy. Whether the demonstration of hate at the commissioning of the crime aligns to the underlying motivating intent is immaterial to the impact of the crime on the victim and wider society.

9.49 A personal response also agreed but stated that “there needs to be clear and irrefutable evidence of the demonstration of hostility, far in excess of simply the ‘victim’s’ perception”.

9.50 A requirement for objective evidence of the hostility is in fact already the current legal position. As we discussed in Chapter 1, this differs from the standard for police recording which is based solely on the victim’s perception.<sup>25</sup>

9.51 The Alan Turing Institute agreed with our provisional view, but also noted the practical challenges in applying the test:

Yes. “Hostility” is difficult to evaluate – our research indicates that individuals have very different thresholds for assessing whether someone has been motivated by prejudice, whether their actions should be considered aggressive/hostile and whether they should face any sort of prosecution or sanction. As such, it is likely that demonstration of hostility could be highly subjective, resulting in unevenness in how the law is applied. Trying to assess “objectively” what another individual has done is likely to result in conflicting perspectives; those who adopt a free-speech outlook are likely to view a (potentially) hateful act as non-hostile whereas those who adopt a critical race theory perspective may view it as definitely hostile and hateful. These differing positions are often irreconcilable.

A further concern is that this part of the law depends heavily on how the “demonstration” of hostility is evidenced. If the threshold for demonstrating hostility is not set at a sufficient level then actions which belie ignorance, or a lack of awareness, could erroneously be considered hateful. This might lead to overcriminalization. However, at the same time, unawareness is more often used as an excuse to counter accusations of prejudice than a genuine defence.

Overall, the demonstration of hostility, is an important part of the law given that otherwise it would solely rely on motivation of hostility, which is far harder to evidence. Thus, although there is a risk that the current two “limb” approach could be over-used we believe this is outweighed by the need to protect victims of hate.

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<sup>25</sup> See College of Policing, *Major Investigation and Responding to Hate* (20 October 2020), available at <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/responding-to-hate/#perception-based-recording>.

9.52 The majority of negative responses were personal. There were also concerns from a number of faith institutions. Generally, these groups were broadly against the existence or expansion of hate crime laws. For example, one individual said:

All "Hate Crime" should be abolished. Providing additional protection for specific groups is unjust. Justice requires punishment be proportional to the harm inflicted, not if that harm had anything to do with "wrong think".

9.53 Where responses elaborated on their reasoning, some based their concerns on the (incorrect) view that it was only the victim's perception of the hostility that was determinative:

"demonstration of hostility"? This just perception by the supposed victim, there is no subjective proof needed.

9.54 Professor Kathleen Stock elaborated her concerns as follows:

I have strong reservations about the consideration offered in the proposal in favour of retaining the current legal position, and summarised thus:

"Significant additional harm may still be caused to the victim and the wider community by such conduct, regardless of the offender's motivations".

If a person acts in a way that was not intentionally hateful, or hatefully motivated, then it isn't hateful even if it also causes harm. This expands the brief of "hate crime" unacceptably beyond the original understanding of it, which is particularly dangerous when talking about aggravated sentencing. Moreover, conceptions of "harm" can be notoriously subjective and these days it seems too easy for a group to claim harm authoritatively for itself without independent evidence.

9.55 Similar concerns were expressed to us in pre-consultation meetings by Professor Gail Mason. However, as we noted in our consultation paper there are also academic voices in support of retaining this aspect of the test.<sup>26</sup> For example, Dr Kay Goodall argues that:

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.<sup>27</sup>

9.56 Other personal responses were concerned that qualitatively the demonstration test encompassed too much conduct. For example:

Making a couple of comments on Twitter is very different to having an evidenced history of targeted hostility.

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<sup>26</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras [15.32] to [15.34].

<sup>27</sup> K Goodall, "Conceptualising 'racism' in criminal law" (2013) 33 *Legal Studies* 215, pp 222, 237.

## Conclusion following consultation

- 9.57 While we recognise that there are differing views on this question, we do not consider that consultation responses provided a compelling basis for us to depart from the present position in law. As we provisionally proposed in the consultation paper, we consider that proof of the demonstration of hostility towards a victim’s membership (or presumed membership) of a protected group at the time of committing an offence, or immediately before or after doing so, should reach the threshold for an aggravated offence or enhanced sentence.
- 9.58 The demonstration limb is a significant component of the UK approach to recognising and addressing hostility-based offending. There are other approaches – most Australian jurisdictions and New Zealand are primarily concerned with proof of the defendant’s motivation, whilst jurisdictions in North America use a range of different tests including a “discriminatory selection” approach.
- 9.59 In introducing comparable laws for the first time, the Republic of Ireland has recently announced that the test will be whether the defendant was “motivated by prejudice” towards the protected characteristic. Ireland will not introduce a demonstration limb.<sup>28</sup>
- 9.60 The view amongst most institutional stakeholders was that the current approach should be maintained so that hate crime laws continue to operate effectively and fairly in England and Wales. Significantly, and contrary to the concerns expressed by some consultees, the demonstration limb is *not* based on the subjective perception of the victim. The decision-maker (judge, magistrates or jury) must be satisfied beyond reasonable doubt that the defendant demonstrated the requisite hostility.
- 9.61 The court also retains discretion as to the severity of the sentence increase it may apply. In some demonstration limb cases, the court may determine that in the circumstances of that case, the hostility was relatively incidental to the offending, and therefore only a small uplift is warranted. A more significant uplift may be warranted in cases where the court or jury finds that the offence was motivated by such hostility.<sup>29</sup> But in either case we consider that the threshold for the application of a sentence uplift should be satisfied.

### Recommendation 19.

- 9.62 We recommend that the demonstration limb of the legal test for aggravated offences and enhanced sentencing be retained.

## THE MOTIVATION LIMB

- 9.63 The motivation limb of hate crime laws is the more common approach to hate crime laws internationally. It requires evidence of the subjective mental state of the offender.

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<sup>28</sup> We describe the Republic of Ireland’s proposals in greater detail in Chapter 2 at paras 2.203 to 2.214.

<sup>29</sup> In Chapter 2 at paras 2.40 to 2.47 we outline Sentencing Council Guidance that has considered these issues in greater detail.



It is generally less contentious than the demonstration limb, though some opponents of hate crime laws still object on the basis that it amounts to a “thought crime”, with the defendant being punished not only on the basis of the physical act of the crime, but also on the basis of why they committed it. However, hate crime laws are not unique in this regard. Various different mental states may be applicable to different criminal offences. For example, proof of a mental state of “intention” is required for murder, while “recklessness” or “gross negligence” is required for involuntary manslaughter. Many offences also incorporate an additional requirement for a particular mental element. For instance, conviction for theft or fraud requires that the defendant was acting “dishonestly”.

9.64 A concern that has arisen amongst disability stakeholders is that the test of hostility in this context operates to exclude a significant proportion of offending that they consider should be understood as a form of hate crime. They argue that disabled people are disproportionately targeted for various forms of crime on the basis of prejudices that surround their disability. However, 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 in the context of racism, religious hatred, homophobia and transphobia.

9.65 The CPS has created legal guidance in relation to disability. It notes that common features of disability hate crime and other crimes against disabled people 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.<sup>30</sup>

9.66 From the above it is apparent that only some forms of offending against disabled victims have features that could easily be described as obviously hostile. Much of the abuse that disabled people experience derives from prejudicial attitudes towards them that view them as not deserving of rights and respect on an equal basis with other members of the community. The Foundation for People with Learning Disabilities summarised these concerns as follows:

The use of the word "hostile" is a major barrier to prosecuting learning disability hate crime.

There is a huge gulf between reports of disability hate crime and victimisation in the England and Wales Crime Survey (~70,000 reports in 2018/19), the number recorded by the police (8,256), and the number of completed disability hate crime prosecutions (752). Dimensions' work with the National Office of Statistics found that people with learning disabilities and/or autism are four times more likely to be victims than people with other disabilities but are hidden in the data because of the way that hate crimes are recorded.

Some of the disparity between the experience of people with learning disability and the numbers recorded and prosecuted is due to police forces not being trained well enough to enforce the law as it currently stands, and there are challenges in identifying learning disability hate crime, but the law itself needs to be better at capturing victimisation of people with learning disabilities in hate crime legislation.

Crimes against people with learning disabilities are not always openly or conventionally "hostile" but do take advantage of their protected characteristic through manipulation or opportunism. These incidents can be belittling and dehumanising and cause significant mental distress, but the victims of these crimes do not receive the proper protection that ought to be due to them under the law; the law as it stands is failing them.

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<sup>30</sup> 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>.

...

So far, there has been a systematic failure by public authorities to recognise the extent and impact of harassment and abuse of people with learning disabilities, to take preventative action, and to intervene effectively when it happens. This review of hate crime is an important opportunity to begin the process of change by addressing the shortcomings in the law itself.

- 9.67 In our consultation paper we considered arguments by some academics and disability campaigners to reform the legal test so that it is based on causation.<sup>31</sup> This test would ask whether the crime was committed “by reason of” the victim’s characteristic (or perceived characteristic).<sup>32</sup> In support of this reform, The Lifecycle of a Hate Crime Project at the University of Sussex has argued 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.<sup>33</sup>

A number of states in the United States have hate crime laws that adopt such an approach.<sup>34</sup>

- 9.68 However, we indicated that our provisional view was that a “by reason of” approach would be over-inclusive and would risk capturing some offenders whose conduct does not justify the label of “hate crime”.<sup>35</sup> For example, consider the case where an offender targets a person using a mobility aid for a mugging on the basis that they are less likely to be able to resist or get away. While this is deplorable, without further evidence of hostility or prejudice towards the victim, it is not clear that it deserves the label “hate crime”. As Goodall has argued, such conduct can be “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.”<sup>36</sup>

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<sup>31</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, pp 358 to 370.

<sup>32</sup> 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>.

<sup>33</sup> 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.

<sup>34</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 15.57 to 15.61.

<sup>35</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 15.101.

<sup>36</sup> K Goodall, “Conceptualising ‘racism’ in criminal law” (2013) 33 *Legal Studies* 215, pp 222, 228.

- 9.69 Another approach we considered was whether the application of the hostility test might be aided through statutory guidance. This could, for example, 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”. However, we noted that the CPS has issued guidance along these lines for years, with only minimal tangible impact. We concluded that this approach would be unlikely to prove effective in addressing the concern of disabled victims.
- 9.70 We also considered whether there was a case to treat disability hate crime differently to hate crime against other characteristics, in recognition of the particular features that make it more difficult to prosecute than others. For example, a “by reason of” test could be applied to the characteristic of disability alone. However, we concluded that such an approach would reinforce existing concerns about the differential treatment of different characteristic groups and was therefore undesirable.
- 9.71 If the test were to be reformed, the approach we ultimately preferred was one which asked whether the defendant was motivated by hostility *or prejudice* towards a protected characteristic of the victim. Prejudice-based tests are not uncommon in comparable jurisdictions,<sup>37</sup> and we argued that this approach would be more likely to capture the exploitative and prejudice-based criminal conduct that disabled victims disproportionately experience.
- 9.72 Equally, we argued that this change would not 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. This is still likely to be significantly more difficult than for cases that involve clear outward manifestations of hostility which satisfy the demonstration limb. However, it may be better adapted to some of the subtle and exploitative forms of crime that are of particular concern to disabled victims.

## Consultation

- 9.73 We put this issue to consultees as follows:

Consultation Question 23 and 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.

- 9.74 A majority of personal responses (and a majority overall) were against the proposal, while a majority of organisational responses were in favour.
- 9.75 The Welsh government agreed with our suggestion that the addition of “prejudice” would be a subtle but important shift:

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<sup>37</sup> See, for example, Victoria: Sentencing Act 1991 (Vic), s 5(2AC)(daaa), New South Wales: Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h), and Canada: Criminal Code (Cda), s 718.2.a.

We agree with the reasoning outlined in the consultation paper regarding adoption of a slightly widened “hostility or prejudice” test to try to better accord with crimes which may be experienced by disabled or older people, where hostility is currently hard to prove in a court. The widening of scope is not significant but may be enough to lead to a greater level of prosecutions without unjustifiably diluting the purpose of hate crime legislation.

9.76 Galop also supported the proposal:

Galop supports the Law Commission proposal to extend the legal test from “hostility” to “hostility or prejudice” as a means of making the test more relevant to the forms of abuse that deaf and disabled people face. In our view “prejudice” is an accurate description of the mental element driving hate crime offending and it is a concept that is generally well understood among the public, criminal justice professions, the judiciary and jurors.

9.77 Though not his preferred approach, Professor Mark Walters, who is a leading proponent of the “by reason of” approach, stated that if this option were not to be pursued, he would support the expansion of the motivation limb to include both hostility and prejudice: “I believe that it is essential that the test be amended and that the word “prejudice” be added”.

9.78 Some personal responses also supported the addition of “prejudice”, though this was a minority of the personal responses. One individual said, “Yes, hostility and prejudice are a key factor in relation to someone's motivation to commit a hate crime.” Another agreed:

As above, yes hostility should be extended to prejudice. And prejudice should have a broad understanding relevant to the context and patterns of the targeted behaviour received by each protected group.

9.79 The Bar Council also considered “prejudice” to be appropriate, but hesitated to go any further:

The term “hostility” is most apt to apply to offences of violence or threats of violence (including criminal damage) as first enacted in s 28 of the Crime and Disorder Act 1998. Its application to sentencing for other offences such as theft, burglary by ss 145-146 of the Criminal Justice Act 2003 gives rise to the question how hostility is demonstrated in such crimes. There will be cases where hostility is apparent from evidence of words or gestures used at the time of the offence, or from material found on the accused's electronic devices. As the Law Commission points out, individuals or sections of the community are targeted because of perceptions about their vulnerability or as acts of gratuitous malice (which is not necessarily a synonym for “hostility”).

Given the test for proof of hostility or prejudice, and the social need to protect the vulnerable, we agree with this recommendation.

At paragraphs 15.71-15.72 [of the consultation paper] the Law Commission poses without answering the question whether “hostility” should be replaced by a more extensive term, such as “exploitation” or “discrimination.” Like the Law Commission

we consider that more evidence is required to justify the reduction of the current ingredients of an offence, which is rightly considered as marking condemnation as well as carrying a substantial sentence.

- 9.80 The CPS supported the introduction of “prejudice” but argued that it should also be extended to the demonstration limb for consistency. They also wished to see a further “by reason of” limb:

Amending the current “motivation” test to explicitly include “prejudice” would bring it in line with para 14.4c of the Code for Crown Prosecutors which states that, “It is more likely that prosecution is required if the offence was motivated by any form of prejudice against the victim’s actual or presumed... protected characteristic”. As such this change would be welcomed. However, it would be inconsistent for the “demonstration” limb to only refer to hostility if the “motivation” limb were to refer to both “hostility and prejudice”. Consistency may better be delivered through also amending the first limb to refer to a “demonstration of hostility or prejudice”. Furthermore, the addition of “prejudice” may be too subtle a shift to cover the crimes committed against disabled people because of their actual or perceived vulnerability or through opportunism or selection of an “easy target”. One way of addressing this gap in the law could be to add a third limb to the existing two-limb test: “The offender targeted the victim by reason of the victim’s protected characteristic”. Under this model, which would apply equally to all of the protected characteristics, the test for hate crime aggravation would be met if the prosecution could prove one or more limbs of the new three-limb test. This model could enable the effective prosecution of all types of hate crime, including crimes targeting disabled people which lack the element of “disablist hostility”.

- 9.81 As we indicated in our consultation paper at paragraph 15.88, we consider that a “by reason of” test would be overly expansive. We also consider that *demonstration* of prejudice – without further evidence of the defendant’s motivation – is too low a threshold for offending to be designated as a hate crime.

- 9.82 Dimensions UK welcomed the proposal to add “prejudice” to the motivation limb, but argued that “contempt” should also be included:

The legal framework for prosecuting hate crimes should reflect the experience of people who have a learning disability and autism.

- Crimes involving coercion, grooming and exploitation, where the individual’s disability was a determining factor in their being targeted, should be treated as hate crimes.

- Crimes motivated by an ill-will, dislike, contempt or prejudice towards the person’s perceived difference on account of their disability should be treated as hate crime.

- Crimes motivated by perceptions of the victim as vulnerable or an easier target because of their disability should be treated as a hate crime.

We support the introduction of a broader definition of hate crime to accommodate the reality of victims who have a learning disability and autism.

Above all, the legal framework should recognise that crimes against people who have a learning disability and autism often entail a disregard for the victim's dignity and autonomy on account of them having a learning disability or autism. Introducing prejudice into the legal definition of hate crime is a proposal we welcome. Additionally, we advocate for the introduction of contempt within the legal definition of hate crime.

9.83 The APCC was more equivocal in its response, noting concerns around the potential for added complexity if different language were used in the two limbs:

On one hand, we can see how adopting the wording "hostility or prejudice" within the motivation test could particularly help to ensure that the law covers exploitative and prejudice-based criminal conduct, which may not meet the threshold of explicit hostility. This conduct is often targeted at disabled people.

However, we have heard concerns from one of our members that any changes in the legal tests – which have been used for past two decades – could create complexity in both theory and practice. This could lead to further delays in the criminal justice process and in turn negatively impact victims' experience within the [criminal justice system].

9.84 Negative responses either indicated broad objection to hate crime laws and/or their expansion or outlined specific concerns about the inclusion of "prejudice".

9.85 Examples of broad objections from individuals included the following:

- (1) "I have explained elsewhere that the crime itself is the material issue. The motivation, whether obvious or not is irrelevant in a sensible grown up court of law where you are not waving symbolic flags around."
- (2) "I have no view on this question in particular, as I regard the concept of differentiating between crimes in this manner abhorrent. If a violent act is carried out against someone for no reason, it does not mean that the protagonist is less guilty than if he carried out the same violent act because the person was a different race, sex or age. The violent act is what matters."
- (3) "There should be no such test. Existing "hate crime" laws should be abolished, not extended."

9.86 More specific forms of objection tended to fall into the following categories:

- (1) Prejudices are a normal part of the human condition and should not be criminalised. For example:

"No. Prejudice is an unavoidable element of the human condition brought about as a result of our upbringing and experience. To that extent a person's actions are always motivated by prejudice, whether knowingly or otherwise. To widen the scope of motivation to include prejudice would risk criminalising people for their human nature."
- (2) Hate crime should be about hostility or hatred only. For example:

“Hostility should be the test. Prejudice is too wide. It should not [be] the role of the law to tell people what they should and should not be in favour of”.

“I think hostility is the right test, prejudice is harder to define and needs to be examined and discussed in the light of free-speech and questioning. Questioning something is not hostility nor prejudice.”

“It needs to just be hostility. Being prejudiced against someone is often taken to mean somebody thinks negatively about that someone, but that does not necessarily have to mean they are hostile to them as well, or that their views do not actually come from their own research or experience.”

“Hostility yes, prejudice no. By considering people’s opinions of a group is tantamount to “thought police”. Only active hostility should be treated as a hate crime.”

(3) Prejudice is too vague as a basis for the criminal law. For example:

“‘Prejudice’ is a vague word which means different things to different people. Including it in the motivation test could lead to ordinary, well-meaning people falling foul of the law, simply because they don’t share another person’s views.”

“I do not think the motivation test should be amended to include ‘prejudice’”

“The word “prejudice” should NOT be added to the motivation test. “Prejudice” and “discrimination” are too vague to be used here. Almost every interaction with another person is based on “prejudice” and “discrimination” to some extent. Offering an elderly person your seat on a bus is based on both prejudice and discrimination.”

9.87 Some responses also questioned whether prejudice would be sufficient to capture the conduct in question. Dr Andreas Dimopoulos argued that:

Persons with disabilities are sometimes the targets of crime because they are seen as easy targets by perpetrators. The motivation behind these crimes remains clearly disablist. These victims are selected because they are 'inferior' to able-bodied persons, even if, in terms of animus, the perpetrator may be indifferent to persons with disability. Hostility or prejudice are inapposite concepts to capture this harm.

### Conclusions following consultation

9.88 Following the extensive and helpful consideration of this question in consultation responses, we recommend that the motivation limb be revised to include “hostility or prejudice” towards the victim’s membership of the protected group. We accept that this conclusion runs counter to the views expressed in the majority of submissions – particularly many personal responses. However, we consider the shortcomings of the hostility test in relation to disability hate crime provide a compelling basis for reform.

9.89 Although we consider this reform to be important we do not consider it to be a substantial shift. Most offending will continue to be prosecuted under the demonstration limb, which will remain unchanged. For characteristic groups other than



disability – race, religion, sexual orientation and transgender – hate crime offending is more typified by overt hostility, and we do not anticipate that the addition of prejudice will substantially expand the range of prosecutions in these contexts. Indeed, as we have noted, the term “prejudice” is commonly used in “motivation-only” jurisdictions – for example, Canada and the largest Australian States (Victoria and New South Wales) – and these jurisdictions are not notable for having a disproportionate number of hate crime prosecutions. However, for the more subtle forms of abuse and exploitation that characterise disability hate crime, the addition of “prejudice” to the motivation test may make a small but significant difference in recognising more of the types of conduct outlined at paragraph 9.65.

- 9.90 We particularly note that the addition of “prejudice” to the motivation limb of hate crime laws is very unlikely to expand the range of prosecutions for speech-based offending – such as public order and communications offences. Hate crime aggravations for these offences typically rely on the demonstration limb. Further, if implemented, our separate recommendations to reform the communications offences to provide greater clarity and stricter criteria should further reduce the potential for these offences to be misapplied in practice.<sup>38</sup>
- 9.91 We have considered the concern expressed by the CPS and APCC about using a different test for the motivation and demonstration limbs. However, we consider that some difference is justified in this context (indeed, as we note at paragraph 9.20, there are already some differences between these tests regarding whether the hostility needs to be directed at a characteristic of the victim). The demonstration limb is evidentially easier for the prosecution and allows them to bypass a more difficult inquiry into the motivations of the accused. In our view, it is therefore appropriate that the degree of proven antipathy required be more stringent. By contrast, the motivation limb in its current form appears to be failing disabled victims in particular and is in need of reform.
- 9.92 We also note the concerns of some consultees that prejudices are an inevitable part of life, and it would therefore be draconian to criminalise them. We accept that this view is based on genuine concern about the reach of these laws and agree with the view that prejudices and biases are inevitable and widespread in society. However, it is important to note that what we recommend is not the criminalisation of prejudice *per se*. Rather, it is much narrower: appropriate labelling and an enhanced penalty where a criminal offence has been committed, and there is proof that the offence was motivated by the defendant’s prejudice towards members of a group sharing a protected characteristic, based on their membership of that group. As we noted at paragraph 9.89, a “prejudice” test is common in other jurisdictions, and there is no evidence that it leads to widespread overuse or unjustified intrusion into individuals’ rights to hold differing views and values.
- 9.93 We have also considered the proposal of Dimensions UK, and several other disability stakeholders, to expand the motivation limb to include “contempt”, in addition to “prejudice”. A significant proportion of the criminal offending against disabled people is characterised by contemptuous attitudes and behaviour towards them. However, in our view, such a further expansion is unnecessary as it is difficult to conceive of a

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<sup>38</sup> See Modernising Communications Offences: A Final Report (2021) Law Commission Report No 399.

“contemptuous” motivation towards a characteristic that could not also be described as prejudicial or hostile. Parliamentary Counsel has also advised us that the addition of “contempt” may risk casting doubt on the generality of the reference to “prejudice”, which on its ordinary meaning should cover contempt. The addition of contempt could therefore lead to further confusion in the operation of the law, without any clear tangible benefit.

**Recommendation 20.**

9.94 We recommend that the motivation limb of the legal test for aggravated offences and enhanced sentencing should be met when the offence was motivated (wholly or partly) by hostility or prejudice towards members of a group sharing a protected characteristic, based on their membership of that group.

# Chapter 10: Offences of stirring up hatred

## INTRODUCTION

- 10.1 The offences of stirring up racial hatred, religious hatred and hatred on grounds of sexual orientation are some of the most controversial aspects of hate crime laws. They are also little used: there are only a small number of prosecutions every year.<sup>1</sup>
- 10.2 They are also often misunderstood. Most so-called “hate speech” is not prosecuted under the stirring up legislation, but under communications or public order laws.<sup>2</sup> As we discuss in paragraphs 10.7 to 10.8, we have separately published recommendations to reform the communications offences.
- 10.3 The stirring up offences deal with a smaller category of more serious communications. It is not enough that the words or material *express* hatred. The focus of these offences is on the capacity of the words or material to incite hatred *in others*. As we detailed in our consultation paper, the standard for hatred is high.<sup>3</sup> The CPS notes “conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet the requisite threshold”.<sup>4</sup> In comparable jurisdictions,<sup>5</sup> terms such as “vilification” are used, and we are satisfied that this reflects the standard that prosecutors and the courts apply when considering these offences. Within the Crown Prosecution Service, stirring up offences are handled by the Special Crime and Counter Terrorism Division.
- 10.4 In our 2014 report we expressed a concern that some respondents harboured unrealistic expectations of the sort of conduct, such as negative media reporting and the use of false statistics, that would be caught by the creation of new stirring up offences for additional characteristics.<sup>6</sup> In our 2020 consultation paper we pointed out that any extension of the stirring up offences would not catch conduct such as

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<sup>1</sup> In 2018/19, there were thirteen prosecutions for stirring up hatred, resulting in eleven convictions. The CPS identified this as a “spike” with several prosecutions attributable to attempts to stir up religious hatred in the aftermath of the Manchester bombing in March 2017 and the London Bridge/Borough Market attack in June 2017 (CPS Hate Crime Report, 2018-19, p 47). There were nine prosecutions in 2017/18, resulting in eight convictions; four prosecutions in 2016/17, all successful; one prosecution in 2015/16, successful; and one prosecution in 2014/15 resulting in a guilty plea.

<sup>2</sup> In particular Communications Act 2003, s 127(1); Malicious Communications Act 1988, s 1; and Public Order Act 1986, sections 4, 4A and 5. Where aggravated by racial or religious hostility, the offences in the Public Order Act can be charged as aggravated offences under the Crime and Disorder Act 1998 s 31.

<sup>3</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 4.95.

<sup>4</sup> Written evidence to the Joint Select Committee on Human Rights inquiry into Freedom of Expression, 27 January 2021.

<sup>5</sup> Including Canada (*R v Keegstra* [1990] 3 SCR 697 777), South Australia (Racial Vilification Act 1996, s 4), Victoria (Racial and Religious Tolerance Act 2011, ss 7 and 8) and Australian Capital Territory (Criminal Code 2002, s 750).

<sup>6</sup> Hate Crime: Should the Current Offences be Extended (2014) Law Com 348, paras 7.113 to 7.122.

stereotyping of disabled people in films and television programmes or “misgendering” or “deadnaming” trans people.<sup>7</sup>

10.5 Similarly unrealistic expectations – or fears – were often held by those who opposed extension in their responses to our consultation. Many individual respondents to our consultation – possibly drawing on the subjective classification of “hate crime” and “hate incident” used by police for recording purposes – answered on the understanding that our provisional proposals would mean people could be convicted on the basis that their words or behaviour were merely offensive (and often believed that the test was subjective, based on the perception of the complainant). The following comments from members of the public are indicative:

- (1) “Current hate speech laws make it a crime when someone is offended grossly or otherwise, alarmed, or distressed, or perceive speech to be ‘hateful’.”
- (2) “Your whole premise is that if someone is offended, that they can have another person locked up.”
- (3) “Everything you are proposing is subjective, that is from the view of the victim.”

10.6 In particular, a large number of respondents had been led to believe, wrongly, that we had proposed that visual representations of Mohammed, or at least cartoons like those published in *Charlie Hebdo*,<sup>8</sup> would be criminalised.

The *Charlie Hebdo* cartoons should be 100% legal, but would likely become illegal should the proposal be acted upon.

No, *Charlie Hebdo* should not be outlawed.

10.7 To be clear, we have never proposed that hate crime laws should operate on the basis of offensiveness and, indeed, we have recently recommended reform of the criminal law to remove the notion of gross offensiveness from the legislation which is most often used to target “hate speech”. The vast majority of “hate speech” offences are actually prosecuted using other legislation, in particular the offence in section 127(1) of the Communications Act 2003, which is used to prosecute online material. The test for this offence is that a person sent (using a public communications network) a message or other matter that is grossly offensive or of an indecent, obscene or menacing character. A similar offence extending to both physical and digital material is found in the Malicious Communications Act 1988.<sup>9</sup>

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<sup>7</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 18.221 to 18.222.

<sup>8</sup> In September 2005 the Danish newspaper *Jyllands-Posten* published twelve cartoons, several of which portrayed Muhammad. French satirical magazine *Charlie Hebdo* republished the cartoons in 2006. In 2011 the *Charlie Hebdo* offices were firebombed and in January 2015 two terrorists attacked the *Charlie Hebdo* offices murdering eight of the newspaper’s staff, two police officers, a maintenance worker and a visitor. During negotiations to secure the attackers two days later, one of their accomplices attacked a Kosher supermarket in Paris, murdering four Jewish customers and taking fifteen other customers hostage.

<sup>9</sup> The test for this offence is that the person sends an a letter, electronic communication or article of any description which conveys (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b) any article or electronic

- 10.8 We have separately published recommendations for reform of these offences, which would replace the term “grossly offensive” with a test based on likely harm to a likely recipient. In that consultation, we said explicitly

The criminalisation of grossly offensive speech is predicated on the notion that being offended is a harm that, when sufficiently serious, warrants the protection of the criminal law. This is a notion that the law should be slow to adopt. Ours is a society of many opinions; inescapably, then, there are as many avenues for causing offence – even serious offence. That someone is caused to be offended is no indication of the moral standing of the behaviour causing that offence. It is therefore not clear that offence – without more – is of the nature or level of harm sufficient to invite the interference of the criminal law.<sup>10</sup>

- 10.9 In our 2020 hate crime consultation paper we did not propose that offensiveness should have any role in the stirring up offences.

- 10.10 We appreciate that members of the public will not always fully understand the law. This is not to dismiss their concerns. Where the law affects a right like freedom of expression, uncertainty and misunderstanding of the law can create a “chilling effect” on the exercise of that right, even if that interference itself is permissible, proportionate and justified.<sup>11</sup> As Eady J put it in *Jameel v Wall Street Journal*, “there is no more “chilling effect” upon freedom of communication, or indeed upon the exercise of any other rights such as those of privacy and the protection of individual reputation, than uncertainty as to the lawfulness of one's actions.”<sup>12</sup> If people wrongly believe that the law prohibits, or may prohibit, certain conduct, they may needlessly censor themselves.

- 10.11 We were therefore concerned that many of these public responses were in direct response to particular articles and communications that had been published and disseminated which grossly misrepresented our provisional proposals. This included misattributing to the Law Commission third party views quoted and attributed in a literature review;<sup>13</sup> editing quotations to change their meaning;<sup>14</sup> and in at least one

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communication which is, in whole or part, of an indecent or grossly offensive nature with the purpose of causing distress or anxiety to the recipient or to any other person to whom he or she intends that it or its contents or nature should be communicated.

<sup>10</sup> Harmful Online Communications: The criminal offences (2020) Law Commission Consultation Paper 248, para 1.5.

<sup>11</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 18.62 to 67.

<sup>12</sup> *Jameel v Wall Street Journal Europe* [2003] EWHC 37 (QB); [2004] 1 WLUK 273 at 18.

<sup>13</sup> Free Speech Union (FSU), “The Law Commission would make Mohammed cartoons illegal”. The FSU claimed that the Commission “suggests that “the British media were right not to publish”” the *Charlie Hebdo* cartoons. That was not our view, but that of Professor Ronald Dworkin, included in a literature review, which we explicitly attributed to Professor Dworkin. The FSU also stated, “Criminalising misogyny, it [the Law Commission] says, would remind people that “negative attitudes towards women are not acceptable””. This was not our view, but the view of Melanie Onn MP, which we explicitly attributed to her.

<sup>14</sup> Free Speech Union, “The Law Commission would make Mohammed cartoons illegal”: The FSU claimed that it was “clear” that a reference to “Islamophobic cartoons ...” [ellipsis in the FSU text, not the consultation paper] included the images of Muhammad published in *Charlie Hebdo*. The curtailed phrase was also used in an article in the *Spectator* by the Union’s Director Toby Young.

case directly attributing to the Law Commission a statement which we had never made.<sup>15</sup>

10.12 The chilling effect does not only arise when the law is unclear or ambiguous. It can also arise when the law or proposed changes to the law are misrepresented. We are deeply concerned that misrepresentations as to the sort of conduct which are caught by the stirring up offences may lead people to avoid saying things that they are perfectly entitled to express. They may also encourage other people to report lawful expression as being unlawful hate speech. That is, by their misrepresentations, those organisations risk bringing about precisely the kind of chilling effect on free expression about which they purport to be concerned.

10.13 However, we also appreciate that many respondents raised issues and had legitimate concerns about some aspects of our provisional proposals. We address these below. We accept that there is force in some of these concerns and have modified several of our provisional proposals accordingly.

### **Stirring up offences and freedom of expression**

10.14 We proceed on the basis that stirring up offences represent an interference with the right to freedom of expression. Freedom of speech has never been absolute in England and Wales – or as far as we know in any country. Most countries have laws, such as those against defamation, obscenity, threats, and incitement to violence and criminal conduct, that restrict the exercise of the right to free speech. For instance, in the United States – usually considered to have the most stringent constitutional protection for freedom of expression, the Supreme Court has upheld restrictions on inflammatory speech directed to or inciting immediate lawless action,<sup>16</sup> “fighting words” likely to provoke violence,<sup>17</sup> false statements of fact,<sup>18</sup> and obscenity.<sup>19</sup>

10.15 For the UK, the European Convention on Human Rights, which is incorporated into the law of England and Wales through the Human Rights Act 1998, places a burden

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The untruncated text referred to “Islamophobic cartoons *cited by the Home Affairs Committee*” [emphasis added] with a footnote citing the page of the Home Affairs Committee report in question. This, in turn, referred to “a cartoon of a white woman being gang raped by Muslims over the ‘altar of multiculturalism’; a cartoon stating that ‘Muslims rape’” and “a cartoon that we reported depicting a group of male, ethnic minority migrants tying up and abusing a semi-naked white woman, while stabbing her baby to death.” It did not refer to *Charlie Hebdo* or images of Muhammad in general; it explicitly referred to something else.

<sup>15</sup> Free Speech Union, “The Law Commission would make Mohammed cartoons illegal”. At point 6 the FSU says: “The Commission says the point of hate-crime law is to educate the public.” The same claim was made in an article by Joanna Williams, (“The Harm in Hate Crime Laws”, Spiked, 6 October 2020), to which the FSU claim hyperlinked. We did not say this, and it does not reflect our view.

<sup>16</sup> *Brandenburg v Ohio*, 395 US 444 (1969).

<sup>17</sup> *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).

<sup>18</sup> *Gertz v Robert Welch*, 418 US 323 (1979); *Illinois ex rel. Madigan v Telemarketing Associates Inc*, 538 US 600 (2003).

<sup>19</sup> *Miller v California*, 413 US 15 (1973).

on states to justify any interference with exercise of the right to freedom of expression protected by Article 10 of the Convention.<sup>20</sup>

10.16 A very small amount of speech falls outside the protection of Article 10 altogether, because of Article 17. This provides that

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.

10.17 That is, the right to freedom of expression does not extend to speech *aimed* at the destruction or restriction of Convention rights. However, the scope of this restriction is severely limited. It extends only to speech *intended* to destroy or restrict others' human rights. The European Court of Human Rights (ECtHR) has held that this can include a general vehement attack on one ethnic or religious group,<sup>21</sup> or calling for the use of violence to bring about Sharia law.<sup>22</sup> In *Ibragimov*, the ECtHR held that Article 17

should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article [i.e. 10] from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention ... whether the text in question sought to stir up hatred, violence or intolerance, and whether by publishing it the applicant attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.<sup>23</sup>

10.18 The ECtHR has therefore distinguished between two forms of hate speech:

the first category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10... The second category is comprised of 'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict".<sup>24</sup>

10.19 Only in the most extreme and obvious cases does expressive conduct fall outside the protection of freedom of expression under Article 10 altogether. In all other cases the restriction must be justified. Any interference with that freedom must be "prescribed by

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<sup>20</sup> The terms of reference for this project require us 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".

<sup>21</sup> *Ibragim Ibragimov v Russia*, Applications. nos. 1413/08 and 28621/11; *Norwood v UK*, Application no. 23131/03 (admissibility).

<sup>22</sup> *Belkacem v Belgium*, Application no. 34367/14.

<sup>23</sup> *Ibragim Ibragimov v Russia*, Applications. nos. 1413/08 and 28621/11, paras 62 to 3.

<sup>24</sup> *Lilliendahl v Iceland*, Application no. 29297/18.

law and necessary in a democratic society” and for one or more of the following purposes:

- (1) the interests of national security, territorial integrity or public safety
- (2) the prevention of disorder or crime
- (3) the protection of health or morals
- (4) the protection of the reputation or rights of others
- (5) the protection of information disclosed in confidence,
- (6) maintaining the authority and impartiality of the judiciary.

10.20 Case law of the ECtHR has held that restrictions on “hate speech” can be justified on one or more of these grounds. In *Soulas v France*<sup>25</sup> and *Vejdeland v Sweden*,<sup>26</sup> for instance, the court held that the prosecution of individuals for stirring up hatred on grounds of religion and sexual orientation respectively pursued a legitimate aim of protecting the rights of third parties. In *Féret v Belgium*, the Court accepted that limits were permissible on the basis that “speeches that incite hatred based on religious, ethnic or cultural prejudices represent a danger to the social peace and political stability in democratic states”.<sup>27</sup> In *Ibragimov*, it noted that “statements expressing deep-seated and irrational hatred towards identified persons may be interpreted as likely to encourage violence”.<sup>28</sup>

10.21 This is an area in which individual states have a wide, but not unlimited, discretion or “margin of appreciation”. This margin of appreciation is also context specific. For instance, the scope for interference with the right is limited in cases such as political speech, greater in the “sphere of morals”, especially religion and sexual morality.<sup>29</sup>

10.22 There are thus many ways in which a state might permissibly interfere with freedom of expression under the ECHR, but where a state might equally choose not to legislate. An example would be Holocaust denial: the ECtHR has held that denying crimes against humanity is one of the most serious forms of racial defamation against Jews and of incitement to hatred of them, and upheld the lawfulness of Holocaust denial laws. Holocaust denial itself, however, is not a crime in England and Wales, unless it

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<sup>25</sup> *Soulas v France*, Application no. 15948/03, para 30.

<sup>26</sup> *Vejdeland v Sweden*, Application no. 1813/07, para 49.

<sup>27</sup> *Féret v Belgium*, Application no. 15615/07, para 73.

<sup>28</sup> *Ibragim Ibragimov and others v. Russia*, Applications nos. 1413/08 and 28621/11, para 94.

<sup>29</sup> In *Wingrove v UK* (Application no. 17419/90), the ECtHR held that “there is little scope under Article 10(2) ... for restrictions on political speech or on debate of questions of public interest” and contrasted this with the “sphere of morals”, where a wider margin of appreciation is applied.



is done in such a way as to breach some other law, for instance if it amounts to incitement to racial or religious hatred<sup>30</sup> or a communications offence.<sup>31</sup>

### Stirring up offences and other rights

- 10.23 Stirring up offences represent an interference with freedom of expression, but they may also amount to an interference with other rights. Article 9 of the ECHR protects the right to freedom of thought, conscience and religion, which includes the right to manifest religion or belief in worship, teaching, practice and observance. As with Article 10, this right can be limited in the interests of public safety; public order, health or morals; or the protection of the rights and freedoms of others.
- 10.24 Articles 9 and 10 often overlap, not least since interferences with the right to freedom of thought will generally only come into play where beliefs are manifested, and this will usually constitute an act of expression.
- 10.25 As with Article 10, states have a margin of appreciation as to how they give effect to the rights in Article 9.
- 10.26 The stirring up offences already recognise the potential for an interference with the right to manifest one's religion. Section 29J of the Public Order Act 1986 seeks to limit the offence of stirring up religious hatred, so that it does not restrict proselytising or urging a person to cease practising their religion. Section 29JA provides that criticism of sexual conduct or practices and urging 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. Although couched in secular and neutral terms, this makes clear that the law does not prohibit expression of religious views on sexual behaviour (or criticism of same-sex marriage) which for people of faith may be considered part of the manifestation of their religion.
- 10.27 The right in Article 9 also extends to non-religious beliefs. In the recent case of *Forstater v CGD Europe*,<sup>32</sup> the Employment Appeal Tribunal ruled that "gender critical" beliefs (that is, broadly, a belief that sex is binary and immutable and that a person cannot change their sex) were protected by Article 9. Crucially, such beliefs were found to be "worthy of respect in a democratic society", the tribunal holding that in a pluralist society, only those beliefs which fall outside the protection of Article 10 altogether are not worthy of respect. (Implicitly, therefore, the expression of gender

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<sup>30</sup> In *R v Sheppard and Whittle* [2010] EWHC Crim 65, charges relating to possession and publication of racially inflammatory material were upheld in relation to Holocaust denial material. Crucially, perhaps, the publication suggested that Jewish people had a history of inventing stories of the commission of atrocities against them.

<sup>31</sup> In *R v Chaboz* (unreported), on appeal from City of Westminster Magistrates Court, HHJ Christopher Hehir said "There is no crime of Holocaust denial in this jurisdiction" and "anti-Semitism is not a crime, just as Holocaust denial is not a crime". However, Chaboz's conviction was upheld, on the basis that the way she had expressed her views amounted to "grossly offensive" communications. These included "jovial references to Dr Josef Mengele ... to the bodies of babies being burnt; and to the death in a concentration camp of one particular child, Anne Frank"; it being "particular[ly] repellent" that "the song is sung in a spiteful parody of a Yiddish or similar accent"; a description of Auschwitz as a "holy temple"; and "sickening holocaust-related references to shrunken heads, soap, lampshades and smoke coming from crematorium chimneys".

<sup>32</sup> *Forstater v CGD Europe*, Appeal no. UKEAT/0105/202/JOJ, 10 June 2021.

critical beliefs is covered by Article 10.) We discuss *Forstater* at paragraphs 10.502 to 10.504 in the context of the protection required for gender critical beliefs, were the stirring up offences brought into line with other hate crime laws in respect of trans and disabled people, as we recommend.

- 10.28 Article 8 provides a right to respect for a person’s private and family life, home and correspondence. Interferences with this right are permitted in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of crime or disorder, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- 10.29 Article 8 has been broadly interpreted by the ECtHR. However, it is in its core understanding that Article 8 is most relevant to offences of stirring up hatred. This right has particular relevance for consideration of issues such as the application of the stirring up offences to private conversations or conduct which takes place in a dwelling (see paragraph 10.245 and following).
- 10.30 The right to respect for one’s private life is not limited to wholly private activities. Case law recognises that it extends to a private social life.<sup>33</sup> It does not, however, extend to activities which are “of an essentially public nature”.<sup>34</sup>
- 10.31 Our clear view is that legislation which aims to restrict conduct which is intended or likely to stir up hatred against groups is *capable* of being a legitimate interference with the rights under Articles 8, 9, 10, and 11. This is because they are measures aimed at the protection of public safety, the prevention of crime or disorder and the protection of the rights and freedoms of others. Whether they are in fact a legitimate interference will depend on whether they are lawful, necessary and proportionate to these aims.
- 10.32 An interference with the right to freedom of expression, religion and association must be “prescribed by law”.<sup>35</sup> Moreover, Article 7 of the Convention provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”. The ECtHR has interpreted both provisions as requiring that the law be formulated with sufficient precision so as to enable people to foresee – if necessary, with advice – with reasonable (but not absolute) certainty the legal consequences of their actions.<sup>36</sup> A large number of respondents felt that some of the concepts involved in the stirring up offences – including the notion of hatred, and whether conduct was “likely” to stir up hatred – were vague and subjective.<sup>37</sup>

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<sup>33</sup> *Bărbulescu v. Romania*, Application no. 61496/08 (Grand Chamber decision) para 71; *Botta v. Italy*, Application no. 21439/93, para 32, *Peck v United Kingdom* (2003) EHRR 287 (Application no. 44647/98).

<sup>34</sup> *Friend and Others v. the United Kingdom*, Application nos. 16072/06 and 27809/08.

<sup>35</sup> The English text of Article 8, on the right to respect for private and family life, says “in accordance with the law”. However, the French text of the Convention uses “*prévues par la loi*” for both. The ECtHR has held that since both French and English texts are equally authentic the two phrases must, so far as possible, be interpreted compatibly. *Sunday Times v United Kingdom*, para 48.

<sup>36</sup> *Perinçek v Switzerland*, Application no. 27510/08.

<sup>37</sup> In our recent report on the communications offences, one of our objections to the use of the standard “grossly offensive” in the current legislation was that someone sending a communication could not foresee

## The limits of the criminal law

10.33 It was clear from their responses that many individual respondents were as concerned about social sanction as formal law.

- (1) “Disagreement on various issues has been interpreted as hatred as a ploy to close down debate. That avoids having to look at the reasons advanced and debate with them; so much easier just to cry misogynistic, homophobic, transphobic, racist or (that favourite catch-all) fascist; then comes the call to the police or public shaming on social media or an email to HR department.”
- (2) “As a woman, if I express views which can be considered gender critical, I run the risk of being labeled transphobic or a terf,<sup>38</sup> which will almost certainly result in abuse, both online and in real life.”
- (3) “We already see people claiming that any criticism they receive is because of their gender rather than their arguments or actions.”

10.34 Our concern in this report is with the criminal law and its consequences. We are wary of attempts to use the criminal law merely to send a social signal, whether that is towards making the expression of certain views unacceptable, or, conversely, to encourage social acceptance of a broader range of views. If, as some respondents claimed, there is a social problem that people are too ready to take offence, or that spurious claims of hostility are made to shut down debate, it is unlikely that changes to the criminal law will substantially affect this.

10.35 Moreover, criticising someone’s expression as racist, sexist, or homophobic is itself an act of free expression, and the law should be slow to interfere with it. If free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative,<sup>39</sup> it also includes the right to tell someone they are being offensive, irritating, contentious, eccentric, heretical, unwelcome and provocative.

10.36 That said, we do recognise that there might be a related issue of people too readily invoking *legal* complaints, which may have a chilling effect on the exercise of the right to freedom of expression, as highlighted in the *Miller*<sup>40</sup> case (although this did not

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with reasonable certainty whether a court would consider it grossly offensive. Modernising Communications Offences (2021) Law Com 399, para 2.17.

<sup>38</sup> TERF stands for “trans-exclusionary radical feminist”, although it has come to be used to refer to people with gender-critical views more broadly, whether or not they are radical feminists. In *Miller v College of Policing*, it was held that TERF “can be a pejorative term”.

<sup>39</sup> *Redmond-Bate v DPP* [1999] EWHC Admin 733, 20.

<sup>40</sup> *Miller v College of Policing and the Chief Constable of Humberside* [2020] EWHC 225 (Admin). Mr Miller was the subject of a complaint to Humberside Police in respect of a number of messages posted on Twitter relating, broadly, to transgender issues. In response, an officer from the Humberside Police visited Mr Miller at his workplace and warned him as to his future conduct. Mr Miller applied for judicial review of the actions of Humberside Police, and of the College of Policing’s Hate Crime Operational Guidance, on the grounds that both were an impermissible interference with his Article 10 rights. The High Court upheld the complaint against Humberside Police, finding that the messages were “for the most part, either opaque, profane, or unsophisticated” but “congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons” and constituted political speech. It held that the police officer’s visit to his workplace was an interference with Mr Miller’s Article 10 rights, and that as there

involve the stirring up offences). Moreover, the understandable importance that law enforcement authorities place on being seen to tackle hate crime may mean that authorities do not give sufficient consideration to the implications of their actions on freedom of expression when considering how to respond to allegations of “hate speech”.

10.37 Our concern in this review is with the law. Police practice is a matter for the Home Office and the College of Policing. We understand that the College is reviewing its guidance in the light of *Miller* and that the Home Secretary has asked the College and the National Police Chiefs Council to consider whether there are realistic and credible options for reforming non-crime hate incident recording to improve personal data protections.<sup>41</sup>

10.38 We believe that insofar as the law itself may be giving rise to ill-founded complaints that interfere with the right to freedom of expression, the correct way to address this is by clearly defining the limits of the stirring up offences (and, for the same reason, the communications offences).<sup>42</sup> It is possible that in making clear that the law does not criminalise – for instance – discussion of controversial topics, our recommendations will enable law enforcement officials to deal robustly in dismissing complaints that do not amount to a criminal offence.

