

Law Commission Consultation on Hate Crimes

Questions (blue print) followed by CMF answers (black print)

Q1 We provisionally propose that the criteria that should be considered for the addition of any further characteristics into hate crime laws should be:

- **Demonstrable need:** evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.
- **Additional Harm:** evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.
- **Suitability:** protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of resources, and is consistent with the rights of others.

Do consultees agree?

No. We welcome the intent to bring clarity and coherence to the laws relating to hate crime and hate speech and applaud the Law Commission for their work in this regard.

In our opinion, a move away from a characteristic-based approach would be preferable. Hatred and hostility expressed towards any personal characteristic should be the crime, and the law should set and test the thresholds of evidence to guide sentencing. A law based on characteristics will always be behind the curve of societal and cultural change. It will always exclude certain groups of people from the scope of its protection. The three tests for inclusion, listed in the question, will doubtless help legislators to decide when a new characteristic should be added, but in the time lapse between offences coming to light and inclusion in the 'qualifying' list, injustices multiply.

There is a vagueness in the three criteria:

- how many criminal acts of prejudice or hostility must be reported before the threshold of 'prevalence' is met?
- what sort of evidence would meet the requirement for 'additional harm'? What yardsticks would be used to measure 'harm to society'?
- the proposed wording under 'suitability' leaves the reader thinking that justice will first have to pass the tests of practicality and cost efficiency before it can be applied.

Q2. Should the characteristic of "sex or gender" be added to the characteristics protected by hate crime laws?

If the proposal to go with a characteristic-led approach is adopted then 'Sex' should be added, in the sense that both natal men and natal women can become targets of hate speech/crime.

In your summary proposals you question if 'sex/gender' should be added as a new characteristic. By linking them in this way, the reader is led to believe that you are using the two terms interchangeably. Similarly, in the wording of Q2, 'sex or gender' is described as 'the characteristic', ie singular, not plural. However, we suggest that in popular understanding, sex and gender are no longer understood as interchangeable terms. Sex is understood to define one's objective biological identity; gender is taken to refer to one's subjective gender identity, that may or may not be congruent with one's biology. 'Sexual orientation' and 'transgender' are included in the list of five characteristics covered by the existing laws. 'Sexual orientation' is widely understood to describe a spectrum of sexual preference/experience. 'Asexuality' is included in this spectrum and does not, in our opinion, need separate mention. If separate mention of it is made, then the case for including other sexual orientations, such as bisexuality, pansexuality, demi-sexuality, and so on, is surely also made. The list is lengthy and will always be out of date as new subdivisions are added. Some group or another will inevitably feel offended.

You suggest also revising the 'transgender' definition to make explicit reference to people who are transgender, non-binary, cross-dressing or intersex. We have several comments to make in this connection. A significant proportion of the trans community believe that gender identity is fluid. Any attempt to categorise beyond 'non-binary' will fail to be all-inclusive. Cross-dressing does not belong in the transgender category. Cross-dressers do not generally see themselves as trans. Their gender identity is normally congruent with their biology, but they experience sexual stimulation from dressing in the clothes of the opposite sex. Intersex conditions are (mercifully) rare disorders of sexual differentiation of the embryo in development. Individuals with an intersex condition may be born with ambiguous genitalia but they do not belong in the transgender category.

Q3. Should the characteristic of "age" be added to the characteristics protected by hate crime laws?

In our opinion, the issue is not whether age should be added as another 'qualifying' characteristic. The issue is whether the offensive behaviour meets the qualifying threshold to be considered criminal, regardless of the 'object' of that behaviour, young or old, male or female, gay or straight, black or white, Jew or Gentile etc.

Q4. Should any of the following groups be specifically protected by hate crime laws?

- sex workers
- homeless people
- alternative subcultures (for example, goths, punks, metallers, emos)
- philosophical beliefs (for example, humanism)

Please see our answer to Q3, above.

The 'qualifying characteristic' approach will regularly throw up questions like this one, because new groups of targets/victims will continually arise. If it is necessary to do research, gather data, and weigh evidence for each group, not only will that job never be complete but, in the process, many targeted individuals will go without justice.

Q5. We provisionally propose that the current legal position – where the commission of a hate crime can be satisfied through proof that the defendant demonstrated hostility towards a protected characteristic of the victim – should be maintained.

Do consultees agree?

Yes. The definition of 'hostility' is key to this. Some victims maintain that the very sharing of a contrary opinion to the one they hold dearly is hostile in and of itself. They might claim that it is hurtful and disrespectful, that they felt offended, intimidated, belittled.

If the process by which the 'demonstration of hostility' is measured takes into account the weight of subjective offence claimed, it would become a plaintiff's charter. We would hope for clear guidance objectively defining 'hostility.'

Q6. We invite consultees' views as to whether the current motivation test should be amended so that it asks whether the crime was motivated by hostility or prejudice towards the protected characteristic.

Yes, we agree that the motivation limb of the test should be widened to include 'prejudice.' But what tests will be evidential of prejudice? Hostility is more easily proven, but prejudice? Who can read the motivations of the human heart? We would be interested to know what tests would be applied. We agree with those who argue that 'criminal exploitation of disabled people sometimes takes forms which, while lacking overtly hostile features, is founded on a fundamental disregard for them as human beings and as members of the community.' Sadly, the state and its institutions may foster such attitudes.

For example, those adults living with Down Syndrome are harmed, though without overt hostility, by the way our health service providers encourage the termination of pre-birth babies with the same condition. The introduction of non-invasive prenatal testing has led to a rapid decline in the number of children born with Down Syndrome. The message is: 'your Down Syndrome baby is 'unacceptable' and it would be kinder not to let it live.' What does this say to adult members of society who have Down Syndrome, other than that their existence is a regrettable mistake, that their life is not worth living? This is institutional prejudice and it undoubtedly does harm.

