



# HATE CRIME LAWS: ENGLISH PEN CONSULTATION RESPONSE

## Introduction

1. English PEN is a writers' organisation, founded in 1921, committed to defending the right to freedom of expression. The main focus of our consultation response is the proposals concerning reform of 'stirring up' offences, and the detail of our response is concentrated on those questions (**Questions 40 to 55**) related to the reform of the existing hate speech laws. We have also offered short comments on how the recommendations relating to aggravated offences might impact on freedom of expression.
2. English PEN is also committed to broad principles of equality. We recognise the intent behind international treaties such as the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) and accept that 'aggravated' offences will continue to be a tool the government uses to combat racial inequalities and promote racial harmony.
3. We note that aggravation and 'stirring up' laws concern themselves with the mental element (*mens rea*) of an offence. We believe that when the Government creates or reforms any offence that is concerned primarily with its citizens' thoughts, it should proceed with the utmost care. This means being particularly mindful of the potential for unintended consequences, in particular the over-criminalisation of thoughts or beliefs, and the 'chill' on free speech. Where there are grey areas, the law should err on the side of caution and resist criminalisation. This may mean that some actions and words that could be perceived as hate crimes and hate speech — which our intuition might suggest cause harm — will remain legal. When this happens, ministers and other parliamentarians should be honest about the limits of hate crime laws and explain the trade-offs between the legitimate need to combat hate, and the importance of freedom of expression.

## Question 1 — Hate Crime Act

4. The creation of a unifying Act of Parliament could be either an opportunity or a threat. The Government and parliament could take the opportunity to optimise and narrow the offences, to achieve a better balance between the right to freedom of expression and the rights of marginalised groups to live in safety. Alternatively, a new law could expand the ambit of hate speech laws in a way that further erodes Article 10 rights. We reserve our final judgment on this question until the government produces a white paper and draft legislation.
5. However, our reading of the approach taken in the Law Commission's consultation paper suggests that, on balance, a Hate Crime Act has the potential to hone and optimise hate speech laws in a way that could expand the space for freedom of expression. As identified in the paper, a significant issue with the current framework is that it spans several statutes, and that amendments to the Public Order Act 1986 have been inconsistent — different 'protected characteristics' receive different protections. Alignment of these protections is surely desirable.
6. Also, when elements of the law are set out in many different places (or only in the common law) this increases the possibility that citizens do not know what the law actually is. This, in turn, can lead to a 'chill' on freedom of speech, where expression that parliament (and society) believes should be legal is nevertheless silenced through fear of prosecution.
7. A codifying statute should give citizens a better understanding of the law and the specific limits parliament has placed on expression, without having to seek specialist legal advice.

## Questions 2 to 20 — Protected Characteristics

8. We support the Law Commission's recommendation that the law continues to specify 'protected characteristics' (**Question 2**). The alternative, where *any* trait could be deemed by the police or a court to trigger hate crime/speech prosecutions, would increase uncertainty and therefore the 'chill' on free speech.
9. We note also that the adage 'when everyone is special, no-one is special' may have some force in this context. An expanding list of characteristics, not limited to those where there is evidence of prevalent discrimination, risks an undesirable expansion of the law that will be significantly detrimental to freedom of expression. Therefore, we support a thorough, consultative and evidence-based approach to the designation of 'protected characteristics' (**Question 3**), as set out in paragraph 10.89 of the consultation paper and discussed in paragraphs 10.89 to 10.152.
10. The historic and current discrimination against women is well documented. If the purpose of 'protected characteristics' and hate crime laws are to protect specific groups who have suffered formal and informal discrimination, then clearly women as a group should be included.
11. When Parliament comes to legislate on this issue, it should reaffirm the purpose of hate crime legislation, addressing the points above. A clear conception of why certain groups should be in scope, and others outside of scope, will surely contribute to public understanding of, and support for, any new law.
12. We note that most 'protected characteristics' are defined neutrally. While this is, of course, the correct approach, any new law should make provisions to ensure that the particular groups that are on the receiving end of most abuse or discrimination are, in fact, protected by the law. Any designation of 'protected characteristics' should be accompanied by an obligation on the police and/or the Crown Prosecution Service to properly log the details of the victim's protected characteristic.

