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# 1. INTRODUCTION

- 1.1** We are publishing a public policy statement on prosecuting cases of disability hate crime to make clear our commitment to dealing effectively with this type of offending. We want disabled victims and witnesses and their families and communities, as well as the general public, to be confident that the Crown Prosecution Service (CPS) understands the serious nature of this type of crime. We want them to know what they can expect from us.
- 1.2** This guidance document gives more detail about some of the key areas of the policy statement to assist prosecutors when they deal with this type of crime.
- 1.3** The need for a public policy statement was based on a number of factors including:
- the implementation of section 146 of the Criminal Justice Act 2003, which imposed a duty on the courts to increase the sentence for any offence aggravated by hostility based on the victim's disability or presumed disability;
  - our commitment fully to comply with the Disability Equality Duty (under the Disability Discrimination Act 2005) by proactively promoting disability equality; and
  - our commitment to the target in the Criminal Justice System (CJS) Public Service Agreement (PSA), set in 2004, to reassure the public by reducing the fear of crime and anti-social behaviour, and building confidence in the CJS without compromising fairness.
- 1.4** Section 146 of the Criminal Justice Act 2003 is designed to ensure that offences aggravated by hostility based on disability are treated seriously by the courts. It brings them in line with offences that are aggravated by racial or religious hostility or hostility based on sexual orientation. As prosecutors, we now have a duty to ensure that evidence of such hostility is brought to the attention of the sentencing court.
- 1.5** The Disability Equality Duty requires public authorities, when exercising their functions, to have due regard to the need: to eliminate harassment of and unlawful discrimination against disabled people; to promote positive attitudes towards disabled people; to encourage participation by disabled people in public life; and to promote equality of opportunity between disabled people and other people. The CPS Single Equality Scheme 2006-2010<sup>1</sup> encompasses our Disability Equality Scheme, our Race Equality Scheme and our Gender Equality Scheme, which are all required by law (a Gender Equality Scheme is required from 6 April 2007). However, for us, equality and diversity are about more than just meeting our statutory requirements. Equality and diversity are fundamental in delivering fair prosecutions and achieving equitable employment practice and essential if we are to command the confidence of all the communities we serve.
- 1.6** The policy statement is primarily focussed on how the CPS deals with disability hate crime as defined by section 146 of the Criminal Justice Act 2003. However, we also recognise that some disabled people may be victims of crime due to their perceived vulnerability or because they have unequal access to safety – for example, relationships where there may be unequal

<sup>1</sup>published on 4 December 2006

power between the parties such as where the defendant is the victim's carer, or in domestic violence cases. The policy statement therefore also makes reference to crimes committed against disabled people because of their perceived vulnerability, recognising that these people may need support to enable them to give evidence in order to ensure they have equal access to justice. It also explains how the needs of the disabled victim and any disabled witnesses, whatever the circumstances of the crime, will be assessed at the earliest opportunity in order to see what measures, including special measures, may be available and suitable to support them in court, so that they can give their best possible evidence.

- 1.7** The policy statement and this guidance also contribute to our efforts to raise awareness of issues relating to hate crime generally, as demonstrated already by the publication of policy statements and guidance on prosecuting domestic violence, prosecuting homophobic crime and prosecuting racist and religious crime.

### The impact of disability hate crime on individuals and communities

- 1.8** Feeling and being unsafe or unwelcome – from shunning or rejection, to violence, harassment and negative stereotyping – have a significant negative impact on disabled people's sense of security and wellbeing. They also impact significantly on their ability to participate both socially and economically in their communities.
- 1.9** The impact of hate crime on victims is different for each individual, but many experience similar problems. They may feel scared, embarrassed, humiliated and stressed by the crimes and unable to do anything to stop them. They may feel extremely isolated or fearful of going out or even staying at home and become withdrawn and suspicious of organisations and strangers. They may lack confidence in the ability or willingness of others, including the police, to do anything to stop the offences.
- 1.10** The fear, confusion and lack of safety felt by individuals can have a ripple effect in the wider community. Crimes against individuals are likely to strike at all disabled people by undermining their sense of safety and security within the wider community. These crimes can cause all disabled people to feel victimised and vulnerable to further attack.
- 1.11** As with our other policy statements, we have consulted colleagues from across the CJS, other government departments and the voluntary and community sectors with whom we work. By doing this, we have gained a better knowledge of the issues that are important to disabled people and that we need to know about.

## 2. DISABILITY HATE CRIME – THE LEGISLATION

### Section 146 of the Criminal Justice Act 2003<sup>2</sup>

**2.1** Section 146 was implemented on 4 April 2005. It did not create any new offences; it imposed a duty upon courts to increase the sentence for any offence aggravated by hostility based on the victim's disability (or presumed disability). Therefore, when an offender has pleaded guilty or been found guilty of an offence and the court is deciding on the sentence to be imposed, it must treat evidence of hostility based on disability as something that makes the offence more serious. The court must also state that fact openly so that everyone knows that the offence is being treated more seriously because of this evidence of hostility based on disability. Sections 6.2 to 6.4 of this guidance explain the procedure in cases to which section 146 applies.

**2.2** Section 146 applies where the court is considering the seriousness of any offence committed in any of the circumstances mentioned in section 146(2). Those circumstances are:

(a) that, 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 a disability, or presumed disability, of the victim;

**or**

(b) that the offence is motivated, wholly or partly, by hostility towards persons who have a disability or a particular disability.

**2.3** It is very important to note that (a) and (b) are alternatives. This means that in a case where a demonstration of hostility can be proved (this will usually be in the form of spoken words) there is no need also to prove a hostile motivation, and vice versa. It may be helpful to think of section 146(2)(a) as being about 'demonstration' and section 146(2)(b) as being about 'motivation'. Motive is always difficult to prove and it is likely that section 146 will be more widely used in relation to demonstrations of hostility than in relation to hostile motivation. However, prosecutors should work proactively with the police to identify any evidence that will assist in the prosecution of these types of cases.

**2.4** As sections 146(2)(a) and (b) mirror sections 28(1)(a) and (b) of the Crime and Disorder Act 1998, which relate to racially and religiously aggravated offences, it is helpful to look at case law in that area to explain the difference between (a) and (b).

In *RG & LT v DPP*<sup>3</sup>, May LJ said that section 28(1)(a) is: "not so much to indicate the offender's state of mind as to prove what he said so as to demonstrate racial hostility towards

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<sup>2</sup>For a copy go to <http://www.opsi.gov.uk/acts/acts2003/30044--o.htm#146>

<sup>3</sup>[2004] EWHC 183

the victim. Often the demonstration will be by words or shouting. It may equally be possible to demonstrate racial hostility by means of doing something other than literally by means of words as, for instance, holding up a banner with racially offensive language on it". By contrast, section 28(1)(b) is concerned with the offender's motivation, requiring proof that the substantive offence was wholly or partly motivated by racial hostility. May LJ said that: "motive, in my judgment, is at least capable of being established by evidence relating to what the defendant may have said or done on another or other occasions".

**2.5** Under section 146(3), the court **must**:

(a) treat the fact that the offence was committed in any of those circumstances as an aggravating factor;

**and**

(b) state in open court that the offence was committed in such circumstances.

**2.6** Section 146(4) states that it is immaterial for the purposes of section 146(2) whether or not the offender's hostility is also based, to any extent, on any other factor.

**2.7** Section 146 is a sentencing provision. It mirrors the provision which relates to those crimes which, although aggravated by racial or religious hostility, are not crimes specified in sections 29 to 32 of the Crime and Disorder Act 1998. (That provision is now found in section 145 of the Criminal Justice Act 2003, although it was first created by section 82 of the Crime and Disorder Act 1998.) There are no specific crimes involving hostility based on disability like those involving racial or religious hostility under sections 29 to 32 of the Crime and Disorder Act 1998. However, section 146 has added hostility based on disability to the list of statutory aggravating factors.

**2.8** In the policy and in this guidance, crimes which fall within the ambit of section 146 are referred to as disability hate crimes.

### **"Disability"**

**2.9** For the purposes of section 146, "disability" means any physical or mental impairment (see section 146(5)).

**2.10** This definition is not the same as the definition of disability in the Disability Discrimination Act 2005, which covers people with a wide variety of disabilities, including those people living with HIV or AIDS, or those who have cancer or multiple sclerosis.

**2.11** Whilst for the purposes of section 146, 'disability' does not include those people living with HIV or AIDS unless there is any physical or mental impairment, under the Disability Equality Duty prosecutors must record, monitor and address proactively instances of hate crime against people living with HIV or AIDS, whether or not an impairment is involved.

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**2.12** It is important to note that section 146 is also relevant to cases where the offender presumes the victim is disabled, whether or not that presumption is correct.

### “Hostility”

**2.13** Hostility is not defined in the Act. The ordinary dictionary definition of hostile includes simply being “unfriendly”. One will see from the case law on racially aggravated offences that “demonstrations” of hostility often involve swear words, for example: “bloody foreigners” (*R v Rogers*<sup>4</sup>); “black bastard” (*DPP v Woods*<sup>5</sup>); or “African bitch” (*R v White*<sup>6</sup>).

