

December 2020

Hate crime laws: A consultation paper - NSS response

Submitted by email to: hate.crime@lawcommission.gov.uk

About the National Secular Society

This submission is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. We advocate for separation of religion and state and promote secularism as the best means of creating a society in which people of all religions and none can live together fairly and cohesively. We seek a diverse society where all are free to practise their faith, change it, or to have no faith at all. We uphold the universality of individual human rights, which should never be overridden on the grounds of religion, tradition or culture. We promote free speech as a positive value.

Summary

The NSS welcomes the opportunity to respond to the Law Commission's consultation on hate crime law. The NSS agrees that hate crime is a serious concern and that it causes egregious harm to society, as well as to the individuals it affects. The NSS welcomes efforts to reduce hate crime, as well as to eliminate extremist, hateful ideologies that give rise to hate crime. Hateful extremism is corrosive to democracy, liberty, social cohesion and human rights. It has no place in our society.

In our responses to the consultation questions, we have addressed three key issues of concern for us. They are:

1. Freedom of expression
2. The approach of using specific protected characteristics for the purposes of hate crime law
3. Tackling hate as extremism

1. Freedom of expression

Throughout our 150 year history, the NSS has always championed freedom of expression. We campaign for a secular democracy where freedom of expression is not restricted by religious considerations, as stated in our Secular Charter.¹

We believe a vibrant civil society with robust freedom of expression is best placed to challenge hateful speech, discrimination and sectarian bigotry. We therefore campaign to protect and preserve freedom of expression, including offensive, critical and shocking speech.

For this reason, we are concerned that some of the proposals in this consultation, particularly those relating to 'stirring up offences', risk restricting expression to an unacceptable degree. We do not agree that increased criminalisation of 'hate speech' is the appropriate response to tackling hate crime or hateful extremism. Increased criminalisation of speech and expression not only undermines the principle of free speech; it also risks being counter-productive.

¹ The full charter can be read here: <https://www.secularism.org.uk/the-secular-charter.html>

Those who are investigated or prosecuted for ‘stirring up’ hatred or other forms of ‘hate speech’ can become ‘martyrs’ to their ideologies, increasing the feelings of resentment, mistrust and aggrievement commonly harboured by hateful extremists. Criminalising speech also drives it ‘underground’, decreasing the likelihood of those with extremist sympathies being exposed to alternative viewpoints. Criminalising speech may also feed common narratives held by hate groups that they are being persecuted, and that it is the group who they hate that are the persecutors and oppressors.

Increased criminalisation of hateful expressions also has a chilling effect on wider public discussion. While robust criticism or mockery of certain issues may not result in a prosecution, the threat of a police investigation may be enough to silence artists, journalists, and those who would otherwise speak out on controversial issues. Criminalising increased forms of expression also risks giving those who have poor judgement or taste, including those with learning difficulties, a criminal record when they pose no genuine threat to society.

2. Specific protected characteristics for the purposes of hate crime law

While we think this approach is reasonable, we have identified some flaws – and we think those flaws may be exacerbated if the list of protected characteristics is expanded as proposed. We think this approach results in some inconsistencies; for example, failing to protect people from caste-based hate crime while proposing to protect goths and punks.

3. Tackling hate as extremism

We think a better approach to tackling hate crime and hateful ideology is to treat it as a form of extremism. The recently established Commission for Countering Extremism has taken a rights-based approach to challenging extremism, which balances the need to protect people from extremism with fundamental human rights, including freedom of expression and freedom of religion or belief. The Commission already recognises “hateful extremism” as being within its remit.² This is why we do not support the proposal for a Hate Crime Commissioner, and instead call for greater support for the initiatives of the Commission for Countering Extremism, including non-legislative means.

Our responses to the consultation questions go into more detail on these points. We have not answered those questions that are beyond our organisation’s remit.

