

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

10 May 2019
SC(19)MAY06 – Public Order
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1 ISSUE

1.1 This meeting requires consideration of consultation responses for the draft guideline on hate crime offences.

2 RECOMMENDATION

2.1 The Council is asked to;

- consider responses to the draft guideline for offences of stirring up racial hatred or hatred against persons on religious grounds or grounds of sexual orientation;
- consider whether revisions are required to any factors and sentences in the definitive version of the guideline.

3 CONSIDERATION

3.1 The draft Public Order guideline includes a guideline for sentencing a number of hate crime offences provided for by the Public Order Act 1986. These include stirring up racial or religious hatred and hatred based on sexual orientation. Early consideration was given to some of these offences during the development of the terrorism guideline, with a particular focus on 'hate speech' type offences. The worst examples of cases share similarities with the offence of encouragement of terrorism, and racial hatred offences have been charged in a number of cases alongside soliciting to murder in a terrorism context. It was decided that as these offences are provided for by Public Order legislation, it would be appropriate to include them in the Public Order guideline.

3.2 Volumes of these offences are very low, and very few cases were available to analyse in development of the guideline. A case list which informed the draft guideline is included at

Annex A. A copy of the consultation document including the rationale for factors and sentences is included at **Annex B.**

3.3 It was agreed that while the various ways in which these offences can be committed are broad, one guideline could sufficiently capture all types of hatred offences. Although racial hatred activity can be broader and include abusive or insulting elements, the mischief of all offences is the incitement of hatred and potential harmful activity then being directed at particular groups.

Legislative provisions

3.4 Part 3 of the Public Order Act prohibits activities intended or likely to stir up racial hatred. Part 3A of the Act prohibits activities intended to stir up hatred against persons on religious grounds or grounds of sexual orientation.

3.5 The legislation prohibits a range of activity conducted with the intention or likelihood of stirring up hatred including:

use of words or behaviour or display of written material; publishing or distributing written material; public performance of play; distributing, showing or playing a recording; broadcasting or including programme in cable programme service; and possession of racially inflammatory material. All offences carry a 7 year statutory maximum sentence.

It should be noted that the racial hatred offences can be committed recklessly as can extend to acts *likely* to stir up hatred as well as those *intended* to, whereas the threshold is higher for activities prohibited in relation to religion or sexual orientation as these must be intended to stir up hatred.

3.6 The offences also contain an important distinction in that the racial hatred offences can include use of threatening, abusive or insulting words or behaviour, while the offences relating to hatred against persons on religious grounds or grounds of sexual orientation provide for threatening words or behaviour only, and do not extend to activity which is abusive or insulting. This was due to Parliament, and in particular the House of Lords, proposing amendments to the original bill to limit prohibited activities for hatred of religious or sexual orientation to threats. This was based on concerns that criminalising insults and abuse of a belief held regarding religion or sexual orientation would constitute a fundamental restriction of free speech, and wholly differs from abuse and insults based on an individual's race.

Consultation responses

3.7 This guideline elicited the majority of responses to the Public order consultation. The vast majority were from individual members of the public, with almost 40 being an identical template response from members of a far-right organisation in protest at the inclusion of the guideline.

3.8 Some responses wholly misunderstood the purpose of the guideline and thought that new laws were being created. Others did not appreciate the nuances of the offences and the threshold of threats being the basis of some of the offences, and responses referred to censorship of speech, the undermining of democracy and saw the guideline as an interference with political considerations. Extracts of some of these responses are included below;

“Whoever drafted this obscenity should be dismissed - scrap it and start again from the perspective that the CJS has no business interfering with political discussions” - Individual response

I consider these proposals a nations attempt to build a control structure around political activities in this country. I reject all of these proposals. I view these proposals with absolute horror because I can see them being used to ‘manage’ the political scene in Britain. -
Individual response

