

Hate crime: the case for legal reform



Summary

We all want to live in a just and inclusive society, where we are free from harm. But hate crime is on the increase. Currently the law treats different groups unequally in the protections it offers. The Law Commission is investigating the case for legal reform, providing opportunities for current disparities to be addressed. This think piece reviews the evidence and options for reform from an equality perspective. It recommends greater 'parity' and 'clarity' in the law to ensure equitable treatment and levelling up of protections for different groups.

- Hate crime is any crime perceived by the victim or another person to have been motivated by hostility or prejudice based on a person's race, religion, sexual orientation, disability or transgender identity.
- There has been a recent increase in hate crime, with recorded offences almost doubling in the past five years.
- Hate crime law does not currently provide equal protection to all groups that are targeted by perpetrators of hate crime. Race and religious hate crimes are treated as aggravated offences. Sexual orientation, gender identity and disability related hate crimes are not. Other characteristics protected under equality law, namely sex and age, and other social groups affected, like homeless people, are not covered at all.
- The implementation of the law leads to unequal charging decisions, prosecution and sentencing outcomes for different groups. There is a justice gap in how hate crimes are addressed for all groups, but a particularly large justice gap for disabled people.
- Hate crime law needs to: deter perpetrators; ensure that hate crimes are adequately addressed when they arise; and deal fairly with those affected. Any reforms should adhere to key principles on equality and justice and send a clear signal on acceptable social norms.
- Priorities for legal reform include: ensuring parity of treatment of different social groups; greater clarity in the law – ideally through consolidation of hate crime legislation into a single Act; and a greater emphasis in the long term on prevention and tackling the underlying causes of hate crime.

Background

History of the law on hate crime

In legal terms, a 'hate crime' is any crime perceived by the victim or another person to have been motivated by hostility or prejudice based on a person's race, religion, sexual orientation, disability or transgender identity. Although hate crimes are recorded for all five of these 'protected characteristics' by the police and Crown Prosecution Service (CPS), the criminal offences that specifically address hate crime only cover some, not all, characteristics. The law has evolved incrementally, creating disparities and only partial coverage of different equality strands.

The current legal framework emerged after increasing racial violence in the 1970s and 1980s, including the murder of Stephen Lawrence in 1993. This led to the introduction of racially aggravated criminal offences under the Crime and Disorder Act 1998 (CDA) for specific offences, including assaults, criminal damage, harassment and some public order offences, where these crimes are motivated by racial hatred or demonstrate hostility to the victim for their actual or perceived membership of a racial group. In these cases, perpetrators can be given increased sentences. In 2001, the CDA was extended to cover religiously aggravated offences.

Subsequently, the Criminal Justice Act 2003 (CJA) required courts to treat sexual orientation and disability, and in 2012, transgender hostility, as aggravating factors in sentencing for any offences motivated by, or demonstrating hostility based on, those factors. In addition, the Public Order Act 1986 and subsequent legislation introduced offences for incitement to racial hatred, religious hatred and stirring up hatred based on sexual orientation.

Recent trends

Hate crime is on the increase, suggesting a need to take this threat more seriously. Recorded offences have more than doubled over the last five years, from 42,255 in 2012/13 to 94,098 in 2017/18. In 2017/18 alone, there was a 17 per cent increase (Figure 1). While this may partially reflect increased reporting, there have also been recent spikes in hate crimes linked to the EU referendum in 2016 and terrorist incidents in 2017 (Home Office, 2018), with evidence of a hardening in attitudes towards Muslims (Hope not Hate, 2018) contributing to the overall upward trend.

Race hate crime is the commonest form of hate crime, comprising three quarters of all recorded offences. It has doubled since 2011/12. Offences linked to other aspects of identity have increased more markedly in the past year, particularly religious offences, while offences relating to sexual orientation form the second largest category overall (Figure 1).

Figure 1: Home Office recorded hate crime offences 2011/12-2017/18

Hate crime strand	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	% change 2016/17 to 2017/18
Race	35,944	35,845	37,575	42,862	49,419	62,685	71,251	14
Religion	1,618	1,572	2,264	3,293	4,400	5,949	8,336	40
Sexual orientation	4,345	4,241	4,588	5,591	7,194	9,157	11,638	27
Disability	1,748	1,911	2,020	2,515	3,629	5,558	7,226	30
Transgender	313	364	559	607	858	1,248	1,651	32
Total number of motivating factors	43,968	43,933	47,006	54,868	65,500	84,597	100,102	18
Total number of offences	N/A	42,255	44,577	52,465	62,518	80,393	94,098	17

Source: Police recorded crime, Home Office.

