

## Hate crime and the “justice gap”: the case for law reform

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## Hate Crime and the “Justice Gap”: The Case for Law Reform

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### Introduction

This year marks the 20<sup>th</sup> anniversary of the introduction of racially aggravated offences under the Crime and Disorder Act 1998 (CDA), which created the first “hate crime” offences<sup>1</sup> in England and Wales, and reflected the emergence of a new policy agenda aimed at tackling the social problem of hate-motivated offending. Since then, the policy domain has expanded, bringing into its ambit other forms of hate-based offences; perhaps more accurately described as crimes involving identity-based hostility. In 2001, the CDA was amended to include religiously aggravated offences,<sup>2</sup> while further sentencing provisions were included in the Criminal Justice Act 2003 (CJA) that require the courts to increase an offender’s sentence where there is evidence of sexual orientation, disability and/or transgender hostility.<sup>3</sup>

Though the development of hate crime legislation has ensured that a broader range of characteristics is included in law, the piecemeal way in which the various provisions have been prescribed has resulted in differing levels of protection for the current five recognised victim groups. This has led some critics to state that there is now a “hierarchy of hate” in

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<sup>1</sup> Excluding hate speech offences: Public Order Act 1986 (POA) ss.18-23 and ss.29B-29G.

<sup>2</sup> Anti-terrorism, Crime and Security Act 2001 s.39.

<sup>3</sup> CJA s.146. Offences falling outside the CDA can also be sentenced as racially and religiously aggravated under CJA s.145.

English and Welsh law.<sup>4</sup> In response, the Ministry of Justice requested that the Law Commission examine whether the aggravated offences in the CDA should be extended to give parity to all five protected characteristics.<sup>5</sup> The Commission's final report, published in 2014, recommended that a wider review of hate crime laws be carried out in order to determine whether the law should be amended, abolished or extended.<sup>6</sup> Failing such a review, the Commission recommended that the aggravated offences in the CDA be extended to include sexual orientation, disability and transgender identity.

This article presents key findings from an EU-funded two-year empirical study into the legal process for hate crime undertaken in England and Wales.<sup>7</sup> The study is the first large-scale review of hate crime legislation since the Home Office review of racially aggravated offences in 2001-2002.<sup>8</sup> This article is one of a series of papers which collectively examine the legal process for hate crime, from evidence gathering through to criminal procedure, legal interpretation and sentencing. We start from the position that hate crime legislation is a crucial mechanism through which identity-based hostility offences must be addressed. Notwithstanding the many criticisms that can be levelled against governments who *focus* primarily on punitive legislative measures to tackle what is a highly complex social phenomena,<sup>9</sup> there are compelling reasons for legislating against hate which are now well-rehearsed within the extant literature and which will be discussed in more detail below, when outlining the justifications for law reform.<sup>10</sup> The focus of this article is an evaluation of how hate crime laws<sup>11</sup> are currently being applied in practice, to identify limitations in their application, and to determine whether and how hate crime laws should be reformed to improve their effective application.

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<sup>4</sup> Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com No.348, Cm 8865,p.84.

<sup>5</sup> And extend the stirring up of hatred offences under the POA to apply equally to all five.

<sup>6</sup> It also recommended that there be new Sentencing Council guidance in hate crime cases and that every time enhanced sentencing is applied, this be recorded on the Police National Computer.

<sup>7</sup> For key findings, see also M.A. Walters, S. Wiedlitzka and A. Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017). This was part of a comparative study funded by the EU Directorate-General Justice and Consumers Department examining the use of hate crime laws across five EU member states (England and Wales; Ireland; Sweden; Latvia and the Czech Republic). See J. Scheppe, A. Haynes and M. Walters, *The Lifecycle of a Hate Crime: Comparative Report* (Dublin: ICCL, 2018).

<sup>8</sup> E. Burney and G. Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002), HORS 244.

