



TITLE **OFFENCES OF STIRRING UP HATRED ON THE GROUNDS OF SEXUAL ORIENTATION**

From: Criminal Law Policy Unit
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This circular is being sent to: Chief Officers of Police (England and Wales), HM Chief Inspector of Constabulary, Association of Police Authorities, Chairman of Police Authorities, The Director of Public Prosecutions, Chief Crown Prosecutors, Crown Court Managers, Justices' Chief Executives, The Law Society, The Bar Council, Lord Chief Justice of England and Wales, The Director of Criminal Operations (Court Service), HMCS Area Directors, Senior Presiding Judge, Senior District Judge (Magistrates' Court), District Judges (Magistrates' Court), The Judicial Studies Board, The Justices' Clerks' Society, The Magistrates' Association, Director General, National Offender Management Service

Introduction

1. The Criminal Justice and Immigration Act 2008 (the 2008 Act), which received Royal Assent on 8th May 2008, introduced a wide range of measures on sentencing, offences and immigration. Its provisions have been commenced in stages.
2. The purpose of this circular is to give some explanatory guidance to those working in the criminal justice system on the offences created by section 74 of and Schedule 16 to the Act. This circular is for guidance only, and should not be regarded as providing legal advice. Legal advice should be sought if there is any doubt about the application or interpretation of the legislation. The CPS will issue guidance to prosecutors on the new offences.
3. Section 74 amends Part 3A of the Public Order Act 1986 (the 1986 Act) so as to create offences of intentionally stirring up hatred on the grounds of sexual orientation. These complement the existing offences under the 1986 Act of intentionally stirring up hatred on religious grounds.
4. Section 74 of and Schedule 16 to the 2008 Act will be brought into force by Order. The provisions will come into force on 23 March 2010.

Formulation of the offences

5. The new offences introduced by section 74 and Schedule 16 deal 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.
6. The offences are similar to the offences involving stirring up of religious hatred, in being limited to material or conduct which is threatening, and which is intended to stir up hatred. The racial hatred offences, by contrast, cover a wider range of conduct or material: they extend to conduct or material which is threatening, abusive or insulting, and which is intended or likely to stir up hatred.
7. The term 'hatred on the grounds of sexual orientation' is defined in the new section 29AB of the 1986 Act. It is expressly limited to orientation towards persons of the same sex, the opposite sex, or both. The term does not extend to orientation based on, for example, a preference for particular sexual acts or practices. It therefore covers only groups of people who are gay, lesbian, bisexual or heterosexual.
8. The 2008 Act amends six existing offences under the 1986 Act to extend them to cover the stirring up of hatred on the grounds of sexual orientation. The offences cover:
 - the use of words or behaviour or the display of written material (section 29B(1));
 - the publishing or distribution of written material (section 29C(1));

- the public performance of a play (section 29D(1));
- distributing, showing or playing a recording (section 29E(1));
- broadcasting or including a programme in a programme service (section 29F(1); and
- possession of inflammatory material (section 29G(1)).

Any of these activities will be covered by the new provisions if the conduct or material is threatening and is intended to stir up hatred against a group of persons defined by reference to sexual orientation.

9. The offence under section 29B of the 1986 Act is qualified in important respects. Subsection (2) provides that no offence is committed if the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and is not heard or seen except by another persons in that or another dwelling. Subsection (4) provides a statutory defence if the words or behaviour are used or the written material is displayed inside a dwelling and the defendant had no reason to believe that they would be heard or seen by a person outside that or any other private dwelling.

10. As with the offences of stirring up racial or religious hatred, prosecution for the offences requires the consent of the Attorney General.

11. The new section 29JA of the 1986 Act concerns freedom of expression. This states that:

For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening.

Section 29JA is simply a statement that certain conduct is not of itself to be taken to be threatening. It does not therefore affect the threshold of conduct or material needed for the offences at sections 29B - 29G to be made out. It has no substantive effect. If, in the circumstances of a particular case, such conduct is in fact threatening then the offence will be made out, provided that there was an intention to stir up hatred on the grounds of sexual orientation.

