



CPS

# Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime

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**CPS**

Policy for Prosecuting Cases of  
Homophobic and Transphobic Hate Crime

**PUBLIC STATEMENT**

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## Introduction

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- 1.1 This document explains the way in which we, the Crown Prosecution Service (CPS), deal with cases involving homophobic or transphobic hate crime. This is the second edition and reflects the changes in legislation and society that have taken place since publication of the first edition in November 2002.
- 1.2 For the purposes of this document, we mean the phrase “the LGBT communities” to include references to all those who identify themselves as lesbian, gay, bisexual and/or as a trans person. Some words and phrases used in this document may not be familiar to everybody. We have therefore set out a glossary of terms at the back of this document in which we have defined some of the words and phrases used.
- 1.3 We regard homophobic and transphobic crimes as particularly serious because they undermine people’s right to feel safe about and be safe in their sexual orientation, whether they are lesbian, gay, bisexual or heterosexual, and in their gender identity, whether they are women or men and including trans men and women. Such crimes are based on prejudice, discrimination and hate and they do not have any place in an open and democratic society.
- 1.4 We wish to deter people from committing homophobic and transphobic incidents by issuing a clear statement that such behaviour is not acceptable and, where appropriate, will be prosecuted effectively through the criminal courts. We also want to help in providing an environment in which those affected by such incidents have the confidence to report

what has occurred and support any prosecution that follows by giving their evidence in court.

- 1.5 Every person has an equal right to be protected by the criminal law and by the criminal justice agencies. Stopping homophobic and transphobic crime and bringing perpetrators to justice must therefore be a priority for our society and for the CPS. Such crimes must be investigated fully and prosecuted firmly so that those affected by them recognise that the criminal law, and those who seek to enforce it, protect and support them as much as they do others. We are determined to play our part by prosecuting cases effectively.
- 1.6 In doing so, we want to promote greater confidence in the criminal justice system — a key aim for all agencies involved. We recognise that those affected by homophobic and transphobic crime often face many difficulties in reporting a homophobic or transphobic incident to the police and then supporting any prosecution at court that may follow that report. In this document, we explain what measures can be taken to assist those who may be required to give evidence in court. Securing the confidence of those affected by homophobic and transphobic crime is an essential part of the CPS' approach to dealing effectively with cases with a homophobic or transphobic element.
- 1.7 The CPS is not the only agency that deals with cases with a homophobic or transphobic element. The police, the criminal courts, magistrates and judges all have roles to play in promoting greater confidence in the criminal justice system. We shall encourage our partner agencies to play their role in ensuring, with us, that the whole criminal justice process brings perpetrators of homophobic and transphobic crime to justice.

- 1.8 We will continue to work and train with community partners from the LGBT communities, both nationally and locally, to help us to improve our understanding of homophobic and transphobic crime and to reach the right casework decisions.
- 1.9 In the drafting of this policy, we have consulted members of LGBT and wider community organisations with professional knowledge in the fields of crime reduction and victim and witness support. We have greatly appreciated their input; however, the content of this document is the responsibility of the CPS alone.

## What does this Policy cover?

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- 2.1 There is no statutory definition of a homophobic or transphobic incident. However, when prosecuting such cases, and to help us to apply our policy on dealing with cases with a homophobic or transphobic element, we adopt the following definition:

*“Any incident which is perceived to be homophobic or transphobic by the victim or by any other person.”*

- 2.2 In adopting this definition, the CPS is building on the approach which has generally been accepted for defining other types of hate incidents, such as racist incidents. Our definition includes, therefore, those incidents which either the victim or a witness thinks are based on homophobia or transphobia whether or not anyone else (including the defendant) perceives that to be the case or whether or not that indeed is the case. Our definition means that those who are affected by homophobic or transphobic incidents

because they are thought to be a member of the LGBT communities (whether or not that is correct) and those who become victims of homophobic or transphobic incidents because they defend, support or protect members of the LGBT communities, come within it. Our definition also includes incidents which the perpetrator alone may perceive as homophobic or transphobic.

- 2.3 We recognise that some people may commit crimes for more than one reason. Such crimes may be motivated by homophobia or transphobia and also by a hatred based on a person's race, religion or belief, age, gender or disability. Some homophobic or transphobic crimes may be committed in a domestic setting, including between adults, children and young people. The CPS has published or intends to publish its policies explaining the way in which we deal with cases where these issues arise and each relevant policy is applied in each appropriate case. Copies of the relevant policies are or will become available (when they are approved) from the CPS Communications Branch, 50 Ludgate Hill, London, EC4M 7EX, from local CPS offices or from our website: <http://www.cps.gov.uk>
- 2.4 This policy statement also recognises that there are people who have sex with people of the same sex who do not see themselves as an LGB person. This fact does not stop this policy applying to them, provided the incident in which they are involved is perceived by someone as homophobic or transphobic.
- 2.5 All those affected by homophobic or transphobic incidents deserve the support of the criminal justice agencies so that such incidents are reported to the police; properly investigated; and, where appropriate, effectively



prosecuted. The definition that we have adopted is wide: it covers all incidents which are perceived to be homophobic or transphobic by anyone involved in them (including the perpetrator) or by anyone who witnesses them.

- 2.6 Not every incident that is reported amounts to a crime however, and even where the incident can be proved to be a crime, there may be insufficient admissible evidence to put before a court to show the element of homophobia or transphobia that brings the incident within the terms of our policy.
- 2.7 This means that some incidents that come within our definition may not lead to criminal proceedings, or, where they do, the prosecution may not be able to provide the court with evidence of the homophobic or transphobic element. However, where such evidence is admissible, the CPS shall advise the court of it.
- 2.8 Whether or not incidents that are perceived to be homophobic or transphobic lead to prosecutions, the CPS shall treat victims of, and witnesses to, such incidents in accordance with this policy.
- 2.9 We recognise that many LGBT people may have different concerns and may face different types and forms of discrimination. Many institutions have evolved barriers which make it more difficult for some people to live and work in an environment where they feel safe. In addition to homophobia or transphobia, these barriers can be due to institutional racism, language, culture, religion or belief, ethnic or national background, disability, gender, age, or they can be economic in nature. These barriers affect individual members of the LGBT communities differently, so

that some LGBT people may be more reluctant to report crime and support the prosecution of the perpetrators than others. These may include (but they are not limited to) black and minority ethnic, disabled, younger or older LGBT people or LGBT people who live in rural areas. We also recognise that members of the LGBT communities may identify with more than one group and therefore they may experience multiple forms of discrimination.