10.39 We consider it notable that most of the recent controversies cited by stakeholders (such as those of Harry Miller,<sup>43</sup> Amber Rudd,<sup>44</sup> and Darren Grimes<sup>45</sup>) have occurred in precisely those areas such as race, disability and trans rights where there are no equivalents of the free speech clauses found in sections 29J and 29JA of the Public Order Act 1986. It may be that the ‘free speech’ provisions relating to criticism of religion, sexual conduct and same-sex marriage in the stirring up offences have contributed to a greater understanding of what does not amount to unlawful conduct, not only for the stirring up offences themselves, but for other allegations of hate speech.

10.40 However, we would not want it to be thought that anything that is not unlawful is therefore to be encouraged. In recent years, the explicit use of racist or homophobic language, or the expression of racist or homophobic beliefs, has become socially

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was “no evidence that the Claimant either had, or was going to escalate his tweets so that they potentially would amount to a criminal offence” it was not “prescribed by law” or proportionate.

However, the court held that the Hate Crime Operational Guidance was a proportionate interference with Article 10 rights, since its aims were legitimate, and “the recording of non-crime hate incidents barely encroaches on freedom of expression”. This aspect of the judgment has been appealed by Mr Miller, but judgment has not yet been handed down.

<sup>41</sup> Letter from the Lord Chancellor and the Minister of State for Crime, Safeguarding and Vulnerability to Philip Davies MP, 9 July 2021.

<sup>42</sup> See our discussion of this in *Harmful Online Communications: The criminal offences (2020) Law Commission Consultation Paper 248*, paras 3.118 to 3.119 and *Modernising Communications Offences (2021) Law Com 399*, paras 2.91 to 2.92.

<sup>43</sup> *Miller v College of Policing and the Chief Constable of Humberside* [2020] EWHC 225 (Admin).

<sup>44</sup> See *Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250*, paras 18.281 to 18.285.

<sup>45</sup> See paras 10.543 and following.

unacceptable, and we consider this something to be welcomed. While there is a role for legislation in underpinning this and criminalising the most serious forms of hate speech, we consider that the most important driver of this change has been social change. In this, we agree with the comment of English PEN in their consultation response that “the criminal law is an imprecise and limited tool” for changing attitudes. It is precisely because social responses are often an effective means of challenging beliefs and changing minds that recourse to the criminal law, especially where it amounts to an interference with a fundamental right, should be a last resort.

10.41 In the rest of this chapter, we first describe the current criminal law on stirring up hatred. Second, we consider our provisional proposals in relation to the legal test for the stirring up offences and which characteristics should be covered, the responses we received, and our recommendations. Next, we consider the issue of dissemination of inflammatory hate material, where we had provisionally proposed consolidating the current offences into a single offence. Finally, we consider the important issue of protections for freedom of expression necessary in the context of an offence which covered all the characteristics currently protected under hate crime laws.

## CURRENT LAW

10.42 As detailed in Chapter 2, the law on stirring up hatred has developed in a piecemeal manner. Laws on stirring up hatred developed initially from public order laws – and some factors such as the ‘dwelling exception’ and the requirement for ‘threatening, abusive and insulting’ words or behaviour are a legacy of this. Within the stirring up offences there are also offences that were initially contained in the Theatres Act 1968 and the Cable and Broadcasting Act 1984 as a consequence of the end of theatre censorship and the introduction of cable television, which were later moved into the Public Order Act 1986. These provisions were subsequently replicated, with amendment, to cover hatred on grounds of religion and sexual orientation. As a consequence of this, the law is considerably more complex than it needs to be, not all characteristics are treated equally, and not all characteristics protected by hate crime laws are covered by stirring up offences.

### Racial hatred

10.43 There are six offences relating to stirring up of racial hatred. These concern

- (1) Use of words or behaviour or display of written material
- (2) Publishing or distributing written material
- (3) Public performance of a play
- (4) Distributing, showing or playing a recording
- (5) Broadcasting or including a programme in a programme service
- (6) Possession of racially inflammatory material.

10.44 The ‘dwelling exception’ (see paragraph and following) applies to the first of these, but not to the other offences.

10.45 Racial hatred means hatred against a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.<sup>46</sup>

10.46 The test for these offences is that the words, behaviour or material were threatening, abusive or insulting, and that the conduct was intended or likely to stir up racial hatred.<sup>47</sup> Each of the racial hatred offences contains a provision providing a defence for a person who is not shown to have intended to stir up hatred if he or she did not intend the words or material to be, and was not aware that they might be, threatening, abusive or insulting.

10.47 In addition, the offences relating to public performance of play and including material in a programme service provide a defence where the person did not know that the circumstances were such that racial hatred was likely to be stirred up. These do not apply to the other offences: in general, while a failure to recognise that the conduct was threatening, abusive or insulting is a defence, a failure to recognise that hatred was likely to be stirred up thereby is not.

#### Hatred on grounds of religion or sexual orientation

10.48 There are six offences relating to stirring up hatred on grounds of religion or sexual orientation, corresponding to the six forms of conduct listed for racial hatred above.

10.49 The test for these offences, however, is different. The words, behaviour or material must be “threatening”, and the conduct must be intended to stir up hatred on grounds of religion or sexual orientation (or for the possession offence, the material must be held with a view to its being displayed, etc, with intent thereby to stir up hatred).

10.50 The legislation on religion and sexual orientation is substantially simpler than that for racial hatred. Because the offence requires an intent to stir up hatred, the complex defences in the racial hatred offences for those without any intent to stir up hatred are omitted.

10.51 In addition, there are specific clauses dealing with freedom of expression. Section 29J says that

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.

10.52 Section 29JA provides that

(1) 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

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<sup>46</sup> Public Order Act 1986, s 17.

<sup>47</sup> For the possession offence, the test is that the material was held with a view to being displayed, published, played, shown, distributed, or included in a programme service, with intent thereby to stir up racial hatred or if racial hatred is likely to be stirred up thereby.

conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

- (2) 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.

10.53 A particular anomaly that arises from the structure of the offences in the Public Order Act 2003 is that the “freedom of expression” clauses in sections 29J and 29JA of the Act only apply to the offences in Part 3A of the Act, i.e. the religion and sexual orientation offences. We highlighted in the consultation paper that this means that, for instance, criticism of a religious practice such as non-stun slaughter or male circumcision is explicitly protected against a charge of religious hatred but not one of racial hatred.

### **Should the existing stirring up offences be retained?**

10.54 Repealing the existing stirring up offences was not in our terms of reference. Nonetheless, given that they represent an interference with the right to freedom of expression, and especially given the number of respondents who argued that the offences should be scrapped altogether, we think it is important to explain why we would, in any case, wish to see legislation against stirring up hatred retained.

10.55 The law recognises that in certain circumstances it is legitimate to restrict the right to freedom of expression, for a variety of reasons. Thus there are laws against defamation (grounded in the right to reputation), contempt of court (to protect the integrity of judicial proceedings) and privacy and confidence; and offences relating to, among other things, obscenity, the encouragement of crime, material useful to terrorists, data protection, and protection of official secrets.

10.56 Speech which encourages or incites hatred can directly or indirectly incite unlawful action, whether this is criminal (such as acts of violence) or civil (such as unlawful discrimination).

10.57 Many respondents argued that stirring up offences were unnecessary because we already have laws against incitement of violence which should be sufficient. Others made a related argument that incitement of violence (sometimes immediate violence) represented the limit of what the law should prohibit.

10.58 However, we think that these responses may be overestimating what can be caught by incitement laws. First, the person must be either intend or believe that one or more specific offences will be committed, and that intent must be direct – it is not enough that it was a foreseeable or natural consequence of their actions.<sup>48</sup> This means that what amounts to a generalised encouragement of violence may not be caught by the law of incitement.

10.59 The National Secular Society (NSS) objected to an example we used in the consultation paper of a broadcast in which a preacher says “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

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<sup>48</sup> Serious Crime Act 2007, ss 44 to 47.

an apostate, then it is not right to wait for the authorised courts; anyone may kill him". The NSS said "We feel this is an inappropriate example and misrepresents what 'stirring up' hatred could entail. Most people, even those who robustly defend freedom of speech, would agree that incitement to murder or other serious crimes should be criminalised".

10.60 Yet in our view, this example – which is based on a real case investigated by Ofcom<sup>49</sup> – is precisely the sort of material which might reasonably be prosecuted as stirring up hatred. A prosecution for incitement to murder would not be possible, as the speaker was commenting on a case in Pakistan in which the killing had already taken place, and was (at least arguably) explaining religious doctrine rather than advocating a personal position. In order to secure a conviction for incitement to murder, it would be necessary to prove that he *intended* to encourage someone to commit murder<sup>50</sup> or that he believed a murder *would* (not might) be carried out as a result of his encouragement.<sup>51</sup> It would not be enough that it was foreseeable that someone might carry out a murder. Indeed, the station which carried the broadcast was fined by Ofcom because the material was *likely* to incite crime or disorder, with Ofcom noting that this "is fundamentally different from the test that would apply for bringing a criminal prosecution".<sup>52</sup>

10.61 The second reason why the law of incitement cannot be relied upon is that the activity that is being encouraged must be a criminal offence – inciting other unlawful acts is not covered. So, for instance, encouraging shops to refuse to serve Jewish customers – an act of direct racial and religious discrimination which would be unlawful,<sup>53</sup> but not criminal, for a shop to engage in – would not be caught by the criminal law on incitement, or the civil law on instructing, causing or inducing discrimination.<sup>54</sup>

10.62 Third, incitement laws would not cover the encouragement of actions against a group which would be perfectly legal for an individual to undertake, but where encouragement is rightly punished. For instance, it would be perfectly lawful for an individual to choose to avoid Jewish-owned business, as individual customers are not subject to the non-discrimination duties in the Equality Act 2010.<sup>55</sup> Therefore

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<sup>49</sup> Ofcom Broadcast Bulletin no. 205, May 2012, pp 4 to 15.

<sup>50</sup> Serious Crime Act 2007, s 44.

<sup>51</sup> Serious Crime Act 2007, s 45.

<sup>52</sup> Ofcom Broadcast Bulletin no. 205, May 2012, p 7.

<sup>53</sup> Equality Act 2010, s 29 read with ss 9, 10 and 13.

<sup>54</sup> Until 2010 it was unlawful to induce a person to commit an act of unlawful racial discrimination under the Race Relations Act 1976, s 31. However, the scope of this was restricted by the Equality Act 2010, s 111 to cases where the person inciting the unlawful discrimination was themselves in a position to discriminate unlawfully against the person they were seeking to influence.

<sup>55</sup> The European Court of Human Rights has considered the complicated position of boycotts on several occasions. In *Baldassi v France*, Application no. 15271/16, which concerned a boycott of Israeli goods, the court noted "A boycott is primarily a means of expressing a protest. Therefore, a call for a boycott, which is aimed at communicating protest opinions while calling for specific protest actions, is in principle covered by the protection set out in Article 10 of the Convention. However, a call for a boycott constitutes a very specific mode of exercise of freedom of expression, in that it combines the expression of a protesting opinion with incitement to differential treatment, so that, depending on the circumstances, *it may amount to a call to*



encouraging others to boycott Jewish-owned businesses would not constitute encouragement of a crime. However, it is likely that encouragement of a racial boycott would be capable amount to an offence of stirring up racial hatred (although at present this would require the use of threatening, abusive or insulting conduct).

10.63 Fourth, even where criminal conduct *is* encouraged, incitement offences are intended to capture the paradigm case in which a single act of incitement leads to a single act of criminal conduct, and accordingly sentencing provisions tie the maximum penalty for encouraging crime to the maximum penalty for the offence encouraged.<sup>56</sup>

However, where hatred is stirred up against a *group* the commission of multiple offences may be a likely outcome. So, for instance, if a person encourages acts of lesser violence against a minority – for instance, offences which would amount to common assault<sup>57</sup> – the maximum sentence for that act of incitement would be the maximum sentence for common assault (six months' imprisonment, or two years' where racially or religiously aggravated). However, the person's conduct may, in practice, have encouraged *many* instances of assault, and accordingly involve greater culpability than that attaching to any particular individual who actually carried out an assault.<sup>58</sup>

10.64 The law does on occasion prohibit communication short of explicit encouragement where possession or dissemination of material is *conducive* to encouraging commission of a crime. For instance, section 58 of the Terrorism Act 2000 criminalises collection and possession of information likely to be useful to a terrorist without reasonable excuse; and the Serious Crime Act 2015 created an offence of "possession of a paedophile manual". In introducing provisions criminalising the possession of "extreme pornography",<sup>59</sup> the then Government (at least partly) based its arguments on the propensity of such images to contribute to a climate encouraging sexual violence.<sup>60</sup>

10.65 The law also treats interpersonal conduct differently from purely personal conduct. With a few exceptions, it is lawful for an individual to plan and prepare for a crime; no

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*discriminate against others*. Incitement to discrimination ... is one of the limits which should never be overstepped in exercising freedom of expression."

<sup>56</sup> There are two exceptions to this. First, where the offence encouraged is murder, the *maximum* penalty is life imprisonment, whereas for committing murder the mandatory sentence is life imprisonment. Second, where a person is convicted of encouraging one or more imprisonable offences, the maximum penalty is the longest term available for any of the offences in contemplation.

<sup>57</sup> The infamous "Punish a Muslim" letter, for instance, encouraged recipients – among other things – to "verbally abuse a Muslim" and "pull the headscarf off a Muslim woman". See <https://www.cps.gov.uk/cps/news/anti-muslim-extremist-who-praised-us-killer-sentenced>.

<sup>58</sup> In theory, if these assaults were carried out, it might be possible to have the inciter charged separately as a procurer in *each* case. However, in practice it will rarely be possible to tie each instance to the act of generalised incitement to the specific act of violence. Moreover, we consider that the inciter's culpability in doing an act which is likely to encourage multiple acts of violence is high, even where those acts are not ultimately carried out.

<sup>59</sup> Criminal Justice and Immigration Act 2008, s 63.

<sup>60</sup> C McGlynn and E Rackley, "Criminalising extreme pornography: a lost opportunity" (2009) 4 *Criminal Law Review* 245; and C Itzin, A Taket, and L Kelly, "The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (2007) Ministry of Justice Research Series, 11(07)

offence is committed until the point at which they actually attempt to carry it out. When two people plan a crime, however, an offence of conspiracy is committed the moment they form an agreement. Likewise, there is no offence of holding racist or homophobic beliefs (and such an offence would truly amount to a “thought crime”) but inciting such views in others is capable of being a criminal offence.

10.66 Although we did not ask a specific question, we are satisfied that the existing characteristics of race, religion and sexual orientation should continue to be covered by the stirring up offences. There is extensive evidence that the propagation of inflammatory hate material can lead to violence and disorder.

10.67 At footnote 1 of this chapter, we note the “spike” in stirring up offences prosecuted following the Manchester bombing in May 2017 and the London Bridge/Borough Market attacks in June 2017. Two weeks after the latter of these Darren Osborne carried out a terrorist attack in Finsbury Park, North London. He drove his van into a crowd of Muslims leaving a mosque after prayers: Makram Ali, aged 51, was killed and at least a dozen other people were seriously injured.

10.68 In her sentencing remarks the judge noted that Osborne had been radicalised over a short period of only a month by exposing himself to increasingly inflammatory hate material on the Internet:

Your research and joining Twitter early in June 2017 exposed you to a great deal of extreme racist and anti-Islamic ideology. *You were rapidly radicalised over the internet encountering and consuming material put out in this country and the USA* from those determined to spread hatred of Muslims on the basis of their religion. The terrorist atrocities perpetrated by extremist Islamists fuelled your rage. Over the space of a month or so your mind-set became one of malevolent hatred. You allowed your mind to be poisoned by those who claim to be leaders...

You attempted to kill at least a dozen people and succeeded in taking the life of a peaceful man you knew nothing about and had never met. You acted alone. You had not been radicalised over a long period of time but your rapid decline into irrational hatred of all Muslims turned you a danger to the public.<sup>61</sup>

10.69 We did not receive any evidence of the existing stirring up offences being *prosecuted* in a way which amounted to an improper interference with freedom of expression. On the contrary, prosecution of such offences has almost invariably occurred in the context of expression which would fall outside the protection of Article 10 altogether, or which amounts to encouragement of crime or violence. We have no doubt that conduct such as calling for gay people to be hanged<sup>62</sup> or “purged”,<sup>63</sup> for Muslims to be “punished” or “butchered”,<sup>64</sup> or for a “Roundup” of Jews,<sup>65</sup> is rightly criminalised.

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<sup>61</sup> Mrs Justice Cheema-Grubb, Sentencing Remarks, 2 February 2018.

<sup>62</sup> *R v Ahmed, Ali and Javed*.

<sup>63</sup> *R v Dymock*.

<sup>64</sup> *R v Parnham*.

<sup>65</sup> *R v Bonehill-Paine*. The use of this phrase was a deliberate reference to a well-known herbicide used by gardeners to kill invasive plant species.

## THE LEGAL TEST FOR THE STIRRING UP OFFENCES

10.70 In the consultation paper, we identified several problems with the current legal test(s) for the stirring up offences.

### Differing standards for race and other characteristics

10.71 First, there are separate legal tests for (i) racial hatred and (ii) religious hatred and hatred on grounds of sexual orientation.

10.72 Although we did not ask a specific consultation question on this issue, we could see no objective justification for treating race differently from religion or sexual orientation. In responses, and especially in relation to the question of whether to extend the offences to cover trans and disability, a number of respondents linked the test for protection to the degree to which a characteristic is or is not immutable.

10.73 Jen Neller has noted that during debates on extending the law to cover religious hatred, it was argued that “race and religion were distinct and should be treated as such, it was argued, because race is immutable and it makes no sense to persuade someone to change their race, while religion is chosen and proselytising is often viewed as a religious duty.”<sup>66</sup>

10.74 She notes, however, that

Even though it was generally (although not unanimously) agreed that sexual orientation is, like race, an immutable characteristic, the inclusion of the [sexual orientation] hatred offences at the narrower threshold of the religious hatred offences was not questioned. Rather than any particular property of sexual orientation, the establishment of the [sexual orientation] hatred offences at the stricter threshold seems to reflect the extent to which homosexuality was viewed as a controversial and contestable topic.<sup>67</sup>

10.75 We consider that this demonstrates the way that two distinct issues – immutability, and the extent to which something is controversial and contestable – have become intertwined in the legislation. Race is unquestionably and wholly immutable, unlike religion. Sexual *behaviour* (as opposed to orientation) and how one manifests one’s religion are within a person’s control. While we can see an argument for saying that there needs to be greater protection for the ability to criticise beliefs and conduct, as opposed to wholly immutable characteristics, it is not at all clear why the fact that a characteristic may be immutable means that the legal test should be different; and even if it was, this is not how the law currently operates (as the example of sexual orientation demonstrates).

10.76 Nor does the issue of immutability work comfortably with disability: while some disabilities are present from birth, a person may become disabled – suddenly or progressively. The extent to which a condition is disabling may vary over time and in some circumstances a person may cease to be disabled. None of this, we would

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<sup>66</sup> Jen Neller (forthcoming), *Stirring Up Hatred: Myth, Identity and Order in the Regulation of Hate Speech*.

<sup>67</sup> Jen Neller (forthcoming), *Stirring Up Hatred: Myth, Identity and Order in the Regulation of Hate Speech*.

suggest, is relevant to whether disability should be protected as a characteristic, nor to the extent of protection it should enjoy.

10.77 Moreover, applying different standards to race and religion creates a problem because the law accepts that certain groups – for instance Jews and Sikhs – can constitute a racial, as well as religious, group, because they have shared ethnic origins.<sup>68</sup> This means that incitement targeting an ethnoreligious group can be prosecuted more easily, using racial hatred laws, than incitement targeting other religious groups – even if the basis of the incitement is essentially religious.

10.78 We note that in Scotland, where a different legal test has been retained for racial hatred, the arguments for retaining a distinct threshold were not particularly principled. The then Scottish Justice Secretary said “That does go counter to a legal purist point of view and potentially causes a hierarchy, but I do think there’s a justifiable case as two thirds of hate crime in Scotland is related to race. If we remove insulting, Scotland would be the only legal jurisdiction in the UK that would not have insulting as part of the legal threshold. Scotland would have the perception of having the weakest racial stirring up offence.”<sup>69</sup>

10.79 In summary, we consider that having different thresholds for race, religion and sexual orientation:

- (1) Lacks a logical foundation;
- (2) Reinforces the idea of a ‘hierarchy of hatred’;
- (3) Reinforces the notion that whether a characteristic is mutable or immutable should have a bearing on the extent to which it is protected – which is likely to lead to ultimately sterile considerations of the extent to which characteristics such as sexual orientation and gender identity are innate and immutable; and
- (4) Sustains an unhelpful division between ethnoreligious groups such as Jews and Sikhs and other religious groups such as Christians, Muslims and Hindus.

### Insulting conduct

10.80 Our second concern was the inclusion of ‘insulting’ within the racial hatred test.

10.81 In 2013 Parliament amended the offence in section 5 of the Public Order Act 1986 to remove ‘insults’ from the scope of that offence.<sup>70</sup> Under section 5 it was an offence to use threatening, abusive *or insulting* words or behaviour, or disorderly behaviour, or display any writing, sign or other visible representation which is threatening, abusive *or insulting*, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. The offence does not have to be targeted towards a particular person. Campaigners had argued that the low threshold for conviction

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<sup>68</sup> *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7 [1983] 2 WLR 620.

<sup>69</sup> *The Scotsman*, 25 November 2020.

<sup>70</sup> Crime and Courts Act 2013, s 57.

meant that it was being used inappropriately in a way which restricted legitimate exercise of freedom of expression.<sup>71</sup>

10.82 Insulting conduct continues to be covered by the offences in section 4 of the Act, which concerns behaviour which is targeted at a person with intent to put a person in fear of violence, or to provoke unlawful violence, or where it is likely to do so; and section 4A of the Act which concerns behaviour with intent to cause a person harassment, alarm or distress.

10.83 In the consultation paper<sup>72</sup> we suggested that a reasonable argument could be made for treating offences under section 5 differently from those under sections 4 and 4A: the offences in section 4 and 4A are targeted at a particular victim, whereas the offence in section 5 is not.<sup>73</sup> Moreover, whereas the section 4 and 4A offences require proof of intent (for section 4, intent to cause a person to fear immediate personal violence or to provoke such violence; for section 4A to cause harassment, alarm or distress), there is no such requirement for the section 5 offence.

10.84 We felt that the racial hatred offence had more in common with the offence in section 5, which is not necessarily targeted at a particular victim, than those in sections 4 and 4A, which require an identifiable target, and accordingly made a provisional proposal that insults should be taken out of scope.<sup>74</sup>

### Intentional stirring up

10.85 Our third concern was that the requirement for threatening (or abusive or insulting) words or behaviour was being exploited by some extremist groups which explicitly sought to stir up hatred, but did so knowingly avoiding the use of threatening or abusive terms.

10.86 Since we published our consultation paper, the Commission for Countering Extremism has published *Operating with Impunity*, a review of the legal framework on hateful extremism. It found

Law enforcement, in particular national advisors for hate crime policing, have found that a higher threshold for committing stirring up hatred offences, particularly in

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<sup>71</sup> Examples included a protestor who received a summons after displaying a sign claiming “Scientology is a cult”; a man who was prosecuted (and convicted and fined, although both were quashed on appeal) for growling at two dogs; a student arrested for asking a mounted police officer “Do you realise your horse is gay?”; the campaigner Peter Tatchell, who was arrested for displaying placards condemning the persecution of LGBT people by Islamic governments; a street preacher who was arrested after telling a police officer he believed homosexuality was a sin; and an atheist pensioner who was threatened with arrest for displaying a sign in his window saying “religions are fairy stories for adults” (<http://reformsection5.org.uk/#?sl=3>).

<sup>72</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 18.204.

<sup>73</sup> This is reinforced by the fact that s 31 of the Crime and Disorder Act 1998, which creates a racially or religiously aggravated version of the offences in sections 4, 4A and 5, had to include a deeming provision in relation to the section 5 offence, whereby references to ‘victim’ in the hostility test should be read as references to the person likely to be caused harassment, alarm or distress, because the section 5 offence does not involve the targeting of a victim.

<sup>74</sup> In this respect, it should also be noted that the Hate Crime and Public Order (Scotland) Act 2021, which extended the stirring up racial hatred offence to other characteristics used “threatening or abusive” for the newly covered characteristics. The New Zealand Government has also announced plans to remove “ridicule” from the corresponding offence in section 131 of the Human Rights Act.

relation to religion and sexual orientation, is limiting efforts in tackling hateful extremism and does not capture the ideological motivations of hate groups and extremist actors.<sup>75</sup>

#### 10.87 It went on

Hateful extremist actions, behaviours, or content which are intended to stir up racial hatred but are not done in a threatening, abusive, or insulting manner (and religious hatred which is not done in a threatening manner, but nevertheless is intended by the perpetrator to incite religious hatred) would not contravene this legislation... We are currently seeing a large amount of extremist activity which is clearly intended to stir up various types of hatred, but is done in a non-threatening way so is 'legal' under the Public Order Act.<sup>76</sup>

#### 10.88 The Commission highlighted a particular problem of extremists "stirring up hatred and violence through the use of extremist religious terms or different languages not recognised or understood by law enforcement agencies":

Too often those within the criminal justice system are unable to discern the difference between robust theological arguments and carefully constructed campaigns of threats, hatred and intimidation by extremist actors... There is a lack of cultural and religious extremism expertise within community policing and the criminal justice system to recognise stirring up of hatred if religious or theological terminology is used and in an unfamiliar language.<sup>77</sup>

### Our provisional proposal

#### 10.89 We provisionally proposed that there should be a common test applying to all protected characteristics. This would be that the words, behaviour or material were

- (1) Intended to stir up hatred against a group, or
- (2) Threatening or abusive words, behaviour or material likely to stir up hatred which the defendant knew or ought to have known was threatening or abusive and likely to stir up hatred

#### 10.90 It is not uncommon for the criminal law to treat intentional wrongdoing and conduct which creates a risk of harm differently. Examples include:

- (1) The separate offences of intentionally encouraging or assisting an offence (Serious Crime Act 2007, section 44) and encouraging or assisting an offence believing it will be committed (Serious Crime Act 2007, section 45).

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<sup>75</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) para 5.10.

<sup>76</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) para 5.12.

<sup>77</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) para 4.9.

- (2) The offences of wounding with intent (Offences Against the Person Act 1861, section 18) and wounding or causing grievous bodily harm (Offences Against the Person Act 1861, section 20).
- (3) Manslaughter: which includes both manslaughter by gross negligence (where there is no intent, but gross negligence), and unlawful act manslaughter (where there is intent to do an unlawful and dangerous act, from which death results).

10.91 Broadly, our reformed test would enable a person to be convicted of stirring up hatred on two alternative bases of culpability: their intent, or their culpable use of threatening or abusive words or conduct.

10.92 In the consultation paper, we provisionally proposed a new test that would apply to all protected characteristics. It would be based on the current “two-limbed” test applying to racial hatred, where conduct can be caught if it is *intended* to stir up hatred or *likely* to stir up hatred.

10.93 However, there would be some differences. First, the requirement that the person should have used “threatening, abusive or insulting” words or behaviour would no longer apply where it is proved that the person’s intent was to stir up hatred.

10.94 Second, the threshold for conviction under the “likely to” limb would be raised:

- (1) the requirement that the material or conduct be “threatening, abusive or insulting” would be replaced by a requirement that it be “threatening or abusive”;
- (2) the defence that a person did not know and was not aware that their conduct might be threatening, abusive or insulting,<sup>78</sup> would be replaced by a requirement for the prosecution to prove that the person did know or ought to have known that their conduct was threatening or abusive; and
- (3) there would be an additional burden on the prosecution to show that the person knew or ought to have known that the conduct was likely to stir up hatred.

10.95 It is important to recognise that retaining the “likely to” limb in the racial hatred offences, and applying it to the other forms of stirring up hatred, would not mean that a person could be convicted for a “slip of the tongue” or because a court decided that their words were “likely to” stir up hatred.<sup>79</sup> First, as we discuss in paragraphs 10.121

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<sup>78</sup> Strictly speaking, this “defence” operates differently across the various offences. For offences of publishing or distributing written material, staging a play, showing or distributing a recording, or including material in a programme service, the burden of proof lies with the defence. For the “use of words or behaviour” offence this provision is not phrased as a defence and where the burden of proof lies is not stated: it is *probably* for the defence to raise the issue but having done so, for the prosecution to show that the person did know or was aware that the words or behaviour might be threatening, abusive or insulting.

<sup>79</sup> Free Speech Union, “Ten Reasons to throw out the Law Commission’s Anti-Free Speech Proposals”.

to 10.124 below, “likely to” does not mean “liable to”.<sup>80</sup> There would have to be a substantial risk that their actions would incite hatred.

10.96 Second, the defendant would have to have used threatening or abusive words, behaviour or conduct. It is not generally necessary to use threatening or abusive words or behaviour, and those who choose to do so, do so at the risk that their actions may cross the line into illegality. Freedom of expression does include – as outlined above – “the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative”. Whether, and in what circumstances, it extends to the threatening and the abusive is less certain.<sup>81</sup>

10.97 Third, under our provisional proposals there would be a substantial degree of mental culpability required – the prosecution would have to show that the person knew or ought to have known that the words used were threatening or abusive, and likely to stir up hatred.

### **Intentionally stirring up hatred**

10.98 We asked consultees the following question:

10.99 Consultation Question 45

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.

Do consultees agree?

10.100 Stakeholders supportive of this proposal included the Police and Crime Commissioners for Hampshire, Dyfed-Powys, Northumbria and Gwent, Humanists UK (“as long as there is protection for freedom of speech”), UKLFI, the Bar Council, the Magistrates Association; and the London Mayor’s Office for Policing and Crime.

10.101 The CPS responded

if the language requirement was removed, you may be able to show that the speaker intended to stir up hatred by demonstrating the relevant material was generated by a group whose agenda is explicit about their goal to stir up hatred. To illustrate this point with a case example, in 2016, four individuals were successfully prosecuted for stirring up hatred offences for placing stickers around a university campus with National Action branding. The language in these stickers was less explicit than what is often seen in stirring up hatred cases and read variously ‘white

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<sup>80</sup> *Parkin v Norman* [1983] QB 92, [1982] 3 WLR 523, [1982] 2 All ER 583. For reasons we discuss at paras 10.120 to 10.124, we are satisfied that this is the relevant test for the stirring up offences.

<sup>81</sup> The law does recognise that in some circumstances making threats may be legitimate. For instance, the Malicious Communications Act 1988 excludes a threat “used to reinforce a demand made on reasonable grounds” where the defendant had reasonable grounds for believing that the use of the threat was a proper means of reinforcing the demand. The law on stirring up hatred does also protect “abuse” of religion and of particular religions (we recommend that this protection should be retained and should be extended to cover abuse of particular countries or their governments).



zone' and 'Britain is ours, the rest must go'. The CPS built a case using evidence of the nature and goals of the group to demonstrate the intent of the suspects in placing the stickers around campus and to further demonstrate the likely impact of the stickers by adducing evidence of the groups' parallel use of social media.

10.102 Among individual respondents, a number felt that it was not possible to prove intent:

Proving intent is almost impossible.

What is the definition of 'intention', how is this proven, from whose perspective?

How can you show what somebody's 'intentions' are? This is extremely subjective, and very concerning that no proof would be required.<sup>82</sup>

10.103 However, we are satisfied that courts would be capable of establishing to the criminal standard whether intent was or was not present: this is the basis on which most serious criminal offences are formulated, and courts are well used to dealing with it. For instance, murder requires an intent to kill or commit grievous bodily harm; theft requires intent to permanently deprive the other person of property; burglary requires intent to steal or commit grievous bodily harm. If intent were truly unascertainable, as many respondents suggested, the entire fabric of the criminal law of England and Wales would unravel.

### The "likely to" limb

10.104 We asked consultees the following question:

Consultation Question 46

We provisionally propose that where intent to stir up hatred cannot be proven, it should be necessary for the prosecution to prove that:

the defendant's words or behaviour were threatening or abusive;

the defendant's words or behaviour were likely to stir up hatred;

the defendant knew or ought to have known that their words or behaviour were threatening or abusive; and

the defendant knew or ought to have known that their words or behaviour were likely to stir up hatred.

Do consultees agree?

10.105 Unfortunately, this was a question where raw numbers could give a highly misleading impression. First, some respondents interpreted the four tests as a menu of options; others erroneously thought we were proposing that any one of these would be sufficient to secure a conviction.

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<sup>82</sup> We did not suggest that "no proof would be required".

10.106 Second, while the number of people who said “no” was higher than those who said “yes”, those responding “no” included not only many who opposed hate speech laws altogether but also a small number who thought that insulting words and behaviour should continue to be covered. In addition, some respondents favoured including threatening, but not abusive, words and conduct.

10.107 The majority of organisational responses favoured the new test, including the Welsh Government, the Magistrates Association, the National Police Chiefs Council, Stonewall and the Equality and Human Rights Commission.

10.108 The Equality and Human Rights Commission said

We are persuaded that it would be safe to remove the word ‘insulting’ by the evidence advanced by Lord Bracadale.

10.109 The Bar Council said

Subject to the response to Question 44 above, we agree that these elements of the offence create a sufficiently nuanced balance between strict liability and mens rea and allow the defendant’s personal circumstances to be taken into account in relation to what the defendant knew or ought to have known.

10.110 The Crown Prosecution Service stated

We do not see any challenges that would arise in applying the proposed amendment to the law. The proposed language of ‘known or ought to have known’ is well understood and similar to that used in legislation for other offences, for example, harassment.

10.111 The Zionist Federation said

We believe in free speech and do not consider “insulting” behaviour to properly be liable to criminal sanctions. It is the price we pay to live in a democracy.

10.112 However, some organisational responses were keen to retain “insulting”. The Police and Crime Commissioner for Gwent said

We are concerned that some may view such a change as opportunity to use language and behaviour with the deliberate intention of insulting those sharing protected characteristics, while remaining just below the threshold of being “threatening and abusive”.

10.113 It is worth stressing that nothing we propose here would have the result of legitimating insults in other contexts. In-person conduct targeted at an identifiable victim is dealt with under sections 4 and 4A of the Public Order Act 1986, which continue to include “insulting” words and behaviour. It is also worth pointing out that at present neither insulting nor abusive conduct is covered by the stirring up offences in relation to characteristics other than race.

10.114 In the consultation paper we noted that when proposals were made to remove “insulting” from the test for the offence in section 5 of the Public Order Act 1986, the then Director of Public Prosecutions, Sir Keir Starmer QC, had concluded that the

word could therefore be safely removed without undermining the CPS's ability to bring prosecutions successfully. Lord Bracadale, reviewing hate crime laws in Scotland, concluded that this would also apply in relation to the offences of stirring up racial hatred. Our own examination of the cases prosecuted in recent years suggests none have involved material which was insulting, but not abusive. We have therefore concluded that removing "insulting" from the "likely to" limb would reduce the extent to which the law interferes with the right to freedom of expression, but have a negligible impact on the ability of prosecutors to target the types of serious conduct currently prosecuted under the stirring up offences.

### The meaning of "likely to"

10.115 We asked at Consultation Question 44 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), and invited views on how this might be defined.

10.116 The Bar Council responded

The words "likely to" are not easily susceptible to statutory definition and we are not aware of their standard use in criminal statutes as part of the actus reus of an offence. In terms of causation it would be preferable to use a more precise form of words in the proposed legislation such as "real and substantial possibility".

10.117 Index on Censorship argued that the current wording was too ambiguous to allow individuals to moderate their behaviour in accordance with the standard and was therefore potentially insufficiently certain in its application as to comply with the requirement that the restriction be "prescribed by law" under the European Convention on Human Rights. Conversely, the Free Speech Union, while opposed to the limb on principle, saw no need for further definition.

10.118 The CPS, however, replied

There would be significant challenges in defining the meaning of 'likely to' in statute as any definition would need to encompass the range of varied circumstances that arise in individual cases. Determining the meaning of 'likely to' is ultimately the type of determination best left to the common sense of jury members who see this material in context. As such, they are best placed to make judgments based both on the standards and expectation of the community and the impact the material in question would have on the mix of society they represent. We are not aware of any anecdotal evidence that juries are struggling to apply this law or that there are a statistically higher number of hung juries or jury challenges in these cases.

10.119 Prof. Eric Barendt, said

I would prefer the meaning of 'likely to' is left to the courts to decide. They are used to the interpretation of plain words in statutes, and I see no benefit in attempting to clarify them here.

10.120 In Modernising Communications Offences, we proposed that the test of "likely harm" should be one of a "real or substantial risk of harm", stating "This is a view fortified by

the Divisional Court in *Parkin v Norman*,<sup>83</sup> in which the court held that, for the purposes of section 5 of the Public Order Act 1936, “likely to” indicated a higher degree of probability than “liable to”.<sup>84</sup>

10.121 We have concluded that the phrase “likely to” is unlikely to cause practical difficulties. While the law recognises diverse meanings attaching to the words “likely to”, we think that the most relevant case law is *Parkin v Norman*, which stresses that “likely to” does not mean “liable to”. In the recent case of *Pwr, Akdogan and Demir*,<sup>85</sup> the High Court held that the offence in section 13(1) of the Terrorism Act 2000<sup>86</sup> should be considered in the context of “predecessor legislation, dating back to 1936” (i.e. the Public Order Act 1936) and *Parkin v Norman*. We think the same would apply to the stirring up offence, and accordingly the courts would have regard to the statement in *Parkin v Norman*.

10.122 In practice, if “likely to” does not mean “liable to”, then it means something more than mere possibility, but not necessarily a mathematical probability greater than 50%. Index on Censorship drew attention to Lord Nicholls’ reference in *re H* to “a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case”.<sup>87</sup>

10.123 We think that in practice “likely to” as applied in *Parkin v Norman* is unlikely to mean anything different in substance than a “real and substantial likelihood”. We also think that substantial is likely to be context-specific to the harm, so little different in practice from the test in *re H*. Were the law to replace “likely to” with “real and substantial likelihood”, identical issues of interpretation and application could conceivably arise in particular cases. We therefore conclude that there is no benefit in defining “likely to” further in legislation and juries would be best placed to interpret and apply it in particular circumstances. If necessary, judges would be able to give guidance to the effect that likely to does not mean liable to; the likelihood of hatred being stirred up must be real, not fanciful or speculative, and substantial, having regard to the circumstances and the nature and gravity of the hatred that might be stirred up.

10.124 We are satisfied that the phrase is not so vague as to give rise to serious issues of foreseeability that would mean that the interference is not “prescribed by law” for the purposes of the Convention. To the extent that it may be difficult for an individual to foresee whether their conduct is likely to stir up hatred, this is likely to be due to the actual foreseeability of the consequences of certain conduct, rather than legal

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<sup>83</sup> [1983] QB 92, 100.

<sup>84</sup> Modernising Communications Offences (2021) Law Com 547, p 39, para 2.110 and fn 56.

<sup>85</sup> *Pwr, Akdogan and Demir v DPP* [2020] EWHC 798 (Admin).

<sup>86</sup> This provides that “A person in a public place commits an offence if he (a) wears an item of clothing, or (b) wears, carries or displays an article in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation”.

<sup>87</sup> Index also drew attention to an error in the consultation paper where we attributed to Lord Nicholls in *re H* [1995] UKHL 16, the statement “[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”. This was actually from Lord Lloyd’s dissenting judgement in the same case (though he concurred with the majority on the meaning of “likely to”).

uncertainty, and our proposed reform would put a new burden on the prosecution to establish that hatred being stirred up was foreseeable.

“Knew or ought to have known”

10.125 There is a further issue with knowledge that should be addressed. In the consultation paper we proposed the requirement that the defendant “knew or ought to have known that material was threatening or abusive and likely to stir up hatred”. This is potentially ambiguous.

10.126 In *White v White and Motor Insurers Bureau*,<sup>88</sup> Lord Nicholls held that “the meaning of the phrase [“ought to have known”] depends on its context” (in that case, the context that it was intended to give effect to an EU Directive was determinative), but that it was “apt to include knowledge which an honest person ... would have [and] includes the case of a [person] who *deliberately* [emphasis added] refrains from asking questions. It is not apt to include mere carelessness or negligence”. He also stated:

There is one category of case which is so close to actual knowledge that the law generally treats a person as having knowledge. It is the type of case where [a person] deliberately refrained from asking questions lest his suspicions should be confirmed. He wanted not to know (‘I will not ask, because I would rather not know’).

10.127 Although this was a civil case, in the criminal case of *Westminster City Council v Croyalgrange*,<sup>89</sup> the House of Lords noted, *obiter dicta*, that “it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed”.

10.128 “Ought to have known” in relation to dissemination of inflammatory hate material could mean:

- (1) The person had actual knowledge of the contents but did not appreciate that the words or material were threatening or abusive, or did not appreciate they were likely to stir up hatred.
- (2) The person did not have actual knowledge of the contents but ought to have had such knowledge; and if they had had actual knowledge they would have known that the words or material were threatening or abusive and that they were likely to stir up hatred.
- (3) The person did not have actual knowledge of the contents but ought to have appreciated, nonetheless, that the material was threatening or abusive and that it was likely to stir up hatred, for instance because of the known views of the author or contributor.

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<sup>88</sup> [2001] UKHL 9.

<sup>89</sup> [1986] 1 WLR 674.

10.129 We do think that (1) ought to be captured by the offence. Otherwise there is a danger of 'wilful blindness' in the face of material which is clearly inflammatory. If the material is such that a person who had actual knowledge of it ought to have realised that it was threatening or abusive and likely to stir up hatred, we believe this is a level of culpability which justifies criminal liability. If, on the other hand, they had good reason for not realising the words were threatening or abusive or likely to stir up hatred – for instance, because the words were slang or dialect terms with which the person was unfamiliar – then the prosecution would not be able to demonstrate that they "ought to have known" that the material was threatening or abusive and likely to stir up hatred.

10.130 We do not think that (2) ought to be captured by the offence: this is really describing a situation where the person negligently failed to exercise due diligence. To convict in such a situation is effectively to treat stirring up hatred as a strict liability offence. There may be some cases – such as including material in a broadcast – where it might be reasonable to expect a heightened level of prior diligence and to hold those who fail to exercise it to account legally liable. In the consultation paper, we gave the example of a religious broadcaster which broadcasts "bought-in" material from overseas and which, having failed to check material prior to transmission, broadcasts a programme in which a preacher urges viewers to kill apostates. We suggested that in such a case the broadcaster "ought to have known" that the material was likely to stir up hatred because, had it carried out checks that it ought to have carried out, it would have known.

10.131 On reflection, we consider that this is a case where regulatory action would be more appropriate than criminal prosecution. We do not favour extending "ought to have known" to situations where a person did not have knowledge of the material but ought to have had such knowledge. Such negligence is more appropriately dealt with as a regulatory matter.

10.132 The third scenario is trickier but on balance we favour treating this in a similar way to (2). The first resort should not be to criminal prosecution but to making the person aware of the nature of the material they are disseminating. Once this has been done, they will have actual knowledge and any future conduct could be dealt with as (1).

#### Is the "likely to" limb necessary?

10.133 During passage of the Hate Crime and Public Order (Scotland) Bill, the Scottish government abandoned its initial proposal to apply the "likely to" limb to the stirring up offences in relation to characteristics other than race. The limb would be retained for racial hatred offences.

10.134 In view of this we reconsidered whether the "likely to" limb is necessary.

10.135 In the consultation paper we noted the background to the "likely to" limb. It was introduced following Lord Scarman's report into the Red Lion Square disturbances in 1974, in which a student, Kevin Gately, died during a counterdemonstration against a march by the National Front. Lord Scarman was critical of the existing stirring up offence in the Race Relations Act 1965:

Section 6 of the Race Relations Act is 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 ... The section needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation of the intent to be proved before an offence can be established.

- 10.136 Accordingly, the Government amended the legislation so that the offence could be committed by conduct “likely to” stir up hatred. In 1986 intent was reintroduced as an alternative limb, and the “likely to” limb was further amended, so that a defence was available where a person could show that they did not intend their words or behaviour, or the written material, to be, and were not aware that it might be, threatening, abusive or insulting. (Previously, this defence had only been available to a person in respect of publication or distribution of material where they were not aware of the contents.)
- 10.137 One argument against the “likely to” limb is that in the consultation paper we argued that it should be accompanied by several additional protections for those who do not have a provable intent to stir up hatred. This adds substantially to the complexity of the offences. (As noted above, the existing offences of stirring up religious hatred or hatred on grounds of sexual orientation are substantially simpler at present precisely because, requiring intent, they do not need the defences for those who do not intend to stir up hatred).
- 10.138 In addition – and notwithstanding the number of respondents who opposed hate speech laws on the basis that proving intent was impossible – a large number of respondents felt strongly that the offence should require proof of intent.
- 10.139 However, getting rid of the “likely to” limb altogether would significantly roll back the protection against racial hatred, unless, as in Scotland, the limb were retained for race alone. (Retaining a separate test only for race would, however, maintain the “hierarchy of hatred” we have discussed and the differential treatment of ethnoreligious and other religious groups.)
- 10.140 Second, the issue raised by Lord Scarman remains, although its locus may have extended from the “policeman on the street” to the “police officer on the internet”. There will be situations in which law enforcement officers need to tell a person that their conduct is unlawful and should be stopped, or material removed, on pain of arrest or prosecution. It would be unsatisfactory if all that person had to do was to deny any intent to stir up hatred.
- 10.141 Third, we think that the use of threatening and abusive words and behaviour, when it is likely to stir up hatred against groups, is potentially culpable.
- 10.142 We have therefore concluded that scrapping the likely to limb and relying solely on intent to stir up hatred would not be appropriate, and accordingly confirm our provisional proposal.

### **Recommendation 21.**

10.143 We recommend that there be a single test applying to all forms of hatred. Under this test a person would be guilty of stirring up hatred if they used words or behaviour intended to stir up relevant hatred; or used threatening or abusive words or behaviour likely to stir up relevant hatred.

10.144 For the “likely to” limb of this test, the prosecution would have to prove that the person knew, or ought to have known, that the words or conduct were threatening or abusive, and knew, or ought to have known, they were likely to stir up relevant hatred.

## **SHOULD THE STIRRING UP OFFENCES COVER ADDITIONAL CHARACTERISTICS?**

### **Other characteristics currently protected by hate crime laws**

10.145 At present, of the five characteristics protected under other hate crime laws, only three (race, religion and sexual orientation) are covered by stirring up offences. Disability and transgender status are not covered, despite being recognised under other hate crime laws.

10.146 The principal argument in favour of extension is one of equality, given that the law already recognises disability and transgender within the hate crime legal framework. Arguments in favour of extension thus typically focus on the “hierarchy” of hatred that arises when some characteristics are treated differently to others. In addition, some stakeholders claimed there was a demonstrable problem of hatred being stirred up against excluded groups which would be unlawful if it were targeted at groups on the basis of race, sexual orientation or religion.

10.147 The principal arguments against extending the stirring up offences to cover all five protected characteristics are (i) freedom of expression and (ii) a purported lack of demonstrable need for the offences.

10.148 We are sceptical that freedom of expression concerns can be decisive. As we discuss above, interferences with the right to freedom of expression where the right is used to stir up hatred against a group can be justified on grounds of preventing crime and disorder and protecting the rights of third parties. Under our proposals, only conduct which was intended to stir up hatred, or which was threatening or abusive and likely to stir up hatred, would be covered. Particular concerns that arise from extending the existing offences to cover additional characteristics can probably be addressed through specific freedom of expression provisions – as has been done in relation to religion and sexual orientation.

10.149 In our previous report on Hate Crime in 2014, we said that consistency of treatment between protected characteristics was desirable but expressed scepticism that consistency alone could justify new stirring up offences. Rather, there would need to be a practical need for the offences. However, we noted that the examples of “hate speech” against disabled or trans people that we received in response to that consultation were unlikely to be capable of prosecution under either the “broad” test



applying to racial hatred or the “narrow” test applying to religion and sexual orientation.<sup>90</sup> We noted that the stirring up offences “do not cover pure abuse” but equally do not cover “criticism in the course of a debate on public policy, however adverse to the interests of the groups in question”. We noted, for instance, that one case cited by Mencap – a local councillor advocating euthanasia of severely disabled children – had not been prosecuted under public order legislation, despite a much lower legal threshold for conviction than under the stirring up offences.

10.150 That is not to say that a low number of potential prosecutions should be decisive. As we said in 2014:

[t]he question before the court in any particular case will not be whether the conduct in question occurred on a large enough scale to justify the original introduction of the offence. Rather, the question is whether the conduct that occurred in the particular case is likely to cause social harm of a type and degree sufficient to justify restraining it by criminalisation. Accordingly, from the human rights point of view it is not an objection that the requirements for new stirring up offences are not likely to be met in many cases. It would be an objection if the requirements for the offences would be met in many cases, but if in most of those cases it was impossible to demonstrate a pressing social need. Given the high threshold for the existing offences of stirring up hatred, we find it difficult to envisage such cases.<sup>91</sup>

10.151 Indeed, there have been few prosecutions for stirring up hatred on grounds of sexual orientation, but we are satisfied that where they have been pursued, for instance in the case of leaflets distributed encouraging the execution of gays, a pressing social need was demonstrated.<sup>92</sup> The issue, therefore, is less about whether there would be many cases, but whether there would be cases which meet the high threshold for prosecution.

