Bar Council response to the Law Commission consultation on Hate Crime Laws

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation on Hate Crime Laws[1].

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Chapter 9

Question 1: Do consultees agree that hate crime laws should, as far as practicable, be brought together in the form of a single "Hate Crime Act"?

4. Yes, the current piecemeal enactment of hate crime laws is confusing and difficult for the public to access. It will also provide a strong statement as to the importance of the protected characteristics in the criminal justice system.

[1] Consultation paper

Chapter 10

Question 2: We provisionally propose that the law should continue to specify protected characteristics for the purposes of hate crime laws. Do consultees agree?

5. Yes, it is the only sensible means of distinguishing hate or hostility which constitutes criminal behaviour from other forms of hate or hostility which are regularly experienced in everyday life, but which are deemed insufficiently deserving of criminalisation in a free society. It is perhaps unusual to define criminal behaviour by reference to the specific traits of its victim (most offences can be committed against any fellow citizen, whether particularly deserving of protection or not, albeit the nature of the offence, as with sexual offences, may be restricted to broad categories of victim), but there is no other obvious means by which to make the law clear and effective in terms of addressing the identified harm.

Question 3: 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?

6. Yes. In respect of (1), and the three criteria by which to test demonstrable need (namely absolute prevalence, relative prevalence and severity [§10.98]), there can be no arithmetical formula which alone determines which characteristic is deserving of protection by the criminal law. Inevitably there is a risk that instances of hostility towards certain groups are under-reported and/or those groups are under-represented. An example would appear to be GRT [§11.23-11.26], against whom the Equality and Human Rights Commission's 2018 Report recorded the highest level of negativity in society. It is of note that in Ireland theirs is a protected characteristic.

7. In respect of (2), we agree, for the reasons given, that 'disadvantage' (as defined at [§10.122, 13.86] is to be preferred to 'vulnerability' as a generic description for those subjected to the harms of hate crime [§10.40-10.41, 10-120].

8. In respect of (3), it is not entirely clear from the Consultation's treatment of individual characteristics how much weight is given to factors such as using the criminal law's 'symbolic function" in tackling hostility [eg §3.50-3.52, 3.91-3.94, 10.78, 10.112, 10.148, 12.178] and regarding criminalisation as an effective educative tool [§12.179-181, 12.201]. Whilst it seems to be accepted that those factors are relevant in tackling, for example, misogyny, they are not considered so in respect of GRT [§11.26].

Chapter 11

Question 4: 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.

9. 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, is to be welcomed.

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?

10. Where there already exists an authoritative definition of a characteristic then, for the same reasons as in Question 4 above, it would be preferable for the definition to be included in the new Hate Crime Act. Where any terms used in offence-creating provisions require further definition, it should be set out in the legislation; leaving it to 'developing caselaw' is unsatisfactory. In first instance criminal courts a term may be construed differently and inconsistently on a regular basis until a suitable case is appealed to the CACD. The fact that a definition may be difficult to formulate should not prevent Parliament from doing so. The Supreme Court [§11.45] unanimously provided a 'description' (not a 'definition') of religion which could be adapted for a non-exhaustive statutory definition in a criminal statute. That said, the Bar Council is not aware of there being a demonstrable problem with the construction of 'religious group' in cases that hitherto have been prosecuted involving hostility to religion whether as an aggravated offence or subject to the enhanced sentence provisions.

Indeed there does not appear to have been any appellate authority expressly on point in the twenty years since the Crime and Disorder Act 1998 came into force.

Question 6: 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?

11. Yes.

Question 7: We invite consultees' views on whether "asexuality" should be included within the definition of sexual orientation.

12. 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].

Question 8: We provisionally propose that the current definition of "transgender" in hate crime laws be revised to include:

- **People who are or are presumed to be transgender**
- **People who are or are presumed to be non-binary**
- **People who cross dress (or are presumed to cross dress); and**
- **People who are or are presumed to be intersex.**

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.

13. The Bar Council is not in a position to comment on the experiences of individuals within the transgender community or how they identify themselves, which, in this instance, should be the principal driver for the appropriate terminology. The definition proposed in the Question, following that adopted in the equivalent Scottish legislation, will itself require further definition for comprehension by a jury or lay bench of magistrates.

