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# Homophobic, Biphobic and Transphobic Hate Crime - Prosecution Guidance

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## Introduction

This guidance sets out the factors to be taken into consideration when reviewing cases and prosecuting offences classified as Homophobic, Biphobic or Transphobic Hate Crime. It deals with crimes committed directly against LGBT people, but it should also, where relevant, be read in the

context of crimes committed where the suspect has mistakenly identified the victim as belonging to or associating with this group.

Prosecutors are reminded to read this guidance with our [Public Statement on Prosecuting Homophobic, Biphobic and Transphobic Hate Crime](#), as it provides greater detail on some of the key areas of policy.

Prosecutors should also familiarise themselves with stirring up hatred on the grounds of sexual orientation, the hate crime material on the Knowledge Hub and the [Hate Crime page on the CPS website](#). The Transgender Equality Management Guidance currently includes guidance on prosecution, community engagement and employment matters.

## Referral of Homophobic, Biphobic and Transphobic hate crime cases to CPS

[The Director's Guidance on Charging](#) requires offences classified as hate crime under CPS policies to be referred to a prosecutor for early consultation and a charging decision, whether admitted by the suspect or not.

## Flagging of homophobic, biphobic and transphobic crime

It is essential that the CPS identifies all those cases that might properly be prosecuted as homophobic, biphobic or transphobic crimes.

All cases referred to the CPS by the police which have been identified as a homophobic, biphobic and transphobic related incident, should be flagged immediately on Compass CMS using the appropriate case monitoring codes. Similarly, if the receiving CPS lawyer perceives that the case involves an element of sexual orientation or transgender identity hostility, the appropriate monitoring code should be added on CMS. The current monitoring flag of "homophobic" should additionally be used for all cases involving hostility or prejudice based on sexual orientation including biphobia or hostility towards any other sexual orientation. The decision to flag can be taken at almost any stage of the process; if not already flagged by the investigating officer, it might be flagged by the reviewing prosecutor, at review stage even up to and including the trial. It is best practice to flag as soon as possible in order to ensure the correct support is made available to the victim and facilitate a proactive investigation of the evidence.

The CPS uses definitions agreed with the National Police Chiefs' Council to identify incidents/crimes which involve an element of hostility on the grounds of sexual orientation or transgender identity and to monitor the decisions and outcomes:

"Any incident/criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a person's sexual orientation or perceived sexual orientation" or

"Any incident/criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender".

Flagging is a subjective question. Flagging a case puts the CPS on notice that someone at some stage has perceived the incident that gave rise to the case had such an element to it of hostility based on sexual orientation or transgender identity or prejudice to it. For a conviction to receive enhanced sentencing in court the police need to provide sufficient evidence to prove the hostility element, however this is not required for flagging purposes. Therefore, whilst not all flagged cases will result in an application for an uplift of sentence under s146 of the Criminal Justice Act 2003, they should still be flagged on CMS.

It is not CPS policy to remove a flag in the absence of sufficient evidence to support a sentence uplift. This in part reflects the commitment to treat hate crime seriously and to support the victim's perception and also to encourage community confidence in reporting all such offending. However, if a flag has been attached to a file due to an administrative error, it will be removed, to support increased data accuracy. Removal of a flag can have serious consequences and advice should be sought from a hate crime specialist or a senior manager before removal.

Some cases may need more than one flag, for example, cases that also involve domestic violence, rape, or racist, religious or disability elements. Accurate flagging of cases is important: it means that CPS can monitor how these cases are handled and can report back to communities on our performance in tackling these types of hate crime.

It is important that the relevant fields on Compass CMS are completed where flagged hate crimes qualify for an enhanced sentence. This enables monitoring of whether or not the prosecutor drew the court's attention to the sentencing provisions, and whether or not the court applied an enhanced sentence.

## Case Building

Prosecutors must adopt a proactive approach to seeking further information from the police to help them to decide if a case can be prosecuted as a homophobic, biphobic or transphobic hate crime and that there is sufficient evidence that should be presented to the court at sentence.

## Case Reviews

If the case passes the evidential stage and it is a case of homophobic, biphobic or transphobic hate crime, or was motivated by discrimination against the victim's sexual orientation or gender identity, it is more likely that a prosecution is required in the public interest: see paragraph 4.12(c) of the [Code for](#)

## Crown Prosecutors.

In cases where s146 may apply, since this provision does not create an offence it is not necessary to consider the aggravating factor when assessing the evidential stage of the Full Code Test.

