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Prosecuting hate crime: procedural issues and the future of the aggravated offences

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In 2012, the Ministry of Justice asked the Law Commission to examine the case for extending the racially and religiously aggravated offences in the Crime and Disorder Act 1998, so that they also cover disability, sexual orientation and transgender identity. The terms of reference for the project were narrow, and did not include an examination of whether the existing offences are in need of reform. The Commission recommended that before a final decision is taken as to whether the offences should be extended, a full-scale review of the operation of the existing offences should be carried out. This paper contends that, in determining the future of the aggravated offences, consideration should be given to the procedural difficulties that can be encountered during the prosecution stage of the criminal process. The paper highlights a number of significant procedural problems that arise from the structure of the existing aggravated offences. These problems are largely related to alternative charges, whereby the prosecution charge both the aggravated offence and the lesser offence encompassed within it, and alternative verdicts, whereby the jury can convict of the lesser offence if the aggravated element is not proven. This paper argues that the procedural problems, coupled with a failure to properly understand the offences, can lead, and have led, to unfair outcomes. If the offences cannot be prosecuted effectively, they become little more than an empty gesture to those affected by hate crime, and this may be counterproductive. Procedural problems also put defendants at risk of wrongful conviction. The paper concludes that the preferred way forward would be to repeal the racially and religiously aggravated offences and rely on sentencing legislation to deal with hostility-based offending.

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INTRODUCTION

In a report published by the Home Office in 2002, the structure of the racially aggravated offences in the Crime and Disorder Act 1998 was described as 'the cause of many a procedural headache'.[1] Recent case-law, as well as several responses to a Law Commission consultation on hate crime, suggest that this is still the case. The

* The author is grateful to Dr Mark Walters, Catherine Heard and the reviewers for their comments on previous drafts. The author is also grateful for the support of the Centre for Responsibilities, Rights and the Law at the University of Sussex.

1. E Burney and G Rose *Racist Offences: How is the Law Working?* (London: Home Office Research Study 244, 2002) p 17.

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racially and religiously[2] aggravated offences are complex. They are more serious versions of certain pre-existing offences, and this can present prosecutors with difficult charging decisions. At trial, the consequences of a misunderstanding or misapplication of the offences are significant, and include not only poor outcomes for victims, but also the imposition of improper and unjustified convictions and sentences.

An examination of the procedural issues associated with the aggravated offences fell outside of the scope of the Law Commission's recently completed hate crime project.[3] As part of this project, the Commission examined the case for extending the racially and religiously aggravated offences in the 1998 Act, so that they also cover disability, sexual orientation and transgender identity. In its final report, the Commission recommended that a full-scale review of the operation of the existing aggravated offences be carried out, before a decision is taken as to whether they should be extended.[4] The Commission noted that 'If the current offences are flawed in their structure or operation, there will be little benefit for future victims of hate crime for the offences to be extended in their current form.'[5] A wider review could reveal whether changes to the structure or elements of the existing offences are required, or whether they should be repealed. If the recommendation for a wider review is not supported by government, the Commission recommended in the alternative that the offences be extended in order to bring about equality of treatment across the five statutorily recognised hate crime characteristics.[6]

There is a growing body of literature concerning the appropriate substantive elements of hate crime offences and the rationale of hate crime legislation,[7] which the Law Commission suggested be addressed as part of the wider review.[8] While these are important matters to be considered in determining the future of the aggravated offences, this paper will focus on the equally important procedural issues that arise

2. As originally enacted, the Crime and Disorder Act 1998 included only racially aggravated offences. Religiously aggravated offences were added by the Anti-Terrorism, Crime and Security Act 2001, s 39.

3. Law Commission *Hate Crime: The Case for Extending the Existing Offences – A Consultation Paper* (Consultation No 213, 2013); Law Commission *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014).

4. Law Com No 348, para 5.102.

5. Ibid, para 5.83.

6. Ibid, para 5.105.

7. See eg I Hare 'Legislating against hate: the legal response to bias crime' (1997) 17 Oxford J Legal Stud 415; J Jacobs and K Potter *Hate Crime: Criminal Law and Identity Politics* (Oxford: Oxford University Press, 1998); M Malik ' "Racist crime": racially aggravated offences in the Crime and Disorder Act 1998 Part II' (1999) 62 Mod L Rev 409; P Iganski 'Hate crimes hurt more' (2001) 45 Am Behav Scient 626; H Hurd and M Moore 'Punishing hatred and prejudice' (2004) 56 Stan L Rev 1081; B Dixon and D Gadd 'Getting the message? "New" Labour and the criminalization of "hate" ' (2006) 6 Criminology & Crim Just 309; P Iganski *Hate Crime and the City* (Bristol: Policy Press, 2008); D Gadd 'Aggravating racism and the elusive motivation' (2009) 49 Br J Criminology 775; K Goodall 'Conceptualising "racism" in criminal law' (2013) 33 Legal Stud 215; N Hall *Hate Crime* (New York: Routledge, 2013); J Stanton-Ife *Extending the Aggravated Offences to Include Disability, Sexual Orientation and Transgender Identity: Theoretical Arguments* (2013), available at http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf (accessed 25 June 2014); and M Walters 'Conceptualizing "hostility" for hate crime law: minding "the minutiae" when interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014) 34 Oxford J Legal Stud 47.

8. Law Com No 348, para 5.90.

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from the structure of the existing racially and religiously aggravated offences, and the significant problems thereby caused during the prosecution of the offences. The main focus will be alternative charges and alternative verdicts, which were identified as the main areas of procedural concern in 2002.[9] A doctrinal examination of these procedural issues is important in its own right, in order to determine whether there can be effective administration of justice in individual cases. The examination is further necessitated by the fact that a failure to properly prosecute the aggravated offences, due to procedural problems, could undermine the aims of the offences, which include combatting racism and xenophobia, and improving social cohesion. At the same time as creating an impression that hate crime will not, or cannot, be effectively prosecuted, the procedural issues also put defendants at risk of injustice.

The paper begins with a brief overview of the structure of the offences and the separate enhanced sentencing provisions that operate alongside them. It then goes on to assess the available charging options, including the advantages and disadvantages of laying alternative charges, covering both the aggravated offence and the lesser offence encompassed within it. Next, it considers how some of the problems associated with alternative charges can be alleviated by, instead, leaving alternative verdicts. However, alternative verdicts can only be returned in the Crown Court and can also create difficulties. The paper then turns to the issue of inconsistent verdicts, which can occur when more than one aggravated offence is charged. It will be argued that juries are not always directed appropriately, resulting in a possible under-conviction or over-conviction of the defendant. By upholding convictions where there is, arguably, an inconsistent verdict, the Court of Appeal has done little to rectify this problem.[10]

The procedural issues explored in this paper are not confined to the racially and religiously aggravated offences; they can be relevant to other types of offending, where the offence charged includes a separate and less serious offence.[11] Yet, the issues are most pertinent in relation to the aggravated offences. Given that tackling hate crime is currently high on the government's agenda,[12] extension of the offences, either before or after a wider review, is not improbable.[13] It is, therefore, important to appreciate and understand the complex nature of the existing offences, in the hope that past experience can minimise a reoccurrence of significant mistakes being made during future prosecution of these offences. However, it becomes apparent from an assessment of the relevant policy, legislation and recent case-law, that the most pragmatic solution would be to repeal the existing aggravated offences, and rely on sentencing legislation to deal with offending involving hostility on the basis of, or

9. Burney and Rose, above n 1, p 17.

10. See eg *Mihocic* [2012] EWCA Crim 195, discussed below.

11. For example, if an offender is guilty of wounding with intent contrary to s 18 of the Offences Against the Person Act 1861, they must also have committed the lesser offence of wounding contrary to s 20. Another example is the offence of possession of a controlled drug with intent to supply contrary to s 5(3) of the Misuse of Drugs Act 1971, which includes the lesser offence of possession of a controlled drug contrary to s 5(1).