**2.14** Proving that there was a “demonstration” of hostility requires evidence of words or actions which show hostility towards the victim. This may be in the form of spoken or written words. The words “cripple out” spray painted on the home of a disabled person would be sufficient to prove a demonstration of hostility for the purposes of section 146(2)(a), as would the words “take that, you blind bastard” shouted by the perpetrator immediately after an assault on a blind victim.

**2.15** The case of *Parry v DPP*<sup>7</sup> confirmed that:

- hostility can be demonstrated even if the victim is absent, as long as it occurs in the immediate context of the substantive offence; and
- the word “immediately” qualifies both the words “before” and “after” and accordingly hostility has to be demonstrated immediately in either case.

**2.16** Proving that a crime was “motivated” by hostility based on disability may be more difficult in practice. In the absence of a clear statement by the defendant that their actions were motivated by hostility towards the victim based on his or her disability, how can motive be proved? Such a motive cannot be inferred simply from the fact that the victim is a disabled person. In some cases, background evidence can be important, for example, evidence of expression of views against disabled people in the past might be sufficient, dependent upon the facts, admissible evidence.

**2.17** Offences that are motivated by hostility based on disability may not be directed towards a disabled person; for example, the victim may be someone who associates with a disabled person, such as a parent or carer.

### Cases where the offender’s hostility is also based on other factors

**2.18** It is immaterial for the purposes of section 146(2) whether or not the offender’s hostility is also based on any other factor. This is also the case for racially and religiously aggravated offences (see section 28(3) of the Crime and Disorder Act 1998). The case law in that area shows that hostility is sometimes based on additional factors and that the courts have sometimes erred in taking these factors into consideration.

<sup>4</sup>[2005] EWCA Crim 2863

<sup>5</sup>[2002] EWHC 85

<sup>6</sup>[2001] EWCA Crim 216

<sup>7</sup>[2004] EWHC 3112

In *DPP v McFarlane*<sup>8</sup>, the defendant shouted threatening and racist abuse at the victim after finding the victim parked in a disabled bay in which the defendant, not the victim, was entitled to park. The Deputy District Judge was not satisfied that the offence was racially aggravated because he believed that what was being demonstrated was hostility towards the victim's conduct in parking in a disabled bay and not towards his membership of a racial group. The Administrative Court said the Deputy District Judge was wrong; the defendant had clearly demonstrated hostility towards the victim based on his membership of a racial group by shouting racial, threatening and abusive words towards him. It was immaterial that the defendant may have had an additional reason for uttering the racial words in question, for example because he was angry about the victim's conduct in parking in a disabled bay.

In *DPP v M*<sup>9</sup>, the defendant had an argument with the chef in a kebab shop about whether he had paid for his food. He then went outside, shouting "bloody foreigners" and broke the shop window. The magistrates were not satisfied that the offence of criminal damage was racially aggravated, believing that it was possible that the defendant's actions "were the result of annoyance following the dispute over payment for the food or a mindless act of violence". The Administrative Court said that the magistrates had been wrong. Use of the words "bloody foreigners" in this case was capable of amounting to a demonstration of hostility based on racial group or presumed racial group; the fact that it was possible that the defendant's hostility was also based on annoyance over the dispute about payment for food was immaterial.

### The reaction of the victim to the demonstration of hostility

**2.19** It does not matter, for the purposes of proving that an offence is aggravated by hostility based on disability, what the victim thought about the "demonstration of hostility". Again, reference can be made to the case law on racially and religiously aggravated offences.

In *DPP v Woods*<sup>10</sup>, the victim, a nightclub doorman, refused entry to one of the defendant's companions. The defendant became abusive towards the doorman and called him a "black bastard" immediately before punching him in the head. In giving evidence, the victim said that he was "not bothered" by such comments which were often made in that type of situation, so long as those who made them did not "touch" him. The magistrates were not satisfied that the assault was racially aggravated, stating that they had taken into account "how the victim assaulted perceived the comments" and that "he made no play (at any stage) of the words being racially offensive and said he was not bothered by such comments". They also said that they found the defendant's hostility to be borne out of his frustration and annoyance as a result of his companion being denied entry to the premises (erring in the same way that the courts did in the cases mentioned in paragraph 2.18 above). They said that they believed that the defendant's frame of mind was such that he would have abused any person standing in the victim's shoes "by reference to any obvious physical characteristic, had that individual happened to possess one".

<sup>8</sup>[2002] EWHC 485 (Admin)

<sup>9</sup>[2004] EWHC 1453 (Admin)

<sup>10</sup>[2002] EWHC 85 (Admin)

The Administrative Court said that the magistrates had been wrong in three ways.

- (1) They were wrong to take into account the victim's perception of the words. The fact that the person to whom the words were directed may have had a personality which enabled him to take a resilient or broad-shouldered view of the situation is irrelevant to the question of whether an offender demonstrates towards the victim hostility based on the victim's membership of a racial group.
- (2) It was immaterial that the defendant had or may have had an additional reason for uttering the words, that is to say, a reason unrelated to race, and in this case his apparent annoyance as a result of his companion being denied entry to the premises.
- (3) The fact that the defendant's frame of mind was such that he would have abused any person standing in the victim's shoes by reference to an obvious physical characteristic was irrelevant. The court said: "if the [defendant] would have assaulted another person and called him, say, "a fat bastard", that would not have been an aggravated offence because Parliament has not found it necessary to provide additional protection to the overweight by the creation of an aggravated form of the offence by reference to that characteristic".

### Proving an offence is aggravated by hostility based on disability

**2.20** Not all incidents that the victim or some other person perceives to be a disability hate crime will be in law a disability hate crime, or even a crime. For section 146 to apply, the prosecution must prove that the offender has committed a criminal offence and then prove that that offence was aggravated by hostility based on the victim's disability or presumed disability. To help us decide whether an incident reported to the police amounts to a crime and whether there is enough evidence to prosecute the case, we use the Code for Crown Prosecutors. If the evidence is insufficient to provide a realistic prospect of conviction, we cannot prosecute, whether the allegation is of an offence aggravated by hostility based on disability, or of any other offence.

**2.21** We recognise that, to prove that an offence is aggravated under section 146, spoken hostility may need to be 'heard' by the victim or witness, and in some cases disabled victims or witnesses might not be able to hear or may have a learning disability that results in difficulties when communicating. Some responses to these issues are identified in section 5 – 'Information and support for disabled victims and witnesses'. We must also work with disability organisations when developing training for our prosecutors so that our prosecutors are aware of the challenges they may face and of the possible solutions to them.

### Disability hate crimes and crimes committed against disabled people

- 2.22** It is important to make a distinction between a disability hate crime and a crime committed against a disabled person because of his or her perceived vulnerability. A disability hate crime is any crime committed in any of the circumstances explained in section 146. Where there is evidence available to prove that an offence is aggravated by hostility based on the victim's disability, we must do our utmost to ensure that that evidence is put before the court for sentencing purposes.
- 2.23** However, not all crimes committed against disabled people are disability hate crimes. Some crimes are committed because the offender regards the disabled person as being vulnerable and not because the offender dislikes or hates disabled people. For example, in the case of the theft of a wallet from a blind person, if there is no demonstration of hostility towards the victim based on his or her disability or any evidence that the crime was motivated by hostility based on disability, the offender is likely to have been preying on the victim's perceived vulnerability. This will not be a disability hate crime within the definition of section 146.
- 2.24** In such cases, even where the offence does not fall within the definition of a disability hate crime under section 146, prosecutors should have regard to guidelines issued by the Sentencing Guidelines Council in December 2004, *Overarching Principles: Seriousness*, which is mentioned in more detail in section 6 of this guidance – 'Sentencing'.
- 2.25** There may be other cases where it cannot be proved either that the offender demonstrated or was motivated by hostility or that the offender knew that the victim was disabled and targeted him or her because of that. In such cases, section 146 will not be relevant.
- 2.26** It is important to make these distinctions and to explain them whenever necessary so as not to raise expectations that all crimes committed against disabled people will be prosecuted as disability hate crimes.

### 3. HOW TO MAKE SURE WE TAKE FULL ACCOUNT OF A DISABILITY ELEMENT WHEN WE PROSECUTE A CASE

- 3.1** We must make sure that we identify all those cases that might properly be prosecuted as disability hate crimes. This begins at the point where we are first consulted by the police. The police should record as a 'disability related incident' (sometimes referred to as a 'disablist incident') any incident which falls within the following definition:

"Any incident which is perceived to be based upon prejudice towards or hatred of the victim because of their disability or so perceived by the victim or any other person".

This definition has been developed from the definition of a 'racist incident' which was set out in the February 1999 report of *The Stephen Lawrence Inquiry*<sup>11</sup>. Since the adoption of the 'racist incident' definition – "any incident which is perceived to be racist by the victim or any other person" – similar definitions have been adopted in respect of other types of 'hate incident' because the observations of the Stephen Lawrence Inquiry can equally be applied to them.