Question 9: We invite consultees' views on whether the current definition of disability used in the Criminal Justice Act 2003 should be retained.

14. Again, 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.

Question 10: 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.

15. The prevalence of this category of hostility is not clear. Assuming it is made out, a 'presumed disability' would, on its face, included able-bodied individuals who were subject to hostility on the erroneous assumption that they *were* disabled. Whilst that might qualify under the criteria of 'additional harm', in that such unchecked hostility will add to the suffering of the disabled community in general, it does not provide protection to a vulnerable/disadvantaged group in society. A disabled person who is abused because his disability is not ostensibly serious enough for the circumstances which give rise to the abuse (for example using a disabled parking place), is still being abused because of their characteristic of disability – just a different level of disability.

16. If an ostensibly able-bodied disabled person is abused for a lack of a disability, then that person's characteristic could only be protected by extending disability to 'presumed lack of disability'. In contrast to 'presumed disability', there is no likelihood that such an extension could sensibly be applied, on a literal interpretation, to an able-bodied person.

<u>**Chapter 12**</u>

Question 11: We provisionally propose that gender or sex should be a protected characteristic for the purposes of hate crime law. Do consultees agree?

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.

17. Clearly, if it is thought appropriate, there is a wealth of empirical evidence on which the Law Commission could propose that gender or sex are included as protected characteristics. Whether it is appropriate is a matter of judgment taking into account a variety of factors, including a socio-political assessment of the need. The Bar Council is not in a position to comment on, or decide between, the various experiences and opinions advanced on behalf of the numerous stakeholders whose contributions are summarised in the Consultation. 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.

Question 12: We invite consultees' view as to whether sex or gender-based hate crime protection should be limited to women or include both women and men

18. For the reasons given above the Bar Council is not in a position to comment.

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?

19. Yes, for the reasons set out in the 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?

20. Yes, for the reasons set out in the Consultation.

<u>Chapter 13</u>

Question 15: We invite consultees' views on whether age should be recognised as a protected characteristic for the purposes of hate crime law.

21. For the reasons set out in answer to Question 11 above, the Bar Council is not in a position to respond.

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.

22. For the reasons set put in answer to Question 11 above, the Bar Council is not in a position to respond.

Chapter 14

Question 17: We invite consultees' views on whether "sex workers" should be recognised as a hate crime category

23. For the reasons set put in answer to Question 11 above, the Bar Council is not in a position to respond.

Question 18: We invite consultees' views on whether "alternative subcultures" should be recognised as a hate crime category

24. For the reasons set put in answer to Question 11 above, the Bar Council is not in a position to respond.

Question 19: We invite consultees' views on whether "people experiencing homelessness" should be recognised as a hate crime category

25. For the reasons set put in answer to Question 11 above, the Bar Council is not in a position to respond.

Question 20: We invite consultees' views on whether "philosophical beliefs" should be recognised as a hate crime category

26. For the reasons set put in answer to Question 11 above, the Bar Council is not in a position to respond.

Chapter 15

27. Chapter 15 examines the legal test for hate crimes, both as to the elements of the offence and the process for determining whether an enhanced sentence is available to a court. The impetus for reform is driven by concerns that the current law is difficult to enforce and that, on one hand it provides for increased sentencing powers without proof of an explicit hostile intent; and, on the other that it fails to provide adequate protection to certain categories of vulnerable people targeted by criminals, especially those suffering from an identified disability.

28. We have taken the questions out of sequence because it seems logical to defer Question 21, which concerns sentencing, until after the questions on the elements of the substantive offence.

29. There has been concern about the existence of the two alternative modes of proof for aggravated versions of existing offences which is provided in s.28 of the Crime and Disorder Act 1998 –

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.

30. The Law Commission observes that in practice the two-limb test has caused confusion as to which limb is in issue. It also gives rise to concern that the first limb produces an objective test which results in over-criminalisation of conduct which was not intended to be hostile nor to cause the victim to perceive it as such. Arguments in favour of preserving the first limb are that the conduct can cause wider fear within the protected community or encourage similar conduct by others, as well as giving proper weight to the effect on the individual victim.