## Consultation

10.152 We asked consultees the following questions:

### Consultation Question 48

We provisionally propose that the offences of stirring up hatred be extended to cover hatred on the grounds of transgender identity and disability.

Do consultees agree?

10.153 In retrospect, the way that this question was phrased proved a distraction – we should have asked separate questions about each characteristic. A large number of respondents objected to our linking disability and transgender identity in this way. Over sixty personal responses used the following wording:

Disability and transgender identity are two completely different issues, and it is wrong for this question to present them as a package requiring a yes/no answer.

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<sup>90</sup> See *Hate Crime: Should the Current Offences be Extended* (2014) Law Com 348, paras 7.119 to 7.134.

<sup>91</sup> *Hate Crime: Should the Current Offences be Extended?* (2014) Law Com No 348, para 7.51

<sup>92</sup> *R v Ali, Javed and Ahmed* (2012), Sentencing remarks of HHJ Burgess, 10 February 2012.

Transgender ideology is controversial and hate speech laws covering this area would clamp down on a subject of major political debate...

10.154 Accordingly, it was often difficult to establish whether respondents – the vast majority of whom responded “no” – thought that neither or those characteristics should be covered by stirring up offences, or that one but not both should, unless they had provided a further comment explaining their thinking. Analysis of those comments suggests that there was much higher support for extending the offences to cover disability than transgender identity. For example in the following personal responses:

- (1) “Issues surrounding transgenderism CANNOT be equated with disability. One is a contested and debated area within societal, political and sexual politics circles (transgenderism) and one is not (disability).”
- (2) “Transgender and disability are so different that it is disingenuous to lump them together.”
- (3) “Disability yes, however, I have already stated that transgender is an extraordinarily large umbrella and the debate on trans women's desire to be recognised as actual women is particularly contentious at the moment. Legislation around this could shut down discourse totally.”

10.155 We consider it highly significant that two of the main “free speech” organisations, Index on Censorship and English PEN, favoured extending the offences (assuming they were retained) to cover these two groups. Index on Censorship agreed that the offence should be extended to cover additional characteristics, provided that this was in accordance with robust criteria. English PEN said “if offences of this kind are to remain in some form, then we do support the inclusion of transgender identity and disability and sex and gender”.

10.156 The Society of Editors expressed concern about extending hate crime laws to cover additional groups:

We remain concerned that the Commission’s consideration of whether to make sex/gender a protected characteristic alongside extending hate crime laws to cover other areas including ageism, and hostility towards other groups such as homeless people, sex workers, alternative subcultures and people who hold non-religious philosophical beliefs such as humanists etc could work in practice to result in the loss of legitimate public discussion and debate around numerous issues. While no doubt designed to provide enhanced protections to individuals from discrimination, any new laws must be justified and strict criteria agreed before the addition of any further characteristics into hate crime laws.

10.157 However, they did not express specific concerns about our proposal to extend hate speech laws to cover disability and transgender.

10.158 The Bar Council felt that “this is essentially a question of policy and [therefore] the Bar Council is not in a position to comment. However there is clearly now an empirical basis for the proposed extension.”

- 10.159 The Equality and Human Rights Commission supported extension of the stirring up offences to cover the protected characteristic of gender reassignment, but said that they were unaware of evidence supporting the need to extend to cover disability.
- 10.160 In the consultation paper, we recognised that while there was limited evidence of material which would qualify were the stirring up offences extended to cover trans and disabled people, this was almost inevitable while such material remained legal and hence unrecorded. There was, however, now extensive evidence of hate crimes against trans and disabled people which was not available in 2014. We also pointed to the findings of the House of Commons Women and Equalities Select Committee in 2016 on Transgender Equality and the House of Commons Petitions Committee on Online Abuse in 2018, both of which had recommended giving these categories parity. While much of the online abuse was targeted at individuals, the latter cited evidence of Facebook groups seeking specifically to target groups of people with a particular disability for collective abuse.<sup>93</sup>
- 10.161 Restricting incitement to hatred can be a legitimate interference with the right to freedom of expression. We recognise that there are considerable concerns about the implications for freedom of expression of extending the stirring up offences to cover additional protected characteristics, especially in relation to current debates about gender identity. However, we believe that these can be addressed through the sort of measures to protect freedom of expression already in place in the legislation covering religion and sexual orientation.
- 10.162 Since our 2014 report, there is much more extensive evidence of hatred – especially online – targeting trans and disabled people. There is less evidence of material which would meet the threshold for prosecution for stirring up hatred, and much of the material which is identified by campaigners as transphobic or disablist would not meet the threshold for prosecution under stirring up legislation. Indeed, some clearly falls into the category of legitimate contribution to debate on matters of public interest. We do not think such material should be criminalised and our recommendations on modernising the communications offences would ensure that it could not be prosecuted on the basis that it was “grossly offensive”.<sup>94</sup>
- 10.163 Nonetheless, we do have evidence of some material which could amount to stirring up hatred against trans and disabled people and which might be prosecuted. We would not necessarily expect large numbers of prosecutions – indeed, this is also true of the offences of stirring up religious hatred and hatred on grounds of sexual orientation.
- 10.164 In relation to transphobic material, for instance, Galop’s Online Hate Report 2020 refers to “pages and pages of anti-trans comments on trans related articles, *saying we should be killed, have mental illness, and are paedophiles*”, and “people ... jumping on

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<sup>93</sup> See House of Commons Petitions Committee, “Online abuse and the experience of disabled people”, 2017-19: HC 1459, para 35.

<sup>94</sup> Modernising Communications Offences (2021) Law Com 399.

a thread, saying they were going to beat, kill and rape every one of my identity that they came across".<sup>95</sup>

10.165 As with transphobia, the majority of the material which activists or commentators have identified as disablist would not meet the threshold for prosecution under stirring up legislation. For instance, welfare support for disabled people is a legitimate topic for public debate. Comments which, for instance, overestimate the extent of benefit fraud or draw disproportionate attention to fraudulent claims of disability, are not intended to stir up hatred against disabled people and are unlikely to constitute threatening or abusive conduct. On the other hand, characterising disabled people generally as "parasites" and encouraging violence – such as the comment "all parasites should perish" found by Burch<sup>96</sup> on the online forum Reddit – might, in context, cross the threshold.

10.166 In summary, there is evidence of material which stirs up hatred against trans and gender diverse people and would potentially be prosecutable were the existing laws extended to cover that characteristic. There is less evidence of material expressing hatred of disabled people that would cross the threshold for prosecution, although there is some material online which probably would do so. Conversely, consultation responses suggested greater support for extending the offences to cover disabled people than trans people, something which may reflect underlying differences in social attitudes towards the two groups.

10.167 That being so, we see a case for extending the stirring up offences to cover hatred against people who are transgender or gender diverse.<sup>97</sup> In view of those consultation responses, and the (albeit small) amount of disablist material we have identified that might be caught under stirring up legislation, it would be unsatisfactory for disability alone to be excluded from the stirring up offences. Accordingly, we recommend that the stirring up offences should be extended to cover all five characteristics currently protected by hate crime laws.

10.168 Nonetheless, we recognise that debates over gender identity, and in particular the legal framework surrounding gender reassignment, are a legitimate aspect of public discourse. Nothing we propose is intended to stymie such discussion; rather we are referring to material, usually in threatening and abusive terms, which incites hatred of trans people as a group. We recognise the potential for laws such as these to have a "chilling effect" on legitimate discourse. This is especially so where there is a risk that the criminal law may be invoked against those engaging in legitimate freedom of expression. Accordingly, later in the chapter, we will discuss the protections that we believe are necessary to make clear the limits of the stirring up offence and ensure that it is understood and applied in a way that does not chill legitimate expression.

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<sup>95</sup> Galop, *Online Hate Crime Report 2020*, pp 8 and 11.

<sup>96</sup> L Burch, "'You are a parasite on the productive classes': online disablist hate speech in austere times" (2017) 33 *Disability & Society* 392. It is not clear whether the comments on the online forum Reddit cited by Burch were posted within or targeted at the UK.

<sup>97</sup> We discuss this terminology at paras 4.216 to 4.229 above.

## Recommendation 22.

10.169 We recommend that the stirring up hatred offences should cover the five characteristics currently protected by hate crime laws equally, subject to recommendation 29 on protections for freedom of expression.

### Sex or gender

10.170 In the consultation paper we provisionally proposed that the stirring up offences should be extended to include gender or sex. We drew attention to the extent of sexist and sexualised abuse targeted at women online and evidence we had received from the police and CPS about the increasing problem of “incel” material, which had been linked to misogynist violence in Northern America.

10.171 The Commission for Countering Extremism has defined “incels” as follows:

‘Involuntary celibates’ (or ‘Incels’) are an overwhelmingly male online community, whose members understand society as a three-tiered hierarchy dictated by physical appearance. Incels place themselves at the bottom of the pile, meaning that they perceive themselves to be forced into involuntary celibacy. The Incel worldview has been described as “a virulent brand of nihilism”, with many Incels advocating violence against women.<sup>98</sup>

### Consultation

10.172 We asked consultees the following questions:

#### Consultation Question 49

We provisionally propose that the stirring up offences be extended to cover sex or gender. Do consultees agree?

10.173 In provisionally proposing that “the stirring up offences should be extended to cover sex or gender”, our reference to “sex or gender” was intended as no more than a reflection of the fact that some people identify as male or female though that is not their biological sex, and in particular that trans women are also subject to, and liable to be affected by, misogynistic hatred. We were not using “gender” here to extend the category to cover genders other than male and female or to bring the category of transgender within the category of “sex and gender”. (We had separately provisionally proposed that inciting hatred against trans people as a group should be covered by a distinct stirring up offence.)

10.174 A very large number of respondents, around half of all those who gave a reason for opposing the provisional proposal, objected to our including both sex and gender, or, as they saw it conflating sex and gender. Many simply responded “sex, not gender”. This makes bare analysis of the numbers somewhat difficult, as some of these

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<sup>98</sup> See Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) p 30.

answered the binary question (which referred to sex or gender”) as “yes”, some “no”, and some “other”. Some of those who responded “no” indicated that they supported extending the offence to cover sex alone. It seems likely therefore that had the question been asked about extending the stirring up offences to cover “sex”, there would have been greater support for the proposal. For example, the following personal responses:

- (1) “If they cover sex then this is workable. Gender is too fluid to be included and so would be unworkable.”
- (2) “Sex is observable and defined. Gender is subjective and undefinable.”
- (3) “If “sex” and “gender” are synonyms, as the overwhelming majority of people believe, then there is no reason whatsoever to use “gender”.”
- (4) “Sex and sexual orientation, yes. Gender is cultural and societal and utterly subjective.”

10.175 Other than this, the main reasons given for opposition were “freedom of speech” concerns or a general opposition to hate crime laws.

I prefer a man to be able to say sexist things. He should be allowed to express an opinion. He should be stopped when he acts on them by preventing us from having jobs, freedom, houses or services but he should have the right to offend me. He should also have the right to have religious beliefs that say I am lesser. I can disagree and he can have his beliefs. Being offended should not be a crime. Encouraging people to beat, rape or murder is wrong and should be criminal. Thinking differently to me, should not be a criminal matter.<sup>99</sup>

10.176 Organisations were mostly supportive of the proposal. Those in favour included the Government Independent Advisory Group on Hate Crime, Stonewall, the PCC for Nottinghamshire and the Association of Police and Crime Commissioners, the Jo Cox Foundation, Refuge, the Welsh Government, the Magistrates Association, and the National Police Chiefs’ Council.

10.177 Refuge said:

Refuge strongly supports the proposal to introduce a ‘stirring up’ offence for misogyny hate crime. As the Law Commission noted in the consultation document, the ‘incel’ movement has grown in prominence over the past few years, resulting in real-life mass homicides targeted against women, which in some cases have been charged as terror offences. The apparent growing popularity of the ‘incel’ movement and ‘manosphere’ should be a cause for serious alarm and serve as a definitive argument for why stirring up offences for misogyny hate crime should be introduced, in line with the existing stirring up offences. Anything less would place misogyny hate crimes on a lower position on a hate crime hierarchy.

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<sup>99</sup> Personal response.

10.178 Despite general concerns about stirring up laws, English PEN supported extending the law to cover sex:

Notwithstanding [our] reservations, if offences of this kind are to remain (in some form) then we do support the inclusion of transgender identity and disability (Question 48) and sex and gender (Question 49) as protected characteristics for such offences. We agree that the harms suffered by these groups are real and pervasive.

10.179 The Fawcett Society stated that extending the stirring up offences had not been its priority, but that there is a case for the inclusion of misogyny (or, failing that, sex/gender) in the stirring up offences.

10.180 A notable exception was that several groups representing 'gender critical' feminist views did not support extension, feeling that hate speech laws were used, and would be used, to silence gender critical views.

10.181 As noted above, the Society of Editors expressed concern about the potential consequences for freedom of expression of extending hate crime laws to cover sex or gender, and said that it was imperative that safeguards be included in any new hate crime legislation and that these should work in practice:

We remain concerned that the Commission's consideration of whether to make sex/gender a protected characteristic ... could work in practice to result in the loss of legitimate public discussion and debate around numerous issues. While no doubt designed to provide enhanced protections to individuals from discrimination, any new laws must be justified and strict criteria agreed before the addition of any further characteristics into hate crime laws. Alongside this, laws must not work in practice to unintentionally provide pressure groups with a platform to stifle or close down important discussions. With this in mind, it is essential that ... safeguards are included in any new hate crime legislation to protect freedom of expression and legitimate debate. While the Society recognises the Commission's proposals to change offences of "stirring up hatred" to focus on deliberate incitement of hatred and provide greater protection for freedom of speech where no intent to incite hatred can be proven, it is essential that any safeguards do also work in practice.

10.182 The Free Speech Union expressed concern about the impact on the expression of religious beliefs – for instance in relation to the role of women in positions of religious or secular authority – and the controversy over Pauline Harmange's *Moi les Hommes, Je les déteste (I Hate Men)*.<sup>100</sup>

10.183 More recently, Professor Andrew Tettenborn, who is a member of the Free Speech Union's Legal Advisory Council and has represented the FSU in meetings with us, has written an article challenging the idea that there is material relating to sex which is comparable to that caught by the racial and religious hatred offences:

Race or religious hatred is a genuine social cancer, typically comporting a desire to have a minority group removed or marginalised; those guilty of it would, in most cases, be perfectly happy if the relevant group did not exist at all. Misogyny, even in

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<sup>100</sup> We discuss this further at paras 10.527 to 10.530.

the extended sense it is given today, is something very different. It means merely distaste for the society of women, disavowal of sexual equality or participation in a social system that denies it. It affects not a marginalised minority but half the human race. Misogynists (or misandrists) overwhelmingly do not call for, and would not want, the elimination of the sex in question; they merely dislike the prospect of associating with it on a basis of equality...

There is no social problem of sex hatred equivalent to that of racial or religious hatred. Men do not go around saying they hate women in the sense that they would be happy if there were none, nor yet women men (as demonstrated by the sheer kookiness of French author Pauline Harmange's *succès de scandale* "*Moi les hommes, je les déteste*"). True, there is a problem of discrimination, and undoubtedly in many cases women still end up short-changed. But while this may amply justify anti-discrimination laws, it provides no argument whatever for any stirring-up offence...<sup>101</sup>

10.184 He expressed a concern that

in the absence of any genuine sex hatred which has to be suppressed in order to secure social peace or non-marginalisation of females (or males), the only thing any such offence could bite on would be statements against sex equality, or in favour of the subjection of one sex to another.<sup>102</sup>

### Analysis

10.185 Although we have concluded that the existing hate crime model would not be an appropriate model for dealing with crimes relating to sex- or gender-based hostility, our decision on this was grounded in practical concerns about "suitability". The same arguments do not necessarily apply to the stirring up offences. Again, the key argument is whether there is a demonstrable need.

10.186 In their recent report *Operating with Impunity* the Commission for Countering Extremism found

While instances of real-world violence perpetrated by Incels remain relatively rare, the Counter-Terrorism Division of the Crown Prosecution Service has encountered a rise in extreme misogynistic hate speech in the UK, mainly perpetrated by Incels. They noted that the "spread of Incel ideology [in the UK] has been linked to an increase in misogynistic murders and several mass killings in Northern America". Evidence gathered by HOPE Not Hate on websites promoting an extreme misogynistic worldview found that, after the USA, the UK is one of the major sources of user traffic. UK traffic came second globally for three popular Incel sites and fourth globally for a fourth Incel site.

10.187 In 2020 there were at least two cases in which individuals in the UK were convicted of preparatory acts relating to terrorism where there was evidence of links to incel culture.

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<sup>101</sup> Andrew Tettenborn, "Misogyny is not a hate crime", *The Critic*, September 2020.

<sup>102</sup> Andrew Tettenborn, "Misogyny is not a hate crime", *The Critic*, September 2020.



- (1) In March 2020, Anwar Driouch pleaded guilty to charges of one offence of possessing an explosive substance contrary to Section 4(1) of the Explosives Substance Act 1883 and seven offences of possessing a document likely to be useful to a person committing or preparing an act of terrorism contrary to section 58 of the Terrorism Act 2000. The court heard that Anwar had made internet searches relating to mass shootings and incels.<sup>103</sup>
- (2) In January 2021 Gabrielle Friel was sentenced to ten years' imprisonment for offences under the Terrorism Act relating to weapons. A separate charge relating to incel culture was not upheld, but he had spoken of having an "affiliation" with Elliot Rodger, who killed six people and injured fourteen others in attacks using guns, knives and his car.<sup>104</sup> Rodger had published a manifesto in which he had advocated a "war on women" and is frequently glorified in online incel communities.<sup>105</sup>

10.188 In addition, reports have suggested that the perpetrator who killed five people, including a child, in a shooting spree in Plymouth in August 2021, had sought out Incel material and posted videos online expressing Incel sentiments.<sup>106</sup>

10.189 In their response to our consultation, the Commission for Countering Extremism said "We consider the Incel subculture to meet our definition of hateful extremism, as their activities create a climate conducive to terrorism, hate crime, and violence" and recommended extending the stirring up of hatred offences to include sex.

10.190 In *Operating with Impunity*, it provided multiple examples of content, including memes glorifying extreme violence against women, such as material advocating rape as a response to sexual rejection.<sup>107</sup> We are satisfied that similar content targeted at people on account of their race, religion or sexual orientation, could have been prosecuted under the stirring up legislation.

10.191 While issues relating to the characteristic of sex are core to the "incel" phenomenon, misogyny is also present as a motivating factor in other extremist communities, including Islamist and neo-Nazi groups. For instance, an Islamist group convicted in 2007 for plotting bomb attacks, including one on the Ministry of Sound nightclub, had identified "slags dancing around" as one of their targets, justifying this on the basis that "no one can turn around and say 'oh, they were innocent'".<sup>108</sup>

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<sup>103</sup> Commission for Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) p 26; "Middlesbrough fantasist Anwar Driouch jailed for explosive substance", *BBC News*, 7 March 2020.

<sup>104</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) p 26; "Gabrielle Friel: An 'incel follower' obsessed by mass murder", *The Times*, 13 January 2021.

<sup>105</sup> Elliot Rodger, "How misogynist killer became 'incel hero'", *BBC News*, 26 April 2018.

<sup>106</sup> "Plymouth shooting: thousands of boys drawn to 'incel' sites urging them to kill women", *Sunday Times*, 15 August 2021; Matthew Weaver and Steven Morris, "Plymouth gunman: a hate-filled misogynist and 'incel'", *The Guardian*, 13 August 2021.

<sup>107</sup> For instance, a meme reading "She put you in the friend zone. Put her in the rape zone."

<sup>108</sup> "How MI5 got lucky with hotline call", *Daily Telegraph*, 1 May 2007.

- 10.192 The former Chief Crown prosecutor Nazir Afzal has identified the 2017 suicide bombing of an Ariana Grande concert, in which 22 victims were killed – 17 of them women or girls – as an attack specifically aimed at women and girls.<sup>109</sup>
- 10.193 In a recent report for the Antisemitism Policy Trust and HOPE not hate, David Lawrence, Dr Limor Simhony-Philpott and Danny Stone provided evidence of material on neo-Nazi online forums and social media that combined antisemitism with extreme misogyny, including pro-rape content. The authors found that despite both movements often being conflated as “far right”, neo-Nazi misogyny was often hostile to incels, the term being used to denigrate those men’s lack of success with women. Incel culture was even sometimes portrayed as a Jewish plot to lower white birth rates.<sup>110</sup>
- 10.194 The evidence of the circulation of material which would pass the threshold for prosecution if sex were covered by stirring up offences is at least as strong, and probably stronger, for sex than it is for either trans or disability.
- 10.195 Against this, one of our key aims throughout this project has been to rationalise hate crime laws. Were sex or gender to be covered by stirring up offences but not by other hate crime measures, this would amount to something of an anomaly. It could be seen as creating a new “hierarchy of hatred”, where sex was protected under hate speech laws, but not hate crime laws.
- 10.196 We also recognise that a large majority of respondents, including several “gender-critical” women’s groups, opposed the extension of stirring up offences to cover sex or gender. They felt that this would be used to shut down gender critical views.
- 10.197 As we have repeatedly made clear in this chapter, the stirring up offences do not criminalise content that is merely offensive. However, it is now apparent that there are extremist misogynist actors, whose actions have been implicated in several acts of extremist violence. There is material in circulation which goes beyond “offensiveness”, and clearly incites acts of hatred and violence against women and girls. Such material has been linked to acts of terrorism and violence in the UK and overseas.
- 10.198 In our view, therefore, there is a case for extending the stirring up offences to cover the incitement of hatred on the basis of sex.
- 10.199 To be clear, our recommendations would not criminalise “offensive” comments. They would not stop people discussing differences between the sexes or articulating views on the suitability of women for positions in religious or secular authority. They would not criminalise the telling of sexist jokes (just as the Race Relations Acts of 1965 and 1976 did not prevent comedians from telling racist jokes). We do not agree with Professor Tettenborn that “the only thing any such offence could bite on would be

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<sup>109</sup> Nazir Afzal’s Diary, *New Statesman*, 23 May 2018. Shashank Joshi of the Royal United Services Institute also linked the attack to misogyny being “deeply rooted in the radical Islamist worldview” (*Washington Post*, 23 May 2017).

<sup>110</sup> D Lawrence, L Simhony-Philpott and D Stone, *Antisemitism and Misogyny: Overlap and Interplay* (2021).

statements against sex equality, or in favour of the subjection of one sex to another”.<sup>111</sup>

10.200 What we are referring to is threatening or abusive material which incites and glorifies violence, including sexual violence, against women and girls, and praises men who murder women.

10.201 Given that we have recommended that hate crime laws should not otherwise be extended to cover sex or gender, it is important to understand why we have come to this conclusion.

10.202 We concluded that *in principle* hate crime laws should cover sex or gender. However, we were clear in the consultation paper that we had concerns over the suitability criterion, including concerns about creating hierarchies of sexual violence.

10.203 In the event, we have concluded that these suitability concerns are insurmountable. The bespoke solutions we have considered to address these suitability concerns are themselves seriously problematic, while the benefits of extending hate crime sentencing aggravation laws to sex or gender are limited or unproven.

10.204 The same suitability considerations do not apply to the stirring up offences. The stirring up offences concern the group as a whole, not an individual. Issues that we identified in Chapter 5 – such as the risk of creating hierarchies of sexual violence, the unsuitability of the “hostility” test to many forms of Violence Against Women and Girls (VAWG) offences, or distorting VAWG resource allocations – do not apply in this context.

### Terminology

10.205 We did not ask a question about the terminology that should apply if the stirring up offence were extended, nor whether the offence should be unidirectional, covering only hatred towards women, or bidirectional, covering both misogyny and misandry.

10.206 In chapter 5 we considered the question whether the hate crime regime should cover ‘sex’, ‘gender’ or ‘sex or gender’. In relation to hate crime laws, we concluded that ‘sex or gender’ was preferable. This was grounded in the fact that hate crime laws operate in respect of offences which (usually) have an identifiable victim. We noted that trans women, for instance, may experience misogyny, even where the perpetrator is unaware they are trans. Our view was that referring to ‘sex’ alone might be inappropriate in such cases.

10.207 As mentioned above, however, the stirring up offences operate at the level of the group – in this case women or men – rather than towards an identifiable victim, so this consideration does not necessarily apply. It is hard to conceive of circumstances in which a person might stir up hatred against – say – women as a sex, but not as a gender, or vice versa.

10.208 It was very clear that a large number of individual respondents objected to the inclusion of “gender” in this potential protected characteristic for the stirring up

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<sup>111</sup> Andrew Tettenborn, “Misogyny is not a hate crime”, *The Critic*, September 2020.

offences. It was also clear that the multiple meanings attaching to the word “gender” risked obscuring the purpose of legislation in this area. Some respondents thought that our reference to gender was intended to cover transgender status, although we had made a separate proposal that this should be covered by the stirring up offences under a distinct heading.

10.209 In chapter 5 we also considered the question whether the test should be unidirectional, covering only hatred towards women, or bidirectional. Again, we did not ask a specific question as to whether, if the stirring up offences were extended to cover sex or gender, the offence should be gender neutral or apply to hatred against women only.

10.210 The evidence that we have received has overwhelmingly been of misogynist material. Indeed, the only example of supposedly misandrist material – *Moi, les hommes, je les déteste* – was given as an example of material which should not be criminalised.

10.211 The existing characteristics covered by the stirring up offences – race, religion, and sexual orientation – have operated bidirectionally. Some responses suggested that this was inevitable given the complex nature of the sub-categories that were covered by those categories, but that the same did not apply to sex or gender. While this is likely true of race and religion, the offences of stirring up hatred on grounds of sexual orientation define sexual orientation as “towards persons of the same sex, the opposite sex or both”.<sup>112</sup> It would have been easy to limit the offence to hatred against a group of persons defined by sexual orientation to the same sex or both sexes. Nonetheless, the legislation was drafted and passed in neutral terms, notwithstanding that there was no evidence of “heterophobic” material that would be caught by the offence.

10.212 It was very clear from responses to the earlier question on whether hate crime laws should operate unidirectionally or bidirectionally, that workable public support for extending the stirring up offences is unlikely if protection is limited to women alone – even if, in practice, there are unlikely to be many, if any, cases of misandrist material that would meet the threshold for prosecution.

10.213 Moreover, in principle, given the high threshold required for stirring up hatred, we think that *if* there is material which is intended to incite hatred against males, or which is threatening and abusive and likely to incite such hatred, it should be covered by the law. Accordingly, we have concluded that the offence should operate bidirectionally.

10.214 Given that we are not recommending that the aggravated offences or enhanced sentencing provisions should apply to sex or gender, the desirability of using common terminology with those provisions is no longer in issue. The purpose of extending the stirring up offences is to cover material which incites hatred against women (or potentially men) as a group. The separate issue of hatred towards people who are transgender or gender diverse is discussed in the previous section. We think it is important that disputes over terminology do not detract from the importance of

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<sup>112</sup> Public Order Act 1986, s 29AB.

extending the law to cover a demonstrable danger that exists from inflammatory material inciting misogynistic hatred.

10.215 Accordingly, while we have concluded that the stirring up offences should be extended to cover sex or gender, by this we simply mean that the offences should be extended so that material which stirs up hatred against women, or against men, would be covered by the stirring up offences. It will be for Parliament to consider how such legislation should be drafted.

### **Recommendation 23.**

10.216 We recommend that the stirring up offences should be extended to cover hatred on grounds of sex or gender.

### **Stirring up hatred against more than one characteristic**

10.217 In Chapter 8 (paragraphs 8.146 to 8.195) we discussed crimes involving hostility towards more than one characteristic. Similar considerations can apply to the stirring up offences in several different ways.

10.218 The first is a situation in which a person stirs up hatred against an ethnoreligious group such as Jews or Sikhs. At present, this would likely be prosecuted as stirring up racial hatred, since the legal test is lower for stirring up racial hatred. Under our recommendation of a single test applying to all characteristics, this would not be the case. While it may seem odd to imply that the person was guilty of inciting racial hatred but not religious hatred (or vice versa) in such a situation, there is no substantial injustice in prosecuting only one characteristic. Conversely, we would suggest it would be unfair to the defendant if they could be convicted of two separate offences of stirring up racial hatred and religious hatred. Moreover, this would risk creating a hierarchy, in which hatred targeted at an ethnoreligious group was treated more harshly than hatred targeted at a race or religion alone.

10.219 The second is a situation in which a person engages in conduct intended or likely to stir up hatred against more than one group. For instance, a person might incite violence against black people and Muslims, or against homosexuals and transsexuals. Lawrence, Simphony-Philpott and Stone cite the example of a “conspiracy theory that Jews were imperilling white women by encouraging an influx of rapacious immigrants”.<sup>113</sup> In these cases, it should be possible to charge more than one stirring up offence – for instance stirring up religious hatred against Jews and stirring up racial hatred against immigrants – in relation to the conduct.

10.220 The third is a situation in which a person stirs up hatred targeted against a group that is a subset of two or more protected characteristics – for instance, gay black men, or white Muslims. In such circumstances, it is currently possible to prosecute only one form of the incitement. Given the broader scope of the racial hatred offences, it would typically be easier to focus on this aspect (if race is one of the characteristics). Again,

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<sup>113</sup> D Lawrence, L Simphony-Philpott and D Stone, *Antisemitism and Misogyny: Overlap and Interplay* (2021)

were our recommendation of a single test adopted, this consideration would no longer apply, and prosecutors would have to choose the most appropriate charge.

10.221 For example, if a defendant were to call for the extermination of “female Jewish MPs”, (and our recommendation to include the characteristic of “sex or gender” within stirring up offences were adopted), the prosecution would need to consider how to approach the charging of both the misogyny, and racial/religious hatred.

10.222 The fourth situation arises where a person is clearly stirring up hatred, and it is clear that this relates to protected characteristics, but it is unclear to which characteristic they are referring. For instance, someone posts an image of, say, Asian people wearing what appears to be Islamic dress, accompanied by inflammatory text. It may be unclear whether they are inciting racial or religious hatred. As already discussed, because the legal test is currently lower for racial hatred, it might be preferable to prosecute on the basis that this was likely to stir up racial hatred, than prosecute for behaviour intended to stir up religious hatred. (Indeed, given the need at present for “threatening” conduct under the religious hatred offence, if the material was merely abusive, it would not be possible to prosecute it as stirring up religious hatred.)

10.223 If the offences are extended as we recommend to cover stirring up hatred towards transgender people, there may be further scenarios where this could arise. For instance – a person posts inflammatory and abusive comments alongside an image of an LGBT Pride parade, explicitly inciting violence or hatred and using an ambiguous but clearly derogatory term such as “freaks” or “perverts”; it may be unclear whether the target is gay people or trans people; indeed the defendant may not actually be distinguishing between the two.

10.224 In the consultation paper we asked for consultees’ views as follows:

Consultation Question 50

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.

10.225 The Association of Police and Crime Commissioners said

In principle, we believe that the suggestion that the Commission outlines ... could work, in terms of introducing a single offence of “unlawfully stirring up hatred” with the definition listing not only the characteristics, but also specifying the criminality of “hatred against a group defined by a combination of more than one characteristic” ...

10.226 They cautioned that “any limitations to reflect intersectionality in law should not prevent the appropriate police recording of intersectional hate crimes.”

10.227 Others in support included Stonewall, Refuge, Antisemitism Policy Trust, National Police Chiefs’ Council, the Magistrates Association, the Bar Council, and the Alan Turing Institute.

- 10.228 National AIDS Trust noted that “HIV often intersects with other protected characteristics” and suggested “It is important to include them in the same charge in order to not result in duplicity whilst ensuring the totality of the crime is detailed.”
- 10.229 The Free Speech Union stated that they had no objection in principle to this proposal.
- 10.230 The Welsh Government noted that “often a perpetrator will lack a full understanding of racial or religious customs and confuse the terminology when committing a crime which could make prosecution of the crime more difficult.”
- 10.231 A personal response accepted the need to record the characteristics targeted, but argued that the targeting of more than one characteristic should not lead to multiple charges, nor increase the sentence:
- If hatred towards more than one characteristic is expressed, it should be noted, but it should neither enhance the sentencing, nor should it be counted as two different hate incidences. It should be counted as the more prominent one if possible.
- 10.232 Another personal response highlighted what we consider to be a highly pertinent issue with this possibility:
- If you are charged with a crime you should have the right to know exactly the charge against you so that you can properly defend yourself.
- 10.233 The Indictments Act 1915 requires that every indictment must contain “a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.”<sup>114</sup>
- 10.234 Considering the examples we refer to above – where it is not clear whether the hatred is intended to be stirred up against a religious group or a racial group, or against a group defined by sexual orientation or by transgender identity – in both cases an indictment could be formulated with sufficient clarity to give the defendant sufficient grounds to present a defence. If the law extended to all five groups equally, it would be no defence to say “I intended to stir up hatred against Muslims but not Asians”; or “trans people, not gays”, since these would be equally unlawful.
- 10.235 As we discuss in paragraphs 8.175 to 8.178, the issue is not likely to be one of the charge being so uncertain as to breach the right to a fair trial under Article 6(3)(a) of the European Convention on Human Rights. For instance, in the two examples given, it would be possible to draft an indictment detailing what the image showed, the accompanying text, and charge that the conduct was likely to stir up a form of hatred covered by the offence, whether racial or religious in the first example, or on the grounds of sexual orientation or transgender status in the second. No prejudice is caused to the defendant by this. The issue is more one of fair labelling.<sup>115</sup>

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<sup>114</sup> Indictments Act 1915, s 3(1).

<sup>115</sup> See paras 8.187 to 8.192 where we discuss the principle of fair labelling.

10.236 Under the Hate Crime and Public Order (Scotland) Act 2021, it is possible to convict a person of stirring up hatred on grounds of more than one characteristic. Section 6 of that Act says:

Where a person is convicted of an offence [of stirring up hatred] under section 4, the court must—

(a) state on conviction, and

(b) record the conviction in a way that shows, the characteristic (or characteristics) to which the offence relates.

10.237 This explicitly contemplates that a defendant's conduct might stir up hatred against a group of persons defined by reference to more than one characteristic. However, it seems to preclude the possibility of convicting a person for an offence under section 4 unless the court is able to identify at least one characteristic defining a group against which the person's conduct was intended to or likely to stir up hatred: that is, it would not be possible to convict on the basis that the conduct was intended to or was likely to stir up hatred against a group defined by either one characteristic or another.

10.238 We consider the case of stirring up hatred to be distinct from the circumstance of aggravated offences that we discussed in Chapter 8. In such cases, we consider that multiple charges arising from one form of conduct is likely to be excessive. For example, where a defendant assaults a victim once, while using both racist and homophobic language, we consider one charge of aggravated assault – specifying racial hostility and/or hostility on the basis of sexual orientation – to be more appropriate than two separate charges of aggravated assault. The latter risks overloading the indictment, and if the defendant is found guilty of both, the convictions would unfairly suggest that the defendant has committed two separate assaults.

10.239 By contrast, we consider the form and content of the hatred in question to be the very essence of the offence of stirring up hatred. Without the identification of the characteristic against which hatred is stirred up, no offence would be committed. We have therefore concluded that the charge should be specific. In practice, this may mean charging two or more separate offences arising from the same words or conduct where the hatred is targeted at two or more characteristics.

10.240 Further, in charging each form of hatred separately, the prosecution would be identifying a distinctive form of offending and wrongdoing. We therefore do not consider the same concerns about oppressive charging of the defendant apply.

10.241 If the prosecution were to include more than one characteristic in a single charge of stirring up hatred, it would risk the entire prosecution failing if the jury were not persuaded in respect of *both* characteristics. We anticipate, therefore, that where a defendant is charged with stirring up hatred against a single group that can be defined in terms of more than one characteristic, whether that is, for instance, an ethnoreligious group (which is both a racial and religious group), or lesbians (who are defined by both sex and sexual orientation), the prosecution will frame the charge in terms of the characteristic that more accurately reflects the nature of the offending.



10.242 We recognise that this more restrictive approach could make prosecutions harder in scenarios like the examples given in the fourth category, but we think that the problem is more theoretical than real. Were the two-limb test we recommend in recommendation 21 to be adopted, a person could be prosecuted if their conduct was likely to stir up hatred against a group, even if it could not be shown that they intended to stir up hatred against that group.

10.243 In the LGBT pride example, even if the prosecution charged both offences, leaving it to the jury to decide if the defendant was guilty of stirring up hatred on grounds of sexual orientation, hatred on grounds of transgender status, or both, it might be that the jury would be unable to find to the criminal standard that the defendant intended to incite hatred on grounds of sexual orientation; and unable to find to the criminal standard that the person intended to incite hatred on grounds of transgender status; and therefore, while satisfied that the person intended to stir up hatred on one or other ground, had to acquit on both charges.

10.244 However, provided that the defendant had used threatening or abusive language or behaviour and the requisite fault elements were present, in such a case it would be possible to convict under the “likely to” limb in respect of both characteristics.

## THE SCOPE OF THE OFFENCES

10.245 We asked two questions in the consultation paper which related to the scope of the existing offences: one on the exclusion from the offences relating to “use of words or behaviour” of conduct that takes place inside a “dwelling” and is not seen or heard outside that dwelling; and the other on the definition of “written material” in the offences relating to the display and dissemination of material.

### The Dwelling Exception

10.246 The “use of words or behaviour” offences in sections 18 and 29B of the Public Order Act 1986 – but not any of the other stirring up offences – are limited in that no offence is committed where the conduct takes place in a “dwelling” and cannot be seen or heard outside that *or another* dwelling. There is also a defence where the accused can prove that he was inside a dwelling and had no reason to believe that the conduct would be seen outside that or another dwelling.

10.247 The Public Order Act 1936 had created new offences like the wearing of uniforms in connection with political objects and “offensive conduct conducive to breach of the peace” which applied “in a public place or at a public meeting”. The 1965 and 1976 offences of incitement to racial hatred used this formulation. The Public Order Act 1986 removed this requirement. This was part of a broader change under which several public order offences (including the new offences in sections 4 and 5 of the Public Order Act 1986) became capable of being committed in a public or private place, other than a dwelling.

10.248 While the intention behind removing the “public place” test was to *expand* the scope of the offences, in removing the term “public meeting” from the offence as it had stood since 1965, a (possibly unintended) consequence was that a public meeting in a building which constituted a dwelling became exempted from the law where previously it had been covered.

## Problems with the dwelling exception

10.249 In the consultation paper we highlighted several problems with the dwelling exception:

- (1) The law is inconsistent: the exception applies to the use of words or behaviour or the display of written material (sections 18 and 29B), but does not apply to showing a sound or video recording (sections 21 and 29E).
- (2) It is poorly targeted: the exception would include a public meeting in a private house, but not a private conversation in, say, a car.
- (3) Other incitement offences are not protected just because they take place in a person's home.

10.250 A further complication with the dwelling exemption is demonstrated in the Court of Appeal's recent ruling in *R v Chipunza*<sup>116</sup> as to whether a hotel room constitutes a "dwelling" for the purpose of the Powers of Criminal Courts (Sentencing) Act 2000.

10.251 The Court found:

In most cases, it is obvious whether or not a building is a dwelling. Houses and flats are generally built to be lived in, to be used as dwellings. The fact that no one is living in it at the time of a burglary does not necessarily render a building other than a dwelling... We can envisage a situation where, for example, a newly built house may not yet be a dwelling. It may well be possible for a building built and previously used as a dwelling to become derelict, or to become a building site ... Hotels are not generally built to be used as dwellings ... Where someone lives in a hotel long term and uses it as their home, the hotel or a part of it may be a dwelling. Some rooms may be provided within a hotel for staff to live in. Such rooms could be dwellings. Much would depend on the configuration of the rooms and the particular arrangements in each case.

10.252 Thus, the same hotel room – or, for instance, a room in a university hall of residence – may or may not constitute a dwelling depending on the nature of a person's occupation of it.

10.253 In principle, a person should be capable of ascertaining at the time of their conduct whether the behaviour would be caught by the criminal law. The ambiguity about whether a particular place is a dwelling militates against this. Unless a person can confidently predict whether the property is a dwelling, they cannot know whether their conduct will or will not be lawful. (In this respect it should be noted that the test is whether the property is a dwelling, not the person's own dwelling.)<sup>117</sup>

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<sup>116</sup> *R v Chipunza* [2021] EWCA Crim 597. Section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 set a minimum sentence of three years' imprisonment for a third "domestic" burglary, defined as a burglary committed in respect of a building or part of a building which is a dwelling. The provision is now in s 314 of the Sentencing Code.

<sup>117</sup> Sections 18(4) and 29B(4) provide a defence where the accused proves that they were in a dwelling and had no reason to believe that the words or behaviour would be seen or heard by a person outside that or any other dwelling. However, while this would provide a defence to the person who wrongly believed their

10.254 Consideration of both our proposals and reform of hate crime laws in Scotland often focused on family conversations at the dinner table: *Chipunza* suggests that a family dinner in, say, a holiday rental property would not be covered by the exception.

### Consultation responses

10.255 We asked at Consultation Question 51

We provisionally propose that the current exclusion of words or behaviour used in a dwelling from the stirring up offences should be removed. Do consultees agree?

10.256 We received 1,569 substantive responses, the overwhelming majority opposing this proposal. For example, the following personal responses:

- (1) “What is said in a person's home is different from what is said in public, and there would be a danger of people pursuing unnecessary litigation and so prohibiting freedom of speech.”
- (2) “People should be allowed to say what they like in their own home.”
- (3) “Although hate speech is wrong wherever it is ... for most of us home is where we relax, we may express careless words, but we often correct one another.”

10.257 Some key legal stakeholders, including the Bar Council, the Magistrates Association and the Association of Police and Crime Commissioners, supported our proposal, echoing our reasons. The Alan Turing Institute noted “The ‘dwelling’ requirement is a real limit for prosecuting online behaviour which typically takes place in an individual’s home. Although this is a dwelling, it is still a public space.”

10.258 Organisations responding “no” included English PEN, National Secular Society, Civitas, the Free Speech Union, the Evangelical Alliance, Christian Concern, Families Need Fathers, and the Christian Institute.

10.259 Moreover, it was apparent that several of the minority of respondents who did support the removal of the dwelling exemption believed that it was an obstacle to prosecution of cases of abuse with a direct victim. For example the following personal responses:

- (1) “Even if we accept a principle that people “should” be allowed total freedom of thought & expression in private, the fact is that what occurs in a dwelling is frequently NOT private in actual effect. Visitors deserve protection from hate... But MOST importantly, LGBT+ people often face life-damaging levels of homophobic and transphobic hate within their own homes (or their parents' homes).”
- (2) “Some victims are subject to abuse from family and friends they live with and that sometimes their dwelling is where the offences generally occur.”

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words could not be heard outside the dwelling, it would not cover a person who wrongly believes the building they are in constitutes a dwelling.

10.260 However, such abuse would generally not be covered by the stirring up offences.

10.261 Some respondents favoured reform rather than outright abolition. Chara Bakalis responded:

I think you are right to remove the dwelling defence, but it does need to be replaced with something else. Clearly it needs to be removed as it does not make sense to have a dwelling defence where online communications are concerned. However, even beyond this, as the offence currently stands, it is too wide from a freedom of speech point of view as it can apply to public or private conversations. This is not compliant with general freedom of speech principles as criminalisation of speech should be limited to the public sphere. The dwelling defence does not offer sufficient protection. A distinction based on public/private will ultimately offer greater protection as it will protect private conversations wherever they are held.

10.262 Humanists UK said

We agree with the updating of the private dwelling exception, but not its entire removal. We would recommend that it is replaced with a 'private conversation' defence as used in Canada.

10.263 In the light of the strength of feeling our provisional proposal had generated, including representations from members of the House of Lords, we undertook to explore alternative ways in which the law might be reformed in order to ensure that these laws are compatible with both the right to freedom of expression protected by Article 10 and respect for one's home and private and family life protected by Article 8.<sup>118</sup>

10.264 Once considered in the light of Article 8 as well as article 10, it can be seen that the dwelling exception can operate arbitrarily. The right under Article 8 protects a person's home *and* private life. The "dwelling exception" in focusing on homes (and not necessarily the defendant's home) neglects the wider right to respect for private life.

10.265 Other comparable jurisdictions approach this issue differently, for instance by distinguishing between public and private *places*; or between public and private *conduct*.

### Public vs private places

10.266 In New Zealand the corresponding offence can only be committed in a "public place", defined as "a place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place; and includes any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle carrying or available to carry passengers for reward".<sup>119</sup>

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<sup>118</sup> "Law Commission revisits proposals amid 'hate crime at home' furore", *Law Society Gazette*, 10 February 2021; "Offensive comments made at private dinner tables will not be classed as hate crimes", *Telegraph*, 10 February 2021.

<sup>119</sup> Human Rights Act 1993, s 61(1)(b), Summary Offences Act 1981, s 2(1).

10.267 A difficulty with these tests is that – like the dwelling exception – it is based primarily on the physical world.

### Public vs private acts

10.268 Several Australian jurisdictions distinguish between public and private acts.

10.269 In Australia, Commonwealth (i.e. federal) legislation and legislation in the Australian Capital Territory (ACT) and Western Australia (WA) require that the conduct be “otherwise than in private”.<sup>120</sup> The Commonwealth and WA legislation defines this in terms of a public place and communication to the public;<sup>121</sup> in the ACT, the legislation proceeds by way of examples of “other than in private”, including publicly viewable social media posts and speaking in an interview intended to be broadcast or published.<sup>122</sup>

10.270 In the Australian states of New South Wales, Queensland, South Australia and Tasmania the offence covers “a public act”,<sup>123</sup> which is then defined in terms of communication to the public or conduct observable to the public (so little different in substance from the Commonwealth and WA offences).

10.271 It is not clear whether the Australian jurisdictions that rely on a “public act” capture conduct such as a meeting of, or communication between, members of a closed group of like-minded individuals (e.g. a hate group).

10.272 It is also arguable that the ‘public space’ element in some of these provisions goes too far in that they could capture private conversations in a public space even though no members of the public were present.

### Private conversation

10.273 The Canadian offence of wilful promotion of hatred excludes “private conversations”.

10.274 “Private conversation” is not defined. However, in *Keegstra*,<sup>124</sup> the Supreme Court held

it is reasonable to infer a subjective mens rea requirement regarding the type of conversation covered by s. 319(2), an inference supported by the definition of “private communication” contained in s. 183 of the Criminal Code.

10.275 This is because Section 183 of the Canadian Criminal Code defines “private communication” from the perspective of the originator of the communication:

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<sup>120</sup> Racial Discrimination Act 1975 (Cth) s 18C; Criminal Code 2002 (ACT) s 750 (1)(d); Criminal Code Compilation Act 1913 (WA) ss 77 and 78.

<sup>121</sup> Racial Discrimination Act 1975 (Cth) s 18C (2); Criminal Code Compilation Act 1913 (WA) s 80E.

<sup>122</sup> Criminal Code 2002 (ACT) s 750 (1)(e).

<sup>123</sup> Crimes Act 1900 (NSW) s 93Z (5); Anti-Discrimination Act 1991 (Qld) s 124, 131A and 4A; Racial Vilification Act 1996 (SA) sections 4 and 3; Anti-Discrimination Act 1998 (Tas) ss 19 and 3.

<sup>124</sup> *R v Keegstra* [1990] 3 SCR 697.

any oral communication, or any telecommunication ... that is made under circumstances in which *it is reasonable for the originator to expect that it will not be intercepted by any person* other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it.

10.276 However, while section 183 may help explain how the 'private communication' exemption is to be interpreted, not all communications are "conversation". In *R. v. Goldman* the Supreme Court held:

The difference between the word conversation and the word communication is, in the context of this statutory provision, significant. A communication involves the passing of thoughts, ideas, words or information from one person to another. Conversation is a broader term and it would include, as all conversations do, an interchange of a series of separate communications.<sup>125</sup>

10.277 One advantage of the Canadian approach is that it is more suited to application in a world in which a great deal of communication takes place virtually. The provision that it is grounded in, which concerns interception and eavesdropping, is drafted with both electronic and physical communications in mind.

10.278 Case law has established that this definition extends to text messages<sup>126</sup> and also applies where communications between individuals are routinely cached by a third-party telecommunications provider.<sup>127</sup>

10.279 The private conversation exemption does seem to include some private interchanges of the sort that most concerned opponents of our proposals – for instance the Sunday lunch or a dinner party – but also covers a private telephone conversation or, it is suggested, an email exchange.

10.280 Not every private activity is exempted, only 'conversation'. It is unlikely that it would cover, for instance, the sharing of hate materials within a large Facebook group of strangers, or an address to a closed meeting in a hall, notwithstanding that there might be an expectation that all present would maintain the secrecy of the proceedings.