## Questions 21 to 39 — Aggravated offences

13. We acknowledge that the concept of 'aggravating factors' is well established in the criminal law. In some cases, the aggravation is identified by additional behaviours or actions surrounding the offence (for example, the use of a weapon; repeat offending; or co-ordination with a criminal gang). In other cases, the aggravation is identified as a mental element at the time of the offence, in addition to the *mens rea* of intent or recklessness element of the crime.
14. For hate crime, the aggravation always takes on this additional mental element. The law is essentially punishing an additional thought or a belief that is distinct from mere intent. Moreover, adducing evidence for this belief will very often involve consideration of an offender's past words. As such, it engages Article 10. A Hate Crime Act would be an opportunity for parliament to re-consider and re-affirm the principles which underly the creation of aggravated offences. We would urge the law in this area is drawn very narrowly.
15. **Question 27** asks whether 'aggravated versions of communications offences with an increased maximum penalty [should] be introduced...' We disagree with this proposal because the *actus reus* of such offences is often determined by a written or verbal assault on a protected characteristic. In such cases, the protection that society affords marginalised groups lies in the fact that abusive epithets are within the scope of the conduct element. This is no need for additional protections by prosecuting an 'aggravated' version of the same offence.

## Questions 40 to 55 — Hate Speech

16. The consultation paper suggests (at para 1.25) that hate speech laws do not amount to 'thought crime,' because the offences involve a conduct element as well as a mental element; and that in any case, many other types of crime require a mental element (*mens rea*) to be made out. However, the consultation paper also notes (at paragraph 18.3) that the conduct element of existing hate speech offences (Public Order Act 1986 c.64, ss.18-23 and ss.29B-29G) amounts to inspiring thoughts in others that are themselves legal. This might be described as 'thought crime by proxy.' It is therefore problematic and certainly engages Article 9 and Article 10 rights.
17. Any laws regulating hate speech must be compliant with the ECHR provisions in Article 9(2) and Article 10(2). They should be drawn narrowly enough so that any infringements on rights of belief and expression are limited, proportional, and linked directly to harms that can be identified and evidenced.
18. The ultimate purpose of hate speech laws is to change attitudes. The criminal law is an imprecise and limited tool for such a task. It should be affirmed, therefore, that other policy levers — such as educational, artistic and cultural interventions — must be preferred.
19. Indeed, English PEN's programme of work takes exactly this approach. The PEN International Charter commits our members to promote 'good understanding and mutual respect between nations and people' and to 'dispel all hatreds and to champion the ideal of one humanity.' Through our events, campaigns and programmes, we promote empathy and understanding between people of different backgrounds.
20. Such long-term work may seem unattractive compared to the 'quick fix' of the criminal law, but we believe it is far more effective in the long term. We would consider the publication of any Hate Crimes Bill that was not accompanied by an associated long-term social and education strategy, to be incomplete. This is, of course, a matter for Government, rather than the Law Commission.
21. With those significant reservations, and on the assumption that some form of 'stirring up' offence

will continue to exist in the criminal law, we support most of the proposed reforms. The rationale for standardising the 'stirring up' offences to apply to any kind of published material (**Question 40**) is sensible. Similarly, the proposal of creating a single offence of 'disseminating inflammatory material' (an amalgamation of ss.19-22 and ss.29C-29F, **Question 41**) is to be welcomed. As described above, a simpler law is likely, *ceteris paribus*, to reduce the 'chill' on free speech.

