



Hate Crime: The Case for Extending the Existing Offences
Response of Stop Hate UK to the Law Commission

September 2013

Introduction

1. Stop Hate UK is the leading national organisation that supports people affected by all forms of Hate Crime in some parts of the UK. The support we provide extends to people who have experienced or witnessed incidents and those who are related to, work with or otherwise know people who are experiencing or are likely to experience incidents. We support people affected by incidents motivated by hostility towards one or more of the five strands of Hate Crime, monitored annually by the government and police forces in England, Wales and Northern Ireland, but we also support people affected by any other form of Hate Crime, motivated by other aspects of personal identity.
2. We currently operate two helplines that are open 24 hours a day, every day of the year. The Stop Hate Line provides support to people affected by all forms of Hate Crime in some parts of the UK. The service is locally commissioned and funded. It has been in operation since 2006. Stop Learning Disability Hate Crime was launched in 2013. The service is funded by the Ministry of Justice Victim and Witness General Fund. Through Stop Learning Disability Hate Crime we support people who are affected by Learning Disability Hate Crime in England and Wales.
3. Stop Hate UK also provides specialist services to individuals, communities, organisations and statutory bodies. For example, we have significant experience of delivering training, consultancy, research, community cohesion, work with young people, and ad hoc projects relating to our areas of expertise.
4. Our knowledge and experience in the field stems from our work with victims and communities who are affected by Hate Crime. We therefore consider that we represent the interests of victims and communities and, through advocating for them and working to further their rights, we provide them with a voice. It is with this in mind that we respond to this consultation.

5. We are pleased that the Ministry of Justice referred this pertinent issue to the Law Commission. We are grateful to the Law Commission for the way in which this consultation has been conducted and for the wide range of views sought. Stop Hate UK hopes that this consultation will have an impact on the lives of victims and communities and that it will lead to improvements in the criminal justice system and an increase in confidence of victims in it.

Scope of the consultation

6. We are aware that the terms of reference from the Ministry of Justice to the Law Commission were narrowly defined and appreciate that the Law Commission has been unable to go beyond the terms of reference. However, we would like to use this as an opportunity to give our views on the scope of the consultation.
7. The remit of the Law Commission in this consultation allowed consideration only of an extension to the legislation in respect of disability, sexual orientation and “transgender identity” (we prefer to use the broader term gender identity).
8. As stated above, we provide support to people affected by all forms of Hate Crime, whether or not the strand of Hate Crime is annually monitored by the government. In our view hostility can be motivated by any aspect of a person’s identity. We are aware of Hate Crimes based on aspects of identity such as age, alternative subculture, sectarian and sex work being recorded by some police forces in England, Wales and Northern Ireland. It is necessary, therefore, to point out that in the future additional strands of Hate Crime may become subject to national monitoring in the same way as the existing five monitored strands.
9. Although we have concerns about the prevalence and under-reporting of all forms of Hate Crime, Stop Hate UK does not intend to use this as an opportunity to express a view on which of the ‘other’ strands of Hate Crime should be nationally monitored. However, it is important that the Law

Commission is aware that should any other strand of Hate Crime become nationally monitored, it is likely that the same arguments relating to extending the legislation in respect of disability, gender identity and sexual orientation will surface in connection with the new monitored strand or strands. In fact, such arguments already exist and are likely to be made in response to this consultation by interested groups.

10. We now confine ourselves to the scope of the consultation and move to consider our responses to the questions posed by the Law Commission

The aggravated offences

Reform Option 1 – enhanced sentencing provisions

Proposal 1

Do we agree that the enhanced sentencing regime under the Criminal Justice Act 2003 (“CJA 2003”) could provide an adequate response to hostility-based offences on the grounds of disability, sexual orientation and gender identity, if the provisions were properly applied and resulted in an adequate record of the offender’s wrongdoing?

11. We **disagree** for the reasons set out below.

12. Stop Hate UK strongly believes in the need to improve the operation of sections 145 and 146 in the courts. However, we disagree that this is the *only* response that is required and consider that there is a need to also extend the aggravated offences. It is our opinion that an *adequate response* to hostility-based offences would incorporate both an extension of the aggravated offences to the strands of disability, gender identity and sexual orientation and improvements to the application of sections 145 and 146 to cases.

13. Hate Crime legislation is (or should be) about equality. We therefore believe that where aggravated offences exist for the strands of race and religion, they

should equally exist for disability, gender identity and sexual orientation. We consider that sections 145 and 146 are also needed but improvements must be made.

The case of Sheard

14. Steven Simpson was 18 years old when he was killed at his birthday party by Jordan Sheard. He was gay, had a diagnosis of Asperger's Syndrome and also had a speech impediment.
15. When we learned that Sheard had received a sentence of only three and half years' detention, we conducted further research into the case by assessing the available media reports. From our research we formed the view that there was clear evidence of hostility demonstrated by Sheard prior to the manslaughter. Further, we considered that there had been a misapplication of the principles of section 146, which had resulted in a sentence that we believed to be unduly lenient. We subsequently submitted a request to the Attorney General for a review of the case and launched a campaign. The campaign resulted in a number of other organisations and individuals writing to the Attorney General. In particular, members of the Disability Hate Crime Network wrote in support of our request for review.
16. The Attorney General, having reviewed the papers, considered that the sentence may be unduly lenient and a reference was sent to the Court of Appeal under a reference by the Attorney General in *Sheard v. R* [2013] EWCA Crim 1161.
17. In the Crown Court, where Sheard pleaded guilty, the manslaughter had been presented as motivated by Simpson's sexual orientation and "vulnerability". Sheard, however, disputed that the killing was motivated by these aspects of Simpson's identity. A written basis of plea had been tendered and a hearing was listed, in accordance with *R. v. Newton* [1983] Crim LR 198.
18. Prosecution and defence agreed that the *Newton* hearing could go ahead