² Commission for Countering Extremism, ‘Independent adviser calls for overhaul of extremism strategy’. Gov.uk, 7 October 2019. <https://www.gov.uk/government/news/independent-advisor-calls-for-overhaul-of-extremism-strategy> Accessed 1 December 2020.

Consultation Question 1.

21.1 We provisionally propose that a single “Hate Crime Act” be used to bring together the various reforms to hate crime laws proposed in this paper. This could include:

- shifting the substantive aggravated offences currently in the CDA 1998 and the stirring up hatred offences in parts 3 and 3A of the POA 1986 to the new Hate Crime Act;
- making amendments to the enhanced sentencing provisions (currently in the CJA 2003 but planned to move to the Sentencing Code) and the Football (Offences) Act 1991; and
- if a Hate Crime Commissioner is to be introduced, the establishment of this office and its powers.

21.2 Do consultees agree that hate crime laws should, as far as practicable, be brought together in the form of a single “Hate Crime Act”?

It is reasonable from the viewpoint of practicality to consolidate existing hate crime laws into a single Act, in the same way that equality laws were consolidated into the Equality Act 2010. However, we have concerns regarding some of the recommendations and proposals made by the Law Commission in its consultation document, including concerns relating to the establishment of a Hate Crime Commissioner as referred to in this question. We outline our concerns in the relevant section of our response. These concerns must be addressed before attempts are made to consolidate hate crime laws into a single Act to ensure only legislation that is necessary, just, fair and reasonable is enacted.

Consultation Question 2.

21.3 We provisionally propose that the law should continue to specify protected characteristics for the purposes of hate crime laws.

21.4 Do consultees agree?

While the rationale behind specifying protected characteristics for the purposes of hate crime laws is reasonable and assists in codifying what qualifies as a hate crime, we recognise that there are some disadvantages in this approach. These disadvantages may be outweighed by the advantages (e.g. clarity, identifying those most affected etc.) of the current strategy at present. However, if more protected characteristics are added to the list, as proposed by the Law Commission, these disadvantages may grow to outweigh the advantages.

The biggest disadvantage we have identified is the increasing risk of inconsistency in how certain crimes are treated depending on the victim. This inconsistency is evident within the Law Commission’s own proposals as to what groups should be considered for inclusion into the protected characteristics. It also appears that deciding which groups should and should not be included as hate crime categories is likely to be highly influenced by politics. This is undesirable and will result in groups with a greater political clout getting protection, while those who are so oppressed as to have little political power will get none.

We would like to raise the example of caste-based hatred as a case in point.

Caste-based hatred

We found it incongruous that while the Law Commission has proposed including “sex workers”, “alternative subcultures” and “people experiencing homelessness” as hate crime categories, it has dismissed any consideration on including “caste” as a hate crime category. Furthermore, while the Law Commission engaged with organisations representing the interest of these proposed categories, such as SOPHIE, it did not engage with any groups representing members of oppressed castes (‘Dalits’) before publishing its consultation paper.

In its consultation paper, the Law Commission justifies this dismissal partly on the grounds that “caste” is not explicitly included as a protected characteristic in the Equality Act 2010.³ We do not accept this rationale, because “sex workers”, “alternative subcultures” and “people experiencing homelessness” are also not protected characteristics in the Equality Act.

The case for adding “caste” to hate crime categories is at least as strong as that for sex workers, alternative subcultures and people experiencing homelessness. Across the world, Dalits face oppression and persecution. Research has estimated there are at least 50,000⁴ (other estimates say as many as 500,000⁵) people living in the UK who are regarded by some as low caste and are therefore at risk of caste-based hatred, prejudice and discrimination.

