

Submission to the Law Commission, re Consultation Paper 250 (Hate Crime Laws)

A Table addressing specific Consultation questions is included after this text.

(Un)desirability of Hate Crime Laws

I note that the Law Commission write “although not everyone agrees with hate crime laws, we have not been asked to review the fundamental question of whether they should exist at all”, but I cannot regard this as an acceptable prohibition because the matter is too serious.

It is not appropriate to respond to this Consultation simply by responding to the specific detailed questions (either the 20 questions of the Summary or the 62 questions of the main Consultation). This would be rather like responding to an enquiry as to whether you prefer to be, (a) punched, (b) kicked, (c) scalded, or, (d) starved, without having the option to decline all of them on grounds of generic undesirability.

My Key Observations

Harmonious relations are not promoted by the spectre of criminal sanctions. No evidence is presented that the mutual respect which is necessary for harmonious relations within a diverse society is promoted by the imposition of hate crime laws or hate speech laws. One could equally assert that they will have the opposite effect. Moreover, laws of this kind invite a very reasonable accusation of creeping authoritarianism, which the Consultation document does little to dispel.

The most important issue is that the law should not, in either its *de jure* wording or its *de facto* working, serve to legitimise and hence to deepen existing prejudice. In the matter of sex, the Law Commission is at serious risk of doing just that, departing from unbiased consultation and presenting instead an explicit position, viz,

“there is one group, namely women, who clearly satisfy the first two criteria for hate crime recognition on the basis of sex or gender. Men do not – there was little evidence to suggest that criminal targeting against men based on hostility or prejudice towards their gender is prevalent or causes additional harm.”

I contend that this claim is empirically false, and the purported evidence to support it actually arises from biases inherent in the means by which such evidence is obtained, these means being fatally contaminated by an inherent prejudice which any sex-based hate crime laws are in danger of deepening rather than alleviating.

As regards hate crime laws or hate speech laws generally, one must ask: where is the empirical evidence that such laws do not do more harm than good when the whole society is taken into account? The burden of proof is on those who propose such laws, but so such evidence has been presented.

Liberty & Liberalism

The matter of hate crime hinges essentially on personal liberty.

I note that para 3.64 of the Consultation refers to the classical liberal tradition (with which my views align), and quote J.S.Mill in his influential essay “On Liberty” as arguing that we

should all have “*absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological*”. To go no further than that is a rather serious misrepresentation of Mill’s position, and, by association, of the whole body of classical liberal thought. Let me set the record straight on J.S.Mill by reminding readers of his more complete, and balanced, opinion. For example, here is another extract from “On Liberty”, “*An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.*”

Hence, Mill – and classical liberals generally - are not so far from acknowledging some limitation to freedom of speech as is often supposed. However, what Mill envisages in this example as potentially legitimising restrictions to personal freedom is incitement to violence, not mere offensiveness or expressions of prejudice. This is also my position.

Before addressing some of the specific Consultation questions, I make some generic observations on the motivations for hate crime and hate speech laws itemised within the Consultation report.

Reasons for Hate Crime Laws

The reasons why England and Wales have chosen to implement hate crime and hate speech laws are cited (Summary p.8) as being,

1. The additional harm hate crime causes to both the individual victim and the wider community;
2. The symbolic function of the legislation as a tool for tackling bigotry, prejudice and inequality; and,
3. The practical benefits flowing from it, such as the ability to monitor trends and encourage reporting by victims.

Bearing in mind J.S.Mill’s dictum that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”, the first of these reasons is potentially valid. However, hate crime legislation itself must be subject to the same examination of harm. That the imposition of such laws may, by their divisiveness or skew in application, be harmful themselves has not been demonstrated, nor even considered. This is a very serious objection as there is already evidence within the Consultation report that the proposed laws would be skewed (e.g., to one sex rather than the other) either explicitly or as regards *de facto* application.

As for the second reason, it is rather odd to assert that a valid function of legislation is to be “symbolic”. More substantively, I would challenge whether legislation against (say) speech that some might regard as bigoted or prejudiced is indeed an effective tool for tackling it. If person A is punished by the State for expressing views which are judged prejudiced against person B, or a characteristic shared by person B, it is unlikely to diminish A’s undesirable attitude towards B, but rather to deepen it. The same is true even if, knowing he would be

punished for expressing an opinion which others might consider prejudiced, person A instead bites his tongue. This also can only encourage a deepening resentment, which, regardless of the merits or otherwise of his initial position, becomes better justified in his being silenced.