without the calling of evidence. The judge was said to have expressed surprise but allowed this proposed course of action. He did, however, indicate that he was *willing* to hear evidence from the defence but said that if Sheard chose not to give evidence this would not be held against him. The hearing proceeded without evidence.

19. At the Court of Appeal it was submitted on behalf of the Attorney General that, assuming the judge had read all the papers, at some point prior to or even during the *Newton* hearing he should have realised that there was more to explore and should have directed the calling of evidence. Sheard would have retained the right not to give evidence but the direction would have allowed both prosecution and defence to better consider their respective positions.
20. The Court of Appeal decided not to interfere with the sentence on the basis that to do so would be unfair because Sheard had not had the opportunity to give evidence as to the disputed facts and to present himself sympathetically to the court. This is notwithstanding the fact that Sheard may have chosen not to give evidence.
21. The failure to conduct a *Newton* hearing with evidence was grave indeed. Whether or not hostility towards sexual orientation and disability was present in the offence was central to the sentencing exercise. With the potential to substantially increase the sentence, the hostility element was not a trivial or insignificant factor. The principle of orality - that is the prominence of oral evidence that can be subject to examination and tested - is fundamental to our criminal justice system, not only in contested trials but in resolving important matters of dispute in sentencing.
22. If a *Newton* hearing with evidence had been carried out and the judge had still decided that he did not consider hostility proven, proceedings in the Court of Appeal may have resulted in a different outcome. The evidence adduced in the Crown Court would have been available to the Court of Appeal, enabling the appellate judges to take their own view as to hostility. In fact, it was stated by the Court of Appeal that had the submissions on aggravating factors been

supported by oral evidence, it is likely the sentence would have been found unduly lenient and quashed.

23. It is our view that this case represents an injustice and one that need not have occurred. We believe that had section 146 featured more prominently in the mind of the sentencing judge or had an aggravated offence been available, the outcome may have been different.

24. We ask the Law Commission to consider the following alternative scenarios:

(a) *If the Crown Prosecution Service (“CPS”) in the Sheard case had been required to make specific reference to section 146 at the outset of the case, would the judge have considered it necessary to hear evidence?*

(b) *If the judge had been referred to a sentencing guideline for section 146 cases, would the judge have considered it necessary to hear evidence?*

(c) *If Sheard’s actions had not resulted in death and he had instead been charged with inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861, if an aggravated offence would have been available for offences where Disability and/or Sexual Orientation hostility was present, would an aggravated offence have been charged?*

25. We believe that prosecutors should be required to flag at an early stage in proceedings that they intend to present a case as one which falls within the ambit of section 145 or 146. We consider it necessary to introduce a sentencing guideline. We also believe prosecutors should have the case of *Sheard* in their minds when a *Newton* hearing arises in a section 145 or 146 case. It may be that had these improvements existed at the time of the *Sheard* case that the judge may have approached the case differently.

26. However, we do not think the above improvements to sections 145 and 146 are sufficient. We believe that had the circumstances in (c) above existed, there is a strong possibility that an aggravated offence would have been charged. As long as aggravated offences exist for two of the annually monitored strands, we believe they should also exist for disability, gender identity and sexual orientation.

Proposal 2

Do we agree that a new guideline from the Sentencing Council should be produced to deal exclusively with aggravation on the basis of hostility under sections 145 and 146 of the CJA 2003?

27. We **agree**.

28. We believe that a new guideline from the Sentencing Council should be produced. We agree that such a guideline should deal exclusively with hostility under sections 145 and 146.

29. This is likely to have a beneficial impact on the operation of section 145 and 146 cases by giving the principles more prominence in sentencing exercises. Prosecutors would be required to refer judges to the guideline and judges would be required to consider the guideline before sentencing. Further, where the guideline is departed from it would become necessary for the judge to explain their reasons for departing from it.

30. However, we recognise a number of limitations and practical considerations in the production of a sentencing guideline. We ask the following question:

Would the guideline only come into play once hostility is considered to have been proved?

31. It should be noted here that in section 145 and 146 cases that the hostility element of an offence will always fall within the discretion of the judge. In

cases where a guilty plea is tendered but where there is a written basis of plea disputing the hostility element, a *Newton* hearing approach will be adopted. In cases where a trial took place and a guilty verdict is returned, this answers only the question as to whether the defendant is considered to have done the act amounting to an offence, not whether the defendant was motivated by hostility. It will therefore again fall within the discretion of the judge as to whether they consider hostility to have been proved.

