Hostility crime and the Law Commission

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1. Introduction

The Law Commission intends to report later this year with proposals in relation to what are, incorrectly, called 'hate crimes'. This follows a consultation which closed on Christmas Eve 2020. This paper argues that the consultation was flawed and there are reasonable grounds to conclude that it breached the Cabinet Office *Consultation Principles* 2018. In addition, analysis of the consultation's failings raises issues concerning the role of the Law Commission in the process of general policy-formation, as opposed to technical law reform.

The background to the Law Commission's current 'hate crime' project is that, in a report published in 2014[1], it recommended '*A full-scale review of aggravated offences and the enhanced sentencing system to see if they should be retained in their current form or amended*'. This was because what were, at that time, its narrow terms of reference precluded it from doing so. The government accepted the recommendation. The Commission published a background paper in March 2019 and a Consultation Paper (hereinafter referred to as the LCCP) on 23rd September 2020, inviting responses by 24th December 2020.

Critical examination of the law in this difficult area is merited. There are strong arguments that the criminal law should distinguish between crimes which are aggravated by conduct which demonstrates, or is motivated by, hostility to people who share certain characteristics and crimes which are not. The system of criminal justice should be effective in deterring, detecting, and punishing such conduct. The policy choices reflected in the law should enjoy the widest possible public confidence.

What follows is essentially concerned with process and (with one exception[2]) not the substance of any particular provisional proposal. In summary, it will be contended that the LCCP is intimidatingly long, hard to follow, and contains too many questions. It draws unnecessarily and extensively on contentious and controversial sociological theories, with scant critical evaluation, seemingly unaware of how contentious (even at odds with government policy[3]) these theories are and the risks attendant on their becoming the lens through which this subject is seen and understood. There is a lack of balance. Potential consultees are not provided with sufficient material to make informed contributions. The range of people targeted for responses has been too narrow. Rightly, the interests of those who might be protected are considered in detail but little attention has been paid to those who might suffer (or fear suffering) the consequences of laws being too widely drawn or misused. No adequate thought seems to have been given to the difficulty of reaching beyond a limited range of academics and organisations to the full variety of academic voices, organisations, commentators, and members of the general public who have no organisation to speak for them. There appears to be little awareness of the extent to which debate in this area is inhibited and the resulting impact on both the process of consultation and the substance of policy proposals.

The Law Commission is a creature of statute[4], with a technocratic and non-political[5] role. It will be argued that, here, it approached its terms in

1. Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014)
2. LCCP *Ch.20: A Hate Crime Commissioner?*
3. *Hansard* HC Deb. Vol.682 cols. 1011-4, 20 October 2020
4. *The Law Commissions Act 1965;* amended by *The Law Commissions Act 2009*
5. Emphasised in a protocol signed by the Lord Chancellor and Chair of the Law Commission in March 2010. *Law Commission, Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 2010)

reference[6] in a way which not only stretched and exceeded them but also went beyond its statutory role and non-political status in ways for which it is unsuited. This not only raises the issue of the Law Commission's own perception of its role but also the question of the temptation for the government to use the Law Commission as 'long grass' or cover for difficult political decisions which should be the sole responsibility of democratically accountable politicians.

2. Hostility crime

There is important ground-clearing to be done in relation to the expression 'hate crime'. It is simply wrong. The term is positively and unhelpfully misleading in relation to what it purportedly describes. It is emotive when what is needed is dispassionate analysis, empirically focused on objective evidence. It is very unfortunate that it is now almost universally used, even by government. Even the terms of reference for the present review, speaks of 'conduct' or 'crimes motivated by or demonstrating hatred', revealing (what ought to be) a surprising ignorance of the current law.

The offences under discussion fall into three basic categories: offences where 'hostility' is an element of an aggravated form of a substantive offence (*Crime and Disorder Act 1998*); offences where 'hostility' is not an element of the offence itself but increases sentence (*Criminal Justice Act* 2003); and offences of 'stirring up hatred' (*Public Order Act 1986*). Figures given in the LCCP[7] show the rarity of prosecutions in the last of these: only 13 (11 of which resulted in conviction) in 2018-9, a tiny number compared with the thousands of cases in the 'hostility' categories. Hostility is bad enough but it is by no means the same as hate[8].

Statistics which are routinely presented as those of 'hate crimes' are misleading. For those compiled by the police and the Crime Survey for England and Wales [CSEW], the threshold for inclusion is not that which is in the law. The police and CSEW record as 'hate crimes' complaints of offences which are subjectively perceived (which, contrary to widespread belief, is not the law) by anyone motivated by or demonstrating 'prejudice' (which is not the law[9]) towards a specified group. This may involve 'hostility' (which is the statutory test) but need not. Therefore, 'hate' is neither a legal element of the relevant crimes nor is 'hate' necessary, even as a subjective perception, for an incident to be added to 'hate crime' statistics.

The word 'hate' could have been used in the statutes, but it was not (except in relation to the very rarely prosecuted 'stirring up' offences). It would be an extraordinary category error to call a consolidating/reforming statute the 'Hate Crime Act', as LCCP suggests.[10] Throughout this paper, the expression 'hostility crimes' (but without inverted commas) will be used.