It is an under-statement to say that legislation is a blunt tool for tackling bigotry and prejudice; it is the wrong tool. Such undesirable behaviour must be addressed within society by open exchange of factual evidence and communication, not the reverse. In short, hate crime laws are quite likely to be divisive, and hence not beneficial to society as a whole. So I return to the issue that the burden of proof is on those who would propose such laws: where is the empirical evidence that such laws do not do more harm than good when the whole society is taken into account?

As for the third reason, above, it is frankly preposterous to cite the “ability to monitor trends” as a valid motivation of a new law. One does not create a new law in order to gather sociological or criminological data. Nor does it make any logical sense to motivate a new law in order to “encourage reporting by victims”, since, prior to the introduction of the law there would be no victim to report! It is circular logic. But there is something even more serious amiss in area of “encouraging reporting by victims”. Where this “encouragement” is applied in a skewed manner (i.e., subject to sample bias) the results mislead rather than enlighten. I believe this is the case, for example, in the sex imbalance in the currently available data on sex-based hate crime / hate speech referenced in the Consultation (amplified below).

Rationale for Hate Speech Laws

The Summary / Consultation Paper also proposes specific rationales for hate speech laws, in particular,

4. Protection of groups from violence incited by hate speech and maintenance of public order;
5. Protection of vulnerable groups from the emotional and psychological harms of hate speech;
6. Prevention of the social exclusion and marginalisation of vulnerable groups in society; and,
7. Setting parameters for acceptable conduct, thereby fostering social cohesion.

The first rationale, (4), is legitimate, provided that the speech in question is genuinely likely to inspire violence. But what role does the word “hate” then play? One might as well frame the law around “speech which incites violence”, without the word “hate” being necessary. It is not necessary, then, that such provision lie within “hate crime” legislation, and one is reasonably suspicious that the purpose of alluding to “hate” is to weaken, in practice, the reliance upon the likelihood of inciting violence.

As for the second rationale, (5), psychological harm can indeed be very serious, although it usually requires prolonged contact between the individuals to be enacted. Real harm conducted through speech alone, and without any incitement to violence, is unlikely in a casual contact. But there is a real danger that insults, or speech that is regarded as offensive, is conflated with emotional harm. The rider that this category applies specifically to “vulnerable groups” only makes this concern greater, as the designation “vulnerable” predisposes the individual to misinterpret offense as damaging. Moreover, it begs the question as to who is regarded as “vulnerable”, and who not. In practice this opens the door to societal prejudice.

This is particularly pertinent in the case of the third rationale, (6). To be working class, heterosexual, white and male is unlikely to lead to you being regarded as vulnerable, and yet it is increasingly recognised that this demographic is amongst the most marginalised, in terms of educational attainment, employment, health, well-being and societal regard.

Finally, I would ask where is the empirical justification for the claim made in the last rationale, (7)? One does not need to be a psychologist to appreciate that punishing someone, or threatening to punish them, on account of their behaviour towards another person is not likely to endear them to that person, whatever the actual merits or otherwise of the case. Legal sanctions are not what fosters social cohesion: that requires mutual respect and understanding which is not furthered by punishment. Rather than promoting social cohesion, hate crime laws are likely to promote increasing division and distrust. The burden of proof lies with those claiming otherwise.

In making these observations I am mindful of the arguments of Section 3 of the Consultation. However, those arguments do not overturn the above objections, and many of the points made in the Consultation reinforce the above points.

Hate Crimes and *Mens Rea*

It is worth remarking on a potential confusion between *mens rea* and hate crime. *Mens rea* is an established, valid and just principle which recognises that intent, and/or premeditation, are highly significant in judging culpability. But *mens rea* does not address motivation, nor does motivation for an act usually impact upon legislative culpability. Hate crimes are unusual in respect of motive being held to be an aggravating factor. This raises specific questions which have nothing to do with *mens rea* proper. I note that the Consultation para 3.43 makes this point by reference to Hurd. But hate crimes render the same act as worthy of greater punishment for some motives than others, and align these aggravating motives with protected characteristics. The worst aspect of this is that such hate crime laws are likely to be deployed in a skewed manner, not equitably. Hence, those who are straight, white, male and Christian will tend to be on the receiving end of punishment, but not of protection.

(PTO...