<sup>9</sup> M.A. Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford: OUP, 2014).

<sup>10</sup> See J. Stanton-Ife, "Criminalising Conduct with Special Reference to Potential Offences of Stirring Up Hatred Against Disabled or Transgender Persons" (HMSO, 2013); F.M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Cambridge, MA: Harvard University Press, 2006); J.M. Jacobs and K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford: OUP, 2006).

<sup>11</sup> We do not include speech offences (e.g. stirring up of hatred in Parts 3 and 3A POA) because these raise issues of free speech and the use of online platforms which are beyond our purview.

In the first part of the article, we outline the methodology employed in our empirical study, the current legislative framework, and the secondary statistics that expose what we refer to as the “justice gap” for hate crimes. Through exposure of the “justice gap”, we emphasise the need for better enforcement of the law. The second part of the article provides a detailed analysis of interview data relating to two particularly important factors that limit the application of hate crime laws: the inconsistent application of sentencing provisions; and the difficulties in proving motives of hostility – as illustrated through an exploration of disability hate crime cases. In the final part, we outline our two main proposals for law reform, aimed at reducing the justice gap and improving the operation of hate crime legislation for *all* types of hate crime.

## Part 1: Uncovering the “justice gap”

### Methodology

The aims of the study were to evaluate the application of criminal laws (aggravated offences) and sentencing provisions for hate crime in England and Wales,<sup>12</sup> and to detail the operational realities of legislation by gathering experiential accounts of the legislation “in action” from legal professionals. We employed a mixed-methods approach that 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. The research design included: an assessment of existing public policies and publicly available statistics; the collation and thematic review of over 100 case law reports via Westlaw and Lexis Library;<sup>13</sup> and 71 in-depth, qualitative, semi-structured interviews either face-to-face or via phone/Skype interviews. We interviewed 21 Hate Crime Leads/Hate Crime Coordinators at the Crown Prosecution Service (CPS),<sup>14</sup> 17 independent barristers,<sup>15</sup> nine Crown Court (Circuit) judges<sup>16</sup> and 11 District Judges (Magistrates’ Court).<sup>17</sup> Interviews included questions on the prosecution of hate crime at key stages of the criminal process: proof requirements and making the decision to prosecute; court procedure and rules of evidence; and sentencing approaches. Six interviews were also conducted with practitioners working for a charitable organisation or civil society organisation that supported victims of hate crime,

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<sup>12</sup> CDA ss.28-32 and CJA ss.145 and 146.

<sup>13</sup> We are grateful to Chara Bakalis for giving us a collated list of hate crime cases up to March 2014.

<sup>14</sup> Interviewees are cited as CPS #.

<sup>15</sup> Cited as IB #.

<sup>16</sup> Cited as CCJ #.

<sup>17</sup> Cited as DJ #.

one interview was conducted with a victim who had been through the court process, and a further six police officers (and linked personnel) were interviewed who had experience investigating hate crimes.

All 71 interviews were transcribed and uploaded onto a new software programme called Quirkos for coding. We employed thematic analysis of the data, allowing us to organise them into a number of different “thematic reports”. Using these reports, we identified topics that arose during reading (and re-reading) of the interview transcripts. This approach allowed us to construct central themes and sub-themes that emerged from the main issues that interviewees discussed. These themes were used to structure our written findings.<sup>18</sup>

### The framework of hate crime laws in England and Wales

Under ss.28 to 32 of the CDA, specific *criminal* offences (assaults,<sup>19</sup> criminal damage,<sup>20</sup> public order offences,<sup>21</sup> and harassment and stalking<sup>22</sup>) can be aggravated by racial or religious hostility. These are set out in law as more serious versions of pre-existing, or “basic”, offences. They have higher maximum sentences than the basic offences and are recorded on an offender’s criminal record as racially or religiously aggravated. Throughout this article, we refer to the aggravated offences as RRAOs (racially or religiously aggravated offences) to distinguish them from other offences where hostility based on a personal characteristic is treated as an aggravating factor at sentencing.