Question 22: 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?

31. We agree. The state must protect vulnerable members of the community. The commission of crimes which are demonstrably indicative of hostility should not need the additional burden of proof of a subjective intent to show hostility to the individual or group. In cases where the demonstrable hostility was a momentary and uncharacteristic act, that can adequately be catered for within the Sentencing Guidelines.

32. It is common for prosecutors of crimes involving subjective knowledge or intent to rely on inferences from the conduct. That is not the same as a presumption of intent from the natural and probable consequences of an act, which was abolished by s.8 of the Criminal Justice Act 1967. We can see no reason why vulnerable members of the community should be at risk of inadequate protection by insistence on proof of a hostile intent in all case in addition to a deliberate act demonstrating such an intent.

33. A lawyerly compromise might have been to recommend the creation of an offence based on recklessness. The Law Commission is correct not even to consider

such a proposal. Recklessness as a forensic test has been consistently criticised by Professor David Ormerod in *Smith and Hogan's Criminal Law* and by Professor Andrew Ashworth in *Principles of Criminal Law*. The terms "hostility" and "demonstrated" are ordinary words, not yet encrusted with legal annotation.

Question 23: 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.

34. 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").

35. Given the test for proof of hostility or prejudice, and the social need to protect the vulnerable, we agree with this recommendation.

36. At §§15.71-15.72 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.

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?

37. We agree. §§15.7 to 15.11 set out the current law on what amounts to "hostility" for the purposes of the Crime and Disorder Act 1998 and the test for enhanced sentences in ss.145-146 of the Criminal Justice Act 2003. They are almost, but not quite, identical. There is no justification for any distinction. Sentencing is complex enough. The presumptively binding effect of the Sentencing Guidelines makes it essential that enhanced sentences, based on judicial determination of the evidence rather than on a

jury's verdict, should be subject to an identical test in law to that of a statutory offence, and subject to the same stringent test that satisfies the criminal standard of proof.

Chapter 16

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 consultees agree?

38. Yes. As noted in the consultation, the benefits of this model include fair labelling and the possibility of a sentence that exceeds the statutory maximum for the base offence. While we note the concern that the maximum sentences available to the court for aggravated forms of summary-only base offences, such as common assault, are significantly higher than the maximum for the base offences themselves, the data in the table at §16.20 do not suggest that the courts tend to impose sentences at the upper end of the scale.

39. In order to ensure that drafting of indictments is as straightforward and clear as possible, and in order that any new offence be versatile and "future proof", we consider that there is a method by which the range of offences which could be aggravated by virtue of hostility towards a protected characteristic could be expanded through the creation of a single new offence, to replace the current offences under ss29-32 Crime and Disorder Act 1998.

40. Applying this technique to a hypothetical offence of ABH, which is said to be aggravated by reason of hostility towards a particular protected characteristic, an indictment containing the new offence could be drafted as follows:

Count 1

STATEMENT OF OFFENCE

Assault occasioning actual bodily harm, contrary to s.47 of the OAPA 1861.

PARTICULARS OF OFFENCE

X, on 12 November 2020, assaulted Y, thereby occasioning him actual bodily harm.

Count 2

STATEMENT OF OFFENCE

Committing an offence [motivated by] [while demonstrating] hostility or prejudice towards a protected characteristic, contrary to s.1 of the Hate Crime Act 2021.

PARTICULARS OF OFFENCE

X, on Y, committed an offence, namely assault occasioning actual bodily harm, as particularised in Count 1, and at the time of, or immediately before, committing the offence [was motivated by] [demonstrated] hostility or prejudice towards a protected characteristic, namely Z.

41. If this or a similar formulation were adopted, there would only need be one new offence – "s.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.

42. In any event, we consider that the ambit of the offences which could be subject to an aggravated offence (whether or not the model which we suggest is adopted) should be limited. In our model, that could be done by way of a statutory schedule. The schedule could potentially be capable of amendment under delegated powers, to cater for shifts in the necessity of creating aggravated forms of certain offences. The offence itself could then be labelled "committing a scheduled aggravated offence …".