6. http://www.lawcom.gov.uk/project/hate-crime/#related
7. LCCP para 5.36
8. See, for example, LCCP para 1.35: '*…"hatred" is more than mere hostility, or ridicule, or offence.*'
9. The Law Commission has expressed a preference [LCCP para 15.101] that the law be changed to add the words 'or prejudice'. Prejudice is not a point along a conceptual continuum, which has 'hate' at one end. Prejudice means prejudgement. It usually, but not necessarily, implies adverse prejudgement (it is possible to be prejudiced in favour of something). When adverse, it does not say anything about the strength of the aversion, which can be anything from loathing to mild disapproval. If this proposal were adopted, describing successfully prosecuted cases as 'hate crimes' would be even more misleading.
10. See LCCP para 9.26-7/ Q.1.

3. Theoretical underpinnings of the Law Commission's Consultation Paper

Chapters 3 and 10 of the LCCP contain extensive reviews of what are said to be the philosophical/political underpinnings of the criminal law in relation to hostility and stirring up hate, and the shared characteristics to which they apply.

To illustrate a general point, one strand will be picked out. Particular reference is made to the work of the '*highly influential*' Canadian academic, Dr. Barbara Perry, and '*her 2001 articulation of hate crime as a display of bigotry and power from a majority group towards a minority group [arguing] that the underlying purpose of hate crime is to maintain the status quo of the two parties – the majority group keeping the minority group in a subordinate position.*'[11] Broadly, this approach is approved: '*As an overarching explanation of the social forces that underpin and reinforce the commission of hate crime, we find Perry's formulation helpful.*'[12] There is reference to the crimes which do not seem to fit this analysis (such as those committed by those suffering from disadvantage, themselves having a protected characteristic, being known to the victim, and when hostility is not the prime motivation) and the view that Perry's '*framework … inadvertently marginalizes a range of experiences that could, and should, be considered alongside the more familiar aspects of hate crime discourse.*'[13] However, the trajectory which runs through the LCCP is that these offences are to do with power/subordination, reflecting the structures of society.

The expressions 'intersectional' and 'intersectionality' are repeatedly used in the report and, the latter, in Q.32. 'White privilege' makes an oblique appearance at para 10.28 and 'male privilege/entitlement' at paras 12.57 and 12.124. Theories of 'intersectionality' are related to 'critical theory', depicting society as a web of interlocking oppressive power relationships. These are extremely controversial and have been widely criticised. The LCCP gives the impression of not being aware of this. No contrary voices seem to have been heard and there is scant critical analysis. In any event, and in terms of underpinning, it is plain that hostility crime legislation in England and Wales originated before the development of these theories and Dr Perry's 'articulation'.

The same questions arise in relation to the other extensive and complex references to academic sociological work and theory in these and other chapters. The reader is not provided with any, or any sufficient, material to evaluate what is written or the basis upon which it, as opposed to any other literature, has been chosen.

This raises a further question: what is this academic material for? If, in relation to hostility crimes, it adds explanatory value, to simply stated evidence of prevalence and impact (individual and communal), of different types of conduct, how is that value added to policy analysis or the effective discussion of technical legislative solutions?

11. LCCP Para 3.4
12. LCCP Para 10.31
13. Chakraborti and Garland, quoted in para 3.5.

4. Statistics

Statistics are central to pragmatic, empirical analysis and devising effective policy solutions. As has been said, both the Crime Survey of England and Wales and the Police use a definition of hostility crimes which is not in line with the law and, as the result, incidents are recorded as 'hate crimes' even if they involve subjective perception of no more than prejudice (and even that need not be the primary motivation). This is not to deny the seriousness and importance of what is at stake. But, if problems are to be addressed in the most effective way, their true prevalence and nature demand precise calibration.

Relying on an untested account of what someone thinks was in somebody else's mind presents an obvious difficulty, compounded by the use of the criteria 'hostility or prejudice' when 'prejudice' is not the statutory test. It is not surprising that the 2019 report of Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services identified:

> *'ongoing confusion over whether the perception of the victim or the police officer as to the motivation of the offender is recorded. Other significant problems with the flagging of hate crimes included: flags not being used when they should have been; the wrong flags being used; flags being used without any apparent justification.' … and … 'Most forces are doing too little to put this right. This means we have concerns about the accuracy of the hate crime data forces give the Home Office.'*[14]

The difficulty of evaluation is not made easier by differences between the CSEW (which show a marked decline in these offences over a 10 year period) and the police recorded crime figures, and information from other sources (such as community support organisations). The relationship between recorded crimes and the vastly smaller number of charging decisions is not explained, which raises the question of whether incidents are recorded as 'hate crimes' (and remain so) but are incidents which, on examination by the CPS, are not considered to be crimes, or not provably so. Analysis of the proportion of reports which did not relate to a (provable) offence might have cast some light on the extent to which recorded crimes are a reliable indication of prevalence.

The even greater difficulty in interpretation is that the raw numbers give little idea of where in the scale of seriousness offences fall. There is no sufficiently detailed analysis of the prevalence of offending by reference to the alleged facts, including the nature of, for example, the racial element, the circumstances, whether the incident occurred in relation to some other dispute, or whether the protagonists were known to each other. The relative gravity of each incident is undisclosed. It is not even possible to tell the split between summary and indictable offences.