12. See HM Government *Challenge it, Report it, Stop it: the Government's Plan to Tackle Hate Crime* (2012).

13. It should be noted that the next general election will take place in May 2015. It is highly unlikely that a wider review could be completed by this time. However, it is likely that, even with a change in government, tackling hate crime will remain on the political agenda.

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towards, particular personal characteristics. This solution is endorsed in the final section, which summarises the current procedural issues and considers the future of the aggravated offences.

THE AGGRAVATED OFFENCES AND THE ENHANCED SENTENCING REGIME

The procedural problems that can arise during the prosecution of the aggravated offences are primarily caused by the structure of the offences. It is, therefore, helpful to set out the basic structure and substantive elements of the offences before examining the problems. Although it is outside the scope of this paper to assess the theoretical underpinnings of the offences, some consideration will also be given to the aims of the offences, and to whether sentencing legislation can meet those aims. This issue is dealt with more fully in the final section of the paper.

The Crime and Disorder Act 1998 (the 1998 Act) created aggravated versions of 11 pre-existing, or 'basic', offences. These offences are set out in ss 29–32 of the Act. They cover various forms of assault,[14] criminal damage,[15] various public order offences,[16] and harassment and stalking offences.[17] The racially and religiously aggravated offences carry higher maximum sentences than their basic offence counterparts. In accordance with s 28(1) of the 1998 Act, the basic offence becomes aggravated 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 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.

Section 28(1)(a) requires only an outward demonstration of hostility, which will often be verbal or written. Liability is not contingent on the subjective state of mind of the defendant; whether or not the basic offence was committed because of animosity towards the victim's race or religion has been said to be irrelevant.[18] As such, it can include those who may have been caught up in the 'heat of the moment'.[19] However, the legislation is not clear on whether it is sufficient to prove that, absent the defendant's mental state, the conduct objectively demonstrated hostility. Walters has argued that the defendant should at least be *aware* that his expression is *likely* to be perceived by other right-minded individuals as being one of racial or religious hostility.[20] Section 28(1)(b), on the other hand, requires proof that the offending behaviour was motivated by hostility.

Sections 28(1)(a) and 28(1)(b) provide two separate means of establishing the commission of an aggravated offence. Yet, the distinction between the two limbs of s 28 has caused a great deal of confusion, particularly in the lower courts. Numerous

14. Crime and Disorder Act 1998, s 29.
15. Ibid, s 30.
16. Ibid, s 31.
17. Ibid, s 32.
18. See eg *DPP v Woods* [2002] EWHC 85 (Admin); *DPP v Green* [2004] EWHC 1225 (Admin).
19. See Walters, above n 7, at 63–70.
20. Ibid.

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reported cases indicate that some trial judges mistakenly proceed on the basis that a subjective motivation must be proved for each limb of the offence.[21] Walters notes that, in addition to this confusion, there has been a reluctance on the part of some judges to apply s 28(1)(a) in cases where the demonstration of hostility appears to be incidental, as against casual, to the offence committed.[22] A failure to understand or properly apply the basic requirements of s 28 fuels concern that the procedural complexities discussed below cannot be easily avoided or resolved.

The two limbs of s 28 are drafted widely. Section 28(1)(a) also covers situations in which hostility is demonstrated on the basis of an *association* with members of a racial or religious group,[23] and where the offender mistakenly *presumes* the victim to belong to a particular racial or religious group.[24] Section 28(1)(b) requires only that the offender was motivated *in part* by hostility towards members of a racial or religious group. Racial or religious hostility may, therefore, be a minor cause of the offending behaviour. Section 28(3) provides that, for the purposes of both s 28(1)(a) and s 28(1)(b), it is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in the provisions. In addition, the terms 'racial' and 'religious' have been interpreted broadly and flexibly,[25] in order to reflect the underlying policy aims of the statute. As stated by Baroness Hale, 'The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia.'[26] For example, calling someone a 'bloody foreigner' can amount to a demonstration of hostility based on membership of a racial group.[27]

One way in which the offences might achieve the aim of tackling racism and xenophobia is through their symbolic and communicative function. They send a clear message that hate crimes are considered to be more serious, and different in kind, to basic offences, and will invoke special condemnation and enhanced levels of punishment.[28] Hate crimes have the potential to cause greater harm than the basic offences and, therefore, increase the offender's culpability.[29] They are a direct attack on the victim's sense of identity and can result in psychological harm that is suffered not only by the victim, but also by other minority group members and their wider communities.[30] By denouncing racial and religious hostility, the aggravated offences have the potential to contribute to a positive shift in societal attitudes regarding racism and xenophobia and, therefore, to secure social cohesion.

In addition to the harsher sentences that follow conviction, the aggravated offences also carry a 'label' that reflects the more serious nature of the offending behaviour, and that can reinforce the communicative and denunciatory effect of the offences. The aggravated element of the conviction appears on the offender's criminal record, and

21. See eg *SH* [2010] EWCA 1931 (Admin); *Jones v DPP* [2010] EWHC 523 (Admin); *RG v DPP* [2004] EWHC 183 (Admin); *DPP v M* [2004] EWHC 1453 (Admin); *DPP v Woods* [2002] EWHC 85 (Admin).
22. Walters, above n 7, at 61–63.
23. Crime and Disorder Act 1998, s 28(2). See *DPP v Pal* [2000] Crim LR 756.
24. Crime and Disorder Act 1998, s 28(2).
25. Ibid, ss 28(4) and 28(5). See also *DPP v M* [2004] EWHC 1453 (Admin); *White* [2001] EWCA Crim 216.
26. *Rogers* [2007] UKHL 8 at [12].
27. *DPP v M* [2004] EWHC 1453 (Admin); *Rogers* [2007] UKHL 8.
28. Consultation No 213, paras 3.29 and 3.72; Law Com No 348, paras 4.65–4.89.
29. See eg F Lawrence *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999); Iganski (2008), above n 7.
30. Walters, above n 7, at 72–73.