The National Institute of Economic and Social Research (NIESR) has found evidence of caste-based discrimination, harassment and bullying present in employment, education and in the provision of services. Its catalogue of these incidents include reports of violence and criminal activity that the victims say were motivated by caste. In one account, a radio station promoting the Ravidassia community (a Sikh sect with large numbers of Dalit adherents) was targeted with telephone threats and was burgled, apparently motivated by caste-based hatred.⁶

NIESR warned that relying on the Indian community to take action to reduce caste discrimination and harassment was “problematic”.⁷

During the establishment of the Equality Act 2010, Dalit advocacy groups submitted evidence to the Joint Commission on Human Rights in support of including caste as a protected characteristic.⁸ However, caste was rejected as a protected characteristic in the Equality Act, largely due to opposition from ‘high caste’ groups and the politicians supported by them. ‘High caste’ groups,

³ Law Commission, ‘Hate Crime Laws: A Consultation Paper’. 23 September 2020, pp.216-218, paras. 11.34-11.41

⁴ Metcalf, Hilary and Rolfe, Heather. ‘Caste discrimination and harassment in Great Britain’. National Institute of Economic and Social Research, 28 July 2011, p.vi.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85522/caste-discrimination.pdf Accessed 12 November 2020

⁵ iNews, ‘Why hasn’t Britain done more to outlaw the forced labour of ‘untouchable’ Indians?’ November 29 2016 <https://inews.co.uk/news/long-reads/dalits-indian-caste-discrimination-britain-uk-modern-slavery-33842> Accessed 17 August 2020

⁶ Metcalf, Hilary and Rolfe, Heather. ‘Caste discrimination and harassment in Great Britain’. National Institute of Economic and Social Research, 28 July 2011, p.57.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85522/caste-discrimination.pdf Accessed 12 November 2020

⁷ *ibid*, p.52

⁸ Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill, 26th Report of Session 2008-2009, pp. 28-29 <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/169.pdf>. Accessed 17 June 2020

by the very nature of caste, are less likely to suffer adversely from discrimination or hatred, and in fact be likely to benefit from the status quo. They also have an interest in protecting Hinduism and Sikhism from negative publicity and criticism.⁹

The JCHR itself expressed concerns that caste discrimination “is a problem which may be hidden but real within some ethnic minority groups”.¹⁰

Subsequent to the Law Commission’s roundtable on the hate crime and reform of the communications offences consultations on November 4, where we raised these concerns, we are pleased that the Law Commission has been engaging with the Dalit Solidarity Network UK.

However, we feel the exclusion of caste from consideration, while sex workers, alternative subcultures and people experiencing homelessness have been considered for inclusion, illustrates the problem of consistency in the approach of identifying protected groups for the purposes of hate crime. It also demonstrates how such decisions about which groups to include are subject to considerable political influence, which is not in the interest of justice, fairness or protection of the victims of hate crime.

We recommend the Law Commission consider revisiting the strategy of specifying protected characteristics for the purposes of hate crime laws, and investigating how inconsistencies of this nature can be avoided, before adding any further protected characteristics into hate crime legislation.

Consultation Question 3.

21.5 We provisionally propose that the criteria to determine whether a characteristic is included in hate crime laws should be:

- (1) Demonstrable need: evidence that crime based on hostility or prejudice towards the group is prevalent.
- (2) Additional Harm: there is 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.
- (3) Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others.

21.6 Do consultees agree?

Please refer to our answer to Consultation Question 2 for our views on the problem of specifying protected groups for the purposes of hate crime law.

⁹ For more information, see ‘Caste-based discrimination’ in our 2020 report *Faith-shaped holes: How religious privilege is undermining equality law* www.secularism.org.uk/uploads/download-the-full-report.pdf

¹⁰ *ibid*, p.29.

Consultation Question 5.

21.8 We provisionally propose to retain the current definition of religion for the purposes of hate crime laws (we consider the question of non-religious beliefs separately in Chapter 14).

21.9 Do consultees agree?

We are concerned that there is confusion in this area.

Our interpretation of the definition of religion for the purposes of hate crime laws (“a group of persons defined by reference to religious belief or lack of religious belief”) is that those who belong to nonreligious groups, including humanists, are explicitly included because “lack of religious belief”, i.e. rejection of a belief in gods or the supernatural, is a key component of their identity.