“Criticism is not hate. But hate is a legitimate emotion and people have every right to express it, regardless of who has a vested interest in silencing them. You cannot criminalise emotions. In natural law, real law, not government decree, people are as free to hate as they are to love. There are things deserving of hatred. Hatred is not always a negative emotion, just as love is not always a positive emotion. There are people who love torturing, raping and killing other people. Hatred of an evil can hardly be described as wrong, yet the state would prosecute people for expressing hatred of evil. That makes the state evil. I hope I have made clear my utter contempt for this travesty of law and everyone involved in enforcing it.” -
Individual response

This is not a game and there is a tremendous public backlash fermenting in the background. I am now of the opinion that the quicker this backlash happens the better so we can better purge our institutions of fruitcakes that treat the rest of us like morons and then hide behind bureaucracy and threats to avoid liability. Actually, I have changed my mind.....bring in this sentencing and jail anyone with an opinion that opposes the current political trends. Encourage an army of professional scam merchants and victims and make sure they cause as much damage as possible and alienate themselves and their communities even more than they already are. Give the police even more powers to jail anyone they don't like or who is white or male or Christian or criticises the police or government so that they lose even the slim amount of credibility they have remaining. Make more laws banning things. Ban all opinion. Empower certain groups over other groups. Make it law that indigenous people must doff the cap to anyone who identifies as BAME or an immigrant. men must prostrate themselves before women and beg for forgiveness for having a penis. Ban the internet. Bring back slavery. Bring back corporal punishment and build lots and plots of gulags for dissidents. Create a new Inquisition. All thought crime will be severely punished. Elevate fear

levels such that people are terrified to voice anything other than what they are permitted to say. Give corporations more rights than silly humans. The bigger the corporation, the more power and standing and rights. Burn books. All books that counter the current narrative must be torched and banned. Let's start with everything written by Winston Churchill, Robert Louis Stevenson, Mark Twain, Shakespeare and everything written prior to 1962. Let's ban the Royal Protestant Oath as being a hate crime. Oh, just ban everything. Embrace the power and ban a fair and equitable justice system. All courts should be political courts policed by political officers to ensure that the party line must be obeyed. - Individual response

In the circumstances, whilst we have nothing to say about the more serious offences involving violence or the threat of violence, we strongly object to your unaccountable body seeking to impose stiffer sentences on those whose exercise of free speech is only treated as a crime if what is said offends Left/Liberal Internationalist/Globalist anti-nationalist/multi-culturalist, anti-English, politically correct opinion. Conversely when patriots and nationalists are viciously smeared we are told that this must be accepted as legitimate expressions of Free Speech. The lack of balance and equivalence between these approaches demonstrates that you are seeking to do nothing more than to further politicise the criminal justice system in support of the British Political Establishment rather than on the basis of rationality or dispassionate objectivity. – English Democrats

"This is a blatant attempt to enshrine Islamic Sharia blasphemy "laws" into UK Law" - Individual response

This is highly politically motivated and designed to prevent political organisation against the Cultural Marxist philosophies. 1. Group activity: this is designed to prevent right-wing political parties from engaging in activism. If you wish to abolish democracy, this would be the way to go. 2. The volume of dissemination: you mean that a small Youtube channel pointing the excessive involvement of black people in crime, say, would lead to a lower sentence, than a popular Youtube channel -- when no real offence other than engagement in politics had taken place. 3. Using multiple social media platforms? Well, in a democracy, online activism involves attempting to disseminate views widely. 4. History of failure to comply with court orders: what if those orders directly contravene the Queen's Coronation Oath and judges' Judicial Oaths? - Individual response

1984 was not an instruction manual. - Individual response

Please put me on your hate speech list because i will condemn those that will not stand up for the culture of my heritage. I will speak out and speak the truth. I will not be intimidated by some spineless speech monitor whether they be in Britain or anywhere else. Cower in fear you spineless perpetrators of cultural genocide. Damn you, damn all of you! Your judgement will come! (Please consider my speech threatening because I consider your behavior as genocide.) - Individual response

3.9 The Council have previously noted that in the current social climate there is the potential for the Public Order guideline to appear to be politically influenced or motivated. In development it was noted this was a potential risk of including the guideline for hate crime

offences. The guideline was included predominantly to provide for the terrorism related offences and serious examples of hate crime, and not the types of activity referred to in responses. However, the consultation document did not include examples of the types of cases relevant to this to avoid creating perceptions that particular groups were the focus of the guideline.

