

Hate Crime and the Legal Process: Options for Law Reform

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Hate crime is a priority area for the Government and policymakers. Among other initiatives to tackle and respond to hate crime, the Government published hate crime 'action plans' in 2012 and 2016, the Law Commission completed a project on hate crime legislation in 2014, and, in 2017, the Crown Prosecution Service published new public statements on how it prosecutes hate crime. Public awareness of hate crime has also grown, particularly since the 2016 EU referendum which led to a huge spike in the number of hate crimes reported to the police.

More generally, following the referendum, there have been reports of increased levels of anxiety and fear among minority groups and marginalised communities. But what happens when a hate crime is reported to the police? How effectively does the law (and legal professionals) respond to allegations of hate crime? This Briefing Paper presents findings from a 24-month empirical study on the operation of hate crime legislation. These findings indicate that significant reform is necessary to ensure justice for both victims and defendants in hate crime cases.

enabled us to compare and contrast the stated aims and purposes of policies and legislation with the experiences of those tasked with enforcing and applying the law. This approach included: (a) an assessment of existing policies and publically available statistics; (b) a review of over 100 reported cases; and (c) 71 in-depth, qualitative semi-structured interviews with "hate crime coordinators" and "hate crime leads" at the Crown Prosecution Service (CPS), District (Magistrates' Court) and Circuit (Crown Court) Judges, independent barristers, victims and staff at charitable organisations that support victims of hate crime, police officers, and local authority minority group liaison staff.

The piecemeal way in which hate crime laws have been enacted in England and Wales means that there are now different levels of legislative protection for the five recognised groups commonly targeted for hate crime – race, religion, sexual orientation, transgender identity and disability. Racially aggravated offences were first introduced almost 20 years ago, under the Crime and Disorder Act 1998 (CDA). In 2001, the legislation was amended to include religiously aggravated offences. Sentencing provisions that prescribe sexual orientation, disability and transgender hostilities (as well as race and religion) have since been introduced, and are set out in the Criminal Justice Act 2003 (CJA).

Under the CDA, certain crimes (including assault, criminal damage, harassment and public order offences), can be prosecuted as racially or religiously aggravated if the offender demonstrated racial or religious hostility or was motivated by racial or religious hostility. Those convicted of aggravated offences face a higher maximum sentence than they would if convicted of the "basic" version of the offence. Under the CJA, identity-based hostility must be treated as an aggravating factor when sentencing any criminal offence, but, unlike

offences prosecuted under the CDA, the CJA does not provide for higher maximum sentences and the aggravated element of the offence does not show on an offender's criminal record.

In response to the unequal treatment of the five protected characteristics, in 2012, the Ministry of Justice requested that the Law Commission examine whether the aggravated offences in the CDA should be extended to cover sexual orientation, transgender identity and disability. In its final 2014 report, [the Commission recommended](#) that a wider review of the law be carried out in order to determine whether and how hate crime laws should be amended, abolished or extended.

Our study

In response to the Law Commission's report, I joined Dr Mark Walters and Dr Susann Wiedlitzka from the University of Sussex, to conduct a 24-month study on the application of hate crime laws in England and Wales. The study was funded by the EU Directorate-General Justice and Consumers department as part of a wider European study on hate crime legislation across five EU member states (England and Wales; Ireland; Sweden; Latvia; and the Czech Republic). A mixed-methods approach was employed for the project which

The "Justice Gap"

Using publically available statistics and new data analyses provided by the ONS, we calculated an approximate number of hate-crime offences that are likely to "drop out" of the criminal justice system. The total number of cases that drop out of the system represent what is known as the "justice gap" for hate crime. Analysis of the Crime Survey for England and Wales suggests that between 2015-16 approximately 110,160 hate crimes were reported to the police. Yet, official police statistics for the same period recorded 62,518 hate crimes. This suggests that only 57% of those incidents reported to the police are recorded as hate crimes. During the same year, the CPS prosecuted 15,442 hate-based offences, of which 12,846 resulted in a conviction (the majority of which were guilty pleas). The CPS also recorded the announcement of sentencing uplifts in court as 33.8% of total hate crime convictions, which equates to 4,342 cases. If these data are accurate, it means that out of an approximate 110,160 reported hate crimes, only 4,342 offences (4%) resulted in a sentence uplift based on identity-based hostility. In other words, approximately 96% of reported hate crimes (102,658 cases) may not result in a sentence uplift, or even any action at all.

There are a number of possible reasons for this significant “justice gap” for hate crime, including: differences in definitions of hate crime used by the police compared with the courts; diverging dates between reporting and legal action; complainants retracting statements; and perpetrators never being apprehended. However, we also identified a number of factors that restrict the successful application of hate crime legislation within the legal process. These factors are likely to exacerbate the rate of attrition for hate crimes, and may also lead to unfair outcomes for defendants as well as complainants. The following paragraphs highlight some of the problems that we uncovered at various stages of the legal process.

The evidence-gathering stage:

- A systemic failure to identify and “flag” disability hate crimes;
- Investigators failing to collate evidence of hostility to be relied on at a potential sentencing hearing (as opposed to cases which can be prosecuted as racially or religiously aggravated under the CDA). This reduces the likelihood that hostility based on sexual orientation, transgender identity or disability will be considered and result in a sentence uplift;
- Breakdowns in communication between police and prosecutors.

