



Law
Commission
Reforming the law

Hate Crime: Should the existing offences be extended?

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Law Commission



- An independent body that keeps the law of England and Wales under review
- Carries out consultations on specific areas of law, to work out how well the current law functions
- Recommends reform of the law where needed, to make sure it is fair, modern, simple and cost-effective



- **Aggravated offences** (Race, Religion) – special versions of certain criminal offences, with higher sentences, where D motivated by or demonstrated racial/religious hostility
- **Stirring up hatred** offences (Race, Religion, Sexual Orientation)
- **Enhanced sentencing** (Race, Religion, Sexual Orientation, Transgender, Disability) – hostility element is addressed at sentencing, as an aggravating factor
- **Police recording** – the police and CPS may “flag” offences as hate crimes but they adopt a much less stringent test (based on perception not proof)



The Government (MoJ) asked the Law Commission to examine 2 questions:

1. Should the **aggravated offences** be extended to cover disability, sexual orientation, or transgender identity?
2. Should the **stirring up hatred** offences be extended to cover hatred against people with a disability or who are transgender?

In order to establish whether there was a need for new offences, the Commission also looked at **enhanced sentencing**, to see whether it is sufficient to deal with hate crime against disabled, LGB and transgender people, or whether it would be sufficient if it was improved or changed.

Context: Govt hate crime action plan 2012-15



Enhanced Sentencing Overview

Criminal Justice Act 2003

- Section 146: applies if D **motivated by, or demonstrated**, hostility on grounds of disability, sexual orientation (same test as for the aggravated offences)
- If so, judge must i) make declaration in open court to that effect and ii) treat the hostility as an aggravating factor at sentencing
- Section 145 provides the same in respect of racial and religious hostility, covering the offences that do not have racially and aggravated versions

Important points:

- Hostility is found by the judge (not the jury), sometimes at *Newton* hearing
- Hostility must be proved beyond reasonable doubt



Enhanced Sentencing Consultation Paper

In our consultation paper (2013) the Commission made 2 provisional proposals:

1. A **Sentencing Council guideline** on hate crime - to address inconsistencies and under-use
2. When section 145 or 146 is applied, this should be recorded on the **Police National Computer (PNC)**

Consultees were asked:

1. Whether they favoured these proposals
2. If these improvements were made, whether enhanced sentencing would be sufficient to deal with hate crime against LGB, disabled and transgender people



Enhanced Sentencing Consultation Responses

- Consultees overwhelmingly favoured both proposals (regardless of whether aggravated offences extended or not)
- Most said that enhanced sentencing would then provide an adequate response to hate crime
- But most also wanted aggravated offences to be extended as well



Enhanced Sentencing Final Recommendations

The Commission recommended that **both** provisional proposals should be implemented

To note if the recommendations are accepted:

- Thematic or offence-specific guideline?
- Home Office, HMCTS will have to make minor IT changes and ensure consistent and accurate recording takes place
- Government will have to change secondary legislation to allow enhanced sentencing to appear on Disclosure and Barring Service (DBS) checks (basic, standard and/or enhanced)

Aggravated Offences

Current Law

- Provide “aggravated” versions of certain offences, with higher maximum sentences
- Available offences include common assault, s 47 ABH, s 20 wounding/GBH, harassment, Public Order Act ss 4, 4A, 5, harassment, stalking, criminal damage
- Must prove (to jury or magistrates) that D **motivated by**, or **demonstrated**, racial or religious hostility. Beyond reasonable doubt
- Can convict of the “basic” offence if not satisfied of hostility
- Racial offences created 1998; religious offences 2001
- Except for common assault and criminal damage, conviction rates much lower for aggravated than basic offences: 70-80% basic, 50-60% aggravated



Aggravated Offences Consultation Paper (CP)

- AOs allow only **limited list of “basic” offences**; and not tailored to disability, LGB hate crime.
- ES would allow single **charge selection** approach to all offences (especially given “mutual exclusivity” of s 145 and aggravated offences)
- **Sentencing**: in practice the sentence for an AO no higher than ordinary max; but higher max may be needed for exceptional cases. Difficult to show higher max deters; victims will differ on whether length of sentence is the key way to recognise, address hate crime offending
- **Labelling**: ES involves open court declaration and increased sentence, is it as effective/fair as the specific “aggravated” label.
- **Investigations**: police may not seek out evidence of hostility to support a later application to use ES. By contrast, they know that to support and “aggravated” charge, they must gather it
- **Plea bargaining**: anecdotal evidence that pleas were accepted to “basic” offence and aggravated offence dropped: hostility then goes unrecognised

Aggravated Offences Consultation Responses

Vast majority (85%) of consultees favoured extension of the AOs

Arguments in favour:

- Difficulties with AOs accepted, and 62% felt improved ES would be adequate to address hate crime. But they saw AOs as a higher form of protection, and felt it should be extended on equality grounds
- “Aggravated” label has symbolic/ communicative value; the police more likely to gather evidence of hostility; the availability of higher sentences; increasing public awareness and confidence

Arguments against:

- Overwhelming practitioners and judges, emphasised the practical difficulties and theoretical complexity of AOs
- Present 2-limbed hostility test and the difficulty of proving motivation; if hostility rejected by jury or plea bargain takes place, hostility goes unaddressed; arbitrary list of offences - no sexual offences and communication offences;
- ES is simple, economical, flexible.