In every case that has been flagged as a homophobic or transphobic hate crime case, the reviewing prosecutor should fully address:

- how s146 of the Criminal Justice Act 2003 does or does not apply to the circumstances of the case and give reasons for their decision;
- if s146 does not apply, whether there is evidence of the offender targeting an at risk victim because of their sexual orientation or transgender identity (or presumed sexual orientation or presumed transgender identity), or causing greater harm to the person because of this;
- what, if any, special measures are appropriate - to be discussed with witness. See the legal guidance on [Special Measures](#).
- any other support needs. See the legal guidance on [Interpreters](#) and the National Agreement.
- what ancillary order applications may be required. In particular, see the legal guidance on [Restraining Orders - Section 5, Protection from Harassment Act 1997](#) and [Criminal Behaviour Orders](#).

All these issues should be kept under continuous review.

A review of cases involving homophobic, biphobic and transphobic hate crime should consider the following non-exhaustive set of issues:

## Incident

- Was there any use of derogatory language that referred to sexual orientation or transgender identity?
- Was it a sustained attack?
- Did it involve excessive violence?
- Was cruelty, humiliation or degradation involved?
- Was the area in which the incident occurred particularly associated with gay or transgender activity or was it in response to or undertaken at a time coinciding with a social or political meeting such as Pride?

## Perpetrators

- Was hostility based on the victim's sexual orientation or transgender identity (or presumed sexual orientation or transgender identity) demonstrated by the perpetrator?
- Have there been any previous incidents involving the offender and hostility or targeted anti-social behaviour?
- If so, what was the nature and location of previous incidents?
- Have the incidents escalated in severity and frequency?

- Has opportunistic offending become systematic and regular targeting?
- What was the role of any bystanders?
- Were there multiple perpetrators condoning and encouraging, taking photos/videos?
- What evidence is there to suggest this is not a homophobic, biphobic transphobic hate crime?

If satisfied that there is sufficient evidence to prove that the offence is aggravated in by hostility on the grounds of sexual orientation or transgender identity, prosecutors should make it clear to the defence and to the court at the earliest opportunity that they intend to so advise the court for sentencing purposes by using CMS letters to this effect.

## Homophobic, biphobic and transphobic hate crime - the legislation

### S146 Criminal Justice Act 2003

There is no aggravated offence of homophobic, biphobic or transphobic hate crime but [s146 of the Criminal Justice Act 2003](#) imposes a duty upon courts to increase the sentence for any offence committed that involves either:

- the offender demonstrating towards the victim of the offence hostility based on the sexual orientation or transgender identity (or presumed sexual orientation or transgender identity) of the victim; or
- the offence being motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation or who are transgender.

Note that these are alternatives. This means that in a case where a demonstration of hostility can be proved, there is no need also to prove motivation, and vice versa.

### CPS application of s146

A sentence may be increased under s146 in relation to any offence. Much of the harassment experienced by the LGBT community is persistent, low level offending. In order to counter this type of behaviour it is important that s146 uplifts are applied for in all appropriate cases. This approach is intended to ensure that homophobic, biphobic and transphobic hate crime is punished properly and that justice is afforded to all.

### Definition of sexual orientation and transgender identity

The Public Order Act 1986 confirms that "hatred on the grounds of sexual orientation" means hatred against a group of persons defined by reference to sexual orientation whether towards persons of the same sex, the opposite sex or both. This therefore covers hostility towards lesbian, gay, bisexual and heterosexual people.

Trans or transgender are terms for people whose gender identity does not correspond with their birth gender. The terms 'transgender' and 'transgender identity' are used in the hate crime legislation and include references to being transsexual, or undergoing, proposing to undergo, or having undergone a

process or part of a process of gender reassignment.

S146 is also relevant to cases where the offender has assumed a person has made assumptions about a person's presumed sexual orientation or transgender identity, whether or not that assumption is correct.

## Hostility

Hostility is not defined in the Act. Consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.

## Demonstrating hostility

The words of the subsection require an indication by the offender of hostility towards the victim based on sexual orientation or transgender identity. The demonstration of hostility must be nearly contemporaneous to the conduct element of the offence (at the time of the offence or immediately before or after).

The demonstration of hostility is likely, in many cases, to be something different from and additional to the conduct element of the offence. Mere evidence of the commission of the substantive offence against a victim is not sufficient.

## Motivated by hostility

The second limb of section 146 is concerned with the offender's motivation, requiring proof that the substantive offence was wholly or partly motivated by hostility towards persons who are of a particular sexual orientation or who are transgender. Motive can be established by evidence relating to what the defendant may have said or done on other occasions or prior to the current incident.

With reference to interpretation, it should be noted that section 28(1)(b) of the Crime and Disorder Act 1998, which refers to racial hostility, has been held to be wide enough to include hostility towards one member of such a group, since section 6(c) of the Interpretation Act 1978 provides that "words in the plural include the singular" unless the contrary intention appears, and no such contrary intention appears in the provision.