32. If the guideline only comes into play once hostility is considered to have been proved in the discretion of the judge, this measure would not address cases where hostility may have been present but the judge considers otherwise. For example, returning to the *Sheard* case above, the judge did not consider hostility to be present, despite our view and the view of many others that there was evidence of hostility. If a guideline only becomes relevant at the final stage of sentencing, where hostility is deemed to have been proved, it would not have been considered in the *Sheard* case had it existed at the time. We therefore consider that any guideline should cover both the proper approach to establishing whether proven hostility was present in an offence *and* the proper approach to sentencing where hostility has been proved.

33. We also have questions about the form the guideline might take. Clearly sections 145 and 146 can be applied to any criminal offence (other than offences already containing a Hate Crime element) and in practical terms to produce a guideline incorporating all offences would be unwieldy and require constant updating. However, we wonder whether a balance needs to be struck. We consider that it could be potentially useful for a guideline on the application of sections 145 and 146 to give examples of the categories of offence in which hostility is commonly present across the strands of Hate Crime.

34. It is our view that should a sentencing guideline be produced, interested groups should be consulted upon it prior to its finalisation and implementation.

Proposal 3

Do we agree that where section 145 or 146 is applied this should be recorded on the Police National Computer and reflected on the offender's record?

35. We **agree**.

36. We believe that this proposal would assist the police, prisons and probation services to have a better understanding of the offenders (or suspects in later crimes in the case of the police) that they are dealing with. It would help to better identify patterns of Hate Crime offending behaviours.

37. Organisations that work with children and adults at risk and in need of safeguarding, such as Stop Hate UK, would also be served well by the introduction of this measure. If we were able to discover from a Disclosure and Barring Service check that someone had a previous conviction for an offence in which hostility based on one of the five monitored strands of Hate Crime was present, we may take the view that their appointment as a member of staff or volunteer would be inappropriate. At present we would not know if a conviction for an offence was for one which was motivated by hostility.

38. We also consider that this proposal would bring section 145 and 146 cases closer in line with the aggravated offences. However, as explained above and below, we believe the aggravated offences should also be extended.

Question 1

Do we consider that proposals 2 and 3, if implemented, would adequately address the problems identified in relation to (a) the under-use of section 146 and (b) the inadequate recording of the nature of the offender's wrongdoing?

39. **No**. We set out our reasons below.

40. We believe that the proposals should be implemented. However, we believe it is also necessary for prosecutors to state from the outset of proceedings that

they intend to present a case as a section 146 case. Where it only becomes apparent during proceedings that the case is one to which section 146 might apply, prosecutors should be required to make reference to the section at the earliest reasonable opportunity. Combined with a sentencing guideline and the recording of section 146 convictions on the Police National Computer, we believe this could have the effect of vastly improving the operation of section 146 (and section 145) in the courts.

41. Stop Hate UK considers that it is also necessary to extend the aggravated offences to ensure that the problems identified are adequately addressed. The existence of aggravated offences for disability, gender identity and sexual orientation hostility-motivated offences would have the effect of sending a message to the courts and the general public that crimes committed on such bases are treated as seriously as offences of hostility based on race and religion. We consider that this would have a knock-on effect on the use of section 146 by elevating its status and promoting the use and proper application of it, as well as creating recognition of the meaning of a conviction for an offence to which section 146 has been applied.

Proposal 4

Do we agree that the reforms to the enhanced sentencing provisions under proposals 2 and 3 should be implemented regardless of whether the aggravated offences are extended to include disability, gender identity and sexual orientation?

42. We **agree**.

43. Although we believe that the aggravated offences should be extended to include disability, gender identity and sexual orientation, if the offences are not extended, we believe that proposals 2 and 3 should nevertheless be implemented. Stop Hate UK would like to see the proposals implemented alongside the extension of the aggravated offences.

Reform Option 2 – creating new aggravated offences

Proposal 5

Do we consider that the aggravated offences ought to be extended?

44. **Yes.** We give our reasons below.

45. Although we recognise that many criminal acts fall outside of the scope of the current aggravated offences for race and religion, and that also many crimes in which disability, gender identity or sexual orientation hostility is present would fall outside of the scope of the aggravated offences if they were to be extended, we still believe there is a strong case for extension.

46. There is a perception that there is a hierarchy of Hate Crime created by our current legislation, with Hate Crime motivated by race and religion perceived to be considered more important in legal terms by virtue of the potential for an offence to be charged in its aggravated form, while only section 146 exists for disability, gender identity and sexual orientation hostility offences, according them lower legal status. Stop Hate UK considers that this perception would over time dissipate with the introduction of disability, gender identity and sexual orientation aggravated offences.

47. Stop Hate UK believes that at the heart of Hate Crime legislation should be the promotion of equality. We believe it is necessary to extend the aggravated offences to promote equality between the five monitored strands (which link to some of the groups of people who are likely to experience Hate Crime).

48. An extension of the aggravated offences would send an important message to victims, perpetrators and the wider public that Hate Crime is unacceptable and the law takes Disability, Gender Identity and Sexual Orientation Hate Crime seriously; just as seriously as Race and Religion Hate Crime. This would be likely to lead to an increased confidence in our criminal justice system and in Hate Crime reporting processes.

