Bar Council response to the Hate Crime: The Case for Extending the Existing Offences consultation paper

1. This is the joint response of the General Council of the Bar of England and Wales (the Bar Council) and the Criminal Bar Association to the Law Commission consultation paper entitled Hate Crime: The Case for Extending Existing Offences.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The Criminal Bar Association ('CBA') represents approximately 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist Bar Association. The enviable reputation which is internationally enjoyed by our criminal justice system owes a great deal to the professionalism, commitment, and ethical standards of our criminal practitioners.

5. Note that we have followed the numbering system for questions which is used throughout the Law Commission consultation [for an overview of all questions, see chapter 5, at page 121 of the consultation].

<u>Summary of our Response</u>

(a) Members of minority or vulnerable groups who have been made victims of crime by reason of their particular characteristics deserve the fullest protection of the law.

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[1] The Law Commission 2013 Hate Crime: The Case for Extending Existing Offences

(b) No new criminal offence should be created unless there is clear evidence of a pressing need for it. We do not think the case has been made for it.
(c) The existing range of offences suffices to identify such crimes.
(d) Further protection can be provided by enhancing the Courts' sentencing powers and by improving the recording of 'hate crime' offences.
(e) A 'Definitive Guideline' issued by the Sentencing Council would assist Judges and Magistrates and would increase public confidence.

Chapter 3 – The Aggravated Offences

Question 1: Paragraph 3.45: Proposal 1: We consider that the enhanced sentencing regime under the CJA [Criminal Justice Act] 2003 could provide an adequate response to hostility based offences on the grounds of disability, sexual orientation and transgender identity, if the provisions were properly applied and resulted in an adequate record of the offender's wrongdoing. Do consultees agree? If not, why not?

6. We agree with this proposal. The Law Commission seeks to meet perceived limitations of the existing sentencing provisions by expressly considering what are (at paragraph 3.45 of the consultation) termed “““simple amendments to the enhanced sentencing provisions””. We welcome the two stated aims of the Law Commission (paragraph 3.46 of the consultation) as laudable and pragmatic: first, to best deploy existing sentencing provisions ““as a viable alternative to the creation of new aggravated offences””; secondly, to ““promote consistency and avoid complexity””. Any attempt to rationalise and improve existing sentencing provisions before moving directly to importing new ones – is to be encouraged as an economy of legislation.

7. We respectfully adopt Professor Andrew Ashworth's view on economy of legislation, in his recent article 'Hate Crime', in the Criminal Law Review (issue 9, pp.709-710, at p.709, September 2013). He writes:

> ““The Commission is to be commended for taking a wide sweep, considering the criminal justice response to hate crimes generally rather than restricting itself to an examination of the relevant offences. [...] [T]he Commission is surely right to focus on the response of the sentencing system to hate crimes. Thus the Commission asks at several points whether a change in the criminal law is really necessary. It manifests a healthy (and evidence-based) scepticism about claims that enacting more criminal offences would have a significant deterrent effect, and suggests that different approaches by the police, probation and CPS might be more productive. [...]””

8. Ultimately, we are in agreement with an overarching concern expressed in the consultation. That is: an adequate record should be kept of an offender's wrongdoing. We consider the sentencing process can be used to bring this about.

Possible proposals to improve the operation of the enhanced sentencing provisions

Question 2: Paragraph 3.51: Proposal 2: We provisionally propose 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. Do consultees agree? If not, why not?

9. We think that the Sentencing Council should issue a 'Definitive Guideline' with minimal delay. From a practical perspective, we think that any such new guideline should either be incorporated in to the existing offence specific guidelines or should be a stand-alone document, cross referenced to the relevant existing guidelines. It may not be necessary for Parliament to pass major new legislation, as any new or ""enhanced"" sentencing regime can come under the auspices of the Sentencing Council on the basis of existing provisions, although minor amendments to parts of the Criminal Justice Act 2003 may be needed.

10. The alternative is that lawyers and judges (and the increasing number of self-represented defendants) have to wait for a guideline decision by the Court of Appeal. That would depend on the Court receiving an appropriate case, which may not happen for a long time, if at all, and such a case may not cover the range as effectively as a Definitive Guideline by the Sentencing Council.

11. Professor Ashworth has considered this (ibid) and we again respectfully adopt his view:

> ""[...] The Commission goes on to make proposals for changes that might be considered by the Sentencing Council, notably a fresh guideline to deal with sentencing under ss.145 and 146 of the 2003 Act. One good reason for making these proposals is to be found in the report of the Criminal Justice Joint Inspection, Living in a Different World: Joint Review of Disability Hate Crime (March 2013), which found that in disability cases prosecutors rarely drew the court's attention to s.146 or put relevant material before the court, and which suggested that s.146 appears not to have yet become "embedded in the sentencing system". Drawing attention to it with a new guideline covering all the protected characteristics, presumably following the two-stage test of considering first the seriousness of the underlying offence and then the enhancement for the hostility/hate element, may have a significant "embedding" effect.""