In addition, the circumstances include those where an offence is motivated by hostility towards a third party, based on the relevant characteristic, who is not present: see *Taylor v DPP* [2006] EWHC 1202 (Admin). Accordingly, an offence committed against one person (or many persons) but motivated by hostility towards another person or persons on the basis of their perceived sexual orientation or transgender identity would seem to satisfy the statutory test.

## Case law

The following cases on racially and religiously aggravated offences illustrate the approach that the courts have adopted when interpreting the law:

Evidence of words (spoken or written) or actions that show hostility towards the victim will be required. "Demonstrations" of hostility often involve swear words, for example: "black bastard" (*R v Woods* [2002] EWHC 85) or "African bitch" (*R v White* [2001] EWCA Crim 216). In *RG & LT v DPP* [2004] EWHC 183 May LJ said "It may be possible to demonstrate racial hostility by, for instance, holding up a banner with racially offensive language on it".

In *R v Rogers* (2007) 2 W.L.R. 280, the defendant was involved in an altercation with three Spanish women during the course of which he called them "bloody foreigners" and told them to "go back to your own country". The House of Lords, in upholding the defendant's conviction, held that the definition of a racial group clearly went beyond groups defined by their colour, race, or ethnic origin. It encompassed both nationality (including citizenship) and national origins. The statute intended a broad non-technical approach. Furthermore the victim might be presumed by the offender to be a member of a particular group, even if that was not correct. The House of Lords added that the fact that the offender's hostility was based on other factors in addition to racist hostility or xenophobia was irrelevant. The court also observed that the necessary hostility could be demonstrated by the wearing of swastikas or the singing of certain songs.

The demonstration of hostility need not be based on any malevolence towards the group in question. Disposition at the time is irrelevant: see *DPP v Green* [2004] EWHC 1225 (Admin.) and *R v Woods*, in which it was irrelevant that the offender, who used racially abusive language to a doorman after being refused admission, might well have abused anyone standing in the victim's place by reference to any obvious physical characteristic.

The motivation based on hostility need not be the sole or main motivation for the offence; it may also be motivated by other reasons. In *DPP v McFarlane* [2002] EWHC 485 (Admin), the defendant shouted threatening and racist abuse at the victim after finding the victim parked in a disabled bay in which the defendant was entitled to park. It was immaterial that the defendant may have had an additional reason for uttering the racial words in question.

The victim's reaction to the hostility is not relevant. See *R v Woods*, in which the victim was called a "black bastard" but said in evidence that he was "not bothered" by such comments. The Administrative Court found that the use of racist abuse during the commission of the basic offence made out the test for racial aggravation.

## **Demonstrated: multiple offenders**

Prosecutors will need to analyse carefully the facts of a particular case to determine whether a particular offender can be said to have participated in a demonstration of hostility.

In *R v Davies and Ely* [2004] 2 Cr App R (S) 148 (29), a joint allegation of wounding with intent, the fact that one offender uttered words of racial abuse during the attack did not make all guilty of the aggravated offence, on the facts of the case, and the defendants should not be so sentenced when the evidence did not identify the one who uttered the words.

However, in *RG and LT v DPP* May LJ said that, "an offender may demonstrate racial hostility by joining in the activities of a group of people where a sufficient number of members of the group are themselves demonstrating racial hostility, and where the defendant's adherence to the group is such as to go beyond mere presence within the group, but so as to associate himself or herself with the demonstration of racial hostility which the group as a whole is displaying".

## How to prove an offence was aggravated within the meaning of s146 of the Criminal Justice Act 2003

To assist prosecutors to build cases that will satisfy the criteria for an increased sentence under s146, the elements of each subsection that need to be satisfied are set out below, followed by the evidence that will be necessary or useful to establish those elements.

### A. Demonstrating hostility

The elements to be satisfied are that:

1. The offence to be sentenced has one or more identifiable victims.
2. A victim (or one of them) identifies as having a particular sexual orientation or transgender identity or there is evidence that the offender presumed that he or she was at the time of the offence (whether or not that was in fact correct).
3. The offender, by words or deeds or other indication, demonstrated (i.e. actually manifested or indicated) some hostility towards the victim based on the actual or presumed sexual orientation or transgender identity. Where the offence itself involves some hostile act towards the victim (i.e. an offence of assault) there must additionally be some evidence of a demonstration of hostility on grounds of the actual or perceived sexual orientation or transgender identity of the victim. It need not be proved that the offender was actually motivated by any malevolence on grounds of the sexual orientation or transgender identity of the victim but it must be shown that, viewed objectively, he did in fact make some outward indication of hostility on that ground. Verbal abuse, referring to the presumed sexual orientation or transgender identity, will suffice provided it actually demonstrates hostility towards the victim. Expressions of, or behaviour consistent with, contempt for the individual victim is unlikely alone to suffice, unless it can be shown to amount to the necessary demonstration of hostility based on the actual or presumed sexual orientation of the victim.
4. The demonstration of hostility must have occurred at the time of or immediately before or after the conduct element of the substantive offence.
5. In any case involving multiple offenders, consider first whether there is evidence that each offender, by his behaviour in committing the conduct element of the substantive offence, associated himself with the demonstration of hostility proved (in which case all will be liable for the aggravating feature). If there is no such evidence, can it be shown that the individual offender was himself responsible for the demonstration of hostility relied upon.