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the conviction may be reported in the media as being racially or religiously aggravated. Accurate labelling serves to describe to the public the nature of the wrongdoing and the level of harm caused, as well as providing criminal justice professionals, including sentencing judges and probation staff, with information necessary to enable them to make fair and sensible decisions.[31] However, the specific and general deterrent effects of the aggravated offences are far from certain. In fact, in some cases, leaving court feeling stigmatised could result in rejection of the court's ethical position and lead to recidivism.[32] It is possible that other public awareness and educative measures, short of criminal offences, would be better placed to secure more positive societal attitudes towards ethnic and religious diversity.[33]

There are two statutory sentencing provisions that operate alongside the aggravated offences, and that will be referred to as the 'enhanced sentencing regime'. These are ss 145 and 146 of the Criminal Justice Act 2003 (the 2003 Act). If applied appropriately, the enhanced sentencing regime could provide a viable alternative to having aggravated offences. Section 145 requires the sentencing judge to pass a higher sentence than would ordinarily be imposed if, at the time of committing an offence, or immediately before or after doing so, the offender demonstrated racial or religious hostility, or the offence was motivated by racial or religious hostility, in the same way as required for the aggravated offences. Section 146 does the same in relation to disability, sexual orientation and transgender identity. The sentence imposed cannot exceed the maximum available for the offence charged. The maximum sentence that could be imposed for a 'basic offence', applying s 145, would, therefore, be lesser than that available for an aggravated offence under the 1998 Act. However, in practice, the sentences imposed for the aggravated offences tend to fall well below the maximum available for the basic offence.[34]

Where ss 145 or 146 is applied, the judge must state in open court that the offence was aggravated,[35] but, unlike the aggravated offences, this fact will not be recorded on the Police National Computer (PNC) and, so, will not show on the offender's criminal record. Likewise, the offending behaviour itself is not described, or 'labelled', as racially or religiously aggravated. As such, one could argue that the sentencing regime lacks the symbolic and communicative function of the aggravated offences. However, this need not be the case. The enhanced sentence itself can represent fairly the 'nature and magnitude of the law-breaking', which is a concern of the principle of fair labelling.[36] Moreover, as well as stating that the offence was aggravated, the judge, at the public sentencing hearing, must state the reasons for deciding on the sentence passed.[37] Since the judge's sentencing remarks can be made available to the public, and since local and national media can report the length and type of sentence imposed in individual cases, the enhanced sentencing regime has the potential to convey the desired message at least as effectively as the aggravated offences.[38] In addition, the

31. See J Chalmers and F Leverick 'Fair labelling in criminal law' (2008) 71 Mod L Rev 217.
32. See E Burney 'Using the law on racially aggravated offences' [2003] Crim L Rev 28 at 35.
33. See Law Com No 348, paras 4.89–4.101.
34. See Law Commission *Hate Crime: The Case for Extending the Existing Offences Appendix C – Impact Assessment* (Consultation Paper No 213, 2013) para C.61.
35. Criminal Justice Act 2003, ss 145(2)(b) and 146(3)(b).
36. A Ashworth and J Horder *Principles of Criminal Law* (Oxford: Oxford University Press, 7th edn, 2013) p 77.
37. Criminal Justice Act 2003, s 174(2).
38. Stanton-Ife, above n 7, pp 55–56; Law Com No 348, paras 4.82–4.86.

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Law Commission recommended improvements to the enhanced sentencing regime, in order to make it more effective, including recording the application of the sentencing provisions on the PNC in individual cases.[39] These recommendations are considered further in the final section of this paper.

The operation of the sentencing provisions, and the benefits of using them as a means of dealing with hate crime, was explored at length by the Law Commission.[40] Suffice it to point out here that, unlike the fixed list of offences that can be aggravated under the 1998 Act, the sentencing provisions can be used to increase the sentence for any offence. As such, they can address a whole range of hostility-based offending, including theft and sexual offences. However, the aggravated offences and the enhanced sentencing regime are 'mutually exclusive'; the enhanced sentencing regime applies in relation to all offences *other than* the offences under ss 29–32 of the 1998 Act.[41] As discussed below, this mutual exclusivity is relevant to an examination of the procedural complexities of the aggravated offences.

ALTERNATIVE CHARGES

Many of the procedural issues that can be encountered during the prosecution of the aggravated offences concern alternative charges. Where there is sufficient evidence that an aggravated offence has been committed, the Crown Prosecution Service (CPS) can charge both the basic offence and the aggravated offence, or, if the case is tried in the Crown Court, include counts covering both offences in the indictment. The CPS's Guidance on Racist and Religious Crime states that consideration should be given in all cases to putting alternative charges covering both the basic and the racially or religiously aggravated offences.[42] There are pragmatic reasons for this guidance. As discussed below, charging only the basic or aggravated offence can lead to undesirable results. However, there can also be significant consequences if the purpose of alternative charges is not properly understood.

Charging decisions

If there is evidence that an aggravated offence has been committed, but only the basic offence is charged, there may be no opportunity to take account of racial or religious hostility as an aggravating factor at sentencing, applying s 145 of the 2003 Act. This is because, as explained above, the aggravated offences and the enhanced sentencing regime are mutually exclusive. However, the full extent of the mutual exclusivity is not clear,[43] and this may lead to inconsistency in case outcomes. There is some authority, as well as practitioner guidance, which suggests that if an aggravated offence was

39. Law Com No 348, para 3.104.
40. Consultation No 213, ch. 3. See also A Owusu-Bempah 'Improving sentencing of hate crimes' (2013) 177 Crim L & Just Weekly 559.
41. Criminal Justice Act 2003, s 145(1).
42. Crown Prosecution Service *Racist and Religious Crime – CPS Guidance*, available at http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a15 (accessed 25 June 2014).
43. Law Com No 348, paras 2.65–2.71.

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available, but not charged, s 145 cannot apply.[44] On the other hand, it has been contended that the relevant case-law has been misunderstood, and that, while s 145 cannot apply to the aggravated offences themselves (or to the basic offence following an acquittal of the aggravated offence), it is open to the court to apply s 145 where the aggravated offence could have been, but was not, charged.[45] It is submitted here that the former interpretation is preferable; s 145 should not apply to the basic offences that can be charged as aggravated offences under the 1998 Act. This is consistent with the principle that an offender should not be sentenced for a more serious offence than the offence of which he has been convicted.[46] If there is evidence of racial or religious hostility, then the aggravated offence should be charged. If it is not charged, then the more serious nature of the offending behaviour should not be reflected in the sentence.

However, if only the aggravated offence is charged, and the prosecution is unsuccessful in proving the aggravated element, the defendant must be acquitted, despite evidence that he committed the basic offence. This is subject to the possibility of an alternative verdict being returned, if the case is tried on indictment, as discussed in the next section. If the offence is tried in the Magistrates' Court, where there is no power to return an alternative verdict to a lesser offence, the opportunity for a conviction of the basic offence will be lost. One benefit of alternative charges is that the defendant will not escape liability for the basic offence because the trier of fact was not satisfied that the offence was motivated by racial or religious hostility, or that such hostility was demonstrated towards the victim.

If only the aggravated offence is charged and a guilty plea to the basic offence is offered but rejected, the plea must be treated as of no effect and withdrawn. If the defendant is then tried for the aggravated offence, and the aggravated element is not proven, the earlier plea cannot be used as a basis for a verdict of guilty to the basic offence. This mistake was made by the judge in the recent case of *Al-Tamimi*,[47] in which the prosecution could offer no evidence of racial aggravation at trial, and so the judge directed not guilty verdicts, but then directed that a verdict of guilty be entered for basic criminal damage, based upon an earlier rejected plea. The defendant was then given a conditional discharge and ordered to pay costs. The Court of Appeal held that neither the conviction nor sentence could stand. Since the earlier plea had been rejected, there was no residual conviction of the lesser offence for which the defendant could be sentenced.[48] This case highlights one of the most considerable problems that can arise from the structure of the aggravated offences. The fact that the aggravated offences subsume lesser offences can lead to the mistaken imposition of improper and wrongful convictions and sentences when only the aggravated offence is charged, but only the basic offence can be proven.