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?

43. Yes. There would not appear to be any good reason to withhold parity of protection across the range of protected characteristics.

Question 26: We provisionally propose that the decision as to whether an aggravated version of an offence should be created be guided by:

- **The overall numbers and relative prevalence of hate crime offending as a proportion of an offence;**
- **The need to ensure consistency across the criminal law;**
- **The adequacy of the existing maximum penalty for the base offence; and**
- **Whether the offence is of a type where the imposition of additional elements of the offence requiring proof before a jury may prove particularly burdensome.**

Do consultees agree?

44. Up to a point. These seem to be sensible factors to take into account. However, as recognised in the Consultation, there are likely to be issues around the recording of when hate crime represents a feature of the offence – in some cases the complainant may perceive a crime to be motivated by hate when that is not a reasonable reading, whilst at other times a complainant may not recognise that the crime is motivated by

hate when it is objectively clear that it was. Further, even if very few examples of a particular offence feature a hate crime aspect, the creation of an aggravated offence may be justified in order to properly protect those who are victims in those few cases. Absolute and relative prevalence need to be balanced by the degree of hostility shown in what may be statistically few cases, and the resultant harm experienced.

45. There may also be discrete reasons why specific offences (for example murder – see below) should not be included as an aggravated offence. Also we suggest that the principle of 'fair labelling' is an important factor to be taken in account.

46. Above, in response to Question 24, we set out a method by which this could be achieved through the use of a single statutory provision.

Question 27: We provisionally propose that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws.
Do consultees agree?

47. 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 an aggravated offences.

Question 28: 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?

48. We agree that aggravated versions of s.18 OAPA 1861 and arson with intent/reckless as to whether life is endangered should be created, as a solution to the issue identified at §16.68. Consideration will need to be given as to whether the uplift following a conviction for an aggravated offence, where the appropriate sentence for the base offence alone would be a determinate sentence, could in itself result in the passing of a life sentence. Consideration will also need to be given as to the effect on extended sentences under the dangerousness provisions. In the rare cases where the

base offence would justify a life sentence, the uplift would need to be reflected in the minimum term.

49. We suggest that an aggravated version of the offence of throwing a corrosive substance on a person (s.29 OAPA 1861) should also be created, to ensure consistency between the various types of violent assault offences created by the OAPA. We also tentatively suggest that aggravated versions of kidnap and false imprisonment are created.

50. We agree that it would not be appropriate or helpful to create an aggravated version of the crime of murder, for the reasons given in the consultation paper. In addition it would not be appropriate, as the law of homicide currently stands, to grade the seriousness of the offence of murder solely by the motivation or demonstration of hostility towards a protected characteristic; for example why is the murder of a police officer not to be similarly treated (albeit for different reasons) as an aggravated offence? There are good grounds, as previously advanced by the Law Commission, for a wholesale change to the structure of homicide; it would not be appropriate to partially achieve that aim by way of a change to hate crime offences.

Question 29: We provisionally propose that aggravated versions of the following offences against the person should not be introduced in reformed hate crime laws:
(a) Maliciously administering poison so as to endanger life or inflict grievous bodily
harm (section 23 OAPA 1861);
(b) Maliciously administering poison with intent to injure, aggrieve or annoy any other person (section 24 OAPA 1861);
(c) Threats to kill (section 16 OAPA 1861); and
(d) 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?

51. We agree that the criteria set out in Question 26 above do not appear to be met. Although 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.

Question 30: We invite consultees' views on whether any property or fraud offences should be included within the specified aggravated offences.

52. We consider that more evidence is required before a conclusion can be reached on the necessity for aggravated property offences or fraud. However, in the interests of fair labelling we tentatively suggest that all of the offences listed in the consultation should be capable of taking an aggravated form.

Question 31: 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?

53. Yes, for the reasons given in the 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.

54. 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.