The following evidence will be necessary:

1. Evidence of the utterance, doing or showing of any indication of hostility towards the victim. The evidence should be as particular as possible as to the terms of the indication of hostility.
2. Alternatively and/or additionally, evidence that the offender either knew or presumed that the victim identified with a particular sexual orientation or transgender identity.
3. Evidence that the demonstration of hostility relied upon was more or less contemporaneous with the conduct element of the offence, or that it can immediately be related to it in time.

In addition, evidence of some malevolence towards the victim based on his or her actual or presumed sexual orientation or transgender identity, although not necessary, will be useful. This need not necessarily be contemporaneous to the substantive offence.

It should be noted that mere evidence of the commission of the substantive offence against a person identified with a particular sexual orientation or transgender identity will not suffice. That is not to say that it is irrelevant: evidence of the commission of an assault offence or one that involves the use or threat of violence may well be good evidence of the relevant hostility being present or demonstrated. Typically however there will be another explanation for the commission of the offence and so further evidence of a specific, express demonstration of hostility based on presumed or actual sexual orientation or transgender identity will be required.

## **B. Motivated by hostility**

The elements to be satisfied are that:

1. The offender can be shown to harbour a hostility towards a person or persons who are of, or are presumed to be of, a particular sexual orientation or transgender identity.
2. At least one reason why the offender committed the offence was his hostility towards that person or such persons who are or are perceived to be of a particular sexual orientation or transgender identity i.e. his purpose or incentive for committing the substantive offence included that hostility, even if it was also motivated by other reasons. It need not be shown that it was his sole or main motivation.
3. It need not necessarily be the case that the immediate victim of the offence actually identifies as lesbian, gay, bisexual or transgender. Indeed, it is not necessary that there is one, or more than one, individual victim of the offence, provided that the directed hostility is one of the motivations. For example, an offence may be directed at:
  - o A friend or associate
  - o A venue known to be frequented by the LGBT community
  - o An organisation known to support members of the LGBT community

The following evidence will be necessary:

1. Primary evidence, whether direct or circumstantial, from which it can be deduced or inferred that the offender has a hostility towards people (or one person) who are of a particular sexual

orientation or transgender identity. The kind of evidence will vary from case to case but may well include, for instance:

- words, whether contemporaneous or not;
- writings;
- social media postings;
- insignia;
- presence with others promoting such hostility or association with them;
- previous incidents of hostility, e.g. targeting only persons of a particular sexual orientation as the victims of criminal attacks or forms of abuse, such as a bisexual person's house for criminal damage but no other houses in the same street; and
- previous convictions for offences directed at similar victims.

2. Evidence from which it can be inferred that the current offence is motivated by the hostility referred to. In some cases the existence of the hostility and the fact of its contribution to motivation may derive from the same evidence and may be direct and simple: for example, the words accompanying the conduct element of the offence, as reported by the victim, may make clear the hostility of the offender for persons who identify as lesbian, gay, bisexual or transgender and the association of the feeling with the commission of the offence. In other cases a more determined search for such evidence will be necessary.

In cases where the obvious motivation for the commission of the offence is common to all such offending (theft, robbery, sexual offending, drugs offending, etc.) there will have to be discrete, additional evidence of motivation which displaces the obvious inference.

In cases where the offence charged usually has a fact specific motive (public order offences directed at individuals, offences against the person, etc.), it may be that the primary evidence readily gives rise to the conclusion that the hostility is based on sexual orientation or transgender identity. If not, some further, secondary evidence of motive will be necessary.

## **Stirring up hatred on the grounds of sexual orientation**

Part 3A of the Public Order Act 1986 ('the 1986 Act') was amended in 2010 so as to create offences of intentionally stirring up hatred on the grounds of sexual orientation.

The offence deals with conduct (either words or behaviour) or material which is threatening in nature, and which is intended to stir up hatred against a group of people who are defined by reference to sexual orientation. By contrast, the racial hatred offences cover a wider range of conduct or material including that which is threatening, abusive or insulting, and which is intended or likely to stir up hatred.

The term 'hatred on the grounds of sexual orientation' is defined in the new section 29AB of the 1986 Act and is expressly limited to orientation towards persons of the same sex, the opposite sex or both. It does not extend to orientation based on, for example, a preference for particular sexual acts or

preferences.