However, we are concerned that the definition relies heavily on the idea that only those belonging to a “group” defined by a religious or lack of religious belief are protected, which fails to protect significant numbers of people who could be victims of hate crimes. Many people, including those with religious or nonreligious beliefs, do not identify as belonging to a “group” defined by those beliefs. For example, many people who have no religion do not actively identify as atheists, humanists or any other group ‘label’. Yet these people may still be hate crime targets due to their beliefs. ‘Apostates’ from conservative religious communities, who frequently do not identify with a particular religious or nonreligious group, are especially vulnerable to hate crime yet they may not easily fit the definition necessary for legal recourse under hate crime laws.

As the Law Commission referenced in its consultation paper, Asad Shah was murdered because of his religious beliefs. But because those beliefs were individual to him and not those of a specific religious group, the court took the view that the case could not be prosecuted on the basis of hostility against a religious group.¹¹ This leaves those with individual beliefs without protection from hate crime laws. Similarly, those with dissenting views within religions, who may also be targeted with violence and other malicious criminal activity, would also be left exposed without protection from hate crime laws as proposed.

It should be noted that the definition of the protected characteristic of “religion or belief” in the Equality Act 2010 captures a broader range of people who may be victims of discrimination on the basis of religion or belief. The name of the characteristic, “religion or belief”, makes it explicit that beliefs that are not religious are included from the outset. The definition is also clearly inclusive of nonreligious beliefs including humanism and atheism: “(1) Religion means any religion and a reference to religion includes a reference to a lack of religion. (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.”¹²

The NSS recommends that the category of “religion” under hate crime laws be changed to “religion or belief”, and for the adoption of the same definition of this category as that is used in the Equality Act 2010. This would provide protection for a greater number of people who are currently vulnerable to hate crime on the basis of their religion or belief, in addition to consistency with equality law.

¹¹ Law Commission, ‘Hate Crime Laws: A Consultation Paper’. 23 September 2020, p. 220, para 11.51

¹² Equality Act 2010 C1 S10 <https://www.legislation.gov.uk/ukpga/2010/15/section/10> Accessed 10 Nov 2020.

Consultation Question 6.

21.10 We do not propose to add sectarian groups to the groups protected by hate crime laws (given that they are already covered by existing protection for “religious groups”).

21.11 Do consultees agree?

Yes, we agree. We also think the recommendation given in our answer to Consultation Question 5 would also give greater protection from sectarian hate crime.

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?

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.

Answer to 21.21: While we agree that sex is a factor in the crimes listed here, we are concerned that presenting some of these crimes as entirely sex-based may lead to unequal treatment of boys and men who may be victims of these crimes. Men can also be victims of sexual offences, forced marriage and domestic abuse, yet these cases are often underreported due to fears of not being taken seriously (and presenting these crimes as those that only happen to women reinforces this).

Similarly, non-consensual religious or cultural genital cutting of men and boys can be just as traumatic, psychologically harmful, and excruciatingly painful as many forms of FGM. It can also carry similar risks of complications including death.¹³ Yet while all forms of FGM are prohibited by law, boys receive no such protections at all against the permanent and non-consensual cutting of their healthy genitals. Presenting genital cutting as exclusively a crime against women undermines victims of unwanted male circumcision who are speaking out against the practice and campaigning for similar protections in law as girls and women.

¹³ Many studies have been held on the ethics of non-consensual, non-therapeutic male circumcision and have made similar findings. Recent example: Kai Möller, ‘Male and Female Genital Cutting: Between the Best Interest of the Child and Genital Mutilation’, *Oxford Journal of Legal Studies*, Volume 40, Issue 3, Autumn 2020, Pages 508–532, <https://doi.org/10.1093/ojls/gqaa001>

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.