44. See eg *McGillivray* [2005] EWCA Crim 604; *O'Callaghan* [2005] EWCA Crim 317; Sentencing Council *Magistrates' Court Sentencing Guidelines* (2008) p 178; Anthony and Berryman's Magistrates' Court Guide (2013) para B5.2B; Crown Prosecution Service, above n 42.

45. R Taylor 'The role of the aggravated offences in combating hate crime 15 years after the Crime and Disorder Act 1998: time for change?' (2014) 13 Contemp Issues in Law 76.

46. See eg *Druce* (1993) 14 Cr App R (S) 691; *Davies* [1998] 1 Cr App R (S) 380; *Canavan* [1998] 1 WLR 604.

47. [2011] EWCA Crim 1123.

48. Ibid, at [18].

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Charge bargaining

Despite the pragmatic reasoning, charging both the basic and the aggravated offence can have undesirable consequences, including 'charge bargaining'. Some prosecutors may be willing to accept a plea of guilty to the basic offence on the condition that the aggravated charge is dropped. When the racially aggravated offences first came into force, there was concern that this practice was taking place. In a study conducted for the Home Office, Burney and Rose found that some prosecutors were willing to accept pleas to the basic offence, and that racially aggravated charges were frequently withdrawn or downgraded to the basic offence before trial at the Crown Court.[49] Accepting a plea to the basic offence and dropping the charge of the aggravated offence risks creating the impression that hate crime is not taken seriously, particularly as there will be no opportunity to reflect the racial or religious aspect of the offending in the sentence for the basic offence. Both victims and the wider community may be left feeling that hate crime legislation is something of an empty gesture. In some situations, the defendant could also be adversely affected by the possibility of a charge bargain. For example, a defendant who is maintaining innocence of both charges may face pressure from the prosecution or his own lawyer to plead guilty to the basic offence because not only will he receive a lesser sentence than if convicted of the aggravated offence, but he will also receive a reduction in sentence for pleading guilty.[50] For these reasons, charge bargaining should be avoided.

Since 2003, it has been CPS policy that where an aggravated offence is charged, a plea to the basic offence alone will not be accepted, unless there are proper reasons for doing so;[51] for example, because the evidence required to prove the aggravated element is no longer available. However, there is some evidence to suggest that the practice of charge bargaining has continued. CPS and Ministry of Justice statistics, presented in the Law Commission's impact assessment, indicate that there is a significant gap between the number of aggravated offences charged and reaching a first hearing in the Magistrates' Court and the number of offences sentenced.[52] For example, according to CPS data, 2,415 aggravated common assault offences were charged and reached a first hearing in 2009, whereas, according to Ministry of Justice data, only 881 aggravated common assault offences were sentenced. In 2011, the figures were 2,636 and 203 respectively. There may be legitimate explanations for the significant difference between the number of aggravated offences charged and sentenced, and for the drop in sentencing, including: issues with the way in which offences are recorded; variations in the way in which the CPS and the Ministry of Justice record data; difficulty in proving the aggravated element of the offence; an actual decrease in the number of aggravated offences; or an increase in the use of restorative justice.[53] Nonetheless, it is possible that at least some of the initial charges were downgraded to the basic offence without proper reasons for doing so.

49. Burney and Rose, above n 1, pp 80–83. See also The Gus John Partnership *Race for Justice: A Review of CPS Decision Making for Possible Racial Bias at Each Stage of the Prosecution Process* (2003) para 95.
50. Criminal Justice Act 2003, s 144.
51. Crown Prosecution Service *Racist and Religious Crime – CPS Prosecution Policy*, available at http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a30 (accessed 25 June 2014).
52. Law Commission *Hate Crime: The Case for Extending the Existing Offences Appendix C – Impact Assessment* (Consultation Paper No 213, 2013) paras C.58 and C.63.
53. Ibid, paras C.59 and C.63.

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A more optimistic picture is presented in a recent report by the Home Office, Office for National Statistics and Ministry of Justice.[54] While the 2009 sentencing figure for common assault is consistent with the figure set out above (881), the report shows that, in 2011, 1,618 defendants were proceeded against for aggravated 'assault without injury' and 1,086 offenders were sentenced for the offence.[55] According to this report, in 2012, 8,898 defendants were proceeded against at the Magistrates' Court for all racially and religiously aggravated offences. During the same year, 6,458 defendants were convicted for aggravated offences. This represents a conviction ratio of 72.6%, which is compared, in the report, to a conviction ratio of 72.4% for the corresponding basic offences during the same time period.[56] However, close examination of the data in the appendix tables that accompany the report reveals that the conviction ratios for the individual aggravated offences tend to be significantly lower than for the corresponding individual basic offences. For example, in 2012, the conviction ratio for racially or religiously aggravated 'assault with injury' was 51%, compared to 85% for the basic offence. For criminal damage, the figures were 58% and 79% respectively. The only offence that had a higher conviction ratio for the aggravated offence than for the basic offence was 'assault without injury' (ie common assault), though the difference was less than 1%.[57]

It is noted in the report that, between the initial hearing at the Magistrates' Court and the first hearing at the Crown Court, the CPS can decide to downgrade the aggravated charge to the basic offence, to 'increase the chances of a conviction'.[58] The most assured method of increasing the chances of a conviction would be to initiate or accept a charge bargain. Ongoing scrutiny is required. The Law Commission has suggested that a wider review of the offences could help to explain the low conviction ratios and the drop in sentencing for the aggravated offences.[59] It would also be helpful if comprehensive records were kept of the charges proceeded with after the initial hearing, and of the reasons for downgrading charges in individual cases. The prevailing attitude of practitioners prior to 2003 was that charge bargaining should not take place, yet it appeared to do so.[60] Several responses to the Law Commission's consultation indicate that, in practice, this is still the case.[61]

The benefits of a charge bargain, in terms of saved time and money, as well as the guarantee of a conviction of the basic offence, may sometimes prove too tempting, particularly if the basic offence is serious and the evidence of hostility is weak. Continuous charge bargaining could result in hate crime legislation losing both its practical and symbolic value. In fact, routine charge bargaining has the potential to reverse the positive communicative effect of the law. Instead of assuring the public that hate crime is taken seriously, that it is wrong to target individuals because of their personal characteristics and that such conduct will not be tolerated, we could be left with an empty political gesture that is unlikely to influence attitudes or deter potential

54. Home Office, Office for National Statistics and Ministry of Justice *An Overview of Hate Crime in England and Wales* (2013).
55. Home Office, Office for National Statistics and Ministry of Justice *An Overview of Hate Crime in England and Wales: Appendix Tables* (2013) Tables 3.04 and 3.13.
56. Home Office, Office for National Statistics and Ministry of Justice, above n 54, p 37. See also Appendix Table 3.12.
57. Home Office, Office for National Statistics and Ministry of Justice, above n 55, Table 3.12.
58. Home Office, Office for National Statistics and Ministry of Justice, above n 54, p 37.
59. Law Com No 348, para 5.25.
60. Burney and Rose, above n 1, p 82.
61. Law Com No 348, paras 4.177–4.180.