The nature of offences varies by group. Violence against the person is more common in transgender hate crime, whereas disabled people more commonly face harassment, sexual offences, theft, burglary and fraud – often linked to their perceived vulnerability (Walters et al, 2018, 57). There is also concern about increasing online hate crime, with a recent parliamentary review highlighting its impact on disabled people (Petitions Committee, 2019) and Government proposals to introduce new regulation to address online harms (HM Government, 2019).

The case for legal reform

Legal disparities and inequality

The law is important for a range of reasons, from sending a signal about acceptable behaviour in society and permissive social norms, to providing a deterrent to committing offences and supporting appropriate redress for victims and wider society when offences are committed. Hate crime law and its application are currently contributing to inequality in two important ways.

First, the law does not provide equal protection to all groups protected under the Equality Act 2010 in relation to hate crime:

- Some race and religious hate crimes are defined as ‘aggravated offences’ and subject to increased sentences.
- For sexual orientation, gender identity and disability cases, enhanced sentencing is possible for any offences identified as hate crime, but evidence of hostility may not be gathered to support this if a case is not flagged as a possible hate crime, or may not

make it to court; and as only the basic offence is recorded, it is harder to identify repeat offenders.

- For other characteristics protected under equality law, particularly sex and age, there is no provision.
- Incitement or stirring up offences do not apply to transphobia or disability.
- Definitions of protected groups are not necessarily inclusive of all those affected, for example, while sexual orientation is broadly conceived, transphobia is considered unduly narrow.

Second, the implementation of the law leads to unequal charging decisions, prosecution and sentencing outcomes for different groups:

- Certain types of hate crime, particularly race-related crimes, appear to be recorded more frequently by the police than those linked to other characteristics, possibly reflecting greater recognition of the CDA than the CJA.
- Fewer homophobic and transphobic hate crimes reported to the police result in a charge than other monitored hate crime strands.
- Disability hate crime and religious hate crime cases have lower rates of successful convictions (75 and 79 per cent respectively) compared with homophobic/transphobic (83 per cent) and race (84 per cent) hate crime.
- There are far lower rates of sentence uplifts for disability related hate crime (12 per cent) than for race, religion and sexual orientation (from 32-38 per cent).
- Racially and religiously aggravated offences lead to longer custodial sentences on average than other hate crime offences (Walters et al 2018, 58-64).

Even in areas such as race hate, where recording levels are higher, there are still significant issues of under-reporting and of inadequate practice and outcomes. There is therefore a need to level up and strengthen legal protections, and improve practice for all hate crime.

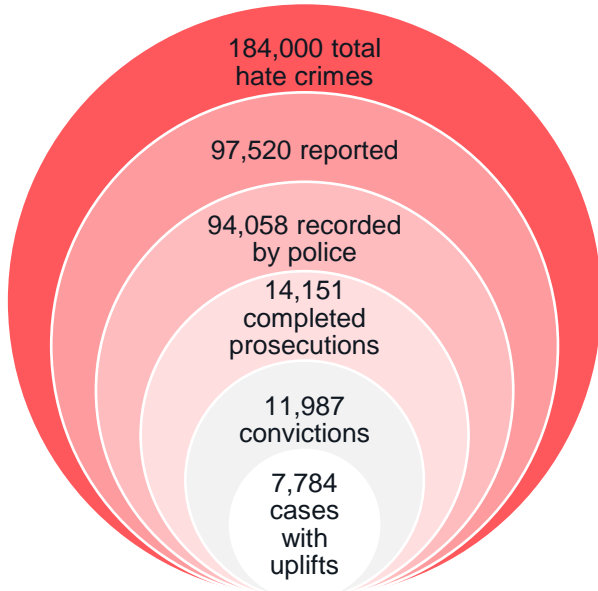
The justice gap

Research highlights a substantial overall justice gap in relation to people's experience of hate crime and outcomes from the criminal justice system. According to the latest crime survey in England and Wales, around 184,000 incidents of hate crime are experienced by the public each year (3 per cent of all crime), but over half of these incidents do not come to the attention of the police (Home Office, 2018). In 2017/18, only 8 per cent of the 97,520 reported crimes resulted in sentences with uplifts on the basis of identity-based hostility, creating a 92 per cent justice gap. There is drop out at all stages of the process, from initial reporting to prosecution and conviction. This justice gap applies across all monitored equality