3.10 It is not proposed that the guideline is excluded from the definitive version based on the critical responses. The consultation response document will be clear on the breadth of activity captured and could include examples of cases. Proposed guideline revisions take into account concerns raised in consultation and seek to ensure a proportionate approach to lower level offences.

Question 1: Does the Council agree that the definitive Public Order guideline should retain the offences related to stirring up hatred?

Culpability factors

3.11 It was agreed that culpability factors should relate to the intention to stir up hatred and the objective of such activity, as this is the essence of these offences, rather than the level or content of threats, abuse or insults which are captured as aggravating factors. Given the similarities which exist between hatred offences and some terrorism related incitement offences, some culpability and harm factors in the encouragement of terrorism guideline were adapted and included.

3.12 The first high culpability factor relates to person in position of trust, authority or influence. This factor is included in the Terrorism guideline, and was relevant in the case of Abul Aba Hamza, the Iman who incited jihadist activity among those attending the mosque at which he preached. This was the type of offence this factor sought to capture. However, some respondents thought this was specifically drafted to capture individuals such as Tommy Robinson and Nigel Farage, and spokespeople or activists of right wing groups. Others questioned how the status of the individual would be determined or measured;

What exactly do you mean by position of trust, authority and influence? The Nolan principles on public life already set a series of standards for those in public service (even if honoured in the breach of the same by many, particularly politicians who frequently breach these).

If we are talking outside of people in public service, how are you defining a position of trust, authority and influence? Are you looking at YouTube views? - Individual respondent

There were observations that this factor could extend to politicians and members of the press. It is not proposed the factor be removed or revised as the Council considered that influential figures bear a greater responsibility not to abuse their position to incite criminal

activity against particular groups. This will be clarified in the consultation response document.

Question 2: Does the Council wish to retain the high culpability factor relating to offenders in a position of trust, authority or influence?

3.13 There was little dissent specifically directed at the other two high culpability factors, and no further amendments are proposed.

3.14 The lesser culpability factor 'reckless as to whether hatred would be stirred up' would only be relevant to the racial hatred offences, as the other offences must be intended. It was envisaged this would be relevant where an offender may have recklessly shared or added commentary to a social media post which included threats or encouragement of violence towards particular groups. The factor attracted significant criticism that it could be too far reaching and difficult to objectively assess;

Given that the internet has billions of potential viewers how can a person when discussing a controversial subject on a website, or YouTube video not be "reckless" as to the reaction from some viewers? If the controversial subject is also emotive, then recklessness has to be acknowledged as non-culpable unless this is about censoring free speech and opinion on controversial subjects. Would the Council view a documentary or commentary on US police shootings of black people and Black Lives Matter in the same way as a documentary on Julius Malema (Economic Freedom Fighters Party) and the plight of white South African farmers? In my view both are controversial subjects that need discussion, but inevitably anyone posting such a video must be reckless of the consequences because of the emotive nature of the subject matter.- Individual respondent

I find the penalties for 'reckless sharing' utterly absurd and an affront against justice. You are asking a Judge to decide how careful people should be about sharing information and to imagine if some unidentified persons may feel a strong emotion and to imagine what the consequence of that could be on society. This goes beyond what a Judge should be expected or allowed to decide.- Individual response

While it is thought that reckless behaviour should be provided for at a lower level than intended behaviour, further consideration of the factor has highlighted that distinction in its applicability to racial hatred offences (intention is required in stirring up other types of hatred) only is not clear in the guideline as drafted. Given the nuances and different criteria for offences this could be misleading for sentencers. If one guideline is to be provided for all offences, there are two options to address this. One option would be to have only two culpability categories, with the existing high culpability category retained and a lesser culpability factor of 'all other cases'. Sentence starting points and ranges could then be adjusted accordingly. An alternative option would be to retain the factors as drafted, but qualify the reckless factor with 'applicable to racial hatred offences only'. This does mean

that as there must be intention to commit the offences relating to hatred based on religion or sexual orientation, only two levels of culpability are available in the assessment.