The conclusion that hostility crimes are a significant problem, of which awareness is increasing and which calls for good investigation and support services[15] is unexceptional, but it is far from clear to what extent it really helps in relation to any particular provisional proposal.

A plausible view, drawing on the data in the CSEW surveys (which

14. LCCP para 5.25
15. LCCP para 5.41

are not affected by changes in rates of reporting) and other studies to which the LCCP refers, might be this. There has been significant progress in that crimes, perceived as motivated by or demonstrating hostility or prejudice, have been steadily falling, now being 38% lower than 10 years ago.[16] They are largely committed by deprived, uneducated, young white men, primarily for the excitement and thrill involved, often against people already known to them. A significant minority of incidents involve perpetrators who are members of a minority group acting against someone of another minority group.

Seen through such a lens, a rather different landscape might appear than that which is commonly presented, one which might seem to be at odds with an overarching, interlocking, oppressor/oppressed, majority/minority, power relationship explanatory theory. This possibility seems not have been considered by the LCCP's authors. The point is not that this would be a right or sufficient analysis but that it shows that close, empirical attention to evidence, free from preconception, is needed in order to identify precisely the scale and nature of multi-faceted problems and the proper responses to them.

Such a process might lead, for example, to increased recognition of the range of circumstances and experiences between and among people who share certain characteristics, and the different problems, which might arise as the result of something as basic as geographical location. This might make clearer the case for a more flexible approach entirely within a system of enhanced sentencing, not based on categories which are 'closed' by statute but which can evolve as circumstances change and can take account of issues which may even be local and temporary, thereby giving judges scope to pass sentences which do justice in the individual cases before them, while sending an appropriate message to the wider public.

5. Language

In the controversies related to hostility crimes, language is of especial significance as the use of a particular expression may well be one of the key factors in decisions about, for example, motivation/demonstration. It is all the more important as the goal posts have a way of moving. What is deemed to be permissible terminology has been an intense and protean area of conflict. The criminal law is by no means the only arena in which controversy is playing out. Definitions used with the authority of the Law Commission, especially if they find their way into the criminal law itself, are bound to be deployed in other contexts. The Law Commission should have been acutely aware of this and taken the greatest possible care to produce a carefully balanced consultation document.

The LCCP begins with a glossary. Among the expressions defined are: 'cisgender', 'intersex', and 'transgender' (including 'transgender man' and 'transgender woman').

To focus on the central problem with this, the question of the many women who find the neologism 'cisgender' offensive in itself and the competing theories concerned with gender (not defined in the glossary)

16. The latest figures, not in the LCCP, are here: https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2019-to-2020/hate-crime-england-and-wales-2019-to-2020#hate-crime-from-the-csew

will be left on one side. The definitions of 'cisgender' and 'transgender' refer to *'the sex they were assigned at birth'*. A 'transgender man' is defined as *'Someone who was assigned male at birth but identifies and lives as a woman'* (and 'transgender woman' the other way about). The definition of 'intersex' is: *'Having biological attributes which do not align with societal assumptions about what constitutes male or female biological attributes.'*

One of the sharpest contemporary disputes concerns whether sex (as an immutable biological fact from birth) should be at the centre of public policy and should not be confused with theories about gender. It is argued that whether someone is male or female is not something 'assigned' at birth[17], as if a judgement were made about it which can be changed by medical procedure or self-identification; and that 'societal assumptions' have nothing to do with whether a person's biological attributes are intermediate between male and female. These definitions assert, and lend authority to, that which is intensely contested.

For its glossary, the Law Commission could have drawn on, for example, S.146(6) of the *Criminal Justice Act* 2003 (as amended). Instead, it chose to adopt definitions provided by the controversial[18] campaigning organisation, Stonewall. This is not a criticism of Stonewall. It is entitled to campaign and is well-known for doing so. However, the Law Commission in this, and in other ways which appear in the LCCP, gives the appearance of having used Stonewall in a manner akin to a consultant, as opposed to a consultee, placing significant reliance on information provided by it and on its opinions.

The glossary definition of 'transgender' has a note to the effect that there is discussion in the LCCP as to *'how the term transgender might be defined in law for the purposes of hate crime'*. The footnote reference, however, takes the reader not to such discussion but to Stonewall's website. In the absence of an index or mention in the table of contents, short of reading the whole document, the discussion itself can only be found by following the paragraph number given in Q.8, which contains a draft definition.

LCCP paras 11.72-92 reinforce the impression that the Law Commission has, on this issue, spoken only to Stonewall and like-minded organisations and individuals. It appears simply to have assumed that they are representative of transgender and non-binary people in identifying 'contemporary understandings'. No account is given of others who have a legitimate interest in this issue and the reasons why they strongly dissent from Stonewall's definitions – including many women[19], lesbians and gays, and others who are transgender or non-binary, and even the general public, who seem to play little part in the Law Commission's thinking.