- 2.10 However, the CPS believes that there are common issues underpinning the way in which cases involving any of these groups of people should be considered. That is not to say that the individual issues of any particular victim or witness will not be considered on their own merits, but the purpose of this document is to provide general guidance about how the CPS deals with cases which involve an element of homophobia or transphobia. This document also deals with what the CPS believes are common concerns about the way in which all cases of this nature are prosecuted through the criminal courts.

## Homophobic and transphobic hate crime

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- 3.1 In April 2005, section 146 of the Criminal Justice Act 2003 (CJA) was implemented. Section 146 does not create any new offences; it imposes a duty upon courts to increase the sentence for **any** offence aggravated by hostility based on a number of factors including the victim's sexual orientation (or presumed sexual orientation). Therefore, when an offender has pleaded guilty or has been found guilty and the court is deciding on the sentence to be imposed, it must treat evidence of hostility based on sexual orientation

(or presumed sexual orientation) as something that makes the offence more serious. The court must also state the fact openly so that everyone knows that the offence is being treated more seriously because of this evidence of hostility based on sexual orientation (or presumed sexual orientation).

- 3.2 Section 146 does not, however, apply in cases of transphobia where hostility is based on the victim's gender identity or presumed gender identity.
- 3.3 In addition, there is a difference between a homophobic incident and a crime involving hostility based on homophobia. Section 146 applies only to those criminal proceedings in which the prosecution can prove, by evidence that the court is able to accept, that the defendant demonstrated hostility towards the victim because of their sexual orientation (or presumed sexual orientation) or that the offence was motivated by hostility towards persons who are of a particular sexual orientation. This means that there will be incidents perceived by the victim, or anyone else, as being homophobic that will not eventually lead the court to treat the offence as one which is aggravated by hostility based on sexual orientation.
- 3.4 Section 146 is designed to ensure that offences aggravated by hostility based on the victim's sexual orientation (or presumed sexual orientation) are treated seriously by the police, prosecutors and the courts and it ensures that such offences (and offences aggravated by hostility based on disability) are treated in the same way as offences that are aggravated by racial or religious hostility.

- 3.5 The CPS therefore now has a duty, where there is evidence of such hostility, to bring it to the attention of the sentencing court.

### **When will section 146 CJA apply?**

- 3.6 Section 146 applies to offences committed where:

“At the time of committing the offence or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on the sexual orientation (or presumed sexual orientation) of the victim”,

OR

“The offence was motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation”.

- 3.7 It is important to note that these are alternatives. This means that in a case where a demonstration of hostility can be proved (this will usually be in the form of spoken words) there is no need to prove a hostile intention, and vice versa. Motive is always difficult to prove and it is likely that more section 146 cases will relate to hostile acts than to hostile motivation.
- 3.8 However, section 146 will apply even if the incident was prompted by some non-sexual orientation related incident, provided the offender has gone on to demonstrate hostility based on the sexual orientation (or presumed sexual orientation) of the victim.

## **Proving that an offence was aggravated by hostility based on sexual orientation (or presumed sexual orientation)**

- 3.9 Not all incidents that the victim or some other person has perceived to be a crime motivated by hostility towards a victim's sexual orientation (or presumed sexual orientation) will be covered by section 146. For the section to apply, the prosecution must first prove that the offender has committed a criminal offence and then must prove that the offence was aggravated by hostility based on the victim's sexual orientation (or presumed sexual orientation). To help us decide whether an incident reported to the police amounts to a crime and whether there is enough evidence to prosecute the case, we use the Code for Crown Prosecutors. We explain the Code later in this document.

## **The role of the CPS**

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- 4.1 It is the responsibility of the police to investigate allegations of crime and to gather evidence about what occurred.
- 4.2 Following the implementation of Statutory Charging, it is now the responsibility of the CPS to decide charges in all but minor and routine cases. Our prosecutors will work with the police to ensure that homophobic or transphobic crime cases are identified as early as possible so that the correct charging decision can be made.
- 4.3 The criminal justice system in England and Wales is based on witnesses coming to court to give evidence about what occurred. Usually, witnesses give evidence in open court with members of the public and press there. The defendant

is almost always present as well. The reporting of crime and the giving of evidence is a public duty and the key to any successful prosecution is based on the willingness of witnesses to come forward.

- 4.4 We know that those affected by homophobic or transphobic incidents are sometimes reluctant to report them or to give evidence if the perpetrator is prosecuted because they may be “outed”, that is, their sexual orientation or their trans identity may become known or more widely known than the person wishes. We recognise the concerns that members of the LGBT communities may have about this and we will treat all victims and witnesses with respect and dignity. It is important to us all that those affected by homophobic and transphobic incidents report them and come to give their evidence in court when a prosecution follows: telling their account in court can make a difference, but we cannot guarantee that the defendant will be found guilty. We will do all that we can to make giving evidence in court as easy as possible including, in particular, using the provisions of section 46 of the Youth Justice and Criminal Evidence Act 1999 which allows for reporting restrictions as to the identity of the victim in certain circumstances (see sections 10.17 – 10.22 of this policy).

## The Code for Crown Prosecutors

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- 5.1 The way in which we reach our decisions about whether to prosecute is set out in the Code for Crown Prosecutors. This document is issued by the Director of Public Prosecutions who heads the CPS. It is updated regularly so that it reflects current practice. It is a public document. We review the

cases that are referred to us in line with the two stages that are set out in the Code. In the few cases where the police have already charged a defendant, we have to decide whether to continue the prosecution, reviewing the case in accordance with the Code. In both situations, the responsibility whether a prosecution should take place is ours, not that of the victim or the police.

