PUBLIC POLICY STATEMENT ON THE PROSECUTION OF OFFENCES INVOLVING HOSTILITY ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY

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1. Does the section on "CPS policy" address the key issues in prosecuting homophobic, biphobic and transphobic crime?
Under the criminal law, the offender's motivation is a crucial element when considering the seriousness of a crime. As motive, as expressed by mens rea (the mental element of a crime), is so important, many criminal statues provide harsher penalties where the criminal intent is malicious. Additionally, sentencing guidelines are in place throughout the law. These allow judges to consider the offender's intention as a factor when determining the type and length of the sentence. The discretion afforded to judges by the sentencing guidelines provides them with a sphere of autonomy in arriving at their sentence. It also promotes fairness, by providing an optimum balance between settled standards and the facts of the case. Through the different degrees of criminal classification of crimes, along with discretion in sentencing guidelines, judges are already equipped to punish crimes where the intent is malicious. Therefore, while motive does matter and malicious intent is something that should, and must, be punished by the law, the concept of adding an additional "hate" element is superfluous. It is also costly as it absorbs unnecessary judicial and police resources, and further strains a criminal system which is already at capacity. Finally, the CPS's approach is overly limiting, and effectively privileges those with protected characteristics over those without.

2. Does the section on "Crimes involving hostility towards sexual orientation and gender identity" clearly set out the key definitions and law relevant to the prosecution of these crimes?
The Rule of Law requires power to be exercised within a constraining framework of well-established public norms, rather than in an arbitrary, ad hoc, or purely discretionary manner based on a law enforcer's own preferences or ideology. For this to be possible, each law must be formulated with sufficient precision to enable the individual to understand the remit of the law, to regulate his conduct accordingly, and to be protected from arbitrary state interference. This was affirmed by the court in *Hasan and Chaush v Bulgaria (2002)* 34 EHRR 55: *"For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity*

the scope of any such discretion conferred on the competent authorities and the manner of its exercise."

These principles were reiterated by Lord Hope in *Purdy v DPP* [2009]: *"The word "law"…implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable…The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail."*

It is clear that the CPS' policy falls short of these requirements.

The CPS fail to acknowledge what constitutes 'stirring up hatred'. Words such as 'threatening', 'abusive' and 'insulting' are said to amount to 'stirring up hatred', yet there is no indication of when an individual's conduct will reach this level. Furthermore such a reading goes against decades of case-law which protects expression which is said to be shocking, offensive and disturbing. Precisely stated, the concepts are not defined clearly, and no examples are provided to indicate what amounts to 'threatening', 'abusive' or 'insulting' behaviour. Indeed, the word 'insulting' was removed from the public Order Act 1986 because of the inability of the Police to apply the law sensibly on 1st February 2014. The law thus fails the foreseeability test, as it is unclear what conduct will incur criminal liability.

The explanation also fails to indicate who judges whether the message is 'threatening', 'abusive', or 'insulting' – the victim, or an objective observer. These definitional problems render the law arbitrary and less predictable, and they pave the way for unfettered, coercive power to be exercised to restrict the individual's freedom of expression.

By way of comparison to the protected characteristic of religion, it is also contrary to Section 29J of the Public Order Act 1986, which provides that the rules on public order must not be applied *"in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".*

The CPS' policy also conflicts with numerous high-profile ECHR and domestic cases. It is our experience that the Public Order Laws have been misapplied to prosecute Christians seeking to exercise their freedom of speech, very often when engaged in 'street preaching'. We have appended a summary of a number of recent cases which have infringed upon Christians' freedom of Speech that we have assisted with. We would ask you to note the following ECHR and domestic jurisprudence:

In *Klein v Slovakia*, the crucifix was defamed by its sexualisation in an advertisement for the Milos Forman film 'The People vs Larry Flint'. When the leading Slovakian Archbishop objected to this use of the crucifix in an advertisement, he was subjected to vitriol from Mr Klein in an article, which accused him of sleeping with his mother, possible homosexual or bi-sexual tendencies and of being a spy for the former Communist regime. Mr. Klien was subsequently successfully sued for the remarks by two Slovakian family associations. The ECtHR held that insufficient reason had been shown which justified limiting Mr Klien's freedom of expression. The restriction therefore failed to answer any pressing social need and could not be considered necessary in a democratic society.

In *Gunduz v Turkey*, Mr. Gündüz, a self-proclaimed member of an Islamist sect, made very critical statements on Turkish television concerning democracy. He described contemporary secular institutions as "impious" and openly called for Sharia law. Criminal

proceedings were instituted against him, on the grounds that his speech had incited people to hatred and hostility. The ECtHR held that this interference by the Turkish authorities with the applicant's right to freedom of expression violated Article 10 of the Convention. The Court emphasised that Article 10 of the Convention also protects information and ideas that shock, offend and disturb. It further underlined that merely defending sharia law, without calling for the use of violence to establish it, cannot be regarded as "hate speech". Finally, in *Percy v DPP* (2001) JP 166 93 the Divisional Court gave primacy to freedom of expression in relation to the purposive insulting act of burning a United States flag in front of serving US military personal. The presumption in favour of freedom of expression meant that the fact that a message could be delivered in a less insulting way was not conclusive and the conviction breached Article 10.