The LCCP proposes a definition adapted from the controversial *Hate Crime and Public Order (Scotland) Bill* (now, *Act*). Its discussion[20], displays the narrowness of the field of vision. The LCCP says at one point[21] that the definitions of sex and gender and the extent to which they correspond are highly contentious and beyond its scope. However, what follows implicitly assumes the significance of the related issues without identifying them. The issue of biological sex is effectively removed – the main point in

17. The LCCP refers [para 12.13] to language used, rather confusingly, by the ONS to the effect that sex is both assigned at birth and determined by … anatomy … produced by … chromosomes, hormones and their interactions. The ONS cites the WHO's description of sex as 'characteristics that are biologically defined'. The words 'determined 'and 'defined', are importantly different from 'assigned': Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019).
18. See for example, an article by Professor Kathleen Stock, *Quillette*, dated 6th July 2019, arguing that Stonewall's influence in universities has the effect of limiting the free speech of gender critical academics. https://quillette.com/2019/07/06/stonewalls-lgbt-guidance-is-limiting-the-free-speech-of-gender-critical-academics/
19. At LCCP para 10.33, in the Chapter headed *How should characteristics be selected?*, there is passing reference to 'tension … between some trans activists and some radical feminist groups' but the cause of the tension is not identified.
20. LCCP para 11.72-92/Q.8
21. LCCP 12.15

contention. No reasoning is advanced as to how the definition proposed in paras 11.89-92/Q.8 (shifting the emphasis towards '*the identity and personhood of the individual*') avoids this problem without causing difficulties deriving from inconsistency with other legislation and its use in other contexts as a precedent in relation to the vexed question of whether sex is immutable. With an underlying problem not in plain view, the reader may not appreciate what is at stake.

The Law Commission appears, therefore, to have taken a position, seemingly having heard only one side and without having sought a range of opinion. It may be said that others can have their say now. However, a fair-minded and informed observer would be entitled to think that potential consultees, for example the women's and LGB groups who feel very strongly about such matters, but seem to have been ignored thus far, may lack the necessary confidence that they will get a fair hearing.

6. Inhibited debate

A further illustration of the Law Commission's narrow field of vision is that there is scant acknowledgement of an elephant in the room: the apprehension, even fear, which results in self-censorship. It is a constant feature of many people's daily lives; to coin a phrase, their lived experience. Not only does it affect law enforcement, work environments, and social intercourse, it affects this very consultation process. It is difficult to explore sensitive issues if people are reluctant to speak; and for a consultation paper to carry authority, there should be an awareness that there is a problem to be confronted and overcome. The occasional and brief references to the 'chilling effect' and the discussions of freedom of expression in Chapters 1(Introduction), 3 (Rationales), 8 (Evaluating the current law), and 18 ('Stirring up' offences) do not get to grips with this problem and its seriousness.

There is abundant evidence that there are those who dare not speak freely on these topics for fear that they may be putting their careers at risk, extinguishing their chances of advancement, or even risking dismissal. For many, the threat of the Twitter storm is enough to silence them. For others, the fear of a visit by the police (upsetting enough in itself, whether or not any other action is taken) as the result of a politically or personally motivated complaint will do the same[22].

In the judgement in the well-known case of *Miller v. The College of Policing and the Chief Constable of Humberside*[23], the work in this area of James Kirkup, Director of the Social Market Foundation, is referred to. In a series of articles in *The Spectator*, Kirkup has documented the climate of fear generated by activists in the gender/trans debate, reporting that journalists, members of parliament, business people, and women are afraid to speak out. In an article dated 21st June 2018, he wrote this:

> *'Since I started writing about the gender debate in February, I've lost count of the number of MPs and other political people (of all parties and ranks, from policy advisers to Cabinet ministers) who have privately told me they are*

22. For example: https://www.spectator.co.uk/article/is-it-a-crime-to-say-women-don-t-have-penises-19-august-2018.

    See also the case of *Scottow v. Crown Prosecution Service* [2020] EWHC 3421 (Admin), Lord Justice Bean, a former Chair of the Law Commission, presiding, which concerned an appeal against conviction of an offence of persistently making use of a public electronic network for the purpose of causing annoyance, inconvenience or needless anxiety to another, contrary to section 127(2)(c) of the Communications Act 2003. The appellant had posted rude messages about the complainant on Twitter and Mumsnet. The conviction was quashed. In the course of a long judgement, covering numerous points, the court referred to *'the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another.'*

23. [2020] EWHC 225 (Admin)

> *worried about the nature of this debate and worried about the implications of policy. Yet almost all of those people have also said they are not willing to talk about this publicly, for fear of the criticism and vitriol they believe they would face from people who believe the interests of transgender people are best served by shouting down questions with allegations of transphobia and bigotry. I understand that silence, but it has costs.'*[24]

In a later article, Kirkup wrote this (after referring to a ComRes survey, in October 2018, which asked MPs to agree or disagree with this statement: *'I feel I can speak freely on transgender issues without undue fear of social media attacks or being accused of transphobia.'* 33% agreed. 54% per cent disagreed):

> *'Why? Why don't they talk? I've written elsewhere that some of it is due to the huge political clout wielded by trans-rights groups: it takes a brave politician indeed to willingly invite accusations of bigotry from, say, Stonewall - even if Stonewall's own position is under quite serious challenge thanks to genuinely courageous people like Jonny Best. (His petition calling on Stonewall to rethink its aggressive approach towards dissent over gender has now been signed by more than 6,000 people.)'*[25]