### **The first stage — the evidential stage**

- 5.2 Crown Prosecutors must first be satisfied that there is enough evidence to provide a “realistic prospect of conviction against each defendant on each charge”. This means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
- 5.3 To secure a conviction in a criminal court, we have to prove the case so that the court is sure of guilt.
- 5.4 The evidential stage that we use is therefore different from the test that the court applies before it may convict a defendant. Just because a case may pass the evidential stage set out in the Code, it does not necessarily mean that the case will result in a conviction. Many things can happen between our decision to prosecute a case and the court’s verdict: for example, witnesses may not attend court to give evidence; witnesses may give different evidence in court from that which they gave to the police; or the defendant may give evidence and tell a different version of events and this may cast doubt upon the truth of the victim’s story. It is for the court to decide whether a defendant is guilty based upon the evidence that it hears or reads. This accounts for why not all cases that are prosecuted result in a conviction.

- 5.5 If the case does not pass the first stage based on the strength of the evidence, it must not go ahead, no matter how important or serious it may be. This is because we have reached the view that the court is not likely to convict the defendant of the crime alleged on the evidence we have. In such cases, it is wrong to put the defendant through the criminal justice process and it is wrong to raise the expectations of victims and witnesses when we do not believe that a conviction is likely.

### **The second stage — the public interest stage**

- 5.6 If the case does pass the evidential stage, Crown Prosecutors must then decide if a prosecution is needed in the public interest. A prosecution will usually take place “unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour”.
- 5.7 When considering the public interest stage, one of the factors that Crown Prosecutors should always take into account is “the consequences for the victim of the decision whether or not to prosecute; and any views expressed by the victim or the victim’s family”. We always think very carefully about the interests of the victim when we decide where the public interest lies. But we prosecute cases on behalf of the public at large and not just in the interests of any particular individual. There can be difficulties in striking this balance. The views and interests of the victim are important, but they cannot be the final word on the subject of a CPS prosecution.
- 5.8 We regard any offence motivated by hostility towards the victim because of the victim’s sexual orientation, gender



identity, perceived sexual orientation or perceived gender identity as being more serious. As a result, the public interest in homophobic and transphobic hate crime cases that are referred to us will almost always be in favour of a prosecution.

5.9 Some public interest factors that we will consider are:

- the seriousness of the offence;
- the victim's injuries — physical and/or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats before or after the attack;
- if the defendant planned the attack;
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who is, or may become, involved;
- the victim's relationship with the defendant; and
- the defendant's criminal history, particularly any previous offences against vulnerable people.

5.10 The Code is a public document. Copies are available from CPS Communications Branch, 50 Ludgate Hill, London, EC4M 7EX or from local CPS offices, or from our website: [http://www.cps.gov.uk/victims\\_witnesses/code.html](http://www.cps.gov.uk/victims_witnesses/code.html)

### **Assessing cases without the victim's evidence**

5.11 In many homophobic or transphobic incidents, the victim is often the only witness. Where there is sufficient evidence and the incident leads to a charge and a prosecution, it will usually be necessary for the victim to give evidence in court unless the defendant pleads guilty or there is strong supporting evidence. We know that some victims of

homophobic and transphobic crime will find this very difficult. If it is necessary for the victim to give evidence, we will consider all the options available to us to help the victim give their best evidence in court. We have set out those options in sections 10.15 – 10.32 of this policy.

- 5.12 However, we will not automatically assume that asking the victim to give evidence in court is the only way to prove the case. We will also consider what other evidence may be available as an alternative to the victim's evidence. In cases of homophobic or transphobic crime — as in all cases — the reviewing prosecutor must apply the Code for Crown Prosecutors. If there is sufficient evidence to proceed without the evidence of the victim, subject to the public interest stage, the case may still be able to proceed. We have set out in sections 8 and 9 of this policy how this may be achieved.

### **Minor offending by the victim of, or a witness to, a more serious crime**

- 5.13 The CPS recognises that LGBT people may be particularly reluctant to report homophobic or transphobic incidents committed on them or on others that they witness. They may fear that they may become the subject of a police investigation and a possible prosecution, because of where they were; because of whom they were with; or because of what they were doing, when the incident occurred. For example, they may be committing a minor sexual criminal offence, such as is sometimes the case by cruising or cottaging, in an area that is known for such types of sexual behaviour. They may also become a victim of, or a witness to, a crime simply because they are found in such places where others believe that they are likely to be engaging in such types of sexual behaviour.

- 5.14 Whatever the reason, there are many members of the LGBT communities who are victims of, or witnesses to, homophobic or transphobic incidents who are not prepared to come forward to the police because they fear that they will be investigated for their own behaviour.
- 5.15 The CPS is committed to playing its part in the protection of all members of society through the appropriate use of the criminal justice process. Although the CPS cannot guarantee that people who commit minor offences will not be prosecuted, when deciding if a prosecution should take place, we will consider such offences in the context of what else occurred.
- 5.16 Every case is considered on its merits. However, where a person who commits a minor offence becomes the victim of, or a witness to, a more serious crime, it is right, as a matter of public policy, that the more serious crime is investigated and, where appropriate, prosecuted, even if this means that the minor offending of the victim or witness is not prosecuted.

## Policing hate crime

- 6.1 The Association of Chief Police Officers represents the 44 police services in England, Wales and Northern Ireland and, in March 2005, it issued a tactical guidance manual to all services, in relation to Hate Crime and Hate Incidents.
- 6.2 A Hate Incident is defined as:

*“Any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person as being motivated by prejudice or hate.”*

6.3 A Hate Crime is defined as:

*“Any incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by prejudice or hate.”*

6.4 A Homophobic or Transphobic Incident is defined as:

*“Any incident, which is perceived to be homophobic or transphobic by the victim or any other person.”*

6.5 The manual emphasises the importance of police investigators notifying prosecutors that a crime has been identified as a homophobic or transphobic incident and whether the victim(s) or a key witness is from the LGBT communities.

## Prosecuting cases of homophobic and transphobic hate crime

7.1 We may not always be able to prove that an offence that the victim or some other person thinks is a homophobic or transphobic crime is a hate crime in law. However, it is important that any offence which has been considered to be a homophobic or transphobic crime is identified as such by the police and the CPS as this will inform the way that we handle the case. All such incidents should be identified to us by the police and we will then monitor the way we deal with them.

