



Public policy statement on the  
prosecution of offences involving  
hostility on the grounds of sexual  
orientation and gender identity

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## Public policy statement on the prosecution of offences involving hostility on the grounds of sexual orientation and gender identity

### CPS policy

It is our policy to:

- Identify crimes involving hostility on the basis of sexual orientation or transgender identity as early as possible.
- Build strong cases with our partners that satisfy the tests within the [Code for Crown Prosecutors](#).
- Apply for a sentence uplift under s.146 Criminal Justice Act 2003 (s.146 CJA 2003) where there is evidence of 'hostility based on sexual orientation or transgender identity or presumed sexual orientation or transgender identity'.
- Recognise that crimes of stirring up hatred based upon sexual orientation are by their very nature highly sensitive. For this reason, and to ensure a consistent approach, all such cases will be considered by our Special Crime and Counter Terrorism Division. No charges can be brought without the consent of the Attorney General.
- Work closely with the police, criminal justice agencies and community stakeholders to continuously refresh our understanding of homophobic, biphobic and transphobic crime and to improve our response to it.
- Improve awareness of homophobic, biphobic and transgender hate crime and the public confidence to report it.
- Monitor the implementation of this policy.

When deciding whether it is in the public interest to prosecute homophobic and transphobic hate crimes, our prosecutors must have regard to whether the offence was motivated by any form of discrimination, including against the victim's sexual orientation or transgender status or whether the suspect demonstrated hostility towards the victim based on sexual orientation or transgender identity.

The presence of any such motivation or hostility will mean that it is more likely that prosecution is required.

#### Question 1

**Does the section on 'CPS policy' address the key issues in prosecuting homophobic, biphobic and transphobic crime?**

### Crimes involving hostility towards sexual orientation and gender identity

The reporting and prosecution of hate crime are shaped by two definitions; one is subjective and is based on the perception of the victim and the other is objective and relies on supporting evidence.

Both the subjective and objective definitions refer to hostility, not hatred. There is no statutory definition of hostility and the everyday or dictionary definition is applied, encompassing a broad spectrum of behaviour.

We have an agreed definition with the police for identifying and flagging cases involving hostility on the basis of sexual orientation and transgender identity. The joint definition is:

*Any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person's sexual orientation or transgender identity or perceived sexual orientation or transgender identity.*

It is important that relevant incidents are identified as hate crime as early as possible. This will assist the police to investigate and gather the best available evidence.

### The legal framework

In order to treat a crime as a hate crime for the purposes of investigation, there is no need for evidence to prove the aggravating element. However, this evidence will need to be made available at a later date to prove that s.146 CJA 2003 applies to the case.

There is no offence of homophobic, biphobic or transphobic hate crime, but s.146 CJA 2003 imposes a duty on courts to increase a sentence where an offender demonstrates hostility to the victim, based on the victim's sexual orientation or transgender identity or presumed sexual orientation or transgender identity, or is motivated by hostility towards people on those grounds.

### Stirring up hatred

In cases of stirring up hatred, we acknowledge that people have a right to freedom of speech. However, we will balance the rights of an individual to freedom of speech and expression against the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime and to protect the rights of others.

Stirring up hatred in this context is committed when someone says or does something which is threatening, abusive or insulting and the person either intends to stir up hatred on the grounds of sexual orientation, or makes it likely that such hatred will be stirred up. It covers behaviour such as making a speech, posting material online, displaying a poster, performing a play or broadcasting on the media.

The law does not currently include stirring up hatred on the grounds of transgender identity.

#### Question 2

**Does the section on 'Crimes involving hostility towards sexual orientation and gender identity' clearly set out the key definitions and law relevant to the prosecution of these crimes?**

## Communities affected by homophobic, biphobic and transphobic crime

We recognise that hate crime not only impacts on the individual victim but also on the wider community. Individual incidents can send reverberations throughout communities, just as they can reinforce established patterns of prejudice and discrimination. This is why it is so important for hate crime to be effectively prosecuted.