The offence is committed if a person uses threatening words or behaviour, or displays any written material, which is threatening, if he intends thereby to stir up hatred on the grounds of sexual orientation. Threatening is the operative word, not abusive or insulting. Possession, publication or distribution of inflammatory material is also an offence.

The offence can be committed in a public or private place, but not within a dwelling, unless the offending words and behaviour were heard outside the dwelling, and were intended to be heard.

The defendant must intend to stir up hatred on the grounds of sexual orientation; recklessness is not enough; and the behaviour must be threatening. So using abusive or insulting behaviour intended to stir up hatred on the grounds of sexual orientation does not constitute an offence, nor does using threatening words likely to stir up hatred on the grounds of sexual orientation.

Conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet the requisite threshold required by the Act, i.e. hatred. So, for example, the offences do not, and are not intended to extend per se to childish name calling, or the telling of jokes, or the preaching of religious doctrine, unless those activities are threatening or intended to stir up hatred.

This is reinforced by the freedom of expression defence contained in section 29JA, which confirms that "for the avoidance of doubt, the discussion or criticism of sexual conduct or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening".

In deciding upon the public interest of charging these offences it is essential that we keep in mind that in a free, democratic and tolerant society people are able to robustly exchange views, even when these may cause offence. However, we have to balance the rights of the individual to freedom of expression against the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime, and to protect the rights of others.

All such allegations are by their very nature sensitive. For that reason, and to ensure a consistent approach, any allegation under this legislation must be referred to the Counter Terrorism Unit in the Special Crime and Counter Terrorism Division. Referral means the submission of a report by the Area to enable SCCTD and the Area to have an informed discussion about where the responsibility for the case should lie.

When an Area becomes aware of such a case, it should be referred to SCCTD within seven days. If it is decided that the case should be prosecuted as an offence of stirring up hatred on the grounds of sexual orientation, SCCTD will take over the conduct of the case from the Area. If SCCTD considers that it is clearly a case where stirring up hatred on the grounds of sexual orientation does not apply, the case should be returned to the Area within seven days of that decision being made.

If SCCTD decides to deal with a case, the file is held there and dealt with there. Thereafter, cases can only proceed with the consent of the Attorney General.

## Gender Recognition Act 2004 and Hate Crime

The Gender Recognition Act 2004 (GRA 2004) provides for the legal recognition of the trans person in their acquired gender and the opportunity to acquire a new birth certificate for their new gender. The GRA 2004 also protects those who have received or who are in the process of receiving a Gender Recognition Certificate from having this information revealed without their consent.

Under section 22 GRA 2004, it is an offence for a person who has acquired "protected information" in an "official capacity" to disclose the information to any other person.

That "protected information" includes information regarding the application process itself, whether it has been applied for, started or concluded OR, if a Gender Recognition Certificate has been granted, the gender status of the individual before his or her acquired gender.

"Official capacity" relates to a person's functions as a civil servant, constable, holder of public office or in connection with the functions of a local or public authority of a voluntary organisation.

It also includes those functions as an employer or prospective employer or in the conduct of business or the supply of professional services.

It is not an offence to disclose protected information relating to a person in circumstances set out in statute and including:

- the information does not enable that person to be identified;
- that person has agreed to the disclosure of the information;
- the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued;
- the disclosure is in accordance with an order of a court or tribunal;
- the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal;
- the disclosure is for the purpose of preventing or investigating crime; and
- the disclosure is made for the purposes of the social security system or a pension scheme.

The police and CPS have agreed to treat unauthorised breaches under s22 GRA 2004 as potential hate crimes if the alleged victim or any other person perceives them as such. Under the Director's Guidance, all hate crime cases where the police decide there are sufficient grounds for a prosecution must be referred to the CPS for a charging decision.

Flagging all such appropriate instances as transphobic hate crime will increase the likelihood of such cases being reported to the CPS for consideration of charges.

This guidance is supplemental to the Director's Guidance on Charging. Cases should not be charged by the police or referred to prosecutors unless it is considered the full Code test can be met or unless the making of a charging decision in accordance with the Threshold Test is justified.

In order to monitor these cases, prosecutors should notify Operations Directorate of any referrals made by police for prosecution under s.22 of the GRA 2004. All cases should be notified to [HateCrime.policy@cps.gsi.gov.uk](mailto:HateCrime.policy@cps.gsi.gov.uk).

## Victim and Witness Issues

To ensure that 'vulnerable' and 'intimidated' witnesses have access to the support they need, it is important for prosecutors to be familiar with [CPS Legal Guidance in relation to the Victims' Code](#) and with legal guidance on [Special Measures](#).