55. Were the proposal in our response to Question 24 to be adopted, an indictment could include separate counts under our hypothetical s.1 of the Hate Crime 2021, each reflecting an individual protected characteristic. There would need to be only one count reflecting the base offence (ABH in the example above). Counts 2 & 3 on the indictment could reflect different protected characteristics. The tribunal of fact could of course only convict in each count if they were all (or a majority) sure that the prosecution's case was made out in respect of the characteristic charged.

56. As discussed in the consultation paper, an alternative course would be to permit the inclusion of more than one characteristic in the pleaded aggravated offence. Our hypothetical s.1 of the Hate Crime Act 2021 could incorporate this from a drafting perspective. There is an established procedure where, in a variety of cases, the jury's verdict (there would be no problem in the Magistrates Court where the same tribunal determines the verdict and sentence) does not return the legal basis of guilt (for example, manslaughter or offences involving alternative *mens rea*). The matter is

resolved either by a 'special verdict' – the jury stating on conviction the basis of the verdict – or by the judge deciding on the evidence adduced at trial to the criminal standard.

57. 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 (it is assumed that the option of deploying 'special verdicts' will not be adopted - the Court of Appeal has stated that even in cases of murder, whether there are a number of bases on which a verdict of manslaughter could be returned, 'special 'verdicts' should be a rarity; *R v Hopkinson* [2013] EWCA Crim 795). The arguments in favour of each approach are set out below:

Separate counts

58. 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 unwieldly if individual protected characteristics are required to be pleaded separately.

'Rolled up' count

59. In an average case an offender may in one abusive outburst incorporate several epithets directed at protected characteristics, possibly relating to different people, in the same incident. If the utterance of a few words is to be subject to an individual count to reflect the different characteristic, that could lead to a number of practical problems:

(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;

(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.

Question 33: We invite consultees' views on whether the maximum sentences for the aggravated offences in the CDA 1998 are appropriate.

60. That is a question of sentencing policy, to which the Bar Council does not routinely respond.

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.

61. In principle, yes, for the reasons set out in the Consultation.

62. Our response to Question 24 provides a way around the problems with the present position identified in the consultation paper.

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.

63. Our proposal (at Question 24 above) combines the virtues of the Sussex Report's proposals with a solution to the problem identified in the consultation that the Sussex Report proposal would require the removal of increased maximum penalties.

64. As set out in Chapter 17 below, we consider that there is still a place for enhanced sentencing, but not in respect of offences for which the aggravated offence is available.

Chapter 17

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?

65. Yes.

Question 37: We provisionally propose that sentencers should continue to be required to state the aggravation of the sentence in open court. Do consultees agree?

66. Yes

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.**

67. It is to be hoped that by adopting the revision to the aggravated offences (whether the model we suggest at Question 24 above or otherwise), Parliament will include all those base offences which, according to the four stage test advocated at Question 26 above or similar, will qualify for the additional protection for the specified characteristics. It is always to be preferred, where legally possible and practical, that a jury, rather than a judge, determines whether criminality, which could lead to a greater sentence, has been proven to the requisite standard. We do, however, agree that in a fast-changing world it is not always possible to predict which characteristics will render those who possess them more vulnerable to crime. 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.

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?

68. 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 as issue should be subject to a separate count. That is consistent with the general approach to sentencing. In *O'Leary* the CACD concluded that in the particular circumstances of that case, that 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 s.29 of the Crime and Disorder Act 1998 would have had the effect of overloading the indictment and overly complicating the jury's task."

69. 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.

70. It is noted though that changes to the recording of convictions on the non-public Police National Computer, would alleviate to some extent the concern that the aggravated nature of the offending would not be adequately marked without a conviction of an aggravated offence.

Chapter 18

Question 40: We provisionally propose that the stirring up offences relating to "written" material be extended to all material? Do consultees agree?

71. Yes, this distinction is quite clearly out of date and in the modern multi-media age all material should be treated the same.

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?

72. Yes, as the consultation makes clear the current legislation has, over time, created substantial and troubling inconsistencies and the Bar Council welcomes the simplicity and clarity of the proposal.