Section 28 of the CDA states:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

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<sup>18</sup> Ethical approval was granted by the University of Sussex (ER/SW474/1), and by the Judicial Office (05/12/2016). All interviewees’ data has been anonymised.

<sup>19</sup> CDA s.29.

<sup>20</sup> CDA s.30.

<sup>21</sup> CDA s.31.

<sup>22</sup> Including putting people in fear of violence: CDA s.32.

There are also sentencing provisions in ss.145 and 146 of the CJA, which state that a judge must enhance the penalty of a defendant convicted of a crime aggravated by racial, religious, sexual orientation, disability or transgender hostility. These two sections replicate the wording of s.28 in regard to hostilities that motivate an offender, or that are demonstrated during the commission of the offence. Section 146(3) also states:

The court—

- (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
- (b) must state in open court that the offence was committed in such circumstances.

This means that where evidence proves identity-based hostility, the court is obliged to give effect to this as an aggravating factor during sentencing and openly state that this is the case. Both ss.145 and 146 apply to *any* criminal offence and are applicable at sentencing only. Consequently, only those offences covered by the CDA can be classified in criminal law as “aggravated offences” (e.g. “racially aggravated assault”), while those covered by the sentencing provisions will be recorded in law as the basic offence (e.g., an assault).

### The “justice gap” for hate crime

In 2002, Burney and Rose reflected that “[a]ttrition’ is a common feature within the criminal justice process, as potential offences, charges and convictions make their way through the system’s many ‘gateways’”.<sup>23</sup> For most types of crime, attrition means that only a small percentage of cases result in a conviction. In hate crime cases, opportunities for attrition are compounded by the fact that there are two evidential hurdles that must be surmounted. The CPS must not only prove that the basic offence has been committed, but must also prove that the offence is a “hate crime”. As we will see below, filtering out of the hostility element occurs at various stages of the legal process, and, while many cases end with a conviction for the basic offence, the aggravation of the offence is less likely to be proved in court.

According to the Office for National Statistics’ (ONS) Crime Survey for England and Wales (CSEW) (estimated by combined years March 2014 to year ending March 2016), there were approximately 204,000 hate crimes committed each year. 54 per cent of respondents stated that the incident was reported to (or came to the attention of) the police. This suggests that

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<sup>23</sup> E. Burney and G. Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002), HORS 244, p.25.

approximately 110,160 hate crimes were reported to the police during the year 2015-2016. We compared this data to official police statistics for 2015-16 which reported that 62,518 hate crimes were recorded that year. If these data are accurate, we can *estimate* that 57 per cent of reported hate crime incidents are *recorded* as hate crimes on police crime reporting systems throughout England and Wales.

Data published by the CPS for this same period showed that 15,442 hate crime cases were proceeded against, resulting in 12,846 convictions.<sup>24</sup> However, the conviction rate here does not directly reflect the successful application of hate crime legislation. Under the CJA, and in accordance with Sentencing Council guidelines, the court must state openly when a sentence has been aggravated based on the hostility element and must state what the sentence would have been without the hostility aggravation, and what it is with it.<sup>25</sup> CPS data for this period reported that out of 12,846 convictions, one third (4,342 cases) involved an announcement of sentencing uplift. In other words, only in one third of hate crime cases that resulted in a conviction was the CDA or CJA successfully applied.<sup>26</sup>

By comparing the number of declared uplifts with the number of incidents reported to the police, we can estimate an *approximate* percentage of cases which drop out of the system (or where the hostility element is filtered out). Out of an approximate 110,160 reported hate crimes each year, only 4,342 offences resulted in conviction *and* a declared sentence uplift based on identity-based hostility. Thus, the “justice gap” for hate crime is approximately 96 per cent. In other words, just four per cent of reported hate crimes result in a conviction and a declared sentence uplift.<sup>27</sup>