strands, but is particularly pronounced for disability hate crime, where only 1.8 per cent of recorded crimes resulted in convictions with uplifted sentences in 2017/18 (Figure 2).

Figure 2: Justice gap in hate crime from incident recording to final outcomes 2017/18

Lifecycle of a hate crime



Overall hate crime:
184,000 hate crimes
7,784 cases with uplifts
Estimated 'Justice Gap' → 92%

Lifecycle of a disability hate crime



Disability hate crime:
52,000 hate crimes
133 cases with uplifts
Estimated 'Justice Gap' → 98%

Source: Mark Walters, University of Sussex, presentation at Equally Ours seminar, 28/11/2018

This justice gap reflects a range of underlying issues, as highlighted in research by the University of Sussex (Walters et al, 2018).

First, there may be gaps in police recording of hate crime, even when it is reported. For example, there are systemic failures in identifying and flagging disability hate crimes (Walters et al, 2018, 81), and the recording of Gypsy/Traveller status under ethnicity is also not yet standard practice, although this is changing (HMICFRS, 2018).

Second, there is a reluctance by some juries and judges to accept 'demonstrations of hostility' as 'real' hate crimes. There may be problems in obtaining supporting evidence, particularly if there are no witnesses beyond the victim, and concerns, for example, over branding someone racist for what may be construed as a one-off remark in the heat of an argument.

Third, the need to prove 'hostility' as a basis for the offence is not always straightforward, due to defendant denials, the stigma of labelling offenders, and juror and judicial resistance to denote offences as racially or religiously aggravated where the main motivation is not seen as hate-based (Walters et al 2018, 125). There are particular problems for disabled people, as 38 per cent of prosecuted disability hate crimes are sexual or property-related, and disabled people are often targeted due to their perceived vulnerability, which may not be seen as 'hostility' or hatred (Walters et al 2018, 172).

Fourth, there is a widespread lack of awareness in the criminal justice system of the CJA provisions for enhanced sentence uplifts for offences concerning sexual orientation, transgender identity and disability, resulting in disparity in applying sentence uplifts across the monitored characteristics.

Finally, there is a lack of consistency amongst judges as to how much enhancement in sentencing should be applied (Walters et al, 2018).

Principles for reform

Legal reform offers opportunities to support parity of treatment for different groups. Employing key principles could assist with this, namely: equality, justice and social norming.

Equality: on equality grounds, people experiencing hate crime across the characteristics currently monitored through the criminal justice system (ie race, religion, gender identity, sexual orientation and disability) should all be given equal legal protection and treatment in

terms of sentencing.¹ The Equality Act 2010, however, also provides protection for a wider range of groups than those currently supported under hate crime law² and includes consideration of age and sex. Hate crime law needs to deliver on equality requirements and take a human-rights based approach, recognising that everyone is born equal in dignity, worth and rights. The current disparity in the law unintentionally signals that some types of hate crime are more serious than others and/or that some groups are more deserving of protection, undermining notions of fairness, and implying a 'hierarchy of hate'.

Justice: parity of approach towards different groups could assist in prosecuting offences and preparing legal cases (as identity factors may only otherwise be considered at sentencing for those hate crimes addressed under the CJA – evidence of hostility may not make it into trials). It could also support equitable sentencing across different groups. Parity may also be important for legal outcomes; there is a reported correlation in hate crime law implementation and pro-equality policies and lower hate crime in the United States (Walters et al 2018, 186-7). Flagging offences across groups also supports monitoring and identification of repeat offenders.

Social norming: finally the law sends a message about what is and is not permissible conduct, which is important as a deterrent and for shaping social norms, as well as supporting communities at risk of hate crime. Supporting parity of approach across different equality strands demonstrates the importance in society as a whole of all citizens and the unacceptability of hate crime in any form against anyone.