Question 3: Does the Council wish to remove the recklessness factor from culpability, or qualify with ‘applicable to racial hatred offences only’?

3.15 The Campaign against Anti-Semitism response made the following point regarding culpability factors;

‘The assessment of culpability should include the persistent use of social media to disseminate to a wide audience hateful slurs about the behaviour of specific racial or religious groups. Such slanders would include the use of inaccurate stereotypes to portray the targeted group as a threat to society. For example, antisemitic conspiracy theories such as Jews exerting a control of global finance that allows them to profit at the expense of others is clearly designed to encourage hatred of Jewish people. In the same vein, slanders that Jews are allowed to kill non-Jews and are permitted to engage in paedophilia are widely disseminated across social media, and are clearly designed to incite hatred’.

The persistent activity high culpability factor would capture persistent dissemination of hatred type material, and this will be clarified in the consultation response document. The guideline includes a high harm factor included relating to widespread dissemination which will be discussed later in this paper.

Harm factors

3.16 There were few issues raised with the category 1 harm factor relating to encouragement of activity threatening or endangering life. However, concerns were raised regarding the second high harm factor relating to ‘widespread dissemination’. Specific concerns related to the threshold of ‘widespread’ and how this could be assessed in the digital age. Some respondents thought that an individual may not intend for a statement, publication or broadcast to be widely shared but this may occur anyway. A number of responses cited the case of *R v Meechan* as an example, which involved the offender posting a video on You Tube of a dog he had taught to respond to nazi commands which he said he intended as a joke to challenge perceptions of the animal as ‘cute’, and it went viral;

In R V Meechan (2018), Meechan made a video aimed at a small group of around 10 people, but which went viral subsequently obtaining several million views outside Meechan’s control. Even then the public did not make a complaint directly to the police, who with the support of the CPS took it upon themselves to prosecute the matter.- Individual respondent

In developing the guideline the cases that influenced the inclusion of this factor were *R v Burns* and *R v Sheppard and Whittle*. In each case information intending to stir up hatred was shared on the internet and potentially reached a wide audience.

The MA thought the factor should be separated into two points;

The second limb of Category 1 is: 'Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced'— this phrasing seems unclear, and we query whether the 'influence' needs to be tied to intention to stir up racial hatred or cause harm. We suggest that this limb be broken down into two separate points, firstly the widespread dissemination, and secondly the strong likelihood of influence.- MA

However, they also raised concerns regarding a risk of double counting if the factor was applied where high culpability is present;

We have some concern that the high culpability factor 'in position of trust, authority or influence and abuses their position' may, if considered together with the high harm factor relating to widespread dissemination, result in double counting for the purposes of determining the sentencing starting point. It is probably easiest to illustrate our concern by way of example: someone may be considered to fall into the high culpability factor as holding a position of influence because they have a large social media following, and any comment that person makes on social media is thereby disseminated widely. This would then automatically mean that the person falls into the A1 sentencing range, as having fulfilled the Category A culpability requirement and Category 1 harm. – MA

3.17 It is thought that offenders publishing items online do so in the knowledge that it may be viewed widely, and this would be more obvious to an offender with a large social media following, and the factor does require widespread dissemination of hatred based material. However, there is some force in the argument that this factor could potentially capture a high volume of cases where information is shared digitally, and it could appear disproportionate to the harm involved in the other category 1 high harm factor which captures encouragement of activity endangering life. However, intention is required in all offences other than racial hatred offences, so a high threshold is required to prove the offence.