As expressed in our answer to 21.21, we are concerned that limiting sex or gender-based hate crime protection to women will result in decreased protection for men who are also victims of sexual offences, forced marriage, religious and cultural non-consensual genital cutting, and domestic abuse.

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?

As expressed in our answer to 21.21, we are concerned that limiting sex or gender-based hate crime protection to women will result in decreased protection for men who are also victims of sexual offences, forced marriage, unwanted religious or cultural genital cutting, and domestic abuse.

Consultation Question 17.

21.29 We invite consultees' views on whether "sex workers" should be recognised as a hate crime category.

Please refer to our answer to Consultation Question 2 for our views on the problem of specifying protected groups for the purposes of hate crime law.

Consultation Question 18.

21.30 We invite consultees' views on whether "alternative subcultures" should be recognised as a hate crime category.

Please refer to our answer to Consultation Question 2 for our views on the problem of specifying protected groups for the purposes of hate crime law.

Consultation Question 19.

21.31 We invite consultees' views on whether "people experiencing homelessness" should be recognised as a hate crime category.

Please refer to our answer to Consultation Question 2 for our views on the problem of specifying protected groups for the purposes of hate crime law.

Consultation Question 20.

21.32 We invite consultees' views on whether "philosophical beliefs" should be recognised as a hate crime category.

We think that our recommendations made in Consultation Question 5 to bring the definition of "religion" for the purposes of hate crime law in-line with that for the protected characteristic of "religion or belief" in the Equality Act 2010 would make it unnecessary to recognise "philosophical beliefs" as a hate crime category. Case law has established that the Equality Act 2010 provides adequate protection for a number of non-religious philosophical beliefs including veganism.¹⁴

Consultation Question 40.

21.66 We provisionally propose that the stirring up offences relating to "written" material be extended to all material.

21.67 Do consultees agree?

We do not agree. We are concerned that extending stirring up offences to other kinds of material could lead to an unacceptable level of censorship.

While we share the Law Commission's concerns about stirring up hatred, we do not think that criminalisation of increasing forms of expression is the most appropriate or effective means of combatting hateful extremism. **We encourage parties involved in tackling hate crime and extremism to further investigate non-legislative methods, including education and social cohesion strategies.**

One of our concerns regarding an extension of stirring up offences relates to cartoons or other media that some religious groups find 'blasphemous'. A key example could be pictures of the Islamic prophet Muhammad. Regardless of their context or the intentions behind their display or distribution, pictures of Muhammad cause offence to many Muslims who believe depicting Muhammad is blasphemous. Depictions of Muhammad have motivated some Islamic extremists to murder those who create or display them. This is brutally evidenced by two acts of terrorism in France: the shooting of *Charlie Hebdo* cartoonists in 2015 for drawing Muhammad, and the murder of teacher Samuel Paty in 2020 after he showed cartoons of Muhammad during a lesson on freedom of expression.

The vast majority of Muslims are peaceful and law-abiding citizens who would not contemplate such atrocities. However, many Muslims would nevertheless argue that drawing 'blasphemous' images is "likely" to stir up hatred and may seek prosecution under hate crime laws for those who draw or display pictures of Muhammad.

Putting those who draw or display pictures of Muhammad, or those who perform any other act of expression that offends religious sensibilities, at risk of criminal proceedings is inimical to the principle of free speech. We were concerned that, during our meeting with the Law Commission on November 4, the Commission were unable to give any assurances that those who display or distribute depictions of Muhammad would not be subject to criminal investigation.

¹⁴ *Conisbee v Crossley Farms Ltd & Others* [2019] ET 3335357/2018.

Consultation Question 41.

21.68 We provisionally propose to replace sections 19 to 22 and 29C to 29F of the Public Order Act 1986 with a single offence of disseminating inflammatory material.

21.69 Do consultees agree?

As expressed in our answer to Consultation Question 40, **we urge the Law Commission to ensure robust protections for free expression be put in place before extending and consolidating ‘stirring up’ offences.**

Consultation Question 42.