Question 3: Paragraph 3.53: Proposal 3: We provisionally propose that where section 145 or 146 is applied, this should be recorded on the Police National Computer and reflected on the offender's record. Do consultees agree? If not, why not?

12. Section 145 deals with increase in sentences for racial and religious aggravation.

13. Section 146 deals with increase in sentences for aggravation related to disability or sexual orientation.

14. It is consistent with our view that sections 145 and 146, respectively, require that a sentencing court makes public pronouncement as to the circumstances of hostility. This needs to be followed through by proper record keeping of the offence and the sentence.

Section 145(2) provides:

(2) If the offence was racially or religiously aggravated, the court

(a) must treat that fact as an aggravating factor, and
(b) must state in open court that the offence was so aggravated.

Section 146(3) provides:

(3) The court

(a) must treat the fact that the offence was committed in any of those circumstances [i.e. based on the actual or presumed sexual orientation, transgender identity or disability of the victim] as an aggravating factor, and
(b) must state in open court that the offence was committed in such circumstances.

15. These requirements should already ensure that administrators including prosecutors, court clerks, and those who enter information on the Police National Computer know what they should be recording. The proposal (paragraph 3.53 of the Consultation) is to record circumstances of hostility on the Police National Computer and so match what should also appear on an offender's criminal record. Professor Ashworth observes, ""…of course this means that a record will need to be made at an earlier stage, which presumably means by the judge or the court clerk"". We would add to that that a statement by the prosecutor and an adequate record of an allegation of the aggravating features will need to be made at the earliest opportunity invariably, the first court appearance.

16. Criminal practitioners may be sceptical about the feasibility of creating an accurate and seamless record between the court clerk and the police, given the all too familiar administrative problems that are encountered every day. However, sections 145 and 146 could be amended so as to require exactly this. Statutory requirements can be deemed to focus minds.

17. We propose that this statutory addition to sections 145 and 146 would be a cost-efficient law reform which would simply involve inserting into sections 145(2) and 146(3), respectively, the following words:

> ""must state in open court, and adequately record on the court record, which must be communicated to the police so as to be recorded on the Police National Computer, that the offence was committed in such circumstances.""

Question 4: Paragraph 3.54: Question 1: Do consultees consider that proposals 2 and 3, if implemented, would adequately address the problems identified above in relation to (a) the under-use of section 146 and (b) the inadequate recording of the nature of the offender's wrongdoing? If not, why not?

18. We agree. See our considered responses to proposals 2 and 3, and, in particular, our practical proposal in respect of proposal 3, immediately above.

19. There may be some additional cost in bringing the recommendation into effect. However, we consider that the cost is proportionate and the advantage of adequately recording the wrongdoing is threefold:

20. First, the accurate recording of wrongdoing gives practical effect to an important principle. We note that the Commission proposes that the enhanced sentencing regime would ""provide an adequate response to hostility-based offences on the grounds of disability, sexual orientation and transgender identity"" (at paragraph 1.13 of the consultation). We endorse this proposal. Criminal law has a communicative and public function, which also serves to deter potential offenders.

21. Secondly, accurate recording is important in individual cases of repeat offending. The Judge or Magistrate should be informed that the offender's previous convictions have the aggravating characteristics. It will also be relevant to bail applications, to enable the prosecution to take an informed view as to whether or not bail is opposed and, if so, on what grounds. It will assist remand courts with what, if any, conditions are required to meet objections to bail.

22. Thirdly, it may assist penological and sentencing research by the Home Office, other government departments, and academia.

Question 5: Paragraph 3.55: Proposal 4: If consultees consider that proposals 2 and 3 are likely to be effective in achieving their stated aims, these reforms to the enhanced sentencing provisions should be implemented regardless of whether the aggravated offences are extended to include disability, sexual orientation and transgender identity. Do consultees agree? If not, why not

23. We agree. The arguments we have proposed in respect of proposal 3 are central to making sections 145 and 146 more effective. Accordingly, those arguments apply however widely the proposed reforms to the sentencing provisions are cast, in terms of the category of hostility.

<u>Reform option 2: creating new aggravated offences</u>

Question 6: Paragraph 3.76: Proposal 5: If proposals 2 and 3 are regarded as inadequate, we consider that an alternative solution would be the extension of the aggravated offences to include disability, sexual orientation and transgender identity. These offences would only apply where the perpetrator of a basic offence demonstrated, or was motivated by, hostility on the grounds of disability, sexual orientation or transgender identity. Do consultees consider that the aggravated offences ought to be extended?