The use of [Victim Personal Statements](#) should be encouraged in all hate crime prosecutions and requests should be made to the police at the earliest opportunity. A [Community Impact Statement](#) (CIS) may also be made to show the impact of offending on the wider community. For more information, please see the [CPS guidelines on the use of CIS in hate crime cases](#).

Victims of hate crime are entitled to an enhanced service under the [Victims' Code](#) and in the event of a decision to end the case or to substantially alter charges, the victim must be notified of the reasons within one day. The victim should also be advised how they can access further information from the CPS and seek a review of the decision.

A meeting must be offered to the victim in hate crime cases in accordance with the Victims' Code. The meeting could be a dedicated teleconference or a face-to-face meeting.

A meeting is not required when the CPS makes a decision not to prosecute during a charging consultation save for in homicide cases.

Prosecutors should note that there may be additional sensitivities when contacting members of the LGBT communities: for example, the individual(s) concerned may not be out to their family, relatives or friends. In addition, the person affected may be in a heterosexual relationship.

Care should be taken to ensure that any telephone call or correspondence is carried out with the person(s) concerned. Talking the issues through with the police, an experienced lawyer, the CPS Area Hate Crime Co-ordinator and/or contacting the CPS LGBT Network could provide useful information about how best to approach victims in these instances.

To ensure that 'vulnerable' and 'intimidated' witnesses have access to the support they need, it is important for prosecutors to be familiar with CPS Operational Guidance in relation to the Victims' Code and with legal guidance on Special Measures.

The use of Victim Personal Statements should be encouraged in all hate crime prosecutions and requests should be made to the police at the earliest opportunity. A Community Impact Statement may also be made to show the impact of offending on the wider community, including the disabled community.

Victims of hate crime are entitled to an enhanced service under the Victims Code and in the event of a decision to end the case or to substantially alter charges, the victim must be notified of the reasons within one day. The victim should also be advised how they can access further information from the CPS and seek a review of the decision.

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Care should be taken to ensure that any telephone call or correspondence is carried out with the person(s) concerned. Talking the issues through with the police, an experienced lawyer, the CPS Area Hate Crime Co-ordinator and/or contacting the CPS LGBT Network could provide useful information about how best to approach victims in these instances.

## Appropriate language

In all dealings with cases involving a homophobic, biphobic or transphobic element whether in writing, in verbal communication or at court, it is essential that prosecutors adopt a style of address or reference that demonstrates respect for the sexual orientation, gender identity and lifestyle of the individuals concerned. When dealing with members of the LGBT communities, prosecutors should avoid making stereotypical assumptions, either about the way in which they lead their lives or about how they wish to be addressed.

If there is in any doubt about how to refer to the sexual orientation or gender of the victim or witness, the person concerned should be asked how they wish to be addressed.

## Withdrawal

In cases with a homophobic, biphobic or transphobic element - as in all cases - the reviewing prosecutor must apply the Code for Crown Prosecutors with regard to the determination of the public interest. The CPS prosecutes on behalf of the public at large and not just in the interest of any

particular individual. However, when considering the public interest, prosecutors should always take into account the consequences for the victim of the decision whether or not to prosecute, and any views expressed by the victim.

Many members of LGBT communities do not report homophobic, biphobic and transphobic crime to the police because of a lack of confidence in the criminal justice system. When offences are eventually reported, previous failures to report should not be seen as diminishing a witness's credibility. In cases where the victim or witness has reported a case to the police, the defendant has been charged, and the victim or witness then decides that they no longer wish to give evidence, it is essential that the police are asked to make full enquiries into why support for the prosecution has been withdrawn. The CPS must:

- ask the police to take a written statement from the victim explaining the reasons for that withdrawal, confirming whether the original complaint was true and identifying whether the victim has been put under any pressure to withdraw support;
- ask the police to give their views and, where appropriate consult the Area Hate Crime Co-ordinator.

The [College of Policing Hate Crime Operational Guidance \(2014\)](#) contains guidance on the information the police should provide to the CPS to accompany a withdrawal statement.

As a result of receiving the withdrawal statement and accompanying police report, prosecutors may need to consider whether further charges, for example, witness intimidation or harassment are appropriate. It may also be appropriate to ask the police to offer the victim the services of a specialist support agency if this has not already been done.

The prosecutor should also liaise closely with the Witness Care Officer to establish what support has been provided to the victim and to establish whether it would be appropriate to offer the victim the services of a specialist support agency if this has not already been done. The prosecutor must also have regard to any special measures that may help the victim or witness to give evidence.

In cases involving transgender victims or witnesses, prosecutors should be sensitive to the risk of inadvertent disclosure of previous gender identity. Whilst court procedures are protected under the Gender Recognition Act 2004, it is good practice to ensure that when attending court the witness is treated according to their affirmed gender role e.g. in terms of address, access to appropriate toilet facilities, personal searches by officers of the same gender.

