



Ministry of
JUSTICE

Legal Aid, Sentencing and Punishment of Offenders Bill

Lords Committee Stage Amendments

Equality Impact Assessment

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Introduction

This Equality Impact Assessment (EIA) relates to amendments to the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill for proposals relating to:

- hate crime, and
- appeal against bail.

The proposals are to be tabled as amendments to the LASPO Bill at Lords Committee Stage.

This EIA is intended as a companion document to the impact assessment (IA).

Equality Duties

Under the Equality Act 2010 section 149, when exercising its functions, Ministers and the Department are under a legal duty to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
- Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
- Foster good relations between different groups.

Paying 'due regard' needs to be considered against the nine "protected characteristics" under the Equality Act 2010 – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

The Ministry of Justice (MoJ) has a legal duty to investigate how policy proposals are likely to impact on the protected characteristics and where a potential disadvantageous effect is identified how that is either mitigated or justified by reference to the objectives of the policy. The MoJ also has a legal duty to advance equality of opportunity in the design and delivery of its policies and practices. MoJ records its fulfilment of its duties by completing an Equality Impact Assessment (EIA).

Evidence Sources

We have used evidence from a range of statistics and research.

Data on recorded hate crime from police forces in England, Wales and Northern Ireland during the calendar year 2010 are from the Association of Chief Police Officers (ACPO).

Data on defendants tried or sentenced at the Crown Court for indictable offences by remand status at the point of committal for trial or sentence, ethnicity, age and gender are from the Court Proceedings Database.

We have also drawn on the following reports:

- 'Engendered Penalties: Transgender and Transsexual Peoples Experiences of Inequality and Discrimination', Whittle, Turner and Al-Alami (2007).

The main sources of qualitative data used in the 'Engendered Penalties' report are the Electronic Materials Databases (EMDs) of Press for Change and the Female to Male Network, covering the period 1998-2005. These were supplemented with quantitative and some further qualitative reporting from an Online Survey of 873 trans self-identified respondents, which was available for completion during the month of August 2006.

Because of the nature of those people who contact Press for Change for advice and information, there is more focus in the qualitative data on those people who live their lives permanently in their preferred gender role. This includes those people who would be identified as transsexual by themselves or others, and who wish to have, intend to have, are having or have had gender reassignment which includes some hormonal therapies and may include surgical gender reassignment.

Furthermore transgender people who live permanently in their preferred gender frequently experience victimisation through on-going discrimination, and are treated differently because other people are able to identify them as a trans person, and it is as such that they seek help or support through these groups.

The online survey provided some balance to the views and experiences reflected in the qualitative data as almost 40% of its respondents were not living permanently in their preferred or acquired gender role. Thus it presents the views of some of those who identified as temporary cross dressers, transgender individuals and others who self-identify as transsexual but who had not lived, or were not yet living permanently in their preferred gender role.

- Headline Findings from Transgender E-Surveys, Government Equality Office, (2011)

These are three on-line surveys drawn using snowballing sampling techniques (where each respondent identifies further suitable respondents by forwarding the survey on to anyone else who may be eligible to respond). Consequently, the

findings cannot be generalised beyond those who responded but, in the absence of more reliable data, provide indicative information on the experience of transgender individuals and their experience of various public services.

Survey 1 focused on health, employment, education, safety and support, access to services and public and political participation. It was launched in April 2011 and received 1,275 responses.

Survey 2 focused on access to health services – delays, General Practitioners and Primary Care Trusts. It was launched in June 2011 and received 485 responses.

Survey 3 covered employment issues, identity and privacy including awareness of trans issues in the work place, experience of discrimination and harassment, transgender policy, job seeking, privacy and identity. It was launched in August 2011 and received 412 responses.

- 'Getting Away With Murder. Disabled people's experiences of hate crime in the UK', Disability Now, the UK's Disabled People's Council and Scope (2008);

This report examines the available evidence on the prevalence of hate crime against deaf and disabled people in the UK, the reasons behind its low profile and prosecution rate, and the consequences of this for disabled people. The quotes presented reflect the views of disability organisations on the differential treatment of disability and other hate crimes, and may therefore not be representative of the views of disabled people/organisations in general.

- Hate Crime and Crimes Against Older People Annual report 2009-2010, Crown Prosecution Service (2010).

This report gives information on prosecutions of various strands of hate crime (race and religious, transphobic and homophobic crime and disability hate crime), and crimes against older people. All data is drawn from CPS administrative systems.