22. We also support the implied abolition of 'possession' offences currently provided for at s.23 and s.29G (and if the Commission did not intend to imply this at paragraphs 18.88 to 18.92, we would recommend this reform in any case). The conduct element should always entail actual dissemination to others, and should not capture mere 'possession with intent to disseminate.' This is because inflammatory material is similar to defamatory material, in that the harm (whatever it may be) only occurs when the material is disseminated/published. Inflammatory material that is not disseminated is inert and does not cause harm. It should not, therefore, be criminalised.
23. Such a reform would also deliver a tangential but important protection to journalists and academics who research radicalisation and extremism, and who may come into possession of inflammatory material during the course of their work. If an 'intent to disseminate' offence is retained, then it must contain a clear exception for such possession for academic, journalistic and other public interest activities.
24. As explained above, we are concerned that the concept of 'stirring up' is ill-defined. We therefore recommend reform of the law to better protect freedom of expression. Notwithstanding these reservations, if offences of this kind are to remain (in some form) then we do support the inclusion of transgender identity and disability (**Question 48**) and sex and gender (**Question 49**) as protected characteristics for such offences. We agree that the harms suffered by these groups are real and pervasive (paragraph 11.11 and 18.214 to 18.238).
25. However, we support this extension only on the basis that an amended law includes sections analogous to s.29J and s.29JA (**Question 52**). Such clauses are essential protections for free speech. Indeed, parliamentarians referred to s.29J as 'the PEN amendment' when it was added to the Racial and Religious Hatred Bill (see HL Deb, 24 Jan 2006, Col 1074). Omitting such a provision from any future legislation would represent an intolerable expansion of the law. It will likely result in unjust prosecutions, police investigations and a significant increase in the 'chill' on free speech. The precise wording for such clauses would need to be a matter of further consultation and should be debated in parliament.
26. The proposed hate speech offence will apply online as well as offline. It will engage the Article 10 rights of millions of individuals on a daily basis. Certainty is therefore essential. Citizens should be able to discern clearly in advance whether a particular set of words would be criminalised. Ambiguous definitions will cast a disproportionate 'chill' on freedom of expression, even if specific defences and exemptions are provided for elsewhere in the law.
27. The practical application of the proposed new offence will therefore depend on the definitions of 'stirring up' and 'inflammatory material' adopted by parliament. Adequate definitions of such phrases should be written into the statute.
28. If adequate definitions are not supplied by parliament, then the task of defining these terms will be left to the police, the Crown Prosecution Service and the Courts. This process will take time and could lead to inconsistencies. Even if adequate definitions are ultimately 'discovered' by the common law, they will not be immediately accessible to individual citizens.
29. We note that the section of the consultation document entitled 'Defining Inflammatory: The Threshold For Criminalisation' (page 473) does not actually give a clear definition of 'inflammatory.' However, the term is defined at paragraph 18.5 as material that is 'likely to provoke angry or violent

feelings.' The definition therefore refers not to objective qualities of the words themselves, but their effect on the subjective *feelings* of other people. This is highly problematic and likely to cast a chill on freedom of expression.

30. We note that the formulation 'likely to stir up hatred' is present both in the proposed measures relating to innocent dissemination (**Question 42**) and dissemination when direct intent cannot be proven (**Question 46**). The operation of the law will depend on how 'likely' is interpreted. If the 'likely' bar is set too low, it could mean media companies become liable for prosecution when publishing or broadcasting the words of others in news reports, or when they publish opinions in op-eds and interviews.
31. The effect of the 'likely to' test also rests on what definitions are ascribed to 'stirring up' and 'inflammatory' (see above) which are not adequately defined in the consultation document.
32. In keeping with the principle that curbs on freedom of expression can be justified only when harm is evidenced, we suggest that the definition of 'likely to' be changed to 'will,' or linked to some other objective standard to which citizens and the Courts may refer.
33. **Question 45** suggests that '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.' The rationale for this is given in a quote from Stop Hate UK (at paragraph 18.178):

*organised groups, such as the far-right ... are generally aware of the offences and limit their conduct accordingly, so as not to become criminally liable.*

In other words, extremists might use euphemisms or dog-whistles to avoid threatening and abusive language, and therefore avoid prosecution.