3. Does the section on "Communities affected by hate crime" clearly set out the CPS understanding of the individuals and communities affected?

A slippery slope exists in criminalising acts against persons of certain protected characteristics, as this may lead to things traditionally left to civil law to in the future being punished under the criminal law as being hateful. The criminal law should not be used as a tool to further social policy changes or societal values. The future of democracy depends on respecting difference, and thus rather than suppressing unpopular views, the state must respect the individual conscience.

With this in mind, the CPS' limited understanding of the individuals and communities affected by the hate crime policy is noteworthy. Whilst a small minority of the public experience gender confusion or same-sex attraction, the legislation would significantly affect a much larger portion of the population. By focusing heavily on prosecuting 'homophobic, biphobic and transphobic' hate crime, the CPS fail to acknowledge the detrimental incursion on vital freedoms, as well as the interests of numerous societal groups.

For example, free speech is vitally important, as it is an expression of the equality and dignity given to all people. Yet by undermining the importance placed on freedom of speech, the CPS's policy is likely to oppress Christians and compromise the delivery of vital services. It would further disadvantage Christians working in the public square. The comments made by Magistrate Richard Page, for example, who expressed the view during a closed-door consultation with colleagues that his legal duty to act in the best interests of the child meant that he could not agree with placing the child with a same-sex couple, would likely render him guilty under hate crime laws. The conclusion is that the law is protecting a right not to be offended by the refusal of services. This is both a denial of individual freedom and against the public interest.

Prosecuting "homophobic" and "transphobic" "hate crime" would also further the development of 'equality and diversity' codes by governing bodies, which would narrow the space in which Christians can express their religious beliefs. This would lead to vocal Christians being barred from entering various professions, and thus act as an assault on Christian morality and private conscience.

This is problematic in a democracy, as true democratic freedom demands individual freedom, and citizens cannot be truly free if they are not able to live according to their beliefs of what is most important. Religious freedom is a barometer of the health of a nation's democratic wellbeing. In a proper democracy, Christian beliefs should be respected and accommodated, not because the state gives its assent to these views, but because its citizens are naturally imbued with the fundamental freedom to live out their

religious beliefs. Religious freedom is not a right to be acknowledged only when all other rights have been met. Such a rendering would make freedom of religion meaningless. Forcing people of faith to acquiesce under the penalty of the law, for example, to the wishes of someone who self-identifies as being transgender is an abuse of freedom of conscience. An individual's request to be known by a different name, or to use shared facilities, for example, requires Christians to deny that gender is irrevocably determined by creation and evidenced by a person's biology. Where Christians are faced with either recognising an individual as belonging to a gender other than their birth sex, or face a hate crime conviction, their freedom of thought, conscience and religions is invaded. Thus, prosecuting transphobic hate crime opens the door to abusing freedom of conscience, which itself is protected under Article 9 ECHR.

Being expected to act contrary to one's conscience, and the subsequent risk to or loss of livelihood for those feeling unable to comply, are no light matters. To treat public life and private life as mutually exclusive is tantamount to asking practising Christians to only be true to their intrinsic identity and values inside their homes, and to repress, conceal or be ashamed about their identity and its manifestation in public - a prospect at serious odds with a pluralist democracy extolling tolerance and the competing voices of diversity.

4. Does the section on "Offending Behaviour" clearly set out the CPS understanding of offending behaviour?

Of particular concern is the phrase: *"In general, we believe 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. This is not a commitment to allow people to commit crime with impunity; it is an undertaking to prosecute serious crime effectively wherever we can, even if that means that those who commit minor criminal acts are not put before the courts."*

This is a policy statement made in advance - absent a specific factual matrix - not to enforce the law where the Police self-determine the offence as established by Parliament is 'minor'. It stands in conflict with established case law, most notably Lord Denning's assertion in *R v Metropolitan Commissioner, ex parte Blackburn.*

In that case, the Commissioner had issued a confidential instruction to the police force to the effect that prosecutions of gaming clubs operating in breach of the Betting, Gaming and Lotteries Act 1963 (U.K.) would require his approval.

On the duty of the Commissioner of Police, Lord Denning M.R. said stated: *"...He [the Commissioner of Police] is not subject to the orders of the Secretary of State…I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself...The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."*

5. Do you have any further comments on the CPS Policy on offences involving hostility on the grounds of sexual orientation and gender identity?

In recent years, there have been a growing number of cases in which Social Services have interfered in the lives of loving and respectable Christian families by taking their children into care.