7.2 We will adopt a proactive approach to seeking further information from the police to help us decide if a case may properly be prosecuted as a homophobic or transphobic crime. In some cases, we may advise the police to follow up other possible lines of enquiry. This might include

looking at previous reported incidents involving the same victim, or the same suspect, or the same location. In all cases, prosecutors should liaise directly with the officer in the case to make sure all available evidence has been obtained and sent to the CPS so that we may fully review the case. This may be especially important if the situation represents repeat victimisation.

- 7.3 We aim to build the strongest possible cases to put before the court. If we are satisfied that there is sufficient evidence to prove that the offence is aggravated in accordance with section 146, we will make it clear to the defence and the court that we intend to put this in evidence before the court for sentencing purposes. In some cases – particularly where it is disputed - it may be necessary to call witnesses (who may include the victim) to give evidence to prove the aggravating feature(s) of the offence.

### **Charge selection**

- 7.4 The charges that we decide on in any prosecution should always reflect the seriousness of what took place, any element of pre-meditation or persistence in the defendant's behaviour, the provable intent of the defendant and the severity of any injury suffered by the victim. The charges must help us to present the case clearly and simply and they must give the court the power to impose a suitable sentence.<sup>1</sup>
- 7.5 The CPS and the police have agreed what are called "charging standards" for certain types of offence, including

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<sup>1</sup>Prosecutors' Pledge: "Take into account the impact on the victim or their family when making a charging decision" and The Code of Practice for Victims of Crime, section 7.2 refers to the CPS obligation to ensure that victims are informed of charging decisions taken by the CPS.

assaults. These are guidelines that help us to make consistent decisions about the right charges. Examples of charging standards can be seen at:

[http://www.cps.gov.uk/legal/section5/chapter\\_c.html](http://www.cps.gov.uk/legal/section5/chapter_c.html)

- 7.6 If a case is being prosecuted as a homophobic crime, the charge itself will not reflect the fact that the crime is a homophobic crime. This is because section 146 of the Criminal Justice Act 2003 does not create any specific offence but instead places a duty on courts to increase sentences for offences aggravated by hostility based on the victim's sexual orientation (or presumed sexual orientation). We do not have to prove the aggravating factor in order for the defendant to be found guilty of the offence charged (for example, assault or criminal damage). However, we do have to prove the aggravating factor to ensure that the offence is treated more seriously by the sentencing court under section 146 of the Act.
- 7.7 Although there is no statutory power, the court has a general power and discretion to increase sentences that are aggravated by transphobic hostility.

## **Bail**

- 7.8 After a person is charged with an offence, the police will decide, in consultation with the prosecutor, whether to release the person on bail, with or without conditions, to attend the next available court hearing (usually within two to five days of charge), or to keep the person in custody to appear before the magistrates' court that day or the next. Once the accused appears before the court, the magistrates will make the decision about bail after hearing from the prosecution and the defence. We can appeal, in certain circumstances, against a decision to grant bail.

- 7.9 The time after an offender is charged with a crime can cause anxiety for the victim, and a victim of hate crime may feel particularly vulnerable. In order to protect victims and witnesses from the risk of danger or threats or repeat offences, we may ask the court to impose conditions on the bail or may ask for the defendant to be remanded in custody. The court can only refuse bail, or impose conditions on bail, if we can show that one of the exceptions to granting unconditional bail applies. Examples of such exceptions would be based on reasonable grounds for believing that the person would not attend court, would commit offences or would obstruct the course of justice, perhaps by intimidating witnesses.
- 7.10 Conditions that the court can impose include requirements not to approach any named person or to keep away from a certain area. In making decisions about whether to oppose bail, we will take account of information provided to us by the police about the fears of a victim or witness about harassment or repeat offending.
- 7.11 We will work with the police and the courts to make sure that the victim or witness is kept informed, either by the police or by us, of any change to the bail conditions or custody status of the accused person. Witness Care Units, run by the police and the CPS, provide support and information for victims and witnesses and a Witness Care Officer will keep in contact with the victim or witnesses to let them know of any changes. We set out our obligations to victims and witnesses in section 10 of this policy.

## What happens if the victim wishes to withdraw support for the prosecution or no longer wishes to give evidence?

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- 8.1 Sometimes, a victim will ask the police not to proceed any further with the case, or will ask to withdraw the complaint. This does not necessarily mean that the case will automatically be stopped. As a general rule, we will prosecute all cases where there is sufficient evidence and there are no factors that prevent us from doing so. If the victim has decided to withdraw support for the prosecution, we have to find out why. This may involve delaying the court hearing to investigate the facts and decide the best course of action.
- 8.2 We will take the following steps:
- we will ensure that an experienced prosecutor supervises the case;
  - if the victim decides to withdraw support, we will ask the police to take a written statement from the victim explaining the reasons for that withdrawal, confirm that the original complaint was true and whether the victim has been put under any pressure to withdraw support;
  - we will ask the police to give their views about the evidence in the case and how they think the victim might react if they are compelled to attend court; and
  - where appropriate, we will ask for advice from the police's LGBT liaison officer and/or the CPS Homophobic Crime Co-ordinator<sup>2</sup>.

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<sup>2</sup>Details of the Homophobic Crime Co-ordinator for your Area can be obtained from the Equality and Diversity Unit; Tel: 020 7796 8790.



- 8.3 If the victim's statement, after withdrawing the complaint, is not the same as the earlier statement, we will expect the police to ask the victim to explain why it has changed.
- 8.4 If the victim confirms that the complaint is true but does not want to give evidence in court, we will consider first whether it is possible to continue with the prosecution without the evidence of the victim (the evidential stage) and then, if it is possible, whether we should continue the case without the support of the victim/against the victim's wishes (the public interest stage).
- 8.5 The prosecutor will want to know the reasons why the victim no longer wishes to give evidence. In cases of homophobic or transphobic crime, this may be because the victim lives in a place in which they feel isolated or particularly vulnerable (and we recognise that feeling isolated or vulnerable may have deterred or delayed the victim from reporting the incident in the first place), or because supporting the prosecution may place the victim at further risk of harm, for example, in domestic violence cases or situations where the victim is fearful of other consequences of giving support to the prosecution. In such cases, the prosecutor must have regard to any special measures or other support available to the victim that may help them, at least in part, to overcome their concerns.<sup>3</sup>
- 8.6 If we suspect that the victim has been pressured or frightened into withdrawing the complaint, we will ask the

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<sup>3</sup>Prosecutors' Pledge: "Address the specific needs of a victim and where justified seek to protect their identity by making an appropriate application to the court" and The Code of Practice for Victims of Crime, section 7.8 states that CPS prosecutors must consider applications for special measures for potentially vulnerable or intimidated witnesses.

police to investigate further. The investigation may reveal new offences, for example, harassment or witness intimidation, or that bail conditions have been breached. If necessary, we will ask the court to delay any hearing so that a thorough investigation may take place before we decide about the future of the case. If the reason for a victim's or witness' withdrawal is based on fear or intimidation, the prosecutor will consider that evidence and decide whether further charges, for example, of witness intimidation, should be brought.