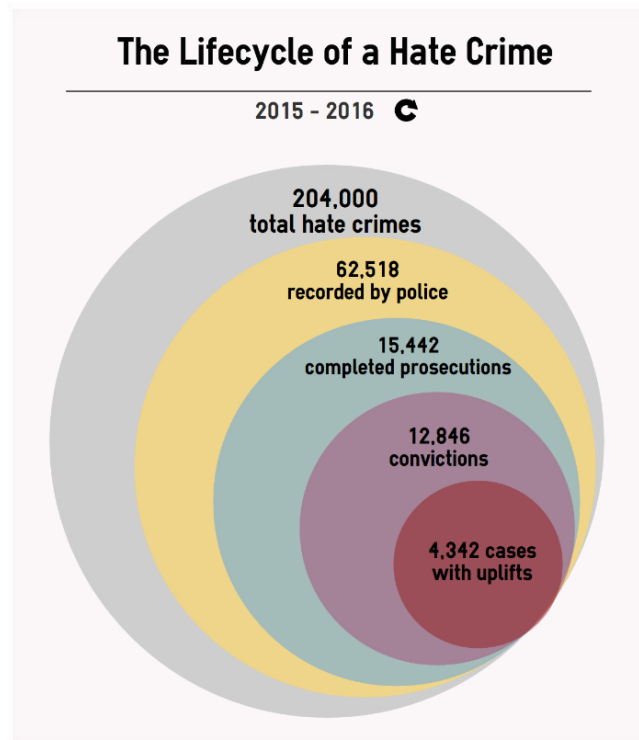
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<sup>24</sup> An 83 per cent conviction rate. CPS data may not precisely match police data: cases may take months to reach court.

<sup>25</sup> Sentencing Council, “Hate Crime: 3. Approach to Sentencing” (n.d.).

<sup>26</sup> It is possible that some judges applied the uplift but did not declare this in court.

<sup>27</sup> This was also broken down by strand of hate crime: see Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.5.5. The most significant gap was in disability hate crime: just 0.2 per cent of reported disability hate crimes resulted in a conviction and declared uplift.



It should be noted that this percentage does not represent the “conviction rate” for hate crime. Limitations in the data and definitional issues pertaining to recording versus prosecuting hate crimes mean that the data analyses provide only an *estimate* of how many hate crimes may be “dropping out” of the system. In terms of definition, for example, the operational definition of hate crime used by the police and CPS is based on the perception by the victim (or any other person) of an offence as a hate crime, whereas the CDA and CJA require proof beyond a reasonable doubt that the defendant demonstrated or was motivated by hostility. Thus, at least some reported and recorded hate crimes will not (and cannot) meet the necessary statutory criteria. Moreover, the justice gap percentage does not tell us why cases drop out. These reasons are likely to be multiple and varied.<sup>28</sup> It is beyond the scope of this article to examine all of the possible factors. Instead, we focus on those variables relating to the structure and application of the law as identified within our study as *contributing* to the justice gap.

## Part 2: Applying hate crime legislation

<sup>28</sup> See Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.5.5.



i. Lack of effective application of the Criminal Justice Act 2003

A major theme that emerged from the review of both case law and interview data was that, unlike the CDA, the CJA provisions are not being consistently applied in court.<sup>29</sup> This finding echoes concerns raised by respondents to the Law Commission's consultation on hate crime.<sup>30</sup> Interview data revealed that evidence of hostility in non-CDA cases was often "filtered out" of the system, and in some cases evidence was not collated at all:

"[I]t may get forgotten ... So we do speak to individuals [CPS lawyers] personally and we will say, 'Well why have you forgotten to mention the uplift?' That's why it's difficult because it's not part of the original offence." (CPS 12)