21.70 We provisionally propose to align the defences available to innocent disseminators of inflammatory material to ensure consistency as follows:

- (1) The provisions relating to performers, rehearsals and recordings of performances would apply to both plays and broadcasts.
- (2) The defences available to third parties who did not intend to stir up hatred would be aligned, so that the offence would not apply to a person who did not realise that the material was to be included; did not realise that material was threatening or abusive; or did not realise that the circumstances were such that hatred was likely to be stirred up.
- (3) Unless intention to stir up hatred is proved, no offence would be committed by showing a recording that has been certified by the British Board of Film Classification or licensed for cinema performance by a local authority.

21.71 Do consultees agree?

We agree. The burden must be on the prosecution to prove intent, not the defendant to prove the opposite. This is more consistent with the principle of the presumption of innocence which underpins justice.

Consultation Question 44.

21.74 We invite consultees’ views on whether the meaning of “likely to” in the racial hatred offence should be defined in statute (and for any other characteristics to which it would apply in future). We further invite views on how might this be defined.

We have concerns regarding the phrase “likely to” in the racial hatred offence, as it means intention to stir up hatred is not required. This could dramatically impact upon a wide variety of expression. Even the reporting of objective, evidence-based facts could be chilled out of fears they are “likely to” incite racial hatred.

It is already the case that some authorities have withheld reporting out of concerns of being accused of racism. For example, the Independent Office for Police Conduct has recently upheld a complaint against a senior Rotherham officer who admitted that his force ignored the sexual abuse of girls by ‘grooming gangs’ of men of largely Pakistani heritage “for decades” because it was afraid of increasing “racial tensions”.¹⁵ And more recently the Independent Inquiry into Child Sexual Abuse was criticised by one abuse survivor for being “scared of being called racist” for refusing to extend its inquiry into Rotherham and Rochdale grooming gangs.¹⁶

Although it is clear that neither the police nor IICSA have any intention to stir up racial hatred, releasing information on the ethnicity of grooming gang offenders could be interpreted as “likely” to stir up racial hatred under the proposed changes to stirring up offences, exacerbating the problem of failing to report on relevant facts.

While it is essential that issues involving race and ethnicity must be treated sensitively, and consideration given to the impact of reports on matters of race to communities affected, the reporting of facts must not be obstructed by concerns of accusations of stirring up hatred.

We are also concerned that, in connection to this question, paragraph 18.144 in the consultation document implies that distribution of *Protocols of the Elders of Zion* could effectively be banned under hate crime laws as it is “likely” to stir up hatred without using threatening, abusive or insulting language. It is easy to see how, following from this, other antisemitic tropes such as holocaust denial may also be outlawed. While we condemn antisemitic conspiracy theories of any kind, we do not believe criminalising the distribution of materials like *Protocols* will tackle antisemitism. We are concerned that criminalising antisemitic or other speech “likely to” stir up hatred may exacerbate conspiratorial views about certain groups of people, drive those views ‘underground’ where they cannot be subjected to criticism, and create ‘free speech martyrs’ out of those prosecuted under ‘stirring up’ offences.

We have an additional specific concern about the ‘blood libel’ trope, which is also given as an example in para. 18.144. In recent years, accusations of using this trope have been levied against those who have expressed legitimate ethical and human rights concerns about the Jewish practice of circumcising baby boys.¹⁷ Criminalising the ‘blood libel’ trope may be used by supporters of circumcision to silence debate on this issue, and perhaps other contentious religious practices.

¹⁵ Pearson, Allison. ‘The grooming gang cover-up is Britain’s real racism scandal’. The Telegraph, 21 January 2020. <https://www.telegraph.co.uk/women/life/tolerant-nation-time-shamed-grooming-gangs-prey-girls/> Accessed 1 December 2020.