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offenders, and is likely to dishearten, and further marginalise, the very people whom the offences are intended to protect. Thus, a failure to properly prosecute the offences could undermine the justifications for having them in the first place.

Double convictions

A further consequence of alternative charges is that it creates the possibility of the defendant being convicted of both the basic and the aggravated offence. If it is proved that the defendant committed the aggravated offence, then he must also have committed the basic offence (since the latter is a necessary element of the former). The 'double conviction' problem is most pertinent in the Magistrates' Court, where alternative verdicts cannot be returned. Fortunately, and with good reason, it has recently been made clear that a defendant should not be convicted of both an aggravated and basic offence, where the two charges arise out of a single set of facts. The case of *R (on the application of Dyer) v Watford Magistrates' Court*[62] concerned a defendant who had been convicted of both causing racially aggravated fear or provocation of violence and the equivalent basic public order offence of causing fear or provocation of violence. The Divisional Court allowed the claim for judicial review and quashed the conviction on the lesser charge, finding that for the defendant to be convicted twice for a single wrong was unfair and disproportionate. As stated by Laws LJ, 'It must be basic to our system of criminal justice that a person's criminal record should reflect what he has done, no more and no less.'[63]

Prior to this decision, there had been cases that supported the proposition that it was open to the magistrates to convict of both offences.[64] In *DPP v Gane*, it was held that one appropriate mechanism for dealing with alternative charges would be to record convictions of both offences, but impose a sentence only for the more serious offence.[65] The obvious consequence of this is that the defendant will have two separate convictions on his record. Arguably, this amounts to an additional punishment in itself, as it could have negative implications for future employment prospects and involvement in other civic activities.[66] It has been suggested that, prior to *Dyer*, the principle that a person should be punished in a manner proportionate to his offending behaviour had been consistently flouted in summary trials, with defendants falling foul of the double conviction problem.[67] The Court's finding that to impose a double conviction is wrong in principle is, therefore, to be welcomed.

The Divisional Court went on to confirm that in such circumstances, the magistrates should adjourn the lesser charge before conviction under s 10 of the Magistrates' Courts Act 1980, so that if an appeal succeeded against conviction on the aggravated charge, the lesser charge could subsequently be dealt with. Consequently, what might amount to a relatively minor offence could become the subject of two trials and an

62. [2013] EWHC 547 (Admin).
63. Ibid, at [11].
64. *DPP v Gane* (1991) 155 JP 846; *R (on the application of CPS) v Blaydon Youth Court* [2004] EWHC 2296 (Admin).
65. *DPP v Gane* (1991) 155 JP 846 at 849.
66. R Wheeler 'The danger of the double conviction' (2013) 177 Crim L & Just Weekly 191, at 192.
67. Ibid, at 191.

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appeal, requiring significant resources. However, the Divisional Court felt that any practical difficulty caused by this could not override the principle that a person should be convicted only once for one wrong.[68]

Dyer serves to further highlight the complex nature of the aggravated offences, and the type of problems that arise as a result of the sometimes competing interests of, on the one hand, prosecuting hate crimes and, on the other hand, maintaining fairness in procedure and outcome. Both *Dyer* and *Al-Tamimi* are recent cases. Given the continuous confusion in the lower courts regarding the correct interpretation of s 28 of the 1998 Act, it will be important to remain alert to the possibility that double convictions will continue to be imposed as a result of alternative charges being treated as if they were cumulative, and that defendants will continue to be sentenced in relation to offences of which they cannot be convicted.

ALTERNATIVE VERDICTS

Some of the problems associated with alternative charges can be avoided in the Crown Court by specifying only the aggravated offence in the indictment and, at trial, leaving an alternative verdict of the basic offence to the jury. If the jury is not satisfied of the aggravated element of the offence, the defendant can, nevertheless, be found guilty of the basic offence. This can render the prosecution less vulnerable to charge bargaining and can prevent double convictions. However, because alternative verdicts cannot be delivered in the Magistrates' Court, summary trials will remain susceptible to these problems. This area of procedural law is now relatively settled, but it is complex, particularly in relation to the aggravated offences. As with alternative charges, a misunderstanding or misapplication of the law can have undesirable consequences.

The complexity of the law in relation to the aggravated offences arises, in part, because the basic offences capable of being aggravated under the 1998 Act consist of both summary only offences and either-way offences, whereas all but one of the aggravated offences are triable either way. The exception is the aggravated version of s 5 of the Public Order Act 1986 (harassment, alarm or distress),[69] which remains triable only in the Magistrates' Court, and so no alternative verdict is available. Provision has been made by the 1998 Act,[70] the Criminal Law Act 1967[71] and the Criminal Justice Act 1988,[72] allowing juries to find guilt on the alternative basic offences when the aggravated offence is tried in the Crown Court, even if the basic offence is a summary offence and is not specified in the indictment. As a result of this complicated body of legislation, the jury can, therefore, convict of a basic offence that would otherwise fall outside of the jurisdiction of the court of trial.

The benefits of alternative verdicts

In some situations, leaving an alternative verdict may be disadvantageous to both the prosecution and the defence. From the prosecution perspective, it might create a risk

68. *R (on the application of Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin) at [12].
69. Crime and Disorder Act 1998, s 31(1)(c).
70. Ibid, ss 31(6), 32(5) and 32(6).
71. Criminal Law Act 1967, ss 6(3) and 6(3A).
72. Criminal Justice Act 1988, s 40.

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that the jury will be induced to convict of the lesser offence when there is evidence of the more serious offence. Several responses to the Law Commission's consultation on the aggravated offences indicate that, in practice, juries can be reluctant to convict defendants for aggravated offences.[73] As with charge bargaining, an inability to secure appropriate convictions may render the offences counterproductive, as it could create the impression that hate crime will not, or cannot, be effectively prosecuted. From the defence perspective, leaving an alternative verdict might create a risk that the jury will convict of the lesser offence when it would otherwise have acquitted, resulting in potential injustice to the defendant.

Yet, leaving alternative verdicts has clear benefits. In addition to alleviating some of the problems associated with alternative charges, leaving an alternative verdict of the basic offence may prevent the jury from acquitting the defendant altogether, despite evidence that he committed the offence. It may also prevent the jury from convicting of the aggravated offence out of reluctance to see the defendant 'get away with' the basic offence, despite not accepting the racial or religious element. This issue arose in the recent case of *Mihocic*,[74] in which the jury had found the defendant guilty of racially aggravated harassment but not of racially aggravated criminal damage. The jury did, however, find him guilty of the basic offence of criminal damage, which had been put as a separate count in the indictment. It was argued on appeal that the trial judge had been wrong not to leave an alternative verdict in relation to the count of aggravated harassment, and that the jury's finding of guilt might have been a means of ensuring liability for the basic offence, rather than an acceptance of racial aggravation. The defendant did not deny that he had shouted at the complainant, but did deny using any words that were racially aggravating.