49. Although an entry on the Police National Computer is contained within proposal 2, and it would go some way to addressing the problem, we doubt that this would have exactly the same labelling effect as being convicted of an aggravated offence. Obviously access to the Police National Computer is restricted and data on criminal convictions can only be obtained for limited and defined purposes and by people entitled to access it.
50. Taking into account the principle of open justice, and notwithstanding the presumption of innocence, the labelling effect of the aggravated offences can be seen throughout the court process.
51. When dealing with an aggravated offence, when defendant is asked to enter a plea, the charge put to the defendant will indicate to anyone present in court that the charge is one deemed to be a Hate Crime. If the defendant pleads guilty to the charge, that public plea is an admission of the commission of a Hate Crime. If a defendant pleads not guilty to an aggravated offence, anyone present knows that whether the defendant committed a Hate Crime is to be determined. If a trial takes place, the verdict of guilty or not guilty is given in response to the question of whether the defendant did or did not commit a Hate Crime. In section 145 and 146 cases the verdict merely tells the public that the defendant committed the basic offence. If the defendant is convicted of an aggravated offence, it will be clear in sentencing that the offence they committed was a Hate Crime. Even with necessary improvements to the operation of sections 145 and 146 we do not believe the same clarity in sentencing can be achieved.
52. Furthermore, even if the actual effect on the length and/or type of sentence a defendant convicted of an aggravated offence would receive when compared with the sentence received by a defendant convicted of the same offence in the same circumstances but where section 145 or 146 has been applied, we believe that the fact that the aggravated offences have in-built higher penalties sends a message to society that Hate Crime is viewed as having more of an impact on victims than the same crime committed in other

circumstances, and that offenders should be labelled accordingly. We do not see why this should apply only to racially and religiously aggravated offences.

53. We also hold the view that the introduction of disability, gender identity and sexual orientation aggravated offences is likely to have a positive impact on the operation of section 146. As well as sending a message about the gravity of offending based on hostility towards these groups, it is likely to make all involved in the criminal justice system more aware of the need to look out for the presence of hostility in an offence. We ask the Law Commission to consider the following scenario:

A trans woman receives a single punch to the head in a city centre late at night. She loses consciousness and is taken to hospital. The police, aware that there is the potential for a gender identity aggravated offence to be charged, explore a potential hostility motive with a view to obtaining evidence that the suspect demonstrated hostility based on the victim's membership of a trans group or that the offence was motivated by hostility towards members of the trans community. The victim later dies in hospital as a result of the punch to the head. The suspect is charged with manslaughter on the basis that he did not intend to kill or cause grievous bodily harm. The same evidence the police gathered when they thought the offence may be one that had the potential to be aggravated can now be used to support an aggravated sentence under section 146.

54. We wonder whether improvements to sections 145 and 146 alone would have the same awareness-raising effect as the introduction of aggravated offences. Sections 145 and 146 are very much court-focused statutory provisions and, while Hate Crime as a concept may be a consideration for individual police officers, we are not clear on exactly how much is known about the sections and how they operate, and how much the sections feature in the minds of officers during an investigation.

55. Finally, in the case of offences based on disability hostility, we believe that

there is an obligation to extend the aggravated offences contained within the UN Convention on the Rights of Persons with Disabilities (“CRPD”), which has been signed and ratified by the UK. First, Article 5 provides support for the existence of an obligation. Under 5.1, states are required to recognise that all persons are equally entitled to the protection and benefit of the law, while 5.2 provides that states are required to prohibit discrimination against disabled people and guarantee disabled people equal and effective legal protection against discrimination. Hate Crime is one way in which discrimination manifests.

56. Furthermore, Article 16.1 of CRPD requires states to take all appropriate legislative steps to protect disabled people, inside and outside of the home, from exploitation, violence and abuse. This is followed by 16.5, which requires states to put in place effective legislation and policies to ensure that instances of exploitation, violence and abuse are identified, investigated and, where possible, prosecuted. It is Stop Hate UK’s view that a disability aggravated offence amounts to an appropriate and effective legislative measure for tackling this form of Hate Crime.

Proposal 6

Do we agree that the definition of “disability” in any new aggravated offence should mirror the definition in section 146?

57. We **disagree**. Our reasons are below.

58. For the purposes of our work the definition we adopt of disability is wide-ranging. This means that we are able to support people who experience a Hate Crime because they are disabled or because they are perceived to be disabled. In some cases a person may not self-identify as disabled or may not be perceived to be disabled but they may still experience hostility based on disability. Our definition also allows us to support people who experience a Hate Crime because of their association to a disabled person or organisation. We do not believe that hostility based on disability only affects those who

identify as disabled people.

59. We believe that in legal terms it makes sense for there to be consistency between the definition of disability in section 146 and in any aggravated offence that might be introduced. If two different definitions exist it is likely to lead to confusion and ultimately get in the way of advancing the rights of victims and ensuring perpetrators are dealt with accordingly.

60. However, we wonder whether the consistency issue could be overcome by modifying the section 146 definition instead. We note that some disabilities would not ordinarily be described as “physical” or “mental” impairments. For example, we consider that sensory impairments and long-term health conditions should be incorporated into the definition and believe it necessary to distinguish learning and cognitive impairments from impairments affecting mental health, rather than to refer to “mental” impairments as one category.

Question 2

Do we agree that the definition of “disability” in the Equality Act 2010 is inappropriate for any new disability aggravated offence that might be enacted?