- 8.7 We will explore all these options fully, before we decide whether to proceed with a prosecution. The safety of the victim or any other potentially vulnerable person will be a prime consideration in reaching our decision.

## Continuing a case where the victim has withdrawn their support for the prosecution

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- 9.1 Generally, the more serious the offence (because of, for example, the level of violence used or the real and continuing threat to the victim or others), the more likely we are to prosecute in the public interest, even if the victim says they do not wish us to do so.
- 9.2 In cases where we have sufficient other evidence, we may decide to proceed without relying on the evidence of the victim at all.
- 9.3 If we decide that the case should continue and that it is necessary to rely on the victim's evidence to prove the case, we have to decide:

- whether we should apply to the court to use the victim's statement as evidence without the victim having to give evidence in court;
- if we can proceed with the prosecution by helping the victim to attend court through the use of special measures; and
- whether we should compel the victim to give evidence in person in court.

9.4 Background information is crucial in helping a prosecutor to make the correct decision about how to proceed in a case where the victim has withdrawn their support for the prosecution. Where appropriate, we will ask for help and advice from the police's LGBT liaison officer and/or the CPS Homophobic Crime Co-ordinator.

9.5 Some of the factors that should be considered include:

- the ability of the victim to testify;
- whether there is an ongoing relationship between the victim and the defendant;
- where there is an ongoing relationship, the history of the relationship and any instances of previous abuse;
- the likelihood of the defendant offending again;
- the impact on the victim of proceeding or not proceeding with the case; and
- whether there have been any threats made since the incident.

9.6 There may be occasions when it will be necessary to compel a victim or witness to give evidence because of the seriousness of the offence or the way in which it was committed, for example, where a weapon was used or where the assault was carried out by a gang. In these cases,

we have to balance the reluctance of the victim or witness to give evidence with the public interest in ensuring that those accused of such serious crimes are brought to court.

- 9.7 Prosecutors will only make a decision to call victims to give evidence against their wishes after consultation with the police and, possibly, others with a legitimate interest. Any decision to compel a victim to give evidence will also take into account the rights an individual has under the Human Rights Act 1998.
- 9.8 The law allows us to use the victim's statement in court without calling the victim to give oral evidence but only in very limited circumstances. It is for the court to decide and it will only allow this if it is in the interests of justice to do so. If the victim is the only witness to the offence, it may be difficult to satisfy the court that justice is being served when the defence cannot cross-examine that witness.

## Support for victims and witnesses

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- 10.1 We recognise that legislation, Codes of Practice and policies that provide guidance on the care and treatment of victims and witnesses during the court process variously refer to victims only, witnesses only or victims and witnesses. In this part of our Policy we have adopted the description used in each of the source documents to maintain consistency. If, for example, there is reference to a victim, the service or support being offered is only available to victims. However, reference to witnesses should also be taken to include victims who are required to attend court to give evidence.

- 10.2 The CPS is fully committed to taking all practicable steps to help victims and witnesses through the often difficult experience of becoming involved in the criminal justice system. The CPS recognises that in the past there have been concerns about the way in which the criminal justice system has dealt with offences relating to homophobia and transphobia. We also recognise that members of LGBT communities might be reluctant to report incidents out of fear, mistrust or because of their previous experience of those who are involved in that system.
- 10.3 Initiatives such as No Witness, No Justice, special measures, meetings between the CPS and vulnerable and intimidated victims and witnesses and reporting restrictions are all designed to increase the confidence of victims and witnesses in the criminal justice system. Support may also be available from a very early stage from the police, community groups, Housing Services and other support agencies which can continue throughout the life of the prosecution.

### **The Prosecutors' Pledge**

- 10.4 This is a 10-point Pledge that describes the level of service victims can expect to receive from prosecutors. The Prosecutors' Pledge should ensure that the specific needs of LGBT victims are addressed, that they are assisted at court to refresh their memory from their written or video statement and that they are protected from unwarranted or irrelevant attacks on their character.
- 10.5 The Prosecutor's Pledge can be obtained from our website: [http://www.cps.gov.uk/publications/prosecution/prosecutor\\_pledge.html](http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html)

## **The Code of Practice for Victims of Crime**

- 10.6 This Code sets out the obligations of the CPS towards victims. An example of one of the obligations is where a prosecutor decides either that there is insufficient evidence to bring any proceedings (following a full, written evidential report from the police), or where the prosecutor decides to alter substantially or to drop any charge. In those circumstances, the prosecutor must notify the victim. If the victim is vulnerable or intimidated, the prosecutor must notify them within one working day of the decision being made, and within five working days of the decision being made for other victims. For homophobic or transphobic offences, the prosecutor will also offer to meet the victim to explain the decision. Where a prosecutor has made a decision not to charge during a face to face consultation with a police officer (that is, without a full, written evidential report), the police officer must notify the victim.
- 10.7 Copies of the Code of Practice for Victims of Crime can be obtained from CPS Communications Branch at 50 Ludgate Hill, London EC4M 7EX or from our website:  
[http://www.cps.gov.uk/victims\\_witnesses/victims\\_code.pdf](http://www.cps.gov.uk/victims_witnesses/victims_code.pdf)