Charging decisions and the trial process:

- The risk of “double convictions” in the Magistrates’ Court, whereby, despite charges being put in the alternative, defendants are convicted of both the basic and aggravated version of an offence;
- The potential for “over-charging”, whereby the CPS may charge an offence as racially or religiously aggravated under the CDA even though evidence of racial or religious hostility is very weak;

- Difficulties in getting complainants to attend court to support the prosecution’s case.

The interpretation and application of hate crime laws in court:

- A lack of clarity as to whether a “demonstration of hostility” requires that the defendant understood their actions to be racially or religiously hostile;
- A perceived reluctance amongst jurors to accept “demonstrations of hostility” committed in the “heat of the moment” as falling within the scope of the CDA. This reluctance was attributed to jurors not wanting defendants to be labelled as a “hater” or “racist”, simply because they lost their temper and said something abusive in the heat of the moment;
- A reluctance in parts of the judiciary to accept “demonstrations of hostility” as amounting to an aggravated offence where the defendant had not been motivated by hostility, but had merely used “unpleasant” language during an offence. One judge referred to these as “silly little so-called ‘racially aggravated’ cases”.

Sentencing hate crime:

- A general lack of awareness of the hate crime sentencing provisions in the CJA amongst certain key professionals, indicating that disability, sexual orientation and transgender-based hate crimes are less likely to attract a sentence uplift than hate crimes based on race and religion (which can be prosecuted under the CDA);
- Diverging approaches to calculating “uplifts” for enhanced sentencing, with calculated uplifts ranging from 20%–100%;
- The potential for “double counting” of hostility at sentencing, due to the fragmented nature of the legislation;
- Confusion and uncertainty as to the relationship between the aggravated offences under the CDA and the sentencing provisions in the CJA;

- A general lack of (and use of) rehabilitation or community-based sanctions for hate crime offenders.

Disability hate crime

We also found a number of specific issues that arise in respect of prosecuting disability hate crime. For example, the complex relationship between perceived vulnerability and hostility continues to confuse practitioners and inhibits the successful prosecution of an offence as a disability hate crime. We found a reluctance amongst many judges and legal practitioners to accept evidence of targeted violence against disabled people as proof of “disability hostility”.

Reform options

Our study concludes that, despite vast improvements over the years, hate crime laws are still too frequently ignored or incorrectly applied by the courts. There remain significant inadequacies in relation to: the collation of evidence; procedural decision making; legal interpretation of the statutory provisions; and sentencing practices. Within our report, we make specific recommendations to deal with the issues highlighted above, as well as several other issues that we uncovered.

We believe that more substantial legal reform is necessary to ensure justice for both victims and defendants. In order to address the perceived problems within the legal process for hate crime, we advocate four key law reform options:

1. We recommend, as a minimum, that Parliament amend section 28 of the Crime and Disorder Act 1998 to include sexual orientation, disability and transgender identity. Extending the Act so that all five characteristics are treated equally under hate crime legislation could: dispel current perceptions of an “hierarchy of hate”; help ensure that all strands of hate crime are taken seriously by the authorities; assist with consistent “flagging” of hate crimes; and better protect the rights of defendants. Interviewees told us that the CDA safeguards

defendants by, for example, ensuring transparency as to the issues in the case and allowing for jury trials, with jurors being more open to defence evidence and more willing to scrutinise the hostility element of an offence than judges or magistrates.

2. The CDA should be extended to include further offences. The current offence categories included under the CDA (assault, criminal damage etc) do not map precisely onto the most common types of offence committed across the five hate crime strands. Based on the statistics and analysis of interviewee data, the following offences should be considered for inclusion: affray; violent disorder; all sexual offences; theft and handling stolen goods; robbery; burglary; fraud and forgery; section 18 grievous bodily harm; and homicide offences.
3. We recommend, as a preference, the creation of a new Hate Crime Act that consolidates the existing fragmented framework of legislation. The new Act should prescribe any offence as "aggravated" in law where there is evidence of racial, religious, sexual orientation, disability and/or transgender identity hostility. Sentencing maxima for the aggravated offences should be the same as for the basic offence, with the legislation mirroring sections 145 and 146 of the CJA in so far as the courts "must" take into consideration hostility (or the by

reason selection, explained below) and state in open court how the sentence has been affected by the aggravation.

4. We propose that the successful prosecution of all types of hate crime will be enhanced were the legislation to be amended at section 28(1)(b) of the CDA (or equivalent in a new Hate Crime Act) so that the provision reads as follows: "the offence is committed by reason of the victim's membership (or presumed membership) of a racial or religious group, or by reason of the victim's sexual orientation (or presumed sexual orientation), disability (or presumed disability), or transgender identity (or presumed transgender identity)."

If these options for reform are taken up by the Government, we strongly believe that the criminal justice system will be better equipped to tackle the growing problems associated with hate crime in England and Wales.

Further analysis and recommendations can be found in the full report (including an executive summary): "[Hate Crime and the Legal Process: options for law reform](#)".

The report is co-authored by [Mark A. Walters](#), [Susann Wiedlitzka](#) and [Abenaa Owusu-Bempah](#), with [Kay Goodall](#).



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