61. We **agree**. Our reasons are set out below.

62. We do not believe that it is necessary that a physical or mental impairment has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities for a criminal act against that person to constitute a Hate Crime based on disability and be treated as such in a criminal court.

63. If the Equality Act 2010 definition were to be adopted for the purposes of an aggravated offence the potential is there for some of the focus to switch onto the victim, possibly launching an inquiry into their status as a disabled person and the effects of being disabled or even whether the perpetrator had in their mind the effects of the actual or presumed disability upon the victim of the

incident. It may also lead to a need to demonstrate the effects of a disability in order for an offence to have been deemed to have been committed, which the victim may be opposed to.

64. The purpose of an aggravated offence is to reflect the hostility demonstrated by the perpetrator towards a disabled person or groups of disabled people. We believe that the Equality Act 2010 definition would detract from this. We ask the what the effect would be on racially aggravated offences if “racial group” was defined as follows:

“Racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins and by virtue of being a member of that group the person or group of persons is likely to experience an adverse effect on their normal day-to-day activities.

65. We consider that the above definition of “racial group” would be unworkable for dealing with racially aggravated offences. We believe that some of the convictions successfully obtained for racially aggravated offences would fall outside of the scope of the definition above, providing support for the view that the Equality Act 2010 definition is inappropriate for the purposes of a disability aggravated offence.

66. We also consider consistency between section 146 and a new disability aggravated offence to be important but as stated above we do not consider that the current definition contained within section 146 is broad enough.

Question 3

Do we agree that the definition of “disability” in the UN Convention on the Rights of Persons with Disabilities is inappropriate for a new disability aggravated offence?

67. We **agree**. Our reasons are below.

68. Although we support and work to a social model of disability approach, we consider the CRPD definition to be inappropriate for the purposes of a new disability aggravated offence for similar reasons to those given above when asked to consider the appropriateness of adopting the Equality Act 2010 definition.
69. The focus in the CRPD definition is more on the barriers and inequalities created by society than the Equality Act 2010 definition (which is positive) but adopting it may still prompt an unnecessary inquiry into the victim's effective participation in society. We ask whether, if the CRPD definition were to be adopted, 'evidence' of a victim's effective participation in society could be used to rebut the suggestion that the victim was presumed by the defendant to be disabled. Overall we consider that the focus for the criminal law in proving an offence should be on the perpetrator's intentions and demonstration of hostility towards someone who is or is presumed to be disabled, not on the victim's disability status.
70. We acknowledge that the list of impairments in the CRPD is more appropriate for the purposes of a consistent definition of disability between section 146 and a new aggravated offence.

Question 4

Do we consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on disability?

71. **Yes.**

72. Although in legal terms we agree that a disability aggravated offence should mirror the racially and religiously aggravated offences already in existence, we consider that the perception that some sections of society hold that disabled people are inherently vulnerable is likely to lead to difficulties in determining whether hostility was present. This perception, we believe,

already has an impact on section 146 being dis-applied.

73. We accept that not every crime against a disabled person is a Disability Hate Crime, in the same way that not every crime against a gay person is a Sexual Orientation Hate Crime. However, we have concerns that a number of cases of Hate Crime based on disability hostility are slipping through the net because they are deemed to be crimes against someone vulnerable and motivated by that person's vulnerability, when in fact they are crimes motivated by hostility.

74. We return now to the case of *Sheard*. Despite guidance for prosecutors on the distinction between hostility and vulnerability in cases of Disability Hate Crime, in the *Sheard* case the focus seemed to be more on Simpson as a "vulnerable victim" than on whether Sheard was hostile on the basis of disability. We do not believe that the introduction of an aggravated offence would result in a societal change in perceptions about disabled people and vulnerability.

75. Stop Hate UK believes that while an aggravated offence should be introduced, much work will need to be done to ensure that the new aggravated provision is used appropriately and effectively as a tool for challenging Disability Hate Crime where it occurs.

Proposal 7

Do we agree that the definition of sexual orientation in any new aggravated offence should mirror the existing definition adopted in case law?

76. We **disagree**. Our reasons are as follows.

77. For the purposes of our work we adopt a broader and more inclusive definition of sexual orientation to encompass any way in which a person might define their sexual and emotional attraction (or not) to others. We also prefer to talk about sexual and emotional attraction to others in terms of "gender", as opposed to "sex". The use of the term "both" in reference to sex perpetuates

the idea of gender binary.

78. Anyone can experience Hate Crime because of their actual, self-defined or perceived sexual orientation, whatever that might be, or because of sexual orientation of someone they are associated with, whatever that might be. We do not believe that sexual orientation can only be defined by reference to the terms “gay”, “lesbian”, “bisexual” and “heterosexual”. By adopting a broad definition of sexual orientation we are able support anyone who experiences Sexual Orientation Hate Crime.

79. We believe that there is a need for consistency but a sexual orientation aggravated offence should not and need not adopt such a narrow definition of sexual orientation in order to ensure consistency. Instead, a broader working definition should be adopted across all legislation relating to Sexual Orientation Hate Crime.

Question 5

Do we consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on sexual orientation?

80. **Yes.** Our reasons are set out below.

81. We believe that a sexual orientation aggravated offence should mirror the existing provisions for racially and religiously aggravated offences and should incorporate situations where the victim is presumed by the perpetrator to be of a particular sexual orientation and targeted because of it. We further believe it is necessary to include situations where people are targeted by association.