We note that there is a lack of research or statistical evidence relating to a number of protected characteristics. As part of a wider programme of work, MoJ is looking at how best the data gaps that exist might be filled, taking into account cost considerations.

The following assessments only explore equality impacts arising from the policy proposals in relation to the groups affected by the proposals. They are not intended to provide an assessment of the wider factors at play which may explain observed differentials in the distribution of protected characteristics at each stage of the criminal justice system. Such an analysis would consider the extent to which factors other than equality characteristics (such as offence type and offending history) might contribute to the over- or under-representation of particular groups. Two MoJ statistics publications provide some of this more detailed analysis: "Statistics on Race and the Criminal Justice System" and "Statistics on Women and the Criminal Justice System"¹.

¹ <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/race.htm>
<http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/women.htm>

Consultation and Engagement

Transgender hate crime

The Green Paper, 'Breaking the Cycle: Effective punishment, rehabilitation and sentencing of offenders', outlined proposals to review hate crime provisions and, in particular, asked for views on whether or not there should be a generic provision dealing with hate crime. These proposals received a mixed response, with concerns raised that they may water down the current provision and render it meaningless.. There was, however, support for adding the transgender group to those groups attracting a statutory aggravating factor in sentencing for any offence where the offender was motivated by hostility towards the victim on certain grounds – currently, race, religion, sexual orientation and disability. In addition to the Green Paper responses, there has been a steady lobby for such an amendment. For example, the Independent Advisory Group, which advises Government and CJS responses to hate crime, has repeatedly advocated this change. There has also been steady pressure in Ministerial meetings with lobby groups and MPs to address an anomaly in the guidance to courts for determining the minimum term for a life sentence for murder in relation to murders aggravated on the basis of the victim's disability. The Equality and Human Rights Commission has also made recommendations in this area in their report 'Hidden in plain sight: the inquiry into disability related harassment' (2011) and available at:

<http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/>

Appeal against bail

The consultation process included discussions with the Crown Prosecution Service, the Attorney General's Office, the Serious Fraud Office, and senior judiciary.

Hate crime

Summary

The proposals are to treat all five monitored strands of hate crime equally in relation to statutory aggravating factors in sentencing for any offence and in the starting point a murder case should attract where it is aggravated on the basis of race, religion, sexual orientation, disability or transgender. So the proposed changes would mean an:

- Amendment to section 146 of the Criminal Justice Act (2003) so that a statutory aggravating factor in sentencing would be applied to crimes motivated by hostility on the basis of the victim's transgender identity; and
- Amendment to schedule 21 of the Criminal Justice Act (2003) so that the starting point for life sentences for murder would be 30 years for murders motivated by hostility on the basis of the victim's transgender identity or disability.

Direct discrimination

Our assessment based on the available evidence is that these proposals are not directly discriminatory within the meaning of the Equality Act 2010 as they will provide parity for transgender and disability related hate crime, in that these crimes will be treated in the same way as the other strands of monitored hate crime. There may be some benefits in terms of increased victim confidence in the criminal justice system, and greater reporting of such crimes.

Indirect discrimination

The proposals will apply equally to those who share a protected characteristic and those who do not. Due to a lack of data on offenders convicted of transgender and disability related hate crime we have been unable to identify any differential impacts. However, if there are differential impacts on those offenders convicted of transgender and disability related hate crime, the government considers that these proposals are a proportionate means to seek to bring the way in which transgender and disability related hate crime offences are dealt with, in line with the other strands of monitored hate crime.

Discrimination arising from disability and the duty to make reasonable adjustments

We do not consider there to be a risk of discrimination arising from disability and the duty to make reasonable adjustments within the meaning of the Equality Act 2010 as a result of these proposals.

Harassment and victimisation

We do not consider there to be a major risk of harassment or victimisation within the meaning of the Equality Act 2010 as a result of these proposals. If anything we believe that these proposals are likely to reduce incidents of harassment and victimisation as perpetrators realise that this form of hate crime is being treated in the same way as the other monitored strands.

Advancing equality of opportunity

It is possible that these proposals will impact positively on the duty to advance equality of opportunity if victims of transgender related hate crime know that perpetrators will face an aggravating factor added to their sentence.

It is also possible that awareness of harsher penalties for murders motivated by hostility on the basis of a victim's transgender identity or disability would reduce the frequency of these heinous crimes being committed.

Fostering good relations

We have considered this objective but do not think it is of particular relevance to the proposals.

Conclusion

Having paid due regard to the potential impacts identified in the 'analysis' section below, the government is satisfied that it is right to table these amendments.