10.281 In *R v Keegstra* (1990) the Supreme Court of Canada held

Statements made "in private conversation" are not included in the criminalized expression. The provision thus does not prohibit views expressed with an intention to promote hatred if made privately, indicating Parliament's concern not to intrude upon the privacy of the individual. Indeed, that the legislation excludes private conversation, rather than including communications made in a public forum,

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<sup>125</sup> *R v Goldman* [1980] 1 SCR 976.

<sup>126</sup> *R v Marakah* [2017] 2 SCR 608.

<sup>127</sup> *TELUS Communications Company v the Queen* 2013 SCC 16 [2013] 2 SCR 3.

suggests that the expression of hatred in a place accessible to the public is not sufficient to activate the legislation...

Consequently, a conversation or communication intended to be private does not satisfy the requirements of the provision if through accident or negligence an individual's expression of hatred for an identifiable group is made public.<sup>128</sup>

10.282 Although framed as an exception for “private conduct”, the Australian state of Victoria uses a formulation which is very similar to Canada’s “private conversation” exemption, where “circumstances ... indicate that the parties to the conduct desire it to be heard or seen only by themselves” and not “circumstances in which the parties to the conduct ought reasonably to expect it might be heard or seen by somebody else”.<sup>129</sup>

### Conclusion on the dwelling exemption

10.283 We recognise the strength of feeling our provisional proposal generated.

10.284 In reconsidering our provisional proposal, we have given additional regard to the right to respect for private and family life under Article 8. We have concluded that simply repealing the dwelling exception would not strike the right balance between the need to protect against propagation of hatred and incitement to violence and illegality, and respect for a person’s private, home and family life.

10.285 Nonetheless, we remain of the view that the ‘dwelling exemption’ does not strike this balance correctly either. It is both over-inclusive and under-inclusive – it protects some activity which is not truly private and fails to protect much activity for which a greater claim for privacy could be made.

10.286 On balance, we have concluded that an exception that is based on whether the conduct was in a public or private *place* is outdated when so much inflammatory hate material is circulated online.

10.287 A protection based on “conversation” accords best with the types of communication respondents were most keen to see protected. We believe that this would provide greater clarity than trying to enumerate in legislation what activities are “public” and/or “private”.

10.288 Our conclusion is, therefore, that the dwelling exception should be replaced with a provision that exempts private conversation from the scope of the stirring up offences.

10.289 We have considered whether, and how, “private conversation” should be further defined. We do not think the definition in the Canadian legislation, which is based primarily on its laws relating to interception of communications, would be appropriate. We believe that the correct test is whether the parties have a reasonable expectation of privacy.

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<sup>128</sup> *R v Keegstra* [1990] 3 SCR 697.

<sup>129</sup> Racial and Religious Tolerance Act 1991 (Vic) s 12.

10.290 Courts are accustomed to ascertaining whether a communication involves a reasonable expectation of privacy, which the Supreme Court held (by a majority) to be the “touchstone” for whether Article 8 was engaged in *JR38*.<sup>130</sup>

10.291 In *Murray v Express Newspapers*,<sup>131</sup> which concerned the publication of photographs of a child, the Court of Appeal held

the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher”.

10.292 While not all of these would be relevant as to whether there was a reasonable expectation of privacy in respect of a conversation (since they were listed with the activities of paparazzi in mind), they give an indication of the factors courts would consider. In respect of “the place at which it was happening”, whether conduct took place in a dwelling would be a highly relevant factor. In almost all circumstances, conduct inside a dwelling that could not be observed outside would give rise to a reasonable expectation of privacy. An exception would be the example we gave in the consultation paper of a public meeting in a large private house.<sup>132</sup>

10.293 We also consider that such a test is sufficiently flexible to address digital communications. For instance, messages on a WhatsApp group composed of a small number of members of a family would almost certainly give rise to a reasonable expectation of privacy. Conversely, a group of police officers sharing racist or homophobic material would not.<sup>133</sup>

10.294 There are some circumstances where such an exemption would protect a private conversation that took place in a public place within the sight or hearing of another person (although this would be unusual since ordinarily a person would not have a reasonable expectation of privacy for a conversation in public within the sight or hearing of others).

10.295 There is no doubt that a third party might find this offensive or threatening. However, it does not follow that it is right in these circumstances that those involved should be guilty of a stirring up offence. The harm at which the stirring up offence is directed is the propagation of hatred, not offence or harassment. If that conduct puts third parties

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<sup>130</sup> *In the Matter of JR38* [2015] UKSC 42.

<sup>131</sup> *David Murray (by his litigation friends Neil Murray and Joanne Murray) v Big Pictures (UK) Limited* [2008] EWCA Civ 446. Joanne Murray is the author JK Rowling.

<sup>132</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 18.252.

<sup>133</sup> In the Scottish case of *BC v Chief Constable of Scotland* [2020] SC1H 61 it was held that police officers who were members of two WhatsApp groups (with fifteen and seventeen members respectively) could not have a reasonable expectation of privacy in respect of sexist, racist, antisemitic, homophobic and disablist messages, since they knew that other members of the group, being police officers, would be under a duty to report such conduct by a colleague.



in fear or causes them to feel harassed, then the correct charge is a public order offence, not a stirring up offence. It is likely that in those circumstances a charge under section 5 of the Public Order Act 1986 would be available,<sup>134</sup> aggravated<sup>135</sup> or enhanced by the relevant hostility.

#### **Recommendation 24.**

10.296 We recommend that the dwelling exception be replaced with an exception for “private conversation”.

#### **Written material and images**

10.297 In our consultation paper we noted an ambiguity in the existing law. The offences in sections 18, 19, 23, 29B, 29C and 29G refer to the display, distribution and publication, and possession of “written material”. An interpretative provision states that “written material includes any sign or visual representation”.<sup>136</sup>

10.298 Other offences in the Public Order Act 1986 refer simply to the display of “any writing, sign or other visible representation”. It is not at all clear why the 1965 legislation used this circuitous and ambiguous formulation.

#### **Consultation**

10.299 We asked, at Consultation Question 40,

We provisionally propose that the stirring up offences relating to “written” material be extended to all material. Do consultees agree?

10.300 As noted at the beginning of this chapter, many individual respondents thought we had proposed criminalising offensive or blasphemous images, or even images of Muhammad specifically. This can partly be attributed to a briefing which claimed “The Law Commission would make Mohammed cartoons illegal”.<sup>137</sup>

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<sup>134</sup> This offence covers threatening or abusive (but not insulting) conduct within the hearing or sight of a person likely to be caused harassment, alarm or distress. There is a defence available where the accused can prove that he or she had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress.

<sup>135</sup> Charging an aggravated offence is currently only possible on grounds of racial or religious hostility, but if our recommendation 12 were implemented, any hostility based on a protected characteristic would be covered.

<sup>136</sup> Public Order Act 1986, ss 29 and 29N.

<sup>137</sup> Free Speech Union, “The Law Commission would make Mohammed cartoons illegal”: The FSU claimed that it was “clear” that a reference to “Islamophobic cartoons ...” [ellipsis in the FSU text, not the consultation paper] included the images of Muhammad published in Charlie Hebdo. The untruncated text referred to “Islamophobic cartoons *cited by the Home Affairs Committee*” [emphasis added] with a footnote pointing the page of the Home Affairs Committee report in question. This, in turn, referred to “a cartoon of a white woman being gang raped by Muslims over the ‘altar of multiculturalism’; a cartoon stating that ‘Muslims rape’” and “a cartoon that we reported depicting a group of male, ethnic minority migrants tying up and abusing a semi-naked white woman, while stabbing her baby to death.” It did not refer to Charlie Hebdo or images of Muhammad in general.

10.301 Responses along these lines included the following from a member of the public:

I don't think we should be creating a secular equivalent of blasphemy.

10.302 The National Secular Society (NSS) expressed similar sentiments:

One of our concerns regarding an extension of stirring up offences relates to cartoons or other media that some religious groups find 'blasphemous'. A key example could be pictures of the Islamic prophet Muhammad. Regardless of their context or the intentions behind their display or distribution, pictures of Muhammad cause offence to many Muslims who believe depicting Muhammad is blasphemous. Depictions of Muhammad have motivated some Islamic extremists to murder those who create or display them... The vast majority of Muslims are peaceful and law-abiding citizens who would not contemplate such atrocities. However, many Muslims would nevertheless argue that drawing 'blasphemous' images is "likely" to stir up hatred and may seek prosecution under hate crime laws".

10.303 We understand the NSS's concerns. However, we do not think that the problems they point to are specific to images in any way. To give a counterexample, the law clearly *does* cover written statements. Allegedly blasphemous statements could give rise to precisely the concerns which the NSS articulates in relation to images. This would suggest that it is not the fact that the allegedly blasphemous images are images that is the problem, but the relationship between alleged blasphemy and perceived hatred.

10.304 First, the NSS states that "many Muslims would nevertheless argue that drawing 'blasphemous' images is "likely" to stir up hatred". However, the test for prosecution and conviction is objective – the material must *be* likely to stir up hatred. Second, we appreciate the NSS's concern that people could "seek" prosecution. As we discuss below, however, we believe that the correct response in order to prevent unmeritorious prosecutions is to require, as at present, consent to prosecution.

10.305 Third, under our provisional proposals it would be necessary to show that the material in question was "threatening or abusive". It would not be sufficient to show that material was insulting or offensive. Read with the existing free speech protections applying to religion, which we recommended should be retained, this would make clear that abuse *of a religion* (as opposed to abuse of a group of people) was not in scope. Moreover, our recommendation to remove "insulting" from the scope of the stirring up offences would make it far harder to argue that images which merely offend – however profoundly – are in scope.

10.306 Finally, it is worth noting that the corresponding provision in French law explicitly extends to "*prints, drawings, engravings, paintings, emblems [and] images ... provoking discrimination, hatred or violence against a person or group of people by reason of their origin or their belonging or their non-belonging to a specific ethnic group, nation, race or religion*".<sup>138</sup> Both are very similar to the stirring up offence in the law of England and Wales, but explicitly extend to pictorial representations. Nonetheless, French courts held that the *Charlie Hebdo* Muhammad cartoons were

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<sup>138</sup> *Loi sur la liberté de la presse*, 29 juillet 1881, art. 23, 24.

not in breach of this law because they were *not* an attack on Muslims generally, but on religious fundamentalism. The earlier publication of the cartoons by *Jyllands Posten* was not prosecuted in Denmark. The prosecutor concluded that section 266b of the Criminal Code, which criminalises dissemination of statements or other information by which a group of people are threatened, insulted or degraded on account of their religion, extends to cartoons. However, the prosecutor concluded that the publication of the cartoons did not breach section 266b.<sup>139</sup>

10.307 In short, the issue that the *Charlie Hebdo* cartoons raise is not whether images should be covered, but concerns about the use of stirring up offences to clamp down on material – whether images or words – considered blasphemous or offensive.<sup>140</sup> We appreciate this concern, but are satisfied that the offences of stirring up hatred involve a much higher threshold than whether material is considered blasphemous or offensive. Insofar as the problem is that people may nonetheless make complaints under the legislation for such material, or that authorities will respond in a way which compounds the interference with freedom of expression, we believe that the correct response is to be absolutely clear about the scope of the law, something to which we return in the third part of this chapter when we discuss the freedom of expression provisions.

10.308 The Evangelical Alliance said:

We believe that an update of this language is understandable, given the widespread and new nature of material disseminated online. However, we would raise concerns as to whether “intent” could be proven so easily in relation to non-written material, and an expansion may lead to legislation covering memes and GIFs on social media, in ways which will be difficult to police or enforce.

10.309 The Alan Turing Institute responded:

Hate can be expressed in different ways; in an online context, we have evidence of hate being expressed through memes, videos, gifs, snaps and both short- and long-form text. In principle, all forms of communication should come under the law.

10.310 English PEN said

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<sup>139</sup> Response by the Danish Government to letter of 24 November 2005 from UN Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir, and UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène, regarding cartoons representing the Prophet Mohammed published in a newspaper, 23 January 2006.

<sup>140</sup> However, we do think that the NSS have highlighted one important issue – namely the risk that the existing legislation could be interpreted as covering not only material which foments hatred, but that which provokes hatred. We are satisfied that this was not the intention behind the legislation. As Jen Neller has put it, the stirring up offences “concern speech addressed to third parties who might be incited to hate, rather than speech addressed directly to its targets”. In the original 1965 offence this was clear, because the law required intent to stir up hatred against a group and the likelihood of stirring up hatred against *the same* group. With its reformulation in 1976 and 1986, this explicit link was lost. Publishing material that is likely to provoke people offended by it into a violent or hateful response against a group is not explicitly excluded. We do not think this is something the law was ever intended to cover, but are satisfied that the courts do not interpret the legislation this way.

The rationale for standardising the ‘stirring up’ offences to apply to any kind of published material is sensible.

10.311 The Free Speech Union expressed concern that non-verbal symbols including the Confederate Flag and Pepe the Frog<sup>141</sup> had been identified as hate speech symbols by the Anti-Defamation League (ADL), and suggested it would be “very dangerous if displays of such things became even potentially criminal unless the person could bring themselves within some defence or safe harbour”.

10.312 Were our proposal to ban such images as “hate speech symbols” under stirring up laws, there would be force in this submission. It would also raise issues of compatibility with the European Convention on Human Rights. In *Vajnai v Hungary*,<sup>142</sup> the ECtHR held that the conviction of a Hungarian communist for display of a “totalitarian symbol” – a five-pointed red star – was an impermissible interference with his right to freedom of expression. The Court said it was “mindful of the fact that the well-known mass violations of human rights committed under communism discredited the symbolic value of the red star” but that “it cannot be understood as representing *exclusively* communist totalitarian rule [and] also still symbolises the international workers’ movement” [emphasis added]. While the law was aimed at a legitimate aim, it was not proportionate to that aim and in view of Hungary’s transition to a stable democracy, it did not represent a “pressing social need”. Accordingly, the law, in applying uncritically to all displays of an ambiguous symbol, was not in accordance with the Convention.

10.313 Indiscriminately bringing images such as the Confederate Flag and Pepe the Frog under the stirring up offences would be subject to the same challenge. However, the concerns expressed over these symbols neglects the wider requirements of the stirring up offences. The stirring up offences require intent to stir up hatred, or a likelihood of inciting hatred. It is barely conceivable that use of these symbols alone, regardless of context, would be capable of inciting hatred. As the ADL themselves state “All the symbols depicted here must be evaluated in the context in which they appear. Few symbols represent just one idea or are used exclusively by one group. For example, the Confederate Flag is a symbol that is frequently used by white supremacists but which also has been used by people and groups that are not racist”.<sup>143</sup> They also state “The mere fact of posting a Pepe meme does not mean that someone is racist or white supremacist. However, if the meme itself is racist or anti-Semitic in nature, or if it appears in a context containing bigoted or offensive language or symbols, then it may have been used for hateful purposes.”<sup>144</sup>

## Analysis

10.314 In our view, there is no logical reason why the stirring up offences should be restricted to communications in writing, although we recognise that in the case of

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<sup>141</sup> Pepe the Frog is a cartoon frog, created by American illustrator Matt Furie. Around 2016, the meme was sought to be appropriated by figures associated with white nationalist and “Alt-Right” movements.

<sup>142</sup> *Horváth and Vajnai v Hungary*, Application nos. 55795/11 and 55798/11.

<sup>143</sup> See <https://www.adl.org/hate-symbols>.

<sup>144</sup> See <https://www.adl.org/education/references/hate-symbols/pepe-the-frog>.

purely visual images it will often be harder to say conclusively whether the image was intended or likely to stir up hatred.

### The growth of emojis and memes

10.315 The use of visual imagery to communicate ideas is nothing new. Nor, unfortunately, is the use of visual representations to stir up hatred novel: one need only think of the grotesque caricatures published by *Der Sturmer* and other Nazi publications in the 1920s, 1930s and 1940s in order to incite hatred, discrimination, violence and ultimately genocide against Jews.

10.316 However, in recent years, technological changes have seen increased prominence of the use of pictorial communications such as emojis<sup>145</sup> and memes.<sup>146</sup> In *Operating with Impunity*, the Commission for Counter Extremism said:

Some extremists use specific tactics to attract young people. This can include using a range of content and platforms to reach larger audiences, including younger people, and disguising the content through memes, videos, or diagrams to conceal its extremism...<sup>147</sup>

10.317 They went on

We are worried that harmful materials, such as memes or GIFs,<sup>148</sup> may not be caught under current legislation and may be distributed on a much wider scale before being picked up.<sup>149</sup>

10.318 The racist abuse of three black English footballers following the Euro 2020 Final in July 2021 highlights this issue (although this personal abuse would not necessarily constitute the type of “hate speech” covered by the stirring up offences). In several cases, abuse using monkey and/or banana emojis was sent to the footballers, and accordingly was not identified as racist by text-based moderation systems. A study by

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<sup>145</sup> The Oxford English Dictionary describes an emoji as “A small digital image or icon used to express an idea, emotion, etc., in electronic communications”. The Unicode Standard – a standard intended for consistent encoding of text in most of the world’s writing systems – contains over three thousand emojis. Some emojis have innuendo meanings – for instance, the aubergine is often used to represent a penis – meaning that they can be used to express ideas not explicitly catered for within the corpus.

<sup>146</sup> The term “meme” is often used to refer to ideas, behaviours or styles that are spread via the Internet, often for humorous purposes. It can be used to refer to a range of phenomena, including videos, images and even challenges. Memes often have several layers of meaning, sometimes building off previous memes, meaning that it a meaning may be apparent to some viewers but not to others.

<sup>147</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) para 3.10.

<sup>148</sup> GIF stands for “Graphics Interchange Format” an image format in widespread use in internet communications, which enables visual images, including animated images to be compressed, meaning that small lower quality images and short soundless videos can be sent using very little data. The term is sometimes used for any small still or animated images sent using the internet.

<sup>149</sup> Commission for Countering Extremism, *Operating with Impunity – Hateful Extremism: the need for a legal framework* (February 2021) para 5.18.

the Professional Footballers' Association (PFA) in 2020 found that more than 29% of racially abusive social media posts were in the form of emojis.<sup>150</sup>

10.319 To the extent that it is possible to stir up hatred through the use of symbols and imagery, we think it is right that the law should address this. The PFA study includes at least one example of a message composed entirely of emojis which, in context, could amount to threats or incitement of serious violence against black footballers.<sup>151</sup>

#### Lack of legal certainty

10.320 A compelling case for clarification was made, unintentionally, by the Free Speech Union (FSU). In their response to our consultation, the FSU argued that

the definition of “written material” already includes “sign or other visible representation” ... We find it difficult to see why, for example, the *Charlie Hebdo* Muhammed cartoons are not a sign or other visible representation.

10.321 However, in a separate briefing that the FSU circulated, they say – specifically in the context of the *Charlie Hebdo* cartoons:

The Law Commission says that the offence of “stirring up hatred” under the Public Order Act 1986 should be extended beyond written material, which would mean that people who publish “inflammatory images”, i.e. newspaper and magazine editors, could face up to seven years in jail.

If the law of England and Wales was *changed* [emphasis added] in this way – and publishing “offensive” cartoons *became* [emphasis added] a hate crime – that would represent an extraordinary victory for terrorism.

10.322 This highlights the ambiguous nature of the current legislation: in their consultation response the FSU say *Charlie Hebdo* cartoons are likely already covered by the stirring up offences; in their briefing, it would represent an “extraordinary” change in the law.

10.323 Given the lack of judicial interpretation of this clause, we conclude that a defendant could not be sure whether the deeming of “written material” to include a “sign or other visual representation” would include a sign or visual representation without writing. That is to say, it is not clear whether the deeming provision is defining the term “written material” as a whole, or clarifying the meaning of the word “material”.<sup>152</sup>

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<sup>150</sup> Professional Footballers Association / KickItOut, “AI Research Study: Online Abuse and Project Restart”, p 1.

<sup>151</sup> The tweet was composed of emojis depicting knives, monkeys, bananas, and a thumb-up symbol.

<sup>152</sup> By way of comparison, the Criminal Justice and Public Order Act 1994 extended the offences relating to indecent photographs of children in the Protection of Children Act 1978 to “pseudo-photographs”. A deeming provision stated that “references to an indecent pseudo-photograph include ... (b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph.”. Clearly, (b) only clarified the term “pseudo-photograph” within the expression; otherwise any digitally stored pseudo-photograph would be an indecent photograph, however innocuous the image it encoded.

## Conclusion on written material

10.324 It is not clear whether the references to “written material” in the stirring up offences include non-verbal visual content, but for the reasons outlined above, we conclude that the offences should extend to such content. To the extent that the existing law is ambiguous it should be redrafted to put the matter beyond doubt.

10.325 While we appreciate the concerns of some individual and organisational respondents, we think these reflect concerns about the scope of stirring-up offences generally rather than their application to images specifically. Concerns that people might seek to use the stirring up offences to prevent the circulation of offensive or blasphemous images are no different in substance to concerns that they might seek to suppress offensive or blasphemous text in this way. The answer is not to seek to exclude images but to define clearly the limits of the offences.

### **Recommendation 25.**

10.326 We recommend that the wording of the stirring up offences make clear that the offences can apply to any writing, sign or visual representation.

## **DISSEMINATION AND POSSESSION OF INFLAMMATORY HATE MATERIAL**

10.327 There are at present eight different offences relating to dissemination of material likely to or intended to stir up hatred, with two offences – one for racial hatred and one for hatred on grounds of religion or sexual orientation – for each of written material, plays, audio or visual recordings, and television or radio broadcasts.

10.328 The defences available for each of the eight offences are subtly different.

10.329 There are, in addition, offences of possession of racially inflammatory material and inflammatory material. These use the same tests as the other offences – the material must be threatening, or in the case of race, abusive or insulting, and must be possessed with a view to its display, publication, distribution, showing, playing or inclusion in a programme service, with intent to stir up hatred (or in the case of racial hatred whereby hatred is likely to be stirred up). Thus ‘inflammatory’ is used synonymously with the categories of material covered by the existing stirring up offences.

10.330 In the consultation paper we provisionally proposed to replace the dissemination offences with a single offence of disseminating inflammatory material.

## **Consultation**

10.331 We asked consultees the following question:

### Consultation Question 41

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. Do consultees agree?

10.332 It was clear some respondents were concerned about the term 'inflammatory'. Almost all those individuals who responded "no" and explained their view either indicated opposition to hate speech laws altogether, or pointed to the term 'inflammatory' as vague, subjective or ambiguous.

10.333 'Inflammatory' is a shorthand used in the legislation. The legal test is essentially the same as used for the rest of the stirring up offences – that is, threatening, abusive or insulting material intended or likely to stir up racial hatred, and threatening material intended to stir up religious hatred or hatred on grounds of sexual orientation.

10.334 We agree with respondents that 'inflammatory' would be too vague a term to form the legal test for an offence. We also agree that if this were the test, this could potentially capture material that *provokes* a violent response in others, even if this reaction was unjustified, rather than material which *incites* hatred.

10.335 However, we are satisfied that this would not be the consequence of our provisional proposal, which was made on the basis that the test for which materials would be covered would be the same as our proposed general test – that is material which is intended to stir up hatred, or threatening or abusive material which is likely to stir up hatred. We refer to such material hereafter as "inflammatory *hate* material".

10.336 The focus of the question was intended to be whether the dissemination offences should be consolidated in a single offence. As noted above, very few individual responses addressed the question in this way. Organisational responses, in the main, did.

10.337 The Free Speech Union said:

We would not be averse to the creation of a single offence of dissemination, provided it were narrowly drawn. It should in our view be a good deal more strictly confined than the various subsisting offences are at present. We would prefer it to be limited to distributing material or making it available to the public or a section of the public. The expression or dissemination of opinion within a household, or within an organisation only to the members of that organisation, should not be the subject of the criminal law, any more than the lending of a book in a pub.

10.338 Antisemitism Policy Trust said:

The current offences, although lengthy, are not exhaustive and could provide opportunities for other material which is inflammatory to slip through the legal gaps. At a time of fast-paced technology and new modes of communication, additional materials may become available which are not currently included in legislation.

10.339 The Bar Council said:

The current legislation has, over time, created substantial and troubling inconsistencies and the Bar Council welcomes the simplicity and clarity of the proposal.

10.340 The Magistrates Association agreed: "We can see the benefits of consolidating the legislation so there is consistency and clarity.



10.341 English PEN supported the proposal, saying “a simpler law is likely, ceteris paribus, to reduce the ‘chill’ on free speech.”

10.342 In principle, therefore, we have concluded that the various offences in sections 19 to 22 and 29C to 29F should be combined into a single offence of disseminating inflammatory hate material. The test for whether material was “inflammatory hate material” would be in line with our overall test – material disseminated with intent to stir up hatred and threatening or abusive material likely to stir up hatred (subject to the fault elements described earlier).

10.343 Below, we consider particular issues that could arise in the context of consolidation.

### Plays

10.344 The offences in sections 20 and 29C refers to “plays”, but this includes any dramatic piece, including improvisation, the whole or a major proportion of which involves the playing of a role. It also includes ballet, whether or not it involves a “role” – so abstract dance is covered (although it is hard to conceive how abstract dance could be staged in such a way as to stir up hatred). Much stand-up comedy would also be covered. As the word “plays” gives a misleading impression of restrictiveness, we use the word “performance” below.

10.345 We received a joint response to the consultation paper from the Society of London Theatre and the UK Theatre Association. This said:

We agree, in principle, with the proposal to replace sections 19 to 22 and 29C to 29F of the Public Order Act 1986 with a single offence for the reasons stated in the consultation document but subject to the comments below.

We consider it to be important that, as referred to in the consultation document, this single offence is supplemented with separate provisions specifying how the mode-specific clauses apply. In particular, we believe that it is essential that there is a separate clause dealing specifically with how the offence applies to plays and other public performances.

The current provisions in section 20 of the Public Order Act 1986 on the public performance of a play contain wording which is of specific application to plays and which we, therefore, believe it is crucial to retain in the mode-specific clause referred to above. In particular, we strongly believe that the wording in the second limb of the offence in section 20, which states “...having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby”, should be retained in relation to plays and other staged public performances.

10.346 We address the provision in section 20 at paragraph 10.366. The joint response continued:

We would want to avoid any rationalisation of provisions and defences inadvertently adversely affecting the position of those who present plays and other staged public performances.

10.347 We agree it is important that in consolidating the offences, the benefits of these protections are not lost. We do not think a separate offence dealing with performances is necessary; this was a legacy of the relaxation of theatre censorship in 1968. The Theatres Act 1968 abolished theatre censorship. In its place it created three new statutory offences covering obscenity<sup>153</sup>, provocation of breach of the peace by means of a play,<sup>154</sup> and incitement of racial hatred.<sup>155</sup>

10.348 As we see it, the most important salient feature of the plays provision is, as with the other Theatres Act provisions that it replicates, to detail *who* is responsible for the content of performances (currently any person who presents or directs the performance). Section 18 of the Theatres Act 1968 provides:

(a) a person shall not be treated as presenting a performance of a play by reason only of his taking part therein as a performer;

(b) a person taking part as a performer in a performance of a play directed by another person shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction; and

(c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance; and a person shall not be treated as aiding or abetting the commission of an offence under section 2, 5 or 6 of this Act in respect of a performance of a play by reason only of his taking part in that performance as a performer.<sup>156</sup>

10.349 These provisions were copied into the stirring up offences from the Theatres Act 1968. This has resulted in unnecessarily complex legislation. For instance, a performer who acts outside of the script and the director's instructions is exempt as a performer but becomes liable because they are treated as having "stepped into the shoes" of the director. This makes sense in the context of the Theatres Act offence of *presenting* an obscene performance because the offence only applies to the presentation or direction of the performance; taking part in obscene conduct within a performance is not an offence.<sup>157</sup> However, use of words to stir up hatred is already an offence.

10.350 Nor is it necessary to make provision to apply to the stirring up offences provisions in the Theatres Act relating to evidential presumptions relating to scripts, and the powers

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<sup>153</sup> Theatres Act 1968, s 2. This replaced the application of any common law offences in respect of the content of plays, and was based on the test of obscenity in the Obscene Publications Act 1959.

<sup>154</sup> Theatres Act 1968, s 6. This was based on the offence in the Public Order Act 1936, s 5.

<sup>155</sup> Theatres Act 1968, s 5. This was based on the stirring up offence in the Race Relations Act 1965.

<sup>156</sup> Theatres Act 1968, s 18(2).

<sup>157</sup> Section 4(d) of the Theatres Act provides that offences where it is of the essence that the conduct was "obscene, indecent, offensive, disgusting, or injurious to morality", and the offences of conspiracy to corrupt public morals or to do an act contrary to public morals or decency, do not apply to plays.

of the police to order copies of scripts to be made.<sup>158</sup> Ordinary rules of evidence would be sufficient.

10.351 However, we are mindful of the need to proceed carefully when considering how to consolidate the offences. In this respect, it is instructive to consider the experience of Scotland's reform of hate crime offences in 2020-21. When the Hate Crime and Public Order (Scotland) Bill was initially laid, the offence relating to racially inflammatory material in a play was consolidated into the core racial offence and new provisions relating to the liability of producers and directors were included as a standalone section.<sup>159</sup> These provisions proved unexpectedly contentious and were ultimately withdrawn from the Bill by the Minister.

10.352 Although the intention behind the legislation as initially tabled seems to have been to retain the existing culpability of producers and directors for inflammatory material contained within a play, consolidation of the offences necessitated a change of approach. Instead of a distinct offence which would apply to (i) those who used the offending words, (ii) producers and (iii) directors; under the new legislation, those who used the words would be covered by the core offence of stirring up hatred, while producers could be convicted if a person committed the offence and this was attributable to the consent, connivance or neglect<sup>160</sup> of the producer or director.

10.353 In an analysis of those proposals, Fred Mackintosh QC noted a particular issue with the liability of performers under the Bill:

The problem with consolidating the four offences into one is that some of the specific detail and defences which are an important part of the existing separate offences have been lost... The existing offence, under section 20 of the 1986 Act, criminalises people who present or direct a performance and either intend to stir up racial hatred or where racial hatred is likely to be stirred up. Sub-section 20(4)(a) specifically excludes from the offence person whose only involvement was as a performer. Actors are not, as yet, criminalised by speaking words in a script that are likely to stir up racial hatred, but directors, producers and theatre owners can be.<sup>161</sup>

10.354 Equity was also concerned about this change urging that "employment relationship context should be considered in any assessment of their liability and accountability over performance content and intent".

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<sup>158</sup> Sections 20(6) and 29D(5) of the Public Order Act 1986 provide that sections 9, 10 and 15 of the Theatres Act 1968 apply to the offences in section 20 and 29D as they apply to offences in the Theatres Act. These allow a script to be used as evidence of what was performed, with a rebuttable presumption the performance was in accordance with the script; create a power for a senior police officer to demand a copy of the script; and enable police officers and licensing authorities to obtain a warrant to enter premises in order to attend a performance or inspect the premises.

<sup>159</sup> Broadcasting is an issue reserved to Westminster under the Scotland Acts.

<sup>160</sup> "Consent, connivance or neglect" is a test often used for criminal liability of directors and senior managers when a corporate body commits an offence. We are not aware of legislation using it as the basis of liability of a person for the conduct of another *natural* person.

<sup>161</sup> Fred Mackintosh QC, "Practical problems with the Hate Crime and Public Order Bill" (20 July 2020), available at <https://www.scottishlegal.com/article/fred-mackintosh-qc-practical-problems-with-the-hate-crime-and-public-order-bill>.

10.355 Removal of the defence for mere “performers” in the reformed Scottish legislation was not accidental. The liability for producers and directors of plays under section 4 of the Bill was contingent upon commission of the core offence by a performer. Had the exemption for performers been retained, the provisions relating to culpability of producers and directors would have been completely ineffective.

10.356 Ultimately, however, the Scottish Government decided that the provisions in clause 4 of the Bill could be safely withdrawn.

10.357 To the extent that it may be necessary to hold a producer or director responsible for a performance that stirs up hatred (and we are not aware of these offences ever having been prosecuted), we have concluded, as the Scottish Government did, that the criminal law of accessory liability is sufficient. A producer or director could be held criminally liable where he, she or it (the producer may well be a corporation) had encouraged, assisted, or procured<sup>162</sup> the conduct. To be liable as an accessory, the producer or director would have to have acted with the same intent as required for a principal – that is, with intent to stir up hatred or knowing (or having ought to have known) that the material was threatening or abusive and likely to stir up hatred. The burdens of proving these matters would lay on the prosecution rather than being, as at present, on the producer or director to disprove.

#### Broadcasts and other performances

10.358 While the provisions relating to plays are wide in that they cover a variety of artforms, they only apply to staged performances. They do not apply to other performances, including those which are recorded for inclusion in broadcast or dissemination by other means. It is particularly relevant that increasingly performances may be recorded before it is clear whether they will be broadcast or distributed over the Internet.

10.359 The broadcasting offence was originally created with cable broadcasters in mind. It was extended to terrestrial transmission in the 1986 Act, but broadcasts by the BBC and the old Independent Broadcasting Authority (which covered Channel 4, the ITV franchises and independent local radio) were initially exempt. This was premised on the notion that the nascent cable broadcasting industry was to be subject to a less regulated regime than terrestrial broadcasting.

10.360 The Broadcasting Act 1990 reversed this position, extending both the regulatory regime and the stirring up offences to all programme services, including radio broadcasts. From 1991 the Independent Television Commission and the Radio Authority, and subsequently Ofcom, regulated all terrestrial, satellite and cable broadcasts (other than, initially, those by the BBC). So, while from 1984 to 1990

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<sup>162</sup> An advantage of this approach is that “procuring” does not require the person actually doing the conduct in question to have the fault that would make them guilty of the offence. For instance, if A asks B to destroy property belonging to a third party, telling her that the property belongs to him and he needs to dispose of it, A can be guilty of procuring criminal damage, even though B would not be guilty (because she believed that the owner had consented to the destruction). Applied to the stirring up offences, a secondary party could be liable for procuring an act of stirring up hatred if they intended to stir up hatred or knew that hatred was likely to be stirred up, even though the person who had *used* the words was not guilty of an offence because they had no such intention or knowledge and were merely taking part as a performer. Therefore, accessory liability is compatible with a “performer” defence in a way which the initial Scottish proposals were not.

regulation and criminal law were treated largely as alternatives, after 1990 they became complementary.

10.361 Although we are not aware of any prosecutions, there have certainly been cases where, because of failures of due diligence, material has been included in programme services (often by non-English language or religious broadcasters) that amounted to stirring up racial or religious hatred or hatred on grounds of sexual orientation. These include:

- (1) An Islamic station based in Dubai, fined by Ofcom for a programme in which the presenter compared gays to animals (and specifically pigs), and described homosexuality as “corrupted”, “insane” and satanic.<sup>163</sup>
- (2) An India-based Hindi channel, fined over a broadcast in which the presenter and his guests described Pakistani people as “terrorists”, “beggars” and “thieves”, and a retired Major General from the Indian Army threatened to bomb Pakistani civilians in their homes.<sup>164</sup>
- (3) A Christian radio station censured for a broadcast in which the presenter had described Buddhists, Mormons, Muslims, Hindus and Jews as “demon worshippers”.<sup>165</sup>
- (4) A UK-based Islamic TV channel fined for a broadcast in which a scholar described killing Jews as “the highest form of religious obedience”.<sup>166</sup>
- (5) A Dubai-based Urdu channel, fined over lectures in which an Islamic scholar variously described Jews as a “cursed people”, having “an evil plan”, who thought it acceptable to “cheat non-Jews, to rob them and deceive them”. He accused Jewish bankers of “laying down their roots like a cancer [to take] the whole of Europe in their grip”. He also cited the notorious antisemitic forgery *The Protocols of the Elders of Zion* as a demonstration of an international Jewish conspiracy.<sup>167</sup>
- (6) A UK-based Asian community radio station, fined over a broadcast in which the presenter described homosexuality as “evil”, “shameful” and “a disease” and called for gays to be “torture[d]”, “punish[ed]” and “beat[en]”.<sup>168</sup>

10.362 These cases have been dealt with as regulatory failures. We agree this will usually be the correct approach. That being so, we question whether the distinct provisions

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<sup>163</sup> Ofcom Broadcast and On Demand Bulletin 383, July 2019; Ofcom, Decision Notice – Lord Production, 5 May 2020.

<sup>164</sup> Ofcom Broadcast and On Demand Bulletin 397, February 2020; Ofcom, Decision Notice – Worldview Media Network Ltd, 22 December 2020.

<sup>165</sup> Ofcom Broadcast and On Demand Bulletin 327, April 2017.

<sup>166</sup> Ofcom Broadcast and On Demand Bulletin 304, May 2016; Ofcom, Decision Notice – Mohiuddin Digital Television Ltd, December 2016.

<sup>167</sup> Ofcom Broadcast and On Demand Bulletin 299, February 2016; Ofcom, Decision Notice – Club TV Ltd, November 2016.

<sup>168</sup> Ofcom Broadcast Bulletin 207, June 2012; Ofcom, Decision – Radio Asian Fever, November 2012.

applying to broadcasters are necessary. It is worth noting that in Canada<sup>169</sup> and New Zealand,<sup>170</sup> inciting hatred in a broadcast is explicitly included in the core stirring up offence. Ireland, by contrast, has a separate offence, closely modelled on the British offence.<sup>171</sup>

10.363 In some respects, the broadcasting offences are more generous than the other dissemination offences. For instance, there is a defence for those who did not know and had no reason to suspect that the broadcast would be in circumstances in which hatred was likely to be stirred up; this is not available for other disseminators of material. However, were our proposed reformed test to be adopted there would in all cases be a burden on the prosecution to prove that the defendant knew or ought to have known that hatred was likely to be stirred up. The distinct protection offered to broadcasters under the existing legislation would no longer be needed.

10.364 Conversely, some of the defences that are available in respect of staged performances do not apply to broadcasts. In particular, the defence for “performers” and the requirement to consider the performance “as a whole” only apply to stage performances.

10.365 We do not see a logical basis for this. A performer in a television programme – or even a YouTube video – cannot necessarily be expected to know the context in which their performance will be used, any more than a theatre performer would (and arguably less, since recorded material may be used much later and in different circumstances to those envisaged when recorded). They may well be aware that the words they are using *are* threatening and abusive, if the part they are performing requires this. In general, a performer is entitled to rely on the director and producer(s) to ensure that the production is lawful.

10.366 Accordingly, we have concluded that while separate offences relating to performances and broadcasts are not necessary, the provisions in section 20(4) relating to the liability of performers (and excluding performers from general accessory liability) should be retained and applied to both reformed stirring up offences. We also consider that the requirement to consider the play “as a whole” when considering whether racial hatred<sup>172</sup> is likely to be stirred up by a performance, should apply to any work.

10.367 There is one aspect of the specific offences we do not think should be retained. The core stirring up offences relate to words, conduct and material which *is* threatening, abusive or insulting; the offences relating to plays and broadcasts refer to a programme “involving” threatening (abusive or insulting) words, behaviour, images or sounds. On the face of it, this means that material might be considered threatening or

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<sup>169</sup> Criminal Code, s 319(7).

<sup>170</sup> Human Rights Act 1993, s 61.

<sup>171</sup> Prohibition of Incitement to Hatred Act 1989, s 3.

<sup>172</sup> The provision does not feature in the section 29D offence relating to plays in the context of religious hatred and hatred on the grounds of sexual orientation because these offences require intent, whereas the ‘circumstances’ provision only applies to the “likely to” limb.

abusive even though very little of the performance involved the use of threatening or abusive words or behaviour.

10.368 One can certainly imagine situations in which material was threatening overall, even though the threat was only a small part of the material. A threat at the conclusion of otherwise innocuous text can colour the whole of what has gone before. Conversely, there will often be circumstances in which, despite some representations of threats or abuse, the material taken as a whole is not at all threatening or abusive.

10.369 If our proposals to abolish the specific offences relating to plays and broadcasts were implemented, the “involving” test would no longer apply; the test would be whether the words, material or conduct (taken as a whole) *were* threatening or abusive. The offence would therefore be narrower than at present.

### **Recommendation 26.**

10.370 We recommend that the separate stirring up offences relating to plays and broadcasts should be repealed.

10.371 We recommend that provision should be made in the reformed stirring up offences to ensure that performers are not treated as either accessories or principals to the reformed stirring up offences only by reason of taking part as a performer.

10.372 We recommend that the provisions relating to the liability of producers and directors of plays and programmes are repealed. Ordinary principles of primary and accessory liability should apply to those who stage plays containing material intended or likely to stir up hatred.

10.373 We recommend that the current provision that requires a play to be considered “as a whole” should be incorporated into the reformed stirring up offences and apply to words, material or behaviour included in any dramatic, literary, artistic or journalistic work, whether a play, article, or broadcast programme. This would apply both to consideration of whether a work was likely to stir up hatred and whether it was threatening or abusive.

### **Films and videos**

10.374 In the consultation paper we noted that the existing offence of showing or distributing a recording in the Public Order Act 1986 can potentially be committed by distribution of material which has been certified for showing in cinemas or video distribution. We contrasted this with the explicit protection in the Criminal Justice and Immigration Act 2008 offences relating to “extreme pornography” which explicitly exclude words certified by the British Board of Film Classification. We provisionally proposed that unless intention to stir up hatred could be shown, no offence should be committed by distribution or showing of a film or video which had been certified by the BBFC or licensed for exhibition by a local authority.

10.375 A few respondents commented on this provisional proposal. One respondent suggested that “specific reliance on the BBFC disadvantages smaller or alternative

film makers”. Other members of the public were concerned that this would give the BBFC too much of a role in deciding what is – and perhaps more significantly, what is not – acceptable:

I don't think work needs to specifically be classified by the BBFC as a defence.

The BBFC is not an approved or legitimate arbiter of truth and what is or is not offensive.

This puts the BBFC in too powerful of a position in that it becomes the complete arbiter of what is offensive and what is not - in effect it acts like a ministry of truth.

10.376 To be clear, our provisional proposal would not mean that a work *had to be* specifically classified in order to provide a defence. In the case of non-classified works, it would still be for the prosecution to demonstrate that the work was threatening or abusive and likely to stir up hatred and that the person knew or ought to have known that it was threatening or abusive and likely to stir up hatred. The only difference would be that where the BBFC had licensed the performance, the prosecution would have to rely instead on the intent limb. In short, rather than having to come to their own determination as to whether material was threatening or abusive and likely to stir up hatred (as is the case under the current racial hatred offences) distributors and exhibitors of material would be absolutely entitled to rely on the BBFC's judgement.

#### Video games

10.377 In the consultation paper we discussed the application of the existing offences to video games. We had in mind the evidence that hate groups had created and distributed (often rudimentary) games which involved and glorified the targeting of minorities.

10.378 We noted that it is likely that the current definitions of recording do not extend to video games as they generate new imagery and sounds rather than “reproduce” images and sounds.

10.379 Few respondents commented on this aspect of our proposals. The Association of Police and Crime Commissioners said that consolidating the dissemination offences

could make the law easier to understand for the public, police, and the judiciary. It could also ensure that minoritized groups are protected from forms of media that could encourage hatred against them, but do not clearly fall within the ambit of existing legislation (e.g., video games, as covered at paragraph 18.92).

10.380 One personal response argued that “video games do not cause violence”.

10.381 The Hate Crime and Public Order (Scotland) Act 2021 refers to material as “anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form”. Although broader, it is still possible that this definition would not encompass video games. The difficulty seems to be that those who create and distribute video games do not disseminate “material” that is capable of being looked at, read, watched or listened to; they create and distribute



something which is capable of creating such material (and not merely converting it from one form into another).

10.382 It is important to be clear about the sort of material we have in mind. There are many video games which might include the generation of content portraying, say, racist or homophobic behaviour, including violence – just as films, television programmes or plays might include representations of such conduct. For instance, a video game set in Reconstruction-era southern states of the USA might include characters that engage in racist behaviour. Depending on how the game is played, these characters may have a more or less prominent role. Alternatively, players might well exhibit racist behaviour in an online game by – say – targeting black characters. The mere fact that a game is capable of generating racist (say) imagery or behaviour does not mean that the game itself is racist material.<sup>173</sup>

10.383 It is clear, however, that some hate groups have created and circulate video games glorifying racial or homophobic violence with a clear intention to stir up hatred.<sup>174</sup> That is, racist or homophobic footage is not just one of several possible outcomes, it is the purpose of the game.

10.384 Because these generate new imagery, it is unlikely that they could constitute a “record from which visual images or sounds may ... be reproduced” under the existing law.

10.385 We have concluded that the offence of disseminating inflammatory hate material should extend to software which has as one of its *purposes*, the generation of inflammatory hate material where this is intended or likely to stir up hatred. The fact that it may be possible, within gameplay, to exhibit, for instance, racist or homophobic, behaviour would not be enough, but where this is the sole or dominant purpose of the software, this would be covered.

10.386 We have recommended elsewhere that films and video recordings that have been classified by the BBFC should be outside the offence. By extension, this should also apply to video games that have been classified by the Video Standards Council.

#### Dissemination via the internet

10.387 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* the Court of Appeal held that the expression “written material” includes articles in electronic form. We are satisfied the same would apply to the distribution of sound and video recordings online. However, in the consultation paper, we noted that a video clip streamed live would not be covered (although it would probably be covered by the “use of words or

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<sup>173</sup> If, however, this gameplay was recorded and distributed, the recording could separately constitute inflammatory hate material where its distribution was intended or likely to stir up hatred.

<sup>174</sup> See for instance, “Far right video game encourages homophobic mass shootings”, Pink News, 13 November 2018; “How far right uses video games and tech to lure and radicalise teenage recruits”, *The Guardian*, 14 February 2021.

behaviour” offence). A consolidated offence of disseminating inflammatory hate material should encompass such material.

#### Platform liability

- 10.388 The current laws apply to those who make material available by hosting it on the Internet – this includes not only those who actually put the material online, but hosts such as webhosting services and social media companies.
- 10.389 The liability of platforms which host and transmit inflammatory hate material is currently governed by retained EU law, specifically the Electronic Commerce (EC Directive) Regulations 2002 and the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, which give effect to the E-Commerce Directive. The Directive encompasses two key principles. First, the "point of origin" principle, that the liability of "information society service providers" for online material is generally subject to the law where the provider is based, unless it is necessary and proportionate for some public interest objective, for a provider in another Member State to be subject to domestic law. Government policy is to remove the point of origin principle from UK legislation so that EEA online service providers would be liable under domestic laws to the same extent as a provider based in the UK or outside the EEA. Accordingly, the Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021 recently removed the point of origin principle from the stirring up offences relating to religious hatred and hatred on grounds of sexual orientation.<sup>175</sup>
- 10.390 The second principle of the E-Commerce Directive relates to intermediary liability, which regulates treatment of three classes of service provider: "mere conduits", "caches" and "hosts". A "mere conduit", such as an internet service provider (ISP), is exempt if it does not initiate the transmission, select the recipient or select or modify the information contained. An example would be a broadband provider. A "cache" is exempt if it does not modify the information, complies with any conditions attached to having access to the information, and – upon having actual knowledge that the information at the initial source of the transmission has been removed or had access to it disabled, or that a court or administrative authority has ordered its removal or for access to be disabled – either removes it or disables access. We do not think that the activities of either mere conduits or caches should give rise to any criminal liability for stirring up hatred.
- 10.391 It is the third group, "hosts", which is more problematic. Hosts include social media companies and website hosting services. Under the existing stirring up hatred offences, a "host" only incurs criminal liability if it knew when the material was provided that the material was threatening (or, for racial hatred, abusive or insulting) and intended (or in the case of racial hatred, likely) to stir up hatred; or upon obtaining "actual knowledge" of this, did not expeditiously remove the information or disable access. In principle, therefore, a social media company or website hosting company

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<sup>175</sup> Because the racial hatred offences predated the E-Commerce Directive, they were not covered by a specific regulation but by the Electronic Commerce (EC Directive) Regulations 2002. The point of origin principle has not yet been removed from these Regulations.

which fails to remove inflammatory hate material once it becomes aware of such material is committing an offence.

10.392 When we published our consultation paper, it was unclear whether provisions like those in the E-Commerce Directive would form part of any agreement on the future trade relationship between the UK and the EU. In the event, they did not. However, the Government has indicated that it is committed to upholding equivalent liability protections following Brexit.<sup>176</sup>

10.393 We asked a specific question about the liability of platforms. We asked

Consultation Question 43

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?