Responses to Specific Consultation Questions

<p>Summary Consultation Question 1 (Consultation Question 3) We provisionally propose that the criteria that should be considered for the addition of any further characteristics into hate crime laws should be:</p> <p>Demonstrable need: evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.</p> <p>Additional Harm: evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.</p> <p>Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of resources, and is consistent with the rights of others.</p> <p>Do you agree?</p>	<p>I do not agree.</p> <p>An essential fourth criterion is missing, namely, that,</p> <ul style="list-style-type: none"> • The Hate Crime Law does not cause more harm than it prevents. <p>There is no examination within the Consultation or its cited works of the harm that may be introduced by hate crime laws themselves. Such harm may come about because an harmonious society rests upon mutual respect, not upon threats of criminal sanction which are likely to exacerbate divisions. Moreover, hate crime laws are likely to be deployed in a skewed manner, not equitably. Hence, those who are straight, white and male will be on the receiving end of punishment, but not of protection.</p>
<p>Consultation Question 11. 21.19 We provisionally propose that gender or sex should be a protected characteristic for the purposes of hate crime law. 21.20 Do consultees agree?</p>	<p>I do not agree.</p> <p>The Law Commission have stated their own conclusion on this question based on their claim that the criteria Need and Additional Harm have been demonstrated for women but not for men. But this claim is invalid and ultimately springs from endemic, society-wide prejudice which skews concern to one sex.</p> <p>The claim of Demonstrated Need for female victims is based in large part on surveys which deploy an incorrect definition of hate crime and are therefore invalid.</p> <p>The claim is made that women are subject to more gendered online abuse. There are two problems with this: firstly, there are surveys which show the exact opposite (quoting Guardian articles is not credible evidence), and secondly, very little of such verbal abuse meets the “threatening or inciting violence” criterion and hence should not, in my view, be subject to legislation.</p>

	<p>However, the deeper problem is dismissal of any issue for men, “<i>there was little evidence to suggest that criminal targeting against men based on hostility or prejudice towards their gender is prevalent or causes additional harm</i>”. This is wildly incorrect and, ironically, stems from the very type of prejudice that the Law Commission is ostensibly trying to protect against but is, on this point, in danger of legitimising. As the author of a near-700 page book* on male disadvantages I have reason to be well aware of the serious prejudice faced by men and boys and the enormous harm that is done thereby.</p> <p>The smaller number of males reporting “hate crimes”, e.g., in the CSEWs or surveys reported by women’s groups, is not a valid measure of relative prevalence, noting that in these surveys it is the victims’ perception which defines the “hate”. This is not an objective measure but actually a purely subjective perception. Women are encouraged by the prevailing orthodoxy to interpret offences as targeting them “because they are a woman”. Men are not socialised in this way, and so fail to appreciate that much of their personal difficulties may have an origin which is generic to their sex*. Consequently, the hate crime data is less about crime, or hate, and more a huge exercise in gendered perceptions originating from both innate and socialised gendered psychological proclivities.</p> <p><i>*The Empathy Gap: Male Disadvantages and the Mechanisms of Their Neglect.</i></p>
<p>Consultation Question 11. 21.21 We invite consultees’ views on whether gender-specific carve outs for sexual offences, forced marriage, FGM and crimes committed in the domestic abuse context are needed, if gender or sex is protected for the purposes of hate crime law.</p>	<p>To introduce sex-skew by design in these areas where there is already massive <i>de facto</i> sex bias would be retrograde in the extreme. I oppose it. These issue take us well beyond hate crime laws, but for completeness I make some brief points.</p> <p>To regard sexual offences or forced marriage where the victim is male to be less serious than if the victim is female would simply be discrimination and is completely</p>

	<p>unacceptable. There is already a massive societal skew in the perception of sexual offences which leads to victimisation of men being largely neglected. The law of rape is one of the few laws which is explicitly sex-specific (defined as penetration using a penis). This is a bald anomaly given that sexual offences are defined by consent. Yet, in practice, coercion of a man by a woman to undertake sexual acts without his consent is far, far more common than the public acknowledge and yet is never punished due entirely to public prejudice being reflected by the criminal processes (starting with the police). This is perhaps the most serious inequality of our times, but which society is still too immature to face.</p> <p>Male genital mutilation (MGM, euphemistically called “circumcision”) is an offence under the assault laws, but is tolerated in practice. Sir James Munby, former President of the Family Division, has ruled that MGM constitutes “significant harm”. However, he avoided the controversy that would have resulted from declaring MGM illegal by the simple expedient of bowing to custom and practice. In short, MGM is a form of harmful assault which is tolerated in practice solely due to almost universal prejudice that such harms are acceptable if, and only if, perpetrated upon males. This prejudice applies even if the male is a child or baby and is utterly abhorrent.</p>
<p>Consultation Question 12. 21.22 We invite consultees’ view as to whether sex or gender-based hate crime protection should be limited to women or include both women and men.</p>	<p>There should be no hate crime law based on either one gender/sex or both, for the reason given above. In practice it will make little difference whether the protection is for one sex only (perhaps expressed in terms of misogyny) or notionally for both (perhaps including the term misandry) because widespread societal prejudice will ensure that, in reality, protection is not afforded to men or boys. However, I note that protection offered to one sex only would seem peculiarly at odds with other primary legislation (Equality Act 2010) as the</p>