One example, out of many, will serve to illustrate the consequences of expressing sincerely held views, even in the academy. The LCCP touches on this case but conveys no impression of its severity[26]. Professor Kathleen Stock is Professor of Philosophy at Sussex University. She researches and teaches the philosophy of fiction and feminist philosophy. Mr. Justice Knowles, giving judgement in *Miller v. The College of Policing and the Chief Constable of Humberside*, said, *'Her intellectual pedigree is impeccable.'* She has criticised, as she puts it, *'the idea that an inner feeling of gender identity should overrule facts about biological sex in nearly all policy contexts'*[27]. As a result, she has been the subject of persistent abuse. When she was awarded an OBE, she was condemned in an open letter signed by more than 600 academics, which said, *'Academic freedom comes with responsibility; we should not use that freedom to harm people, particularly the more vulnerable members of our community'* and *'We stand against prominent members of our profession using their academic status to further gender oppression.'* [28]

Responding in *The Spectator*, 13th January 2021, Professor Stock described how deeply embedded is a pervasive orthodoxy in the academy and, even, large corporations:

> *'universities themselves, via enthusiastic participation in Stonewall schemes like the Diversity Champions scheme and the Top 100 Employers Index are now, effectively, trans activist organisations at a managerial level, with Stonewall-sponsored policies to match.' She writes that many academics agree with her 'but are too intimidated to say so.' And, 'The costs of this intimidation of academics sceptical about gender orthodoxies – whether via savage open letters or managerial policies controlling speech and thought – are high. Knowledge is lost and public understanding diminished.'* [29]

As already observed, as far as can be discerned from the LCCP, the Law Commission did not speak to Kirkup (whose work is well known), to any organisations such as Women's Place UK and the LGB Alliance, or

24. https://www.spectator.co.uk/article/why-are-women-who-discuss-gender-getting-bomb-threats-
25. https://www.spectator.co.uk/article/even-our-mps-are-afraid-of-the-transgender-mob
26. LCCP para 18.268
27. https://www.spectator.co.uk/article/the-sinister-attempts-to-silence-gender-critical-academics
28. https://sites.google.com/view/trans-phil-letter/
29. https://www.spectator.co.uk/article/the-sinister-attempts-to-silence-gender-critical-academics

to academics or commentors who dissent from what is presented as a new orthodoxy. To broaden the ambit of this concern into matters of race (the subject of the most common hostility crimes), there is a comparable narrowness of vision in the absence of reference to any academics or commentators who are sceptical about the use of concepts of intersectionality, white privilege, critical race theory, or systemic/institutional racism. This is not to criticise those consulted by the Law Commission thus far. It is simply to point to the narrow selectiveness of the Law Commission during this important phase of the project.

Apprehension about speaking freely seems to be present in corporations and government agencies, the police and CPS. This means that, in this consultation, there are unheard voices within these organisations of those who are reluctant to criticise institutional orthodoxy. Whether or not it is lawful to do so (see the case of *Miller*[30]), should the police devote resources to recording and investigating 'non-crime hate incidents' which are not crimes, nor involve hate, nor even hostility? For what, exactly, should such material be used or retained? Should the police and CPS classify as a 'hate crime' an undetermined complaint of subjective perception, in which no allegation of 'hate' is made, irrespective of whether there is any rational basis for it? Is it confusing for the police, or CPS, or the public for police/CPS to have a different test for criminality to that which is the law? Does the CPS have any different standard for the acceptance, by prosecutors, of pleas of guilty in hostility crime cases[31]? Should there be any different standard for the use of conditional cautions[32]? Should the police give priority to the execution of bench warrants in these cases over others? What should be the criteria for giving priority to the investigation of hostility crime cases over, say, one of the tens of thousands of unsolved dwelling house burglaries which happen each year and which can destroy people's lives?

There is the associated problem of hostility crime laws being exploited in pursuit of wider campaigns (by pressure groups or individuals), including the use of allegations to intimidate or close down debate. The law's effectiveness and support of it by the general public are related to this issue. Fears of 'cancellation', disciplinary process, 'no-platforming', the unmeritorious police enquiry, or the Twitter storm are real. It might reasonably be argued that this is an overdue and beneficial corrective when too many were without a voice for all too long. However, such issues (both in themselves and in relation to the conduct of the consultation) need to be addressed.

7. The Consultation Principles 2018

The LCCP is 533 pages long and there are 62 questions. By way of comparison, it is twice as long as the Law Commission's 1989 report on a comprehensive criminal code which consisted of the report, a complete Bill, and a commentary. Its sheer length would be bad enough, but there is no index and no hyperlink. It is far too long to print, difficult to read, time-consuming and hard to navigate on a screen, in order to note and

30. This aspect of *Miller* has been appealed. Judgement is awaited at the time of writing.
31. LCCP para 16.11
32. LCCP para 6.44-6

cross-refer (scrolling back and forth through its almost impossible bulk). Analysis demands considerable expertise and very many hours of reading. Even with a professional background, it is a struggle to follow the dense prose, complicated, often highly technical, arguments and diversions of questionable relevance.