- 3.2** These definitions can be found in the manual published by the Association of Chief Police Officers (ACPO) in March 2005 entitled: *Hate Crime: Delivering a Quality Service – Good Practice and Tactical Guidance*<sup>12</sup> (hereafter referred to as the ACPO *Hate Crime* guidance).
- 3.3** Although we want to encourage victims of, or witnesses to, these incidents to come forward and report the incidents to the police, we have to distinguish between 'incidents' and 'crimes'. Not every incident will amount to a crime; not every incident that is a crime will lead to the perpetrator being found and charged; and not every case that is brought to the attention of the CPS will automatically allow us to lead evidence of the disability related element in it – because it may not be in a form, or of sufficient substance, to allow the court to take it into account when sentencing the defendant.
- 3.4** However, it is imperative that police investigators notify prosecutors that a crime has been identified as a disability related incident and also whether the victim(s) or a key witness is disabled, as this informs the way that the prosecutor will handle the case.
- 3.5** Use of the definition helps in raising awareness of the disability element in any offence, from the point of reporting, through investigation up to and including any prosecution. It is hoped that use of this definition will raise confidence and therefore increase the level of reporting of disability related incidents.

<sup>11</sup>To see the Inquiry report go to <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

<sup>12</sup>For a copy go to <http://www.acpo.police.uk>

### Monitoring

- 3.6** All cases referred to us by the police, which have been identified as a disability related incident, should be flagged on our computerised case management system COMPASS. The disability hate crime flag has been on COMPASS since December 2006. Some cases will need more than one flag, for example, cases that also involve domestic violence, rape, or racist, religious or homophobic elements. The flagging of cases is important: it means that we can monitor how we handle these cases so that we can report back to communities on our performance in tackling these types of hate crime.

## 4. PROSECUTING CASES OF DISABILITY HATE CRIME

- 4.1** Identifying a case as a “disability related incident” means that someone at some stage has perceived the incident that has given rise to the charge as being aggravated by hostility based on disability. It means that section 146 **may** be relevant and that efforts should be made to prove whether it is or not. Prosecutors should be vigilant to make sure that at every review they consider the possibility of a case being a disability hate crime.
- 4.2** Prosecutors should adopt a proactive approach to seeking further information from the police to help them decide if a case can properly be prosecuted as a disability hate crime. In some cases, it will be appropriate to advise the police to follow up other possible lines of enquiry. This might include looking at previous reported incidents involving the same victim, or the same suspect. It may also involve seeking information or evidence from other agencies, for example, Social Services, the National Health Service, specialist support groups or community groups working with disabled people. For example, there may be current or previous eviction proceedings taken by a local authority or housing association involving the parties in the criminal proceedings. In all cases, prosecutors should liaise directly with the officer in the case to make sure all available evidence has been obtained and sent to the CPS to consider when reviewing the case. This may be especially important if the situation represents repeat victimisation.
- 4.3** We always aim to build the strongest possible cases to put before the court. If satisfied that there is sufficient evidence to prove that the offence is aggravated in accordance with section 146, prosecutors should make it clear to the defence and to the court that they intend to so advise the court for sentencing purposes.
- 4.4** Where a domestic violence offence or a racist, religious or homophobic crime is committed against a disabled person, or where the disabled person who is the victim of or witness to a crime is a child, reference should be made to our *Policy for Prosecuting Cases of Domestic Violence, Racist and Religious Crime – CPS Prosecution Policy, Policy for Prosecuting Cases with a Homophobic Element* and *Children and Young People – CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses* as appropriate.

### Charging

- 4.5** *The Director’s Guidance on Charging*<sup>13</sup> currently requires offences involving racial, religious and homophobic aggravation to be referred to a Crown Prosecutor for early consultation and charging decision, whether admitted or not. This list will be amended to include offences aggravated by hostility based on disability. The revision is planned for 2007.
- 4.6** We review cases referred to us by the police in accordance with the Tests set out in *The Code for Crown Prosecutors*. We make charging decisions in accordance with the Full Code Test, other than in the limited circumstances where the narrower Threshold Test applies.

<sup>13</sup>2nd edition, January 2005, as at [http://www.cps.gov.uk/publications/prosecution/dpp\\_guidance.html](http://www.cps.gov.uk/publications/prosecution/dpp_guidance.html)

- 4.7** The first stage of the Full Code Test is consideration of the evidence. We must be satisfied that there is sufficient evidence to provide a “realistic prospect of conviction” against each defendant on each charge. This means that a jury or a bench of magistrates or a judge hearing the case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. If a case does not pass the evidential test it must not go ahead no matter how important or serious it may be. There is no relaxation in the sufficiency of evidence test just because the case has a disability element.
- 4.8** If the case does pass the evidential test, we must then decide whether a prosecution is needed in the public interest. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.
- 4.9** The Threshold Test requires us to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge the suspect. This Test is applied to those cases in which it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available. The Full Code Test must be applied as soon as reasonably practicable.
- 4.10** If the case passes the evidential test and it is a case of disability hate crime, the public interest will almost always be in favour of prosecution. *The Code for Crown Prosecutors*<sup>14</sup> at paragraph 5.9k gives the following example of a common public interest factor in favour of prosecution:
- “the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics.”
- 4.11** The charges that we decide on in any prosecution should always reflect: the seriousness of what took place; any element of pre-meditation or persistence in the defendant’s behaviour; the provable intent of the defendant; and the severity of any injury suffered by the victim. Reference should be made to any relevant *Charging Standard*<sup>15</sup>. The charges must enable us to present the case clearly and simply and they must give the court the power to impose a suitable sentence.
- 4.12** In a case being prosecuted as a disability hate crime, the charge itself will not reflect the fact that the crime is a disability hate crime. This is because, as explained in paragraph 2, section 146 does not create any specific offence but instead places a duty on courts to increase sentences for offences aggravated by hostility based on the victim’s disability or presumed disability. We do not have to prove the aggravating factor in order for the defendant to be found guilty of the offence charged. However, we do have to prove the aggravating factor to ensure that the offence is treated more seriously by the sentencing court under section 146. When we are prosecuting a case as a disability hate crime, we must make it clear to the defence and the court, at the earliest opportunity, that we are doing so.
- 4.13** *The Code for Crown Prosecutors* (paragraph 5.12) also requires prosecutors, when considering the public interest, to:

<sup>14</sup>November 2004 edition

<sup>15</sup>The charging standards on offences against the person and public order offences will be particularly relevant and can be found in the CPS Infonet Legal Guidance

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“take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim’s family”.

**4.14** This is repeated in *The Prosecutors’ Pledge*, which was introduced by the Attorney General on 21 October 2005, and which states that prosecutors will:

“take into account the impact on the victim or their family when making a charging decision”.

**4.15** Victims of disability hate crime may sometimes be reluctant to pursue a complaint for the reasons mentioned in section 1 of this guidance. It is sometimes a difficult task to balance the victim’s wishes against the wider public interest. However, individual acts must be put in the context of the wider social picture.

**4.16** As in other cases, we have a duty to inform the victim where the charge is withdrawn, discontinued or substantially altered. The duty is now enshrined in *The Code of Practice for Victims of Crime* (at paragraph 7.4) and *The Prosecutors’ Pledge*. Sections 5.6 to 5.9 of this guidance contain further details about this duty.

### Bail

**4.17** Decisions about bail represent an important stage in the prosecution process. The results of these decisions can have far reaching consequences for the victims of crime and the public in general. Victims of and witnesses to disability hate crime may be afraid of what will happen to them once the matter has been reported to the police and also after a defendant has been charged. The CPS Legal Guidance on ‘Bail’ provides detailed assistance.

**4.18** Amendments to section 37 of the Police and Criminal Evidence Act 1984 (PACE) now allow pre-charge bail, with or without conditions, to be imposed where cases are referred to Crown Prosecutors for charging decisions and where it is appropriate to release the person on bail. Conditions may be appropriate in hate crime cases, for example, to address concerns about interference with witnesses or the commission of further offences. A person may only be released on conditional bail before charge for the purpose of enabling a prosecutor to make a charging decision. Conditional bail before charge is not permitted when a person is bailed pending further investigation under section 34(5) of PACE. For example, in a case where the police release a suspect on bail to allow them to take statements from other witnesses who have come to light, and thereafter re-interview the suspect, conditional bail will not be appropriate. Therefore, whilst pre-charge conditional bail is a useful tool and should always be considered in appropriate cases, police investigators and prosecutors should be careful not to raise the expectations of witnesses that it can be imposed in every case.

**4.19** The time after an offender is charged with a crime can cause anxiety for the victim, and disabled victims may be particularly vulnerable. Some disabled victims may well be dependent for their care on the perpetrator of the crime committed against them and in such cases we should work with partners to identify support mechanisms which may be provided in the community. At court, it is vital that we have as much information as possible about the offence, the effect on the victim and any fears or concerns that the victim may have about

repeat offending or intimidation in order to make the decision whether to oppose bail or seek conditional bail under the Bail Act 1976. The ACPO *Hate Crime* guidance advises (at paragraph 11.3.7) that the following information should be provided to the CPS:

- details of the defendant's previous convictions;
- details of any previous incidents involving the defendant;
- the police view on victim and family safety;
- the likelihood of recurrence;
- the existence of any other orders e.g. ASBOs, civil injunctions;
- any Victim Personal Statement; and
- any other relevant information.