## **Treatment at Court**

- 10.8 The Equal Treatment Bench Book contains clear guidelines for magistrates and judges about appropriate language and behaviour, so that they can play their part in ensuring that a proper level of respect for victims is maintained. The document can be found at:  
<http://www.jsboard.co.uk/etac/etbb/index.htm>

## **Victim Personal Statements**

- 10.9 A Victim Personal Statement is a statement made by a victim of crime explaining the effect that the crime has had on him or her. In the statement, victims can describe how they have been affected by the crime. They can talk about their wishes or needs during the case and any concerns they may have as a result of the offence, for example, about safety, intimidation or bail. They can mention support (or absence of support) for the prosecution and requests for help from any of the support agencies. In this way, the court can better understand not only the crime but also the context in which it occurred. The statement is optional, and the victim should be asked whether or not s/he wishes to make such a statement or if s/he requires help to make a statement from a support worker or family member. This statement can be made at any time and it is possible to make more than one statement.
- 10.10 It should be clear on a victim's statement whether or not they have been told about the fact that they may make a Victim Personal Statement. Where it is not clear, the prosecutor will ask the police officer to go back to the victim and explain that they may make a Victim Personal Statement if they wish to do so. A leaflet is available which explains what Victim Personal Statements are and how they can be used. Copies of the leaflet can be found at: <http://www.homeoffice.gov.uk/documents/victimstate.pdf>
- 10.11 Prosecutors can use Victim Personal Statements to help them make decisions about cases, for example, when deciding whether they should ask the court to impose conditions when a defendant is on bail.

## **Witness Care Units**

- 10.12 No Witness, No Justice is a joint programme between the police and the CPS and is aimed at responding to the individual needs of victims and witnesses through the establishment of dedicated Witness Care Units.
- 10.13 We have Witness Care Units in all 42 CPS Areas and these are run jointly by the CPS and the police. Witness Care Officers provide a single point of contact and tailored support for each victim and witness to ensure that they are able to give their best evidence. This tailored support is based on a needs assessment which should lead on to the identification of any specialist support that a victim or witness may require.
- 10.14 Witness Care Officers or specialist support agencies will manage the care of victims and witnesses from the time a defendant is charged until the conclusion of the case.

## **Helping witnesses to give their best evidence**

- 10.15 Some LGBT people, and other possible witnesses who are not LGBT, may not initially feel able to give evidence in court about a homophobic or transphobic crime because of the difficulty or danger which they believe they would place themselves in by doing so. There are several ways in which the courts may help: in certain circumstances, the court may agree to allow a witness to give their evidence with the help of "special measures". There are several kinds of special measures. They are all intended to make it possible, or easier, for witnesses to give important evidence which they feel could not otherwise give, or which they feel they could not give safely.



10.16 In addition, there are ways in which the court may assist a witness to give evidence where that witness is concerned that by giving evidence they will be identified in the media. We recognise that these particular issues can play a huge part in a witness' decision whether to give evidence and the following section of this policy sets out the way in which the courts will consider applications for reporting restrictions and anonymity.

### **Reporting restrictions (Youth Justice and Criminal Evidence Act 1999, section 46)**

10.17 Victims of serious sexual offences are entitled as a matter of law not to be named or otherwise identified in the media.

10.18 In some other cases not involving sexual offences, the law allows the CPS to apply for a direction restricting the reporting of certain details of witnesses in the media that may lead to their identification. This direction can be sought at the beginning of a prosecution and, if made, it prevents any branch of the media publishing any information that could identify the witness. Such a direction applies not only to the length of the court proceedings but for the witness' entire life. A section 46 direction can provide a very important protection for people who are concerned about being identified in the media because they give evidence in a case involving a homophobic or transphobic crime.

10.19 The court must follow a set procedure when considering such an application and must determine whether a witness is eligible and, as with special measures, whether the reporting restriction will be likely to improve the quality of the witness' evidence. The focus of all these measures is to ensure that vulnerable and intimidated witnesses are better able to give their best evidence to the court.

10.20 A witness is eligible to be considered for this protection if the court is satisfied that their evidence would be adversely affected by being identified by members of the public as a witness in the case. When deciding whether a witness is eligible, the court must take into particular account:

- the nature of the alleged circumstances of the offence to which the proceedings relate;
- the witness's age;
- if relevant, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances, and any religious beliefs or political opinions; and
- any behaviour towards the witness on the part of the defendant, members of his/her family or associates, or any other person who is likely to be a defendant or witness in the proceedings.

10.21 Once these factors are determined, the court will consider:

- whether it would be in the interests of justice to make a reporting direction; and
- the public interest in avoiding a substantial and potentially unreasonable restriction on the reporting of proceedings.

10.22 The defence and/or the media are entitled to object to any application that we may make. Where a reporting direction is made, the effect will be that no matter relating to the witness during his or her lifetime shall be included in any publication if it is likely to identify him or her as a witness in the proceedings.

## **Providing anonymity for victims or witnesses**

- 10.23 The CPS is aware that the issue of anonymity is of particular concern to many victims and witnesses of homophobic and transphobic crimes. For the most part, it remains a fundamental principle in the criminal justice system in England and Wales that those accused of crimes are entitled to know the name of their accusers. Most criminal proceedings are held in public; therefore, such information inevitably finds its way into the public domain.
- 10.24 However, the court has the power to control its proceedings and this includes allowing witnesses not to give their names in open court. This sometimes happens in cases of blackmail; but occasions when this is allowed are rare. One of the considerations that the court bears in mind is whether the naming of an individual witness might make it more difficult to obtain evidence from other witnesses in the future.
- 10.25 Although we shall do all we can to help witnesses at court, it is unlikely that a court will allow an LGBT victim of, or an LGBT witness to, a crime not to disclose their name in court.
- 10.26 However, unless it is required for evidential purposes, for example, because it is where the alleged offence took place, a witness' address should not be disclosed in open court or disclosed to the defendant.
- 10.27 The Gender Recognition Act 2004 (GRA) enables a trans person to apply for legal recognition of their chosen (acquired) gender in the form of a Gender Recognition Certificate (GRC). The GRA makes it a criminal offence to

disclose protected information (relating to a person's application for, or possession of, a GRC), if this knowledge has been obtained in an official capacity, for example, as a member of the civil service, a constable, or an employee of a public body. There are specific exceptions to disclosure, however, for instance: where the disclosure is for the purpose of instituting court proceedings; where the disclosure is in accordance with an order of a court; or where it is for the purpose of preventing or investigating a crime. On occasions, it may be necessary to mention in court the fact that a person is a trans person. However, the established practice of the courts is that, where disclosure of birth gender is not essential, it should be omitted; it should be possible in such cases to accept the person's apparent identity for nearly all court purposes.