Interviewees provided two key reasons why identity-based hostility is not considered when it does not form part of the substantive offence. First, there was a lack of awareness amongst key legal professionals of the CJA provisions, despite ss.145 and 146 having been in force since 2005. This was especially apparent amongst defence counsel and within sections of the judiciary:

"And when you say how does defence counsel deal with it, they're quite unaware of ss.145 and 146 – as are some members of the judiciary. ... The Crime and Disorder Act, they're used to it – it's included, they deal with it as part of the offending. It often takes them by surprise, ss.145 and 146. And I think it probably takes the judiciary by surprise as well sometimes." (CPS 03)

Indeed, several of the Crown Court judges we interviewed were not aware of ss.145 or 146 at all.<sup>31</sup> However, all were familiar with the Sentencing Guidelines provided by the Sentencing Council that outline hostility-based aggravation. Deference to the Guidelines sometimes resulted in confusion as to whether the court should follow the Guideline only, or whether, in addition, they were required to apply ss.145 and 146. Such a situation can have dichotomous consequences. In some cases, this tension resulted in double counting of hostility at sentencing, as judges applied both the Guidelines and then the CJA provisions.

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<sup>29</sup> See also M.A. Walters, "Conceptualizing 'hostility' for hate crime law: minding 'the minutiae' when interpreting section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) O.J.L.S. 47.

<sup>30</sup> Law Commission, *Hate Crime*, para.3.14.

<sup>31</sup> However, many CPS interviewees said there had been much progress recently. Furthermore, declared uplifts increased from 11.8 per cent in 2014/15 to 33.8 per cent in 2015/16 (CPS, "Hate Crime Report 2014/2015 and 2015/16", p.14) and from 33.8 per cent to 52.2 per cent in 2016-17 (beyond the period of the study): CPS, "Hate Crime Report 2016-17".

Conversely, those judges who relied solely on Sentencing Guidelines sometimes simply refused to apply the statutory uplift despite the CJA provisions stating that the court “must” do so.

“[S]ome are slipping through the net where the bench either refuses to uplift ... But we have to make it absolutely clear ... the sentence must be altered if you find the hate crime element ...” (Interview CPS 16)

Refusal to engage with the CJA provisions could also be linked to some judges’ reticence in accepting hostility as an aggravation in cases where it was demonstrated in the “heat of the moment”. Many such cases involved defendants who had expressed a racist (for example) slur out of anger or frustration during the commission of an offence. Though the hostility element is largely incidental in such cases, case law has made it clear that the CDA and CJA provisions still apply.<sup>32</sup> Yet, many judges remained sceptical (or unaware) of this approach, with one Crown Court judge noting that “the CPS cannot tell the difference between something unpleasant, insulting, said in temper, and something ... which actually indicates that somebody is motivated by racial dislike” (CCJ 03). This same judge dismissed such cases as “so-called silly little racially aggravated cases” (CCJ 03).<sup>33</sup> These statements demonstrate that there is still much more that can be done to increase awareness of the legislation amongst parts of the judiciary in order to improve the consistent application of the provisions.

ii. [The problem with prosecuting disability hate crimes: Perceived vulnerability and the interpretation of “hostility”](#)

The failure of the courts to consistently apply the CJA provisions is undoubtedly limiting the number of successful “hate crime” convictions in England and Wales; thereby exacerbating the justice gap for this type of offending. However, it was not just the hierarchical and disparate nature of the provisions which were proving inhibitive. Problems also emerged with the way in which the current laws are interpreted, with the words “motivation” and “hostility” in both the CDA and CJA proving particularly problematic for prosecutors.<sup>34</sup> The problems were most saliently illustrated through our analysis of disability hate crimes.

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<sup>32</sup> See e.g. *Woods* [2002] EWHC 85 (Admin).

<sup>33</sup> See also Walters, “Conceptualizing ‘hostility’ for hate crime law”.

<sup>34</sup> For more see Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.8.