The term 'gender identity' is not used in the legislation. This is one of the most commonly used terms to acknowledge the gender spectrum. It includes traditional concepts of male and female and incorporates gender nonconforming or gender variance, for example those who might identify as non-gender, non-binary, pan-gender or poly-gender as well as those within the gender reassignment definition in the Equality Act.

We are aware of the increasing confidence of people to identify in this way. Whilst the legal framework has yet to acknowledge the rights of gender nonconforming people, we will continue to prosecute cases on the basis of evident hostility on grounds prescribed by Parliament and to support witnesses to give their best evidence.

Therefore, where there is evidence in a case of gender nonconforming people facing hostility on the basis of sexual orientation or transgender identity, actual or perceived, it will almost always be in the public interest to prosecute, as is the case with all hate crime. Where there is no evidence specific to the current statutory framework for hate crime, prosecutors may still be able to draw the attention of the court to any relevant aggravating features at sentencing.

A suspect's perception as to a victim's sexual orientation or gender identity can be misguided but may constitute evidence of hostility, will be taken into account and, if appropriate, presented at court.

### Question 3

**Does the section on 'Communities affected by hate crime' clearly set out the CPS understanding of the individuals and communities affected?**

## Offending behaviour

Hostility and hatred can take many forms, ranging from verbal abuse to physical and sexual assault and can include threats, criminal damage, harassment, stalking and anti-social behaviour.

Hostility can be directed towards individuals, groups or property and might be based on misconceptions about the individual's characteristics. Offenders can also target this hostility at the victim's friends or associates or even members of the public.

We recognise that the victims of hate crime can be repeatedly targeted. We will encourage the police to investigate any previous incidents or allegations. Wherever appropriate, we will bring charges that reflect the overall picture of offending or if possible make a bad character application to the court to present evidence of previous conduct towards the victim or others.

We accept that many suspects act in an opportunistic way. Hate crime is not always considered or methodical, although such offences certainly exist. Derogatory language and disrespect towards personal characteristics can be hurtful and unsettling but often incidental. Despite what may be perceived as the low-level nature of such offending, the impact will often be significant and victims need recognition of the harm caused.

We recognise that people can be targeted for a combination of reasons, including disability, race and religion in addition to their sexual orientation or transgender identity. Prosecutors will apply to courts for appropriate sentence uplifts based upon all the relevant aggravating features.

### Internet and social media

The internet and social media in particular have provided new platforms for offending behaviour and our revised [guidance on the prosecution of social media cases](#) provides more detail.

In approaching on-line hate crime, we will:

- Recognise that modern communications technology provides opportunities for hate crime.
- Understand internet and social media platforms.
- Be familiar with the relevant law and referral systems.
- Be alert to the need to identify originators as well as amplifiers or disseminators.
- Prosecute complaints of hate crime on line with the same robust and proactive approach used with offline offending.
- Consider the potential impact on a targeted individual or community.
- Treat complaints as seriously as offline complaints and encourage all to be reported to the police.

As with all hate crime offences the police will be required to seek a charging decision from us.

### Spikes and reporting

We recognise that national and international events can serve to exacerbate underlying feelings and attitudes that can often drive hostility. The nature of offending and the language used in incidents can draw upon these events and our prosecutors are aware of the need to be aware of these influences.

We recognise that people may be particularly reluctant to report homophobic, biphobic or transphobic incidents they experience or witness. This may stem from intimidation or fear of outing. People may also fear becoming subject of a police investigation and possible prosecution because of where they were or because of the activity they were engaged in. For example, if they have had sex in a public place or participated in chemsex parties.

In general, we believe it is more important to prosecute the perpetrator of a more serious crime than someone who may have committed a more minor crime where the former is connected to the latter. This is not a commitment to allow people to commit crime with impunity; it is an undertaking to prosecute serious crime effectively wherever we can, even if that means that those who commit minor criminal acts are not put before the courts.

We acknowledge that in certain circumstances, breaches of s.22 Gender Recognition Act 2014 could be motivated by hostility. There have not been any prosecutions to date under this section, but where the victim perceives the incident to be, at least in part, motivated by hostility on the grounds of transgender identity the police should seek our advice regarding charging.

In cases of attempts at extortion and blackmail targeted at victims due to their actual or perceived sexual orientation or transgender identity, we will make sure victims are properly supported to aid a successful prosecution.