24. We do not regard proposals 2 and 3 as impractical, for reasons we have given.

<u>Disability: a new aggravated offence</u>

<u>Defining Disability</u>

Question 7: Paragraph 3.91: Proposal 6: We consider that the definition of disability in any new aggravated offence should mirror the definition in section 146: "any physical or mental impairment". Do consultees agree? If not, why not?

25. We agree. We see no argument to the contrary. The definition of disability which is used in section 146 strikes us as deliberately – and defensibly – flexible and amenable to being purposively construed. This was no doubt what parliament intended when section 146 was enacted.

Question 8: Paragraph 3.94: Question 2: Do consultees agree that the definition of "disability" in the Equality Act 2010 is inappropriate for any new disability aggravated offence that might be enacted? If not, why not?

26. We agree. We think that the circumscribed definition of ""disability"" which is used in the Equality Act 2010 is inapposite, for the reasons given in the consultation at footnote 114, page 85.

Question 9: Paragraph 3.100: Question 3: Do consultees 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? If not, why not?

27. In particular our reasons are:

(1) The definition goes beyond the fact of impairment and includes consideration of the potential consequences which flow from the impairment (an element which is absent from s.146). This was the reason why the Equality Act definition is rejected, albeit in a slightly different context.

(2) There must be a query whether this definition as an element in a criminal offence will be workable in practice. What are "various barriers"? The consultation document (at para 3.97) expands on it, referring to "attitudinal and environmental barriers". Whilst practitioners and experts in the field may understand the terminology, lay jurors will not. Perhaps a good test would be to consider the difficulty presented to a judge in summing up the issue.'

<u>Motivation by Hostility</u>

Question 10: Paragraph 3.110: Question 4: Do consultees 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? If not, why not?

28.. We do not envisage any particular difficulties.

<u>Sexual orientation: A new aggravated offence</u>

Question 11: Paragraph 3.116: Proposal 7: We consider that the definition of sexual orientation in any new aggravated offence should mirror the existing definition adopted in case law: "orientation towards people of the same sex, opposite sex or both". Do consultees agree? If not, why not?

29. We agree. The existing definition should be adopted.

Motivation by Hostility

Question 12: Paragraph 3.124: Question 5: Do consultees 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? If not, why not?

30. We do not envisage any particular difficulties.

Transgender Identity: A new aggravated offence

Defining "Transgender Identity"

Question 13: Paragraph 3.136: Proposal 8: We consider that the definition of transgender identity in any new aggravated offence should mirror the definition in section 146: "references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment". Do consultees agree? If not, why not?

31. We agree. The definition in section 146 gives rise to no issues as to its ambit: it is neither too narrow nor insufficiently certain. It is a pre-existing and therefore familiar and tested definition.

Question 14: Paragraph 3.140: Question 6: Do consultees consider that in any new aggravated offence the definition in section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009 would be preferable to that in section 146 of the CJA 2003?

32. We do not think that the Scottish law definition is preferable to that in section 146. We note the concerns of the Commission at paragraph 3.144 (that the Courts may adopt a narrow interpretation of section 146 such as to exclude transvestites and/or cross-dressers). We think that any such moot concerns can and should be addressed by the courts interpreting the statute purposively and case-sensitively, given the protective ambit of the proposed new aggravated offences. Any real uncertainty in criminal proceedings can and should be resolved in favour of a defendant.

Motivation by Hostility

Question 15: Paragraph 3.148: Question 7: Do consultees 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? If not, why not?

33. No. We endorse the analysis of the Commission at paragraph 3.147 of the consultation.

Chapter 4

The Stirring Up Offences

Question 16: Paragraph 4.63: Proposal 9: On the basis of the arguments set out above, our provisional view is that there is a case in principle for new offences of stirring up hatred on grounds of disability and transgender identity. Do consultees agree? If not, why not?

34. We entirely endorse the observations of Professor Ashworth [ibid], who has considered the creation of new ""stirring up"" offences as proposed in chapter 4 of the consultation:

> [...] [A]ny move in the direction of extending the offences of stirring up hatred would require a choice between a narrow form of definition that requires an intent to stir up hatred, and a broader form of definition that extends to situations in which hatred is likely to be stirred up (without requiring proof of intent). The Commission does not pin its colours to the mast on this issue. The presumption ought surely to be strongly in favour of a requirement of intent, unless there are cogent arguments for departing from this. There is also a question about whether, and (if so) to what extent, any new offences of stirring up hatred on grounds of disability or transgender identity should include explicit protection for freedom of expression under art. 10 ECHR. The strongest case for this is surely in relation to religion.