34. We are therefore wary about removing the 'abusive or threatening' requirement from 'stirring up' offences. It removes a crucial layer of objectivity from the offence, and risks a situation where the police and courts will be required to parse opaque language in the search for potentially inflammatory meanings. It will almost certainly lead to absurd investigations, where neutral words or symbols are prosecuted or become 'unsayable,' only because extremist groups have previously uttered them.
35. Similar measures enacted in more authoritarian countries would enable governments to stifle legitimate criticism of those in power. There are several international examples of states censoring innocuous images (for example, Winnie-the-Pooh in China,<sup>1</sup> or the eating of ice-cream in the public square in Minsk)<sup>2</sup> because of their association with what those regimes deem to be 'extremist.' In such cases, the situation often degenerates into a kind of legal 'whack-a-mole', where activists respond to the censoring of one coded phrase or symbol by replacing it with another.
36. The British Parliament should not place the police or the Courts in a similar position of having to prosecute ostensibly innocuous phrases. Such prosecutions risk creating 'free speech martyrs' of extremists and undermine public confidence in the law. They also encourage the creation and expansion of similar laws in other countries and would hobble the ability of the FCDO and British NGOs to oppose such measures.
37. We support the proposal that the word 'insulting' should be absent from the threshold test in the proposed new offence (**Question 47**). As confirmed by the European Court of Human Rights in

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<sup>1</sup> Stephen McDonnell, 'Why China censors banned Winnie-the-Pooh' *BBC News*, 17 July 2017  
<https://www.bbc.co.uk/news/blogs-china-blog-40627855>

<sup>2</sup> 'Ice-cream eating, strategic smiling, removing balaclavas and hacking state tv: Belarus's brave, funny and inventive protestors' *The Alternative UK*, 3 October 2020  
<https://www.thealternative.org.uk/dailyalternative/2020/10/3/deliberate-smiling-in-belarus>

*Handyside v UK* (1976) 1 EHRR 737, freedom of expression includes the freedom to 'offend, shock or disturb.' Removing such phrases from the criminal law would be in keeping with other recent and proposed reforms, including the amendments to the Public Order Act 1986, s.5(1) and s.6(4) that were made through the Crime and Courts Act 2013 c.22, s.57; and the Law Commission's proposals to update the Communications Act 2003 s.127 offence.

38. English PEN was one of the three organisations that led the Libel Reform Campaign 2009-13, which resulted in the Defamation Act 2013 c.26. However, we are unsure whether the concept of privilege found in defamation law can be easily transposed into the criminal law (**Question 55**). In particular, we note that the concepts of qualified privilege and peer-review are based on the idea that a certain statement loses its 'sting' when subjected to a rejoinder or a rebuttal. 'Qualified privilege' as defined by the Defamation Act 1996 c.31, s.15 requires that a defendant publisher offer a right of reply to a claimant if the defence is to be available. Similar concepts could be applied to the criminal law, but broadcast regulatory codes might be a better place to elucidate such exceptions.
39. Reports that attract 'absolute privilege' in defamation claims (parliamentary proceedings, judicial proceedings etc) could and should be protected under hate speech laws.
40. We would also support protections for peer-reviewed journals. However, we note that nearly seven years after the commencement of the Defamation Act 2013, there have been no defamation cases which turned on the s.6 provisions, and therefore no indication of any potential pitfalls with the law. Section 6(6) disappplies the privilege where the claimant can show malice; an analogous provision in a hypothetical Hate Crime Act would probably be required, to prevent the establishment of a peer-reviewed journal for the precise purpose of disseminating inflammatory material.
41. **Question 51** proposes that 'the current exclusion of words or behaviour used in a dwelling from the stirring up offences should be removed.' We strongly oppose this change, for several reasons.
42. First, hate speech laws have so far been concerned with what takes place in public. Indeed, the current offences are set out in the Public Order Act 1986. Removing the exclusion of 'dwellings' fundamentally changes the nature of the law, from something that regulates public behaviour, to something which also regulates private behaviour. This would be a disproportionate interference with Article 8 and Article 10 rights.
43. Such a change in the law would have a hugely symbolic effect. It would (rightly) attract accusations of illiberalism and allusions to literary dystopias. As such, it will undermine public support for the law.
44. Finally, we are deeply concerned that the removal of a 'dwelling' exception would incentivise police surveillance of private property. We are reminded of how measures introduced in the Regulation of Investigatory Powers Act 2000, intended to enable the security services to combat terrorism and organised crime, were found to have been extensively used by local authorities to gather unrelated information on citizens applying for school places<sup>3</sup> or dropping litter.<sup>4</sup>
45. We note the two reasons why the commission has proposed a change to the 'dwelling' exception. First, because words spoken in private can then be heard/broadcast outside the dwelling (paragraph 18.250). However, when such incidents have occurred in the past, a prosecution has nevertheless been possible, either: under the 'display' conditions already in s.18 of the Public Order Act; under s.21 of the Act; or under alternative offences (for example, Communications Act 2003 s.127).