The Court of Appeal upheld the conviction, finding that the real gravamen of the count of racially aggravated harassment was whether racial abuse had been used, and so it was understandable that only the aggravated count had been left to the jury. This was predicated on the fact that it was a Crown Court trial and that the complainant and the defendant lived in the same street.[75] The relevance of this is not obvious; since the defendant admitted verbally abusing the complainant, the fact that they were neighbours does not in itself make the aggravated element any more central to the charge than would otherwise be the case. This point aside, it is difficult to accept the reasoning implicit in the judgment. Racial aggravation as the real gravamen of the offence does not necessarily increase the likelihood of an acquittal if the jury is not convinced of the racial element. The Court failed to squarely address the concern that the jury might not have convicted of racially aggravated harassment had it been able to convict of the basic offence. This issue was particularly relevant given the acquittal of racially aggravated criminal damage.

The availability of an alternative verdict can prevent the jury from facing a stark choice between conviction of a serious offence and a complete acquittal. For this reason, Lord Bingham, in the House of Lords case of *Coutts*, was of the opinion that the public interest in the administration of justice would be best served 'if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support'.[76] The objective, according to Lord Bingham, must

73. Law Com No 348, para 4.175.
74. [2012] EWCA Crim 195.
75. Ibid, at [17].
76. *Coutts* [2006] UKHL 39 at [23]. See also *Foster* [2007] EWCA Crim 2869.

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be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged.[77] If this logic is not followed in relation to the aggravated offences, the defendant not only faces the risk of a harsher punishment than his conduct deserves, but also of being subjected to the stigma associated with being labelled as a racist.

Alternative verdicts and charging decisions

Despite the benefits outlined above, there are also procedural problems that emerge as a result of alternative verdicts. The availability of alternative verdicts, along with the limited list of offences that can be aggravated under the 1998 Act, creates difficult charging decisions.[78] For example, if there is evidence that the defendant caused the victim grievous bodily harm with intent, the prosecution could charge under s 18 of the Offences Against the Person Act 1861 (OAPA). There is no racially or religiously aggravated variant of the s 18 offence. Section 18 was deliberately excluded from the 1998 Act because it already carries a maximum sentence of life imprisonment (which is significantly higher than the 7-year maximum for the aggravated variants of ss 20 and 47 OAPA).[79] So, if the facts suggest the presence of racial aggravation, this cannot be reflected in the s 18 charge. It would, however, be taken into account at sentencing by applying s 145 of the 2003 Act. Since there is no aggravated variant of s 18, it is not excluded from the enhanced sentencing regime.

If the jury rejects intent, it can return an alternative verdict of recklessly inflicting grievous bodily harm contrary to s 20 OAPA, but not of the aggravated variant of s 20, because this would mean relying on facts that have not been part of the case. The only way to include the racial element, where intent is rejected, is to introduce the racially aggravated variant of s 20 as an alternative count in the indictment. If this route is taken, and the jury does not convict of the aggravated s 20 offence, s 145 cannot be used to increase the sentence.[80] Furthermore, if both the s 18 and aggravated s 20 offences are charged, the prosecution may face pressure to accept a plea to the aggravated offence, because it carries a much shorter maximum sentence than the s 18 offence.[81]

Consequently, in this scenario, the options are: (1) put counts in the indictment covering s 18, the aggravated variant of s 20 and the basic s 20 offence, lose accountability for either the intent or the racial element (or both), and become susceptible to a charge bargain; or (2) charge only the s 18 offence and, if successful, take account of the racial element at sentencing. The second option is risky. If the jury rejects intent, the prosecution may lose the case completely (unless an alternative verdict of the basic s 20 offence is left to the jury). Furthermore, the prosecution might prefer to include the aggravated variant of the less serious s 20 offence because of the symbolic and communicative value of the aggravated offences. In fact, for this reason,

77. *Coutts* [2006] UKHL 39 at [12].
78. See R Leng, R Taylor and M Wasik *Blackstone's Guide to the Crime and Disorder Act 1998* (London: Blackstone, 1998) pp 48–51; Taylor, above n 45.
79. *Hansard* (HL) 12 Feb 1998, vol 585, col 1280. This suggests that higher sentences are the only reason for the aggravated offences, overlooking other considerations, such as their communicative and denunciatory functions. See Taylor, above n 45.
80. *McGillivray* [2005] EWCA Crim 604.
81. Taylor, above n 45.

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there may be circumstances in which prosecutors would prefer to charge the aggravated s 20 offence, and not the s 18 offence. The maximum sentence available would be much lower, but if the circumstances of the case are unlikely to warrant a lengthy sentence following conviction of the s 18 offence, then the racial element might be thought to be more important than the question of intent. Furthermore, the stigma associated with conviction of a racially aggravated offence might be thought to supplement the sentence. For these same reasons, if both the s 18 and aggravated s 20 offences are charged, the jury might choose to convict of the aggravated offence rather than the s 18 offence, despite evidence of intent.[82]

In addition to the complicated charging decisions, there are implications for juries. Whenever the indictment includes aggravated and non-aggravated offences, and whenever alternative verdicts are available, the directions given to the jury are likely to be complicated and difficult to decipher. This is particularly true if an offence that requires proof of intent, but not racial or religious aggravation, is tried alongside an offence that requires proof of racial or religious aggravation, but not intent, and alternative verdicts requiring no intent, or no racial or religious aggravation, can also be returned. It seems, therefore, that no matter which route is taken, the prosecution process will not be straightforward.

INCONSISTENT VERDICTS

A consequence of both putting alternative charges and leaving alternative verdicts is that inconsistent verdicts might be returned, particularly if the aggravated offences are not properly understood. This can occur where, for example, the defendant is charged with two aggravated offences arising out of one incident, and his conviction of one of the aggravated offences is inconsistent with his acquittal of the other. This can also occur where a guilty verdict is returned in respect of one of the aggravated offences, and an alternative verdict of guilty to the basic offence is returned in respect of the other offence. The case of *Mihocic* provides an illustration of how this can happen. As explained above, the defendant had been found guilty of racially aggravated harassment but not guilty of racially aggravated criminal damage. Instead, the jury found him guilty of the alternative count of basic criminal damage. The charges arose from an incident involving a dispute between the defendant and his neighbour. During a confrontation, the defendant verbally abused his neighbour and damaged his neighbour's new car. The Crown's case was that, either very shortly before or after the damage, the verbal abuse became racist. This formed the basis for the charge of racially aggravated harassment, of which the defendant was convicted. On appeal, the defendant argued that the conviction of racially aggravated harassment was unsafe, as it was inconsistent with the acquittal of racially aggravated criminal damage. The Court of Appeal recognised that the jury's decision was surprising.[83] Nonetheless, the Court found that the verdicts were not logically inconsistent; the jury must have been satisfied that there was a sufficient gap in time between the racist abuse and the criminal damage.