This simply excludes the general public from the consultation. It is hard to see how any lay person could be expected to manage. The same applies to any charity or organisation with limited resources. It would be reasonable to conclude that the LCCP breaches *Consultation Principle A*, which provides that lengthy documents should be avoided when possible, that questions should be limited to those which are necessary, and that questions should be easy to understand and to answer.

The situation is not saved by the Summary (21 pages) and the 'Easy Read' summary (51 pages). Inviting consultees to turn for the detail to the report itself does not overcome the immense length and complexity of each section, the technical language used, and the difficulty of following the arguments without an understanding of the premisses which underpin them. These summaries read as scarcely more than outlines of, and advocacy for, the provisional proposals, with almost no countervailing information or arguments. Neither provides a balanced basis for making informed responses. It would be reasonable to conclude that the LCCP breaches *Consultation Principle C*, which requires giving enough information to ensure that all those consulted understand the issues and can give informed responses.

Those who have already contributed and those targeted now for responses are too narrow in range. That is apparent from those identified as having taken part thus far (though the report is not transparent in relation to the process by which they were approached or came forward). This narrow focus is exhibited in the paragraph in the Summary, *'who do we want to hear from? … as many stakeholders as possible including law enforcement, criminal law practitioners, human rights and civil liberties groups, and people who have been victims of hate crime and the service providers who support them.'* To any dissenting person or organisation, this might be interpreted as an invitation to more of the same. Especially in the light of the inhibited debate, consultation should involve actively seeking frank responses from a wider pool. It seems that the Law Commission does not intend proactively to discover and assess attitudes to be found among the general public, including (but not confined to) those who have no organisation to speak for them, those who do not feel represented by organisations which purport to speak for them, those who are reluctant to speak freely, or those against whom allegations have been made in pursuit of some other agenda. It would be reasonable to conclude that the LCCP breaches *Consultation Principles F and G*, in that the Law Commission has failed to consider *'the full range of people, businesses, and voluntary bodies affected by the policy, and whether representative groups exist'*, targeting *'specific groups if appropriate'*, ensuring *'that they are aware of the consultation and can access it'*, tailoring the consultation to their specific needs and preferences, consulting *'in a way that suits them'*.

8. Conclusion: The Consultation

The shortcomings of this consultation could be ameliorated. This would involve a gestalt switch in the vision of those conducting it, re-examining some cherished approaches and ideas. When responses to the LCCP have been considered, there is an opportunity to refine and reset with a view, ultimately, to producing recommendations which are cogent, practicable, and can have the support both of the general public and those who have characteristics which are liable to being subjected to hostility. Wider and more proactive consultation is needed. What is prevailing orthodoxy in some quarters needs sceptical analysis. Dissenting voices should be sought and heard. Where this vexed topic stands in the broader picture of the whole of society needs articulation. This reset would be much more easily accomplished when the effects of the present pandemic are less severe.

Another phase of consultation could involve a narrowing of the issues in a very much shorter consultation document. It could be strictly confined to the terms of reference and to the Law Commission's specialist expertise. Sentences should be short and the language simple.

Evidence of the scale and nature of the problems to be addressed (of which the subjective is an important, but by no means the only, aspect) should be clearly and relevantly set out. Statistics should be selected for their empirical value and simply explained. Passages leading up to any provisional proposal should, with clear headings, tabulate points for and then against, followed by a succinct explanation of why the former are preferred. Further responses could then be sought before the final report.

This might ameliorate but would not completely resolve the problem. The necessary judgements remain too politically contentious for a non-political institution. Furthermore, it would be understandable if potential consultees did not engage, lacking confidence in the Law Commission because they feel it has already demonstrated partiality. This raises questions about the role and purpose of the Law Commission itself. In that connection, another aspect of the LCCP falls to be considered as it both reflects the flaws in this consultation and points to the Law Commission having slipped its moorings.

9. A Hate Crime Commissioner?

The LCCP invites submissions as to whether the office of Hate Crime Commissioner should be created[33]. The Law Commission's statutory role concerns law reform. It has no status in relation to the creation of a new public body. The terms of reference do not include this topic. The fact that consultees raised it (we are not told which) is not a reason for the Law Commission to step outside the statutory and procedural constraints on its work, let alone into a realm of sharp political controversy, in which it has no democratic status nor specialist expertise.

In any event, this is a subject on which the report again fails to deal with the arguments in a properly balanced way, in order to facilitate informed responses. Devoting no fewer than 26 paragraphs to the benefits[34] and only 12 to the difficulties[35], the 'steer' is made abundantly clear. Furthermore,

34. LCCP paras 20.14-39
35. LCCP paras 20.40-51
33. LCCP Ch.20 and Q.62

in relation to the case against the creation of a commissioner, the report mentions only cost, duplication of effort, and analogous objections to a Domestic Abuse Commissioner. The summaries refer only to cost. These are by no means the only objections, or even the most cogent.

If hostility crimes are at the centre of the work of particular university departments or campaigning organisations, such crimes are in the very foreground of their concerns. However, the task of government, and democratically elected representatives as a whole, is to hold competing interests in balance. It may be that a commissioner can be justified where there is an interest without a voice. That cannot be said in relation to hostility crimes. There are university departments devoted to the subject, many committed politicians, and many pressure groups (some of them very assertive) with ready access to mainstream and social media outlets. There are well-organised advocates for those who share every actual and potential protected characteristic.