	protected characteristic is “sex” not “female”.
<p>Consultation Question 13. 21.23 We provisionally propose that a protected category of “women” is more suitable than “misogyny”, if sex or gender-based hate crime protection were to be limited to the female sex or gender. 21.24 Do consultees agree?</p>	<p>Both are unacceptable for the reasons given above.</p> <p>Such a law merely deepens existing widespread prejudice.</p>
<p>Consultation Question 14. 21.25 We provisionally propose a protected category of “sex or gender” rather than choosing between either “gender” or “sex” if hate crime protection were to adopt a general approach. 21.26 Do consultees agree?</p>	<p>Both are unacceptable for the reasons given above.</p>
<p>Summary Consultation Question 12 Consultation Question 45 We provisionally propose that intentionally stirring up hatred should be treated differently to the use of words or behaviour likely to stir up hatred. Specifically, where it can be shown that the speaker intended to stir up hatred, it should not be necessary to demonstrate that the words used were threatening, abusive, or insulting. Do you agree?</p>	<p>I do not agree.</p> <p>Speech should be constrained only when there is a clear case of incitement to violence. This suggestion fails that test.</p> <p>Moreover no definition is given of what constitutes “hatred” only that it may not involve threats, abuse or insults.</p>
<p>Summary Consultation Question 13 Consultation Question 47 Where it cannot be shown that the defendant intended to stir up hatred, we provisionally propose that the offences should cover only “threatening or abusive” (but not “insulting”) words or behaviour likely to stir up hatred. Do you agree?</p>	<p>I do not agree.</p> <p>Speech should be constrained only when there is a clear case of incitement to violence. This suggestion fails that test.</p>
<p>Summary Consultation Question 15 Consultation Question 43 Under what circumstances, if any, should online platforms such as social media companies be criminally liable for dissemination of unlawful material that they host? If “actual knowledge” is retained as a requirement for platform liability, should this be the standard applied in other cases of dissemination of inflammatory material where no intention to stir up hatred can be shown?</p>	<p>Under no circumstance should online platforms be criminally liable for content posted by independent users of their service. The emerging new EU legislation is expected to enshrine as its first Principle that online intermediaries should not be held liable for user content. This is soundly argued on the basis that shifting liability to the platform would inevitably mean that they would have to implement draconian procedures (perhaps via algorithms) which would need to err on the cautious side, in order to address huge volumes of material</p>

	daily and protect themselves. Making online platforms liable would be a virtual guarantee that online speech would not longer be free.
<p>Summary Consultation Question 16 We provisionally propose that: the current protections for discussion of religion and sexual orientation should apply to the new offence of stirring up hatred; similar protections be given in respect of transgender identity, sex/gender and disability. Do you agree and if so what should these cover?</p>	I agree that the existing protections to ensure that nothing in the definition of hate crime or hate speech offences prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse should be retained and applied to any additional protected characteristics to which hate laws are applied.
<p>Consultation Question 54. 21.93 We provisionally propose that prosecutions for stirring up hatred offences should require the personal consent of the Director of Public Prosecutions rather than the consent of the Attorney General. 21.94 Do consultees agree?</p>	<p>I do not agree.</p> <p>The volume of “stirring up hatred” offences is rightly controlled at a very high level of seniority, namely at Attorney General level. This should be retained.</p>
<p>Consultation Question 55. 21.95 We invite consultees’ views on whether the current exemptions for reports of Parliamentary and court proceedings should be maintained in a new offence. Further, we invite views as to whether there are any additional categories of publication which should enjoy full or partial exemption from the offence, such as fair and accurate reports of local government meetings or peer reviewed material in a scientific or academic journal.</p>	Nothing should interfere with academics’ freedom to publish material in academic journals where the journal editors themselves (as advised by independent peer reviewers) are happy that the content is based on sound empirical or theoretical reasoning – the only exception being the threat or incitement to violence (which is extremely improbably within scientific journals). The Journal itself, or its editors, are potentially legally liable, but any attempt to limit academic freedom should be firmly resisted by professional bodies. I personally would not respect such restrictions based on their being inimical to the public good.
<p>Summary Consultation Question 20 Consultation Question 62 Should a Hate Crime Commissioner be introduced in England and Wales</p>	<p>No.</p> <p>Consistent with my overall view that “hate crime” is to be avoided as a concept except where it becomes synonymous with credible threats of, or incitement to, violence, it is highly undesirable to introduce a Hate Crime Commissioner. The inevitable consequence of such a post would be to create a self-fulfilling prophecy of apparently escalating hate crimes as the Commissioner would have a vested interested in such a perception and would be ideally placed to create the evidence.</p>