10.394 Unlike most other questions on stirring up offences, opinion among individual respondents was fairly evenly divided on whether platforms should be liable. In general, those who supported platform liability favoured holding companies liable only when they had been notified and failed to take action in respect of unlawful material. Some favoured a more proactive requirement. Some members of the public expressed fears that platform liability would lead to platforms censoring lawful material out of an abundance of caution:

- (1) “They are, in truth, publishers and therefore should be subject to the appropriate scrutiny.”
- (2) “If the platforms take editorial decisions over what is or is not published, yes - they should be treated in the same way as any other publisher. If they merely provide an open forum for opinion and debate, then no - they should not be liable.”
- (3) “Online platforms should take full responsibility for dissemination of unlawful material unless they could not reasonably be expected to have detected such material.”
- (4) “I don't think they should - they would tend to operate on the “safe side”, presuming that material is unlawful (where they are uncertain or don't fully understand the law), which would have a chilling effect on free speech.”
- (5) “The danger is that online media platforms are already removing valid posts where they are anxious that it contravenes certain hate speech.”

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<sup>176</sup> Department for Digital, Culture, Media and Sport, “The eCommerce Directive and the UK” (2021), available at <https://www.gov.uk/guidance/the-ecommerce-directive-and-the-uk>.

10.395 Most organisational stakeholders did not provide a substantive response. Some felt platform liability needed consideration outside the hate crime review; others favoured a single standard for all dissemination. The Free Speech Union favoured intention as the test for all hate speech offences, so the issue of platform liability would rarely arise, and felt that "actual knowledge would be very much a second-best solution, but if it were adopted it clearly should be adopted across the board".

10.396 The Bar Council felt that consistency between online and offline dissemination was desirable and if this meant applying "actual knowledge" offline, this was acceptable.

10.397 Legal Feminist expressed concern that "shifting liability to the platform would force it to implement draconian procedures (we predict via algorithms due to volume of traffic) which would create censorship due to corporate self-preservation. Free speech would come second to business interests".

10.398 The CPS made an important point:

Liability effectively creates a requirement that companies remove data in relation to which a complaint has been made and upheld. There is obvious benefit to this in reducing the dissemination of this type of material, but it may have an unintended consequence of making it harder to prosecute the original author of the material. *Prosecutions under the legislation generally rely upon open source captures of the offending content and surrounding material.* These captures are often obtained by the police weeks or months after the material is posted. If material is immediately removed, then content can often only be obtained via mutual legal assistance.<sup>177</sup> As many of the biggest social media companies are based in the US, an application is often impossible in this type of case. Content which constitutes stirring up racial hatred will often be considered lawful speech in the US and subject to first amendment protections preventing applications being made in US courts for the required warrants.

10.399 They expressed the view that the position of social media hosts was very different from broadcasters, who choose and plan what material to put out.

10.400 Since we published our consultation paper, the Government has published its response to its Online Harms White Paper of April 2019, accompanied by a new White Paper in December 2020. A draft Online Safety Bill was published in May 2021. The proposed legislation covers internet services which allow users to upload and share content ("user-to-user services") and search engines. The draft Bill would create a regulatory regime for these services under Ofcom. Companies would have a duty of care to understand the risk of harm to users of their services and to put in place appropriate measures to improve user safety. For most providers this would be to address illegal content and activity and to protect children. The largest providers

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<sup>177</sup> Mutual legal assistance (MLA) is a method of cooperation between states for obtaining assistance in the investigation or prosecution of criminal offences. MLA is generally used for obtaining material that cannot be obtained on a police cooperation basis, particularly enquiries that require coercive means. The UK has an MLA treaty with the United States. However, the Treaty allows each party to refuse a request for the search and seizure of material if it relates to conduct which would not be exercisable in its own state. Given the high degree of constitutional protection for speech in the United States, American authorities would rarely be able to obtain authority for a search or seizure on the basis that material was intended or likely to stir up hatred, and accordingly would be unable to use such powers to obtain such material under an MLA request.

“category 1 services”) would also be required to take action in respect of “legal but harmful” content. All companies would be required to have mechanisms in place to report content and to appeal takedown of content. Content published by a news publisher (such as a broadcaster or newspaper) on its website would be exempt.

10.401 The draft Bill distinguishes between priority illegal content and other illegal content. Priority illegal content would be (i) terrorism material, (ii) child sexual exploitation and abuse material, and (iii) other priority illegal material. The first two are defined in statute, the third would be governed by regulations. The government has indicated that “hate crime” would be included in its definition of priority illegal material.<sup>178</sup>

10.402 “User-to-user” providers would be under a duty to minimise the presence and dissemination of priority illegal content, and to take down other illegal content swiftly upon becoming aware of it. Search engines would be under a duty to operate services using systems and processes to minimise the risk of individuals encountering priority illegal content; and other illegal content “that the provider knows about”. Providers would therefore have a proactive duty in respect of priority illegal content, including unlawful hate material.

10.403 User-to-user and search services would have a duty to protect users’ right to freedom of expression within the law when deciding on, and implementing, safety policies and procedures. Category 1 user-to-user services would have additional duties in respect of “content of democratic importance” which would include content specifically intended to contribute to democratic political debate in the United Kingdom.

10.404 The Online Safety Bill thus envisages that the responsibility of user-to-user services as hosts of material would primarily be a matter of regulation. If the Online Safety Bill is enacted, we recommend that inflammatory hate material (see paragraph 10.335) should be classed as “priority illegal content” for the purposes of the Act.

10.405 However, the Online Safety Bill would not alter the existing criminal liability of providers where the current law potentially makes them liable. There are various statutes for which, in effect, the criminal law – coupled with the Electronic Commerce Regulations 2002 – operates on a “take down upon notice” basis. For instance, if material is uploaded to a hosting site – whether a webhosting service or a user-to-user service – which contains indecent images of children, the host is potentially criminally liable once it has “actual knowledge” of the material.<sup>179</sup> A hosting service which receives a police notice under the Terrorism Act 2006 that material constitutes conduct falling within 2(2) of that Act is to be regarded as “endorsing” that material if it has not been blocked, removed or edited within two working days.<sup>180</sup> The stirring up offences effectively create a “take down upon notice” regime for inflammatory hate

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<sup>178</sup> Department for Digital, Culture, Media and Sport, “Landmark laws to keep children safe, stop racial hate and protect democracy online published”, Government Press Release, 12 May 2021, available at <https://www.gov.uk/government/news/landmark-laws-to-keep-children-safe-stop-racial-hate-and-protect-democracy-online-published>.

<sup>179</sup> Protection of Children Act 1978 read with Electronic Commerce Regulations 2002, s 19.

<sup>180</sup> Terrorism Act 2006, s 3(2).

material, because once a provider is aware that material it is hosting is unlawful, continued dissemination of that material by the provider can be an offence.

10.406 We do not think it is ideal to address the stirring up offences in isolation. The *criminal* liability of hosts for material which they make available on an ongoing basis would be better dealt with in the round. As we indicated in the consultation paper, there are arguments both for extending liability (for instance, to encourage proactive monitoring and because AI technology makes it possible to engage in proactive monitoring at a scale which human moderation could not); and arguments for restricting liability (for instance, because risk-averse providers might err on the side of caution with the result that lawful material would be removed; and because AI technology is far from perfect and may wrongly flag content).<sup>181</sup>

10.407 However, we do have to assess whether the existing basis of liability would be satisfactory were our recommendations enacted. In practice, providers are only likely to be liable for racially inflammatory material at present,<sup>182</sup> because of the requirement for intent in cases relating to religion and sexual orientation: even if a provider becomes aware of material that is likely to stir up religious hatred or hatred on grounds of sexual orientation, the fact that it continues to provide access is not proof of an intention on the part of the provider to stir up hatred.

10.408 If our proposals are implemented, social media companies could potentially be liable in respect of more material, since the “likely to” limb would extend – albeit with new protections – to a broader range of characteristics. Moreover, once a provider was seized with knowledge of the allegedly unlawful material, it would be hard for it to argue that it did not know and ought not to have known that the material was threatening or abusive and likely to stir up hatred.

10.409 In these circumstances, the risk of criminal sanctions creates a danger that platforms will be over-cautious in removing material once a complaint is made that material they are hosting amounts to inflammatory hate material.

10.410 That being so, we have concluded that *if* there is an adequate and appropriate regulatory scheme to address hosting of illegal content that includes inflammatory hate material, the negatives of such material attracting additional criminal liability outweigh the advantages. We are particularly conscious of concerns expressed by respondents that the risk of criminal penalties for distribution of third-party material could lead platforms to take an overly cautious approach in a way which could undermine freedom of expression.

10.411 Accordingly, we recommend that if the measures in the Online Safety Bill are enacted, the stirring up offences should not apply to social media companies and

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<sup>181</sup> See for instance Big Brother Watch, “The State of Free Speech Online”, September 2021.

<sup>182</sup> In laying the Draft Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, the Minister, Claire Ward MP, noted “It is debateable whether conduits, caches and hosts could ever commit the offences of stirring up religious hatred or hatred on the grounds of sexual orientation. The offences require an intention that hatred will be stirred up. It is very unlikely that intermediary service providers would have that intention. But the regulations put the position of such service providers beyond doubt”; Delegated Legislation Committee Debates, 2 February 2010, Col. 3.

other platforms in respect of “user-to-user” content (except in the rare circumstances in which intent to stir up hatred on the part of the provider can be proved).

### Other intermediaries

10.412 If social media companies and webhosting services are to be protected in respect of material that they make available on behalf of others, what about other intermediaries, such as bookshops, broadcasters, and individual websites?

10.413 We recognise that not all disseminators of material are the same. Some intermediaries are almost entirely passive. Other intermediaries are much more active. For instance, a broadcaster has a limited number of outlets and actively chooses what goes out on each strand. A small bookshop will select its stock and actively provide or send material out to customers. A large online bookshop, on the other hand, will have far less knowledge of the nature of the material it is ‘handling’.<sup>183</sup> Some large online retailers do not actually handle stock and merely act as an intermediary between customer and supplier.

10.414 In principle, we think that the test we laid out is capable, with modification, of applying to a range of publishers and platforms, just as the current stirring up offences do. It will rarely be the case that a distributor of others’ content will intend to stir up hatred, but it is possible in certain circumstances – for instance, a specialist online bookshop run by an extremist intentionally distributing hate material. We think it is right that the law continues to capture such conduct.

10.415 We have proposed that the “likely to” limb should not apply to certain categories of distributor – such as broadcasters and hosts of online material – and certain categories of material – such as films certified by the BBFC. Where such exceptions did not apply, the test for culpability would be whether the distributor knew, or ought to have known, that the material was threatening or abusive, and whether they knew, or ought to have known, that the material was likely to stir up hatred.

10.416 The challenge is how these tests should apply in cases where the distributor is not a natural person.

### Knowledge and corporate liability

10.417 Where an offence requires a particular mental element – such as intent, or knowledge – unless statute provides otherwise, or the context demands a different approach, the general rule for attributing criminal liability to companies in England and Wales is the ‘identification principle’ or ‘identification doctrine’. This states that only the mental state of a senior person representing the company’s “directing mind and will” can be attributed to the company. In practice, this is limited to a small number of directors and senior managers.

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<sup>183</sup> In 2018, for instance it was discovered that a number of far-right and antisemitic books were listed on the websites of major publishers in the UK. Waterstones’ managing director explained the difference between the firm’s physical and online presences: “Were any of the books listed by Hope Not Hate to be on our shelves, I would have them removed and apologise. Our website, however, is a simple listing of titles lawfully published and made available through established publishers and distributors”.

- 10.418 The legislation on stirring up offences explicitly envisages that they might be committed by non-natural persons.<sup>184</sup> However, the statute does not say under what circumstances a company or other non-natural person will have the necessary fault. In the absence of such a provision, the courts will generally apply the “identification doctrine” that a company will only be criminally liable if one or more natural persons representing the company’s “directing mind and will” – usually a director or directors – had the requisite knowledge and/or intent.
- 10.419 Reliance on the identification doctrine could undermine the application of the stirring up offences to corporate bodies. For instance, in the event that a newspaper were to publish a column by a columnist which crossed the high threshold into stirring up hatred, we think it is right, in principle, that the publisher could be liable. It is unlikely, however, that anyone representing the publisher’s “directing mind and will” would have had the requisite knowledge, since the editor is ultimately responsible – and normally legally responsible<sup>185</sup> – for what is published.
- 10.420 We think that in the absence of reform of corporate criminal liability generally, the legislation should make explicit provision for how the tests should apply to corporations.
- 10.421 This is something which rarely happens. A rare example is the Specialist Printing Equipment and Materials (Offences) Act 2015, which criminalises the supply of specialist printing equipment where the person knows it is to be used in criminal conduct. Section 3(1) of that Act states that “a body (whether corporate or not) is to be treated as knowing a fact about a supply of equipment if a person who has responsibility within the body for the supply knows of the fact”.
- 10.422 Where a charge relates to the supply of inflammatory hate material, we consider that this could be an appropriate basis on which to hold a supplier responsible for an act of dissemination. That is, a company would only be responsible if a person within it who was responsible for the supply of material, intended to stir up hatred thereby, or knew or ought to have known that the material was threatening or abusive and knew or ought to have known that it was likely to stir up hatred.
- 10.423 In respect of the publication of material, the draft Online Safety Bill refers to a “person who has editorial or equivalent responsibility for the material, including responsibility for how it is presented and the decision to publish it”. We think a similar definition could be a suitable basis on which to attribute responsibility to a publisher. For instance, in the example above, we think it should be possible to attribute liability to a publisher if the editor of the publication had the requisite fault.

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<sup>184</sup> Sections 28 and 29M provide for “offences by corporations”, providing that where a corporation is guilty of an offence, a director, manager or secretary or other senior officer can be convicted if the offence was committed with their “consent or connivance”. “Manager” in such provisions has been interpreted as meaning “a person who has the management of the whole affairs of the company” (*Gibson v Barton* [1875] LR 10 QB 329; *re B Johnson* [1955] Ch. 634) or “those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate strategy” (*R v Boal* [1992] QB 591, 2 WLR 890). “Secretary” means the Company Secretary.

<sup>185</sup> For instance, if the column were libellous, the editor could be sued personally as well as the writer and the publisher (the publisher’s liability is broader under civil law than criminal law).



### **Recommendation 27.**

- 10.424 We recommend that the offences relating to dissemination of material intended or likely to stir up hatred should be consolidated in a single offence of disseminating inflammatory hate material.
- 10.425 Where intent to stir up hatred could not be proved, the prosecution would be required to show that the distributor had knowledge – actual or (in the case of a non-natural person) imputed – of the contents of the material and knew, or ought to have known, that the material was threatening or abusive and likely to stir up hatred.
- 10.426 We recommend that no offence would be committed by the exhibition or distribution of a film or video recording which had been granted a certificate by the British Board of Film Classification (or the local authority in whose area the film was shown).
- 10.427 We recommend that the protection for performers in plays should be retained and apply to all performers.
- 10.428 We recommend that the requirement to consider a play “as a whole” should be retained and apply to all material.
- 10.429 We recommend that, if the draft Online Safety Bill becomes law, inflammatory hate material should be included as “priority illegal content”, and the stirring up offences should not apply to social media companies and other platforms in respect of “user-to-user” content unless intent to stir up hatred on the part of the provider can be proved.

### **Possession of inflammatory hate material**

10.430 We also support the implied abolition of ‘possession’ offences currently provided for at s.23 and s.29G (and if the Commission did not intend to imply this at paragraphs 18.88 to 18.92, we would recommend this reform in any case). The conduct element should always entail actual dissemination to others, and should not capture mere ‘possession with intent to disseminate.’ This is because inflammatory material is similar to Responses to the consultation question relating to inflammatory material raised an important point of law which had not been considered in the consultation paper. This concerns the offences in sections 23 and 29G relating to the possession of inflammatory material.

10.431 Index on Censorship said:

defamatory material, in that the harm (whatever it may be) only occurs when the material is disseminated/published. Inflammatory material that is not disseminated is inert and does not cause harm. It should not, therefore, be criminalised.

Such a reform would also deliver a tangential but important protection to journalists and academics who research radicalisation and extremism, and who may come into possession of inflammatory material during the course of their work. If an ‘intent to

disseminate' offence is retained, then it must contain a clear exception for such possession for academic, journalistic and other public interest activities.

10.432 We considered whether the possession offence should be retained. While it is correct to say that the harm only crystallises at the point at which material is received, abolishing the offence would, we believe, hamper the ability of law enforcement agencies to take pre-emptive action against extremists. A police force, responding through the National Police Chiefs Council, said that the possession offences were something “we would not be happy to lose”.

10.433 The stirring up offences are in many ways comparable to an inchoate offence such as encouraging crime. Possession offences are a step further inchoate.

10.434 Ashworth and Horder suggest that “as with the fault element for attempt and conspiracy, the more remote [possession] offences should be confined to cases of proven intention that the substantive crime be committed”.<sup>186</sup> We endorsed this “remoteness principle” in our consultation paper on conspiracy and attempts.<sup>187</sup>

10.435 In general, the criminal law prohibits attempts, but not preparation. To be convicted of attempting to commit an offence, a person must do something “more than merely preparatory” to the commission of the offence.<sup>188</sup> (There are some possession offences, for instance in relation to possession of drugs with intent to supply, terrorist material or indecent images of children, which do seek thereby to discourage the commission of substantive offences, but these tend to be limited to the commission of very serious offences.)

10.436 Merely possessing material because a person intends to use it to stir up hatred is preparatory. In some cases, for instance where two people had agreed to print and distribute material, it would be possible to charge a conspiracy to commit the dissemination offence prior to distribution. However, in other circumstances this would not be possible – for instance where the person was acting alone.

10.437 We have concluded that it is right to retain the possession offence. To do otherwise would mean that where law enforcement authorities had prior knowledge of planned dissemination, they would be unable to take action until the material had been distributed.

10.438 We have concluded though that it would not be appropriate to apply the “two-limb” test to possession. We consider that the current test used for possession of racially inflammatory material is too broad: to criminalise mere possession of material on the basis that *if* circulated it would be *likely* to stir up hatred is too remote from the harm at which the offence is aimed.

10.439 We have also concluded that our reformed two-limb test could create additional problems if applied to possession. First, we propose that dissemination of material with intent to stir up hatred should be unlawful, even if that material was not

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<sup>186</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7<sup>th</sup> ed, 2013) p 488.

<sup>187</sup> Conspiracy and Attempts (2007) Law Commission Consultation Paper No 184, para 4.49.

<sup>188</sup> Criminal Attempts Act 1981, s 1(1).

threatening or abusive. However, we do not think that the possession of material which was not threatening or abusive should be criminalised because the person intended to use it to stir up hatred. This would mean that the possession of “lawful” material for an unlawful purpose was criminalised. This is not unprecedented – for instance, it is an offence to carry an article for use in connection with a burglary or theft, even though the item might itself be otherwise legal; an item like a screwdriver can constitute an offensive weapon if possessed in public without good reason; possession of a document or record containing material likely to be useful to a person committing or preparing an act of terrorism is unlawful under the Terrorism Act 2003. Such cases, however, are rare, and they would not generally engage the right to freedom of expression in the way that the stirring up offences do.

10.440 Second, were we simply to transpose the “two limb” test, this could result in criminalisation of possession of material which a person knew to be threatening or abusive and which they knew or ought to have known was likely to stir up hatred, even though the person had no intention to stir up hatred. As Index points out, a particular example is hate material possessed by journalists. Journalists will often have to handle material knowing that it is threatening or abusive, intending to disclose it, and aware that in doing so there is a risk that some people may be incited to hate. We do not think possession in such cases should be criminalised.

10.441 We think, therefore, that the test should be that the material was threatening or abusive *and* that the person intended to stir up hatred. That is, whereas for the stirring up offences generally, the defendant could be guilty *either* because they intended to stir up hatred *or* because the material was threatening or abusive and likely to stir up hatred, for mere possession both tests would have to be satisfied: the material would have to be threatening or abusive and likely to stir up hatred, and the defendant would have to possess it with intent to stir up hatred by its dissemination.

10.442 At first sight, this might appear counter-intuitive: if either is sufficient for the substantive offence, why should both be required for the possession offence? The answer, we suggest, is that in the case of the former the harm has crystallised.

10.443 Inchoate offences typically require that the person has the necessary “full” intent, even if the offence itself can be committed by recklessness or negligence (because in the latter case, but not the former, the harm has crystallised). Where an offence can be committed without knowledge of some particular fact or circumstance, a person is not guilty of conspiracy to commit an offence unless they intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place. Likewise, where an offence can be committed with a fault element short of intention (such as recklessness), a person can only be convicted of attempting to commit the offence if they had the necessary intent; the lower fault element will not suffice.

10.444 If the possession offence is viewed as an inchoate, preparatory, version of the stirring up offence, it makes sense that a person should only be guilty if they possess the necessary intent to stir up hatred, even though the substantive stirring up offence could be committed without that intent in certain circumstances.

### **Recommendation 28.**

10.445 We recommend that the offences relating to possession of racially inflammatory and inflammatory material should be replaced with an offence of possession of inflammatory material with intent to stir up hatred. This would be restricted to material which was:

- (1) threatening or abusive;
- (2) likely to stir up hatred; and
- (3) possessed with an intention to stir up hatred by its dissemination.

## **PROTECTIONS AND EXCLUSIONS**

### **Freedom of Speech protections**

10.446 In the consultation paper we discussed the ‘freedom of expression’ clauses in sections 29J and 29JA of the Public Order Act 1986. These were added to the legislation creating the offences of stirring up religious hatred and hatred on grounds of sexual orientation as it went through Parliament, against the wishes of the then Government. In the case of the clauses relating to sexual orientation,<sup>189</sup> the Government subsequently sought to remove them in the Coroners and Justice Bill, but backed down in the face of continued resistance from the House of Lords.

### **Consultation**

10.447 We asked consultees the following question:

Consultation Question 52

We provisionally propose that the current protections in sections 29J and 29JA apply to the new offence of stirring up hatred.

Do consultees agree?

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.

10.448 Again, a statistical analysis of responses would be misleading. Almost all of those who responded “no” to the first question and explained their response demonstrated that it was not the protections they were rejecting, but hate crime laws generally or our proposed extension of them. Very few respondents who said “no” were actually expressing opposition to the freedom of expression clauses.

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<sup>189</sup> Strictly speaking the provisions in sections 29J and 29JA apply to both religious hatred and hatred on grounds of sexual orientation, but those in 29J are targeted at the former and those in 29JA at the latter.

## Are ‘freedom of expression’ clauses necessary?

10.449 Although the majority of respondents supported retention of the ‘freedom of expression’ clauses, a small number were opposed. These included Stonewall and the Gender Identity Research and Education Service (GIRES). Stonewall said:

These are avoidance of doubt clauses which do not substantively change the nature of legislation. Should these clauses not exist, this would not impact how the law would operate. Stonewall would strongly query whether such a clause is needed in hate crime legislation, particularly as the European Convention of Human Rights and Human Rights Act already require that freedom of expression be protected, and that any interpretation of national legislation should be compliant with these instruments...

The Commission argues that such provisions are necessary to prevent a ‘chilling effect’ on free speech in British society. However, we have seen just one successful prosecution of stirring up on the grounds of sexual orientation since the creation of this offence and accompanying ‘Waddington amendment’<sup>[190]</sup> a decade ago, despite the high volumes of threatening anti-LGBT+ communications that are sent. This strongly suggests the existing legal framework may, conversely, not be operating in a way that affords effective protection against attempts to stir up hatred – something the Commission should consider carefully when deciding how it should be improved. It is also important to note that provisions under stirring up racial hatred have existed without a free speech clause for over a decade...

If the Commission decide that there should be a caveat in law, this should be a singular, unified general protection which applies equally to all characteristics, and does not set out a non-exhaustive list of behaviours that do not constitute a criminal offence. This will also help future-proof the law, by ensuring that in future the law is not a vestige of time and location-specific discussions that may have since moved on.

10.450 We note that in Northern Ireland, Judge Marrinan’s recent review of hate crime legislation concluded that similar provisions should not be included in his proposed replacement of Northern Ireland’s stirring up laws. Instead, he proposed

any new hate crime legislation should have clarity in the setting of the general purpose and intent behind the legislation ... the right to freedom of expression should be explicitly recognised in amended legislation. Such a provision should state that any stirring up offences should be interpreted compatibly with ECHR rights. Such a provision should reflect the real concerns that some religious groups and organisations hold in that discussion of a wide range of issues associated with religious belief, including sexual matters, might fall foul of any reformed hate law.<sup>191</sup>

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<sup>190</sup> “Waddington amendment” is a reference to section 29JA of the Public Order Act 1986, so-called as the provision was inserted during proceedings in the House of Lords by the former Home Secretary Lord Waddington.

<sup>191</sup> Judge Desmond Marrinan (2020) *Hate crime legislation in Northern Ireland: Final Report*, paras 9.343 to 9.345.

10.451 In Scotland, while the provisions relating to religion in section 29J have been broadly replicated in the Hate Crime and Public Order (Scotland) Act 2021, a much more general provision has been included for other characteristics, stating that “behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of matters relating to age, disability, sexual orientation, transgender identity [or] variations in sex characteristics”.<sup>192</sup>

10.452 We therefore think it is important to consider whether the ‘freedom of expression’ clauses are actually necessary and of value.

10.453 Stonewall is entirely correct to say that any interpretation of the legislation would be required to comply with the right to freedom of expression. The question, however, is whether relying on judicial interpretation in the light of the Convention rights would give sufficient clarity to prevent a chilling effect on freedom of speech. We are not convinced it would.

10.454 The difficulty is that freedom of expression is an area in which states enjoy a wide margin of appreciation. In *Giniewski v France*,<sup>193</sup> the European Court of Human Rights held:

The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.

10.455 Where states enjoy a broad margin of appreciation simply relying on the application of Convention rights may not give sufficient clarity and certainty as to how the law will be applied. This is particularly so in the law of England and Wales where, notwithstanding the incorporation of the Convention, primary legislation remains an important way of striking the balancing exercise between the various Convention rights. There will be a variety of ways in which this balance may be struck, and provided that the particular balance struck in a particular area is compatible with this broad margin of appreciation, the Courts will not be required to interpret the legislation in a particular way in order to ensure compatibility.

10.456 There are clearly some limits – as *Giniewski* demonstrates<sup>194</sup> – where the balance struck may lay outside the margin of appreciation. This is particularly so where the law is being applied to an area – such as contributions to a matter of public debate – where the margin of appreciation is limited.

10.457 There is also an important democratic argument: in an area where states possess a broad margin of appreciation, where conflicting rights are involved, it is entirely

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<sup>192</sup> Hate Crime and Public Order (Scotland) Act 2021, s 9.

<sup>193</sup> *Giniewski v France*, Application no. 64016/00, 31 January 2006.

<sup>194</sup> The Court went on to hold that in the particular circumstances of the case “the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide ranging and ongoing debate... In such matters, restrictions on freedom of expression are to be strictly construed.”

appropriate for Parliament, as the elected, representative body, to articulate clearly where the balance of rights should lie.

10.458 Nor would it be satisfactory to rely on prosecutorial discretion, even if the prosecution clearly laid out in advance how this would be exercised. As we said in our recent report *Modernising Communications Offences*:

As a way of restricting the scope of [an] offence, guidance and discretion are a “last resort”; in general, we should avoid criminalising conduct that does not warrant criminalisation rather than relying on guidance and discretion to exempt such conduct.<sup>195</sup>

10.459 Even if the application of the law in such circumstances were certain, we would be concerned about a chilling effect. There was extensive evidence in the responses to our consultation that people routinely overestimate what the law criminalises. In these circumstances we feel a clear statement on the face of the legislation as to what the law does not prohibit is of value. The then Scottish Justice Secretary said, in relation to the Hate Crime and Public Order Bill, “freedom of expression provisions are an important element of helping people understand the boundaries of the stirring up hatred offences within the Bill. Such provisions have a key role to play in providing clarity and reassurance as to what will continue to be behaviour that is not criminal once the offences in the legislation are in force”.<sup>196</sup>

10.460 Finally, were the existing freedom of expression clauses not retained in future stirring up legislation, there is a risk that courts would interpret their removal as signifying an intention by Parliament that the law should apply differently in future, and implicitly that there should be a reduced protection for freedom of expression.

#### The role of the free speech clauses

10.461 It is clear that some forms of expression – including the deliberate incitement of racial hatred – fall outside the protection of Article 10. However, there will be some forms of expression that come within the protection of Article 10, but where states may legitimately interfere with that freedom.

10.462 This informs our views of what the freedom of expression clauses ought to cover. Our proposed position is that the law should prohibit (i) deliberate incitement of hatred and (ii) the use of threatening or abusive words or behaviour likely to incite hatred. That is, in laying down what the limits of freedom of expression should lie, we are saying that it should be material intended to stir up hatred (which will likely fall outside Article 10), and, for material which does engage the right to freedom of speech, threatening or abusive material likely to stir up hatred.

10.463 There is nothing new in this. Indeed, it is strikingly similar to the task which Lord Reid, in *Brutus v Cozens*, argued Parliament had done in legislating the Public Order Act 1936:

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<sup>195</sup> *Modernising Communications Offences* (2021) Law Com 547, para 7.44.

<sup>196</sup> Humza Yousaf MSP, Response by the Scottish Government to the Stage 1 Report by the Justice Committee, 14 December 2020.

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 ... 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.

10.464 What Lord Reid describes is essentially conducting the same exercise we seek to do in setting the appropriate limits where freedom of speech might be limited in the interests of preventing the fomentation of hatred. It would be going too far to prohibit all speech or conduct likely to stir up hatred – and we have not proposed that. Instead, the speech or behaviour is permitted so long as it does not go beyond any one of two limits. It must not be threatening. It must not be abusive. We do not suggest that free speech is not impaired at all by ruling these out, but free speech is not greatly impaired by ruling out threats and abuse likely to stir up hatred.

10.465 On the face of it, therefore, the limits of the law are clear. Nonetheless, there may be circumstances where, for instance, because the idea expressed is discriminatory or offensive, there is a risk of complainants or law enforcement agencies failing to consider this, and wrongly assuming that because the words encompass a discriminatory idea, they are thereby abusive or likely to stir up hatred. There is also a risk of individuals themselves making this assumption and therefore self-censoring. The free speech clauses make clear that this alone is not grounds for prosecution – the words, behaviour or material must be intended to stir up hatred or threatening or abusive and likely to stir up hatred; and these cannot be assumed merely from the fact that they express, for instance, hostile views towards religious or sexual practices.

10.466 Clearly, not all views which fall within the protection of Article 10 need to be included in freedom of expression clauses. The starting point is one of freedom of expression. Stirring up offences represent an interference with this right. The freedom of expression clauses clarify the extent of this interference. They should not be taken to represent a 'shopping list' of permitted topics. These are 'avoidance of doubt' clauses. They are only necessary where there is a reasonable risk of such doubt.

10.467 It is for this reason that examining cases of overreach, where law enforcement authorities have been found to have wrongly interfered with freedom of expression, on grounds relating to discrimination and equality, is instructive. It highlights where doubt is likely to be present.

10.468 In the consultation paper we identified three themes to the existing protections:

- (1) clarifying that the law applies to hatred against persons, not against institutions or belief systems (section 29J);
- (2) clarifying that criticism of behaviour and practices is permitted (sections 29J and 29JA(1)); and
- (3) maintaining a space for discussion of public policy on potentially controversial issues (section 29JA(2)).



10.469 In respect of (1), although the ECtHR has allowed states a greater margin of appreciation on moral issues (for instance, permitting blasphemy offences) recent legislative history in England and Wales has been towards allowing greater latitude in respect of belief systems: the offences of blasphemy and blasphemous libel were abolished in 2008.<sup>197</sup> (The offence of blasphemy was also abolished in Ireland in 2020 and in Scotland in 2021.)<sup>198</sup> As for criticism of institutions, recent changes to the law on defamation make it harder for companies to sue for libel.<sup>199</sup>

10.470 As regards (2), we take the view that one of the hallmarks of a pluralist society is that reasonable, fair-minded people can differ on conceptions of the good and a degree of criticism of one's behaviour is to be expected and tolerated.

10.471 Finally, (3) is an area where the ECtHR has held that states' scope for restrictions on the exercise of the right to freedom of expression is limited.

10.472 The existing freedom of expression clauses operate differently between the protection for free speech in respect of religion and free speech in respect of sexual orientation.

10.473 In relation to religion, section 29J provides that

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.

10.474 On the face of it, therefore, any speech or material which falls within the protected category is not covered by the offence, even if it is threatening and intended to stir up hatred. It thus represents a 'carve-out' from the offence.

10.475 By contrast, section 29JA states that

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.

10.476 Section 29JA is not, therefore a 'carve-out' but an 'avoidance of doubt' clause.

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<sup>197</sup> Criminal Justice and Immigration Act 2008, s 79.

<sup>198</sup> Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Act 2018; Hate Crime and Public Order (Scotland) Act 2021, s 16.

<sup>199</sup> Under section 1(2) of the Defamation Act 2013 a statement is not defamatory of a body that trades for profit unless it has caused or is likely to cause serious financial loss.

10.477 As a general principle, we consider ‘avoidance of doubt’ clauses to be undesirable: they do not add to the substantive law, and it will generally be preferable to draft legislation so as to avoid ambiguity. However, in this case we feel that there is justification for an ‘avoidance of doubt’ clause. The ambiguity does not arise from the legislation itself but from the perception that criticism of sexual conduct or practices, or criticism of same-sex marriage – which might be taken by some to be homophobic – is thereby threatening or intended to stir up hatred. We think there is an even greater risk of such material being taken to be abusive or likely to stir up hatred, and therefore the case for a clause would be even greater if our proposals on the test for stirring up hatred are accepted. On balance, our view is in this context ‘avoidance of doubt’ clauses are preferable to a ‘carve-out’. A carve out means that hate material can become legal if it can be shoehorned into the exception.

10.478 We note that when the religious hatred offence was brought into Scottish law by the Hate Crime and Public Order (Scotland) Act 2021, the freedom of expression provisions were drafted as ‘avoidance of doubt’ provisions. This included the protections in respect of religion which, in the former Scottish offence of threatening communications intended to stir up religion, had been drafted, as in England and Wales, as a carve-out.<sup>200</sup>

10.479 The Scottish legislation provides that material within the protected categories shall not of itself be taken to be threatening or abusive. The legislation in England and Wales goes further in that that material shall not of itself be taken to be threatening *or intended to stir up hatred*. In view of our position that the freedom of expression clauses are necessary because some classes of conduct or material might be wrongly assumed to be unlawful, we think that this is as likely to manifest in an assumption that criticism of, say, a religion or sexual orientation, amounts to stirring up hatred as an assumption that it is threatening or abusive. A person is unlikely to think that, say, criticising same-sex marriage in moderate terms, is thereby threatening or abusive. However, many individual members of the public expressed concern that certain viewpoints were being characterised as racist, homophobic, transphobic or misogynist, even when expressed in moderate terms, and strongly rejected the implication of hatred implicit in these descriptions.

"Homophobic" and "transphobic " are commonly used of anyone who questions the rightness/morality of such individuals - even when this is done in calm/rational/reasonable way that are made with no malice. ... they have come into common use and the very words themselves suggest hate on the part of the perceived offender.

Sexism has become too broadly used of a term, and non-sexist ideas and actions are wrongly being labelled as such.

10.480 This view was echoed by Professor Kathleen Stock:

Stonewall instructs member organisations of its Diversity Champions Scheme [...] that transphobia is defined as “The fear or dislike of someone based on the fact they are trans, including denying their gender identity or refusing to accept it”. In other

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<sup>200</sup> Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (repealed 2018).

words, since I and other academics, as well as thousands of members of the general public, reject the importance of gender identity for determining womanhood or manhood, my views are counted as “transphobic” and so hateful.

10.481 We therefore conclude that the ‘avoidance of doubt’ protections we discuss below should also provide that the class of material in question should not of itself be taken to be intended or likely to stir up hatred.

### **The freedom of expression clauses for religion and sexual orientation**

10.482 There was considerable support from members of the public for retaining the protections in section 29J and 29JA – especially the provision in relation to marriage in 29JA(2)

The free-speech protections in sections 29J and 29JA are essential. They should certainly be included in any new offence of stirring up hatred.

I believe there should be special clauses stating that it is NOT a hate crime to uphold traditional, Biblical marriage is between one man and one woman.<sup>201</sup>

They should remain. There is a big difference between public reasonable debate on controversial issues such as religion, gender etc. for which there are many differing viewpoints, and generating malicious action or derogatory language deliberately.

10.483 For the reasons discussed above, we have concluded that the existing classes of conduct covered by the current protection for freedom of expression in relation to religion should be retained, but they should be recast as an ‘avoidance of doubt’ provision rather than a carve-out.

10.484 The protection relating to religion in Scotland has removed “abuse” from the list in section 29. This is perhaps because of the superficial contradiction in extending the offence to cover “threatening or abusive” behaviour while exempting “expressions of antipathy, dislike, ridicule, insult or abuse”. However, the two are not actually in conflict. The free speech clause in 29J only covers 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”. It is perfectly coherent to extend the offence to cover abuse targeted at a group defined by religious beliefs, while holding that abuse *of that religion or those beliefs* is not sufficient for the purposes of the offence.

10.485 As long ago as 1985, in our report on offences against Religion and Public Worship, we noted that

Ridicule has for long been an acceptable means of focussing attention upon a particular aspect of religious practice or dogma ... and in that context use of *abuse or insults may well be a legitimate means of expressing a point of view* upon the matter at issue. The imposition of criminal penalties upon such abuse or insults

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<sup>201</sup> Although the provision in s 29JA(2) for “discussion and criticism of marriage to which the sex of the parties to the marriage” is phrased in neutral terms, this is clearly what the clause is intended to protect.

becomes, in our view, peculiarly difficult to defend in the context of a “plural” or multi-racial, multi-religious society.<sup>202</sup>

10.486 Accordingly, we conclude that protection of discussion, criticism or expressions of antipathy, dislike, ridicule, insult *and abuse* targeted at particular religions (or, as in Scotland, at religion in general) and the beliefs and practices of their adherents, should continue to be protected. So should proselytising and urging adherents of a religion to cease practising it.

10.487 We are satisfied that the classes of conduct covered by the ‘avoidance of doubt’ provisions in relation to sexual orientation reflect those that the majority of respondents generally wished to see protected.

### **Freedom of expression: race, countries and governments**

10.488 We asked whether there should be protection along the lines of section 29J to cover racial hatred. We suggested in the consultation paper that this might cover “the discussion or criticism of immigration, asylum or citizenship policy [and] criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular countries or their governments”.

10.489 Legal stakeholders, including the Magistrates Association, Association of Police and Crime Commissioners, National Police Chiefs Council and British Transport Police supported provision to cover the racial hatred offence.

10.490 Only a few personal responses from members of the public focused on this question.

No. Race is qualitatively different from religion and sexual orientation. Race is an inherited trait and whilst some argue that sexual orientation is given at birth, science is far from conclusive on this point.

Racial hatred laws don't need to change, but the police and judiciary need proper training to ensure they are applied properly.

10.491 National Secular Society drew attention to the current discrepancy which means that section 29J does not apply where the group in question is an ethnoreligious group and the charge is one of racial hatred:

This means that robust criticism of certain religious or cultural practices, including non-stun animal slaughter, infant male circumcision, and the wearing of swords in public, could potentially be charged under racial hatred offences despite being protected under section 29J of the POA. As the Law Commission points out, this potentially results in the absurdity of being able to criticise non-stun slaughter for halal meat, but not for kosher meat, without fear of prosecution.

10.492 The Evangelical Alliance opposed this suggestion:

While there are doctrinal debates involved on differences in religious belief, as well as on sexual orientation and gender identity, we know of no legitimate religious belief that justifies criticism or discrimination on the grounds of race. We believe that,

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<sup>202</sup> Offences Against Religion and Public Worship (1985) Law Com 145, para 2.35 (emphasis added).

as in wider equalities legislation, there should be far fewer exemptions permitting discrimination on grounds of race than other protected characteristics which are more contested fields in modern British society.

10.493 London Borough of Tower Hamlets responded “No, this will allow people to defend their racism as their freedom of speech.”

10.494 Index on Censorship was very supportive of new protections to cover the racial hatred offence, suggesting that

the failure to include similar protections in the racial hatred offence was not by design, since it was the first offence. Rather, legislators were [later] able to use their experience to foresee the consequences of future hate crime legislation better, and thus chose to include the free speech protections in both of the later offences.

### Analysis

10.495 As originally legislated, the racial hatred offence referred to “hatred against a group of persons *in Great Britain* defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”. There could have been no possibility of the racial hatred offences being seen as liable to be committed by criticism – or for that matter ridicule, insult or abuse – of particular countries or their governments.

10.496 However, the words “in Great Britain” were removed by section 37 of the Anti-terrorism, Crime and Security Act 2001, passed in the wake of the 9/11 attacks on the United States. With the removal of those words, the position is less clear. This is especially so given that in English, terms referring to a group defined by nationality – such as “the French” or “the Germans” – can be, and frequently are, used as a metonym for a country or its government.

10.497 The existing protection for freedom of expression in relation to religion in section 29J refers to “discussion, criticism or *expressions of antipathy, dislike, ridicule, insult or abuse* of particular religions”. We consider that countries and their governments, like religions, can legitimately be expected to be the targets of ridicule, insult and abuse. In *Karataş v Turkey*, the European Court of Human Rights held that “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician”.<sup>203</sup>

10.498 We are mindful that the International Holocaust Remembrance Alliance definition of antisemitism – which was adopted by the UK Government in December 2016 – provides that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic”. Moreover, criticism of Israel – even where it is a manifestation of underlying antisemitism – would not of itself amount to an offence of stirring up hatred against either Jews or Israelis as a group.

10.499 Section 29J applies to religious practices. There is no similar exception for cultural practices which do not have their roots in a religious or philosophical belief. As we noted in the consultation paper, one of the purposes of the free speech clauses is to

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<sup>203</sup> *Karataş v Turkey*, Application no. 23168/94.

make clear that the offences apply to hatred of *people*, not to criticism of behaviour and practices.

10.500 We think that criticism of particular countries and their governments, and criticism of cultural practices, are both areas which might result in an accusation of racism (whether or not in bad faith). Whether or not this would result in complaints of a criminal offence having been committed, there is a risk that people would interpret the stirring up racial hatred offence as potentially extending to such allegedly racist conduct and self-censor accordingly. We therefore conclude that the current protections applying to discussion and criticism of religious practices should be extended to cover cultural practices and an ‘avoidance of doubt’ provision should be introduced for discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of countries and their governments.

### Freedom of expression: gender identity

10.501 Among responses on whether there should be freedom of expression protections to cover any additional characteristics covered by the stirring up offences, by far the majority related to gender identity. We have already noted how many people responded “sex, not gender” or similar. A large number drew on wording suggested by the Christian Institute to say that any offence covering transgender identity must explicitly protect using a person’s birth name and pronoun, saying that someone born a woman is not a man and vice versa and saying that there are only two sexes. However, similar sentiments were also reflected in many other responses which were not following the Christian Institute specimen responses.

10.502 We have already referred to the recent judgment in *Forstater v CDG Europe*. *Forstater* established that the claimant’s “gender critical” beliefs were “worthy of respect in democratic society”.<sup>204</sup>

10.503 Moreover, the Employment Appeal Tribunal held that the first tribunal had erred in

imposing a requirement on the Claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the Claimant’s right to freedom of expression insofar as they relate to her beliefs... Whilst the Claimant’s belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, *could* [emphasis added] amount to unlawful harassment in some circumstances, it would not always have that effect. In our judgment, it is not open to the Tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.

10.504 The court held that it was particularly relevant that the claim that sex is binary reflects the current law of England and Wales.<sup>205</sup>

10.505 We take from this that “gender critical” views clearly fall within the protection of the right to freedom of expression. This would extend to the use of language which

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<sup>204</sup> See para 10.27.

<sup>205</sup> *Forstater v CDG Europe*, Appeal no. UKEAT/0105/202/JOJ, 10 June 2021, para 114.

expresses a person's 'gender critical' views, such as their use of pronouns. While an interference with a right to express such views *could* be justified, for instance if it amounted to unlawful harassment, it would not be regardless of circumstance.

10.506 Applied by analogy to the stirring up offences, while the law may interfere with the right to express gender critical views where they amount to deliberate incitement of hatred, or are threatening or abusive and likely to stir up hatred – a blanket restriction on the expression of gender critical views would likely be in breach of Articles 9 and 10, because it would be an unnecessary and disproportionate interference with the rights to hold and express those protected beliefs. Moreover, where – as with discussions on reform of the Gender Recognition Act 2004 – the expression was a contribution on a matter of political debate – the scope for interference with the right would be limited.

10.507 Assuming, therefore, that the mere expression of gender critical views is lawful and protected under international human rights obligations, is there a need for separate provisions along the lines of section 29J? Stonewall<sup>206</sup> and GIRES argue that it is not necessary. We disagree with Stonewall's view that the freedom of expression clauses are unnecessary.

10.508 GIRES said:

We disagree with the suggestion that trans rights are up for debate, or that people who express insulting or hateful views about trans people should be protected from prosecution under hate crime legislation under sections 29J and 29JA. We disagree with Professor Stock's comment that efforts to combat transphobia are intended to censor "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". Many of the views she describes are not based on any legitimate empirical research and can only be based on a fear or ignorance about trans people. In other words, we hold that "different value judgements" here amounts to a disdain for the personhood and personal freedom of trans and gender diverse people. We think it would be irresponsible to afford legal protections to people disseminating such views, whatever qualifications they may hold... We think it would be harmful to afford legal protection to people who engage in ... "the discussion or criticism of gender reassignment; treatment for gender dysphoria; provision of and access to single-sex facilities and activities" because this criticism effectively vilifies and dehumanises transgender people and encourages the public to do the same.

10.509 We do not agree with GIRES that such discussion necessarily amounts to "vilification" or "dehumanises" trans people, still less that it encourages others to do so. Indeed, we think that characterising it as GIRES does demonstrates the risk that without explicit protection, such discourse – which has been recognised as protected speech – risks being perceived, reported, and potentially investigated as hate speech.

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<sup>206</sup> See paragraph 10.449 above.

10.510 In a recent editorial, the *Observer* newspaper said:

The belief that the patriarchal oppression of women is grounded partly in their biological sex, not just the social expression of gender, and that women therefore have the right to certain single-sex spaces and to organise on the basis of biological sex if they so wish, represents a long-standing strand of feminist thinking. Other feminists disagree, believing that gender identity supersedes biological sex altogether.

*Both are legitimate perspectives that deserve to be heard in a democratic society. Both can be expressed without resulting in the abuse, harassment and discrimination of trans people or women.* Being able to talk about these alternative perspectives goes to the heart of resolving important questions about how we structure society. They include: whether it is right that the law permits the provision of single-sex spaces and services; whether official government data, such as the census, should record a person's biological sex as well as gender identity; whether women have the right to request that intimate medical examinations or searches are undertaken by someone who is female; what are the appropriate safeguards in the medical treatment of children with gender dysphoria; and whether it is legitimate to exclude those who have been through male puberty from competing in women's sport.

10.511 We agree that such issues are legitimate issues of debate. Moreover, they represent areas of political controversy where the European Court of Human Rights applies particularly strict scrutiny towards any interference with the right to freedom of expression. A measure which *prima facie* criminalised such discussions, even if it were applied in such a way as to avoid doing so, might be held to be in breach of the right to freedom of expression under Article 10.

10.512 Moreover, the rulings in *Miller* and *Forstater* have now made it clear that the expression of "gender critical" views is protected under human rights laws. The issue, therefore, is not whether such expression should be protected, it is whether the stirring up offences would require a provision to make clear it is protected.

10.513 We have concluded that it would. There have now been several cases in which legal authorities have wrongly applied the law in the context of the expression of gender critical views – including the first-tier Tribunal in *Forstater*, Humberside Police in *Miller*, the magistrates' court in *Scottow*,<sup>207</sup> and the CPS in *Yardley*.<sup>208</sup> While the rulings in

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<sup>207</sup> In February 2020, Kate Scottow was convicted of an offence of improper use of a communications network, contrary to s 127(2) of the Communications Act 2003. The specific context of the communications was an injunction that the recipient had obtained against Ms Scottow following allegations of 'misgendering' and 'deadnaming' made by a trans rights activist. Ms Scottow successfully appealed to the High Court on the basis that (i) the offence was not aimed at offensive communications (which were addressed by s 127(1)), but the deliberate misuse of facilities with the purpose of causing annoyance, inconvenience and anxiety; and (ii) the communications in question could not be described as persistent. Crucially, however, the High Court also found that the magistrates' court had failed to engage with the defendant's Article 10 rights, and had it done so, the case would have been dismissed. *Scottow v CPS* [2020] EWHC 3421 (Admin).

<sup>208</sup> In March 2019, District Judge John Woolard, sitting at Basildon magistrates' court, dismissed a charge of harassment, including aggravation on the basis of hostility related to transgender identity, against Miranda Yardley. Yardley (who is herself trans) was accused of harassing trans rights campaigner Helen Islan (who is not). The Judge stated that there was no evidence of harassment, that issues of freedom of speech



*Forstater* and *Miller* may have provided some legal certainty, we conclude that were the stirring up offences to be extended to cover gender identity without an explicit freedom of expression clause, there is a very real risk of the law being misapplied.