Aims and outcomes for the policy

Sections 145 and 146 of the Criminal Justice Act 2003 provide for statutory aggravating factors in sentencing for any offence where it is shown that the offender demonstrated hostility towards the victim on the basis of the victim's race, religion, sexual orientation or disability. Schedule 21 provides a 30 year starting point for determining the tariff for a life sentence for murder where the offence is aggravated on the basis of the victim's race, religion or sexual orientation. There is pressure to widen these hate crime provisions so that all five monitored strands of hate crime are treated equally under these provisions. This requires changes to primary legislation.

The policy objectives are as follows;

- To treat all five monitored strands of hate crime equally in relation to statutory aggravating factors in sentencing for any offence and in the starting point a murder case should attract where it is aggravated on the basis of the victim's race, religion, sexual orientation, disability or transgender;
- To send a strong message that hate crimes will not be tolerated; and
- To ensure that similar hate crimes should be punished in a similar way. The courts should already treat hate crime of any kind as an aggravating factor but the amendments should ensure that the courts sentence hate crime on a more consistent basis.

Methodology

In analysing the potential equalities impacts of these proposals, we have considered the impact on:

- **Victims:** We have examined relevant research to consider the qualitative impact on victims. Statistics are not available centrally on the protected characteristics of victims of transgender and only limited statistics are available on the gender of victims of disability related hate crime. However, by the nature of these offences, victims will have protected characteristics

regarding transgender or disability. There is also a lack of nationally accessible data on the number of murders motivated by hostility on the grounds of transgender identity or disability;

- **Offenders:** We have examined statistics on the number of transgender related hate crimes in England, Wales and Northern Ireland. Information is not available on the protected characteristics of offenders sentenced to transgender hate crime separately from homophobic crime.² The 2009/10 CPS report on Hate Crime does present data on hate crime towards people with disabilities. However, it should be noted that the proposed change in relation to disability hate crime refers specifically to homicide cases (i.e. increasing the minimum sentence to 30 years where there are aggravating factors on grounds of disability hate crime).

Analysis

Impact on victims

These changes will have the greatest impact on victims of transgender related hate crime who by the nature of the offence have the protected characteristic of transgender identity. It is anticipated that the impact of these proposed changes will be positive for this group of victims and their families.

Statistics for 2010 show that there were 357 transgender hate crime incidents recorded by police forces in England, Wales and Northern Ireland (Table 1, Annex A). While the level of hate crime recorded by the police may reflect the confidence that victims have in reporting to the police, and the measures being taken to improve confidence and reporting, victims groups say that this is still greatly under-reported.

Respondents to surveys report that transgender people fear for their safety, to the extent that those not yet living permanently in their new role do not go out into public spaces in their preferred gender. A small scale online survey of 872 self-identified trans people suggested that almost three quarters had experienced harassment, with one in ten being victims of threatening behaviour when out in public spaces.³

Three small-scale e-surveys carried out reported similar concerns amongst those participating. Respondents feared most for their safety on the streets and using public transport. Nearly half of respondents (47 per cent) said they were most worried about being a victim of a violent crime or harassment.⁴

Statistics for 2010 show that there were 1,569 disability hate crimes recorded by police forces in England, Wales and Northern Ireland (Table 1, Annex A). Statistics on murders motivated by hostility on the grounds of disability are not available nationally. However, CPS data on those victims involved in prosecutions for disability hate crimes whose gender had been identified (76% in 2009/10), showed 51% were men. Much evidence has been reviewed and presented by leading disability organisations to focus on the differences in sentences for those convicted of homicide where race, religion or sexual orientation is an aggravating factor compared

² For the first time, the CPS published combined data on offenders charged with homophobic and transphobic hate crime in their 2009-10 report *Hate Crime and Crimes Against Older People Annual report 2009-2010*, Crown Prosecution Service (2010)..

³ *Engendered Penalties: Transgender and Transsexual Peoples Experiences of Inequality and Discrimination*, Whittle, Turner and Al-Alami 2007.

⁴ *Headline Findings from Transgender E-Surveys*, GEO, 2011.

to those where hostility was shown to the victim on the basis of his or her disability. The following three quotes sum up the views expressed:

Julie Newman, acting Chair of the United Kingdom's Disabled Peoples' Council, says: "*The matter of sentencing for those who are convicted of disability hate crime will be of concern as long as there continues to be a difference between this and other forms of hate crime.*"

Liz Sayce, chief executive of RADAR, says: "*These despicable crimes – up to and including murder – that are perpetrated against disabled people must be treated with exactly the same gravity as crimes motivated by racial or homophobic hatred. Only a consistent sentencing regime... will send that message.*"

Robin Van Den Hende, from VOICE UK, adds: "*If the criminal justice system is to tackle disability hate crime then courts must increase sentences in all disability crimes and clearly state when a disability hate crime has occurred. We would be deeply worried if murders motivated by disability hatred did not lead to a longer sentence.*"⁵

Impact on offenders

These changes will have a negative impact on perpetrators of transgender and disability related hate crime who are convicted of such offences as they may be given longer sentences.