**4.20** It is the defendant who is subject to bail conditions, not the victim. Care should be taken when formulating conditions to ensure that the victim retains as much freedom of movement as possible by curbing the ability of the defendant to approach or intimidate the victim at home, work or when in public. Prosecutors should resist applications made at court, without notice, to vary bail conditions unless they are satisfied that they have sufficient information to deal with the application. Magistrates should be encouraged to make it clear to defendants that any breaches of bail will be taken very seriously.

**4.21** A victim may have expressed concerns in a Victim Personal Statement about the effect that the crime has had on them and may raise particular issues about bail in such a statement. These must be taken into account when making decisions about bail.

**4.22** It is important that any changes to the bail conditions or custody status of a defendant are communicated to the victim in accordance with *The Code of Practice for Victims of Crime* (at paragraph 5.17).

### **Witnesses who withdraw support for the prosecution or indicate that they are no longer willing to give evidence**

**4.23** Many victims of hate crime make an immediate decision not to report incidents due to lack of confidence in the CJS. As explained in section 1 of this guidance, we are committed to improving the confidence of all victims of crime. In any event, when offences are reported, previous failures to report should not be seen, in themselves, as diminishing a victim's credibility.

**4.24** When, after reporting a crime, a victim withdraws support for a prosecution or indicates an unwillingness to give evidence, certain steps must be taken:

- ensure that an experienced prosecutor supervises the case;
- if the victim decides to withdraw support, ask the police to take a written statement from the victim explaining the reasons for that withdrawal, confirming that the original complaint was true and identifying whether the victim has been put under any pressure to withdraw support; and
- ask the police to give their views.

## Guidance on Prosecuting Cases of Disability Hate Crime

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**4.25** The ACPO *Hate Crime* guidance advises (at paragraph 11.6.2) that, in these circumstances, the officer must include in the report to the CPS his or her views on:

- the reasons given by the victim;
- how the victim would react if compelled to attend court;
- future risks to the safety of the victim and their family; and
- the impact on the wider community.

**4.26** As a result of receiving the withdrawal statement and accompanying police report, prosecutors may need to consider whether further charges, for example witness intimidation, are appropriate. It may also be appropriate to ask the police to offer the victim the services of a specialist support agency if this has not already been done.

**4.27** Prosecutors should assess at an early stage whether there is sufficient evidence to proceed without the victim, for example by relying on statements from other witnesses, 999 call recordings, admissions in interview, CCTV evidence, forensic evidence, photographs and officers' statements. If there is sufficient evidence, and provided the public interest test continues to be met, there may not be any reason to consider a witness summons if the victim subsequently withdraws support. In any event, it is important for perpetrators of hate crime to know that a prosecution will not simply rely on the victim's willingness to give evidence.

### Continuing a case where the victim has withdrawn support

**4.28** In some cases, a special measures application may provide sufficient reassurance to the victim for them to decide to reconsider and support a prosecution. If such an application is not possible or the victim remains unwilling, in any event, consideration must be given to which of the following alternatives is possible and appropriate:

- proceeding without using the victim's evidence;
- making a hearsay application under section 116 of the Criminal Justice Act 2003;
- compelling the victim to give evidence; or
- discontinuing as a result of the victim withdrawing support for the prosecution.

**4.29** Where we are considering proceeding against the victim's wishes, we must consider all parties' human rights issues and endorse fully and clearly the decision-making process on the file.

**4.30** In addition to the evidence of the nature and seriousness of the offence, background information is crucial in helping a prosecutor to make the correct decision about how to proceed in a case where the victim has withdrawn their support for the prosecution. Some of the factors that should be considered include:

- the ability of the victim to testify;
- whether there is an ongoing relationship between the victim and the defendant, for example, where the defendant is the victim's carer;
- if there is an ongoing relationship, the history of the relationship and any instances of previous abuse;

- the chances of the defendant offending again;
- the impact on the victim of proceeding or not proceeding with the case; and
- whether there have been any threats made since the incident.

**4.31** Prosecutors should seek to establish clearly the reasons why the victim no longer wishes to give evidence. In cases of disability hate crime, this may be because the victim lives in a place in which they feel isolated or particularly vulnerable (feeling isolated or vulnerable having possibly deterred or delayed the victim from reporting the incident in the first place). In some cases, supporting the prosecution may place the victim at further risk of harm, such as in domestic violence cases or situations where the defendant is the victim's carer. In such cases, we must have regard to any special measures or other support available to the victim that may help them, at least in part, to overcome their concerns.

**4.32** Before taking a decision to issue a summons, prosecutors must make enquiries to satisfy themselves as far as possible that the safety of the victim will not be endangered by their decision. The **safety** of the victim is a prime consideration. Some of the factors to be considered in assessing the safety of the victim are:

- the views of the victim about the impact on their safety in proceeding with the prosecution;
- whether a witness summons would make it safer for the victim to attend by effectively making it clear that the decision to proceed with the case is that of the CPS rather than that of the victim;
- the views of the officer in the case on the safety of the victim and the likelihood of further harm; and
- whether or not the victim is being supported by any specialist agency outside the CJS.

**4.33** The ACPO *Hate Crime* guidance (at paragraph 8.2) reminds police staff to be aware that, at all stages, from initial notification to the conclusion of any investigation: "there may be attendant risks to the safety and well-being of victims and witnesses. An important risk factor is the identification of potential further victimisation. Immediate steps should be taken to identify and record these risks. If a risk is identified steps should be taken to manage the risk by using appropriate interventions. The perceptions of victims and witnesses of their own risk are necessary considerations....A record of this risk assessment should be kept to ensure openness and accountability". Prosecutors should ask the police about the risk assessment when making decisions about how to proceed in the case.

**4.34** If an experienced prosecutor has considered whether it is possible to proceed without the victim, and decided that it is but that it would not be right to do so in the particular circumstances, the case will be discontinued. These cases will be rare and should be marked as discontinued in the public interest.

**4.35** Where it is not possible to continue without the victim and the decision is made not to compel attendance, again the decision to discontinue is on public interest grounds.

## 5. INFORMATION AND SUPPORT FOR DISABLED VICTIMS AND WITNESSES

**5.1** The CPS is fully committed to taking all practicable steps to help victims through the often difficult experience of becoming involved in the CJS. Recent legislation and initiatives have been designed to increase the confidence of victims in the CJS. Support may also be available from a very early stage from the police, Social Services and other support agencies which may continue throughout the life of the case. We have witness care units in every CPS Area, which coordinate communications with victims and witnesses and work to identify and address the needs and concerns of victims of witnesses at an early stage.

### The Disability Equality Action Plan

**5.2** Under the Disability Equality Duty, the CPS has gathered and analysed the evidence of disability equality and inequality in prosecution practice and has addressed these identified gaps by producing a Disability Equality Action Plan, which identifies how and when these gaps will be closed. The Disability Hate Crime policy statement and this guidance for prosecutors form a key part of our response to the Disability Equality Duty, and their development, implementation and training to support implementation are included in the action plan. Key to this is equality in the provision of services to disabled victims and witnesses and ensuring that the specific needs of disabled victims and witnesses are addressed by prosecutors. This is an integral part of complying with the Disability Equality Duty.

### The Victim Personal Statement

**5.3** A Victim Personal Statement (VPS) is a statement made by a victim of crime explaining the effect that the crime has had on him or her. In the statement, victims can describe how they have been affected by the crime. They can talk about their wishes and needs during the case and any concerns they may have as a result of the offence, for example, about safety, intimidation or bail. They can mention support (or absence of support) for the prosecution and requests for help from any of the support agencies. In this way, the court can better understand not only the crime but also the context in which it occurred. It is optional, and the victim should be asked whether or not he or she wishes to make such a statement, or if he or she requires help to make a statement from a support worker or family member. This statement can be made at any time and it is possible to make more than one statement. A victim can ask the police or the CPS lawyer for a leaflet which explains what VPSs are and how they can be used.

**5.4** If there is no VPS on the file, prosecutors should ask the police whether the victim has been asked whether he or she wishes to make one. Prosecutors can use these statements to help them make decisions about cases, for example, when deciding whether they should ask the court to impose conditions when a defendant is on bail.

**5.5** The defence and the court should be provided with a copy of the VPS prior to the sentencing hearing.

### Direct Communication with Victims

- 5.6** When the Direct Communication with Victims (DCV) scheme was launched in 2001, it represented a key change in responsibility for the CPS. As a result of the recommendations in the Glidewell and Macpherson reports, the CPS took over from the police the responsibility to communicate to victims any decision to drop or substantially alter the charge. Since the implementation of the scheme, significant changes have taken place in the way that the CPS and other CJS agencies are required to engage with victims and witnesses. Prosecutors should refer to the CPS Legal Guidance on 'Direct Communication with Victims under the Code of Practice for Victims of Crime', which takes into account changes in process brought about by the implementation of the statutory charging scheme, No Witness No Justice and *The Code of Practice for Victims of Crime*.
- 5.7** Following publication of the policy statement and this guidance, the list of DCV cases in which a meeting must be offered will be extended to include cases in which the offence was aggravated by hostility based on disability.