10.514 In the consultation paper, we also drew attention to the findings of the court in *Miller* about the nature of the ongoing debate about trans rights. It is not hard to imagine that without such protection, activists would seek to test the limits of the extended offence.

10.515 Having concluded that an ‘avoidance of doubt’ provision is needed, the more difficult question is what this should cover. Stonewall urged that it should be at a level of generality. We agree that it would not be appropriate to provide a ‘shopping list’ of topics such as that in the *Observer* editorial. Apart from other considerations, such a list could quite quickly become out of date as new issues entered the political debate.

10.516 In the consultation paper, we suggested “the discussion or criticism of gender reassignment; treatment for gender dysphoria; provision of and access to single-sex facilities and activities”.

10.517 Respondents, however, generally highlighted two issues: the expression of gender critical views and concerns about “deadnaming” and “misgendering”, neither of which was in our suggested provision.

10.518 We think that “the view that sex is binary and immutable, and the use of language which expresses this” might be suitable for an avoidance of doubt provision – neither of these, of itself, necessarily amounts to threatening or abusive conduct, and nor is either, of itself, likely to stir up hatred.

10.519 Nonetheless, we would not want to give the impression that those with gender critical views can ‘misgender’ trans persons with impunity. As the appeal tribunal in *Forstater* noted, the indiscriminate use of a person’s birth name or pronouns could, in certain circumstances, amount to discrimination or harassment. Equally, there may be circumstances where the *manner* in which gender critical views were expressed, and the intention of the speaker, meant that the line was crossed into stirring up transphobic hatred.

### **Freedom of expression: disability**

10.520 In the consultation paper, we tentatively suggested possible freedom of expression protections that might apply to sex/gender, gender identity, and race. We did not make a suggestion in relation to disability.

10.521 Since publication of the consultation paper, the Hate Crime and Public Order (Scotland) Act 2021 has been passed which provides that behaviour or material is not to be taken as threatening or abusive solely on the basis that it involves discussion or criticism of matters relating to disability.<sup>209</sup> For the reasons discussed above, we are not convinced this provides sufficient clarity as to the scope of the offence. However,

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enshrined in Article 10 of the ECHR were clearly engaged and that it was a case that the CPS should never have brought. See <https://www.2harecourt.com/2019/03/04/gudrun-young-secures-no-case-to-answer-in-controversial-first-prosecution-for-transgender-hate-crime/>.

<sup>209</sup> Hate Crime and Public Order (Scotland) Act 2021, s 9.

we have found it challenging to articulate those matters which should be included in a free speech protection clause in relation to disability.

10.522 In their response, Dimensions, a charity supporting people with learning difficulties, highlighted two areas where matters of legitimate debate risk being wrongly construed as reflecting, or amounting to incitement of, hatred, stating:

We recognise that there are some contentious topics around which speech will need to be protected, this includes fertility rights and discussions of state welfare provision.

10.523 We do not make recommendations about freedom of expression provisions in respect of disability, because of the low number of responses we received which considered the possible content of such provisions. The government may wish to consider the need for such provisions if stirring up offences are created for disability. Given the low number of responses we received which touched on this particular issue, we make no recommendation on the content of any 'avoidance of doubt' provision in respect of disability.

#### **Freedom of expression: sex/gender**

10.524 We have concluded that the stirring up offences should be extended to cover the stirring up of hatred on grounds of sex.

10.525 Although we asked in Consultation Question 53 for views on whether there should be new freedom of expression protections in respect of sex or gender, no responses specifically addressed this. A few responded in general terms expressing support for protections in respect of all characteristics covered.

10.526 As noted above, a large number of responses felt that the characteristic protected should be sex, but not gender.

10.527 The Free Speech Union drew our attention to the case of the book *Moi les hommes, je les déteste* (*I Hate Men*) by Pauline Harmange:

To take a recent French cause célèbre, if sex should become a protected characteristic for hate speech purposes (which admittedly we would not support), it should not be automatically criminal in this country to write a book such as Pauline Harmange's *Moi Les Hommes, Je Les Déteste*.

10.528 We considered whether *Moi les hommes, Je les déteste* could potentially be caught by an extended stirring up offence. When the book was published in France, a special adviser to the French Minister for Gender Equality reportedly wrote to the book's publishers saying that the book was an incitement to hatred against a group on account of their gender, contrary to the law on freedom of the press, and that if it were not withdrawn from sale, he would be obliged to transmit the matter to the prosecutor for legal proceedings.<sup>210</sup>

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<sup>210</sup> "Un livre féministe provoque un désir de censure au ministère de l'égalité femmes-hommes", Mediapart, 31 August 2020; *The Guardian*, 8 September 2020.

- 10.529 The book's publisher stated in response, "this book is not at all an incitement to hatred. The title is provocative but the words measured".
- 10.530 We concluded that – despite its provocative title – it is not intended to stir up "hatred" (as understood in respect of these offences, see paragraph 10.3). Nor, considered as a whole, is it either threatening or abusive. We also note that under French law, incitement to gender hatred is criminalised, yet there have been no proceedings in respect of the book.
- 10.531 However, we think the case does demonstrate the possibility for *doubt* over whether material would be lawful. As we stated earlier, even if such doubt is misplaced it can lead to a chilling effect on legitimate discussion.
- 10.532 In the consultation paper we suggested an exemption might cover "discussion or criticism of physical or behavioural differences relating to sex or gender". We are confident that this book would fall to be considered under such a clause.
- 10.533 We do not make recommendations about freedom of expression provisions in respect of sex or gender, because of the low number of responses we received which considered the possible content of such provisions. The government may wish to consider the need for such provisions if stirring up offences are created for sex or gender.

### **Recommendation 29.**

10.534 We recommend that ‘freedom of expression’ provisions should be retained in respect of religion and sexual orientation. We recommend that these and any new provisions should be in the form of ‘avoidance of doubt’ clauses, along the lines of section 29JA of the Public Order Act 1986, rather than the ‘carve out’ approach found in section 29J of the Act. These ‘avoidance of doubt’ clauses should reflect our proposed test for the stirring up offences. That is, material that falls within the particular categories should not, of itself, be taken to be threatening or abusive, or intended or likely to stir up hatred.

10.535 We recommend that the protection in respect of religion should continue to cover 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.

10.536 We recommend that the protection in respect of sexual orientation should continue to cover the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct, and any discussion or criticism of marriage which concerns the sex of the parties to marriage.

10.537 We recommend that the existing protection for discussion and criticism of religious practices should be extended to cover cultural practices.

10.538 We recommend that a new protection should be introduced for discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of countries and their governments; and for discussion and criticism of policy relating to immigration, citizenship and asylum.

10.539 We recommend that in extending the stirring up offences to cover hatred towards trans or gender diverse people, a new protection should be introduced for view that sex is binary and immutable, and the use of language which expresses this.

### **Other Exclusions**

10.540 Sections 26 and 29K of the Public Order Act 1986 exempt from the stirring up offences

- (1) a fair and accurate report of proceedings in Parliament or in the Scottish Parliament or in the National Assembly for Wales [sic]; and

- (2) a fair and accurate contemporary<sup>211</sup> report of proceedings publicly heard before a court or tribunal exercising judicial authority.

## Consultation

10.541 We asked consultees the following question:

### Consultation Question 55

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.

10.542 A number of suggestions were made, some of which we discuss below after discussion of the existing exemptions for parliamentary and judicial proceedings. Several respondents suggested an exemption for reporting. Given that our conclusions on this suggestion have implications for whether and how other categories should be protected, we discuss this suggestion first.

## Journalism and reporting

10.543 In October 2020, shortly after publication of our consultation paper, there was considerable public attention after it emerged that Darren Grimes, an activist and commentator, was being investigated by the Metropolitan Police over comments made by the historian David Starkey in an interview which Grimes had hosted, and put on his YouTube channel, in July 2020.

10.544 Although the interview was the subject of a great deal of controversy when it was broadcast in July 2020, it was not until October that it emerged that both Darren Grimes and David Starkey were being investigated following complaints that had been made.

10.545 The Free Speech Union drew attention to the investigation of Darren Grimes in their response to the consultation:

In October 2020 Darren Grimes, the YouTube commentator, was threatened with arrest and required to attend a police interview for not pulling, or editing, an interview he ran with Dr David Starkey when the latter made a now notorious comment about slavery.<sup>[212]</sup> It is our view that potentially criminalising a journalist not for what he or she says, but merely for passing on what others say to him or her in live interviews, is utterly disproportionate and a serious interference with the freedom of the Press.

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<sup>211</sup> The provision provides that if it is not reasonably practicable or would be unlawful to publish a report of the proceedings contemporaneously, it applies if they are published as soon as publication is reasonably practicable and lawful, Public Order Act 1986, s 26.

<sup>212</sup> The key part of the interview, which lasted around an hour, was a comment in which David Starkey commented "Slavery was not genocide otherwise there wouldn't be so many damn blacks in Africa or Britain, would there? An awful lot of them survived"; ("David Starkey widely criticised for 'slavery was not genocide' remarks", The Guardian, 2 July 2020).

The public are, in our view, quite capable of making up their own mind about the quality of Dr Starkey's words, and should be allowed to do so without the law requiring them to be withheld from them.

We would add that the defence of innocent dissemination proposed in Paras.18.94 – 18.100 would not cover the situations just outlined, since it is essentially limited to those who have no reason to know the nature of what they reproduce. The essence of the journalist's defence which we would put forward is that it must go further: a bona fide journalist must be entitled to report on unsavoury speech despite knowing of its nature, and indeed because it is in the public interest that the public be informed of it in detail.

10.546 Several individual responses from members of the public also mentioned the Grimes case in responses to this and other questions in the consultation:

Would this [our provisional proposals on 'innocent dissemination'] have meant that Darren Grimes would have continued to be investigated? It must not be used to harass a broadcaster or Youtuber whose guest makes inflammatory statements.

Look no further than the Darren Grimes case - Mr Grimes was investigated by Police for doing no more than asking a question in an interview

I do not trust the police or the CPS to act in a sensible or even-handed manner. The recent case involving David Starkey and Darren Grimes goes to show that when you give people power to police speech they feel compelled to exercise it and not for the benefit of the average person. Nor is it any comfort that, ultimately, no action was taken against these individuals. The fact they were questioned and in danger of being prosecuted was too much.

10.547 The Grimes case was also cited with concern by the Society of Editors in their response. In October 2020, they had expressed concern over the police's action, saying:

the Society is deeply concerned by the threat such an investigation poses to free speech and the chilling effect it could have on the media's ability to interview controversial figures. While it is right that journalists have a responsibility to robustly question comments that may be considered inaccurate or deeply offensive, it is wrong that the police should seek to hold a journalist accountable for the remarks of another.<sup>213</sup>

10.548 One police force urged clarification

of the role of broadcasters and journalists within any new offences, so that the law is clear and the police are not placed into a position of policing legitimate debate on the basis that populism does not support a particular view. The Darren Grimes / David Starkey investigation is a case in point. Such lack of clarity causes issues of impartiality for the police on matters of political discourse.

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<sup>213</sup> Society of Editors, "Investigation into Darren Grimes raises concerns over free speech", 12 October 2020.

10.549 Concern was also expressed publicly at the time by a number of commentators including *The Times*<sup>214</sup>, a former Director of Public Prosecutions,<sup>215</sup> and a former Home Secretary and a former Leader of the Liberal Democrats.<sup>216</sup>

10.550 Several personal responses proposed that reporting should be exempt from the stirring up offences:

Newspaper and other media reports which maintain an objective level of reporting and do not lend any support to views of hate which have an intent to cause harm should also be exempted.

Freedom of speech should allow for factual reporting, whether through mainstream media or social media, of all events of public interest

Yes, it's important to allow reasonable quotative references... So not just exempting reporting but fair and accurate discussion and explanation of hate-speech itself.

Full exemption for any accurate recording/reporting of facts such as reporting in a newspaper article an occurrence which involved inflammatory material.

ALL fair and accurate reporting of events, speeches and articles should be exempt - otherwise how else will the general public find out about them?

10.551 IMPRESS, a self-regulatory body for news publishers, said

We consider that broadcast and print media should not be subject to criminal liability for hate speech where they are already well-regulated in the public interest by legally recognised regulators such as IMPRESS and OFCOM.

10.552 In our consultation paper on Harmful Online Communications we noted

Given that a free and independent press is crucial in a democratic society, the burden of justification for imposing criminal liability (where none currently exists) is especially weighty. Even if there were not, in fact, any successful prosecutions of the press under the proposed offence, there is a risk that mere existence of the offence would have a chilling effect on the exercise of freedom of expression by the press and media outlets. Finally, the existing regulatory schemes within which these groups operate render the imposition of additional criminal liability superfluous.<sup>217</sup>

10.553 Domestic law recognises the importance of journalism. For instance, journalistic material is treated differently under legislation relating to police searches,<sup>218</sup> and the

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<sup>214</sup> "The Times view on the police inquiry into Darren Grimes", *The Times*, 13 October 2020.

<sup>215</sup> "Prosecutor criticises 'sinister' Met for investigating Darren Grimes over interview", *The Times*, 11 October 2020.

<sup>216</sup> "Sajid Javid and Tim Farron lead backlash against Met Police", Daily Mail, 10 October 2020.

<sup>217</sup> Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 48, para 5.67.

<sup>218</sup> See our report on Search Warrants (2020) Law Com 396, paras 12.112 to 12.173.

Draft Online Safety Bill contains measures to ensure that news organisations are not treated as publishers of user-to-user content.<sup>219</sup>

10.554 Case law on the European Convention on Human Rights has also stressed the importance of journalism to the public interest.

In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued.<sup>220</sup>

10.555 In *Thoma v Luxembourg*,<sup>221</sup> the ECtHR held that

A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.

10.556 In *Jersild*, the ECtHR held – in the context of hate speech – that the press cannot, in general, be held liable merely for disseminating statements made by third parties:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.

10.557 Against this, it should be noted that in *Jersild*, six judges dissented, two holding that the conviction was justified since the journalist “made no real attempt to challenge the points of view he was presenting, which was necessary if their impact was to be counterbalanced, at least for the viewers”. Four others said, “Neither the written text of the interview nor the video film we have seen makes it clear that the remarks of the Greenjackets<sup>222</sup> are intolerable ... it was absolutely necessary to add at least a clear statement of disapproval”. The majority, however, held that

Both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of "a group of extremist youths" who supported the Ku Klux Klan and by referring to the criminal records of some of them. The applicant also rebutted some of the racist statements for instance by recalling that there were black people who had important jobs. It should finally not be forgotten that, taken as

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<sup>219</sup> See Modernising Communications Offences (2021) Law Com 399, paras 4.31 to 4.32 and paras 10.576 to 10.579 of this report,

<sup>220</sup> *Goodwin v United Kingdom*, Application no. 17488/90 (1996) 22 EHRR 123.

<sup>221</sup> *Thoma v Luxembourg*, Application no. 38432/97, 2001

<sup>222</sup> The 'Greenjackets' ("grønjakkerne") were a group of young people from Østerbro who expressed virulently racist attitudes and some of whom admitted to having committed hate crimes against immigrant families.



a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets.

Admittedly, the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant.

10.558 That is, the majority and the dissenters both seemed to accept that there was a duty to disassociate from the racist views of the "Greenjackets" but differed as to whether the journalist had done so.

10.559 At present, the racial hatred offence does not provide this protection. In a case like *Jersild*, where the journalist knew that his report included abusive content, they could be in breach of the law if the material was likely to stir up hatred, regardless of their intent.

10.560 Under our provisional proposal, the journalist would not be convicted unless they knew, or ought to have known, that the article was likely to stir up hatred, and knew, or ought to have known, that the material was threatening or abusive.

10.561 Even so, we do not consider that this gives sufficient protection to the journalist. There will be cases where a journalist will be aware that there is at least a substantial risk that material will stir up hatred in some of the audience, but that there is still a public interest in its broadcast.

10.562 Canadian hate speech legislation contains a defence for a person charged with public incitement or wilful promotion of hatred "if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada".<sup>223</sup>

10.563 While this might provide a defence in a case such as *Jersild*, we feel it does not go far enough. The ability of journalists to report the comments of others should not rely on their willingness to publicly distance themselves from those words, or their purpose in reporting them.

10.564 In the case of *Edwards v National Audubon Society*, the US defamation case which developed the defence of "neutral reportage", the federal appellate court held:

when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity... What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious

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<sup>223</sup> Criminal Code, s 319(3)(d).

doubts regarding their truth. *Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation.*<sup>224</sup>

10.565 It went on

It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations.<sup>225</sup>

10.566 A similar logic can be applied to statements capable of inciting hatred – if there is a public interest in reporting inflammatory comments of a third party, the press should not be required to suppress reporting of them, nor should they be required explicitly to disavow those views. Unless the journalist has implicitly or explicitly concurred in the views, there should be no requirement to “take up cudgels” against them in order to be protected from liability, whether civil liability for defamation, or criminal liability for stirring up hatred.

10.567 Commenting on the Grimes case, David Banks, co-author of McNae's Essential Law for Journalists, argued

We can't have police and the CPS deciding what standard of journalism is appropriate and for them to exercise judgment if you are being a good enough journalist in covering this issue... A more seasoned journalist might have jumped on David Starkey harder in that interview, but there are lots of junior reporters who wouldn't because they haven't got the confidence to do that.<sup>226</sup>

10.568 It is fair to note that in the forty-five years that the racial hatred offence has been on the statute book with the “likely to” limb, there have been no prosecutions of journalists for reporting the comments of third parties. We also note that no action was eventually taken in the case of Darren Grimes.

10.569 It would be easy to dismiss the Grimes case therefore as a one-off. However, there may also be social changes that make such cases much more likely in future. First, it is much easier to report instances of alleged hate speech than previously. In the age of social media, it is also possible for co-ordinated or uncoordinated “pile ons” to put pressure on law enforcement authorities to take action. The former Director of Public Prosecutions Lord MacDonal of River Glaven expressed concern that in investigating the complaints against Darren Grimes, the police were “letting themselves be used as part of a political stunt.”

10.570 Second, the understandable importance law enforcement authorities place on hate crime may mean that they feel the need to take action, such as opening an

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<sup>224</sup> *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2nd Cir. 1977) (emphasis added).

<sup>225</sup> *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2nd Cir. 1977).

<sup>226</sup> “Police drop investigation into Darren Grimes and David Starkey over slavery comments in interview”, Press Gazette (12 October 2021, updated 21 October 21), available at <http://pressgazette.co.uk/youtuber-darren-grimes-threatened-with-arrest-over-reporting-of-david-starkeys-slavery-comments/>.

investigation and speaking to the subject of the complaint, where a substantial number of complaints are received. Even if this does not in the end amount to any formal action, it is likely to have a chilling effect on reporters.

- 10.571 We have concluded that the law as presently drafted – and potentially under our reformulated test – could capture instances where a journalist was responsibly reporting the views of third parties with no intention to stir up hatred. There are circumstances where it will be in the public interest for journalists to report the comments of others, even though those comments may be threatening or abusive and reporting them may stir up hatred (at least in some of the audience).
- 10.572 We do not believe that prosecutorial discretion – which must come after the event – is a suitable way to deal with this concern. As we said at paragraph 10.458, we should avoid criminalising conduct that does not warrant criminalisation rather than relying on guidance and discretion.
- 10.573 Having concluded that there should be protection for journalistic reporting, we considered how such an exemption might be defined.
- 10.574 In our recent report *Modernising Communications Offences*, we recommended that the new communications offences should not apply to journalistic material. We recommended an exemption “along the lines of the wording adopted in the Draft Online Safety Bill relating to protections for journalistic content”.<sup>227</sup> For the purposes of that project, we suggested that there was value in consistency and that the definition in the draft Bill reflected the context and purpose of the exception we were recommending for exclusion of journalistic content from our recommended communications offences.
- 10.575 We therefore considered whether an exemption for “journalistic content” would be appropriate in the context of the offences of stirring up hatred. We do not, however, consider that it would.
- 10.576 For the purposes of the draft Online Safety Bill, material is “journalistic content” if it is “news publisher content” or user-generated content (other than emails, text messages, and certain other exceptions) generated for the purposes of journalism and is UK-linked.
- 10.577 “News publisher content” is material generated on a service by a user that is a recognised news publisher, or material uploaded by a user which reproduces or links to a full article or a recording originally published by a recognised news publisher. A recognised news publisher, in turn, includes the BBC, S4C, the holder of a broadcasting licence who publishes news related material in connection with the licenced activities, and any other entity which has as its principal purpose the publication of news-related material, provided such material is created by different persons and subject to editorial control (and various other requirements are met).

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<sup>227</sup> *Modernising Communications Offences* (2021) Law Com 547, para 4.31.

- 10.578 “News-related material” means news or information about current affairs, opinion about matters relating to the news or current affairs, or gossip about celebrities or other public figures in the news.
- 10.579 The purpose of excluding journalistic content from the draft Online Safety Bill is to ensure that news sites are not treated as social media companies hosting user-to-user material simply because they allow people to comment on their news content, and to ensure that social media companies act expeditiously and with due regard to freedom of expression when dealing with complaints relating material created by news organisations.
- 10.580 The reason we recommended the exclusion of news content from the recommended reformed communications offences was that the purpose of those offences is not to regulate media content but, primarily, person-to-person communications.
- 10.581 The stirring up offences, however, *are* intended to cover communications to the public at large. To exempt news providers as a group would drive a coach and horses through the legislation.
- 10.582 Equally, “journalism” as understood in a legal context is too broad a term. “Journalism” includes comment pieces, etc, which it is entirely proper that the laws on stirring up hatred should cover. It would be unsatisfactory if inflammatory hate material which would be unlawful if distributed on a flyer became lawful when included in a comment article in a newspaper.
- 10.583 The issue that respondents raised was essentially one of “reportage”. We have therefore concluded that the exception should be limited to “reportage”. That is, reporting by the media of comments made by another person should not be covered unless it is the reporter’s *intent* to stir up hatred.
- 10.584 “Neutral reportage” is a concept that domestic law has recently been adopting. At the time the Defamation Act 2013 was passed, the common law was developing a new defence of *reportage*. In *Roberts v Gable* (itself a case involving far-right extremists), Lord Justice Ward said

Reportage is a fancy word. The Concise Oxford Dictionary defines it as “the describing of events, esp. the reporting of news etc. for the press and for broadcasting.” ... The doctrine first saw the light of day in *Al Fagih*. Simon Brown L.J. said in paragraph 6 that it was “a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper”.<sup>228</sup>

- 10.585 In *Jameel*, Lord Hoffman said

there are cases (“reportage”) in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth.<sup>229</sup>

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<sup>228</sup> *Roberts v Gable* [2007] EWHC Civ 721, 34.

<sup>229</sup> *Jameel v Wall Street Journal Europe Sprl* [2006] HL 44, 62.

10.586 We note that in New Zealand, the civil law provisions relating to incitement of racial disharmony in section 61 of the Human Rights Act 1993 (although not the criminal offence in section 131) provide:

It shall not be a breach of subsection (1) to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television or other electronic communication a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words.

10.587 This may be a useful formulation of “neutral reportage”, although one objection that might be raised to this definition is its limitation to broadcasts and tightly defined “newspapers”.<sup>230</sup> It is not clear that this aspect of the definition would be “future-proof” given long term developments in media consumption, including the growing role of ‘citizen journalism’.

10.588 There is, perhaps, a challenge in distinguishing between neutral reporting and active dissemination, especially in an age of citizen journalism. It is possible that a blanket exemption would lead hate groups to seek to create their own publications. Press regulator IMPRESS expressed a concern that “blanket exemptions widely defined may lead to perverse consequences, where bad actors masquerading as news organisations are free to publish hate speech”.

10.589 It is already commonplace, for instance, for political parties to produce material which resembles newspapers,<sup>231</sup> and it is possible to imagine that hate groups might do something similar, seeking to make – or report – inflammatory statements under the cover of journalism. Indeed, in their response to our consultation on reform of the communications offences, Community Security Trust drew attention to the bimonthly magazine ‘Heritage and Destiny’ that, in its own words, “reflects a cross-section of 21<sup>st</sup> century nationalist opinion”. An absolute exemption for reportage might allow such a publication to disseminate speeches or articles by extremists that would be otherwise unlawful under the guise of ‘reporting’ them. This would be particularly problematic where the reports were of comments from people outside the jurisdiction who could not be held criminally liable, thereby creating a lacuna in enforcement.

10.590 However, this could be avoided by allowing reportage as a defence to the “likely to” limb, but not the intent limb.

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<sup>230</sup> Newspaper is defined as “a paper containing public news or observations on public news, or consisting wholly or mainly of advertisements, being a newspaper that is published periodically at intervals not exceeding 3 months.”

<sup>231</sup> In March 2021, the News Media Association launched a campaign against “fake” local newspapers produced by political parties. The Electoral Commission has also reported concern about such materials having been expressed by voters in its review of the 2019 General Election.

### Recommendation 30.

10.591 We recommend that there should be a “neutral reportage” defence to the “likely to” limb of the stirring up offences.

#### Parliamentary proceedings

10.592 Those organisations that responded were unanimous that the existing exemption for parliamentary proceedings should be maintained.

10.593 The Free Speech Union said

The protection of Parliamentary proceedings clearly must be continued. To remove it would be to reopen the argument in the 1840 *Stockdale v Hansard* debacle.<sup>232</sup>

10.594 Most individual respondents also supported this, although some objected to the idea that MPs were gaining a special exemption from the law. To be clear, the question only related to *reporting* of parliamentary proceedings. We took it as axiomatic that the existing absolute privilege for proceedings in Parliament, in Article IX of the Bill of Rights would apply and the stirring up offences would not apply to words and material covered by parliamentary privilege. This includes not only words spoken by MPs and peers, but also, for instance, witnesses before Parliamentary committees. To do otherwise would amount to a profound constitutional change.

10.595 We take it that there is a strong argument in favour of maintaining the exception for fair and accurate reports of parliamentary proceedings. There is a strong democratic argument for ensuring that the public has access to reports of what goes on in Parliament, and while this could, in theory, be abused to put inflammatory hate material into the public domain, we are not aware that the existing exemption has caused any practical difficulties.

10.596 The current provision extends the protection to proceedings of the Scottish Parliament and the “National Assembly for Wales” (sic). (The name of the Assembly was amended to Senedd Cymru or the Welsh Parliament under the Senedd and Elections (Wales) Act 2020.) Proceedings of the Northern Ireland Assembly are not covered. In addition to updating the name of the Senedd in the reformed offences, we can see no good reason for excluding reports in England and Wales of proceedings of the Northern Ireland Assembly from the provision.

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<sup>232</sup> In 1836 the official parliamentary reporter Hansard published, by order of the House of Commons, a report claiming that an indecent book published by John Joseph Stockdale. Stockdale sued Hansard for libel, the court holding that the House of Commons alone had no privilege to order publication of defamatory material outside Parliament. In response, Parliament passed the Parliamentary Papers Act 1840 establishing that publications under the authority of either House enjoy absolute privilege in both criminal and civil proceedings, as do any copy, and – absent proof of malice – extract. Strictly speaking, *Stockdale v Hansard* was about material published under the authority of one or both Houses of Parliament, whereas reports of proceedings in Parliament are only privileged in respect of defamation.

## Court reporting

10.597 In our 2012 report on Contempt of Court: Court Reporting<sup>233</sup> we said:

There is a clear public interest in the transparency of legal proceedings; it is for this reason that they are generally held in courts open to the public. That public interest also means that contemporary accurate court reporting is generally immune from being classified as a contempt of court.

10.598 Fair and accurate reports of court proceedings in any court in the United Kingdom are also exempt from defamation law, along with those of any court established by law outside the UK, and any international court established by the UN Security Council or by international agreement.

10.599 Given the need for the media to cover hate incidents that are prosecuted, it is entirely possible that court reports will need to include threatening or abusive material, notwithstanding that there is a danger that in doing so they risk inciting hatred in at least some part of their audience.

10.600 Some concern was expressed that media organisations may feel compelled to miss out important contextual detail when covering hate incidents. The Free Speech Union said:

It should not be the function of the criminal law to impose effective news and discussion blackouts on the details of events involving hateful speech, or to impose censorship on reports of such events requiring them to be expressed in general terms only.

10.601 We understand this concern. Indeed, we have expressed frustration above that the type of conduct that is caught by the stirring up offences is often misunderstood: vague references to “offensive comments” or “a racial slur” when reporting allegations or convictions may not fully convey the nature of the conduct or material for which people are prosecuted for stirring up hatred.

10.602 However, this is ultimately a matter for the media themselves, who have discretion as to how they report criminal trials. What is important is that they are not fettered by legal concerns. Accordingly, we recommend the retention of the existing exemption for fair and accurate reports of court proceedings.

## Proceedings of local authorities and other bodies

10.603 Respondents were broadly supportive of extending the exemption to cover reports of proceedings of local authorities and other bodies.

10.604 It is likely that if our recommendation on reportage (see paragraphs 10.543 to 10.590) were accepted, reports of Parliamentary and court proceedings would be protected even if they were intended to stir up hatred. However, the protection afforded for reports of parliamentary and judicial proceedings is absolute – the report need only be “fair and accurate”. The law contemplates that material might be

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<sup>233</sup> Contempt of Court (2): Court Reporting, Law Com 344, para 1.10.

intended to stir up hatred yet still be “fair and accurate”.<sup>234</sup> It follows that such a report is protected even if the intent in publication is to stir up hatred.

10.605 We are therefore circumspect about extending the absolute protection afforded to parliamentary and judicial proceedings to a much wider range of bodies. This would allow the deliberate incitement of hatred where this could be done by quoting proceedings in overseas legislatures or courts.

10.606 To give some examples, if the current protection afforded to fair and accurate reports of proceedings in parliament were extended to overseas legislatures, a neo-Nazi group could circulate verbatim copies of a speech calling for violence towards immigrants made by a far-right politician in a regional parliament in Eastern Europe; or an Islamist organisation might seek to circulate verbatim calls for violence against Jews made by an Iranian legislator.

10.607 We do not think the absolute protection afforded to reports of domestic parliamentary proceedings should be extended to cover such situations. We think that our exemption for neutral reportage (which only applies to the “likely to” limb) is preferable. Under our proposed exception for reportage, such reports would be protected if they were made with no intent to stir up hatred; but not if the distributor intended to stir up hatred.

10.608 However, we do see a case for extending the protection to proceedings of a local authority within England and Wales. There are two important differences between proceedings of local authorities and proceedings of overseas legislatures. First, there is an additional public interest in receiving information about the proceedings of local authorities, which is that it enables the public to hold those bodies democratically accountable. Second, unlike members of overseas legislatures, members of local authorities in England and Wales are not outside the scope of the domestic criminal law. Local authority proceedings do not attract the absolute privilege that attaches to parliamentary proceedings, and if a member of a local authority unlawfully stirred up hatred during proceedings, it would be possible to prosecute the member themselves.

#### Academic and scientific publications

10.609 A number of respondents supported our suggestion that there might be protection for peer-reviewed articles in academic and scientific journals.

10.610 English PEN:

We would also support protections for peer-reviewed journals... Section 6(6) [of the Defamation Act 2013] disapplies the privilege where the claimant can show malice; an analogous provision in a hypothetical Hate Crime Act would probably be required, to prevent the establishment of a peer-reviewed journal for the precise purpose of disseminating inflammatory material.

10.611 The Free Speech Union stated:

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<sup>234</sup> This is implied by the fact that section 29K of the Public Order Act 1986 applies the exclusion for “fair and accurate” reports of Parliamentary and judicial proceedings to the offences of stirring up religious hatred and hatred on grounds of sexual orientation, even though these offences require an intent to stir up hatred.



we would go further and say that all bona fide academic journal publications should be protected here in accordance with the high level of protection conferred on academic freedom of speech by the Strasbourg court. People should be entitled to express opinion in an academic context whatever the technical status of the journal they publish their views in.

10.612 Legal Feminist argued:

Nothing should interfere with academics' freedom to publish material in academic journals where the journal editors themselves (as advised by independent peer reviewers) are happy that the content is based on sound empirical or theoretical reasoning – the only exception being the threat or incitement to violence (which is extremely improbable).

10.613 A number of individual responses made similar arguments:

Many scientific papers are often accused of "stirring up hatred" merely because they present findings that conflict with popular narratives.

Peer reviewed scientific papers or scientific research should not be subjected to hate crime legislation. This is likely to lead to the suppression of scientific opinion, or even the policing of essential research in areas that may be deemed contentious.

10.614 National Secular Society said

Exemption of "materials in scientific or academic publications, should be seriously considered to maximise protection for free speech – especially where the reporting of evidence-based facts is concerned.

10.615 There were a smaller number of responses which were sceptical about the suggestion.

10.616 Labour Friends of Israel said

We fear that these could be abused. A leading medical journal has repeatedly contained content likely to stir up hatred against Israelis.

10.617 GIRES said

We favour no exemptions for any publication that is in the public domain.

10.618 The Alan Turing Institute suggested a more nuanced approach:

Provided that they are given with an adequate warning, the production of hateful content and description of hateful events and activities in such publications is critical to free and open debate. However, we caution that all publications should take due care when reproducing any hateful content and that steps should be taken to minimize the risk of harm, such as by keeping any reproductions as short as possible. Publications should only be permissible if they are created in 'good faith' rather than as a way to circumvent any other legal restrictions.

10.619 Like journalism and political speech, academic freedom is considered to be an area where any interference with freedom of expression requires particularly weighty justification.<sup>235</sup>

10.620 A debate about freedom of expression in universities has become increasingly visible in recent years. In 2018, the Parliamentary Joint Committee on Human Rights chaired by Harriet Harman MP published a report on freedom of speech in universities. It “did not find the wholesale censorship of debate in universities which media coverage has suggested” but did acknowledge “disincentives for students to put on challenging events [which] could be having a wider ‘chilling effect’”.<sup>236</sup>

10.621 In *Miller*, the Court accepted the evidence of Kathleen Stock that there was a

‘hostile climate’ facing gender-critical academics working in UK universities. She says that any research which threatens to produce conclusions or outcomes that influential trans-advocacy organisations would judge to be politically inexpedient, faces significant obstacles. These, broadly, are impediments to the generation of research and to its publication.<sup>237</sup>

10.622 Most exploration of this issue has concentrated on events, in particular higher profile cases of no-platforming or disinviting speakers. As Adekoya, Kaufmann and Simpson say, however,

incidents of no-platforming are not the most important threat to academic freedom. Rather, what matters is that research and teaching should happen in a way such that people are free to explore ideas, without needing to fear the consequences of disagreeing with others.<sup>238</sup>

10.623 Section 43 of the Education (No. 2) Act 1986 places a duty on those concerned in the governance of universities to “take reasonably practicable steps to ensure that freedom of speech within the law is secured for their members, students and employees, and for visiting speakers”.

10.624 The Education Reform Act 1988 imposes a duty on universities to ensure

that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.

10.625 In February 2021, the Government published a White Paper, pointing to “a growing body of evidence citing a ‘chilling effect’ on staff and students, domestic and international, who may feel unable to express their cultural, religious or political views

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<sup>235</sup> *Sorguç v Turkey*, Application no. 17089/03, 35. *Sapan v Turkey*, Application no. 44102/04.

<sup>236</sup> House of Commons / House of Lords Joint Committee on Human Rights, *Freedom of Speech in Universities*, 2017-19: HC 589, HL 111.

<sup>237</sup> *Miller v College of Policing and the Chief Constable of Humberside* [2020] EWHC 225 (Admin) para 243.

<sup>238</sup> Remi Adekoya, “Eric Kaufmann, and Thomas Simpson, *Academic Freedom in the UK: Protecting viewpoint diversity*” (2020) *Policy Exchange*, p 40.

without fear of repercussion”.<sup>239</sup> The Higher Education (Freedom of Speech) Bill, currently before Parliament, would add a new “duty to promote” the importance of freedom of speech within the law and academic freedom for academic staff.

10.626 In articulating threats to academic freedom and freedom of expression in universities, a number of factors have been pointed to, including intolerant attitudes and “no-platforming”, unacceptable intimidatory behaviour by protestors, unnecessary bureaucracy, the Prevent duty, regulatory complexity, and unduly complicated and cautious Charity Commission guidance;<sup>240</sup> cultural pressures to conform on ideological or political grounds, the marketisation of higher education, increased dependence on income from China, and the ‘impact agenda’ in the Research Excellence Framework.<sup>241</sup>

10.627 We have not seen evidence that research is being inhibited by laws against stirring up hatred. Rather, both Stock and Adekoya, Kaufmann and Simpson essentially identify pressures from students and academic colleagues – extra-legal considerations – as inhibiting academics from publishing research in particular areas or promulgating certain views or findings.

10.628 These pressures are very different from the direct legal risks under defamation law which was thought to be inhibiting scientific publication and which prompted the explicit protection for publications in scientific and academic journals in the Defamation Act 2013.<sup>242</sup> In particular, there were several cases where *legal* action was employed or threatened with a view to stopping criticism by scientific researchers.<sup>243</sup>

10.629 Conversely, we are not aware of any cases where academics have been deterred or prevented from publishing research because of fears that this would amount to stirring up hatred. Moreover, our reforms to the test for stirring up hatred would require either a provable intent to stir up hatred or the culpable use of threatening or abusive words or behaviour, and require a publication to be considered “as a whole”. Consequently, it

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<sup>239</sup> Department for Education, *Higher Education: free speech and academic freedom* (February 2021) CP 394.

<sup>240</sup> House of Commons / House of Lords Joint Committee on Human Rights, *Freedom of Speech in Universities, 2017-19*: HC 589, HL 111.

<sup>241</sup> Remi Adekoya, Eric Kaufmann, and Thomas Simpson, *Academic Freedom in the UK: Protecting viewpoint diversity*, Policy Exchange, 2020.

<sup>242</sup> Section 6 of the Defamation Act 2013 provides that a peer-reviewed statement in a scientific or academic journal attracts qualified privilege (i.e. it is not privileged if it is shown to be made with malice). This extends to an any assessment of the statement’s scientific or academic merit made in the course of peer-review, and any fair and accurate copy, extract or summary of the statement.

<sup>243</sup> Particularly relevant in the campaign for libel reform organised jointly by Index on Censorship and Sense about Science were the case brought against science journalist Simon Singh for criticism of the British Chiropractic Association for promoting treatments with no demonstrable evidence (see *British Chiropractic Association v Simon Singh* [2009] EWHC 1101 (QB)); and four cases brought in the UK against cardiologist Peter Wilmshurst by NMT Medical after questioning its clinical trial results at an academic conference in the United States (NMT went out of business before the cases could be tried). In 2010, editors of some British scientific journals told BBC News they had withdrawn what they regarded as perfectly good articles for fear of libel action (Pallab Ghosh, ‘NMT libel case intensifies for cardiologist’, BBC News, 2 November 2010).

is very hard to contemplate situations in which the publication in good faith of scientific or academic material would fall within the scope of the offences.

10.630 Accordingly, we are wary of recommending an exemption for material in peer-reviewed academic journals in the absence of evidence that the criminal law – as opposed to other pressures within academia – is having an inhibiting effect on the publication of material.

### Religious texts

10.631 Several respondents considered that religious texts should be exempt from the legislation. During passage of the Hate Crime and Public Order Bill in Scotland, it was suggested that the measures could lead to Bibles or other sacred texts being banned.<sup>244</sup>

10.632 The laws on stirring up religious hatred and hatred on grounds of sexual orientation in England and Wales have been in place for over a decade and there have been no prosecutions in respect of religious texts. We do not envisage that the minor change we propose to the threshold would alter this, still less the proposed extension of the laws to cover sex, disability and trans.

10.633 However, it appeared that some respondents wanted to go further and exempt *quotations* from scripture. One member of the public commented:

I believe there should be special clauses to say the Bible and religious texts cannot be cited as hate crime, if they are reproduced or quoted.

10.634 This issue is much more complicated as clearly scripture can be selectively quoted, and perhaps out of context, in a way which may be intended or likely to stir up hatred against an identifiable group. It would severely undermine the stirring up offences if all that a person had to do in order to incite hatred lawfully was to find a supportive quote in scripture.

10.635 We therefore do not recommend that there should be any exemption from the law for quotations from scripture.

10.636 However, this does not mean that this could lead to Bibles or other holy books being banned under stirring up legislation. First, we are recommending that the freedom of expression clause for religion should be retained, with amendment, in the reformed stirring up offences. Second, at present the freedom of expression protection for religion under section 29J is limited to offences of stirring up religious hatred or hatred on grounds of sexual orientation. It does not apply to offences of stirring up racial hatred. We have recommended that the protections should apply to all stirring up offences (meaning that the protection could be invoked against a charge of stirring up racial hatred where the object was the religious beliefs or practices of an ethnoreligious group such as Jews or Sikhs). Third, we are recommending that in considering whether hatred was likely to be stirred up, there should be an explicit

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<sup>244</sup> *The Times*, 8 November 2020.

requirement for the material to be considered as a whole (as is already the case for plays).

10.637 Taking these measures together, therefore, we are confident that there is no danger that the reformed offences would prevent the dissemination of any holy books of mainstream religions in England and Wales.

### Satire and ridicule

10.638 We were urged by Index on Censorship to amend the free speech clauses to incorporate not only discussion and criticism but also “satire or comedic mockery”.

10.639 Article 10 of the Convention protects not only the substance of ideas and information expressed, but also the form in which they are conveyed.<sup>245</sup> The European Court of Human Rights has made clear that freedom of expression extends to satire:

satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.<sup>246</sup>

10.640 Interpreting the offence in section 127(1) of the Communications Act 2003, the Lord Chief Justice commented

Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation.<sup>247</sup>

10.641 In *Miller v College of Policing*, the High Court stated “The Claimant’s tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1).”<sup>248</sup>

10.642 Accordingly, we have concluded that an explicit reference to satire is unnecessary, as “discussion and criticism” already includes satirical or mocking treatment of issues. We accept that what is intended as humorous or satirical may lose some of that context when analysed in court proceedings, but we anticipate that after *Chambers*<sup>249</sup> (the “Twitter joke trial”), courts in England and Wales are likely to be more sensitive to the context in which communications are made.

### Arts

10.643 Several individual responses to this question from members of the public also suggested that artistic works should be protected:

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<sup>245</sup> *Oberschlick v Austria*, Application no. 11662/85, 23 May 1991.

<sup>246</sup> *Vereinigung Bildender Künstler v. Austria*, Application no. 68354/01, 25 January 2007.

<sup>247</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin).

<sup>248</sup> *Miller v College of Policing and the Chief Constable of Humberside* [2020] EWHC 225 (Admin), para 251.

<sup>249</sup> *Chambers v DPP* [2012] EWHC 2157.

- (1) “There should be no restrictions on art.”
- (2) “I think freedom of expression in the arts is particularly important and artists must be protected to speak nuanced truth about issues without fear of retribution.”
- (3) “Regulating the arts is a dangerous notion that limits societal discourse as a whole.”

10.644 Similar considerations apply to forms of artistic expression as to journalism and academic freedom. Article 10 protects the manner in which material is conveyed as well as its substance.<sup>250</sup>

10.645 The Obscene Publications Act 1959 and the Theatres Act 1968 provided a defence of “public good ... in the interests of drama, opera, ballet or any other art, or of literature or learning” and that “the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground”.

10.646 We considered whether there was value in such a provision. Ultimately, we concluded that such a provision was not necessary.

10.647 First, there is no evidence of the stirring up offences being prosecuted in respect of material which would generally be considered artwork. At a conference organised by Index on Censorship in 2013, participants generally agreed that “the boundaries in the arts are controlled to a far greater extent by non-judicial considerations including public opinion and prevailing (and changeable) morality, taste, sensitivity”.<sup>251</sup>

10.648 A recent publication by Arts Professional surveyed 513 of its readers, two-thirds of whom were directly involved in creating or presenting artistic work. It concluded:

Sometimes people don’t speak out for sensitivity to a situation or fear of hurting someone’s feelings. That’s often understandable, sometimes laudable, but also potentially dangerous if it protects those wishing to censor debate or those incapable of dealing with honest feedback... This, however, is not the primary deterrent to free speech. It is fear of consequences that sits at the heart of self-censorship in the sector... We might expect the sector to be wary of sharing their opinions of those who have power over them, such as funders and others they rely on for their livelihoods. Also, we have learned by now – often from personal experience – that social media can silence even the bravest of those who are willing to stand up and be counted. But it is deeply disturbing to find that colleagues are the ones most likely to leave arts professionals fearful of speaking openly.<sup>252</sup>

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<sup>250</sup> *Jersild*, para 26.

<sup>251</sup> Index on Censorship, “Taking the Offensive: Defending artistic freedom in the UK”, Conference Report, May 2013. See <http://www.indexoncensorship.org/takingtheoffensive/>.

<sup>252</sup> Arts Professional, Freedom of Expression, February 2020.

10.649 As in academia, the threats to freedom of expression in the arts seem more to come from self-censorship, intimidation, reliance on funders, and institutional risk-aversion than a realistic prospect of legal sanctions.

10.650 Second, as a matter of principle, it should be possible for a person to predict with reasonable certainty at the point of making a statement or disseminating material whether they will be committing an offence, all the more so when a fundamental right like freedom of expression is concerned. If a person's culpability can be dependent on a post-hoc assessment by experts it is unlikely there could be reasonable certainty in advance.

10.651 Third, it is not clear that there would be any consensus among experts in the arts as to where the proper balance between freedom of expression and protection against incitement of hatred should lie.

10.652 Finally, proceedings for these offences can only be brought with the consent of, at present, the Attorney General; in the next section we recommend that personal consent of the Director of Public Prosecutions should be required instead. Any decision to consent to a prosecution would have to have due regard to the importance of freedom of expression, and the high level of protection afforded to artistic works.<sup>253</sup>

10.653 We do not think that stirring up offences, reformed as we propose, would have a chilling effect on artistic freedom and accordingly do not see a need to provide particular protection for artistic works.

### **Consent to Prosecution**

10.654 At present, prosecutions for stirring up offences require the consent of the Attorney General (or the Solicitor General). We provisionally proposed that they should instead require the personal consent of the Director of Public Prosecutions.

### **Consultation**

10.655 We asked consultees the following question:

#### **Consultation Question 54**

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. Do consultees agree?

10.656 The vast majority of individual responses opposed this provisional proposal. Although some explanations suggested that this reflected general opposition to hate crime laws, it was also clear that many who expressed this view were engaging with the specific question.

This appears to be a downgrading of the consent requirement from the Attorney General to the Director of Public Prosecutions which again sends the wrong message about the importance of free speech.

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<sup>253</sup> *Jelševar and Others v. Slovenia*, Application no. 47318/07 (3 April 2014) (decision on admissibility).

These laws have serious implications for human rights and the Attorney General should be involved as being answerable directly to Parliament.

10.657 Many personal responses used identical wording, based on a template provided by the Christian Institute.<sup>254</sup>

Requiring the Attorney General's consent is an important check on over-zealous prosecutions. It was included because stirring up hatred laws have the potential for serious infringements of human rights. A person could face up to seven years in prison for spoken words. This extremely serious penalty needs strong safeguards at the highest level. Downgrading the consent requirement from the Attorney General to the Director of Public Prosecutions sends the wrong signal about the importance of free speech.

### Analysis

10.658 Given the degree of opposition in individual responses, we have given our provisional proposal careful reconsideration.

10.659 In our review of Consents to Prosecution,<sup>255</sup> we identified three categories of offence for which a consent provision was appropriate. These were

- (1) where it is likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;
- (2) offences which involve national security or have some international element; and
- (3) offences with a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.

10.660 The rationale for the first of these was that under the Human Rights Act 1998 (which was then before Parliament) the CPS would have to take convention rights into account in any decision to prosecute. A private prosecutor would not be bound by the Convention. It would not be desirable if private prosecutions could be brought in a way which would violate the defendant's convention rights. The rationale for requiring consent for prosecutions in the third group was that in such cases the harm could not be adequately addressed by a subsequent acquittal or dismissal of the prosecution.

10.661 We recommended that for the first and third categories consent should lie with the Director of Public Prosecutions (DPP), and for the second the Attorney General.<sup>256</sup> The reason for preferring the DPP for the first and third categories was that "the DPP is in a position to take a properly informed decision when applying the public interest

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<sup>254</sup> Christian Institute, "Hate crime reform threat to free speech", December 2020.

<sup>255</sup> Consents to Prosecution (1998) Law Com 255.