Question 42: We provisionally propose to align the defences available to innocent disseminators of inflammatory material to ensure consistency as follows:

> **(1) The provisions relating to performers, rehearsals and recordings of performances would apply to both plays and broadcasts.**
>
> **(2) The defences available to third parties who did not intend to stir up hatred would be aligned, so that the offence would not apply to a person who did not realise that the material was to be included; did not realise that material was threatening or abusive; or did not realise that the circumstances were such that hatred was likely to be stirred up.**

(3) Unless intention to stir up hatred is proved, no offence would be committed by showing a recording that has been certified by the British Board of Film Classification or licensed for cinema performance by a local authority.

Do consultees agree?

73. Yes, the example of a play that might be simultaneously live-streamed online has become even more vivid during the current pandemic and illustrates again the out-dated distinctions in the law as it presently stands. The Bar Council again therefore welcomes the simplicity and clarity of the proposal. It protects innocent disseminators whilst removing the potential for loopholes based on archaic categorisations.

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?

74. Online platforms should be criminally liable for dissemination of unlawful material that they host but the Commission is right to be wary of legislation that would stifle freedom of expression through causing online platforms to remove any content that was the subject of complaint. Consistency between online and offline dissemination is desirable, and if this means applying "actual knowledge" to offline dissemination then this would be acceptable, in conjunction with the other proposed reforms, where no intention to stir up hatred can be shown.

Question 44: We invite consultees' views on whether the meaning of "likely to" in the racial hatred offence should be defined in statute (and for any other characteristics to which it would apply in future). We further invite views on how might this be defined.

75. 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".

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?

76. Yes, as noted in the consultation there is evidence that certain group have become accustomed to using language in such a way as to stir up hatred without coming within the prohibited categories. This must be addressed, and any new offences must be clear and robust so as to achieve their purpose in the most serious cases.

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:

> **(1) the defendant's words or behaviour were threatening or abusive;**
>
> **(2) the defendant's words or behaviour were likely to stir up hatred;**
>
> **(3) the defendant knew or ought to have known that their words or behaviour were threatening or abusive; and**
>
> **(4) the defendant knew or ought to have known that their words or behaviour were likely to stir up hatred.**

Do consultees agree?

77. 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. It achieves the aim whilst not unduly punishing unknowing offending.

Question 47: We provisionally propose that there should be a single threshold to determine whether words or behaviour are covered by the "likely to" limb of the stirring up offences, applying to all protected characteristics. Do consultees agree?

If so, would consultees favour applying a single threshold of "threatening or abusive" but not "insulting" words to prosecutions brought under the "likely to" limb?

78. There should be a single threshold across all protected characteristics to ensure consistency, fairness and certainty. Given that this will apply in circumstances where it cannot be shown that there was an intention to stir up hatred, it is acceptable to omit "insulting" for the same reasons that it was removed from s5 Public Order Act 1986.

Serious examples will inevitably be caught by "abusive" in any event, as the DPP made clear at that time.

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?

79. This is essentially a question of policy and for the reasons similar to those set out in response to Question 11, the Bar Council is not in a position to comment. However there is clearly now an empirical basis for the proposed extension.

Question 49: We provisionally propose that the stirring up offences be extended to cover sex or gender. Do consultees agree?

80. For the reasons given above the Bar Council is not in a position to comment.

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.

81. Yes it should. By aligning the thresholds and fault requirements applying to the currently protected characteristics, it would be possible to replace the offences in sections 18 and 29B with a single offence of unlawfully stirring up hatred, with the definition of "hatred" listing not only each of the current and proposed characteristics, but also hatred against a group defined by a combination of more than one characteristic.

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?

82. Yes. The harm at which these offences is targeted is the propagation of hatred. Other offences, such as inciting or encouraging the commission of an offence, are not protected simply because they take place within a person's home. It would in practice be an arbitrary exclusion, if, for example, a group of people specifically chose to engage in criminal behaviour in a private dwelling as opposed to any other building, so as to avoid prosecution.

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.

83. The existing protections in sections 29 and 29JA should apply across all stirring up offences (recognising that in practice they will usually be relevant only to a single form of hatred). As it currently stands there is a mismatch in their application to racial/religious groups which is inconsistent.

Question 53: We invite consultees' views on whether there should be similar protections to those in sections 29J and 29JA under the racial hatred offences.