### The Code of Practice for Victims of Crime

- 5.8** The CPS now has formal obligations towards victims under *The Code of Practice for Victims of Crime*<sup>16</sup>, which came into force on 3 April 2006, having been issued by the Home Secretary under section 32 of the Domestic Violence Crime and Victims Act 2004. It sets out the services that victims can expect to receive from all CJS agencies, including a right to information about their crime within specified time scales, including the right to be notified of any arrests and court cases. An example of one of the obligations is where a prosecutor decides either that there is insufficient evidence to bring any proceedings (following a full evidential report), or where the prosecutor decides to drop or substantially alter any charge. In those circumstances, the prosecutor must notify the victim. If the victim is vulnerable or intimidated, the prosecutor must notify them within one working day. For disability aggravated offences, the prosecutor will also offer to meet the victim to explain the decision. Where a prosecutor has made a decision not to charge during a face-to-face consultation with an investigator, the investigator must advise the victim.

### The Prosecutors' Pledge

- 5.9** This is a 10-point pledge introduced on 21 October 2005 by the Attorney General. It sets out the level of service that victims can expect to receive from prosecutors. *The Prosecutors' Pledge*<sup>17</sup> should ensure: that the specific needs of disabled victims and witnesses are addressed; that they are assisted at court to refresh their memory from their written or video statement; and that they are protected from unwarranted or irrelevant attacks on their character.

<sup>16</sup>For a copy go to [http://www.cps.gov.uk/victims\\_witnesses/victims\\_code.pdf](http://www.cps.gov.uk/victims_witnesses/victims_code.pdf)

<sup>17</sup>For a copy go to <http://www.islo.gov.uk/prosecutorspledge/CrownProsecutionServicePublicPlycystatementonthedeliveryofservicestovictims-TheProsecutorsPledge.doc>

### Special measures, including the use of an intermediary

- 5.10** Prosecutors are familiar with the provisions of Part II of the Youth Justice and Criminal Evidence Act 1999 and the availability of special measures for vulnerable or intimidated witnesses. The current implementation chart is reproduced at Annex B.
- 5.11** The Home Office research report, published in January 2006, *Are Special Measures Working?*<sup>18</sup>, found that the prosecution team was not effective enough in identifying vulnerable and intimidated witnesses; they were often first identified by the Witness Service. Although statutory charging and No Witness No Justice have made identification of vulnerable and intimidated witnesses a key issue, prosecutors, as part of the prosecution team, must play their part in this identification process.
- 5.12** Prosecutors should be particularly aware of the availability and potential value of the use of an intermediary (see section 29 of the 1999 Act). In six 'pathfinder' Areas, the use of intermediaries is being evaluated as a prelude to national rollout. Intermediaries come from a range of backgrounds, including speech and language therapy, occupational therapy, psychology, education and social work. For further information on intermediaries, go to <http://www.homeoffice.gov.uk/documents/Intermediaries-guide-vulner.pdf?view=Binary>

### Special measures meetings

- 5.13** When an application is made for special measures, the witness should be asked if he or she would like to meet the prosecutor. The purpose of meeting is not to discuss the evidence in the case, but to reassure witnesses that their needs will be taken into account and thereby help build up their trust and confidence. The witness does not have to attend that meeting by themselves. They can bring a relative, a carer or other supporter. In order to facilitate communication with the victim, it may be appropriate for an interpreter or other similar person, to attend the meeting. Wherever possible, the prosecutor should ensure that the advocate who will be conducting the trial attends the meeting between the prosecutor and the disabled witness.
- 5.14** The CPS research report, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of CPS Monitoring Data*<sup>19</sup>, found that: "pre-trial contact between CPS lawyers and [vulnerable and intimidate witnesses] to discuss special measures was recorded as taking place in only 3% of our sample cases. As well as contradicting published policy, this evident lack of contact represents significant missed opportunities. If witnesses are better prepared and reassured they are more likely to testify effectively. Prosecutors normally meet witnesses at court on the day of trial in any event. Nonetheless, earlier and more systematic pre-trial contact might improve general levels of witness satisfaction, even if such meetings made no discernible impact on the success of special measures applications or on final case dispositions".

<sup>18</sup>For a copy go to [http://www.homeoffice.gov.uk/rds/notes/january06\\_summaries.html](http://www.homeoffice.gov.uk/rds/notes/january06_summaries.html)

<sup>19</sup>This related to a monitoring exercise conducted between April 2003 and March 2004. The report can be found in the CPS Legal Guidance chapter on special measures.

**5.15** In the light of the findings of the CPS research report, prosecutors are reminded to consider whether to have a special measures meeting in every case where an application for special measures is made.

### Pre-court visits

**5.16** Although the practical arrangements will usually be made by witness care units, prosecutors should be aware of the availability and potential value of pre-court familiarisation visits, particularly for vulnerable and intimidated witnesses. The Home Office report, *Are Special Measures Working?*, found that: “pre-court familiarisation visits are potentially the most useful of the non-statutory measures in the pre-trial phase”.

### Reporting restrictions for adults

**5.17** Section 46 of the Youth Justice and Criminal Evidence Act 1999 was implemented on 7 October 2004. It allows the CPS to apply for an order preventing the reporting of certain details of witnesses in the media that may lead to their identification. The court must be satisfied that the quality of evidence or level of cooperation given by the witness is likely to be diminished by reason of fear or distress about being identified by the public as a witness, and that it is in the interests of justice and the public interest to allow the application. Such applications may sometimes be appropriate in respect of hate crime victims.

### Help for deaf people and for people with a speech impairment

**5.18** A witness who is deaf or has a hearing impairment may require the services of a qualified Sign Language Interpreter or, for those who do not know or use sign language, a Lipspeaker in order to give their evidence at court. Only registered Sign Language Interpreters or Lipspeakers should be used. The Council for the advancement of Communication with Deaf people (CACDP) is the national examining and registration body for sign language interpreters and details of qualified Sign Language Interpreters and Lipspeakers appear in the CACDP Directory.

**5.19** The true record of the original statement of a witness or defendant who uses sign language is a video recording, not the interpreter’s written or oral version of what they say the defendant or witness conveyed: see *R v Raynor*<sup>20</sup> and *R v Governor of Brixton Prison ex parte Saifi*<sup>21</sup>.

**5.20** A witness who has a speech impairment may be permitted to write down his or her evidence at court.

**5.21** For further information see the National Register of Public Service Interpreters, on CPS Infonet, and the Directory published by The Council for the Advancement of Communication with Deaf people (CACDP) at <http://www.cacdp.org.uk/>

<sup>20</sup>Times 19.09.00; 2000 WL 1026990

<sup>21</sup>[2001] 1 WLR 1134; [2001] 4 All ER 168

### Witness profiling, preparation and support

- 5.22** This initiative was pioneered by the Investigations Support Unit (ISU) of Liverpool City Council working with the CPS Policy Directorate. It aims to promote equal access to justice for witnesses with learning disabilities and (other) vulnerable witnesses by providing an in-depth support and preparation programme. This programme deals with the understanding, information and skills required of the witness, while avoiding any discussion of, or reference to, their evidence.
- 5.23** At the pre-trial stage, an assessment of the individual's potential to be a credible and competent witness in the trial is carried out. This detailed work is undertaken to enable the witness to be prepared to be able to give evidence and a witness profile is generated. The profile is served on the court, the prosecution and the defence in accordance with an agreed protocol.
- 5.24** The witness profile prepared by the ISU staff includes details such as the witness's functional skills and powers of concentration (in relation to giving evidence, specifically). Advice is also given to the prosecution advocate about how to ensure that the witness is able to give his/her best evidence and strategies to minimise or resolve potential problems are also included. This enables the prosecuting advocate to consider how to formulate questions in a way that the witness will understand.
- 5.25** Additionally, the witness profile can provide the judge with information about the witness's specific requirements, which may lead to the judge giving directions about any assistance that the witness may need in the courtroom.
- 5.26** The model developed by the Liverpool ISU has now been adopted in some other Areas.

### Treatment of witnesses in the courtroom

- 5.27** *The Prosecutors' Pledge* confirms that prosecutors will: "protect victims from unwarranted or irrelevant attacks on their character and may seek the court's intervention where cross-examination is considered to be inappropriate or oppressive".
- 5.28** It may sometimes assist prosecutors to refer to the *Equal Treatment Bench Book*, which can be found at <http://www.jsboard.co.uk/etac/etbb/index.htm>. The book contains clear guidelines for magistrates and judges about appropriate language and behaviour. It includes a chapter on disability in which judges are reminded that: "it is not simply a question of judges being polite and understanding when faced with people whose disabilities are clearly apparent. All members of the judiciary should be able to recognise disabilities when they exist, identify the implications, know what powers they have to compensate for the resulting disadvantage and understand how to use these powers without causing prejudice to other parties".