82. However, as stated above, our concern is with the definition of sexual orientation that it is proposed is adopted. We consider that adopting the narrow definition as proposed creates a hierarchy of sexual orientations and identities. This will lead to cases in which suspects who commit criminal acts

that otherwise amount to Sexual Orientation Hate Crimes could not be charged with an aggravated offence, simply because they targeted someone who defines (or is presumed to define) their sexual orientation in a way other than gay, lesbian, bisexual or heterosexual. Our view is that hostility on the basis of sexual orientation is of the same hostile nature, whichever sexual orientation it may be aimed at.

Proposal 8

Do we agree that the definition of “transgender identity” in any new aggravated offence should mirror the definition in section 146?

83. We **disagree** and give the following reasons.

84. At Stop Hate UK we support people who have experienced Gender Identity Hate Crime on the basis of any gender identity and not just people who self-define as “transgender” or “transsexual” or who consider that they have undergone a process or part of a process of “gender reassignment”. We prefer to talk about the wider concept of “Gender Identity Hate Crime”, so as to encompass the many different ways in which people might define their gender (or not) and experience hostility on the basis of it.

85. We do not believe that living in a gender other than one assigned at birth can only be described by reference to the term “transgender”. It is our view that anyone can experience Gender Identity Hate Crime because of their actual, self-defined or perceived gender identity, whatever that might be, or by association to someone else, whatever their gender identity might be or might be presumed to be.

86. For example, we have recorded Gender Identity Hate Crimes from victims who describe their gender identity using some of the following terms: “trans”, “cross-dresser”, “transvestite” and “intersex”. Furthermore, we have supported people who do not define their gender.

87. We believe there is a need for consistency but a broader definition ought to be adopted across all legislation relating to Gender Identity Hate Crime.

Question 6

Do we consider that in any new aggravated offence the definition in section 2(8) of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146 of the CJA 2003?

88. **Yes.**

89. The Scottish definition is preferable. By virtue of being non-exhaustive and allowing for the many ways in which people might define their gender identity, the definition would ensure protection for groups not caught by the section 146 definition in the form of a gender identity aggravated offence.

90. We note, however, that the Scottish definition still purports to define “transgender identity”, despite the non-exhaustive list encompassing more than transgender identity. It would be preferable to adopt something akin to the Scottish definition but which instead seeks to define a reference to “gender identity”.

Question 7

Do we consider that any particular difficulties would be likely to arise with these elements of hostility, membership of a group and motivation in their application to a new aggravated offence based on “transgender identity”?

91. **Yes.** Our reasons are below.

92. We consider that a gender identity aggravated offence should mirror the existing provisions for racially and religiously aggravated offences and should incorporate situations where the victim is presumed by the perpetrator to be of a particular gender identity and targeted because of it. We also believe it is

necessary to include situations where people are targeted by an association to someone of a particular gender identity.

93. Our concern is about the proposed definition to be adopted. We consider that adopting the narrow definition as proposed creates a situation where people who define (or are presumed to define) their gender identity in a way other than “transgender” in accordance with the definition are not afforded the same protection from the aggravated offences. Hostility on the basis of gender identity is a form of ‘othering’, stemming from the same prejudice, however the victim chooses to define (or not) their gender identity.

The stirring up offences

Proposal 9

Do we agree that there is a case in principle for new offences of stirring up hatred on grounds of disability and gender identity?

94. We **agree**. Our reasons are below.

95. Although we would not expect to see a large number of prosecutions for stirring up hatred on grounds of disability and gender identity, just as there are few prosecutions under the existing stirring up legislation, we consider there is a need to extend the offences to ensure that there is parity between the legislation across the five annually monitored strands of Hate Crime.

96. Again, there is the perception that the disparity between the existence of legislation in this area for three of the annually monitored Hate Crime strands, while there are no stirring up hatred offences for the remaining two monitored strands, is a result of a hierarchy of importance in how the law views the Hate Crime strands. The introduction of stirring up hatred offences on the grounds of disability and gender identity would send an important message to society that such conduct is unacceptable and will not be tolerated. This is likely to lead to more confidence in reporting Hate Crime across the spectrum of

offences and in the criminal justice system. We consider that this in itself provides a strong case for extension.

97. In terms of the harm created, Stop Hate UK regularly supports victims of Hate Crime who say that the perpetrator's hostility towards them is borne out of societal perceptions created by the media or the statements of others in the media or on social media. For example, many victims of Disability Hate Crime associate the incidents they experience with "scrounger" rhetoric and welfare reform.

98. Some of the victims of Gender Identity Hate Crime we speak to are fearful of the media. In particular, many are worried that if they report Hate Crime to the police that the media will attend court to publish a story on the case for no other reason than that a trans person was targeted (as opposed to an interest in the criminal justice aspect of the case). Many believe that being outed in what they perceive would be a negative and discriminatory way will result in them being harassed by the media and others, in turn leading to increased visibility and victimisation.

99. Both from an historical perspective and in society today we are sure that conduct that would constitute an offence of stirring up hatred on the grounds of disability and gender identity (if the legislation were to be extended) can be directly linked to the killing of people or groups across the world, just as conduct that would constitute offences under the existing stirring up offences have resulted in killings and genocide.

