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Hate crime law: more incrementalism or time for reform?

Catherine Heard

Legislation: [Crime and Disorder Act 1998 \(c.37\)](#)

***Arch. Rev. 4** The Law Commission report, *Hate crime: should the current offences be extended?* was published on May 28, 2014. The project was referred to the Commission by the Ministry of Justice in December 2012 with a scope restricted to assessing the case for extending the existing hate crime offences to apply to all five hate crime characteristics that are currently recognised in criminal justice legislation: race, religion, disability, transgender identity and sexual orientation. Currently, the aggravated offences under the Crime and Disorder Act 1998 (CDA 1998) only apply to racial and religious hostility. Conversely, enhanced sentencing powers under the Criminal Justice Act 2003 (CJA 2003) recognise all five characteristics for sentence uplift where hostility is proved as an aggravating factor, applying the same test for hostility as used in the aggravated offences. There are two alternatives: either, in committing the offence, D was (wholly or partially) *motivated* by hostility towards members of a racial or religious group or, at the time of committing the offence or immediately before or afterwards, D *demonstrated* hostility based on V's actual or presumed race or religion. The project's narrow focus precluded analysis of deeper questions which, the Commission now recommends, require examination prior to any further extension. Why protect some characteristics with specific offences but not others (for example, gender or age)? What advantages derive from having offences requiring proof of hostility as a separate element? And why hostility rather than, say, prejudice or bias?

The effects of piecemeal reform

Parliament's piecemeal approach of adding further characteristics (first disability and sexual orientation, then transgender identity) to the statutory sentencing regime in recent years has had unforeseen and unsatisfactory consequences. Police and prosecutors must now work to a system where investigative approaches and charging decisions in otherwise similar factual cases differ depending whether the hostility was based on, say, race or sexual orientation. In terms of sentencing outcome, the differing legislative treatment may be more form than substance: sentences passed for aggravated offences almost never exceed the maximum that could have been imposed under the corresponding ***Arch. Rev. 5** non-aggravated offence. That suggests that one key rationale for the existence of hate crime offences--the need for higher sentences to punish and deter--could be achieved through proper application of enhanced sentencing.

However, the consultation conducted by the Commission has shown that this unequal legislative treatment may be resulting in potentially serious consequences for the prosecution of hate crime. Several police forces complained that the unequal treatment of protected characteristics in the current system is hindering their work in dealing with hate crime. They argued that, if the aggravated offences applied to all five characteristics, it would lead to improved investigative and prosecution approaches. They considered that this would have positive effects even in cases where the offence fell outside the CDA 1998 scheme (because it was not listed in the CDA 1998 as one of the offences carrying an aggravated form), and could therefore only be dealt with by sentence enhancement. The practical benefit would be that police officers would routinely seek evidence of demonstration or motivation of hostility in all hate crime cases. A system that worked in the same way for all five characteristics would be simpler to use and easier to explain to victims. It would also be fairer.

These are important arguments from a practical perspective. If the aggravated offences remain applicable only to race and religion, this would leave in place what some respondents called a "two-tier system" with

the other characteristics being seen as less important because they are only protected as a matter of sentencing uplift. This sits awkwardly with Parliament's decision to amend the CJA 2003 sentencing regime so that courts must treat hostility against all five characteristics as an aggravating factor. Implicit in that decision was a recognition that hate crime occurs in relation to disability, sexual orientation and transgender identity and is of sufficient seriousness in terms of harm and culpability to warrant statutory recognition. There is no evidence that racial or religious hate crime involves greater harm or culpability or differs in some other significant way so as to make aggravated offences less suitable where the hostility is based on disability, sexual orientation or transgender identity.

Addressing the fundamentals

These considerations led police and prosecutors to favour extension of the existing offences to apply to all five characteristics. Their views were shared by most of the NGOs who support victims of hate crime.

However, objections were raised by others in the criminal justice field, notably the judiciary and some academics. They preferred a pure enhanced sentencing approach to hate crime. The advantages they saw in the sentencing system included the powerful communicative effect of the statement which the judge is obliged to make, in open court, as to the sentence increase attributable to the hate element. They also noted the flexibility of a system that applies to all offences rather than just a limited range (as with the aggravated offences). Their objections to extension of the offences went beyond preferring a pure sentencing approach. Other factors included the undue complex structure of the offences, difficulties in prosecuting them, the reluctance of some juries to convict for them, and a difficult compromise having to be considered on the frequent occasions when pleas are offered to the corresponding non-aggravated offences. Compounding these problems, consultees pointed to the risk that failure to prove an aggravated offence destroys any prospect of marking out the hostility with an enhanced sentence under the CJA 2003: the aggravated offences and the enhanced sentencing system are in essence mutually exclusive.

Another objection to extending the aggravated offences in their current form was that they were not created to address the types of conduct commonly forming the basis of today's hate crime, and did not have the characteristics of sexual orientation, disability or transgender identity in view. Before extending, additional offence types may need to be brought into the list of offences for which aggravated forms exist. For example, should communications offences (Communications Act 2003 s.127 and others) be added to deal with online hatred? Should financial or sexual offences be added, both of which reportedly occur in the disability hate crime context? In view of the reservations expressed about the effectiveness of the existing aggravated offences and the additional problems which extension would bring, the Commission's primary recommendation is that a full-scale review of their operation be conducted. Without prescribing the terms of that review, the Commission sets out some fundamental questions it might address, including: what are the purposes of laws specifically addressing hostility-based offending, for victims, the justice system and wider society?; to what extent do the current aggravated offences and enhanced sentencing systems meet those objectives?; if aggravated offences, or enhanced sentencing, are necessary or desirable, what model should they use (hostility, prejudice, bias, deliberate targeting, motivation, demonstration?), what characteristics should be protected, and on what basis should characteristics be selected?

Accepting that such a review will require Government commitment, the Commission makes an alternative recommendation: if no review is forthcoming, the offences should be extended in their current form. Although not its preferred solution, this would at least produce a more coherent and equal system.

Sentencing reforms required in any event

For the time being, enhanced sentencing remains the only specific criminal law provision that responds to hate crime where hostility is demonstrated or is a motivating factor, based on disability, sexual orientation or transgender identity. It also applies to all cases where racial or religious hostility is shown, but which cannot be prosecuted as an aggravated offence under the CDA 1998. Evidence from the consultation suggests it is under-used. Even where it is correctly applied, no record of this will appear on the offender's record, unlike a conviction for an aggravated offence, which fairly labels the offending for what it is, providing valuable information for those working in the justice system and potential future employers.

The report makes two recommendations to improve the use and the recording of enhance sentencing: detailed Sentencing Council guidance on hostility-based offending; and the recording of enhanced sentencing on the Police National Computer. These reforms are recommended for implementation irrespective of whether a wider review of hate crime offences takes place.

Catherine Heard is the Law Commission lawyer responsible for the hate crime project. An earlier article discussed the provisional reform proposals in the Commission's Consultation Paper No. 213: *Hate Crime : The Case for Extending the Existing Offences*. See [2013] 8 *Archbold Review* 5.

Arch. Rev. 2014, 7, 4-5

1. The report also examines the case for extending the offences of stirring up hatred under the Public Order Act 1986, which apply in relation to hatred on grounds of race, religion and sexual orientation. The report deals with these in chapter 7 but they are not discussed in this article.