84. Although essentially a question of policy, the Bar Council notes the reference to Lord Bracadale's review of Scottish hate crime legislation in which he considered, and rejected, suggestions that hate crime law should cover "hostility towards a political entity which the victim is perceived to be associated with by virtue of their race or religion". He argued that this would extend the concept of hate crime too far, and risk infringing the right to engage in political debate and protest.

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?

85. Yes.

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.

86. Yes, the current exemptions should be maintained. The suitability for other publications to be subject to a similar exemption is a matter for other consultees. However there is a clear imperative that genuine democratic, academical and scientific debate should not be subject to criminal prosecution under the "likely to" limb.

Chapter 19

Question 56: We provisionally propose that racist chanting at football matches remain a criminal offence distinct from the current Public Order Act 1986 offences. Do consultees agree?

87. Yes. While to a certain extent this is a question of policy, from a law reform perspective we can see the value in retaining the bespoke offence, essential for the reason that it catches behaviour that would not otherwise be covered by the POA.

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 racialist 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.

88. While this is essentially a question of policy, there would appear from the consultation paper to be a clearly established need for such an extension, based (a) on the prevalence of allegations of such conduct and (b) the fact that prosecutions under the "indecent" limb of the current offences may not cover all examples of homophobic chanting. Accordingly, from a law reform perspective, we agree that the offence should be extended to include chanting based on sexual orientation. We are unsighted on the prevalence of other discriminatory chanting and are therefore unable to express any views on the desirability of extended the offence further.

Consultation Question 58: We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover gestures and missile throwing.

89. While this is essentially a question of policy, there would not appear to be any legal reason for distinguishing between racist words and racist gestures, provided there was a sufficiently sound evidential basis for interpreting a gesture as racist. Accordingly, we agree that the offence should be extended to cover gestures.

90. In relation to missile throwing, however, the fact that this conduct is already caught by s.2 of the Act militates against incorporating it within s.3. One of the

consequences of including missile throwing in s.3 is that s.2 would become largely otiose (save for e.g. coin throwing, which would in any event amount to an assault, covered by other legislation). A further consequence is that it would become harder to prove the offence when missile throwing was alleged – because there would be a need to prove both the conduct and the (racist / homophobic) intention, which is not presently a difficulty with the s.2 offence.

Consultation Question 59: We invite consultees' views on whether the offence under section 3 of the Football (Offences) Act 1991 should be extended to cover journeys to and from a designated football match.

91. We agree that it would be sensible to harmonise the position between section 3 of the Football (Offences) Act 1991 and the provisions of the Football Spectators Act 1989 relating to banning orders.

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.

92. We agree that harmonisation with the rules on aggravated offences would be appropriate.

Consultation Question 61: We invite consultees' views on whether the current penalty for the offence under section 3 of the Football (Offences) Act 1991 of engaging in chanting of an indecent or racialist nature at a designated football match, a Level 3 fine, is sufficient.

93. That is essentially a question of policy, but we can see the argument for bringing sentencing for the s.3 offence into line with that applicable to comparable public order offences. The failure to take that step may well lead to a preference for prosecution under the POA, which would risk the bespoke football offences being underused.

<u>**Chapter 20**</u>

94. Chapter 20 introduces the proposal for a Hate Crime Commissioner. At §20.18 the justification is given that

… the functions and activities that a Hate Crime Commissioner might perform could bring benefit to hate crime laws and practices.

95. Those benefits are set out in the paragraphs which then follow. It is recommended that the Commissioner would report to the Home Secretary, the Justice Secretary, Attorney General, and the Secretary of State for Housing, Communities and Local Government.

Question 62: We invite consultees' views on whether they would support the introduction of a Hate Crime Commissioner.

96. We agree. 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.

97. We recommend that the Law Commission should have regard to the recommendations about the Independent Anti-Slavery Commissioner in the report produced by the committee chaired by the Rt. Hon. Frank Field in May 2019 at vol. 1. Independence, transparency, and adequate resources are key.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

Bar Council[2]

18 December 2020

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[2] Prepared by the Law Reform Committee