3.18 There are two aggravating factors already included relating to significant volumes of publications published or disseminated and use of multiple social media platforms to reach a wider audience. These factors could be redundant if widespread dissemination is included as a high harm factor. It may be preferable to have the second limb of the factor regarding influence as necessary for the factor to apply by removing the 'or' from 'and/or', which would address the point the MA raised while retaining the factor at high harm. It should also be noted that the response from the Campaign Against Anti-Semitism discussed at paragraph 3.15 specifically noted the widespread dissemination as a highly relevant factor.

Question 4: Does the Council wish to revise the category 1 harm factor relating to widespread dissemination so strong likelihood of widespread influence is necessary, or for widespread dissemination to be captured at Step 2?

Sentence levels

3.19 Sentence levels were based on a limited number of cases which were available for review, and intended to be relative to sentences agreed for the offence of encouragement of terrorism in the Terrorism guideline.

3.20 Unsurprisingly the majority of responses considered the sentences far too high, although the highest starting point in the guideline is considerably lower than the 7 years statutory maximum sentence.

3.21 If the lowest category of culpability is retained, the Council may wish to consider if the lowest starting point in the guideline should provide for a high level community order starting point rather than a custodial sentence. These offences would be reckless offences applicable to racial hatred offences involving lower levels of harm, and it may be thought a high level community order starting point still allowing for an increase if aggravating factors are present would be proportionate.

Question 5: Does the Council wish to revise the starting point of a category C2 offence?

Aggravating and mitigating factors

3.22 Factors which were noted as particularly aggravating in sentencing comments were included in the draft guideline, and some relevant factors from the encouragement of terrorism guideline adapted. This was also the case for some mitigating factors. It is not proposed any be removed.

Question 6: Does the Council wish to retain the aggravating and mitigating factors included in the draft guideline?

4 RISKS & ISSUES

4.1 Given the strength of feeling of a number of respondents there is a risk that the Council will be criticised for including the hate crime guideline in the definitive version of the guideline. However while a high volume of responses were from groups with particular views, these are minority groups that do not share the majority view that such offences are abhorrent and against the principles of an inclusive society. The consultation response document will be clear

on the rationale for the content of the guideline, and clarify that the guideline applies to offences determined by Parliament and is not politically motivated.

R v Burns [2017] EWCA Crim 1466

Convicted of stirring up racial hatred by publishing written material, contrary to section 19(1) of the Public Order Act 1986 (count 1); and of stirring up racial hatred through words or behaviour, contrary to section 18(1) of the same Act (count 2). On 10th March 2017, sentenced to three years' imprisonment on the first count and to a consecutive term of one year's imprisonment on the second count. The total custodial sentence was, therefore, four years' imprisonment. D was a member of National Action, a far-right white supremacist group, and was an avowed racist. Between August and September 2014, when he was aged 20, he posted a series of virulently racist updates, comments and links to a Facebook account he operated under an alias. Those posts gave rise to count 1. The comments contained many vile and deeply offensive comments directed at, in particular, the Jewish and Afro-Caribbean communities. The gist of the messages was to promote militant action against them, with the aim that they should be eliminated, with a view to protecting what the applicant described as "an advanced warrior race consisting of white men and women". If there is any doubt about the appellant's state of mind and intention, it was dispelled by material found on electronic media belonging to him, including e-books, expressing extreme anti-semitic views and extolling Adolf Hitler as "the ultimate being",

The Facebook page could be readily accessed by any user of the internet.