The myriad issues facing criminal justice responses to disability hate crime were previously highlighted by a joint criminal justice inspection in 2013 (CJJI).<sup>35</sup> The inspectorates reported that “there was a lack of clarity and understanding as to what constitutes a disability hate crime and confusion between policy definitions and the statutory sentencing provision contained within s.146”.<sup>36</sup> In addition, the inspectorates recommended further training, internal reviews and new guidance across key criminal justice institutions in order to improve evidence collation for disability hate crime cases and for the CPS to present more robust and consistent evidence in court. Disappointingly, two years later in their follow up report, the inspectorates concluded that “there has been insufficient progress made against the recommendations. An opportunity to achieve improvements in the criminal justice system for all members of society has not yet been taken.”<sup>37</sup>

Our study took place two years after the CJJI’s follow-up review, and it was clear from our data that most of the problems preventing the successful application of hate crime law for disability hate crime remained. The data (both statistical and qualitative) revealed a vast difference between the way that the criminal justice system (CJS) deals with disability hate crimes compared to other strands of hate crime. The first thing to note is that disability hate crimes do not always reflect the offending behaviours that are most common to other types of hate crime. For example, police and CPS data show that, unlike other strands, disability hate crimes frequently involve property offences (including, theft, robbery, burglary and fraud) and sexual offences, collectively making up 38 per cent of all disability hate crimes proceeded against in court.<sup>38</sup> The different nature of some disability hate crimes, combined with the different context in which these offences often occur,<sup>39</sup> mean that police investigators can overlook the “hate” element of an offence. This, in turn, means that evidence of identity-based hostility is instantly filtered out of the process. Examples include:

“... the mistreatment of the infirm in a care home; the theft by the carer of money from somebody’s bank account who they’re looking after; the depletion of funds from a relative’s bank account when they’re suffering from dementia; the theft of somebody’s wallet if they happen to be in a wheelchair and things of that nature, which we’re used to dealing with, but perhaps haven’t been as good historically at identifying it as hate

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<sup>35</sup> Criminal Justice Joint Inspection (CJJI), *Living in a Different World: Joint Review of Disability Hate Crime* (2013).

<sup>36</sup> CJJI, *Living in a Different World*.

<sup>37</sup> CJJI, *Joint Review of Disability Hate Crime Follow-up* (2015), para.1.13.

<sup>38</sup> Corcoran and Smith, *Hate Crime, England and Wales, 2015/16*; data table “Hate Crime by Principal Offence Category 2014-16” in CPS, “Hate Crime Report 2014/2015 and 2015/16” (2016).

<sup>39</sup> See e.g. M.A. Walters and A. Krasodonski-Jones, *Patterns of Hate Crime: Who, What, When and Where?* (Demos and University of Sussex, 2018).

crimes than some of the more obvious insulting behaviour that gets targeted towards people of different skin colour.” (CPS 04)

Even in those cases where disability hostility was part of the CPS’ case, proving the hostility element in court was considered to be more difficult than proving other types of identity-based hostility. Cases which were the “easiest cases to win are where the defendant says something, demonstrates hostility at the time of committing the offence” (CPS 03), such as where the defendant has shouted “‘you crippled bastard’, ‘you retard’, ‘you mong’, ‘you spastic’” (CPS 20). Yet, much more frequent are cases where no disablist remarks (i.e. demonstrations of hostility) have been uttered during the commission of the offence, but where the motivation or intention of the offender is to subjugate the victim because of their disability. In these types of cases, prosecutors noted that they needed to rely on additional evidence to prove the hostility element, such as gratuitous violence during the incident, a lack of evidence suggesting “why else carry out the conduct?” (CPS 03), or factors such as “he kicks the walker, and then makes some sort of adverse comments on social media” (CPS 14).

