I am grateful for the opportunity to provide evidence to this important inquiry. There are 2 aspects of the Law Commission's recent work which may be of interest to the Committee: (1) the findings of a detailed review into hate crime offences completed in 2014 (Law Com No. 348), and our recommendations for its improvement; (2) our current examination of whether a review into the law in relation to offensive online communication should form part of the next Programme of law reform to commence in 2017.

Summary of Evidence

- The Law Commission’s 2014 report on hate crime noted that not all of the protected characteristics are protected equally by the law relating to hate crimes.
- In our report, we made specific recommendations with regard to enhanced sentencing and aggravated offences in particular.
- The upcoming 13th Programme of Law Reform may feature a project on reforming the law relating to offensive online communications.
- We have suggested a review of the law in this area, on the basis that the current statutory regime is unclear and the increasing problems with online abuse and “trolling”.

Reforming the law on hate crime

1.1 The Law Commission is an independent arm’s-length body with a statutory obligation to keep the law under review and to recommend reform where it is needed. The aim of the Law Commission is to ensure that the law is fair, modern, simple and cost effective. In 2013/14, in pursuance of these aims, and at the request of the Ministry of Justice, the Commission conducted a thorough review of the law relating to hate crime, and made recommendations for reform in a report published in May 2014, “Hate Crime: Should the Existing Offences Be Extended?”.


1.3 The full report and other related documents are available from the project page on our website: [http://www.lawcom.gov.uk/project/hate-crime/](http://www.lawcom.gov.uk/project/hate-crime/).

Our project

1.4 The terms of reference for the Commission’s project were to examine the case for extending the aggravated offences in the Crime and Disorder Act 1998 and stirring up offences in the Public Order Act 1986 to apply equally to the five protected characteristics of hate crime: disability, gender identity, race, religion and sexual orientation.

1.5 The police and Crown Prosecution Service record a crime as a hate crime if the victim or anyone else believes it was motivated by hostility based on one of the victim’s personal characteristics, if that personal characteristic was one of the protected characteristics. That approach to recording is much broader than the approach to protection offered in the substantive criminal law.
1.6 Not all of the characteristics are currently offered the same levels of protection by the criminal law:

1) Race and religion: aggravated offences contained in the Crime and Disorder Act 1998 (as amended) allow perpetrators of certain “basic” offences, such as assault and harassment, to be charged with an aggravated form of the offence if they (objectively) demonstrated or were (subjectively) motivated by hostility on the basis of race or religion. The aggravated offences carry longer maximum sentences than the underlying or “basic” offences to which they relate. In our project, we examined the case for extending these aggravating factors to include situations where in the course of the basic offence the defendant demonstrated or was motivated by hostility on the grounds of disability, sexual orientation or gender identity.

2) Race, religion and sexual orientation: offences of stirring up hatred contained in the Public Order Act 1986 (as amended) prohibit certain types of conduct (such as publication, broadcasts etc) intended or likely to stir up hatred on grounds of race, religion and sexual orientation, but not disability or gender identity. We examined the case for extending these offences to include stirring up hatred on the grounds of disability or gender identity.

Enhanced sentencing

1.7 We also critically examined the current “enhanced sentencing” regime. Under sections 145-146 Criminal Justice Act 2003, where an offence has been committed and the defendant demonstrated, or was motivated by, hostility on the grounds of any of the five protected characteristics, this is treated as an aggravating factor at sentencing. This already applies to all five characteristics and involves similar elements to the aggravated offences.

Our main recommendations

Enhanced sentencing

1.8 The enhanced sentencing system is a potentially powerful weapon in the fight against hate crime. Its communicative power lies in the requirement that the judge declares in open court that the offender’s sentence has been increased because the hostility element has made the offence more serious. But this important power is being under-used, and no adequate record is made of cases where it has been applied. If reformed, it could be an effective response to crimes involving hostility based on transgender identity, sexual orientation and disability.

1.9 We recommend two reforms that we believe will help the system of enhanced sentencing achieve its full potential:

1) new guidance from the Sentencing Council on the sentencing approach in hate crime cases; and

2) recording its use on the Police National Computer (PNC), so that the offender’s criminal record shows that fact for any offence which was found to have been aggravated by hostility.

1.10 We recommended that these reforms should be introduced whether or not aggravated offences are extended.
The aggravated offences

1.11 The current scheme treats hostility against race and religion differently from that against disability, sexual orientation or transgender. That inequality would have been a sufficiently strong reason to recommend the immediate extension of the aggravated offences, were it not for the fact that the present scheme of offences is unnecessarily complex in its form and operation.

1.12 Several consultees raised concerns about problems with the aggravated offences as they currently exist.

1.13 One particular concern was whether the basic offences to which the aggravated scheme applies may not be the most appropriate ones. Those concerns would apply equally if not more strongly if the offences were extended to include transgender identity, sexual orientation and disability. If the offences were to be extended, some amendment would need to be made to ensure the “basic” offences listed were suitable for tackling hate crime against disabled, LGB and transgender people. As our terms of reference only allowed us to consider extending the offences in their current form, we could not look at these questions in this project.