Count 2 related to a speech made by the applicant on 23rd May 2015, whilst he was aged 21 and whilst he was on bail for the offence charged in the first count. During a demonstration staged outside the United States Embassy, the appellant spoke, using highly inflammatory language directed towards non-white immigrants and Jews. He alleged that the former were "rapists, robbers and murderers" and that the latter were "parasites and bankers" who wanted to create a "mongrelised" race. The speech was filmed. Video was to be posted on YouTube. Defence at trial was that postings on Facebook were intended to be "private banter" and that his speech, whilst not banter, was not intended to stir up racial hatred and was unlikely to do so. Rejected, but sentence reduced due to age and immaturity, and comparing to other authorities where similar sentences were imposed for significantly greater number of offences and previous convictions for similar offences. Sentence on Ct 1 reduced to 18 mths and Ct 2 sentence remained. Total sentence two and a half years.

R v Sheppard and Whittle [2010] EWCA Crim 65

Whittle was convicted of four counts of publishing racially inflammatory material (counts 4, 5, 7 and 8). Sheppard was convicted of 10 counts of publishing racially inflammatory material, four counts of possessing racially inflammatory material and one count of distributing racially inflammatory material. Whittle composed material which he submitted by e-mail to Sheppard. Sheppard edited the material on his computer and then uploaded it to a website called heretical.com which was set up by him. When posted on the website the material was available for access via the internet by visitors to the website. Pamphlets also posted. Whittle's involvement was less than that of Sheppard and over a shorter period, and he had no previous convictions. On the other hand he was the "brains" behind the construction of the offensive material which he fed to Sheppard.

Offences related to publishing and distributing a pamphlet called Tales of the Holofoax in hard copy and on a website called heretical.com. It was a publication in the form of a comic book, the central theme of which was to cast doubt on the existence of the Holocaust. The publication also suggested that the Jewish people had a history of inventing stories of the commission of atrocities against them and it portrayed the Jewish people in a way that, as was alleged, made it likely that racial hatred would be stirred up against them if the pamphlet was distributed. Number of other articles written by Whittle, edited by Sheppard and published by Sheppard on the website. All the articles were alleged to contain derogatory remarks about Jewish people and black people. A number of other documents which were likewise alleged to contain material that was threatening, abusive or insulting towards various racial groups, distribution by Sheppard of a pamphlet called "Don't be Sheeple"

which was likewise alleged to be racially inflammatory. The Crown Prosecution Service decided that Tales of the Holohoax contained words which were abusive, insulting and possibly threatening towards a racial group, namely Jewish people. No evidence of how many people saw the material or of the consequences of their having seen it, although there were several thousand "hits" or visits to heretical.com per day. There was no evidence of any individual having been corrupted, although the court noted such evidence would be unlikely to be forthcoming.

Shepherd- 4½ years in total reduced on appeal to 3½ years.

Whittle- Sentences of 2 years reduced to 18 months

R v Saleem and others [2007] EWCA Crim 2692

Convicted of stirring up racial hatred during demonstration held in central London to protest against the republication in a number of countries, although not in the United Kingdom, of cartoons depicting the Prophet Mohammed which had originally been published in Denmark. Many posters and placards saying things like: 'Massacre Those who Insult Islam'; 'Be Prepared for the Real Holocaust'; 'Osama Is On His Way'; 'Europe You Will Pay' and 'The Fantastic Four Are On Their Way'. As the march moved off, it grew in size considerably. A public address system was used. Things were said continuously such as: 'Bomb, bomb the UK'; 'Bomb, bomb Denmark'; 'Democracy Hypocrisy'; 'Queen Elizabeth go to hell!'; 'Tony Blair go to hell' and also Arabic words including 'Zakari' and 'Bin Laden'