## 6. SENTENCING

### Procedure in cases to which section 146 applies

- 6.1** Section 2 above explains when section 146 will apply.
- 6.2** There is no procedure laid down by which the court is to determine whether or not an offence was aggravated by hostility based on disability. If the defendant is convicted of an offence to which section 146 of the Criminal Justice Act 2003 applies and evidence tending to show that the offence was aggravated by hostility has not been adduced during the trial, the prosecution should seek to establish the aggravating feature in a Newton hearing (see *R v Newton*<sup>22</sup>) following the guilty verdict.
- 6.3** If there is admissible evidence of hostility based on disability, it must be put before the court and accepted by the defendant, or found proved, for the court to take it into account in sentencing for the purposes of section 146. Case law on racially aggravated offences confirms that the judge should not draw an inference that the offence was so aggravated and pass sentence on that basis without putting the defendant on notice and allowing him to challenge the inference: see for example *R v Lester*<sup>23</sup>.
- 6.4** After hearing the evidence of hostility based on disability, the court should announce whether that aggravating feature has been found proved. If it is not found proved, section 146 will not apply and the court will proceed to sentence accordingly. If it is found proved, section 146(3) will apply and any sentence that the court would have imposed for the 'basic' offence should be increased accordingly.

### How does the court decide on the sentence in a case to which section 146 applies?

- 6.5** There is no current sentencing case law on disability hate crimes but again it is appropriate to look to the case law on racially aggravated crime for guidance. How a court should decide the appropriate increase in sentence for racial aggravation was addressed by the Sentencing Advisory Panel in its advice to the Court of Appeal in 2000<sup>24</sup> and largely adopted by the Court in *R v Kelly & Donnelly*<sup>25</sup>. The judgment advises that a sentencer should determine the appropriate sentence without the element of racial aggravation and then make an addition to the sentence to take account of that aggravation. The extent to which the sentence should be enhanced will depend on the seriousness of the offence and the judgment gives guidance on how to assess this. It was recommended that:

- (1) a sentencer should first arrive at the appropriate sentence without the element of racial aggravation but including any other aggravating or mitigating factors;

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<sup>22</sup>77 Cr App R 13 CA

<sup>23</sup>63 Cr App R (S) 29 A

<sup>24</sup>*Racially Aggravated Offences* published on 29 August 2000, see <http://www.sentencing-guidelines.gov.uk/advice/index.html#raciallyaggravated>

<sup>25</sup>[2001] 2 Cr App R (S) 73 CA

- (2) the sentence should then be enhanced to take account of the racial aggravation, increasing the sentence by an appropriate amount to reflect the degree of racial aggravation;
- (3) the sentencing judge should declare what the appropriate sentence would have been for the offence without the racial aggravation so that the sentence for the racial element of the offence can be clearly seen. That would lead to transparency in sentencing which would benefit both the public and the Court of Appeal (it should be noted that this process is particularly important in cases in which there is subsequently an argument about whether the sentence is unduly lenient);
- (4) the appropriate amount to be added for the racial element of the offence would depend on all the circumstances of the individual case;
- (5) **serious aggravating factors** to be taken into account are:
  - a. planning;
  - b. a pattern of racist offending;
  - c. membership of a group promoting racist activities;
  - d. deliberately setting the victim up for the purposes of humiliation or to be offensive;
  - e. if the offence took place at the victim's home;
  - f. if the victim was particularly vulnerable or providing services to the public;
  - g. if the timing or location of the offence maximised the harm or distress it caused;
  - h. if the expressions of racial hostility were repeated or prolonged;
  - i. if fear and distress throughout a particular community resulted from the offence; and
  - j. if particular distress was caused to the victim or the victim's family; (it can be seen that factors a-d relate to the offender's **intention** and factors e-j relate to the **impact** on the victim or others);
- (6) **less seriously aggravating factors** are:
  - a. if the racist element was limited in scope or duration;
  - b. if the motivation for the offence was not racial; and
  - c. if the element of racial hostility or abuse was minor or incidental.

**6.6** Although guidelines on sentencing disability hate crimes have not yet been published, on 1 September 2005 the Sentencing Advisory Panel published a consultation paper on *Assaults and other Offences Against the Person* in which the Panel stated its belief that the principle established in *R v Kelly & Donnelly* could be adapted to apply to offences aggravated by any one of the four statutory aggravating factors (race, religion, sexual orientation and disability). It said: "the notional sentence should be decided in the normal way and then enhanced, as appropriate, to take account of the specific aggravation". It is clear that the Panel believes that the principles outlined in its advice on racially aggravated offences could be readily applied to offences aggravated by other forms of prejudice.

**6.7** The fact that the abuse may be of a relatively minor nature is not a reason for a prosecutor not to pursue an aggravated offence. The Sentencing Advisory Panel's position is that racial, religious, homophobic or disability-related hostility or abuse, which is minor or incidental in the context of the overall offence, can properly be reflected in the penalty to be imposed. This lends weight to the CPS position that such cases can properly be prosecuted as aggravated

offences and that the perceived “minor” nature of any racial etc. abuse should be reflected in the sentence imposed. Parliament has made it clear that the demonstration of such abuse, in the course of an offence, is unacceptable.

### Sentencing in cases to which section 146 does not apply

**6.8** Prosecutors should always have regard to the guidelines issued by the Sentencing Guidelines Council in December 2004, *Overarching Principles: Seriousness*. They state that a court is required to pass a sentence that is commensurate with the seriousness on the offence. The seriousness of an offence is determined by two main factors: the **culpability** of the offender; and the **harm** caused or risked being caused by the offence. Culpability will be greater “where an offender targets a vulnerable victim (because of their old age or youth, disability or by virtue of the job they do)” (see paragraph 1.17); factors indicating a more than usually serious degree of harm include the fact that the “victim is particularly vulnerable” (see paragraph 1.23).

### The Attorney General’s Guidelines on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise 2005

**6.9** These revised guidelines were published on 21 October 2005. All prosecutors should be aware of their contents and follow them. They explain the important role that the prosecutor plays in protecting the general public interest and the specific interests of victims. They also provide principles that should always be followed when considering the acceptance of a plea and when addressing the court at the point of sentence. They can be found in the CPS Legal Guidance and at [http://www.lslo.gov.uk/pdf/acceptance\\_of\\_pleas\\_guidance.doc](http://www.lslo.gov.uk/pdf/acceptance_of_pleas_guidance.doc)

### Orders made at the time of sentencing

**6.10** Prosecutors should ensure that the court has all relevant information concerning any order which might be imposed upon conviction, such as compensation, restitution and forfeiture orders.

**6.11** In Protection from Harassment Act 1997 cases, although the court may make a restraining order (under section 5) of its own volition, it is expected that the prosecution will ask for an order where appropriate, and that the contents of the order would be discussed in any pre-sentence report. The contents of the order are at the court’s discretion, provided that the court is satisfied that the conditions are necessary to protect the victim or other person named in the order. However, the prosecutor should be prepared to assist the court with suggested conditions. The order gives protection to the victim, and is not a punishment. The duration of the order should reflect the need for future protection and not the seriousness of the previous conduct. Indefinite orders may be appropriate in many cases, with discharge or variation being considered in due course.<sup>26</sup>

**6.12** In cases where there has been a pattern of anti-social behaviour causing or likely to cause harassment, alarm or distress, continuing over a period of time and having an adverse effect

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<sup>26</sup>It should be noted that, when implemented, section 12 of the Domestic Violence Crime and Victims Act 2004 will amend section 5 of the Protection from Harassment Act 1997 to make it possible for the court to impose a restraining order upon conviction or acquittal of any offence.

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on neighbours and the community, it will be appropriate to make an application for an anti-social behaviour order (ASBO) upon conviction, under the Anti-Social Behaviour Act 2003. The police should be asked to provide as much information as possible to support the application and a draft order should be prepared for the assistance of the court.

**6.13** *The Prosecutors' Pledge* confirms that we will: "on conviction, apply for appropriate orders for compensation, restitution or future protection of the victim".

### Unduly lenient sentences

**6.14** It is possible that any type of offence may be aggravated by hostility based on disability because any type of offence may involve a disabled victim or witness. It is therefore possible that a crime that has been sentenced as a disability hate crime may become the subject of an unduly lenient sentence referral (for example wounding with intent, rape, robbery).

**6.15** Sections 35 and 36 of the Criminal Justice Act 1988 empower the Attorney General to apply to the Court of Appeal for leave to refer for review any sentence which appears to the Attorney to be unduly lenient; which was passed on an offender for a limited range of offences; and which was passed in the Crown Court. A written application for leave to refer, signed by the Attorney, must be lodged with the Registrar of Criminal Appeals within 28 days of the sentence being passed. **The 28 day time limit is absolute** so prosecutors must ensure cases are handled expeditiously so that the time limit is met. Prosecutors should refer to the CPS Legal Guidance which clearly sets out the procedure to be followed.

**6.16** Consideration of a sentence for possible referral as an unduly lenient sentence may arise in one or more of the following ways:

- the CPS may consider whether the sentence merits a reference;
- the CPS may receive a complaint about the sentence from, for example, the victim or the victim's family, a member of the public, a lobby group, or from a police officer;
- the Law Officers may receive a complaint about a sentence;
- the Law Officers may call for the case papers, for example after reading reports of individual cases.