If a witness, including police officers, has transitioned since the alleged crime took place, it is possible that the defendant will not recognise the witness. In such circumstances, the CPS should seek agreement with the defence legal team, court staff and the judge or magistrates regarding how this is handled. The established practice of the court is that where disclosure of birth sex is not essential it should be omitted, therefore it should be possible to accept the person's presenting gender expression for nearly all court purposes.

## Continuing a case where the victim indicates a withdrawal of support

If a special measures application is not possible or the victim remains unwilling to give evidence, consideration must be given to whether any of the following options is possible and appropriate:

- proceeding without using the victim's evidence; for example, by relying on statements from other witnesses, 999 call recordings, admissions in interview, CCTV evidence, scientific evidence, photographs and officers' statements
- making a hearsay application under section 116 of the Criminal Justice Act 2003;
- compelling the victim to give evidence; or
- discontinuing as a result of the victim withdrawing support for the prosecution.

In addition to the evidence of the nature and seriousness of the offence, background information is crucial in helping a prosecutor to make the correct decision about how to proceed in a case where the victim has withdrawn their support for the prosecution. Some factors that should be considered include:

- the ability of the victim to give evidence;
- whether there is an on-going relationship between the victim and the defendant;
- if there is an on-going relationship, the history of that relationship and any previous incidents;
- the likelihood of the defendant offending again;
- the impact on the victim of proceeding or not proceeding with the case; and
- whether there have been any threats made since the incident.

## Witness Summons

Section 169 of the Serious Organised Crime and Police Act 2005 allows the court to issue a witness summons if it considers it to be in the interests of justice to do so.

Before taking a decision to issue a summons to require the victim to give evidence, prosecutors must make enquiries to satisfy themselves as far as possible that the safety of the victim will not be endangered by their decision. The safety of the victim is a prime consideration.

If the reason for a victim or witness's withdrawal is based on fear or intimidation, the prosecutor needs to have such evidence brought to their attention. This will allow appropriate decisions to be made about any applications under section 116(2)(e) of the Criminal Justice Act 2003. Such applications are only likely to succeed where there is other evidence to put before the court. Section 116 applications are often unsuccessful when the victim is the only witness to the offence, because in such cases it is very difficult to satisfy the court that justice is being served when the defence cannot cross-examine the only witness against them.

If there is insufficient evidence to continue without the evidence of the witness or victim, the reviewing prosecutor will need to weigh up whether the facts of the case are sufficiently serious to require the victim or witness to attend court under a witness summons. The final decision is that of the

prosecutor, but the decision to compel a witness to give evidence may be construed negatively, so every attempt should be made to regain the victim's or witness's support for the prosecution wherever possible.

## Major and minor offending - homophobic, biphobic and transphobic

Reluctance to engage with the CJS can centre on the concerns that an LGBT person may have about the way in which their conduct will be regarded by the police and the CPS. The victim of, or a witness to, a homophobic or transphobic incident may believe that they will become the subject of a police investigation and then a CPS prosecution because of where they were when the incident occurred; because of whom they were with; or because of what they were doing at the time.

The general position of the CPS is that it is more important to prosecute the perpetrator of a more serious crime than someone who may have committed a more minor crime where the former is connected to the latter

Although the CPS cannot guarantee that people who commit offences will not be prosecuted, we will consider such offences in the context of what else occurred, such as a more serious crime.

## Accepting pleas

It is CPS policy not to accept pleas to lesser offences, or a lesser basis of plea, or omit or minimise admissible evidence of sexual orientation or transgender hostility for the sake of expediency.

Where it is thought appropriate to accept a plea, full regard should be had to the [Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise](#).

## Sentencing

### Statutory sentencing duty

The law imposes a general duty on criminal courts, when sentencing an offender, to treat more seriously any offence which can be shown to be aggravated by hostility towards sexual orientation or transgender identity (Section 146 Criminal Justice Act 2003).

Prosecutors have a duty to present all relevant material to allow the court to pass sentence in accordance with the law. Hostility towards sexual orientation or transgender identity makes an offence more serious and the court has a duty to take this into account when it sentences a defendant.

Where the evidence to support s146 has been identified, instructions to the prosecuting advocate should include a request that an application for an uplift be made, with the basis for this clearly set out.

There is no procedure laid down by which the court is to determine whether a s146 uplift should be applied.

If there is a trial, although not an element of the substantive offence, ideally the issues will at least have been canvassed during the evidence, so that the defendant has an opportunity to deal with them. Care should be taken not to use this as an excuse to introduce evidence that is otherwise strictly inadmissible to prove the elements of the offence, if it has no relevance to the matter in issue in the trial.