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<sup>3</sup> Jessica Shepherd, 'Family win school catchment spying case' *The Guardian*, 2 August 2010 <https://www.theguardian.com/education/2010/aug/02/school-catchment-spying>

<sup>4</sup> 'Council 'spying' to be restricted' *BBC News*, 17 April 2009 [http://news.bbc.co.uk/1/hi/uk\\_politics/8003123.stm](http://news.bbc.co.uk/1/hi/uk_politics/8003123.stm)

46. Second, the consultation paper notes that the exception could be exploited by extremist groups to hold what are essentially public meetings, in what is legally a private space such as a large house (paragraph 18.252). This could indeed be described as a 'loophole.' However, we caution against the law deploying overly broad measures to capture certain 'edge cases' within the ambit of an offence. Since the proposed offence polices words and thoughts, and the definitions of 'hate,' 'stirring up,' 'likely to' and 'inflammatory' are all ambiguous, we believe the law should err on the side of freedom of expression in this regard, by providing absolute certainty that speech in a private dwelling lies beyond the reach of hate speech laws.
47. The suggestion that the dwelling exception should be removed prompts questions about what 'success' looks like for hate crime and 'stirring up' offences. Seeking to prosecute hate speech in private spaces suggests that the overall aim is to eradicate or (to use a political sound-bite) 'stamp out' such expression. However, we are sceptical that such a complete victory over hate speech can ever be achieved, and we caution against laws that reach further into people's private lives, in order to deliver ever more marginal gains. The current law efficiently corrals hate speech into private spaces, where far fewer people can listen. This should be considered a success in itself, and going further would be a disproportional infringement on rights.
48. We support the introduction of a 'private conversation' defence as outlined in paragraph 18.252 of the consultation paper.
49. We support the suggestion (**Question 54**) that prosecutions should proceed with the consent of the Director of Public Prosecutions. While the Attorney General is a law officer, they are also an elected political figure. Charging decisions should be made based on the public interest, and not be influenced by political pressure or media outrage.

## **Question 62 — Hate Crime Commissioner**

50. There is merit to this proposal. The consultation paper describes how the existence of a Hate Crime Commissioner might ensure that victims are represented and that prosecutions do take place. However, we think that a commissioner could also fulfil a valuable public role in reducing the chill on freedom of expression, by leading a public discussion about what is and what is not legally considered hate speech.
51. There are two aspects of the current law which contribute to the chill, and which are not easily fixed through legislation. The first is that the limits of words such as 'hate,' 'stirring up,' 'likely to' and 'inflammatory' are all defined (and may continue to be defined) through judicial decisions and guidance developed by the CPS. A dispassionate analysis of the law by a legal expert might conclude that the hate speech laws are proportionate and well balanced. However, such a conclusion would not be known by an individual accused of hate speech, or those at the receiving end of speech that incites hatred.
52. A related problem is that, due to the ambiguous wording of the current laws, and due to the presence of words such as 'insulting' and 'offensive' in the statutes, political activists can report ideological opponents to the police, who are then obliged to investigate. Such investigations are usually perceived as something initiated by an overbearing state, rather than by fellow citizens. Better awareness of the contours of the Public Order Act, perhaps led by a Hate Crimes Commissioner, might debunk misconceptions about the reach of the law.

53. Another role that a Hate Crime Commissioner could take is that of reminding the Government of its wider obligations to tackle hate through methods other than the criminal law (for example, by delivering the long-term educational and cultural interventions mentioned above). The Commissioner might also participate in debates over press and broadcasting regulation, recommending measures that discourage hate speech without engaging the criminal law.
54. Crucially, a Hate Crime Commissioner should be the conduit for evidence of the nature and extent of the harm caused by hate speech. Such evidence, properly collated, can simultaneously justify the measures that curb hate speech, while also making a case that other kinds of challenging expression should be tolerated. A Hate Crime Commissioner could also act as a focal point for engagement, input and appeals from NGOs.