**6.17** In cases where, following receipt of a complaint, the CPS considers the case and decides not to submit the case to the Law Officers for consideration, it must notify the complainant without delay so that the complainant's option of complaining direct to the Law Officers is preserved and so that the Law Officers will have sufficient time, if a complaint is made, to consider the case.

## 7. COMMUNITY ENGAGEMENT

- 7.1** The Disability Discrimination Act 2005 places a general duty on public authorities (which includes the CPS) to have due regard to the need: to promote equality of opportunity between disabled people and other people; to promote positive attitudes towards disabled people; and to encourage participation by disabled people in public life.
- 7.2 Working with criminal justice partners:** we have a responsibility to work with criminal justice partners to promote the confidence of disabled people in the CJS. It is particularly important that we discuss with the police at a senior level the way in which we can work together to ensure that cases involving disabled people receive the appropriate level of care and consideration in accordance with our policy statement. Chief Crown Prosecutors are encouraged to raise awareness of the policy statement and this guidance with their Local Criminal Justice Boards in order to promote good practice and consistency and to improve the way that all criminal justice agencies handle disability hate crime.
- 7.3 Working with the wider community:** effective community engagement has to take place at a local level so that disabled people trust in the criminal justice services. CPS Area Groups will be establishing Community Involvement Panels in each of the 15 Area Groups in 2007-08. Also in 2007-08, CPS Areas will be establishing Hate Crime Scrutiny Panels. Hate Crime Scrutiny Panels should meet quarterly and focus on identifying lessons from a random sample of completed cases with a view to improving case handling. Areas should ensure that disabled people and representatives from local disability organisations are represented on both these panels.
- 7.4** At a national level, the CPS will establish a Community Accountability Forum in 2007 which will have responsibility for overseeing the implementation of the Single Equality Scheme 2006-2010. This will therefore include ensuring that the Disability Equality Action Plan, contained within the Single Equality Scheme, is being implemented on schedule. Disabled people and representatives of disability organisations will be invited to join the Community Accountability Forum to ensure that we understand the issues that they face; that we share information with them; and that we work to resolve any areas of concern.
- 7.5** Through the establishment of these new national and local fora, and through our work with criminal justice partners, we will ensure that at all levels in the organisation we are critically challenged to demonstrate how we are working to promote equality for disabled people.

## **8. CONCLUSION**

- 8.1** We are determined to play our part in stopping crimes against disabled people and in bringing offenders to justice. We are committed to improving our performance in handling cases of all hate crime and we want victims and witnesses to have confidence in the way in which we review and progress our cases.
- 8.2** We hope that the policy statement and this guidance will help victims of disability hate crime to understand the work of the CPS, how we make our decisions and the different stages of the prosecution process.
- 8.3** Prosecutors will continue to work with the police and other colleagues in the CJS and the voluntary and community sectors at national and local levels to develop good practice in dealing with cases of disability hate crime.

# ANNEX A

## GLOSSARY

**ADHD** (attention deficit hyperactivity disorder) relates to learning and behavioural problems which are not caused by any serious underlying physical or mental disorder. It is frequently characterised by difficulty in sustaining attention, impulsive and disruptive behaviour, and excessive activity. Say: a person with ADHD.

**AIDS** (acquired immunodeficiency syndrome) is an infectious disease resulting in the loss of the body's immune system to ward off infections. The disease is caused by the human immunodeficiency virus (HIV). A positive test for HIV can occur without symptoms of the illnesses that usually develop up to ten years later, including tuberculosis, recurring pneumonia, cancer, recurrent vaginal yeast infections, intestinal ailments, chronic weakness and fever, and profound weight loss. Do not say: AIDS victim. Say: a person living with HIV; a person with AIDS; or a person living with AIDS.

**Autism** is a mental disorder originating in infancy that is characterised by self-centred subjective mental activity, especially when accompanied by withdrawal from reality, inability to socially interact, repetitive behaviour, and language dysfunction. Do not say: autistic. Say: a person with autism.

**Blind** describes a condition in which a person has loss of vision for ordinary life purposes. Visually impaired is the generic term used by some individuals to refer to all degrees of vision loss. Say: a person whose sight is impaired or a person who has low vision.

**Brain injury** describes a condition where there is long-term or temporary disruption in brain function resulting from injury to the brain. Difficulties with cognitive, physical, emotional, and/or social functioning may occur. Do not say: brain damaged. Say: a person with a brain injury.

**Chronic fatigue syndrome** is also called chronic fatigue and immune dysfunction syndrome. It describes a serious chronic condition in which individuals experience long periods of fatigue accompanied by physical and cognitive symptoms. Never use terms such as: Yuppie Flu; malingering; or hypochondria; as they inappropriately imply personality disorders. Say: a person with chronic fatigue syndrome.

**Congenital disability** describes a disability that has existed since birth but is not necessarily hereditary. The terms birth defect and deformity are inappropriate. Say: a person with a congenital disability.

**Deaf** refers to a profound degree of hearing loss. Hearing impaired or hearing loss are generic terms used by some individuals to indicate any degree of hearing loss—from mild to profound. These terms include people who are hard of hearing and deaf. Hard of hearing refers to a mild to moderate hearing loss that may or may not be corrected with amplification. Say: a person who is deaf or who has a hearing impairment/loss.

**Developmental disability** is any mental and/or physical disability usually starting in childhood or teens and continuing indefinitely. It limits one or more major life activities such as self-care, language, learning, mobility, self-direction, independent living, and economic self-sufficiency. This includes individuals with mental retardation, cerebral palsy, autism, epilepsy and other seizure disorders, sensory impairments, congenital disabilities, traumatic injuries, or conditions caused by disease (polio, muscular dystrophy etc). It may also be the result of multiple disabilities. Say: a person with a developmental disability.

**Disability** is a general term used for a functional limitation. It may refer to a physical, sensory or mental condition. Do not refer to disabled people as: the handicapped; handicapped persons; or being in special need. Impairment details can be used when citing laws and situations, such as access issues.

**Disfigurement** refers to physical changes caused by such events as burns, trauma, disease, or congenital conditions. Do not use the term 'victim'. Say: a person with burns.

**Downs syndrome** describes a chromosome disorder that usually causes a delay in physical, intellectual and language development and which usually results in incomplete mental development. Calling a person a mongol, mongoloid or a Downs child/person is unacceptable. Say: a person with Downs syndrome.

**Learning disability** describes a permanent condition that affects the way individuals take in, retain and express information. The term is favoured because it emphasises that only certain learning processes are affected. Do not say: slow learner; retarded. Say: a person with a learning disability.

**Mental disability** generally comprises mental disability, psychiatric disability, learning disability or cognitive impairment, which are acceptable terms. Always precede these terms with: "a person with ....."

**Non-disabled** is the appropriate term for people without disabilities. Normal, healthy (compared to unwell or disabled people), or even the word "whole", are inappropriate.

**Psychiatric disability, psychotic, schizophrenic and other specific terms** should be used only in the proper clinical context and should be checked carefully for medical and legal accuracy. Words such as crazy, maniac, lunatic, demented, schizo and psycho are highly offensive and should never be applied to people with mental health problems. Say: a person with psychiatric disabilities, emotional disorders, or mental disorders.

**Seizure** describes an involuntary muscular contraction, a brief impairment or loss of consciousness resulting from a neurological condition, such as epilepsy or from an acquired brain injury. The term "convulsion" should be used only for seizures involving contraction of the entire body. Do not say: a person has fits; or a person is spastic; or a person is a spastic. Say: a person with epilepsy; or even a person with a seizure disorder.

**Small/short stature** describes people generally under 4'10" tall. Never refer to dwarfs or midgets, which imply a less than full adult status in society. Dwarfism is an 'accepted' medical term, but it should not be used as general terminology. Beware of the (joke) term "vertically challenged". Say: a person of small (or short) stature.

**Speech disorder** is a condition in which a person has limited or difficult speech patterns. Never use mute or dumb. Say: a person who has a speech disorder or a person with a speech impairment.

**Spinal cord injury** describes a condition in which there has been permanent damage to the spinal cord. Quadriplegia denotes substantial or significant loss of function in all four extremities. Paraplegia refers to substantial or significant loss of function in the lower part of the body only. Do not use the term: someone with back pain. Say: a person with paraplegia; a person who is paralysed; or a person with a spinal cord injury.

**Stroke** is caused by interruption of blood to the brain. Hemiplegia (paralysis on one side) may result. Do not say: a person is a stroke victim. Say: a person is a stroke survivor; or a person who has had a stroke.

**Substance dependence** refers to patterns of substance use that result in significant impairment in at least three life areas (family, employment, health etc). Substance dependence is generally characterised by impaired control over consumption; preoccupation with the substance; and the denial of impairment in life areas. Substance dependence may include physiological dependence/tolerance withdrawal. Although such terms as: alcoholic and "addict" are medically acceptable, they may be derogatory to some individuals. Say: a person who is substance dependent; or a person who is alcohol dependent.