Saleem held microphone and addressed the crowd through a public address system. He chants: 'There is no God but Allah!' 'Mohammed is his messenger!' 'Hands up messenger of Allah!' 'Hands up dearest to Allah!' He then leads the chants which are repeated by the crowd: 'There is no God but Allah!' 'Mohammed is the messenger!' 'Hands up messenger of Allah!' 'Hands up dearest to Allah!' 'Democracy, hypocrisy!' 'Democracy, go to hell!' 'Freedom, go to hell!' 'Democracy, go to hell!' 'UK, you must pay!' 'Muslims are on their way!' 'UK, you will pay!' 'Islam is on its way!' 'UK, you will pay!' 'Sharia is on its way!' 'Denmark you will pay!' 'Muslims are on their way'. 'Denmark you will pay!' 'Islam is on its way!' 'Denmark you must pay!' 'Sharia is on its way!'. Saleem addresses large crowd outside Embassy and says: 'There will come a day we will stand inside this Embassy. There will come a day when we remove that flag. There will come a day when we will raise the flag of Islam. Outside every Parliament of every nation whether you like it or not. Islam is superior and can never be surpassed'. He then leads the chants: 'Down, down UK!' 'Down, down Norway!' 'Down, down Denmark!' 'Denmark, you will pay!' 'With your blood, with your blood!' 'Norway, you will pay!' 'With your blood, with your blood.' 'Europe, you must pay!' 'With your blood, with your blood!' After every phrase, the crowd chanted the same words back.

Umran Javed; seen chanting in the crowd and later took over the microphone. Used words to effect of: 'The infidels attack the Muslim nation. They are one group. We will not stand for what Denmark did, for what France did. The whole of the infidels and the Western world are united. You have declared war against Allah and the Muslim nations for which you will pay a heavy price. Take a lesson from Theo Van Gogh and take a lesson from the Jews of Khyber from what you can see, or you will pay with your blood.'

Abdul Saleem was sentenced to four years' imprisonment. Javed was sentenced to three years' imprisonment for stirring up racial hatred (concurrent to six years for soliciting to murder).

Sentences quashed - replaced with 30 months' imprisonment for Saleem and two years' imprisonment for Javed.

El Faisal [2004] EWCA Crim 343

Two counts of using threatening, abusive words or behaviour with intent to stir up racial hatred contrary to section 18(1) of the 1986 Act, for each of which he was sentenced to one year's imprisonment; and one count of distributing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred contrary to section 21(1) of the 1986

Act, for which he was sentenced to two years' imprisonment. The appellant was a minister of Islam. He held a series of public meetings at which he addressed audiences of predominantly young Muslim males. At these he encouraged Jihad, involving the killing of those who did not believe in Islam. Suicide bombings and the use of chemical weapons were recommended. Some of these meetings were recorded and the resultant tapes distributed to a number of specialist bookshops. The offences charged related to meetings that had been recorded in this way.

Abu Hamza [2006] EWCA Crim 2918

Abu Hamza was the Imam of the Finsbury Park Mosque. On 7 February 2006 he was convicted of six counts of soliciting to murder and, inter alia, three counts of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred. The inflammatory speeches that formed the subject matter of these offences spanned a period of about three years between 1997 and 2000. They also were recorded and the tape recordings distributed. The former counts attracted sentences of seven years' imprisonment and the latter sentences of 21 months' imprisonment, all to be served concurrently.

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Section seven: Racial hatred offences and hatred against persons on religious grounds or grounds of sexual orientation

There are a number of other hate crime offences provided for by the Public Order Act.

Part 3 of the Public Order Act prohibits activities intended or likely to stir up racial hatred. Part 3A of the Act prohibits activities based on hatred against persons on religious grounds or grounds of sexual orientation. The legislation prohibits a range of activity including: use of words or behaviour or display of written material; publishing or distributing written material; public performance of play; distributing, showing or playing a recording; broadcasting or including in a programme service; and possession of racially inflammatory material where the offender intends to stir up racial hatred, and in some cases having regard to all the circumstances, racial hatred is likely to be stirred up. All offences carry a 7 year statutory maximum sentence.

The essence of each offence is the intention to stir up hatred. However, the offences contain an important distinction in that the racial hatred offences can include use of threatening, abusive or insulting words or behaviour, while the offences relating to hatred against persons on religious grounds or grounds of sexual orientation provide for threatening words or behaviour only, and do not extend to activity which is abusive or insulting.