12. The offences are limited to threatening conduct or material which is intended to stir up hatred. Subject to those conditions, they do not prevent the telling of jokes or the preaching of religious doctrine. Hatred is a very strong emotion. Conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet that threshold. The offences are not intended to cover, for example, teenagers who call each other names in the playground where this is not threatening and there is no intention of stirring up hatred against a group.

13. It should be noted that the offences criminalise threatening conduct intended to stir up hatred. In some cases, hatred may lead some individuals to commit acts of violence, but not necessarily, and the stirring up of hatred should not be confused with incitement to violence or other offences such as harassment or criminal damage.

14. The offences extend to England and Wales. The maximum penalty on indictment is seven years or a fine or both. The maximum penalty on summary conviction is six months imprisonment, or a fine not exceeding the statutory maximum, or both.

The need for the offences

15. The criminal law protects everybody from violence, such as assault, criminal damage and harassment. There are already aggravated offences of racial and religiously motivated assault and harassment which attract higher maximum penalties than if the offence is not aggravated. There are statutory aggravating factors which must be considered in sentencing for any offence if the offence is motivated by race, religion, sexual orientation or disability. But in this second category, the sentence must remain within the statutory maximum for the offence.

16. In addition, there are offences which cover the stirring up of hatred on the grounds of race or religion. The offences of stirring up racial hatred are contained in Part 3 of the 1986 Act. The offences of stirring up hatred on the grounds of religion are contained in Part 3A of that Act and were inserted by the Racial and Religious Hatred Act 2006 which came into force on 1 October 2007. These are important because stirring up hatred is in itself divisive and damaging. It creates an atmosphere where bullying and violence are deemed acceptable, and where individuals' rights are abused or groups are socially marginalised.

17. There is clear evidence that hatred is being stirred up against groups on the basis of their sexual orientation. This conduct has not hitherto been criminalised by a specific offence, although there may be cases where it would constitute a particular crime already recognised in law such as incitement to particular acts of violence. For example, some song lyrics may threaten and incite hatred against gay men and lesbians, yet fall short of inciting specific offences. Such lyrics would not be caught elsewhere in the criminal law, so new offences are needed to apply to them. Song lyrics can be particularly damaging because they may be aimed directly at a young and impressionable audience.

18. Such hate-filled statements can create an atmosphere of intimidation, for example in the workplace or at school. This sort of behaviour should not be seen as normal and acceptable, and we should be aware of the adverse consequences which flow from it.

Other groups who may be targeted

19. There are other groups who may be the subject of threats, abuse and hatred. In particular, the Government invited debate during the passage of the Bill about whether the offences under the 1986 Act should also be extended to include stirring up hatred against disabled or transgendered people.

20. On balance the Government considered that the existing law, including sentencing guidelines, was satisfactory and did not at this stage require the provisions of the 1986 Act to be further extended to cover these groups. This is because, despite research and contact with a large number of individuals and groups of people, no compelling evidence emerged that hatred was actively being stirred up against them. However, the Government has not ruled out extension of the 1986 Act to cover these groups at a later date, if evidence emerges that hatred is actively being stirred up against them in a way that is not covered by the existing law..

ECHR issues

21. In Parliament there was prolonged debate about whether the offences unjustifiably curtailed freedom of speech, and whether they would have a so-called 'chilling' effect on legitimate discussion and debate.

22. The offences are compatible with Convention rights and therefore in accordance with the Human Rights Act. Convention rights include the right to freedom of expression; to freedom of thought, conscience and religion; to freedom of assembly and association; and to respect for private and family life. Public authorities who are involved with enforcement of the criminal law or related judicial processes in relation to the new offences, will be required by the Human Rights Act 1998 to act in a way which is compatible with such Convention rights. This includes the police, the CPS, the Attorney General and courts.

23. The Joint Parliamentary Committee on Human Rights looked at the offence of stirring up hatred on the grounds of sexual orientation, as part of their scrutiny of the 2008 Act as a whole. They said:-

'We welcome the creation of the offence as a human rights enhancing measure.....We welcome the fact that the new offences... are narrowly defined so as to apply only to threatening words or behaviour intended to incite hatred against people on the basis of their sexuality. In our view this provides an appropriate degree of protection for freedom of speech.'

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