The appointment of a Hate Crime Commissioner would inevitably be a fraught contentious business. There would be enormous pressure for the appointee personally to have one or more protected characteristics. In the real world, there would be assertions that he or she (even those pronouns would be contested) would not have the confidence of the members of one or more groups if this were not the case. Whichever protected characteristic a commissioner has, he or she would be seen as representative of it, with the concomitant risk of not having the confidence of members of other groups and the general public.

Identifying a commissioner's proper role would provoke still more controversy. Would that role concern conduct which does not necessarily involve 'hate' nor amount to a crime? If so, the title 'Hate Crime Commissioner' would be inappropriate. What would be the commissioner's powers and duties? How would the limits be drawn? An implausibly wide range of activities is envisaged[36], round which it would be impossible to place any clear boundary, and which would create a cat's cradle of confused authority and accountability.

It is likely that a commissioner would be under constant, well-organised pressure to act across a range of issues (the cost estimate in the LCCP summary of £1/2-3/4m p.a. seems to be a gross under-estimate), facing constant criticism for not enough action or skewed priorities. This is further compounded by the disputes between people who share actual or potential protected characteristics – not just between groups, but within them. For example, there can be conflicts between groups belonging to different ethnic minorities. The accusations of transphobia against the feminists Julie Bindel, Suzanne Moore, and J.K. Rowling (and others, the list is a long one), and the controversies between some lesbians and gay men, on the one hand, and trans activists on the other, demonstrate the clashes in other areas. Any commissioner would also have the continual problem of knowing to what extent organisations which claim to represent people who share a characteristic actually do.

It is highly undesirable for a civil servant to be in the middle of

36. LCCP paras 20.12-3

such intense disputes, trying to accommodate or arbitrate, or having to decide between them. It would be an essentially political role. This is the responsibility of accountable elected politicians. It is what democracy is for.

Raising whether there should be a 'Hate Crime Commissioner', the Law Commission has produced unbalanced, inadequate consultation material in relation to a matter which is outside its terms of reference and its statutory remit. This implies self-perception of an expanded range of activity for itself. It is to its role and its relationship with government that this paper will now turn.

10. The Law Commission

The Law Commission is a creature of statute. It was set up to '*promote reform of the law*' [S.1 of the *Law Commissions Act 1965*], as the LCCP says. However, the paper does not refer to S.3(1) of the Act which provides that:

> *It shall be the duty of each of the Commissions*[37] *to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.*

This envisages a technical, non-political, role far removed from the exploration of complex, contested sociological material in order to formulate policy in a highly charged, sensitive area of intense political controversy. Were that not so, and the Law Commission took up positions on heated political/social/cultural battlegrounds, it would become, in reality, just one of a number of competing voices and one which, in terms of expertise, moral sensibility, and political judgement, has no more claim to authority than any other; yet it would have a privileged position close to the heart of government. There are signs that the Law Commission has moved in this direction.

The 1965 Act was amended by the Law Commission Act 2009 which provided, *inter alia*, for the Lord Chancellor to report to parliament the reasons for not implementing Law Commission proposals[38]. It also provided for making a protocol, between the Law Commission and the Lord Chancellor, concerned with the relationship between government and the Law Commission and the way in which the latter should go about its work. Accordingly, a protocol was signed in March 2010[39]. By it, it is the Law Commission which decides whether to include a project in its three-yearly programme, subject to the approval of the Lord Chancellor. And it is for the Law Commission to decide whether to accept a referral from a Minister. It is also for the Law Commission to decide whether '*the independent non-political Commission is the most suitable body to conduct a review in that area of the law*' and '*whether the Commissioners and staff have or have access to the relevant experience.*'

The protocol gives to the Law Commission what many will think to

37. Plural, because the Act created Commissions in Scotland and England/Wales.

38. S.3A Law Commissions Act 1965 (as amended)

39. **Law Commission, *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 2010)**

be extraordinary freedom of initiative and action, being able to initiate projects and itself being the arbiter of whether it is a suitable body to carry out such work. The agreement of the Lord Chancellor to the topics in a three-yearly programme is, in these circumstances, a weak safeguard. The criteria for the Lord Chancellor's approval are not set out. Approval of the topics in the programme begs a host of questions in relation to policy objectives and methodology. Terms of reference must be agreed but, once a project is under way, a Minister cannot require the Law Commission to stop working on it. Though Ministers must be consulted and the prospects of implementation taken into account, the Law Commission is not even formally constrained by what it knows to be government policy.