Following conviction, whether after a trial or on a plea of guilty, the issue should form part of the presentation of the case on sentence. Any basis of plea should be scrutinised before acceptance, to ensure that the issue is either accepted or not denied. In most cases involving a plea, defendants are unlikely to accept that s146 applies to their case. See the [Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise](#) for the principles to be followed when considering the acceptance of a plea.

In the event of a dispute, the burden of proving the elements of either limb of s146 is on the prosecution and the standard is the criminal one. Case law on racially aggravated offences confirms that the judge should not draw an inference that the offence was so aggravated and pass sentence on that basis without putting the defendant on notice and allowing him to challenge the inference: see *R v Lester* 63 Cr App R (S) 29.

A Newton hearing may well be necessary. See the legal guidance on [Newton Hearings](#) for the procedure to be followed.

After hearing the relevant evidence, the court should state in open court whether the aggravating feature has been found proved: see s146(3). If it is not found proved, s146 will not apply and the court will proceed to sentence accordingly. If the aggravating feature is found proved, s146(3) will apply and any sentence that the court would have imposed for the "basic" offence should be increased accordingly.

Prosecutors should be familiar with the approach that courts take to sentencing in a case to which s146 applies. This is set out in the section on Hate Crime in the [Magistrates' Court Sentencing Guidelines](#).

The Guideline mirrors the guidance given in *R v Kelly & Donnelly* [2001] 2 Cr App R (S) 73 CA, which addressed the appropriate increase in sentence for racial aggravation and endorsed the following approach:

- the court should first decide on the appropriate sentence without the element of racial or religious aggravation, but including any other aggravating or mitigating features;
- the sentence should then be enhanced to take account of the relevant hostility
- if the offence itself merits custody, that sentence should be enhanced by an appropriate amount to reflect the degree of the relevant hostility;
- the judge should say publicly what the appropriate sentence would have been without the relevant aggravating feature.

Although the original guidance applied to offences charged as specifically racially aggravated offences and to all other offences where s145 Criminal Justice Act 2003 applies, it should also be taken as applying to the sentence provisions of section 146 in relation to sexual orientation and transgender identity hostility.

Prosecutors should be aware of other guideline cases relating to racially aggravated offences that can apply to hostility on the grounds of sexual orientation and transgender identity, such as:

In *R v Fitzgerald* [2003] EWCA Crim 2875 the Court of Appeal acknowledged the guidance contained in *Kelly and Donnelly* but distinguished it by noting there will be cases in which the aggravating feature of the offence is so inherent and integral to the offence itself that it is not possible sensibly to assess the overall criminality involved in such a discrete way. In such cases, the Court must assess the seriousness of the conduct involved and its criminality as a whole.

The position was further considered in *R v Higgins* [2009] EWCA Crim 708. The Court of Appeal reaffirmed the *Kelly and Donnelly* approach and noted this was now adopted by the Sentencing Guidelines for assault cases.

The court should always be invited to apply the staged approach that the Court of Appeal and the Sentencing Council recommend unless it is a rare case that relies on verbal abuse alone and where there are no abusive words other than the hate words the court should be invited to record and state in open court why it cannot follow the staged approach and prosecutors should ensure those comments are recorded. Note that under the Assault Guideline, the s146 statutory aggravating factor should be taken into consideration at step 1 (determining the offence category). There must be no subsequent element of double counting.

Prosecutors should also be aware of the courts' powers to make any ancillary orders when sentencing. For more information, see the legal guidance on [Sentencing - Ancillary Orders](#).

## Unduly lenient sentences

It is possible that a crime that has been sentenced as a homophobic, biphobic or transphobic hate crime may become the subject of an unduly lenient sentence referral (for example, wounding with intent, rape and robbery).

For further information see the legal guidance on [Unduly Lenient Sentences](#).

## Schedule 21 - Criminal Justice Act 2003 (determination of minimum term in relation to mandatory life sentence)

Schedule 21, paragraph 5(2)(g), provides for a starting point of 30 years (rather than 15 years) for the minimum term for a life sentence for murder aggravated on the grounds of the victim's sexual orientation or transgender identity. S146 uplifts will not apply in such cases. For more information, see the legal guidance on [Homicide: Murder and Manslaughter](#).

# Hate Crime Co-ordinators

Area Hate Crime Co-ordinators are available to assist prosecutors on a range of hate crime related issues.

## The Code for Crown Prosecutors

The Code for Crown Prosecutors is a public document, issued by the Director of Public Prosecutions that sets out the general principles Crown Prosecutors should follow when they make decisions on cases.

[Continue reading](#)

## Prosecution guidance

This guidance assists our prosecutors when they are making decisions about cases. It is regularly updated to reflect changes in law and practice.

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

## Related Pages

### Hate crime

The term 'hate crime' can be used to describe a range of criminal behaviour where the perpetrator is motivated by hostility or demonstrates hostility towards the victim's disability, race, religion, sexual orientation or transgender identity.

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