Due to limitations in the available evidence we are unable to identify the potential for any differential equality impacts, as no statistical evidence is available on the protected characteristics of persons sentenced for transgender related hate crime separately from homophobic hate crime or homicide aggravated on grounds of disability related hate crime. However, the most recent CPS report (2010) suggests that, across the current hate crime strands, 83% of defendants in 2009/10 were male, 75% were identified as belonging to the White British category, 50% were aged between 25-59 and 30% between 18-24.

Mitigation and justification

Whilst sentencing guidelines provide for an aggravating factor in sentencing where the offence is motivated by hostility towards a minority group, the current legislation is not consistent and there is the longstanding anomaly that murders aggravated by hostility on the basis of the victim's disability have a 15 year starting point whereas murders aggravated on the basis of race, religion and sexual orientation have a 30 year starting point. The Government does not consider it defensible to leave this anomaly in place. We have explored the possibility of creating a generic hate crime provision but consider that it raises significant drafting difficulties, with the risk of watering down the provisions to the extent that they become meaningless.

The government believes that hate crime, of any kind, is abhorrent and offenders should be in no doubt that sentencing will be more severe for these cases. Victims should feel confident in reporting such crimes knowing that the courts will take a serious view of these offences. By making the proposed changes, the government is sending a strong message that such behaviour will not be tolerated. The proposed

⁵ *Getting Away With Murder. Disabled people's experiences of hate crime in the UK*, Disability Now, the UK's Disabled People's Council and Scope in 2008

changes to section 146 and Schedule 21 mean that all five recorded strands of hate crime will be dealt with equally under these provisions. This will encourage consistency of sentencing practice and address a long standing anomaly in the guidance for determining the minimum term for life sentences for murder. The starting point for murders where the offence was aggravated by hostility towards the victim based on the victim's disability, and now transgender identity, will attract a 30 year starting point.

Appeal against bail

Summary

The proposal will enable the prosecution permission to appeal against the decision of a Crown Court judge to grant bail.

Direct discrimination

The proposal applies to all defendants. There is therefore no direct discrimination within the meaning of the Equality Act 2010.

Indirect discrimination

The proposals will apply equally to those who share a protected characteristic and those who do not. However, to the extent that certain groups that share a protected characteristic are more likely to be subject to proceedings in the Crown Court and bailed, they would also be more likely to be subject to this proposal (which enables the prosecution to appeal a decision of a Crown Court judge to grant bail). Nevertheless the Government considers that any differential impact would be justified, on the basis that these proposals amount to a proportionate means of achieving a legitimate aim of ensuring that the public are protected on the rare occasion that a Crown Court judge grants bail to a defendant who should remain in custody.

Discrimination arising from disability and the duty to make reasonable adjustments

We do not consider there to be a risk of discrimination arising from disability and the duty to make reasonable adjustments within the meaning of the Equality Act 2010 as a result of these proposals.

Harassment and victimisation

We do not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act 2010 as a result of these proposals.

Advancing equality of opportunity

We have had regard to this aspect of the equality duty but do not consider that the proposals will either positively advance equality or impact negatively on the advancement of equality of opportunity.

Fostering good relations

We have considered this objective but do not think it is of particular relevance to the proposals.

Conclusion

Having paid due regard to the potential impacts identified in the 'analysis' section below, the government is satisfied that it is right to table these amendments.

Aims and outcomes for the policy

At present, the prosecution can only appeal against a decision of a magistrates' court to grant bail. The prosecution cannot appeal against the decision of a Crown Court judge to grant of bail, even if the prosecution believes that there is evidence of a risk to public safety. The government accepts, that there may be rare instances in which an inappropriate bail decision is made by a Crown Court judge to grant bail to a defendant and that the need to protect the public requires that the prosecution should be permitted to challenge that decision by way of appeal to a High Court judge. The prosecution's decision to appeal a decision of Crown Court judge should not be done lightly.

The appeal would only be permitted where the appeal was made almost immediately after the decision, as is the case currently with an appeal by the prosecution against the decision of a magistrates court. The defendant would be entitled to representation at the hearing but would not be entitled to a corresponding right of appeal against being refused bail.