<sup>256</sup> We felt that the decision to prosecute in cases which involve national security or an international element might involve questions of public policy, national or international, going beyond the facts of the case, and accordingly it was in the democratic interest that such decisions should be made by an officer who is accountable to Parliament.



test, and the office of the DPP has the advantage that it is less exposed to the risk of allegations of political bias than that of a Law Officer”.<sup>257</sup>

10.662 Prosecutions for stirring up hatred would often fall into the first category. However, we also think they are a type of offence where there is a very real risk of vexatious prosecutions being brought. In our recent report on Misconduct in Public Office we said:

While this has not historically proved to be a cause of major concern with respect to the offence, the recent private prosecution of Boris Johnson MP (prior to his current role as Prime Minister<sup>258</sup>) demonstrates the potential for private prosecutions to be at least open to the criticism of being vexatious and politically motivated.<sup>259</sup>

10.663 Likewise, in our recent report on electoral law, we concluded that a consent requirement should apply to a reformed offence of undue influence because “inappropriate prosecutions could stigmatise communications that in fact are legitimate exercises of religious freedom or free speech, or be used to sabotage a political campaign”.<sup>260</sup>

10.664 There have been at least two occasions in recent political history where legal complaints of stirring up racial hatred have been investigated in relation to political comments that were clearly not within the scope of the stirring up offences that could reasonably be regarded as vexatious. In the consultation paper we referred to the investigation of Amber Rudd (in relation to her speech to the Conservative Party conference).<sup>261</sup> Then Prime Minister Tony Blair was also investigated by North Wales Police in 2005 over allegations he had used the expression “the fucking Welsh” while watching disappointing results in elections to the Welsh Assembly. It is clear to us that the possibility of politically motivated and vexatious complaints being brought under the stirring up offences is real. If these are (rightly) rebuffed by police and/or prosecutors, there is a real danger that in the absence of a consent provision, private prosecutions might be brought.

10.665 In these circumstances, it is unattractive that the decision whether to allow or block a prosecution should lie with someone who may be either a political colleague or ally, or

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<sup>257</sup> Law Commission, Consent to Prosecution, Consultation Paper, para 7.17. The Law Officers – the Attorney General and Solicitor General – are Government appointments, usually drawn from the governing party’s MPs or peers.

<sup>258</sup> This was in respect of claims made during the campaign ahead of the referendum on the UK’s membership of the EU in 2016. However, it is also worth noting that following Mr Johnson’s comments on the burqa in 2018, an accusation – although not a legal complaint – that this was an “attempt[] to stir up racial intolerance” was made by the then Shadow Chancellor (Daily Mirror, 11 August 2018).

<sup>259</sup> Misconduct in Public Office (2020) Law Com 397, para 8.43.

<sup>260</sup> Electoral Law: a Joint Final Report (2020) Law Com 389, Scot Law Com 256, p 140.

<sup>261</sup> 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. Despite concluding that no offence had been committed, West Midlands Police recorded it as a non-crime hate incident. In our Consultation Paper, we gave examples of the criticisms made of both the reporting of the speech as a hate crime and the recording of it as a hate incident. See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 18.281 to 18.283.

equally a political opponent, of the person subject to, or the person bringing, the complaint.

10.666 It was clear that most respondents thought only of the Attorney General as a check on prosecutions, and that requiring the consent of the Attorney General rather than the Director of Public Prosecutions would be a more effective check on prosecutions. Few considered whether an Attorney General may be subject to pressure to *permit* a prosecution that a DPP would *block*.

10.667 We believe that there is just as much danger of political pressure being applied, or being perceived to apply, to an Attorney General to *consent* to a prosecution. In such circumstances the politically safest option for an Attorney General might be to allow the prosecution on the basis that this would put the issue in the hands of the court.

10.668 Having reconsidered the issue, we are satisfied that consent to prosecution should be required and this should lie with the Director of Public Prosecutions rather than the Attorney General.

10.669 Ordinarily, the DPP's consent to prosecute can be exercised by any Crown Prosecutor. This is different from the Attorney General's consent, which is non-delegable (but can be exercised by the Solicitor General under the Law Officers Act 1997). However, under the Bribery Act 2010, consents for a prosecution for an offence under that Act must be personally exercised by the DPP or the Director of the Serious Fraud Office or, if the Director is unavailable, another person who has been personally authorised by the Director to act during his or her unavailability (who must themselves act personally). A similar provision has been included in the Criminal Finances Act 2017 for the offence of failure to prevent facilitation of foreign tax evasion. We believe that this provides a workable precedent. Given the low number of prosecutions for stirring up offences, such an arrangement would not prove onerous. It is already the case that the CPS provides advice to the Attorney General on the exercise of his or her consent and so transferring this responsibility to the DPP would not create an increased workload for the CPS.

10.670 Accordingly, we affirm our provisional proposal that prosecutions for stirring up hatred should require the personal consent of the Director of Public Prosecutions.

### **Recommendation 31.**

10.671 We recommend that any prosecution for stirring up hatred should require the personal consent of the Director of Public Prosecutions.

# Chapter 11: Racist chanting at football matches

## INTRODUCTION

- 11.1 The offence of “racist chanting” at a football match is a distinct offence in the Football (Offences) Act 1991 (“FOA 1991”). The offence was created in a Private Member’s Bill following recommendations in the Popplewell Report into the Bradford Stadium disaster<sup>1</sup> and the Taylor report into Hillsborough.<sup>2</sup>
- 11.2 In his Interim Report Mr Justice Popplewell had said he was minded to recommend that consideration be given to creating a specific offence of chanting obscene or racist abuse.<sup>3</sup> In his Final Report, he recommended that consideration should be given to creating an offence of disorderly conduct at a sports ground, and that consideration should be given to legislation to address racist chanting either as a specific offence or as part of the broader offence of disorderly conduct.<sup>4</sup>
- 11.3 Lord Taylor settled on recommending a distinct offence, arguing that
- If there is a specific offence of throwing missiles at a designated sports ground, a separate specific offence of chanting obscene or racist abuse there and a third specific offence of going on the pitch without reasonable excuse there and, if full publicity is given to the legislation, hooligans will know precisely what is prohibited.<sup>5</sup>
- 11.4 In considering the offence, we start from the premise that the law against racist chanting at football matches is an interference with freedom of expression. Football chants may not always be the most exalted form of expression, but they are a form of expression nonetheless. As we noted in the consultation paper, the former Poet Laureate Andrew Motion has said they can be compared to a form of folk poetry. Musician Martin Carthy MBE has situated football chants within the tradition of folk music as “songs which evolved out of existing songs, sung by the people, adapted to meet the needs of a geographical identity and seemingly created by spontaneous combustion, the unheralded originators remaining anonymous”.<sup>6</sup>
- 11.5 We also recognise that there can be a positive value in football chants “in providing the fans with a voice, a means of showing their disquiet about issues both on and off

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<sup>1</sup> Mr Justice Popplewell’s remit also included the death of a boy at a Birmingham City match on the same day as the Bradford disaster, and was extended to take account of the events at Heysel Stadium in May 1985.

<sup>2</sup> Lord Justice Taylor, *The Hillsborough Stadium Disaster* (1990) Cm 962.

<sup>3</sup> Mr Justice Popplewell, *Committee of Inquiry into Crowd Safety and Control at Sports Grounds*, (1985) Cmnd 9585, Recommendation 8.

<sup>4</sup> Mr Justice Popplewell, *Committee of Inquiry into Crowd Safety and Control at Sports Grounds* (1986), Cmnd 9710, para 4.52.

<sup>5</sup> Lord Justice Taylor, *The Hillsborough Stadium Disaster* (1990) Cm 962, para 299.

<sup>6</sup> Martin Carthy, quoted in C. Irwin (2006) “Sing When You’re Winning: football fans, terrace songs and a search for the soul of soccer”, and Andrew Lawn (2014) “Who are ya? Who are ya? Who are we? Why do we chant at football and what do those chants tell us about who we are as individuals and as a society?”.

the pitch, when they normally do not have the power to do so “ and “providing a positive identity ... by expressing more general feelings of pride”.<sup>7</sup> In footnote 21 of this chapter we highlight research pointing to a positive impact on community relations following the signing of Mo Salah for Liverpool in 2017, reinforced by pro-Salah chants referencing the footballer’s Muslim faith.

- 11.6 As explained in Chapter 10 (in particular paragraphs 10.14 to 10.22), as a form of individual and cultural expression, any interference with this right requires justification. The Taylor report framed the need for an offence in terms of the prevention of crime and disorder. However, there is equally a case for justifying the interference on the grounds of the rights and interests of other people – in particular the targets of the conduct, and others who share the characteristic targeted.
- 11.7 Although the offence was introduced in a particular context, and accepting that, as stakeholders told us, considerable progress has been made in the past two decades (and longer) in changing attitudes towards racist behaviour at football matches, racism within football has not been eliminated. Kick It Out’s most recent annual report referenced over 300 instances of racist conduct related to professional football matches in the 2019/20 season.<sup>8</sup> The number of arrests specifically for racist chanting more than doubled in 2019/20 to 35.<sup>9</sup>

## THE OFFENCE

- 11.8 The FOA 1991 makes it an offence to “engage or take part in chanting of an indecent or racist nature at a designated football match”. Chanting is defined as “the repeated uttering of any words or sounds”; a requirement that the chanting be “in concert with others” was removed from the legislation in 1999. The requirement for repeated uttering means that a single racist outburst would not be caught, but it would if repeated. However, conduct such as “monkey noises” – that are themselves composed of repeated utterances – is caught.
- 11.9 “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”.
- 11.10 This test is different from the racial hostility test used in section 28 of the Crime and Disorder Act 1998 and section 66 of the Sentencing Code, which refer to the demonstration of hostility by the offender towards a victim based on the victim’s membership (or presumed membership) of a racial group, or the offence being wholly or partly motivated by hostility towards members of a racial group.
- 11.11 Taken in isolation, the phrase “threatening, abusive or insulting to a person by reason of his colour, race [etc]” might be thought to suggest that unlike the related provisions

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<sup>7</sup> Dr Joanne Luhrs (2007) “Football Chants and the Continuity of the *Blaison Populaire* Tradition”, pp 231 and 234.

<sup>8</sup> Kick It Out, *Annual Report 2019/20* (2020). The organisation received 282 reports of racist incidents, plus a further 25 instances of antisemitic conduct, which they classify under ‘religion’. Kick It Out is a charity, first established in 1993, to tackle racism and later other forms of discrimination within football.

<sup>9</sup> Home Office, *Football-related arrests, 24 September 2020*, available at <https://www.gov.uk/government/collections/football-banning-order>.

in the Public Order Act 1986 (“POA 1986”), this should be interpreted subjectively; that is, did that person find it insulting by reason of his colour, race, etc. However, in *DPP v Stoke-on-Trent Magistrates Court*,<sup>10</sup> the High Court ruled that “it is immaterial for the purposes of the offence whether persons of the racial group referred to in the alleged offending words are present so as to hear them, or, if so present, are offended or affected in any way by them.” It was sufficient that the words used were “racially derogatory or insulting”.

11.12 The maximum penalty for racist chanting is a level 3 fine (currently £1000). In contrast, the maximum penalty for the offences in sections 4 and 4A of the POA 1986 is six months’ imprisonment, but two years’ imprisonment where racially or religiously aggravated. The maximum penalty for the offence in section 5 of the POA 1986 is also a level 3 fine, but a level 4 fine (currently £2500) where racially or religiously aggravated.

## CONSULTATION PAPER

11.13 In the consultation paper, we asked six questions about the racist chanting offence. A joint response was provided to this consultation from Kick It Out,<sup>11</sup> the Football Association (FA), the Premier League, and the English Football League (“EFL”) (‘the key football organisations’).

### Retention of the current offence

11.14 We asked at Consultation Question 56

We provisionally propose that racist chanting at football matches remain a criminal offence distinct from the current POA 1986 offences. Do consultees agree?

11.15 A large number of individual responses questioned why we were singling out football for particular consideration. In this respect we were simply responding to the fact that the law already treats football differently. There are several pieces of legislation which cover conduct at football matches, but not other sports, a legacy, largely, of the unique problems with hooliganism that English football faced during the 1980s.<sup>12</sup> Whether there should be football-specific legislation is outside our terms of reference.

11.16 The majority of individual and organisational stakeholders supported retention of the racist chanting offence. In view of the generally hostile response of most individual stakeholders to “hate speech” laws, this should be seen as highly significant.

11.17 Significantly, those supporting retention included a number of respondents who opposed hate speech offences in general. For example the following personal responses:

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<sup>10</sup> *DPP v Stoke-on-Trent Magistrates Court* [2003] EWHC 1593 (Admin).

<sup>11</sup> KickItOut is a registered charity established to challenge racism and discrimination in football.

<sup>12</sup> These include the Football (Offences) Act 1991, The Football Spectators Act 1989, the Football Spectators (Seating) Order 1994, the Football (Offences and Disorder) Act 1999, and the Football (Disorder) Act 2000. The Sporting Events (Control of Alcohol) Act 1985 was framed in neutral terms, but only football matches have been designated under it.

- (1) “In spite of the arguments I give above, in favour of the primacy of free speech, this represents a special situation. This is not the arguing of a personal position on a particular topic, or a discourse or debate. This is a tribal chanting, usually *en masse*, and it is calculated to negatively affect the subject(s) of the abuse. Furthermore, it is carried out in a public arena where there are children, and who cannot in this situation be shielded from the influence of the chanters. I think that this goes beyond free speech, and it should be an offence.”
- (2) “The difference between the other answers where I have been against extending this kind of law is that I don't see football chants as being anything like the same as ‘Free Speech’.”

11.18 The key football organisations supported retention of the existing offence:

Whilst we agree that a distinct offence under the Football (Offences) Act should exist, this shouldn't preclude cases being brought under the POA 1986 in the right circumstances. Football has used the racially aggravated versions of sections 4A and 5 of the POA 1986 in private prosecutions for in-stadia abuse and recommend a suite of offences remain available to prosecutors seeking to bring a case against discriminatory abuse inside stadia.

11.19 The Crown Prosecution Service, however, felt that the offence was now redundant:

We consider that this behaviour is better covered by the aggravated public order offences contained in the Crime and Disorder Act 1998 (which superseded the Football (Offences) Act 1991). Racist chanting is inherently aimed at causing harassment alarm and distress to an individual or individuals and the circumstances when it could be realistically argued that no-one was likely to be caused harassment, alarm and distress are difficult to envisage. As the aggravated Public Order Act offences provide a stronger and more flexible means of prosecuting this behaviour at football grounds and other sporting venues, we consider that the arguments in favour of the retention of this offence are outweighed by the arguments that it is now effectively redundant.

11.20 A significant number of individual respondents commented on an ongoing controversy over some fans booing players who “take the knee” as a gesture against racism and/or (as they saw it) solidarity with the Black Lives Matter (“BLM”) movement or particular BLM organisations. Many felt that it was important that such behaviour should not be interpreted as racist. We are satisfied that the definition of “of a racist nature” in the legislation – “threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins” – would not cover spectators booing footballers for such a gesture. First, as noted above, the courts have applied an objective test: booing is not, of itself, *racially* derogatory or insulting. Second, it is clear that such booing might be (and is) targeted at players who choose to take the knee regardless of their ethnicity.

11.21 There was little support for repealing the existing offence. If the value of the offence lies in its communicative force, repealing the offence would, we think, send a damaging signal about the unacceptability of racist behaviour at football matches. Racism remains a problem within English football, as was clearly demonstrated by the

online abuse targeted at Marcus Rashford, Bukayo Saka and Jadon Sancho, three black England players, in the aftermath of the Euro 2020 final.<sup>13</sup>

11.22 We therefore recommend that the offence in section 3 of the FOA 1991 is retained.

#### The scope of the offence

11.23 As noted above, the test in the racist chanting offence is not the same as that used in other racial hate crime laws. In addition to defining “racialist” differently from the definition of racial hostility used for the aggravated offences and enhanced sentencing regimes (see paragraphs 11.10 to 11.11), in the consultation paper, we considered whether the current phrasing creates a gap in the legislation. Clearly, the offence covers racially derogatory abuse aimed at an individual on account of their race. However, the test does not explicitly address two issues contemplated by the test for hostility: where an offence is targeted at one or more people who are wrongly perceived or presumed to be members of a racial group; and where abuse is targeted at someone because of their association with someone else who is (or is perceived to be) a member of the group to which hostility is demonstrated.

11.24 We asked a question about these aspects of the test in the offence in section 3 of the FOA 1991 at Consultation Question 60:

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.

11.25 The majority of individual responses opposed extending the offence to cover association and perceived characteristics. This seemed to correlate with general opposition to hate crime laws.

11.26 A number of organisational responses favoured extending the legislation in these ways. These included the key football organisations, the Magistrates Association, the National Police Chiefs Council, the Association of Police and Crime Commissioners and the Bar Council.

11.27 Having examined this issue further, however, we have come to the conclusion that the current test does capture racist chanting that targets association with a racial group and presumed membership of a racial group.

11.28 We noted above the ruling in *DPP v Stoke on Trent Magistrates Court*, in which the High Court held that the chant “[y]ou’re just a town full of P\*\*\*s” directed at fans of Oldham Athletic at a match against Port Vale was racially derogatory.<sup>14</sup> Given the court’s finding that the chant did not have to be heard by anyone from the racial group targeted by the chant, it seems clear that chanting targeting a person by association

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<sup>13</sup> The online abuse was widely reported. See BBC, “Racist abuse of England players Marcus Rashford, Jadon Sancho & Bukayo Saka ‘unforgivable’” (12 July 2021), available at <https://www.bbc.co.uk/sport/football/57800431/>. A number of arrests were also made in relation to the online abuse targeting the players. See Samuel Meade, “11 arrests made for online racism directed at Marcus Rashford, Jadon Sancho and Bukayo Saka” (5 August 2021) *Mirror*, available at <https://www.mirror.co.uk/sport/football/news/rashford-sancho-saka-racism-arrests-24693297>.

<sup>14</sup> *DPP v Stoke-on-Trent Magistrates Court* [2003] EWHC 1593 (Admin).

with a racial group, or because they were perceived as belonging to a racial group would be caught. If the test can capture racial hostility expressed in comparing someone with members of a racial group, it must also capture racial hostility expressed in targeting someone's association with a group or their presumed membership of one.

- 11.29 Notwithstanding that the test already captures such behaviour, there might arguably be a case for aligning the test with that used in other areas of hate crime law in the interests of clarity and consistency. However, we are concerned that doing so might make it harder to prosecute some instances of racist chanting.
- 11.30 In *DPP v Howard*<sup>15</sup> the High Court considered a prosecution appeal in the case of a man who had been acquitted of a racially aggravated public order offence (but convicted of the base offence) for chanting "I'd rather be a P\*\*\* than a cop" at his neighbours, two off-duty police officers.<sup>16</sup> Although this was not in a football-related context, variations on this phrase are sometimes chanted at opposing football teams' fans.
- 11.31 The High Court concluded that there was no question of the offender having fulfilled the demonstration of hostility test in section 28(1) of the Crime and Disorder Act 1998, since this required that the offender demonstrated hostility *towards the victim* on the basis of the *victim's* membership (or presumed membership) of a racial group. The court found that there was no suggestion that either of the victims were (or were perceived by the offender to be) members of the racial group to which the offender had demonstrated hostility.
- 11.32 The issue then was whether the offender was *motivated* by racial hostility. The Magistrates' Court had found as a fact that there was no evidence that the offender's motivation was anything other than (or additional to) personal dislike of the two police officers.
- 11.33 The High Court held that there did not have to be evidence that somebody who is a member of a racial group had to be identified for there to be hostility towards them as the motivation. It was sufficient for there to be hostility towards members of such a group in general. However, that hostility towards members of the racial group had to be the sole or partial motivation for the conduct; and the Magistrates' Court had found as a fact that the motivation was solely hostility towards the two police officers.
- 11.34 In this respect, the racial chanting offence is broader, not narrower, than the usual test of hostility in the Crime and Disorder Act 1998 and the Sentencing Code. The offence is in this respect more like the stirring up offences – the target is the group rather than the individual. Chanting which *demonstrates* racial hostility is caught, even if it is not racial hostility towards the object of the chanting; there is no requirement to demonstrate that the offender was *motivated*, in whole or in part, by racial hostility.
- 11.35 We consider therefore that although the legislation is not drafted in the same way as the test in the Sentencing Code and the Crime and Disorder Act 1998, it does in

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<sup>15</sup> *DPP v Dykes* [2009] Crim LR 449.



practice enable prosecution of chanting which targets someone on the basis of presumed membership of a racial group or of association with a racial group. In fact, the drafting of the offence makes this easier to prove than an aggravated public order offence. We therefore do not recommend that the offence be amended to cover presumed membership or association.

### **Extension to cover other characteristics**

11.36 The offence in the FOA 1991 is unique in targeting only racial hostility (the aggravated offences in the CDA 1998 also cover religious hostility while the stirring up offences also cover religious hatred and hatred on grounds of sexual orientation).

11.37 In our consultation paper we noted that evidence produced by Kick It Out and other stakeholders suggested that there is a significant amount of behaviour at football matches which targets characteristics other than race. In particular, we noted that homophobic incidents appeared to be prevalent.<sup>17</sup>

11.38 We asked at Consultation Question 57:

We provisionally propose that the offence under section 3 of the Football (Offences) Act 1991 of engaging in “chanting of an indecent or racist nature at a designated football match” be extended to cover chanting based on sexual orientation. Do consultees agree?

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.

11.39 While respondents generally supported retaining the offence covering racist chanting, there was less support for extending the offence to cover other protected characteristics.

11.40 Among those who did support extending the characteristics covered to include sexual orientation, there were a significant number who also flagged up sex.

11.41 The key football stakeholders supported extension of the offence:

Yes, we would strongly welcome the extension to all forms of discrimination not only chanting based on sexual orientation. This is an opportunity to be proactive and create legislation that will continue to be fit for purpose in the future. We encourage parity of protected characteristics across hate crime legislation, including aggravated offences.

11.42 The CPS, while arguing that the offence did not need to be retained, argued:

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<sup>17</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 19.34 to 19.42.

if the offence of racist chanting at football matches is to be retained within a new hate crime legal framework, then it would be logical and consistent for the offence to be extended to cover all of the statutory protected characteristics.

- 11.43 We had much greater difficulty with this issue than with race. In the Consultation Paper we noted the extensive evidence of homophobic chanting identified by the House of Commons Select Committee on Culture, Media and Sport,<sup>18</sup> and by the former rugby international player Gareth Thomas, who has made two documentaries on the subject.<sup>19</sup> We also expressed concern that while some homophobic chanting would be caught by the “indecent” limb of the offence, much would not.<sup>20</sup> On that basis, we found a strong case for extending the offence to cover homophobic chanting.
- 11.44 While there was clear evidence of homophobic chanting, evidence of prevalence of targeting of other characteristics was limited. We received some evidence of chanting based on religious hostility, and although some of this was antisemitic conduct which could already be captured under race, we also received evidence of Islamophobic chanting. Almost every team in the Premier League now has at least one Muslim player. This may mean that there are more occasions on which players will be targeted with Islamophobic conduct.<sup>21</sup>
- 11.45 Stonewall pointed to figures in the report “LGBT in Britain: Hate Crime and Discrimination 2017”, suggesting that seven per cent of trans people who had attended a live sports event in the twelve months prior to the survey had felt personally discriminated against because of being trans. However, we do not know the extent to which transphobic chanting contributed to such feelings of discrimination.
- 11.46 We did receive some evidence of disablist chanting. Given that almost all matches covered by the legislation are at an elite level, it is perhaps unsurprising that few physically disabled people play in games covered by the legislation. However, we received evidence of players being targeted in relation to mental health issues and HIV status. We also received evidence of spectators using facilities for disabled people being subject to abuse for being “not disabled enough”. One example was spectators who are ambulant wheelchair users – capable of walking and standing in some circumstances – receiving abuse when they leave their wheelchair, for instance at moments of tension or celebration.

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<sup>18</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 19.40.

<sup>19</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 19.39.

<sup>20</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 19.41 to 19.42.

<sup>21</sup> On the other hand, there is evidence that the presence of Muslim players can have a positive impact on supporters’ attitudes. See for instance, Ala’ Alrababa’h, William Marble, Salma Mousa, and Alexandra Siegel, “Can Exposure to Celebrities Reduce Prejudice? The Effect of Mohamed Salah on Islamophobic Behaviors and Attitudes.” Immigration Policy Lab Working Paper 19-04, July 2019, American Political Science Review. The authors point to chants such as “Mohamed Salah, A gift from Allah” and “If he scores another few, Then I’ll be Muslim, too”, and suggest that Mo Salah’s signing by Liverpool in 2017 was associated with a reduction – relative to counterfactual figures drawn from areas outside Merseyside – not only in hate speech on Twitter, but overall levels of hate crime in Liverpool.

- 11.47 At the same time, concern was expressed – as we had anticipated – that criminalising disablist chanting could capture chanting targeting a referee’s eyesight or a player’s physical competence. While there is arguably more homophobic conduct that would be caught by an expanded offence than conduct targeting other characteristics, we have concluded that the choice is essentially between extending to cover all protected characteristics or not extending the offence at all. Our provisional proposal was based on the greater prevalence of homophobic chanting, but this is only one consideration. Equally important is whether additional criminal legislation is necessary to deal with such conduct.
- 11.48 Nonetheless, chanting targeting the protected characteristic of a person would be unlawful under the POA 1986 in almost all circumstances, and any such conduct would also be capable of attracting a banning order. That being so, it is unlikely that there is a practical need to extend the offence in the FOA 1991 to cover other protected characteristics.
- 11.49 We have concluded that given that any conduct that would be caught if the offence were to be extended is already capable of being prosecuted under the POA 1986, creating additional bespoke offences is not the right approach. Offences under the POA 1986 are available, which carry penalties at least as severe as, and in many cases substantially in excess of, those available under the FOA 1991. Moreover, if our recommendations in Chapter 8 are taken forward, and aggravated offences are made available in respect of all characteristics currently protected under hate crime laws, such conduct could be prosecuted as an aggravated public order offence.
- 11.50 We accept the need to retain the existing offence in respect of race. However, it was created in a specific context to address a specific problem, and we are satisfied that there are other offences capable of being used to address other forms of abusive or discriminatory chanting at football matches.
- 11.51 Nothing we say here should be taken to suggest that tackling homophobic chanting and other forms of discriminatory abuse should not be a priority for football and law enforcement authorities. Such conduct is not only distressing for those targeted by the abuse, but also creates a hostile environment for others present. We would hope that both football and law enforcement authorities would use the tools that they already have at their disposal to challenge abusive discriminatory chanting.

### **Extension to cover gestures and missiles**

- 11.52 The offence in section 3 of FOA 1991 covers chanting, but it does not cover the use of physical gestures. In addition, while there is a separate offence in section 2 of throwing “missiles” onto the playing area, this is wholly distinct from the racist chanting offence. This means that where there is a racist context to missile-throwing – such as throwing bananas at black players – the offence in section 2 will not recognise that context.
- 11.53 We therefore asked a question about extending the section 3 offence to cover racist gestures and missile throwing. At Consultation Question 58 we asked:

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.

11.54 A large number of responses supported extending the offence to cover missiles but not gestures. Upon examining their reasons, it became clear that this was based on a misunderstanding of the legislation and of the question. Many of those who responded supporting extension of the offence focused on the fact that missiles, unlike gestures, could cause physical harm, and that this justified criminalisation. However, we were not asking whether missile throwing should be criminalised: it is already an offence under section 2 of the Act. The question was whether missile throwing demonstrating racial hostility (for instance, throwing bananas at black players) should be brought within the section 3 offence.

11.55 Professor Geoff Pearson proposed an alternative approach:

Racially-motivated missile throwing is so rare at football that introducing a new offence is unnecessary. It would be more proportionate for the s.2 offence of missile throwing at football to be added to the list of offences which are made Racially Aggravated by the Crime and Disorder Act 1998.

11.56 We agree with Professor Pearson that it would be preferable for the existing offence to be made aggravatable rather than either creating a new offence or trying to fit racist missile throwing into the racist chanting offence. However, we have concluded that there are sufficient powers to deal with such conduct under existing legislation which already allow for the offence to be treated as racially aggravated. Throwing items *at* a player is potentially assault. Throwing items onto the pitch with intent to cause someone harassment, alarm or distress is likely to constitute an offence under section 4A of the POA 1986. The penalty for both these offences where aggravated by racial hostility is up to two years' imprisonment.

11.57 Accordingly, we have concluded that there is no need for a separate, racially aggravated version of the missile offence. The FOA 1991 communicates simply and clearly that throwing *any* item onto the pitch is unlawful. If an offender does so in a way which is racially abusive towards a player or any other person, the authorities already have powers to prosecute this in a way which reflects the offender's greater culpability.

11.58 In relation to gestures, the issue is somewhat different in that gestures are not currently caught by the offences in the FOA 1991. Again, however, we are satisfied that in appropriate cases, gestures can be dealt with under public order legislation, which extends to abusive or insulting behaviour and disorderly conduct intended to cause harassment, alarm or distress.

### **Travel to matches**

11.59 The offence in section 3 of the FOA 1991 can only be committed within the ground. Given the roots of the FOA 1991 in inquiries into events that happened within stadia during matches, it is perhaps unsurprising that it created offences which were contemplated as being committed within the stadium. Indeed, Professor Geoff

Pearson has suggested that the legislation has become “part of the regulation around attending live football events”.<sup>22</sup>

11.60 Of the three offences created by the 1991 Act, one – pitch invasion – must necessarily take place within the ground. Racist chanting (and for that matter throwing missiles at opposing fans) can take place outside the ground, but if they did they would have to be prosecuted using other legislation.

11.61 In contrast, the broader legislation of the Football Supporters Act 1989 (FSA 1989) was created and amended several times with a much wider purpose of dealing with a broader range of offending, both within and outside matches, including dealing with extra-territorial disorder committed by home fans overseas. Consequently, the powers available under the FSA 1989 to make football banning orders (“FBOs”) extend to certain offences committed while the accused was on a journey to or from the match. This is extremely broad, and can include breaks in the journey, including overnight breaks. The powers can also extend to offences committed away from the ground and not while on a journey, if they take place within the period of two hours before and one hour after the match and if the court concludes that they were “related to” one or more matches. In July 2021, following online abuse directed at Marcus Rashford, Jadon Sancho and Bukayo Saka (see paragraph 11.21), the Government announced it would make FBOs available following online abusive behaviour related to football.<sup>23</sup>

11.62 Given that the conduct of racist chanting can potentially take place away from the stadium, such as when supporters are travelling to a match or viewing a screening of a match, we considered there might be a case for extending the offence to cover such circumstances.

11.63 We asked, at Consultation Question 59, whether the offence should be extended to cover travel to and from matches.

11.64 The joint response from the key football organisations did not support extending the offence in this way:

If an offence takes place in a football stadium, it is easy to understand that it should be covered by the Football (Offences) Act. If it is extended to cover travel, it becomes ambiguous and almost impossible to understand where the travelling element stops or starts. For example, if somebody were to go shopping in the town centre before heading to a match, at what point does the travel to the match start?

It’s also possible that an incident that occurs between two parties is between one travelling to a football match and one that isn’t. They may commit exactly the same offence; therefore there is no reason for the Act to apply to one but not the other.

11.65 The Free Speech Union made a similar argument:

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<sup>22</sup> G Pearson, “A Beautiful Law for the Beautiful Game? Revisiting the Football Offences Act 1991” (2021) 85(5) *Journal of Criminal Law* 362.

<sup>23</sup> “Government sets out action to stop online racist abuse in football”, Press Release, 15 July 2021. Available at <https://www.gov.uk/government/news/government-sets-out-action-to-stop-online-racist-abuse-in-football>.

It is in our view arbitrary to subject offensive comments made on a bus or train (or for that matter in a car) to different regimes, depending on whether the defendant is or is not *en route* to a football match at the time.

11.66 There are avenues that enable the prosecution of racist chanting – and also missile throwing and the use of racist gestures – where they occur outside the ground. In order for the FSA 1989 provisions to be applied, the prosecution is required in these circumstances to prove that the disorder was football-related. On reflection, we consider that this is appropriate. While it makes sense to treat disorder within the stadium during and surrounding the match as automatically being football-related for the purpose of making FBOs available, once the locus is moved outside the stadium it is right that a more rigorous test is applied before conduct is brought within the scope of the measures available under the FSA 1989.

11.67 Accordingly, we have concluded that the offence should not be extended in its current form to cover conduct happening on journeys to and from the match.

## CONCLUSION

11.68 We recommend that the existing offence of racist chanting in section 3 of the Football (Offences) Act 1991 should be retained in its present form. Racist behaviour connected to football remains a serious problem as events during the summer of 2021 demonstrate. This includes not only behaviour within stadia, but increasingly online.

11.69 On balance, however, we have concluded that the existing racial chanting offence should not be extended to cover other characteristics. Homophobic and other forms of discriminatory chanting can be prosecuted under public order legislation. So too can racist gestures.

11.70 Nothing we say here should be taken to suggest that we do not think there are real problems, including demonstrable issues with homophobic chanting and racist gestures. Equally, while racist behaviour at football matches is not as prevalent as before, and is far more likely to be reported and challenged by other spectators, it is still too common. No player or official should have to endure abuse because of their race, and no one present at a match should have to witness it.

11.71 Much of the conduct currently covered in the FOA 1991 – such as the legislation relating to pitch invasions – is outside the scope of this review. Conversely, a great deal of the current concern about hate crime connected with football, such as extremism on football-related online forums, does not touch on football-specific legislation.

11.72 The last substantial reforms to the legislation covering conduct at football matches were made in 2006. Professor Pearson has suggested that

As a spectator sport, the ‘beautiful game’ has changed dramatically since the enactment of the FOA 1991. This has been mirrored by fundamental changes to the operation of criminal law in the courts resulting from the introduction of s 3 Human Rights Act 1998 and changing attitudes to ‘Hate Crime’. Combined, these developments challenge the suitability and relevance of the FOA, and in particular ss 3 and 4. The original rationale for the FOA is almost forgotten in its current usage,

which is overwhelmingly to deter and punish low-level regulatory infractions. Where more serious misbehaviour occurs, other criminal offences tend to be used, most obviously under POA 1986 and aggravated offences under the Crime and Disorder Act 1998. As a society we need to decide whether the regulation of low-level disorder and antisocial or verbally offensive behaviour at football matches should be a matter for the criminal law, police and courts. There is a strong argument that FOA 1991 has had its day and that these low-level infractions should instead be managed through ticketing terms and conditions and club surveillance systems and security personnel.

11.73 Against this he recognises that:

the relative simplicity of FOA still serves a purpose. For police officers, who are typically reminded of its powers at each prematch briefing, FOA is highly valuable as a set of established and easy-to-understand and apply rules.

11.74 He concludes that “[t]he Act does, however, need substantial reform to acknowledge its altered role in regulating fan behaviour rather than preventing mass disorder”. This would include not only the racist chanting offence, but parts of the legislation that are outside the scope of this review, including “indecent” chanting, and the scope of section 4 (which although creating an offence of “going onto the playing area” currently criminalises encroachment onto areas outside the pitch “to which spectators are not generally admitted”).

11.75 It may be that in due course the Government will consider that legislation covering offending at, or related to, football needs to be reviewed (not least given the forthcoming return of standing areas in football stadia). Indeed, it may even be questioned whether legislation directed at football specifically rather than sports grounds generally remains appropriate.

11.76 How the law deals with discriminatory chanting might be considered as part of any such review. This could include, for instance, the disparities between the limited circumstances in which the chanting offence can be committed (at the ground in a period of approximately four and a half hours) and the wider circumstances in which conduct can be caught by the general provisions on banning orders (away from the ground, and throughout the entire period of travel to and from a match, including overnight breaks in a journey).

11.77 However, we consider that such issues would be better considered as part of a wider review of the football legislation than considering the chanting offence in isolation.

### **Recommendation 32.**

11.78 We recommend that the offence in section 3 of the Football (Offences) Act 1991 should be retained in its present form.



# Chapter 12: A Commissioner for Countering Hate Crime and a Hate Crime Act

## INTRODUCTION

12.1 This chapter considers two reform options:

- (1) the option of establishing a Commissioner for Countering Hate Crime as a complement to the legislative reforms we have recommended in this report, and
- (2) the creation of a single act to bring together various elements of hate crime laws.

12.2 We considered the Commissioner role in the consultation paper in response to suggestions from stakeholders during pre-consultation.<sup>1</sup> In particular, this reform option was considered because many of the greatest concerns raised with us were not necessarily related to the law itself, but rather its implementation in practice. We also heard that there was significantly more that needed to be done to prevent the damaging effects of hate crime, and that punitive criminal justice responses were not always the most effective approach. A dedicated commissioner is an approach adopted elsewhere in the criminal justice system to provide a focal point for priority areas (for example, domestic abuse and modern slavery), and it has been suggested that hate crime is an area that might also benefit from that approach.

12.3 We provisionally proposed bringing together hate crime laws into a single act in our consultation paper primarily in response to concerns about the current fragmentation of the various hate crime provisions across multiple statutes. This was linked to our wider concern that the law be made clearer and simpler.

12.4 After considering responses to our consultation, in this chapter we ultimately invite the Government to consider establishing a Commissioner with a remit involving the prevention and countering of hate crime. We also recommend the enactment of a Hate Crime Act to bring together hate crime laws into a single statute.

## A COMMISSIONER FOR COUNTERING HATE CRIME

### Other Commissioners in the criminal justice system

12.5 In the consultation paper, we described other commissioner roles relevant to the criminal justice system,<sup>2</sup> namely the Victims' Commissioner,<sup>3</sup> the Independent Anti-

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<sup>1</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, ch 20.

<sup>2</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.3.

<sup>3</sup> Created by the Domestic Violence, Crime and Victims Act 2004, s 48(1); Victims' Commissioner website, available at <https://victimscommissioner.org.uk/>.



Slavery Commissioner,<sup>4</sup> the Commission for Countering Extremism,<sup>5</sup> and the Domestic Abuse Commissioner.<sup>6</sup>

12.6 We considered that the closest analogies to a proposed Commissioner for hate crime were the Independent Anti-Slavery Commissioner (“IASC”) and the Domestic Abuse Commissioner (“DAC”) as their remits relate to specific criminal contexts.<sup>7</sup>

### Independent Anti-Slavery Commissioner

12.7 The key functions of the IASC are to encourage good practice in:

- (1) the prevention, detection, investigation and prosecution of slavery and human trafficking offences; and
- (2) the identification of victims of those offences.<sup>8</sup>

12.8 There is a non-exhaustive list of activities by which the IASC can fulfil these functions.<sup>9</sup> Importantly, the IASC has the power to request that a specified public authority cooperates with the Commissioner in any way that the Commissioner considered necessary for its functions. There is a duty on the public authority to comply with this request as far as reasonably practicable.<sup>10</sup>

### Domestic Abuse Commissioner

12.9 At the time of writing the consultation paper, provisions relating to the Domestic Abuse Commissioner existed in draft form in the Domestic Abuse Bill. The DAC was nonetheless appointed in 2019, to begin her role in the interim. There is now statutory provision for the DAC in Part 2 of the Domestic Abuse Act 2021.

12.10 The functions of the DAC are to encourage good practice in:

- (1) the prevention of domestic abuse;
- (2) the prevention, detection, investigation and prosecution of offences involving domestic abuse;
- (3) the identification of—
  - (a) people who carry out domestic abuse;

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<sup>4</sup> Created by the Modern Slavery Act 2015, s 40(1); Independent Anti-Slavery Commissioner website, available at <https://www.antislaverycommissioner.co.uk/>.

<sup>5</sup> A non-statutory Commission created by the Government in 2018; Commission for Countering Extremism website, available at <https://www.gov.uk/government/organisations/commission-for-countering-extremism/about>.

<sup>6</sup> Created by the Domestic Abuse Act 2021, s 4; Domestic Abuse Commissioner website available, at <https://domesticabusecommissioner.uk/>.

<sup>7</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.4.

<sup>8</sup> Modern Slavery Act 2015, s 41(1).

<sup>9</sup> Modern Slavery Act 2015, s 41(3).

<sup>10</sup> Modern Slavery Act 2015, s 43.

- (b) victims of domestic abuse;
  - (c) children affected by domestic abuse;
- (4) the provision of protection and support to people affected by domestic abuse.<sup>11</sup>

12.11 Similarly to the IASC, there is a non-exhaustive list of activities by which the DAC may carry out its functions: assessing, monitoring, and publishing information about: the provision of services to people affected by domestic abuse; making recommendations to any public authority about the exercise of its functions; undertaking or supporting the carrying out of research; providing information, education or training; taking other steps to increase public awareness of domestic abuse; consulting, co-operating and working jointly with public authorities, voluntary organisations and other persons.<sup>12</sup>

12.12 The DAC also has the same powers as the IASC to request a specific public authority to co-operate with it, and the public authority has a duty to do so as far as reasonably practicable.<sup>13</sup> However, the Domestic Abuse Act 2021 also provides for a duty on public authorities to respond to any recommendations made in relation to it by the DAC, when it makes a report under section 8 “on any matter relating to domestic abuse”.

12.13 Both the IASC and DAC have duties to formulate strategic plans and present annual reports to the Secretary of State.<sup>14</sup>

### **Functions that might be served by a Commissioner for hate crime**

12.14 In the consultation paper, we envisaged that a Commissioner for hate crime could have a similar function to the DAC and IASC; namely, to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, and to identify victims and perpetrators of these offences. We listed 10 activities which a Commissioner for hate crime might perform to achieve these functions. The list is reproduced here as many consultees referred to particular functions in their responses.<sup>15</sup>

- (1) 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.

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<sup>11</sup> Domestic Abuse Act 2021, s 7.

<sup>12</sup> Domestic Abuse Act 2021, s 7.

<sup>13</sup> Domestic Abuse Act 2021, s 15.

<sup>14</sup> Modern Slavery Act 2015, s 42; Domestic Abuse Act 2021, ss 13 and 14.

<sup>15</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.12 and 20.13.

- (2) 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.
- (3) 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.
- (4) Monitor the effectiveness of alternatives to prosecution, such as restorative justice programmes being used in response to hate crime.
- (5) Support the carrying out of research relevant to various aspects of hate crime.
- (6) Support the development and implementation of relevant educational resources which challenge the prejudicial attitudes that underpin hate crime.
- (7) Raise awareness of the prevalence and specific impacts of hate crime on individuals and communities more widely, through media, social media and speaking opportunities.
- (8) Conduct centralised consultation with a diverse range of stakeholders who represent the views of affected parties across all hate crime strands.
- (9) 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.
- (10) Keeping hate crime legislation under review, including ongoing consideration of whether the evidence supports the addition of further characteristic groups, or further specified aggravated offences to the existing regime.

### **Benefits of introducing a Commissioner for hate crime**

12.15 We considered several different benefits that may be achieved by introducing a Commissioner for hate crime.

12.16 First, we said that there may be value in “centralised oversight”. This is because responsibility for tackling hate crime is currently split between the Home Office and the Department for Levelling Up, Housing and Communities, and there are also other departments and sectors, such as the Ministry of Justice, Attorney General’s Office, CPS and police, which have strong interests in hate crime. While we noted current efforts to ensure coordination between agencies, we said that a Commissioner, “operating alongside these different departments and agencies, may assist with ensuring a more consistent, joined up approach to tackling hate crime.”<sup>16</sup>

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<sup>16</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.17.

- 12.17 Second, we considered that monitoring of police practices relating to hate crime may be more easily and routinely undertaken by a Commissioner, rather than HMICFRS, which has recently produced thematic reports on police responses to hate crime.<sup>17</sup>
- 12.18 Third, we said that a Commissioner “might use their oversight function to identify inconsistencies in the quality and quantity of hate crime support services for victims”, using their profile to “draw attention to gaps and recommend improvements”.<sup>18</sup> Additionally, a Commissioner “might also assess the provision and effectiveness of programmes involving perpetrators”.<sup>19</sup>
- 12.19 Fourth, a Commissioner “might bring other benefits to preventative efforts”, including by supporting educational programmes for young people and supporting research.<sup>20</sup>
- 12.20 Fifth, a Commissioner could “continue to raise public awareness of the issues surrounding hate crime” and the impact it has on victims. We noted that this may have “particular emphasis on hate crime affecting those groups who are least likely to report”.<sup>21</sup>
- 12.21 Sixth, in relation to consultation and collaboration, we considered that “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”.<sup>22</sup> There are a wealth of third sector organisations which provide support and information in relation to specific protected characteristics and the needs of groups “often intersect”. A Commissioner could therefore “bring together voices from different victim groups” to best understand their needs.<sup>23</sup>
- 12.22 Finally, we noted how a Commissioner “could keep the scope and application of hate crime legislation under review”.<sup>24</sup>

### **Arguments against introducing a Commissioner for hate crime**

- 12.23 We also considered arguments against introducing a Commissioner for hate crime.
- 12.24 First, we identified that the “financial cost of a Hate Crime Commissioner might be one key argument against introducing the role”.<sup>25</sup> We referred to the budgets of the DAC

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<sup>17</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.20 to 20.22.

<sup>18</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.23.

<sup>19</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.24.

<sup>20</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.25 to 20.29.

<sup>21</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.32.

<sup>22</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.34.

<sup>23</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.35 and 20.36.

<sup>24</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.38.

<sup>25</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.41.

(£1 million per year)<sup>26</sup> and the IASC (£575,000 for the 2019/2020 financial year)<sup>27</sup> and estimated that the Commissioner for hate crime would likely cost somewhere in between these two figures on the basis that the scale of hate crime falls in between the scale of the offending under the remit of these two commissioners.<sup>28</sup> This is not an insignificant cost.

12.25 We asked whether “this cost would represent the most efficient use of the limited resources available to deal with hate crime” and whether this money “might also be better spent by funding third party victim support agencies directly.”<sup>29</sup> In particular, we acknowledged the risk that some of the functions of the Commissioner for hate crime could duplicate work already being done. We concluded that, “[i]f 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.”<sup>30</sup>

12.26 Second, we highlighted the criticisms which were levelled against the proposal to introduce a Domestic Abuse Commissioner in response to the Government consultation which preceded the Domestic Abuse Act 2021.<sup>31</sup> These criticisms include “concerns about the lack of independence”; the “[in]adequacy of resources”; doubts about whether one Commissioner could have “sole expertise to understand the full range of issues associated with domestic violence”; and the “extent of the powers” given to the Commissioner.<sup>32</sup> We acknowledged that “[i]t is possible that some of these criticisms could also apply in the context of a government appointed Hate Crime Commissioner.”<sup>33</sup>

## Practical matters

12.27 In the consultation paper we also highlighted a variety of “practical matters” which would need to be resolved, and on which we offered provisional views. Regarding the legal basis of appointment, we suggested that the Hate Crime Act which we had proposed elsewhere in the report would be the most appropriate place to set out the functions, duties and powers of such a Commissioner.<sup>34</sup> We suggested that the Commissioner would most likely be appointed by the Home Office (which would also determine its budget); have a territorial remit in relation to England and Wales (save to

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<sup>26</sup> Home Office, *Policy paper: Domestic Abuse Commissioner factsheet* (18 May 2021), available at: <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-commissioner-factsheet>.

<sup>27</sup> Independent Anti-Slavery Commissioner, *Annual Report 2019-2020* (September 2020), available at: [https://www.antislaverycommissioner.co.uk/media/1461/ccs207\\_ccs0520602790-001\\_iasc\\_annual-report-2019-2020\\_e-laying.pdf](https://www.antislaverycommissioner.co.uk/media/1461/ccs207_ccs0520602790-001_iasc_annual-report-2019-2020_e-laying.pdf), annex A, p 50.

<sup>28</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.44.

<sup>29</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.45 and 20.46.

<sup>30</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.48.

<sup>31</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.49 to 20.51.

<sup>32</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.50.

<sup>33</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.51.

<sup>34</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.54.

the extent that some functions may be limited in Wales where they fall within the competence of the devolved administration in Wales); and report to the Home Secretary, Justice Secretary, Attorney General and Secretary of State for Housing, Communities and Local Government.<sup>35</sup>

### Consultation question

12.28 We ultimately concluded that a Commissioner for hate crime 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”. We noted that the role may help to raise the profile of hate crime in communities and encourage victims to come forward and report hate crime. However, we said that it is “less clear whether the cost involved in the creation of such a role is proportionate, and if funding may be better spent in other ways”.<sup>36</sup>

12.29 We therefore sought the views of consultees on whether a Commissioner for hate crime should be introduced.<sup>37</sup>

### Consultation responses

12.30 We asked for views on the introduction of a Commissioner role as follows:

Consultation Question 62

We invite consultees’ views on whether they would support the introduction of a Hate Crime Commissioner

Summary Consultation Question 20:

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

12.31 These questions were met with a mixed response, with personal responses mostly against a Commissioner and organisational consultees largely in favour of it.

12.32 HHJ Charles Wide QC wrote an article that was highly critical of the Commission’s consideration of this question, stating that:

The Law Commission’s statutory role concerns law reform. It has no status in relation to the creation of a new public body.<sup>38</sup>

12.33 We recognise (as we did in the consultation paper) that the establishment of such a role does not form part of our terms of reference, and therefore any proposals we

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<sup>35</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.55 to 20.59.

<sup>36</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 20.60 to 20.62.

<sup>37</sup> Consultation question 62.