100. We also believe that conduct amounting to stirring up hatred has the potential to cause harm intrinsically. Even if conduct does not cause or encourage anyone else to take any action in response to it in the form of the commission of another Hate Crime, such conduct impacts on the well-being of individuals and communities. If a victim or community feels hated in and by society this can have just as much of an impact upon their sense of self and identity as experiencing, for example, an incident of personal and targeted verbal abuse.

101. We believe that one of the reasons there are so few prosecutions for the existing stirring up hatred offences is that organised groups, such as the far-right (as opposed to individuals not associated with any group), who may be likely to make statements which would amount to an offence under the existing provisions are generally aware of the offences and limit their conduct accordingly, so as not to become criminally liable. In that sense we consider that the stirring up offences do have a small deterrent effect on the basis that there are so few prosecutions for the offences but there are many who hold and express views in opposition to some of the groups currently afforded legislative protection from having hatred stirred up against them.

102. However, we believe that the same groups, although maybe not technically committing an offence, make statements that are as close to threshold as possible when expressing the views they hold about groups currently afforded protection under the offences. We believe that, if nothing else, the introduction of stirring up hatred offences on the grounds of disability and gender identity may prevent some harmful statements that are currently made freely and without fear of prosecution from being made in the first place. This in itself would amount to a positive outcome for people who are likely to be affected by conduct that has the potential to stir up disability or gender identity hatred.

103. We consider an extension of the stirring up offences a necessary and proportionate response to the problem of Hate Crime specifically in the area of stirring up hatred and as a whole. We fail to see how any freedom of speech arguments that may be legitimately put forward (without discrimination) in opposition to an extension could be applied only to the strands of disability and gender identity. Stop Hate UK expects that the majority of those who hold the view that the stirring up offences should not be extended to disability and gender identity on free speech grounds will also hold the view that the existing stirring up offences should be repealed on the same basis.

104. As stated above in reference to aggravated offences, CRPD provides

support for the existence of an international law obligation to create equal legislation to protect disabled people from discrimination and Hate Crime. We consider that this obligation also exists in relation to the extension of the stirring up offences to incorporate an offence of stirring up hatred on the grounds of disability.

105. In addition, Article 8.2 (c) of CRPD requires states to undertake to adopt immediate, effective and appropriate measures to encourage all organs of the media to portray disabled people in a manner consistent with the purpose of CRPD. We believe that the creation of an offence of stirring up hatred on the grounds of disability would be one way in which to meet this obligation.

Question 8

Do we agree that there is a practical need for the new offences?

106. **Yes.** We give reasons below.

107. As stated above, we recognise that there are few prosecutions and even fewer successful prosecutions for the existing stirring up offences. However, we do not consider that this means there is no practical need to extend the stirring up offences to disability and gender identity.

108. At present, because the stirring up offences do not exist, there is no way of properly categorising and recording how often conduct is occurring which would amount to an offence of stirring up hatred on the grounds of disability of gender identity if the offences did exist. All we have at the moment is anecdotal evidence from individuals and some information collated by interested groups. An extension of the stirring up offences would enable us to monitor trends and patterns.

109. Our experience is that many victims of Hate Crime are often reluctant to report incidents (conduct which is not criminal), as opposed to crimes. This

can be due to the perception that nothing will or can be done or that what they experienced or witnessed is not serious enough to report or will not be taken seriously. An extension of the stirring up offences is likely to result in increased reporting of conduct. There is a practical need to know about community tensions, even if ultimately nobody is charged with or convicted of an offence.

110. There is also a practical need for the Hate Crime agenda in its entirety to increase confidence in the criminal justice system response to the problem. We believe that an extension of the stirring up offences will lead to increased confidence.

Question 9

Do we consider a new offence of stirring up hatred on the grounds of disability should follow the “broad” or “narrow” model?

Question 10

Do we consider a new offence of stirring up hatred on the grounds of gender identity should follow the “broad” or “narrow” model?

111. We consider new offences of stirring up hatred on the grounds of disability and gender identity should follow the **broad** model. Our reasons are as follows.

112. We believe that there should be consistency between the stirring up offences as far as possible. The difficulty lies in the fact that there is already an inconsistency between the existing stirring up offences. We consider that it would be preferable for one model to apply to stirring up offences across the five monitored Hate Crime strands, to ensure equality between them. In the absence of consistency as an option we prefer the broad model.

113. There is some conduct that could be described as “abusive” or “insulting” but not threatening, which could result in the same level and/or type

of hatred being stirred up on the grounds of disability or gender identity. We consider that the penalties for the existing stirring up hatred offences are such because of the harm that is likely to be caused by stirring up hatred on the grounds of race and religion; not purely to punish for the conduct itself because of its intrinsic nature. To explain further, we believe that the punishment predominantly deals with the harm element, with punishing the fact that the thing was said or done as a secondary consideration. We see no reason to criminalise only threatening conduct and not abusive or insulting conduct if the same harm is created.