Approaches to reform

Options for legal reform

The University of Sussex has identified a number of options for reform which could support greater parity and clarity in the law and help to address equality concerns (Walters et al 2018). Table 1 (overleaf) summarises the rationale, limitations and additional considerations associated with two main options.

Option one would simply amend the CDA to support parity for the five groups who are already protected under criminal justice law (a smaller scale change which delivers parity only for some groups). Option two is a more substantive change, involving new legislation (a

¹ This was supported by half of interviewees supporting legal reform in Walters et al (2018)

² The nine protected characteristics under the Act are: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.

new Hate Crime Act), which provides scope for considering additional equality characteristics currently excluded from any protection (such as sex and age).

In addition, changes to wording in the law to consider a test of identity-based hostility ‘by reason’ of membership of a group could address limitations in proving hostility under current legislation, which disproportionately affects successful prosecution of disability hate crimes, as well as cases where bias is demonstrated, but does not meet the literal meaning of ‘hostility’. This would shift the approach from a ‘hatred motivation’ model to a ‘group selection’ model (Walters et al 2018, 201).

Table 1: Options for law reform: rationale, benefits and limitations for equality

Options	Rationale and benefits	Limitations	Considerations
Amend the CDA to include sexual orientation, gender identity and disability	Supports parity for the five characteristics protected under criminal law. Has a firm legal basis; CDA is widely understood and applied for hate crime offences. Enables defendants to challenge allegations of hostility and evidence to be scrutinised in court.	Does not cover additional characteristics, eg, age and gender, not currently recognised in criminal justice system. CDA currently only applies to eleven offences, not all those which may be relevant.	Additional equality strands may need to be considered. Additional offences may need to be included in offences which can be deemed aggravated (eg, theft, burglary, sexual offences, fraud).
A new Hate Crime Act	Offers opportunity to consolidate laws in one place and consider all equality strands. New legislation can trigger additional associated professional practice guidance to support its implementation.	More substantive reform may take longer to achieve and needs priority in legislative programme.	Legislation could be based on CDA provisions and mirror wording in CJA that courts ‘must’ take into consideration hostility (or ‘by reason’ test) and state how the sentence has been affected by the aggravation.

Source: based on Walters et al (2018) and Walters presentation to Equally Ours seminar, 28/11/2018.

Procedural changes

Other procedural improvements could also be beneficial. The Public Sector Equality Duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations when carrying out their activities. While there is no explicit legal requirement to collect and use equality information in tackling hate crime, to meet these aims, police forces need to understand how their policies and practices differ for people with different protected characteristics and to be informed about problems.

A report of recent inspections of police force practice suggest improvements could be made in: identifying hate incidents and crimes and flagging protected characteristics; gathering intelligence and information about those who encounter the police; and analysing this information to meet the Equality Duty. It also highlights Equality and Human Rights Commission (EHRC) advice that 'failing to consider how a function can affect different groups in different ways can contribute to greater inequality and poor outcomes' (HMICFRS, 2018, 86).

The EHRC has also recommended that police data should be disaggregated by protected characteristics (HMICFRS, 2018, 54). Capturing intersectional data would also help to understand the more nuanced reality of people's experiences of hate crime where people may be targeted for multiple reasons.

Delivering parity and clarity in the law

The complex and incremental approach to legislation historically causes unnecessary confusion in how to address cases of identity-based hostility within the criminal justice system. There is a strong case for consolidating hate crime legislation into a single law where all equality strands are addressed. This would have the added benefit of triggering new associated professional practice guidance, which has been highlighted as an important influence in ensuring legislation is given due consideration within the police and wider criminal justice system (HMICFRS, 2018). It could also serve as the basis for instigating national training programmes, which could help to ensure that the police and criminal justice services are better able to respond to hate crime when it occurs.

While there has rightly been a focus on equalising the law for disability, gender identity and sexual orientation hate crimes in line with race and religion, this is also the time to review whether hate crime linked to other aspects of identity is sufficiently addressed. Both sex and age are protected characteristics under the Equality Act that have been ignored in the law to date, and these areas need fuller consideration.