It is proposed that one guideline could sufficiently capture all types of hatred offences. Although racial hatred activity can be broader and include abusive or insulting elements, the mischief of all offences is the incitement of hatred and potential harmful activity then being directed at particular groups.

Volumes of these offences are extremely low and there have been no offenders sentenced for some offences. However, given the recent social climate and an enhanced focus on this type of offending, the Council considers it would be useful for sentencers to be equipped with guidance on sentencing these offences.

STEP ONE

The first step of the guideline is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

STEP ONE

Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

Culpability demonstrated by one or more of the following:

A – High culpability	<ul style="list-style-type: none"> • Offender in position of trust, authority or influence and abuses their position to stir up hatred • Intention to incite serious violence • Persistent activity
B – Medium culpability	<ul style="list-style-type: none"> • Other cases falling between categories A and C
C – Lesser culpability	<ul style="list-style-type: none"> • Reckless as to whether hatred would be stirred up

High culpability

The factors proposed were identified as factors increasing seriousness of offences in the limited numbers of cases available for analysis. Among the cases analysed there were a number of ‘hate speech’ type offences, where inflammatory speeches were given by influential figures with the intention of stirring up racial hatred. Other cases involved publication on YouTube of content inciting serious violence towards particular racial or religious groups, websites being published including abusive and insulting content, with some activity continuing over a long period of time and intended to reach global audiences. The Council considers that activities of the type listed represent the highest level of culpability for these offences, as they demonstrate a serious intention to stir up hatred towards particular groups.

Medium culpability

This category is intended to capture cases where culpability falls between a serious intention and reckless behaviour.

Low culpability

This factor provides for those who may have been reckless as to stirring up hatred. While no cases involving such activity were identified, an example of such a case may be the reckless sharing and adding commentary to a social media post directing threats towards particular groups.

Q37

Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.

Harm factors

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence. There are two categories proposed;

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1	<ul style="list-style-type: none"> • Statement/publication/performance or broadcast directly encourages activity which threatens or endangers life • Widespread dissemination of statement/publication/performance or broadcast and/or strong likelihood that many would be influenced
Category 2	<ul style="list-style-type: none"> • All other cases

Harm category 1 factors

The proposed factors are intended to reflect the most serious harm which could be caused by this offence. The ways in which these offences can be committed are wide ranging, which the factors reflect.

The Council considers that the most serious harm present in these offences would be cases where activity is encouraged which threatens or endangers life, as well as cases involving widespread dissemination of material and/or a strong likelihood that many would be influenced.

Harm category 2 factors

This is a catch all category and provides for cases where a lower level of harm is present in an offence.

Q38

Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

STEP TWO

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point.

Sentence levels

The starting points and ranges have been based on statistical data from the Court Proceedings Database and analysis of first-instance transcripts and Court of Appeal sentencing remarks.

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range from the appropriate sentence table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Harm	Culpability		
	A	B	C
Category 1	Starting point 3 years' custody	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 2 – 6 years' custody	Category range 1 – 4 years' custody	Category range 26 weeks' – 3 years' custody
Category 2	Starting point 2 years' custody	Starting point 1 year's custody	Starting point 26 weeks' custody
	Category range 1 – 4 years' custody	Category range 26 weeks' – 3 years' custody	Category range High level community order – 2 years' custody

Q39

Do you have any comments on the sentence ranges and starting points?

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

Planning of event or campaign designed to stir up hatred

Leading role where offending is part of group activity

Timing of incident – particularly sensitive social climate

Vulnerable/impressionable audience

Significant volume of publications published or disseminated (where not taken into account at step one)

Used multiple social media platforms to reach a wider audience (where not taken into account at step one)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

Minor/peripheral role in group activity

Previous good character

No previous convictions or no relevant/recent convictions

Remorse

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability where linked to the commission of the offence

Sole or primary carer for dependent relatives

Q40

Do you agree with the aggravating and mitigating factors? Please state which, if any, should be removed or added.

Q41

Do you have any other comments on the structure and content of the draft guideline?