35. We agree with Professor Ashworth that intent should be the foremost requirement. It follows that, if ""stirring up"" offences are to be extended, we favour a narrow form of definition that requires proof of an intent to stir up hatred.

36. The Commission has canvassed difficulties in practice with proving that conduct has passed the threshold test of conduct intended to stir up hatred: see paragraph 4.55 of the consultation.

The need for new stirring up offences

Question 17: Paragraph 4.66: Question 8: Do consultees consider that there is a practical need for the new offences? If so, why?

37. We are not persuaded that there is a pressing need for the canvassed new offences. We invite the Commission to consider afresh its provisional view that there is a case in principle for these new offences (see paragraph 4.63 of the consultation). At its height, the argument advanced by the Commission in support of new offences is moot and overly abstract: the Commission contends that the existing offences do not ""capture the true nature of the wrong doing or harm in the same way that stirring up offences would"" (see paragraph 4.49 of the consultation).

38. We remind the Commission of our firmly held view that economy is a virtue of law reform.

Defining any new offences

Question 18: Paragraph 4.76: Question 9: If consultees consider that a new offence of stirring up hatred on grounds of disability is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above?

39. We do not agree that creation of new offences is necessary. See our answers at 1.18 and 1.19, immediately above.

Question 19: Paragraph 4.77: Question 10: If consultees consider that a new offence of stirring up hatred on grounds of transgender identity is necessary both in principle and in practice, should it follow the "broad" or the "narrow" model discussed above?

40. Again, we do not agree that creation of new offences is necessary. See our answers at 1.18 and 1.19 above.

Provisions for the protection of freedom of expression

Question 20: Paragraph 4.84: 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? If so, what should it cover?

41. Once again we adopt Professor Ashworth's analysis (see 1.18, above):

> There is also a question about whether, and (if so) to what extent, any new offences of stirring up hatred on grounds of disability or transgender identity should include explicit protection for freedom of expression under art. 10 ECHR. The strongest case for this is surely in relation to religion.

42. The question highlights a tension between two considerations. On the one hand, there is the necessary and proportionate curtailing of Convention rights in furtherance of pursuing legitimate aims. On the other hand, we recognise that the Convention protects the right to shock, offend or disturb (for the references to case law (see paragraph 4.62 of the consultation). We note the observations of the Commission that the offences would only capture the far more extreme, inflammatory conduct which is intended or likely (depending on the definition of any new offences) to stir up hatred (also at paragraph 4.62 of the consultation).

43. Ultimately, we are of the view that stirring up hatred in respect of disability is not conceivably a legitimate exercise of, or claim to, freedom of speech. On that basis, we think that there should not be explicit protection for freedom of expression which is aimed at stirring up hatred regarding disabled individuals, where the result may be crime and disorder. We rely on the argument which is cogently set out at paragraph 4.60 of the consultation (why religious beliefs and sexual orientation are fundamentally different from

racial characteristics). We think that those arguments apply to, and are interchangeable with, any debate as to stirring up hatred in respect of disability.

Question 21: Paragraph 4.85: If a new offence of stirring up hatred on grounds of transgender identity were created, should it include explicit protection for freedom of expression? If so, what should it cover?

44. If stirring up hatred on grounds of disability should not be protected by freedom of expression principles, then neither should it in the case of transgender identity. While transgender identity may involve an element of choice that disability plainly lacks, we are not persuaded that this is a material or plausible distinction. We consider that transgender identity is so fundamental to a person's identity that it is indistinguishable to other features of identity which are intrinsic.

Defining "disability" and "transgender identity" in any new stirring up offences

Question 21: Paragraph 4.88: Proposal 10: Our provisional view is 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. Do consultees agree? If not, why not?

45. We agree.

Defining "Disability"

Question 22: Paragraph 4.91: Proposal 11: We consider that the definition of "disability" in section 146 would be suitable for new stirring up offences. Do consultees agree? If not, why not?

46. We agree.

Defining "Transgender Identity"

Question 22: Paragraph 4.93: Proposal 12: We consider that the definition of transgender identity in section 146(6) would be suitable for new stirring up offences. Do consultees agree? If not, why not?

47. We agree.

Question 23: Paragraph 4.94: Question 13: Do consultees 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? If so, why?

48. We have no preference as between these definitions. We see no problems in practice arising from using one rather than the other.

Question 24: Paragraph 4.100: Question 14: Do consultees agree that the sentencing provisions in s.146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people?

49. We agree, for the reasons given by the Commission at paragraph 4.99 (1) and (2) (a) and (b).

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