1.14 Consultees also raised concerns that the extension to include these characteristics – disability, gender identity and sexual orientation - did not resolve the broader question: who decides and on what principled basis which personal characteristics ought to be given this enhanced protection of the criminal law. Why should sub cultures such as Goths or punks, or other sections of society such as older people not also qualify? Again, our terms of reference did not permit consideration of these broader fundamental issues.

1.15 As a result, we recommended that prior to any extension of the offences, a full-scale review of their operation should occur. Such a review should examine all the available data to establish whether such offences – and the enhanced sentencing system – should be retained in their current form or amended.

1.16 If our recommendation for a wider review is not supported by the Government, we recommend in the alternative that the aggravated offences be extended to disability, sexual orientation and transgender identity.

The stirring up offences

1.17 Although we consider there would be a case in principle for creating new offences of stirring up hatred on grounds of disability or transgender identity, we were not persuaded of the practical need to do so. The consultation produced no clear evidence of conduct or material intended or likely to stir up hatred on grounds of transgender identity or disability.

1.18 New offences of stirring up hatred on the grounds of disability and transgender identity would rarely, if ever, be prosecuted, and their communicative or deterrent would therefore be negligible. Criminalisation might also inhibit discussion of disability and transgender issues and of social attitudes relating to them.

1.19 The instances referred to us by consultees were more suitably dealt with as offences of assisting or encouraging a criminal offence (capable of being prosecuted under Part 2 of the Serious Crime Act 2007) because they involved people being encouraged to commit crimes rather than being encouraged to hate.

1.20 For these reasons we do not recommend extending these offences.
Offensive online communications

2.1 The Law Commission has identified the law relating to offensive online communications as an area for potential reform as part of our next programme of work: the 13th Programme of Law Reform.

2.2 The Law Commission’s statutory duty under the Law Commissions Act 1965 includes a duty to prepare and submit periodic programmes of potential law reform to the Lord Chancellor. The 13th Programme of Law Reform will be laid before the Lord Chancellor and Parliament in July 2017. We are currently consulting on which projects should be included in the 13th Programme. As part of the consultation process, we have suggested a number of prospective projects. One of these, which seeks to build further upon our past work on hate crimes, is reforming the law on offensive online communications.

2.3 At present, in England and Wales, the criminal law seeks to tackle offensive internet communications through a number of legislative provisions, many of which precede the digital age and vast growth in the use of social media.

2.4 For example, Part 1 of the Malicious Communications Act 1988 makes it an offence to send a communication which is “indecent or grossly offensive” with the intention of causing “distress or anxiety”; and section 127 of the Communications Act 2003 applies to threats and statements known to be false, but also contains areas of overlap with the 1988 Act. 1209 people were convicted under section 127 in 2014, (compared to 143 people in 2004). Part 1 of the Malicious Communications Act saw a ten-fold increase in the number of convictions over the same period.

2.5 The Crown Prosecution Service issued charging guidelines in 2013 following a string of high profile prosecutions after the case of *Chambers v DPP* [2012] EWHC 2157 (QB) (where the High Court overturned a conviction for posting a joke threatening to blow up Robin Hood Airport). The CPS guidelines urged restraint in consideration of freedom of expression. Guidelines are, however, no substitute for clearer statutory provisions.

2.6 In their evidence to the House of Lords Communications Committee in 2014, free speech advocates Article 19 raised concerns about the ambiguity. They highlighted the confusion surrounding the broad definition of “grossly offensive” in the 1988 and 2003 Acts, which may fall foul of the principle of legal certainty. This confusion is increased by the scarcity of developed legal argument available owing to the frequency of guilty pleas in cases of this nature.

2.7 Two recent cases, which saw offenders boasting on Facebook after receiving suspended sentences, have raised further questions regarding whether the current law is fit for purpose. In both cases the suspended sentences were revoked in favour of custody, yet there is a lack of clarity regarding the underlying criminal offences.1

2.8 In addition to the 1988 and 2003 Acts, online abuse may be caught by several other provisions. The scope and inter-relationship between these provisions (covering, among other things, harassment, public order offences and revenge porn) is unclear. There is a clear public interest in tackling online abuse and “trolling”, but this must be done through clear and predictable legal provisions.

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2.9 The Law Commission envisions a potential project considering whether the current law is capable of dealing with offensive internet communications, and whether there is scope for simplifying the law in this difficult area. We are currently seeking consultees’ views on such a project, and whether they think they should form part of our work over the next few years.

Further evidence

3.1 The Law Commission is at the disposal of the Home Affairs Committee if any further evidence we could provide would be of assistance to the inquiry.

Written evidence submitted by Professor David Ormerod QC on behalf of the Law Commission of England and Wales.