#### Question 4

**Does the section on 'Offending Behaviour' clearly set out the CPS understanding of offending behaviour?**

### Working with stakeholders

We work locally and nationally, with the police and other partners in the criminal justice system, as well as with individuals and community groups with experience and expertise in relation to hate crime. This ensures that we are able to continuously refresh our understanding of the nature of homophobic, biphobic and transphobic offending and can improve our response to it.

### Criminal investigation

We adopt a proactive approach and, where necessary, will seek further evidence from the police to assist in the identification of evidence of hostility to support a sentence uplift application.

In some cases, we may advise the police to follow up other possible lines of enquiry. This might include looking at previously reported incidents involving the same victim, or the same suspect. It may also involve seeking information or evidence from other agencies such as specialist support groups and community groups.

Hostility on the grounds of sexual orientation and gender identity are not the same thing. Equally, there is also no need to make enquiries as to the sexual orientation or gender identity of a complainant. What remains essential however is identifying the evidence of hostility in support of s.146 CJA 2003 sentence uplift.

### Charging decisions

When making charging decisions relating to homophobic, biphobic and transphobic crime, as in all cases, prosecutors must apply the [Code for Crown Prosecutors](#) (the Code).

## Bail

Following a decision to charge, a witness may fear that there will be repeat offending.

If there is a risk of danger or threats or repeat offences, we will seek to protect victims and witnesses by seeking to remand the defendant in custody where appropriate or by asking the court to impose conditions on bail where possible (for example, not to approach any named person or to keep away from a certain area).

## Prosecution and sentencing

In all prosecutions involving homophobic, biphobic and transphobic hostility, we will build cases that present evidence based on these aggravating factors. We will remind the court of its duty to increase the sentence where the offence is aggravated on the basis of sexual orientation or transgender identity.

Prosecutors will draw the court's attention to any relevant parts of a [Victim Personal Statement](#) and evidence of the impact of the offending on the community, including any relevant Community Impact Statements. Victims are entitled to say whether they would like to read their VPS aloud in court or whether they would like it read aloud or played (if recorded) for them.

We have a responsibility to assist the court in sentencing. Prosecutors will apply for appropriate ancillary orders, including restraining orders and for compensation for loss, injury or damage. We will always have regard to the victim's needs, including the question of their future protection.

## Withdrawal

Sometimes, a victim will ask the police not to proceed any further with the case, or will ask to withdraw the complaint. This does not necessarily mean that the case will automatically be stopped.

## Victims' right to review

For qualifying decisions, if a victim requests a review of our decision not to bring proceedings, or to end all proceedings, we will look again at the decision to establish if it was correct. For more detail see our [Victims' Right to Review Policy](#).

## Support

We recognise that those who face hostility may often lack the confidence to report it. This can stem from previous experience or the experience of family and friends. It can also arise from not knowing what to expect when supporting a complaint from initial report, through the investigation and finally to prosecution.

It is therefore important to note that 73.9% of homophobic and transphobic prosecutions in 2015/16 resulted in a guilty plea from defendants, reducing the need for witnesses to give evidence in court.

Victims of hate crime are entitled to enhanced support services. Reporting restrictions can be applied for and special measure applications can be made so that victims can give evidence making use of screens in court or from a separate courtroom via a video link. These measures can help prevent any unnecessary disclosure and as a result reduce associated stress and anxiety.

## **Equality Duty**

We are a public authority for the purposes of equality legislation. This policy and our related legal guidance form a key part of our efforts to meet our obligations under the General Public Sector Equality Duty to eliminate the harassment of people due to their sexual orientation or gender identity and to promote equality and good relations.

## **Ensuring that this policy is implemented**

We are committed to implementing this policy and will monitor our performance within our Hate Crime Assurance Scheme, under the oversight of our hate crime governance structures and with community engagement through our Community Accountability Forum.

Our Hate Crime Annual Report provides transparent accountability in respect of our performance.

### **Question 5**

**Do you have any further comments on the CPS Policy on offences involving hostility on the grounds of sexual orientation and gender identity?**