With this in mind, it is likely that the CPS' policy, by mainstreaming the idea that the moral opposition to same-sex attraction or gender ideology is hateful and therefore criminal, would further limit the freedom of parents to bring their children up in conformity with their own religious beliefs. Where children experience gender confusion, for example, parents might be placed under increased pressure to affirm their child's 'new' gender – even though this conflicts with the child's biological sex, the parents' Christian beliefs, and research showing that 80% of children stop experiencing gender confusion by the time they reach puberty. In fact, we see this phenomenon already beginning to manifest because of the social manipulation of equality legislation in the United Kingdom. The criminalisation of specific "hate crimes" based on gender reassignment and sexual orientation would only further delegitimize parental rights in raising their children according to their own religious and moral beliefs. This in turn would only bolster the possibility of intrusive Social Service intervention into Christian family life.

Another issue of concern is the lack of protection offered to both women and children by giving legal effect to the term 'gender identity'. The current understanding of 'gender identity' as being a fluid concept allows an individual to be identified as their chosen gender without safeguards being set in place protecting individuals in such intimate settings as toilet facilities or public changerooms. In this sense, rather than protecting the rights of individuals, by giving effect to 'gender identity' theory, the law potentially victimizes individuals by putting at risk their privacy, their physical and sexual integrity, and protection of their health and morals. This is an untenable position and must be rejected.

There are also numerous cases in which Christian street preachers have been prosecuted for alleged hate crimes, though have later been acquitted. This illustrates that the prosecuting authorities often misapply the law.

Mike Overd:

March 2015 – Street evangelist, Mike Overd, was convicted of a public order offence for referring to Leviticus chapter 20 during a conversation with a homosexual man, to explain that God does not condone homosexual practice. Mike's appeal was upheld, with the Circuit Judge David Ticehurst saying that the Crown failed to provide sufficient evidence to justify the conviction.

February 2012 – Mike was charged under Section 5 of the Public Order Act 1986 after a same-sex couple complained about his preaching on homosexual practice. A Magistrates' Court found in favour of Mike and passed a 'Not Guilty' verdict on the basis that he did not intend to cause harassment, alarm or distress.

Rob Hughes:

May 2015 - Rob was arrested for allegedly breaching public order law after a confrontation with a member of the public who wrongly accused him of using "homophobic" language. He was released after being held in custody for 11 hours, with the police acknowledging that he had been wrongly arrested and falsely imprisoned.

Tony Miano:

January 2014 - A former Los Angeles Deputy Sheriff was arrested on a charge of alleged breach of peace with "homophobic" aggravation whilst preaching on Dundee High Street. He had mentioned sexual sin - including adultery, promiscuity and homosexual practice. All charges were subsequently dropped, as nothing in his preaching constituted 'hate speech'.

Anthony Rollins:

December 2010 - Antony was arrested under Section 5 POA and put in handcuffs after street preaching in Birmingham because a bystander complained that he read out a Bible passage on homosexuality. Police were later ordered to pay him £4,250 in compensation.

Dale Mcalpine:
May 2010 - Dale was arrested and charged under Section 5 after telling a police officer that homosexual acts were sinful. Mr Mcalpine later won £7,000 plus costs from Cumbria Police in settlement for a claim of wrongful arrest, unlawful imprisonment and breach of his human rights.

Miguel Hayworth:
August 2009 – Miguel was questioned and detained by police in Kent after preaching from a passage in the Bible that states that homosexual behaviour is sinful. He was later released, allowed to continue preaching and offered compensation for false imprisonment.

There are other instances in which Christians have lost their jobs after making comments which may be considered 'hateful', though the courts have later ruled in their favour.

Victoria Allen:
November 2016 – A teaching assistant was disciplined by her employer after expressing her Christian beliefs about same-sex relationships, in response to questions asked by a pupil. The matter was settled out of court, with the school accepting that every individual has the freedom to express their views about the nature of marriage in accordance with the law. They sincerely apologised for any upset Victoria may have felt during the disciplinary process.

Sarah Mbuyi:
June 2015 - A Christian nursery worker was dismissed after explaining her Christian view of marriage in response to a question from a homosexual colleague. The Watford Employment Tribunal found unanimously that Sarah had been directly discriminated against based on her belief that homosexual practice is contrary to the Bible. Sarah's belief was described by the Tribunal as one which is "worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others."

Margaret Jones:
August 2014 – A Senior Deputy Registrar at Bedford register office was dismissed after she indicated that her Christian beliefs prevented her from performing same-sex weddings in light of the passage of the Marriage (Same Sex Couples) Act 2013. Margaret's dismissal was unanimously reversed by a panel of Central Bedfordshire Council Members. The panel decided that the council had not fully investigated ways of accommodating Margaret's beliefs.

How did you hear about this consultation?

- National press
- Television or Radio
- Specialist press (e.g. Law Society Gazette)
- CPS Website
- Other website
- CPS Twitter feed
- Other Twitter feed (or social networking site)