There is increasing awareness of misogyny and hate directed towards women. Police forces in Nottinghamshire, North Yorkshire and elsewhere have begun to record misogyny as a hate crime. Trials in Nottinghamshire have been evaluated and, contrary to popular opinion, have not led to a disproportionate upsurge in reporting. In the first year, under 100 offences were reported³. The evaluation found support for the approach across genders⁴. However, there are concerns over whether introducing misogyny as a hate crime nationally might deflect from existing approaches to domestic abuse and violence against women. It has also been suggested that gender rather than misogyny should be the focus of any offence, as this enables cases of misandry (hatred against men) to be considered where appropriate, too, even though the scale of this is likely to be much more limited. Age poses other questions as incidents can be bound up with other issues, including vulnerability and ill health/disability.

A review by Lord Bracadale for the Scottish Government (2018) may offer pointers for reforms in England and Wales. This recommended legal changes in Scotland to:

- introduce aggravations where offending involves hostility on grounds of gender and age, in addition to existing coverage of race, religion, disability, sexual orientation and transgender identity
- create offences to deal with threatening or abusive conduct which stirs up hatred in respect of each of these characteristics – sufficient to cover online hate crime/hate speech
- consolidate all hate crime legislation in a single Act.

Reforming hate crime law to extend legal recourse to all relevant key groups in the Equality Act 2010 would improve current protections. However, this would still fall short of including some who experience hate crime, including homeless people or goths.

There are alternative routes forward which could help to ensure that hate crime is addressed in a holistic way to address prejudicial behaviours linked to identity. The EHRC's response to the Scottish Government's consultation suggests considering introducing 'a more generic definition, based on human rights principles and arguments, that can adequately cover and protect many different groups and characteristics. This might avoid the need for continual review of the law and legal protection and new aggravations where further evidence of hostility to different groups in society develops over time' (EHRC 2018).

³ As reported by former Nottinghamshire Police Chief Constable at Equally Ours seminar 28/11/2018

⁴ As reported by Nottingham Trent University at Equally Ours seminar 28/11/2018

Wider policy reform

In addition to legal reform, wider policies could support better outcomes for those who experience hate crime. Recent inspections of policing practices highlight inconsistent and sometimes poor practices in dealing with victims, undermining incentives to report incidents, and prompting calls for 'a more consistent and considered initial response from the police' including better risk assessment and management for victims (HMICFRS 2018, 6). The emphasis also needs to move beyond reporting to supporting better outcomes for victims. This may, in some cases, mean more consideration of alternative pathways to justice, including restorative justice, where there is appropriate engagement between victim and perpetrator, which could repair the harms caused by hate crime and reduce repeat victimisation (Walters et al 2018, 112). There also needs to be greater focus on capacity building in organisations that support those experiencing hate crime and can offer specialist expertise and assistance, including organisations led by LGBT, Deaf and Disabled, and Black and minority ethnic people, and other groups whose mission is to tackle discrimination and inequality.

Conclusion

The evidence highlights the need for parity and clarity in the law that could be best achieved by levelling up and improving legal protections and practice. The debates about whether misogyny/gender/sex or age or other social groups should be incorporated into hate crime law require further consultation and scrutiny. This should be a focus of the Law Commission review. Consideration should also be given to key principles around equality, justice and social norming in any reforms made. It may be that reform on the basis of understanding hate crime 'by reason of membership of a social group' provides an inclusive way forward.

Longer term, the focus must be on preventing hate crime by tackling the underlying causes. While the Home Office suggests a possible downward trend in hate crime based on the national crime survey, police recorded offences suggest the opposite. Online hate crime is a growing concern. The divisive nature of the EU referendum has also highlighted the fragmented nature of UK society, and the scope for abuse and intolerance to be exacerbated by political and social divisions. In this context, political and media rhetoric that amplifies divisions rather than building bridges between people of different backgrounds risks fuelling perpetrator motivations. Developing the UK evidence base on the causes of hate crime, the opportunities for effective and meaningful interventions to tackle it and the contributions that can be made by different actors, from politicians to the media, schools and frontline service providers, needs greater attention to help shift towards a prevention agenda.

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Additional information

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Further information

Equally Ours (formerly the Equality and Diversity Forum) is the national network of organisations working for equality and human rights across the UK.

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