This outcome is also somewhat surprising. Section 28(1)(a) of the 1998 Act provides that the demonstration of racial hostility must take place at the time of committing the basic offence, or immediately before or after doing so. In the case of

82. Ibid.
83. *Mihocic* [2012] EWCA Crim 195 at [15].

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Babbs,[84] the Court of Appeal took the view that the immediacy requirement is fulfilled by showing a sufficient connection between the demonstration of hostility and the basic offence. In that case, a conviction of racially aggravated assault was upheld, despite there being up to 15 minutes between the demonstration of hostility and the assault. It is unclear from the judgment in *Mihocic* precisely how much time had elapsed between the alleged racist abuse and the criminal damage. The account of the facts presented suggests that it was much less than 15 minutes. The logical conclusion seems to be that the two verdicts were inconsistent; that if racist hostility could be proven to have been demonstrated towards the victim during the harassment, it occurred immediately before or after the criminal damage. There is no mention of *Babbs* in the judgment of the Court of Appeal. The Court did acknowledge, however, that the 1998 Act 'is drafted in terms that one would ordinarily expect that if racial abuse was . . . used at a particular point in time in the short sequence of events . . . the terms of the statute would mean that the racial element applied to the criminal damage whether it occurred before or after'.[85] There may well have been weight in the defence's submission referred to above, that conviction of racially aggravated harassment was a means for the jury to hold the defendant liable for the basic harassment offence, rather than an acceptance of the racial element.

However, the Court's decision that the verdicts were not inconsistent was based on the logic of the verdicts in the light of the directions of the trial judge; the jury 'were not directed as to the logical outcome of the evidence as put before them'.[86] Nor had they been given a direction on inconsistent verdicts. This case serves to highlight not only the potential for inconsistent verdicts when more than one offence is alleged to have been committed, but also how important it is for trial judges to understand the complexity of the aggravated offences, and to direct juries appropriately.

A similar situation formed the basis of an appeal in the earlier case of *Dossett*.[87] The defendant had been convicted of a racially aggravated public order offence but acquitted of racially aggravated assault. He was convicted of assault as an alternative to the count of racially aggravated assault. As in *Mihocic*, the argument on appeal was that the conviction of the racially aggravated public order offence was inconsistent with the acquittal of racially aggravated assault. The charges arose from an altercation between the defendant and a parking attendant. The Crown's case was that, a few minutes after receiving a penalty notice, the defendant confronted the parking attendant, shouted at her, including telling her to 'go back to your fucking country', grabbed her jacket to see her identification number, and continued to shout and threaten her. The words 'go back to your fucking country' constituted the evidence of racial hostility for the purposes of both counts in the indictment. It was submitted on appeal that the question of racial aggravation in relation to the two counts stood or fell together.[88] As in *Mihocic*, the Court of Appeal disagreed, finding that the verdicts were not logically inconsistent. The Court accepted the argument put forward on behalf of the Crown, that the jury may have found that the words relied upon were not spoken at the time of, or immediately before or after, the assault (which was the specific act of grabbing the jacket), but that the public order offence was a more prolonged and ongoing act, and the words were encompassed within it.

84. [2007] EWCA Crim 2737.
85. *Mihocic* [2012] EWCA Crim 195 at [14].
86. Ibid.
87. [2006] EWCA Crim 709.
88. Ibid, at [12].

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Again, it is not easy to accept this logic. Although immediacy is a question of fact for the jury to decide, the complainant had given evidence to the effect that there had been one or two minutes between the relevant words used and the grabbing of her jacket. Even if the jury was unsure of whether the words were spoken immediately in time before the assault, the case as put by the Crown was that the confrontation, assault, shouting and threats constituted one ongoing incident. In future cases of this kind, it would be helpful for juries to be directed that, following *Babbs*, 'immediately before or after' does not require an immediate temporal link.[89] Instead, it requires a connection between the demonstration of hostility and the commission of the basic offence, such that the words used are capable of colouring the behaviour of the defendant during the commission of the basic offence.[90] The important point of s 28(1)(a) is that it is directed not so much to words but to the hostility that is demonstrated towards the victim with the relevant connotation.[91] A direction of this nature could help to prevent outcomes that appear inconsistent, whereby the defendant was either over-convicted of the aggravated offence or under-convicted of the basic offence.

THE FUTURE OF THE AGGRAVATED OFFENCES

The future of hate crime legislation should not be determined only by the type of conduct that we wish to prohibit or the particular personal characteristics that we wish to protect. Consideration should also be given to how well the legislation can work in practice and the issues that are likely to arise at the prosecution stage of the criminal process. This paper has examined a number of procedural difficulties that arise as a result of the structure of the racially and religiously aggravated offences. These difficulties exist alongside a persistent misunderstanding of the substantive elements of the offences and will inevitably be carried forward into any new aggravated offences based on disability, sexual orientation and transgender identity. Attempts have been made to address some of the procedural problems, including the CPS policy against charge bargaining and the Divisional Court's declaration that it is unfair to convict the defendant of both the basic and aggravated offence. Yet, in order to determine whether these solutions are operating sufficiently in practice, close scrutiny is required. The gap between the number of cases reaching a first hearing and the number of sentences imposed for the offences is not encouraging.

There appears to be little that can be done to adequately remedy the procedural problems within the current legislative structure. In the Crown Court, the problems associated with charging both the basic and aggravated offence, or only the aggravated offence, can be alleviated by leaving an alternative verdict to the jury, without specifying the basic offence in the indictment. There must be some responsibility on the part of the trial judge to ensure that an alternative verdict of the basic offence is available whenever an aggravated offence is tried. In the absence of an alternative verdict of the basic offence, there will continue to be situations in which the jury faces a stark choice

89. However, in the earlier case of *Parry v DPP* [2004] EWHC 3112 (Admin), it was held that the demonstration of hostility must occur in the immediate context of the basic offence. In that case, no aggravated offence had been committed where the racial hostility was demonstrated 20 minutes after commission of the basic offence, away from the scene of the basic offence and in the absence of the victim.

90. *Babbs* [2007] EWCA Crim 2737 at [8].

91. Ibid.

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between, on the one hand, convicting of the aggravated offence so that the defendant does not get away with the basic offence, and, on the other hand, acquitting of the aggravated offence despite clear evidence of the basic offence. Unfortunately, this solution to the charging problem cannot be applied in the Magistrates' Court without a change in the law. In 2002, Burney and Rose found that there was a strong body of opinion among stipendiary magistrates and justices' clerks that magistrates should have the power of finding alternative verdicts on aggravated offences, and went on to recommend that they be given this power.[92] This should be considered in a wider review of the offences, as recommended by the Law Commission.

Although leaving alternative verdicts can alleviate problems associated with charging only one or both offences, this is an imperfect solution that has shortcomings of its own. For example, it may become very difficult for a jury to understand the judge's summing up. This is also true if the defendant is also being tried for a non-aggravated offence, such as s 18 OAPA. It is likely that the jury will encounter difficulties in comprehending precisely what must be proven in relation to each count in the indictment and each alternative, and in determining the most appropriate offence of which the defendant should be convicted. Careful judicial directions are currently the only means of dealing with this. Careful judicial directions are also essential if inconsistent verdicts are to be avoided. The jury should be advised of the potential for inconsistent verdicts and the logical outcome of the case whenever more than one aggravated offence is tried. The jury should also be directed carefully as to the requirements of s 28 of the 1998 Act, particularly what is meant by 'immediately before or after'. The higher sentences and increased stigma associated with the aggravated offences make it imperative that the aggravated element is satisfied before a defendant is convicted. Yet, given the complexity of these matters, even the most careful of judicial directions may be insufficient to ensure fair and just outcomes.