## **Special measures**

10.28 Other special measures were introduced by the Youth Justice and Criminal Evidence Act 1999 and are available in both the Crown Court and the magistrates' courts. They are available to help the following witnesses:

- children under 17 years;
- adults (17 and over) who may be considered vulnerable because of incapacity, such as a physical or mental disorder<sup>4</sup>; or learning disability; and
- witnesses whose evidence is likely to be affected because they are intimidated (for example, because they are afraid or distressed about giving evidence).

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<sup>4</sup>This includes someone who is living with a particular condition which may inhibit them from pursuing a prosecution if that fact is going to be widely broadcast

10.29 Special measures include, amongst other things:

- playing to the court the victim's or witness' video-recorded statement (previously taken by the police during the investigation);
- allowing the use of screens in a courtroom to prevent a victim or other witness from seeing the defendant;
- giving evidence away from the courtroom through a live television link (but the defendant will still be able to see them);
- clearing the public gallery in sexual offence cases or cases involving intimidation.

10.30 In deciding whether special measures should be sought, we have to determine if "the quality of evidence that the witness is going to give is likely to be diminished without the special measures that are requested". We will positively consider special measures in cases involving LGBT victims and witnesses who may benefit from them. We will apply for special measures in all appropriate cases, but it is for the judge to decide, and not all special measures are available in every court. As cases proceed, individual circumstances may change so special measures may need to be adapted. Wherever possible, any application for special measures will be made before the day of the trial and the court's decision will be communicated to the witness by their Witness Care Officer.

10.31 The need for special measures should be investigated first by the police and then by the prosecutor. The Witness Care Officer may also have an input following a needs assessment but it will be for the court to decide whether they should be granted. The Code of Practice for Victims of Crime, section 7.8, states that CPS prosecutors must

consider applications for special measures for potentially vulnerable or intimidated victims who are to be called as witnesses to give evidence.

10.32 When the police officer takes a statement from a witness, they will conduct an initial needs assessment for that person which will include asking the witness if they are willing to attend court and if special measures are required. This is an opportunity for the witness to tell the police about anything that is worrying them about a possible court appearance and to discuss the options for special measures. If the witness later has to attend court to give evidence, the Witness Care Officer will conduct a detailed needs assessment. If anything has been missed about the needs of the individual, this is a further opportunity for the witness to give details of their concerns.

### **Meeting between the CPS and vulnerable or intimidated victims and witnesses**

10.33 When an application for special measures is being considered, the CPS will, in some circumstances, hold an Early Special Measures Meeting with the police officer investigating the case or the officer who has particular knowledge about the needs of the witness. The witness may be asked, in certain circumstances, if they would like to meet the prosecutor. The purpose of their meeting is to reassure witnesses that their needs will be taken into account and thereby help build trust and confidence. The witness does not have to attend that meeting by themselves. They can bring a partner, a relative, a friend or other supporter. In order to facilitate communication with the witness, it may be appropriate for an interpreter or other similar person, to attend the meeting. Wherever

possible, the CPS prosecutor will ensure that the advocate who will be conducting the trial will attend the meeting between the CPS prosecutor and the witness. If the CPS prosecutor meets the witness, they will check that the witness has been offered a court familiarisation visit.

- 10.34 Further information about meetings with vulnerable or intimidated witnesses is contained in the leaflet: “Witnesses, Your meeting with the CPS Prosecutor”. This leaflet is available from:  
CPS Communications Branch  
50 Ludgate Hill  
London EC4M 7EX  
or from our website:  
<http://www.cps.gov.uk/publications/prosecution/witnesseng.html>

## Sentencing

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- 11.1 Evidence of aggravation based on a victim’s sexual orientation (or presumed sexual orientation) makes a case more serious and the court has a duty under section 146 Criminal Justice Act 2003 to take this into account when it sentences the accused and to make it clear that it has done so. We will make sure that the court has all the information it needs to carry out this duty.
- 11.2 When a defendant pleads guilty or is found guilty, the court has to decide on the sentence to impose and can choose from a broad range of penalties. The penalties may be in the form of rehabilitative orders, community penalties, fines, “bindovers” or custody.

- 11.3 Before being sentenced, a defendant is entitled to make a plea in mitigation. We will challenge defence mitigation which unfairly attacks the victim's character.<sup>5</sup>
- 11.4 If the defendant pleads guilty or is found guilty of an offence but disagrees with the prosecution that the offence was aggravated by hostility based on the victim's sexual orientation (or presumed sexual orientation), the judge or magistrates will have to decide whether the aggravating feature is proved. The prosecution must call witnesses who can give evidence about the hostility and the defence will be able to cross-examine them before the court makes a decision. This process is called a "Newton hearing". At the end of the hearing, the court must announce whether it is satisfied, having heard the evidence, that the offence was aggravated by hostility based on the victim's sexual orientation (or presumed sexual orientation). If so, the court must treat the offence more seriously when deciding on sentence, in accordance with section 146 Criminal Justice Act 2003. If not, section 146 will not be relevant.
- 11.5 We will give the court information to help it to decide whether to make any orders it has power to make in addition to the main sentence.<sup>6</sup> This includes making an order in appropriate cases for compensation for loss, injury or damage.<sup>7</sup>

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<sup>5</sup>Prosecutors' Pledge: "Protect victims from unwarranted or irrelevant attacks on their character and may seek the court's intervention where cross-examination is considered to be inappropriate or oppressive.

<sup>6</sup>The Code of Practice for Victims of Crime, section 7.12 states that the CPS must answer any questions the victim has about the sentence if the victim is referred to the CPS by the Witness Care Unit (this is if the Witness Care Unit is unable to answer the victim's questions).

<sup>7</sup>Prosecutors' Pledge: "On conviction, apply for appropriate order for compensation, restitution or future protection of the victim".