We would welcome the introduction of legislation that made such prejudice a criminal offence.

Q7. We provisionally propose that both specified aggravated offences and statutory enhanced sentencing should be retained in the law of England and Wales.

Do consultees agree?

Yes

Q8. We provisionally propose that aggravated offences should apply to all five of the current characteristics equally, and any further characteristics that are added.
Do consultees agree?

Yes

Q9. We provisionally propose that aggravated versions of communications offences with an increased maximum penalty be introduced in reformed hate crime laws.
Do consultees agree?

Yes. Consistent with our previous answers, we take the view that 'the punishment should fit the crime' whatever the category of offences, communications or otherwise. The relative prevalence of hate crime offending as a proportion of an offence should not be the deciding criterion, but the nature and impact of the particular offence itself.

Q10. Do you think aggravated versions of any other offences should be created? Why/Why not?

Yes, for the reasons stated in answer to Q9.

Q11. Do you think that a wider group of characteristics should be protected through the process of sentencing?

If yes, should this be achieved by:

- A residual characteristic in statutory enhanced sentencing; or
- Sentencing guidelines?

A 'residual' characteristic would be preferable. Would it not be possible to have a 'residual' characteristic added to the current list of five protected characteristics? Would this be an effective means of avoiding long delays (for research, data gathering, etc) when it becomes clear that hate crimes are being targeted on groups beyond the scope of the existing law?

Q12. We provisionally propose that intentionally stirring up hatred should be treated differently to the use of words or behaviour likely to stir up hatred. Specifically, where it can be shown that the speaker intended to stir up hatred, it should not be necessary to demonstrate that the words used were threatening, abusive, or insulting.

Do consultees agree?

No. It can be fiendishly difficult to gauge 'intent' apart from evidential speech or behaviour. The conscious or unconscious bias of onlookers, witnesses, law-enforcers and even judiciary members makes it essential that there be measurable evidence to prove intent.

Q13. Where it cannot be shown that the defendant intended to stir up hatred, we provisionally

propose that the offences should cover only "threatening or abusive" (but not "insulting") words or behaviour likely to stir up hatred.

Do consultees agree?

No. The horizon between the offence of stirring up hatred and the protection of free speech is blurred. If an evangelical street preacher admits, under challenge, to believing that homosexual behaviour between consenting adults is wrong, on the basis of his understanding of the Bible, his comments may be interpreted as 'threatening' or 'abusive' by gay rights supporters, no matter how respectfully they may have been expressed.

It could be argued, on the basis of the proposed reforms, that 'he should have known' that his comments could be taken in this way and that he should therefore not have made them. However, freedom to answer questions honestly, indeed freedom to declare Biblical teaching openly, must be protected as vigorously as true hate speech must be prosecuted. An objective and impartial measure of what constitutes 'speech liable to stir up hatred' must be made clear, lest offence be weaponised and free speech curtailed.

We do not see in these proposals, sufficient protection for freedom of expression. As stated, they would become a charter enabling strident activists effectively to gag those who do not subscribe to their ideologies.

Q14. We provisionally propose to:

- replace the separate offences dealing with different forms of dissemination of inflammatory material (in sections 19 to 22 and 29C to 29F of the Public Order Act 1986) with a single offence of disseminating inflammatory material;
- align the defences available to innocent disseminators of inflammatory material to ensure consistency.

Do consultees agree?

Yes. Who decides what is 'inflammatory' and by what measures would that assessment be made? As above, in answer to Q12, both conscious and unconscious bias must be removed from the calculus around what constitutes inflammatory content. Things found unpalatable by some are heartfelt convictions to others. Faith communities cherish certain teachings as revealed truth. The dissemination of those teachings in ways that are both clear and courteous must not become the casualty, albeit inadvertently, of legislation intended to protect certain groups from threats and abuse.

Q15. Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host?

Once unlawful material has come to light, social media companies should be held responsible for its removal within a fair and specified time limit. Failure to do so should render them liable to criminal proceedings.

Q16. We provisionally propose that:

- the current protections for discussion of religion and sexual orientation should apply to the new offence of stirring up hatred;
- similar protections be given in respect of transgender identity, sex/gender and disability.

Do you agree and if so, what should these cover?

Yes. Courteous and respectful critique and discussion of the beliefs and practices of religious traditions should not fall foul of hate crime legislation. Proselytising similarly. Willful misrepresentation, ridicule, insult and abuse should not be excused.

The current protection in the law regarding sexual orientation we support. Freedom to critique the ideology behind current ideas regarding gender identity is also important.

Q17. We provisionally propose that racist chanting at football matches should remain a distinct criminal offence.

Do consultees agree?

Yes.

Q18. We provisionally propose that the offence in section 3 of the Football (Offences) Act 1991 should be extended to cover chanting based on sexual orientation.

Do consultees agree?

Yes.

In our opinion, the offence should be extended to cover all protected characteristics (including any that qualify from time to time under the 'residual' category).

Q19. Should the offence under section 3 of the Football (Offences) Act 1991 be extended to cover gestures and missile throwing?

Gestures, certainly. We imagine that throwing missiles that might injure players, officials or others, is an offence covered by other legislation.

Should the offence under section 3 of the Football (Offences) Act 1991 be extended to cover journeys to and from a designated football match?

Yes, particularly in the immediate vicinity of the ground.

Q20. Should a Hate Crime Commissioner be introduced in England and Wales?

No.