<sup>38</sup> Charles Wide, “Hostility crime and the Law Commission” (2021) *Policy Exchange*, p 6, available at <https://policyexchange.org.uk/publication/hostility-crime-and-the-law-commission/>.

make in this regard are merely additional suggestions for government to consider. While the Commission has recommended the establishment of public bodies in previous reports,<sup>39</sup> it is not a common practice of ours.

12.34 A positive recommendation for a Commissioner role was made by the Independent Review of Hate Crime in Northern Ireland as follows:<sup>40</sup>

Recommendation 33

An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.

### Responses in favour of a Commissioner

12.35 Consultees who were in favour of a Commissioner gave a range of answers, identifying benefits which the Commissioner may bring; commenting on the 10 possible areas of activity identified in the consultation paper (see paragraph 12.14); proposing additional functions or areas of focus for the Commissioner; and giving suggestions for conditions they considered necessary for the role to be effective.

### Benefits of a Commissioner

12.36 The following benefits of a Commissioner were identified by consultees in their responses:

- (1) coordination and accountability across public services and Government;
- (2) magnifying the voices of victims;
- (3) centralised (and cross-departmental) oversight in the application of hate crime legislation;
- (4) continuity and consistency in the application of hate crime policy and responses (including and in particular by the police);
- (5) strong symbolic commitment to tackling hate crime;
- (6) monitoring trends in and responses to hate crime; and
- (7) promoting preventative measures.

12.37 Protection Approaches outlined its support in the following terms:

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<sup>39</sup> For example, recommendation 32 of our report in relation to protection of official data was that “An independent, statutory commissioner should be established with the purpose of receiving and investigating allegations of wrongdoing or criminality where otherwise the disclosure of those concerns would constitute an offence under the Official Secrets Act 1989.” See Protection of Official Data: Report (2020) Law Com No 395, para 10.108.

<sup>40</sup> Hate crime legislation in Northern Ireland, Independent Review, Final Report (December 2020) p 47. Available at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf>.



Despite [the] vast apparatus [to prevent and tackle hate crime], there is no current point of responsibility or oversight apart from the Minister. A Hate Crime Commissioner would be uniquely placed not only to provide oversight of the state's implementation of hate crime laws but as a critical focal point and spokesperson. A commissioner could play a pivotal role in ensuring police, CPS, and civil society are joined up. Such a role could help heal systemic gaps and widespread mistrust between communities and police.

12.38 The Jo Cox Foundation agreed:

[A Hate Crime Commissioner could be] particularly important given the current structure of responsibility for hate crime being split between the Home Office and [Department for Levelling Up, Housing and Communities], and the involvement of other departments and agencies such as the Ministry of Justice, the Government Equalities Office and the CPS.

#### Support for the identified functions of a Commissioner

12.39 Consultees who expressed support for the proposal were generally in agreement that the functions and activities listed above were appropriate.

#### *Assessing and monitoring the provision of services to people affected by hate crime*

12.40 First, consultees supported the role of the Commissioner in assessing and monitoring the provision of services to people affected by hate crime.<sup>41</sup> Their reasons included to promote best practice, identify gaps and inconsistencies in service provision, improve coordination between services, and to make recommendations for improvement.

12.41 Refuge commented:

A Hate Crime Commissioner could play a key role in investigating and highlighting gaps in support service provision, promote best practice, oversee the collection of data, and ensure minimum quality standards are met across different support services.

#### *Monitoring the consistency and effectiveness of police recording and the application of CPS guidance*

12.42 Secondly, consultees agreed that the Commissioner could complement the work of HMICFRS in monitoring the consistency and effectiveness of police recording of hate crime and incidents and complement the work of HMCPSI in monitoring the extent to which the CPS applies its hate crime legal and policy guidance in relevant hate crime areas. This support was made expressly and generally in support of monitoring to promote consistency in the application of hate crime legislation within the criminal justice system.<sup>42</sup>

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<sup>41</sup> Refuge; the Jo Cox Foundation; Connected Voice; the Office of the Police and Crime Commissioner Gwent; the NPCC LGBT+ Portfolio, on behalf of the National LGBT+ Police Network; Equally Ours; Northumbria PCC; a collection of students from Newcastle University; Newcastle University Human Rights and Social Justice Forum; Roma Support Group; Schools OUT; Galop.

<sup>42</sup> Refuge; a collection of students from Newcastle University; Newcastle University Human Rights and Social Justice Forum; Antisemitism Policy Trust; GIRES; Dimensions; The Alan Turing Institute; Roma Support



12.43 Beyond monitoring the consistency and effectiveness of recording hate crime and incidents by the police, consultees considered that a Commissioner could have an important role ensuring consistency and best practice in police responses to hate crime and hate incidents. Consultees representing the interests of those with different protected characteristics highlighted the range of police responses they received and the need for specific accommodation to engage with and facilitate the reporting of crimes by these groups.

12.44 For example, the Roma Support Group highlighted the “additional barriers to Roma people being able to report hate crimes online” and the “frustrating and inconsistent” experiences with “police practices relating to hate crime”. Similarly, the Foundation for People with Learning Disabilities and the Mental Health Foundation in a joint response suggested that a Commissioner could have “a specific role in reviewing police practice governing learning disability hate crime and ensuring that the laws are enacted in full.”

12.45 Other consultees gave reports of “considerable regional divergence” in how policy is applied by the police and prosecution services.<sup>43</sup>

#### *Monitoring the effectiveness of alternatives to prosecution, such as restorative justice*

12.46 Third, several consultees were particularly supportive of any Commissioner monitoring the effectiveness of non-criminal justice responses to hate crime, especially restorative justice.<sup>44</sup>

12.47 Stonewall said that, “there is evidence to suggest that [many] LGBT+ victims of hate crime would favour restorative justice measures”. Their response continued:

Restorative justice is particularly important given the injustices posed to Black people by and in the criminal justice system, as highlighted by the global Black Lives Matter movement; alongside the injustices posed to communities of colour more widely by and in the criminal justice system. There is an urgent need for significantly increased investment in restorative justice approaches. [...]

We therefore strongly recommend that the legal remit of the Hate Crime Commissioner goes further than “monitoring effectiveness”, and explicitly requires the Commissioner to play an active leadership role in this area of work.

12.48 The organisation Why Me? also hoped that any new post could “embed the use of restorative justice for victims of hate crime in guidance” for criminal justice agencies, including the [Ministry of Justice], police, probation service, CPS and courts service. Their response continued:

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Group; Stonewall; the Office of the Police and Crime Commissioner Gwent; University of Central Lancashire Students Union;

<sup>43</sup> Dimensions; Covid-19 Anti-Racism Group (CARG).

<sup>44</sup> Our Streets Now; Bent Bars Project; one chief officer in the NPCC; a collection of students from Newcastle University; Stonewall; Newcastle University Human Rights and Social Justice Forum; Why Me?; Muslim Council of Britain; Bar Council; Office of the Police and Crime Commissioner (PCC) for Northumbria.

Strong leadership is vital in this area: the use of restorative justice for hate crime is not common practice in most police and probation areas, so a strong and consistent message is needed to change the mindset of staff working with victims of crime.

12.49 Similarly, the Muslim Council of Britain agreed that a Commissioner could “help to implement more effective non-criminal responses to prevent and mitigate the harmful effects of hate crime in the community.”

12.50 Generally, consultees were supportive of the Commissioner having a role in addressing issues which extend beyond the criminal justice system. The Bar Council said:

The issues arising from hate crime extend beyond criminal justice. They are analogous to modern slavery in that many of the crimes will be unreported and hidden from the criminal justice authorities.

12.51 This was also supported by individual consultees. For example, one individual responding in a personal capacity said that oversight of responses other than prosecution and suggestion of preventative measures would be “essential”.

#### *Supporting the carrying out of research*

12.52 Consultees were generally in favour of the Commissioner having a role supporting the carrying out of research and collection of data relating to hate crime.<sup>45</sup> English PEN considered this function would also be important for gathering evidence on “the nature and extent of the harm caused by hate speech”.

12.53 The Alan Turing Institute also emphasised “improving the provision of information about hate crime” as a function “of particular importance”. In relation to information on online abuse, their response said:

In 2019 we surveyed the available evidence on online abuse and hate and found huge gaps in [it]. We summarised that the evidence is, “fragmented, incomplete and inadequate”. In particular, as of 2020, the official hate crime statistics from the Home Office no longer include any evidence on online hate. This is a huge omission, and there are numerous other problems with how hate crime is evidenced, and how information is communicated to stakeholders and the public.<sup>46</sup>

#### *Supporting the development and implementation of educational resources to challenge prejudicial behaviour*

12.54 Consultees were supportive of an educational function for the Commissioner,<sup>47</sup> and many drew the link between improved education and prevention of hate crime.

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<sup>45</sup> Refuge; Equally Ours; a collection of students from Newcastle University; Newcastle University Human Rights and Social Justice Forum; Stonewall; British Naturism; the Office of the Police and Crime Commissioner Gwent.

<sup>46</sup> Citations omitted.

<sup>47</sup> RCT People First; Tyne and Wear Chapter of Citizens UK; Our Streets Now; a collection of students from Newcastle University, Newcastle University Human Rights and Social Justice Forum; Naturist Action Group;

### *Raising awareness of the prevalence and specific impacts of hate crime on individuals and communities*

12.55 There was also good support for a Commissioner having an awareness-raising role.<sup>48</sup> Several stakeholders considered that improving public awareness about hate crime would encourage and support victims to report hate crimes and incidents to the police.

12.56 The National AIDS Trust said:

We agree that the role may also help to raise the profile of hate crime in communities and encourage victims coming forward and reporting hate crimes and incidents where they have previously felt unable to do.

### *Centralised consultation with stakeholders from across all hate crime strands*

12.57 Consultees supported the function of a Commissioner conducting consultation with a diverse range of stakeholders who represent the views of affected parties across all hate crime strands.<sup>49</sup> Protection Approaches elaborated that this would help “create a much needed forum to connect stakeholders from affected communities, victim groups, and civil society with those tasked with implementing the law, from the police to the CPS to the Home Office.”

12.58 Regarding the breadth of consultation required, Nottingham City Council said: “Any such role would need to be linked into front line services and communities across the country to be effective in listening to and raising concerns of those most affected.”

12.59 British Naturism said:

A key factor in the successful application and ongoing review of hate crime legislation will be an understanding of the minority groups that make up the protected characteristics and to be able to maintain the dialogue with a responsible Commissioner in future would be of continuing benefit to affected stakeholders.

### *Cooperating and consulting with other Commissioners*

12.60 Consultees were in favour of any Commissioner cooperating and consulting with other Commissioners,<sup>50</sup> including the Domestic Abuse Commissioner; Victims’

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Tyne and Wear Chapter of Citizens UK; English PEN; the Office of the Police and Crime Commissioner Gwent.

<sup>48</sup> Changing Faces; Roma Support Group; British Naturism; National AIDS Trust; Connected Voice; Office of the Police and Crime Commissioner Gwent; Our Streets Now; the Alan Turing Institute; a collection of students from Newcastle University; Newcastle University Human Rights and Social Justice Forum; Connected Voice; Equality and Inclusion Partnership; Roma Support Group; Protection Approaches; Stonewall; the Office of the Police and Crime Commissioner Gwent.

<sup>49</sup> English PEN; Southwark Council; British Naturism; National AIDS Trust; Southwark Council; The Alan Turing Institute; a collection of students from Newcastle University; Newcastle University Human Rights and Social Justice Forum; Stonewall; Protection Approaches; the Office of the Police and Crime Commissioner Gwent.

<sup>50</sup> Nottingham City Council; Office of the Police and Crime Commissioner (PCC) for Northumbria; Southwark Council; Equally Ours; Refuge; NPCC LGBT+ portfolio, on behalf of the National LGBT+ Police Network; Protection Approaches; the Office of the Police and Crime Commissioner Gwent.

Commissioner; Independent Anti-Slavery Commissioner; Children’s Commissioner; the Commission for Countering Extremism; and Police and Crime Commissioners.

12.61 Consultees noted that this would help ensure a joined-up approach and avoid duplication. Several consultees pointed to how a Commissioner for hate crime could learn from the experiences of the existing commissioners.<sup>51</sup> Equally Ours added that strong cooperation would ensure that “in avoiding duplication no-one slips through the cracks”.

#### *Keep hate crime legislation under review*

12.62 Consultees were in favour of the Commissioner keeping hate crime legislation under review, including to monitor its effectiveness and keep under consideration the need for additional protected characteristics.<sup>52</sup>

#### *Additional functions for the Commissioner*

12.63 The following are additional functions which consultees suggested should form a part of the activities of a Commissioner:

- (1) a role in relation to intersectionality and hate crime;<sup>53</sup>
- (2) reducing the impact of hate crime on freedom of expression, by “leading a public discussion about what is and what is not legally considered hate speech” and “debunking misconceptions about the reach of the law”;<sup>54</sup>
- (3) holding the Government to account for law and policy which impacts victims of hate crime;<sup>55</sup>
- (4) providing signposting services for victims;<sup>56</sup> and
- (5) ensuring representation of and discussion with groups not currently protected by hate crime law.<sup>57</sup>

12.64 Several consultees asked whether the Commissioner would have a role in relation to reporting and investigating hate crimes, and whether they would have any remit to receive complaints.

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<sup>51</sup> Newcastle University Human Rights and Social Justice Forum; Antisemitism Policy Trust.

<sup>52</sup> Antisemitism Policy Trust; Magistrates Association; British Naturism; the Office of the Police and Crime Commissioner Gwent.

<sup>53</sup> Equally Ours; Stonewall.

<sup>54</sup> English PEN.

<sup>55</sup> Birmingham & Solihull Women's Aid; Dr Jen Neller (Birkbeck University of London).

<sup>56</sup> Antisemitism Policy Trust; Dimensions.

<sup>57</sup> Changing Faces.

## Conditions for the Commissioner to be effective

12.65 Consultees in support of a Commissioner nonetheless identified several conditions which they considered necessary for the role of the Commissioner to be effective:

- (1) statutory footing;<sup>58</sup>
- (2) robust powers;<sup>59</sup>
- (3) independence;<sup>60</sup>
- (4) transparency;<sup>61</sup>
- (5) a properly defined role;<sup>62</sup>
- (6) adequate funding;<sup>63</sup>
- (7) legal duties on other public and statutory bodies to cooperate with the Commissioner;<sup>64</sup>
- (8) a robust and appropriate selection and appointment procedure,<sup>65</sup> which may be “democratic” and not “political or London-centric”;<sup>66</sup>
- (9) a duty to consult with affected groups.<sup>67</sup>
- (10) clearly established relationships with other agencies to avoid duplication;<sup>68</sup> and
- (11) accountability (possibly to Parliament).<sup>69</sup>

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<sup>58</sup> Equally Ours.

<sup>59</sup> MOPAC; Women’s Health Network; Office of the Police and Crime Commissioner (PCC) for Northumbria; Nottingham City Council; Connected Voice.

<sup>60</sup> The Bar Council; MOPAC; Women’s Health Network; Newcastle University Human Rights and Social Justice Forum; Office of the Police and Crime Commissioner (PCC) for Northumbria; Nottingham City Council; National AIDS Trust; Brandon Trust; Stand Against Racism & Inequality (SARI) and Bristol Hate Crime & Discrimination Services.

<sup>61</sup> The Bar Council; Nottingham City Council.

<sup>62</sup> Refuge; VAWG and Hate Crime Team, London Borough of Tower Hamlets.

<sup>63</sup> Stonewall; Equally Ours; Naturist Action Group; The Bar Council; MOPAC; Protection Approaches; National AIDS Trust; Connected Voice.

<sup>64</sup> Stonewall.

<sup>65</sup> Stonewall.

<sup>66</sup> Brandon Trust; Stand Against Racism & Inequality (SARI) and Bristol Hate Crime & Discrimination Services; Resolve West.

<sup>67</sup> Equally Ours.

<sup>68</sup> Equally Ours; Refuge; Naturist Action Group; Southwark Council.

<sup>69</sup> Naturist Action Group; Newcastle University Human Rights and Social Justice Forum; Office of the Police and Crime Commissioner (PCC) for Northumbria.

12.66 Many consultees commented on the qualities which any Commissioner would have to possess, including:

- (1) expertise;<sup>70</sup>
- (2) experience (which some consultees described as an understanding of the “context of hate crimes”,<sup>71</sup> while for others “lived experience” is needed);<sup>72</sup> and
- (3) the ability to engender trust from affected groups.<sup>73</sup>

#### Neutral comments

12.67 Several consultees were unsure and neither supported nor objected to the introduction of a Commissioner. In their reasoning, many of the benefits agreed upon above were cited alongside concerns echoing some of those expressed by those who would not support the creation of a Commissioner.

12.68 Many consultees who were unsure said their support was dependent on the precise terms, remit, resourcing and powers of the Commissioner. For this reason, several called for further consultation and asked for more information before a decision is made.<sup>74</sup>

#### Overlap and duplication

12.69 First, there were comments about the overlap and duplication of functions with existing roles. Notably, the Welsh Government response said that while it was “familiar with the potential benefits of Commissioner roles to address major issues and drive change”:

It appears that a Hate Crime Commissioner may duplicate the roles of several Government Departments and organisations and potentially introduce more confusion.

12.70 Victim Support also commented on the overlap with the Victims’ Commissioner which “already has responsibility for promoting good practice for victims, including hate crime victims, and reviewing the service provided to them”. The response continued:

It is not clear how the creation of a new Hate Crime Commissioner post would work alongside the Victims’ Commissioner, or whether victims of certain crimes such as hate crime would benefit from having specific Commissioners in silo, as opposed to there being one overarching Victims’ Commissioner.

12.71 The Women’s Aid Federation of England asked for more information about the overlap with the Equality and Human Rights Commission and what the relationship would be between the two offices. Among the Association of Police and Crime Commissioners,

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<sup>70</sup> Mishcon de Reya LLP.

<sup>71</sup> Birmingham & Solihull Women’s Aid.

<sup>72</sup> Stand Against Racism & Inequality (SARI) and Bristol Hate Crime & Discrimination Services.

<sup>73</sup> National AIDS Trust.

<sup>74</sup> Welsh Government; Women’s Aid Federation of England.

there were mixed views, with some Police and Crime Commissioners (“PCCs”) describing the introduction as a “positive step”, and others concerned that it would “undermine the statutory responsibility for victims’ support services that rests with PCCs”. Other consultees thought that the role could be incorporated into an existing Commissioner’s remit, such as the Commissioner on Countering Extremism.

### Independence

12.72 Second, consultees expressed concern about the independence of the role and asked how any Commissioner would be held accountable. Consultees demonstrated different understandings of what independence entailed for them, including independence from civil society organisations; certain views and political leanings; any political party; other Commissioners; and the Government.

12.73 The CPS sought to emphasise that:

Should the office of a Hate Crime Commissioner be created, then it is essential that their role be clearly circumscribed so as to ensure that the independence of the Crown Prosecution Service and prosecutorial decision making remains absolute.

### Freedom of expression

12.74 Third, some consultees were anxious to ensure that a Commissioner would also work to uphold freedom of expression.

### Selection process

12.75 Fourth, consultees sought more information about the selection process and qualification requirements of any individual who might become the Commissioner. Several suggested that one or both of the creation and appointment of the Commissioner ought to be subject to a vote. One consultee suggested the role should be limited to a former holder of high judicial office to avoid politicisation.

### Suitable candidate

12.76 Finally, on who might be a suitable candidate for the Commissioner role, consultees raised the extent to which one person would be able to represent or speak for all the protected characteristics.

### Responses against a Commissioner

12.77 Of consultees who responded negatively, several reasons were recurring. In many instances these reasons echo concerns expressed by consultees who were both in favour and unsure of whether to support the creation of a Commissioner.

### Resources and cost

12.78 The most prevalent reason given by consultees against a Commissioner was that it would be a waste of resources. In particular, the view was expressed that there are more important uses for public funds, both in terms of crime and policing, and within the national budget more broadly. For example, one individual said, “it would be a waste of taxpayers money” and another said that “from what we have seen, commissioners are an expensive waste of money”. One individual preferred that money be used for “the police and authorities to deal with existing crime instead”.



12.79 Other consultees were concerned that the cost of a Commissioner would be too expensive, if it was to be done effectively.

### Unnecessary

12.80 The second most prevalent reason was that a Commissioner was unnecessary, because the currently existing mechanisms are sufficient to enforce the law. For example, one individual said, “this seems unnecessary as the current system seems to work fine”. Another said, “I would go as far as to say it is the last thing England needs.”

12.81 In addition, consultees considered that there would be an overlap with currently existing roles, especially the Equality and Human Rights Commission, and aspects of the remit of already existing commissioners, such as the Police and Crime Commissioners and the Victims’ Commissioner.

12.82 One individual said, “There doesn’t need to be a commissioner for every type of crime”. Another individual was opposed to the idea on the basis that “hate crimes are no different than regular crimes”.

12.83 Many consultees also reiterated their view that hate crime laws should be abolished, and therefore there is no need for a Commissioner for hate crime.

### Independence

12.84 Consultees were concerned that it would be difficult to guarantee the independence of the Commissioner, both from government and interest groups, as well as to secure their accountability. For example, one individual said that the Commissioner position would be “open to abuse along party lines”.

12.85 This argument extended to concerns that the existence of a Commissioner would be self-fulfilling and have an institutional interest in perpetuating the existence of hate crime. One individual said that the Commissioner would lead to “prosecution targets, to justify that person’s job.” Another individual said that this would perpetuate the “hate crime industry”.

### Free speech

12.86 Consultees considered that the introduction of a Commissioner would be damaging to freedom of speech. For example, one individual said that a Commissioner would be “just another way of stopping free speech and language policing”.

### Damaging to equality

12.87 Other consultees argued that the existence of a Commissioner would worsen equality and encourage division in society. For example, one individual said that the Commissioner would “lead to promotion of divisive ideas and beliefs” and “would undoubtedly cause a widening of divisions within society”.

### Unsuitable for one person

12.88 Some consultees objected to the role on the basis that hate crime laws are too subjective and definitionally imprecise to be overseen by a single person. For example, one individual said, “To give one person authority over the application of



hate crime laws invites bias [...] I have no faith that a truly unbiased person could be appointed.”

### Ineffective

12.89 Consultees considered that a Commissioner would not be effective to reduce hate crime. In particular, several consultees pointed to the record of other commissioners and did not think there was evidence to suggest this role would be any more effective. One individual said that, in their view, other Commissioners are “entirely useless and this new position would be yet another overpaid under-effective political appointment.”

### Insufficiently justified

12.90 Several consultees considered that the case for introducing a Commissioner was not sufficiently justified in the consultation paper.

### Alternatives to a Commissioner

12.91 Consultees proposed four alternatives to a Commissioner.

### Expanding the remit of the Victims’ Commissioner

12.92 Victim Support suggested that the powers of the Victims’ Commissioner (“VC”) could be strengthened to “advance the interest of hate crime victims”. They suggested the following be enacted through primary legislation:

The creation [of] a statutory duty on criminal justice agencies to co-operate with the VC.

The power to issue reports to the relevant Secretary of State and criminal justice agency, and for them to respond to recommendations within a set period of time.

A greater role for the VC in monitoring the operation of the Code of Practice for Victims of Crime.

### A cross-governmental approach

12.93 The National Police Chiefs’ Council noted that a Commissioner may “be a more expensive solution [compared] to the coordination of a central policy programme”, saying that they “believe the UK progressed significantly under the oversight of a single cross-government programme from 2007-2017” and were critical of its removal.

### A group or committee

12.94 Several consultees suggested that a group or committee would be more appropriate than an individual Commissioner. This was because a group could be more representative of different protected characteristics, and this was considered to give the group more credibility and provide a better position from which to engage with the public.

### Changing the name

12.95 Several consultees thought that the term “Hate Crime Commissioner” was inappropriate, because it sounded like a person who would commission hate crimes. They proposed we choose an alternative name, if any recommendation is made.

## Conclusion following consultation

- 12.96 In the consultation paper, we considered arguments both in favour of and against creating a Commissioner for hate crime. We explored functions which the Commissioner might serve, largely by comparison to existing roles, especially the Domestic Abuse Commissioner and Independent Anti-Slavery Commissioner. We did not make a provisional proposal, but instead asked consultees for their views.
- 12.97 Consultees gave a mixed response to this question, with individuals largely against and organisations largely in favour of the creation of a Commissioner.
- 12.98 Those who responded positively saw the achievement of the identified benefits and functions as a good thing, and therefore supported an institution which could do this. This support may be described as functionally conditional, as it is not clear that consultees were wedded to these aims being achieved by a Commissioner or being pursued more generally. However, there was agreement that a Commissioner could be one way to achieve those ends.
- 12.99 The precise remit of any Commissioner is beyond the scope of this review, and priorities among functions identified (and any others) would remain a matter for Government. If the functions identified are not addressed through a Commissioner, there may be scope for them to receive renewed focus in the next Hate Crime Strategy.
- 12.100 Numerically, the majority of consultees were against a Commissioner. Underlying the negative responses is an assessment that any Commissioner would not be able to achieve the functions envisaged (either at all, or at a reasonable cost). There is also a strong view that a Commissioner is not necessary to achieve those ends because existing structures could do so, or because they are not valuable ends if the concept of hate crime is rejected.

## The role of a Commissioner

- 12.101 We believe that a Commissioner with specific remit for hate crime could serve valuable functions, in particular assessing and addressing the causes of hate crime (through research, education and preventive measures) and by supporting the improvement of responses to hate crime. There are several functions which would merit particular focus by the Commissioner:
- (1) monitoring trends in hate crime and suggesting legal and operational responses to government;
  - (2) preventing and countering hatred in communities; and
  - (3) exploring non-criminal justice responses to hate crime – in particular, restorative justice.
- 12.102 We are sensitive to the concerns raised by consultees both in favour of and against the Commissioner. Many of these concerns relate to issues which are ultimately beyond the remit of this review (such as the budget, powers, duties and appointment process for the Commissioner) and the resolution of which would be a matter for the Government. We support the view that the Commissioner should have a clearly

defined role, including in their relationship to other Commissioners, to support efficiency and prevent duplication. In this regard, we do not believe that a Commissioner would necessarily have significant overlap with other existing roles, even if there are theoretical areas of functional overlap.

#### Responding to consultees' concerns

12.103 This consultation revealed the sense of deep unease which some individuals have about hate crime laws. In particular, we heard from individuals who say they are afraid that hate crime laws prevent them from speaking freely and they consider that hate crime laws damage, rather than build, equality in society.

12.104 We acknowledge these concerns and would support any Commissioner having a remit to explore and monitor the impact of hate crime laws on free speech and equality. We also consider that a Commissioner could help to improve the public understanding of what amounts to a hate crime, so that individuals are not limited by a chilling effect caused through lack of access to accurate and accessible information about the scope and content of the law. Concerns about the appropriate response to hate crime may also be addressed by the Commissioner and their role to explore and support non-criminal justice responses to hate crime.

#### Addressing the alternative suggestions

12.105 First, with regards to the suggestion to expand the remit of the Victims' Commissioner, we note that in the consultation paper we paid closer attention to the remits of the Domestic Abuse Commissioner and the Independent Anti-Slavery Commissioner because "their remit relates to a specific criminal context."<sup>75</sup> We also note that none of the proposals suggested by Victim Support are particular to hate crime. It would be beyond the remit of this review to propose changes to the role of the Victims' Commissioner which either only applied to victims of hate crime, or which applied to all victims of crime.

12.106 Second, in relation to the NPCC's preference for a cross-governmental approach rather than a Commissioner, we note that underlying this suggestion is a recognition of the need for improved governmental, department and cross-agency cooperation on hate crime. This is also one of the reasons why we support the creation of a Commissioner. While it is beyond the remit of this review to call for the development of a new Government strategy, we support the need for improved coordination on hate crime.

12.107 Third, we understand the view that it may be difficult for a single Commissioner to represent all hate crime protected characteristic groups, and there may be merit in having a more representative group. However, we also consider that having a group or series of commissioners may lose the impact of a single focal point and figurehead. We believe that if the Commissioner had a strong remit for consultation with affected groups then this concern may be counterbalanced. Ultimately, the structure and format of any Commissioner (or committee) would be a matter for the Government. We note the example of Independent Advisory Groups, which work with police forces to help support their work representing the communities they serve. The Government

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<sup>75</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, para 20.5.

may wish to consider this and other models of ensuring that any office is representative and can build trust with affected groups.

12.108 Finally, we note the comments from some consultees' that the name "Hate Crime Commissioner" may not be suitable. The Government may wish to consider the most appropriate name for this position when evaluating whether and if so how to implement this recommendation. A title along the lines of "Commissioner for Countering Hate Crime" may be more appropriate.

### Recommendation

12.109 We consider that a Commissioner would provide a valuable focal point to support efforts to counter the harm caused by hate crimes – including through preventative and restorative approaches. It is beyond the scope of our terms of reference to recommend the establishment of such a role, and we therefore limit our recommendation to a suggestion that the Government consider further the merits of doing so.

### **Recommendation 33.**

12.110 We invite the Government to consider establishing a Commissioner for countering hate crime.

## **A HATE CRIME ACT**

12.111 As we outlined in Chapter 2, hate crime laws in England and Wales are spread across four different Acts. These are:

- the Crime and Disorder Act 1998 ("CDA 1998"), which in Part II contains the provisions creating racially and religiously aggravated versions of 11 existing criminal offences.
- The Sentencing Code ("SC"), which contains the enhanced sentencing provisions in section 66.
- The Public Order Act 1986 ("POA 1986"), which creates the offences of stirring up hatred in Parts 3 and 3A.
- the Football (Offences) Act 1991, section 3 of which creates the offence of racist chanting at a football match.

12.112 In our consultation paper we suggested that bringing together some of these provisions into a single statute may help make the law clearer and more intelligible, particularly for those that work with it (such as law enforcement agencies and community organisations).<sup>76</sup> We noted that a similar approach had been taken in Scotland with the Hate Crime and Public Order (Scotland) Act 2021. We also drew

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<sup>76</sup> Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 9.19 to 9.27

comparisons with the thematic legislative approach taken in England and Wales with the Modern Slavery Act 2015, and most recently with the Domestic Abuse Act 2021.

12.113 We accepted that the enhanced sentencing provisions in section 66 of the Sentencing Code should remain in that location as that would be consistent with the wider interest of the consolidation and simplification of sentencing procedure law that the Sentencing Code is designed to achieve.

12.114 In respect of football-specific hate crime offences, we suggested that given the specific context of these offences and their connection to a wider array of civil mechanisms such as football banning orders, they might also most appropriately remain within the existing football offences regime.

12.115 However, we argued that the substantive aggravated offences provisions in Part II of the CDA 1998, and the stirring up hatred offences in Parts 3 and 3A of the POA 1986, could helpfully be grouped together into a single Hate Crime Act, as could any new provisions relating to the role of a Commissioner for Countering Hate Crime that we discussed earlier in this chapter.<sup>77</sup>

12.116 We also suggested that any amending provisions for enhanced sentencing and football offences could be made by way of this Hate Crime Act even if the offences themselves remained in their current Acts.

## Consultation

12.117 We asked the following at Consultation Question 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.

Do consultees agree that hate crime laws should, as far as practicable, be brought together in the form of a single “Hate Crime Act”?

12.118 A large number of responses were opposed to the creation of a Hate Crime Act. The vast majority of these were personal responses, and typically indicated a wider opposition to hate crime laws. Expression of this wider opposition to hate crime laws (a consistent theme in many responses to this consultation) may have been particularly pronounced in this question as it was the first question in the consultation.

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<sup>77</sup> See Hate crime laws: A consultation paper (2020) Law Commission Consultation Paper No 250, paras 9.22 to 9.24

Although it asked a somewhat technical question about the location of laws, it also touched on wider symbolic concerns that respondents had about the concept of hate crime.

12.119 Of those consultees who responded negatively to this proposal, a significant number did so in the belief that hate crime laws constitute an unnecessary interference with freedom of speech.

12.120 Kent ReSisters said that

Any changes being written into law and the potential for negative consequences in practice of extending the reach of these laws have the potential for [a] substantial 'chilling effect' on freedom of speech.

12.121 Wild Woman Writing Club expressed the opinion that hate crime laws are "in practice used as a tool to suppress unpopular political speech."

12.122 The concern that hate crime laws create inequality before the law by specifying protected characteristics also arose in this context. For example:

- (1) Kent ReSisters said that "The idea that behaving in a certain way could sometimes be seen as criminal or not, or that a crime might be seen as more serious depending on who the alleged victim is, does not treat people as equals."
- (2) Wild Woman Writing Club said that "We disagree with the concept of 'hate crime' altogether... If some victims are given greater protection in law than others then this perpetuates inequalities in society and undermines the fundamental principle of equality before the law. Those who are not deemed to have protected characteristics will justifiably feel inadequately protected by the law."
- (3) Another personal response said "I don't think it is right that if you [are] a member of a community with protected characteristics you get legal protections from criticism or anything else you don't want to hear and enhanced punishments if someone carries out a crime against you. We should all be equal under the law and the punishment should be the same for everyone, regardless of minority status."

12.123 Consultees who focussed on the specific question of the legislative location of hate crime laws were more positive about our provisional proposal to bring some of these laws together into a single Act.

12.124 The Crown Prosecution Service considered that it would assist prosecutors:

Prosecutors have found the current legal framework for hate crime fragmented and potentially confusing. Prosecuting hate crime cases has also highlighted anomalies in the current legislative framework. A new overarching 'Hate Crime Act' could have the benefit of bringing together all of the various pieces of hate crime legislation and would provide an opportunity to simplify the law, whilst also resolving the anomalies.

12.125 Protection Approaches similarly argued that “A single Hate Crime Act would bring cogency, coherence, and clarity to currently disparate and disconnected sets of laws and protections.”

12.126 The Office of the Police and Crime Commissioner for Nottinghamshire said that

A clear and new piece of primary legislation to consolidate the existing legislation and deal with inconsistencies and unhelpful complexities in the existing legislative landscape is strongly supported.

12.127 The Law Society agreed:

in our view the current law has evolved in a haphazard manner resulting in the provisions appearing in different statutes; a single statute would make the law clearer and easier to locate for professionals and the public alike.

12.128 Members of the National Police Chiefs’ Council (“NPCC”) also unanimously agreed with this proposal, stating that:

The current situation of disparate statutes, differing rules and applicability is confusing and in our view undesirable as it adds an unwanted complicating factor to an already challenging issue that sits, for many, as a test of public confidence for groups with poor experiences with the criminal justice system.

12.129 A number of other organisations connected their support for a single Hate Crime Act with their wider aspiration for parity of treatment of protected groups.

12.130 The Antisemitism Policy Trust said that “A new act would ensure that the inferred hierarchy of victims, which is a by-product of current legislation, would be limited.”

12.131 The Government Independent Advisory Group on Hate Crime observed that “[t]he complexity of the current system creates a ‘hierarchy of hate’ leaving certain communities feeling disadvantaged and isolated.”

12.132 Stonewall supported

the creation of a single Hate Crime Act that consolidates complex and piecemeal existing legislation, and extends and equalises protections across all protected characteristics, including sexual orientation and transgender identity.

12.133 A number of consultees expressed the view that a single Hate Crime Act would improve understanding of hate crime laws amongst the public, police officers and service providers and across the criminal justice system.

12.134 For example, the Hate Crime Unit said that:

creating a single Hate Crime Act will facilitate the ... public understanding of hate crime law, by removing the need for extensive research and access to many different Acts such as the CDA 1998 and the POA 1986. This will positively improve many aspects of the rule of law previously lacking in this area: clarity, transparency, consistency and access to justice.

12.135 Hampshire Constabulary noted that consolidation of existing hate crime laws would aid “interpretation and understanding of officers” and

enhance our chances of consistency in service delivery and protecting victims. Currently this relies upon those with wider understanding, or a level of specialism in ensuring these laws are used fairly and consistently.

12.136 The NPCC unanimously agreed, stating that “The simplification and consolidation will greatly assist training and offers an opportunity to develop renewed best practice [and] embed this within organisational culture.”

12.137 Finally, the symbolic power of creating a dedicated Hate Crime Act was seen as a key benefit by some respondents.

12.138 The NPCC said it would send “a powerful signal of its purpose to victims and the public and the consequences of transgression to potential perpetrators and offenders.”

12.139 The Hate Crime Unit also held the view that “a Hate Crime Act will act as a symbol for the law’s continued (and increased) protection of society’s most vulnerable.”

12.140 However, HHJ Charles Wide QC argued in an article that

It would be an extraordinary category error to call a consolidating/reforming statute the ‘Hate Crime Act’<sup>78</sup>

12.141 He acknowledged that the proposed act would contain the offences of stirring up hatred, but argued that the majority of the laws (aggravated offences and enhanced sentencing) relied on a test of hostility, not “hate”.

### **Conclusion following consultation**

12.142 We acknowledge the strong concern and opposition towards hate crime laws that was expressed in many responses to this consultation question. While these responses addressed a wider question about the appropriateness of hate crime laws altogether, we also accept that a fair reading of these responses would include opposition to a Hate Crime Act, as such legislation would clearly entrench and reinforce the hate crime regime.

12.143 However, given that the terms of reference for this review are clearly predicated on the ongoing existence of hate crime and hate speech laws in England and Wales, we remain of the view that a single act would be a useful way of grouping these laws in the future. We were particularly persuaded by the views of police and prosecutors in this regard who argued that it would be helpful to them in the course of their work.

12.144 We also consider that “Hate Crime Act” would be a clear and logical title for such an act because the term “hate crime” is widely used to describe these laws and has been adopted by government and law enforcement agencies for decades.

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<sup>78</sup> Charles Wide, “Hostility crime and the Law Commission” (2021) *Policy Exchange*, p 6. Available at <https://policyexchange.org.uk/publication/hostility-crime-and-the-law-commission/>.



12.145 In recommending the introduction of a Hate Crime Act, we wish to emphasise that such an approach is not an essential part of the reforms we have recommended. Far more important are our recommendations to equalise legal protections across hate crime characteristics, as well as related technical recommendations to improve the operation of the law. These could easily be achieved within the existing legal framework if government were to prefer this course.

12.146 If a Commissioner for Countering Hate Crime is to be introduced, then a Hate Crime Act could also be used to establish this office and its powers.

#### **Recommendation 34.**

12.147 We recommended that a single act bring together existing hate crime laws and incorporate the various reforms that we recommend in this report. Specifically, we recommend:

- moving 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 act; and
- using the act as a vehicle for amendments to the Sentencing Code, but retaining the substantive sentencing provisions within the Code.

## Chapter 13: Recommendations

### Recommendation 1.

13.1 We recommend that decisions to include, or not to include further groups in hate crime laws should be based on the following criteria:

- (1) Demonstrable need: evidence of the prevalence of the criminal targeting of the characteristic group based on prejudice or hostility. A balance of the following considerations should inform this determination of need:
  - (a) Absolute prevalence: the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.
  - (b) 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.
  - (c) Severity: the nature and degree of the criminal behaviour that is targeted towards the characteristic based on hostility or prejudice.
- (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.

**Paragraph 3.93**

### Recommendation 2.

13.2 We recommend that the definition of “race” in hate crime laws be retained in its current form.

**Paragraph 4.67**

**Recommendation 3.**

13.3 We recommend that the definition of “religion” in hate crime laws be retained in its current form.

**Paragraph 4.111**

**Recommendation 4.**

13.4 We recommend that the definition of “sexual orientation” for the purposes of hate crime and hate speech laws be amended to include protection of persons who are “asexual”.

**Paragraph 4.152**

**Recommendation 5.**

13.5 We recommend that the term “transgender” in hate crime laws be replaced with the term “transgender or gender diverse”.

13.6 The definition of “transgender or gender diverse identity” should include people who are transgender or transsexual men or women, and people who are gender diverse; for example, people who are non-binary, and people who otherwise do not conform with male or female gender expectations; for example people who cross-dress.

**Paragraph 4.230**

**Recommendation 6.**

13.7 We recommend that the definition of “disability” in hate crime laws be retained in its current form.

**Paragraph 4.279**

**Recommendation 7.**

13.8 We recommend that, consistent with the current approach to race and religion, the scope of protection for disability, sexual orientation and transgender or gender diverse identity be extended to “association” with these characteristics.

**Paragraph 4.288**

**Recommendation 8.**

13.9 We recommend that sex or gender should not be added as a protected characteristic for the purposes of aggravated offences and enhanced sentencing.

**Paragraph 5.381**

**Recommendation 9.**

13.10 We recommend that Government undertake a review of the need for a specific offence of public sexual harassment, and what form any such offence should take.

**Paragraph 5.397**

**Recommendation 10.**

13.11 We recommend that age should not be added as a protected characteristic in hate crime laws.

**Paragraph 6.139**

**Recommendation 11.**

13.12 We recommend that the current dual approach of aggravated offences and enhanced sentencing be retained in England and Wales.

**Paragraph 8.55**

**Recommendation 12.**

13.13 We recommend that aggravated offences be extended to cover all existing characteristics in hate crime laws: race, religion, sexual orientation, disability and transgender identity.

**Paragraph 8.70**

**Recommendation 13.**

13.14 We recommend that aggravated versions of reformed communications offences should not be created if the replacement “harm-based” and sending a threatening communication offence are created as either-way offences.

13.15 If the replacement offences are summary offences, or if the offences contrary to section 127 of the Communications Act 2003 are retained in their current form, we recommend that aggravated versions of these offences should be created.

**Paragraph 8.97**

**Recommendation 14.**

13.16 We recommend that no further aggravated versions of existing criminal offences should be created.

**Paragraph 8.135**

**Recommendation 15.**

13.17 We recommend that a conviction for an aggravated offence should be possible where the prosecution proves that the offence was motivated by or the defendant demonstrated hostility towards “one or more” protected characteristics.

13.18 However, the court should make a clear determination as to the characteristics that have formed the basis for sentencing, and these should be specified on the Police National Computer.

**Paragraph 8.196**

**Recommendation 16.**

13.19 We recommended that for all aggravated offences, both the Magistrates' Court and the Crown Courts should always be empowered to find the defendant guilty of the base offence in the alternative.

**Paragraph 8.238**

**Recommendation 17.**

13.20 We recommend that a court should ordinarily not be permitted to apply an enhanced sentence to a base offence where an aggravated version of that same offence could have been charged.

13.21 We recommend that an exception should exist where the prosecution has chosen to pursue an alternative aggravated form of the offence, which closed off the possibility of pursuing the hate crime aggravation; notably, the offence of assault on an emergency worker contrary to section 1 of the Assaults on Emergency Workers (Offences) Act 2018. In this scenario, a finding that a sentence enhancement should be applied should be open to the court, either in relation to the offence in section 1 of the Assaults on Emergency Workers (Offences) Act 2018, or in relation to the base offence of assault, if the additional elements of the emergency worker offence are not proven.

**Paragraph 8.256**

**Recommendation 18.**

13.22 We recommend that the legal test for the application of hate crime laws should be the same for aggravated offences and enhanced sentencing.

**Paragraph 9.36**

**Recommendation 19.**

13.23 We recommend that the demonstration limb of the legal test for aggravated offences and enhanced sentencing be retained.

**Paragraph 9.62**

**Recommendation 20.**

13.24 We recommend that the motivation limb of the legal test for aggravated offences and enhanced sentencing should be met when the offence was motivated (wholly or partly) by hostility or prejudice towards members of a group sharing a protected characteristic, based on their membership of that group.

**Paragraph 9.94**

**Recommendation 21.**

13.25 We recommend that there be a single test applying to all forms of hatred. Under this test a person would be guilty of stirring up hatred if they used words or behaviour intended to stir up relevant hatred; or used threatening or abusive words or behaviour likely to stir up relevant hatred.

13.26 For the “likely to” limb of this test, the prosecution would have to prove that the person knew, or ought to have known, that the words or conduct were threatening or abusive, and knew, or ought to have known, they were likely to stir up relevant hatred.

**Paragraph 10.143**

**Recommendation 22.**

13.27 We recommend that the stirring up hatred offences should cover the five characteristics currently protected by hate crime laws equally, subject to recommendation 29 on protections for freedom of expression.

**Paragraph 10.169**

**Recommendation 23.**

13.28 We recommend that the stirring up offences should be extended to cover hatred on grounds of sex or gender.

**Paragraph 10.216**

**Recommendation 24.**

13.29 We recommend that the dwelling exception be replaced with an exception for “private conversation”.

**Paragraph 10.296**

**Recommendation 25.**

13.30 We recommend that the wording of the stirring up offences make clear that the offences can apply to any writing, sign or visual representation.

**Paragraph 10.326**

**Recommendation 26.**

13.31 We recommend that the separate stirring up offences relating to plays and broadcasts should be repealed.

13.32 We recommend that provision should be made in the reformed stirring up offences to ensure that performers are not treated as either accessories or principals to the reformed stirring up offences only by reason of taking part as a performer.

13.33 We recommend that the provisions relating to the liability of producers and directors of plays and programmes are repealed. Ordinary principles of primary and accessory liability should apply to those who stage plays containing material intended or likely to stir up hatred.

13.34 We recommend that the current provision that requires a play to be considered “as a whole” should be incorporated into the reformed stirring up offences and apply to words, material or behaviour included in any dramatic, literary, artistic or journalistic work, whether a play, article, or broadcast programme. This would apply both to consideration of whether a work was likely to stir up hatred and whether it was threatening or abusive.

**Paragraph 10.370**



### **Recommendation 27.**

- 13.35 We recommend that the offences relating to dissemination of material intended or likely to stir up hatred should be consolidated in a single offence of disseminating inflammatory hate material.
- 13.36 Where intent to stir up hatred could not be proved, the prosecution would be required to show that the distributor had knowledge – actual or (in the case of a non-natural person) imputed – of the contents of the material and knew, or ought to have known, that the material was threatening or abusive and likely to stir up hatred.
- 13.37 We recommend that no offence would be committed by the exhibition or distribution of a film or video recording which had been granted a certificate by the British Board of Film Classification (or the local authority in whose area the film was shown).
- 13.38 We recommend that the protection for performers in plays should be retained and apply to all performers.
- 13.39 We recommend that the requirement to consider a play “as a whole” should be retained and apply to all material.
- 13.40 We recommend that, if the draft Online Safety Bill becomes law, inflammatory hate material should be included as “priority illegal content”, and the stirring up offences should not apply to social media companies and other platforms in respect of “user-to-user” content unless intent to stir up hatred on the part of the provider can be proved.

**Paragraph 10.424**

### **Recommendation 28.**

- 13.41 We recommend that the offences relating to possession of racially inflammatory and inflammatory material should be replaced with an offence of possession of inflammatory material with intent to stir up hatred. This would be restricted to material which was:
- (1) threatening or abusive;
  - (2) likely to stir up hatred; and
  - (3) possessed with an intention to stir up hatred by its dissemination.

**Paragraph 10.445**

### **Recommendation 29.**

13.42 We recommend that ‘freedom of expression’ provisions should be retained in respect of religion and sexual orientation. We recommend that these and any new provisions should be in the form of ‘avoidance of doubt’ clauses, along the lines of section 29JA of the Public Order Act 1986, rather than the ‘carve out’ approach found in section 29J of the Act. These ‘avoidance of doubt’ clauses should reflect our proposed test for the stirring up offences. That is, material that falls within the particular categories should not, of itself, be taken to be threatening or abusive, or intended or likely to stir up hatred.

13.43 We recommend that the protection in respect of religion should continue to cover 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.

13.44 We recommend that the protection in respect of sexual orientation should continue to cover the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct, and any discussion or criticism of marriage which concerns the sex of the parties to marriage.

13.45 We recommend that the existing protection for discussion and criticism of religious practices should be extended to cover cultural practices.

13.46 We recommend that a new protection should be introduced for discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of countries and their governments; and for discussion and criticism of policy relating to immigration, citizenship and asylum.

13.47 We recommend that in extending the stirring up offences to cover hatred towards trans or gender diverse people, a new protection should be introduced for view that sex is binary and immutable, and the use of language which expresses this.

**Paragraph 10.534**

### **Recommendation 30.**

13.48 We recommend that there should be a “neutral reportage” defence to the “likely to” limb of the stirring up offences.

**Paragraph 10.591**

**Recommendation 31.**

13.49 We recommend that any prosecution for stirring up hatred should require the personal consent of the Director of Public Prosecutions.

**Paragraph 10.671**

**Recommendation 32.**

13.50 We recommend that the offence in section 3 of the Football (Offences) Act 1991 should be retained in its present form.

**Paragraph 11.78**

**Recommendation 33.**

13.51 We invite the Government to consider establishing a Commissioner for countering hate crime.

**Paragraph 12.110**

**Recommendation 34.**

13.52 We recommended that a single act bring together existing hate crime laws and incorporate the various reforms that we recommend in this report. Specifically, we recommend:

- moving 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 act; and
- using the act as a vehicle for amendments to the Sentencing Code, but retaining the substantive sentencing provisions within the Code.

**Paragraph 12.147**

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