An individual who has a history of dependence on alcohol and/or drugs and is no longer using alcohol or drugs may identify themselves as "recovering" or as a person in recovery.

# ANNEX B

		Vulnerable Witnesses (s.16)		Intimidated Witnesses (s.17)	
Adults		Children – automatically eligible			
All Offences Always Quality Tested Mentally Disordered (per MHA 1983) Intellectually and Socially Impaired Physically Disabled	All offences – Primary Rule presumes video evidence & live link, but remains subject to Quality Test for children in cases other than sex or violence and for all other measures Children (Under 17 yrs) only	For Children deemed in need of Special Protection i.e. in Violence, Abduction, Neglect or Sex offences No Quality Test Required for video evidence and live link Children (Under 17 yrs ) only	All Offences Always Quality Tested Automatic eligibility for complainants in sexual cases Quality of Evidence Diminished by Fear or Distress		

SPECIAL MEASURE	YJCE Act 1999	Crown Court		Magistrates' Court		Addl. Info
		Vulnerable (s16)	Intimidated (s17)	Vulnerable (s16)	Intimidated (s17)	
SCREENS	s.23	24 July 2002	24 July 2002	3rd June 2004	3rd June 2004	
VIDEO LINK	s.24	24 July 2002	24 July 2002	3rd October 2005*	3rd October 2005	*From 24/7/02 to 30/9/05 was for children in need of special protection only
EVIDENCE IN PRIVATE	s.25	24 July 2002	24 July 2002	3rd June 2004	3rd June 2004	
WIGS & GOWNS OFF	s.26	24 July 2002	24 July 2002	Not Applicable	Not Applicable	
VIDEOTAPED EVIDENCE IN CHIEF	s.27	24 July 2002	2003 – 2005 Available in Sheffield & Wood Green Crown Courts only	24 July 2002 – Child (sex violence, threats, abduction & cruelty) * only	2004 – 2005 Awaits pilot evaluation in Crown Court	* For all other s.16 wits after evaluation in Crown Court.
VIDEOTAPED X-EXAM	s.28	Subject of review	Subject of review	Subject of review	Subject of review	Part of the Child Evidence Review, now with Ministers for their comments.
INTERMEDIARY	s.29	Awaits evaluation of Pilot	Not Available See s18 (1)(b)	Awaits evaluation of Pilot	Not Available See s18 (1)(b)	Pilots running in Merseyside, West Midlands, Devon & Cornwall, Norfolk, Thames Valley & South Wales
AIDS TO COMMUNICATION	s.30	24 July 2002	Not Available See s18 (1)(b)	3rd June 2004	Not Available See s18 (1)(b)	

Special Measures exist alongside existing common law powers to order measures which will assist the witness to give evidence at trial.

## ANNEX C

Listed below are contact details for some of the organisations that support disabled people & that provide information on disabilities

### **Ann Craft Trust**

The Ann Craft Trust works with staff in the statutory, independent and voluntary sectors to protect people with learning disabilities who may be at risk from abuse. The Ann Craft Trust also provides advice and information to parents and carers who may have concerns about someone they are supporting.

Centre for Social Work  
University of Nottingham  
University Park  
Nottingham  
NG7 2RD  
Telephone: 0115 9515400  
Fax: 0115 9515232  
[www.anncrafttrust.org](http://www.anncrafttrust.org)

### **DIAL (Disability Information and Advice Line)**

Dial is a national organisation of a network of approximately 130 local Disability Information and Advice Line services (DIALs) run by and for disabled people, based throughout the UK. DIAL provides information and advice to disabled people and others on all aspects of living with a disability.

DIAL UK  
St Catherine's  
Tickhill Road  
Doncaster  
DN4 8QN  
Tel: 01302 310 123  
Fax: 01302 310 404  
[www.dialuk.org.uk](http://www.dialuk.org.uk)

### **Disability Rights Commission (DRC)**

The DRC is an independent body established in April 2000 by Act of Parliament to stop discrimination and promote equality of opportunity for disabled people.

The DRC Helpline is the first point of contact for all enquiries.

Telephone: 08457 622 633

Textphone: 08457 622 644

You can speak to an operator at any time between 8am and 8pm, Monday to Friday)

Fax: 08457 778 878

Post: DRC Helpline

FREEPOST MID02164

Stratford upon Avon

CV37 9BR

[www.drc.org.uk](http://www.drc.org.uk)

\*From October 2007, the work of the DRC will become part of the new Commission on Equality and Human Rights (CEHR)

[www.cehr.org.uk](http://www.cehr.org.uk)

### **Guide Dogs for the Blind Association**

Guide Dogs for the Blind Association aims to create a world in which all people who are blind and partially-sighted enjoy the same rights, opportunities and responsibilities as everyone else.

Hillfields

Burghfield Common

Reading

RG7 3YG

Tel: 0118 983 5555

Fax: 0118 983 5433

[www.gdba.org.uk](http://www.gdba.org.uk)

### **Mencap**

Mencap is the UK's leading learning disability charity working with people with a learning disability and their families and carers.

123 Golden Lane

London

EC1Y 0RT

Phone: 020 7454 0454

Fax: 020 7608 3254

[www.mencap.org.uk](http://www.mencap.org.uk)

### **MIND**

MIND works to create a better life for everyone with experience of mental distress by advancing the views, needs and ambitions of people with mental health problems.

15-19 Broadway  
London E15 4BQ  
Tel: 020 8519 2122  
Fax: 020 8522 1725  
[www.mind.org.uk](http://www.mind.org.uk)

### **Leonard Cheshire**

Leonard Cheshire is the UK's leading provider of disability support services, and campaigns on the rights of disabled people. Services include supported living, care at home, residential care, rehabilitation, resource centres and training and employment programmes.

30 Millbank  
London  
SW1P 4QD  
Tel: 020 7802 8200  
Fax: 020 7802 8250  
[www.leonard-cheshire.org.uk](http://www.leonard-cheshire.org.uk)

### **Liverpool City Council – Investigations Support Unit (ISU)**

The ISU a Witness Support, Preparation & Profiling (WSP&P) service to Vulnerable Witnesses, particularly those with a learning disability, who engage with the criminal justice system. This service aims to promote equal access to justice by identifying and reducing barriers for such witnesses and by supporting criminal justice agencies in fulfilling their responsibilities. The WSP&P model developed by ISU has been adopted in a number of other areas.

Investigations Support Unit  
Liverpool City Council  
Community Safety  
c/o Municipal Buildings  
Dale Street  
Liverpool L2 2DH  
Tel. 0151 233 4994 / 4987  
Fax: 0151 233 4990  
E-mail: [investigations.support@liverpool.gov.uk](mailto:investigations.support@liverpool.gov.uk)

## Guidance on Prosecuting Cases of Disability Hate Crime

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### **Respond**

Respond offers a range of services which provide emotional and psychological support to victims and perpetrators of abuse who have learning disabilities. Respond also provides training and support to professionals and carers.

3rd Floor  
24-32 Stephenson Way  
London  
NW1 2HD  
Tel: 020 7383 0700  
Fax: 020 7387 1222  
Helpline: 0808 808 0700  
[www.respond.org.uk](http://www.respond.org.uk)

### **RNIB (Royal National Institute of the Blind)**

RNIB offers information, support and advice to people with sight problems.

105 Judd Street  
London  
WC1H 9NE

RNIB Helpline 0845 766 9999  
[www.rnib.org.uk](http://www.rnib.org.uk)

### **RNID (Royal National Institute for the Deaf People)**

RNID is the largest charity providing support, services and advice to deaf and hard of hearing people throughout the UK.

19-23 Featherstone Street  
London  
EC1Y 8SL  
Tel: 020 7296 8000  
Fax: 020 7296 8199  
[www.rnid.org.uk](http://www.rnid.org.uk)

### **United Kingdom's Disabled People's Council (UKDPC)**

UKDPC is an umbrella organisation that represents some 80 organisations run and controlled by disabled people to promote full equality and participation within society.

Litchurch Plaza  
Litchurch Lane  
Derby  
DE24 8AA  
Tel: 01332 295551  
Fax: 01332 295580  
[www.bcodp.org.uk](http://www.bcodp.org.uk)

### **Victim Support**

Victim Support is the national charity for people affected by crime. Our volunteers provide free and confidential support to help people deal with their experience whether or not they report the crime. Victim Support also runs the Witness Service and Supportline. The Witness Service helps witnesses, victims and their families before, during and after a trial. Trained volunteers provide emotional support and practical information about court proceedings, a visit to the court, and a quiet place to wait before and during the hearing.

Supportline can give practical help and emotional support in confidence and anonymously: ring 0845 30 30 900.

[www.victimsupport.org.uk](http://www.victimsupport.org.uk)

### **Voice UK**

Voice UK supports people with learning disabilities and other vulnerable groups who have experienced crime or abuse and offers support to families, carers and professional workers.

Wyvern House  
Railway Terrace  
Derby  
DE1 2RU  
Tel: 01332 295775  
Fax: 01332 295670  
[www.voiceuk.org.uk](http://www.voiceuk.org.uk)