¹⁶ Norfolk, Andrew and Singh, Hardeep. ‘Child abuse inquiry “scared of racist tag”’. The Times, 24 October 2020. <https://www.thetimes.co.uk/article/child-abuse-inquiry-scared-of-racist-tag-nh2zcctwq> Accessed 13 November 2020

¹⁷ Lempert, Antony. ‘How cutting cultures deny dissenters their voice and identity’. National Secular Society, 23 February 2018 <https://www.secularism.org.uk/opinion/2018/02/schrodingers-penis>

Consultation Question 45.

21.75 We provisionally propose that intentionally stirring up hatred be treated differently from 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.

21.76 Do consultees agree?

We remain unconvinced that speech that is “likely”, rather than intended, to stir up hatred should be criminalised; please see our answer to Consultation Question 44 for more. This proposal would be a substantial change which very much lowers the threshold for prosecution.

We were concerned by the “Case Example” given in the consultation document at paragraph 18.188 as an example of something that is “likely” to stir up hatred in relation to this question. In our opinion, the speech in question (“It is your duty to kill those who turn their back on God”) is incitement to murder or terrorism, not merely stirring up hatred. We feel this is an inappropriate example and misrepresents what ‘stirring up’ hatred could entail. Most people, even those who robustly defend freedom of speech, would agree that incitement to murder or other serious crimes should be criminalised. But fewer would agree that speech that is ‘likely’ to stir up hatred without incitement to violence or crime should be criminalised.

The example of ‘stirring up’ hatred given at paragraph 18.192 in relation to this question also caused us concern. This example implies that the use of a racial slur in an online post could be subject to a criminal investigation because it is likely to stir up hatred. We disagree with the Law Commission that simply using a racial slur is likely to stir up hatred. While using a racial or other slur is highly offensive and certainly likely to cause distress to others, it should not be criminalised on the grounds that it may stir up hatred. Otherwise, this could result in an enormous amount of unnecessary police work, an extreme intrusion into the lives of those who are innocent of any crime but exercise poor judgement in the language they use on the internet, and the censorship of a huge repertoire of cultural expressions including books, movies, and music.

Consultation Question 47.

21.79 We provisionally propose that there should be a single threshold to determine whether words or behaviour are covered by the “likely to” limb of the stirring up offences, applying to all protected characteristics.

21.80 Do consultees agree?

21.81 If so, would consultees favour applying a single threshold of “threatening or abusive” but not “insulting” words to prosecutions brought under the “likely to” limb?

We agree that “insulting” words should not apply to prosecutions under the “likely to” limb. The term “insulting” is highly subjective and can also mean “offensive”. We do not think speech should be criminalised simply because it is “offensive”.

Consultation Question 51.

21.87 We provisionally propose that the current exclusion of words or behaviour used in a dwelling from the stirring up offences should be removed.

21.88 Do consultees agree?

We disagree with the Law Commission's proposal to remove the exclusion of words or behaviour used in a dwelling from the stirring up offences.

We are concerned that the Law Commission has made this proposal without presenting any evidence that groups or individuals motivated to spread hate are using this 'dwelling defence' as a loophole to avoid hate crime laws. It therefore appears to be an unnecessary encroachment into the private domain of individuals and their families.

We note that the proposed Hate Crime and Public Order (Scotland) Bill has no 'dwelling defence'.¹⁸ This has attracted criticism from a wide variety of organisations, including president of the Aberdeen Bar Association Stuart Murray,¹⁹ Index on Censorship,²⁰ and former deputy leader of the SNP Jim Sillars.²¹

We therefore urge the Law Commission to present evidence of the necessity of removing the 'dwelling defence' from stirring up offences, and to consider alternative means of closing 'loopholes' in the law without criminalising private discussions people have in their own homes.

Consultation Question 52.

21.89 We provisionally propose that the current protections in sections 29J and 29JA apply to the new offence of stirring up hatred.