11.6 In all cases, it is for the magistrates or judge alone to decide what the sentence should be. In a limited number of offences (and only when the defendant is sentenced in the Crown Court), we have the right to ask the Attorney General to challenge a sentence, if we believe it is unduly lenient. Anyone, including the victim or the victim's family, can themselves draw the sentence directly to the attention of the Attorney General, if they consider it to be unduly lenient. There is, however, a strict 28 day time limit (from the date of sentence) within which the Attorney General must apply to the Court of Appeal.

## Recording hate crime

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12.1 It is essential that cases that involve a demonstration of hostility or that are motivated by hostility towards the victim on account of their sexual orientation or gender identity or presumed sexual orientation or presumed gender identity are correctly identified. We will record cases identified as a homophobic or transphobic incident by the police and monitor our performance to ensure that we are using the legislation and applying this policy consistently. Since April 2005, we have monitored the performance of all 42 CPS Areas on handling cases of homophobic and transphobic crime on a quarterly basis and have published our annual performance figures on handling cases of homophobic and transphobic crime. We will continue to report on our performance to communities in order to build confidence in the criminal justice system. From 2008-2009 onwards, the CPS will publish an Annual Hate Crimes Report which will contain performance data on homophobic and transphobic crime (along with performance data on other hate crimes).

12.2 The Code of Practice for Victims of Crime has imposed new duties and obligations on the CPS. Monitoring homophobic and transphobic crime and monitoring the outcomes of crimes involving LGBT victims and witnesses will help us to ensure that we are complying with our obligations and that we are providing a quality service for all victims of crime. Each CPS Area has Homophobic Crime Co-ordinators whose role — amongst other things — is to facilitate implementation of this Policy within their Area; to promote this Policy amongst Criminal Justice System partners; and to be an Area source of expertise and guidance for cases involving homophobic or transphobic hate crime.

## Conclusion

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13.1 The CPS is determined to play its part in reducing crimes with a homophobic or transphobic element by bringing offenders to justice, but we need help from victims and witnesses if we are to do our job well.

13.2 We also want the LGBT communities to have confidence in us. We hope that this document allows all members of society, but particularly members of the LGBT communities, to have a better understanding of what the CPS does; why it undertakes its work in the way that it does; and also some of the constraints that we face.

13.3 If we are to build an open, tolerant and inclusive society in which all its members feel safe and confident in the way in which the criminal law operates, it must be a priority for all of us to stop crimes based on homophobia or transphobia and, where we cannot, to arrest and to prosecute the perpetrators of such crimes firmly and effectively.

13.4 The CPS intends to review this public statement regularly, so that it reflects current legislation and social perspectives. We welcome, therefore, observations that enable us to do this.

## Glossary of terms used in the Public Statement

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Terminology and definitions relating to lesbians, gay men, bisexuals and trans people may sometimes seem confusing and they change over the years. We have set out in this glossary some terms that are in current usage and their meanings when this public statement was published in 2007.

### **Bisexual**

A man or woman who is physically, sexually and/or emotionally attracted to people of either sex.

### **Code for Crown Prosecutors**

The public guidance that sets out how Crown Prosecutors take their casework decisions and the factors that they should consider when doing so.

### **Cottaging**

The process in which usually men seek men and/or have sex in a public place, usually in a public toilet.

### **Cruising**

The process in which lesbians, gay men or bisexuals look for sex with other people, often in parks.

### **Gay**

A man or a woman who is physically, sexually and/or emotionally attracted to people of the same sex. (Some gay men prefer to be called gay rather than queer or homosexual.)

### **Gender Identity**

A person's sense of him, or herself, as being masculine or feminine, male or female.

## **Heterosexual**

A man or a woman who is physically, sexually and/or emotionally attracted to people of the opposite sex.

## **Homophobic**

A fear of or a dislike directed towards lesbian, gay or bisexual people, or a fear of or dislike directed towards their perceived lifestyle, culture or characteristics, whether or not any specific lesbian, gay or bisexual person has that lifestyle or characteristic. The dislike does not have to be as severe as hatred. It is enough that people do something or abstain from doing something because they do not like lesbian, gay or bisexual people.

## **Homosexual**

A man or woman who is physically, sexually and/or emotionally attracted to people of the same sex.

## **Lesbian**

A woman who is physically, sexually and/or emotionally attracted to women. (Some lesbians prefer to be called lesbian rather than gay, queer or homosexual.)

## **Out**

The term used by lesbians, gay men, bisexuals and trans people to describe their experience of self-discovery, self-acceptance, openness and honesty about their sexual orientation or gender identity and their decision to share this with others when and how they choose.

## **Outed**

The outcome of someone giving information about a person being LGBT or T without that person's permission.

## **People who have sex with a person of the same sex**

There are many men and women who sometimes have sex with people of their own sex but who do not see that that activity means that they are LG or B. In other words, the activity does not define their identity. This may include some married men and women; some people who are from the black and minority ethnic communities; and some people who live in faith communities.

## **Serious sexual offences**

Those offences set out in section 2 Sexual Offences (Amendment) Act 1992 in respect of which the media are prevented from naming or otherwise identifying the victim.

## **Sexual orientation**

A term used to describe a person's emotional and/or physical attraction to another.

## **Trans people**

Trans people are those who were assigned one gender at birth but who identify elsewhere on the gender spectrum for part or all of the time. Some trans people have medication and/or surgery(ies) to alter their bodies so that they will fit with their personal identity and sense of self. However, surgery should not be used as a marker for trans identification. Trans is an umbrella term which includes transsexual, transvestite (cross dressers) and transgender people, amongst others. In practice, the range of people who fall under this umbrella term is extremely diverse.

## **Transphobic**

A fear of or a dislike directed towards trans people, or a fear of or dislike directed towards their perceived lifestyle, culture or characteristics, whether or not any specific trans person has that lifestyle or characteristic. The dislike does not have to be so severe as hatred. It is enough that people do something or abstain from doing something because they do not like trans people.



This booklet is a public document. It is available on the CPS website:

[www.cps.gov.uk](http://www.cps.gov.uk) <<http://www.cps.gov.uk/>>

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