It is assumed that there will be very few occasions in which a prosecuting authority believes it is necessary to appeal against a Crown Court judge's bail decision. In order to ensure that decisions to appeal are carefully considered, guidance will be issued requiring that the decision to appeal should be made by a senior official in the prosecuting authority.

Methodology

In analysing the potential equalities impacts of these proposals, we have considered the impact on offenders.

Analysis

Impact on offenders

The pool of defendants who are potentially affected by the new provision are those to whom the Crown Court has granted bail. The question is in which of those cases the prosecution decides to appeal.

As the policy change introduces a new process, there are limitations in the available evidence to fully assess the potential for any differential equality impacts. However, we know that, of all those defendants tried or sentenced at the Crown Court for indictable offences in 2010, 67% of defendants of White ethnicity were bailed at the point of committal for trial or sentence, 55% of defendants of Black ethnicity, 67% Asian, 54% Other and 65% of those of unknown ethnicity (see Table 2 in Annex A); 76% of those aged 50-59 and 81% of those aged 60 and over were bailed at committal for trial or sentence compared with between 62% and 69% in other age

bands (see Table 3 in Annex A); and 63% of males and 81% of females (see Table 4 in Annex A).

Mitigation and justification

There are no accessible data to determine any likely differential impact on groups with protected characteristics who would be subject to appeals against Crown Court bail decisions. Once the proposals are implemented, we will monitor impacts across all protected characteristics where data are available. If differences are identified, we will take appropriate mitigating action as necessary. Consistency and fairness in making such decisions will be ensured by the issue of guidance by the Director of Public Prosecutions and other prosecuting authorities, which will require that any decision to appeal must be approved at a senior level.

Monitoring

We will be monitoring the implementation of these reforms for positive, negative and mixed equality effects. Royal Assent is expected in spring 2012, with implementation to follow at a later date. We would require a full year's data on a number of protected characteristics following implementation on which to base a review.

Annex A: Evidence

Table 1: Total of recorded Hate Crime from Police forces in England, Wales and Northern Ireland during the calendar year 2010

Race	Faith	Sexual Orientation	Transgender	Disability	Total	Anti-Semetic
39,311	2,007	4,883	357	1,569	48,127	488

Source: Association of Chief Police Officers (ACPO), 2011

Please note: The above data relates to recordable crimes under Home Office recording rules and indicates those offences that have been perceived as hate crimes by the victim or any other person. Crimes were recorded from 1st January to 31st December 2010 in all police forces in England, Wales and Northern Ireland.

Improvements in the way forces collect and record hate crime data mean that direct year on year comparisons can be misleading. All hate crimes are included and not additional to general crime (i.e. all these crimes are also recorded in the figures for the relevant crime types, for example, robbery, assault etc.) Forces have only been collating data for the five strands of hate crimes since 1st April 2008.

Table 2: Proportion of defendants tried or sentenced at the Crown Court for indictable offences by ethnicity and remand status at point of committal for trial or sentence, 2010

	White	Black	Asian	Other	Not recorded	Total
Not remanded	0	0	0	0	2	0
Bailed	67	55	67	54	65	65
Remanded in custody	33	45	33	46	32	34
No. of defendants (thousands)	83.0	12.9	8.5	4.2	11.3	119.9

Source: Further analysis of Criminal Justice Statistics 2010

Table 3: Proportion of defendants tried or sentenced at the Crown Court for indictable offences by age group and remand status at point of committal for trial or sentence, 2010

	10-17	18-20	21-24	25-29	30-39	40-49	50-59	60+	Total
Not remanded	0	0	0	1	0	0	0	0	0
Bailed	66	65	65	62	62	69	76	81	65
Remanded in custody	33	34	35	37	38	31	24	18	34
No. of defendants (thousands)	3.1	18.3	22.3	21.3	28.1	17.7	6.4	2.8	119.9

Source: Further analysis of Criminal Justice Statistics 2010

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Table 4: Proportion of defendants tried or sentenced at the Crown Court for indictable offences by sex and remand status at point of committal for trial or sentence, 2010

	Male	Female	Other	Total
Not remanded	0	0	99	0
Bailed	63	81	1	65
Remanded in custody	36	18	0	34
No. of defendants (thousands)	106.1	13.6	0.2	119.9

Source: Further analysis of Criminal Justice Statistics 2010

Note: In Tables 2-4, those remanded in custody includes those remanded for part of the time in custody and part on bail.