The Law Commission's freedom of action has been further enhanced by a Memorandum of Understanding of September 2020.[40] This put in place a new funding model by which, instead of receiving more than half its income from the Whitehall Departments concerned with the laws under review, the Law Commission will receive its entire operating budget (£4.9m, as anticipated by its 2020-1 Business Plan[41]) from the Ministry of Justice, which will then itself look to other departments for reimbursement. The Memorandum is explicit that the aim of this funding model is to '*prioritise resources on established projects while also seeking new work*'. The Commission envisages '*cutting-edge projects which look at new … economic or societal legal challenges*' and its suitability criteria '*have been developed … to reflect the way in which they apply to current societal and economic issues*' including, '*fairness, for example supporting individual and social justice.*'

It seems from the Business Plan that the Law Commission seeks to increase its activities and proactively seek more influence. Under the heading 'Strategic use of the Commission', it says: '*During 2020-21, we will continue to develop relationships with other Government departments and Parliamentarians. We will leverage these relationships to promote the use of the Law Commission to consider complex areas of law, utilising our legal expertise.*' This impression is reinforced by something said by the Chair of the Law Commission, Sir Nicholas Green, in a recent interview: '*The Law Commission was a stuffy organisation when I was young; now our people are young and our programmes forward-looking and relevant.*'[42] Some might think that to perform a technocratic, non-political role, the Law Commission should be a bit 'stuffy' and that experience should be at a premium. This, and the reference to its 'forward-looking' (by whose standard?) and 'relevant programmes' (relevant, by what standard, to what or to whom?), suggest that something else is afoot.

Incremental mission creep can escape notice and it can be hard to say exactly when a line has been crossed. Projects concerned with, for example, the regulation of automated vehicles, the technology of smart contracts, or a uniform system of Welsh tribunals do not seem to involve acutely sensitive political issues. However, it should be a matter of real concern if the Law Commission is morphing, at least in part, into an engine of social change, pursuing agendas of its own formulation, by 'leveraging relationships' with parts of the civil service and members of both Houses of Parliament.

40. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/11/MoU-between-the-LC-and-Commission-final-version.pdf

41. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/07/202021-Business-plan-FINAL.pdf

42. *Law Society Gazette*, 18th January 2021

The present consultation's deficiencies are indicative of both mission creep and the Law Commission's unsuitability for it. As is a further specific example. That (even provisional) determination of the balance between human rights and the public interest is beyond the Law Commission's proper function and suitability is amply demonstrated by the fact that its Chair wrote to Lords Pearson and Vinson, less than 2 months after the close of the consultation, to say that the Law Commission was already abandoning its ill-considered proposal to remove the dwelling exception from 'stirring up' offences[43].

Much is made of the Law Commission's independence and its status as an 'Arm's Length Body'. However, in dealing with controversial political issues, complete 'independence' is a chimera. Hostility crimes exemplify this, demanding intensely political judgements, among them: the starting points; the formulation of objectives; the selection of sources of material and evidence; the evaluation of such material; the use of language and the meaning of words; and determining priorities. A striking illustration of political sensitivity, in relation to 'starting points', took place during the LCCP's consultation period. On 20th October 2020, the Equalities Minister, Kemi Badenoch MP, who was brought up in Nigeria, responded for the government in a debate to mark Black History Month[44]. She attacked the Black Lives Matter movement (carefully using capital initials – as can also be seen in the arguably irrelevant reference in the Foreword to the LCCP) and intersectional theories of white privilege and oppression/victimhood. Whether or not Mrs Badenoch is right, this is plainly a deeply fraught area of political controversy.

'Independent' can be a euphemism for 'undemocratic'. The Law Commission's ability to initiate and carry out projects can give those who work for it an undemocratically privileged position in relation to the promotion of political or social issues which may seem important to them but are of less interest to, or priority for, the taxpaying electorate. In this way, the Law Commission can function, at the taxpayers' expense, as an unelected pressure group inside the machinery of government.

It is hard to see why the Law Commission should be given special status in relation to initiatives for law reform. It might be asked whether the 2010 Protocol was the right answer to such problems as there were then. If new laws, or amendments to existing laws, are needed, those concerned can and do raise the matter with Members of Parliament and Ministers. There is a multitude of campaigning bodies and media platforms. Ordering priorities is the stuff of democratic politics. It is for democratically accountable Ministers to decide whether to devote public money to any particular law reform and whether to involve the Law Commission or some other source of expertise (if better, cheaper, or quicker). The Law Commission has its statutory part to play, but if it strays into essentially political areas, there is no reason why its voice should be heard above others and good reason why it should not.

It is beyond the scope of this paper to consider whether keeping the law up to date could be done better without the Law Commission. However,

43. LCCP paras 18.250-7/Q.51

44. *Hansard* HC Deb Vol.682 cols 1011-2, 20 October 2020

it is contended that its role and its relationship with government need restatement. This contention is supported by this flawed consultation, the Law Commission's apparent preparedness, despite its non-political status, to engage with issues of the utmost political sensitivity, and the uniquely privileged platform from which it may promote programmes of social change by law reform and, even, call for the creation of new public bodies.

This restatement would demand democratic accountability in relation to political issues. Further amendment of the *Law Commissions Act* may be necessary. In the short term, there should be clear expression of the Lord Chancellor's criteria for approving the Law Commission's programme and Ministers' criteria for referral to the Law Commission. At the core of those criteria must be the Law Commission's suitability, in terms of its expertise and its non-political status. Politically contentious controversy should be excluded.

Conclusion: The Law Commission

Abstention from politics is the price the Law Commission pays for its independence. Government and the Commission should ensure that it keeps strictly within technocratic, non-political boundaries. At the same time, governments must resist the temptation to use it as long grass into which difficult political issues can be rolled, delaying or dissolving responsibility.

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