114. We also consider that the broad model is preferable in the circumstances because of the alternative option to direct intent for establishing *mens rea*. We consider that it will often be difficult to prove intention to stir up hatred but there may be some circumstances which would be caught by the alternative option in which the defendant is just as culpable for the conduct as if they had directly intended to stir up hatred. We ask the Law Commission to consider the following scenario:

Two men stand outside a local council building handing out leaflets to passersby. The leaflets say variously "People with disabilities are a drain on resources – don't let them get away with it", "Let's get rid of the disabled scroungers – should we bring back eugenics?" and "In times of austerity we should have a survival of the fittest approach to disabled people". A member of the public reports them to the police and they are arrested. Both men admit to handing out the leaflets but say that they did not intend to stir up hatred. They claim their intention was to share their views with members of the public and to inform them that disabled people are to blame for the state of the economy. When probed further about their intention to stir up hatred they say that they did not care whether hatred was stirred up but that was still not their intention.

115. In the above scenario it would be incredibly difficult to prove intention. However, having regard to all the circumstances, it would appear that the

conduct must have been likely to stir up hatred. In the scenario it is obvious that hatred would be likely to be stirred up, even if that was not the intention of the defendants. We do not believe that the defendants in the scenario above would be less culpable than defendants on the same set of facts who had the intention of stirring up hatred.

116. We consider that the requirement to obtain consent from the Attorney General prior to prosecution would offer an appropriate safeguard if the stirring up offences are extended, both to the right to freedom of expression and to any criticisms of the broad model as compared with the narrow model, if adopted. For example, in cases where someone mistakenly does an act which otherwise having regard to all the circumstances would have been likely to stir up hatred, it may be that the Attorney General considers a prosecution would not be in the public interest and does not give his consent to prosecute.

Question 11

If a new offence of stirring up hatred on grounds of disability were created, should it include explicit protection for freedom of expression?

Question 12

If a new offence of stirring up hatred on grounds of gender identity were created, should it include explicit protection for freedom of expression?

117. **No.** Our reasons are below.

118. We do not consider it necessary to include explicit protection for freedom of expression in legislation for offences of stirring up hatred on grounds of disability and gender identity. We believe that the need to uphold and safeguard the right is built in to the process and need not be explicitly stated.

119. We consider that each case in which a stirring up offence has

potentially been committed will turn very much on its own facts and there will always be a balancing exercise to carry out between the right to freedom of expression and the right to protection from the law in situations where hatred is likely to have been stirred up, even if what appears to be an exhaustive list of the circumstances in which freedom of expression rights override the stirring up hatred offences exists. We do not consider that explicit protection for freedom of expression within new stirring up offences for disability and gender identity would have the effect of furthering the right to freedom of expression.

Proposal 10

Do we agree that if new stirring up and aggravated offences were created, the same definitions of “disability” and “transgender identity” should be adopted in relation to both?

120. We **agree** that the definition of “disability” in relation to new stirring up and aggravated offences should be the same. This promotes consistency. We also believe that the same definition should be used in section 146.

121. Stop Hate UK also believes that there should be one definition of “gender identity” for new stirring up offences and new aggravated offences. We also consider that the same definition should be used in section 146. However, for the reasons stated above we prefer a broader and more inclusive “gender identity” definition to one of “transgender identity”.

Proposal 11

Do we agree that the definition of “disability” in section 146 would be suitable for new stirring up offences?

122. We **disagree** and adopt the same reasoning as in paragraphs 57 to 60 above in response to this proposal.

Proposal 12

Do we agree that the definition of “transgender identity” in section 146(6) would be suitable for new stirring up offences?

123. We **disagree** and adopt the same reasoning as in paragraphs 83 to 87 above in response to this proposal.

Question 13

Do we consider that in any new stirring up offence the definition of “transgender identity” in section 2(8) of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146(6) of the CJA 2003?

124. **Yes.** We adopt the same reasoning as in paragraphs 88 to 90 above in response to this question.

Question 14

Do we agree that the sentencing provisions in section 146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people?

125. We **agree**. Our reasons are below.

126. There is some conduct that we believe would fall within the ambit of new stirring up offences on the grounds of disability and gender identity but which would not be relevant to other criminal offences. As stated above, we believe that there is a strong case for extending the legislation to incorporate the strands of disability and gender identity. We see no reason to criminalise conduct amounting to stirring up hatred on the grounds of three of the monitored Hate Crime strands but to consider similar conduct stirring up hatred on the grounds of the two of the other strands not to amount to an offence.

127. Stop Hate UK considers that there is a need in principle and in practice to extend the stirring up offences. The other offences which may be applicable to conduct otherwise amounting to the stirring up of hatred do not address the same harm as new offences of stirring up hatred on the grounds of disability and gender identity would.

Conclusion

128. We are grateful for the opportunity to respond to this consultation and hope that it will result in improvements to the operation of sections 145 and 146 and to the extension of the aggravated offences and the stirring up offences so that there is equality between the five annually monitored strands of Hate Crime. If such reforms are made we believe that the overall effect will be increased feelings of inclusion and confidence in the criminal justice system for groups who are often oppressed, marginalised, discriminated against, and, of course, subjected to Hate Crime.

129. Finally, we believe that the fact that this consultation has even taken place is a positive step in the development of the Hate Crime agenda. Legislation forms just one part of the picture for victims of Hate Crime and the organisations and groups that support them. Although law reform is the core activity of the Law Commission we are pleased that this consultation has sparked debate on how all involved in the criminal justice system and beyond can better support victims, encourage and increase Hate Crime reporting and work towards stopping Hate Crime.

Stop Hate UK