21.90 Do consultees agree?

21.91 We invite consultees' views on whether similar protections should be given in respect of transgender identity, disability and sex or gender, and what these should cover.

We agree that the current protections in sections 29J and 29JA should apply to the new offence of stirring up hatred. We also think similar protections should be given in respect of other characteristics.

¹⁸ Hate Crime and Public Order (Scotland) Bill. <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf> Accessed 13 November 2020

¹⁹ McDonald, Craig. 'No defence: Leading lawyers rubbish Justice Secretary's argument for extending hate crime law'. *The Sunday Post*, November 8 2020. <https://www.sundaypost.com/fp/no-defence-leading-lawyers-rubbish-justice-secs-argument-for-extending-hate-crime-law/> Accessed 13 November 2020.

²⁰ Wade, Mike. 'Poking fun at Islam "wouldn't be illegal under new hate law"'. *The Times*, 2 November 2020. <https://www.thetimes.co.uk/article/poking-fun-at-islam-wouldnt-be-illegal-under-new-hate-law-fszhg2ckc> Accessed 13 November 2020.

²¹ Sillars, Jim. 'Jim Sillars on why the SNP must back further changes to the Hate Crime Bill'. *The National*, 26 September 2020. <https://www.thenational.scot/news/18750069.jim-sillars-snp-must-back-changes-hate-crime-bill/> Accessed 13 November 2020.

Consultation Question 53.

21.92 We invite consultees' views on whether there should be similar protections to those in sections 29J and 29JA under the racial hatred offences.

We agree there should be similar protections to those in sections 29J and 29JA under the racial hatred offences. We note from the Law Commission's own analysis that some religious groups, notably Jews and Sikhs, are also identified as racial groups.²² This means that robust criticism of certain religious or cultural practices, including non-stun animal slaughter, infant male circumcision, and the wearing of swords in public, could potentially be charged under racial hatred offences despite being protected under section 29J of the POA. As the Law Commission points out, this potentially results in the absurdity of being able to criticise non-stun slaughter for halal meat, but not for kosher meat, without fear of prosecution.

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.

We agree that the current exemptions for reports of Parliamentary and court proceedings should be maintained. We also agree exemptions for other categories of publication, including fair and accurate reporting of council meetings and materials in scientific or academic publications, should be seriously considered to maximise protection for free speech – especially where the reporting of evidence-based facts is concerned. As we outline in our answer to Consultation Question 44, we are concerned that reporting facts could potentially be censored under 'stirring up' offences.

Consultation Question 62.

21.105 We invite consultees' views on whether they would support the introduction of a Hate Crime Commissioner.

We would not support the introduction of a Hate Crime Commissioner. We believe the Commission for Countering Extremism already fulfils this remit, because hate crime is a form of extremism. Hate is an important component of all forms of extremist ideology, and should be addressed in the context of countering extremism. A separate Hate Crime Commissioner risks diluting the role of the Commission for Countering Extremism, implying that hate crimes should be treated separately to other forms of extremism.

²² Law Commission, 'Hate Crime Laws: A Consultation Paper'. 23 September 2020, p.484, para. 18.271.

We think the Commission for Countering Extremism has adopted an effective approach to tackling extremism, including hate crimes. The Commission has taken a rights-based approach to challenging extremism, which balances the need to protect people from extremism with fundamental human rights, including freedom of expression and freedom of religion or belief. The Commission already recognises “hateful extremism” as being within its remit.²³

We encourage the Law Commission and other parties involved in tackling hate crime to increase their engagement with the Commission for Countering Extremism and work together to tackle all forms of extremism, including hate crime and hate speech.

²³ Commission for Countering Extremism, ‘Independent adviser calls for overhaul of extremism strategy’. Gov.uk, 7 October 2019. <https://www.gov.uk/government/news/independent-advisor-calls-for-overhaul-of-extremism-strategy> Accessed 1 December 2020.