Aggravated Offences Recommendations

- Clearly there is force in the equality argument
- But the practical difficulties remain.
- Do not want to recommend a change that would be ineffective/counterproductive
- Commission recommends a **“wider review”** to examine both ES and AOs.
- Advantages:
 - Wider terms of reference: not simply whether to extend AOs in current form. **Aimed at finding the best possible response to hate crime**
 - 85% of hate crime is racial/religious. Important to address problems in dealing with that, not just to extend to new groups
 - Could address big gaps in quantitative and qualitative data: eg on use of sections 145 and 146, examination of case files
- But if no wider review, **offences should be extended** on equality grounds



Wider Review

Possible Questions

Among the questions a wider review could ask would be:

- A test based on prejudice or bias or targeting, rather than motivation by or demonstrations of hostility
- Whether reformed enhanced sentencing is working successfully
- If aggravated offences are to be kept, what forms of hate crime are most common for each characteristic and thus what offences need to be included
- What characteristics to include, and on what principles to select them: gender? Age? Subcultures?
- Other non-legislative measures: restorative justice, education, internet/social media control, rehabilitation

The scope of any new aggravated offences

- If AO to be extended
- Definitions of disability, sexual orientation, transgender identity
- For clarity, we recommended using the definitions already used for enhanced sentencing.
- Familiar to all practitioners and police
- We considered consistency vital, and current definitions sufficiently flexible
- Some minor improvement to ensure targeting by association (eg carers) accounted for, as this is a gap in s 146



- CP- considered 2 options
- (a) s 146 CJA 2003
- (b) Scottish model specifically refers to transvestism, intersex and “any other gender that is not standard male or female gender identity”
- Majority of respondents favoured (a)
- S 146 is familiar, can work and is flexible enough to include all aspects of the Scottish definition



Stirring Up Hatred

Current Law - Public Order Act 1986

- Addresses a range of communication: spoken and written word, signs, behaviour, publications, recordings, plays, programmes; also possession of material with view to distribution
- For **race** (created 1986):
 - threatening, abusive or insulting;
 - AND
 - intended or likely to stir up hatred
- For **religion** (2007), **sexual orientation** (2010),
 - threatening
 - AND
 - intended to stir up hatred.
 - Free speech provisions exclude criticising, insulting or ridiculing religious beliefs, criticising sexual conduct or practices
- Rarely prosecuted (no prosecutions at all in 2012-13)
- Very narrow offences

Stirring Up Hatred Consultation

The consultation paper:

- Considered whether existing offences (in conjunction with s146) could tackle the problem
- Considered freedom of speech issues
- Discussed symbolic value of criminalisation
- Provisionally concluded there is a theoretical gap: the spreading of hatred against a group (disabled or transgender people), either intentionally, or where that was likely in the circumstances

We asked consultees whether :

- There is a need in principle to extend?
- For evidence of a practical need for the new crime?



Stirring Up Hatred Consultation Responses

Is there a case in principle?

- 76% said yes. 8% no, 15% unsure
- Most gave no reasons. For those who did, equality was leading reason in favour; also felt serious form of behaviour the law doesn't currently address
- Those against cited freedom of expression; argued offences not justified in absence of widespread conduct not covered by existing law

Is there a practical need?

- 71% said yes. 16% no, 12% unsure
- Those in favour argued stirring up hatred is common; argued that it would address “under-reporting” of hatred
- Those against cited lack of evidence of widespread conduct; argued **these laws would not address internet-based abuse and hate speech**, which need to be addressed in other ways



Stirring Up Hatred Recommendations

In principle, offences could be extended if there was a practical need, and the offences are not in principle problematic under article 10 ECHR. But it is undesirable to restrict freedom of expression in the absence of a clear need to do so

- Examples cited by consultees were generally offensive but not intended to stir up hatred by threats
- Where they were criminal, they passed threshold for other offences, but not stirring up hatred
- Thus there would be very few prosecutions for the new offences, and their symbolic and deterrent effect would be limited

The Commission therefore recommended that the offences not be extended.



- Government considers our report
- Interim response in 6 months, final response in 12 months
- Up to Parliament to pass any new primary legislation
- Govt hate crime action plan finishes next year