If a wider review of the offences is undertaken, it may uncover a way to solve the procedural issues by substantially altering the structure of the law. However, the most straightforward and pragmatic solution would be to repeal the offences and to rely on the enhanced sentencing regime as a mechanism for responding to hostility-based offending. Prosecutors would not face difficult charging decisions and there would be no need to direct juries as to alternative verdicts or inconsistent verdicts. In all cases, the basic offence would be charged, and, if convicted, the aggravating feature of hostility would be evaluated and taken into account by the judge at the sentencing stage. As well as resolving the procedural issues associated with the aggravated offences, the sentencing provisions also address some of the concerns about the characteristics protected by hate crime legislation and the type of conduct targeted; ss 145 and 146 of the 2003 Act *must* be applied in relation to *any* offence (other than an aggravated offence) where there is evidence of hostility based on race, religion, disability, sexual orientation or transgender identity. This solution would, therefore, provide equality of treatment to the five statutorily recognised hate crime characteristics.[93] It would also resolve the confusion that has resulted from the combined system of aggravated offences to deal with certain types of offending and a 'mutually exclusive' enhanced sentencing regime to deal with all other types of offending.

In advocating this solution, the practical, procedural and theoretical limitations of the current sentencing regime should not be overlooked. In terms of the practical

92. Burney and Rose, above n 1, pp 80 and 113.
93. It should be noted that there have been calls to extend hate crime legislation to additional characteristics, such as gender. See Law Com No 348, paras 5.60–5.73.

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limitations, there is evidence to suggest that ss 145 and 146 are not applied as consistently as they should be.[94] There is a danger that where the aggravated element does not form part of the substantive offence, the police will not investigate or gather sufficient evidence in relation to it. Moreover, unless an aggravated offence can be charged, establishing the hostility element might not be a priority for the prosecution. If the issue is not raised by the prosecution, then the sentencing judge is unlikely to be aware of it, and so cannot take account of any hostility in the sentence. However, this can be rectified. The Law Commission responded to these concerns by recommending that the enhanced sentencing regime also be subject to review, and that it be improved in order to deal adequately with hostility-based offending, whether or not the aggravated offences are extended.[95]

In order to improve the operation of the regime, the Commission recommended new guidance from the Sentencing Council on the approach to sentencing hostility-based offending. This would help to improve professional understanding of the sentencing system. It could increase the likelihood of hostility-related issues being raised in appropriate cases and ensure the consistent application of ss 145 and 146. The precise form and content of any guidance would be a matter for the Sentencing Council.[96] Special training for the police and CPS, intended to raise awareness of the enhanced sentencing regime, could also assist in ensuring that hostility-related issues are brought to the attention of the judge, and that ss 145 and 146 become embedded in the criminal justice response to hate crime. The police and CPS must appreciate that although the question of hostility does not arise until after a conviction, it is no less important to gather and present supporting evidence than it is in relation to the aggravated offences.

The procedural problems with the sentencing regime become apparent where the defendant denies that the offence was aggravated. In *O'Callaghan*, it was held that before the sentence is increased to reflect the aggravated element, a *Newton* hearing must be held or, at the very least, the defence must be given plain and adequate notice that sentencing on an enhanced basis is being considered.[97] A *Newton* hearing is a procedure that is used to determine disputed factual issues that were not resolved during a trial and that could have a substantial bearing on the sentence.[98] During the hearing, both the prosecution and the defence can call evidence and cross-examine witnesses, and the onus is on the prosecution to satisfy the judge to the criminal standard of proof that their version of events is correct.[99] However, there has been concern that this process is sometimes less than thorough, resulting in unfairness to victims if the aggravating factor is not taken into account, and unfairness to defendants if they are not afforded a sufficient opportunity to challenge the allegation of hostility.[100] Defendants might also be deterred from contesting the allegation because, if the matter is resolved against them, any 'sentence discount' afforded for pleading guilty to the basic offence may be reduced.[101] Again, these problems could be rectified

94. Criminal Justice Joint Inspection *Living in a Different World: Joint Review of Disability Hate Crime* (2013) p 4; Consultation No 213, paras 3.34–3.38; Law Com No 348, paras 3.6–3.14.
95. Law Com No 348, para 5.102.
96. Ibid, paras 3.49–3.51.
97. *O'Callaghan* [2005] EWCA Crim 317 at [18].
98. See *Newton* (1983) 77 Cr App R 13.
99. *Underwood* [2004] EWCA Crim 2256 at [9].
100. Law Com No 348, para 3.14.
101. *Underwood* [2004] EWCA Crim 2256 at [11].

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through guidance from the Sentencing Council. This guidance could emphasise the importance of ensuring that there is an opportunity for the defence to challenge the allegations, usually at a *Newton* hearing. It could also clarify the correct procedure to be followed, including the prosecution's burden of proof.

Finally, one could argue that the enhanced sentencing regime cannot meet all of the aims of the aggravated offences because it lacks the symbolic and communicative function of the offences. It was argued above that this is not necessarily the case. Although the deterrent effects of hate crime legislation cannot be guaranteed, application of the sentencing provisions could be at least as effective as the aggravated offences in sending out a message that hate crime will not be tolerated. However, this does require that judges make this fact explicit in their sentencing remarks, and that those remarks are routinely made available to the public. It is true that the offence of which the defendant is convicted would not have a label that itself reflects the aggravated nature of the offending behaviour, but if the Law Commission's recommendations are followed, this would not be necessary. The Commission recommended that, in individual cases, the application of ss 145 or 146 of the 2003 Act be recorded on the PNC, so that the offender's record will show the aggravated element of the offending, just as it shows convictions of racially and religiously aggravated offences.[102] In addition to enhancing the communicative function of the sentencing regime, this would provide criminal justice services with a fuller offender history, which could assist in selecting rehabilitation and education programmes, as well as sentencing for subsequent offending. It would also assist potential employers in their decision making process for certain posts that require background checks, particularly those that involve contact with members of a protected characteristic.[103]

If taken forward, the Law Commission's recommendations would help to ensure that the element of hostility is taken seriously and that the enhanced sentencing regime would further encompass the desired symbolic and communicative function of the aggravated offences. This could be usefully supplemented with greater education and public awareness initiatives, designed to promote diversity and reduce incidents of hate crime. Moreover, whenever the commission of a hate crime is suspected or reported, a thorough and sympathetic response from the police and CPS could improve confidence in the criminal justice response to hate crime and increase reporting of hate crime incidents.

Abolition of the aggravated offences is unlikely to appeal to politicians; it could be perceived as a reversal of the progress that has been made over the past two decades to tackle racism and other prejudices. However, if procedural problems result in offences that cannot be enforced properly, they become little more than an empty gesture, and this may be counterproductive. Furthermore, if procedural problems create the risk of wrongful conviction and harsher sentences than merited in individual cases, the offences also become a source of injustice to those accused of wrongdoing. One would hope that anxiety about repealing the offences could be reduced through reassurance that the sentencing provisions are still hate crime laws, and that by eliminating the procedural problems stemming from the aggravated offences, hate crime can be dealt with more fairly and effectively. From a procedural perspective, the preferred way forward would be to improve the operation of the enhanced sentencing regime in place of aggravated offences.

102. Law Com No 348, para 3.104.
103. Ibid, paras 3.90–3.95.

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