In a significant number of cases, the offences directed against disabled people are intrinsically connected with their *perceived* “vulnerability”.<sup>40</sup> One CPS interviewee remarked:

“I think disability is the hardest strand to prosecute - and identifying disability hate crime as well – it’s the overlap with vulnerability. And that is a real challenge ... Obviously you’ve got to be clear for s.146. And there’s been a lot of confusion about whether or not we could argue in court that if someone is targeting someone because of their vulnerability, and that vulnerability arises because of their disability, it’s whether s.146 would apply ... I mean I don’t think it is that difficult [but] I think people are trying to read the legislation in a way that would suit them ... I think that s.146 cannot be read for us to conflate the two together without there being some distinct evidence.” (CPS 16)

Although most prosecutors noted that a successful prosecution required evidence that went beyond showing the defendant had “taken advantage” of the victim’s disability, some interviewees argued that the very fact that someone had been targeted *by reason* of their disability should be sufficient evidence to prove hostility. One of the CPS hate crime leads asserted:

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<sup>40</sup> K. Quarmby, *Getting Away with Murder: Disabled People’s Experiences of Hate Crime in the UK* (London: Scope, 2008).

“I would equate, even if it’s taking advantage of, as well as a disability hate crime in terms of hostility, those two could be grouped together as an aggravating feature in either way.” (CPS 18)

Consequently, the approach taken to prosecuting disability hate crimes may depend, to a great extent, on the prosecutor who leads on the case. As one interviewee noted, “it really depends on the lawyer who’s looking at it, which, I think, strikes me as a problem. There’s no real clear guidance”. (IB 17)

Regardless of what approach the prosecution took, it was clear from almost all interviewees that even the most carefully curated evidence of disability hostility would be met with resistance from the judiciary at sentencing. While a more nuanced understanding of disability hostility has emerged within parts of the CPS, it was clear that judges have remained resolute in their perception that selecting a victim because of a perceived vulnerability (or because they are an easy target) is *not* evidence of “hostility” for the purposes of hate crime legislation:

“They’d [the defendants] befriended [the victim] in kind of a kebab shop, offered to walk him home, and then when they get him to a subway they robbed him quite brutally ... punched and kicked him to the ground and so on, and robbed him ... [The] CPS reviewing lawyer had said that this was clearly a disability hate crime and we want to ask for the sentencing uplift. When I looked at it, on the evidence, the two defendants hadn’t said anything to him in terms of offensive language or anything like that to do with his disability. It was clear, and the judge accepted – and I think to some extent the defence barristers – had to accept as well, that he’d been targeted because he was very obviously vulnerable, so they thought he was very easy pickings. But it was trying to bridge that gap between him being targeted because he’s vulnerable, and targeted because they were motivated by hostility to him based on his disability. [We] put forward the arguments that it was such gratuitous violence that they must have been motivated by more than just wanting his money, so were motivated by his disability. But in the end, the judge found that although it was clearly aggravated by the fact he was disabled and they’d picked on him because he was easy pickings, that it didn’t fall into the hate crime bracket for the purpose of the uplift.” (IB 17)

Frequent judicial declarations at sentencing that disabled victims are “vulnerable” are highly problematic.<sup>41</sup> A number of scholars have argued that by labelling disabled people as

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<sup>41</sup> The CPS are alive to this and provide guidance on appropriate language for prosecutors: CPS, “Disability Hate Crime and other Crimes against Disabled People - Prosecution Guidance” (2017).

“vulnerable” the courts are perpetuating a false representation that disabled people are innately weak.<sup>42</sup> Several CPS hate crime leads were conscious of the systemic bias that was being evinced towards such victims:

“[W]here we can’t show that the offence was motivated by hostility towards the disability, which effectively is ‘disablist’, we have to go down the route of saying that the case involves an aggravating feature of targeting a vulnerable victim ... first of all, it wrongly characterises disabled people as vulnerable almost per se, and secondly, it doesn’t label the perpetrator as being a person who has committed a hate crime - which is hugely important.” (CPS 20)

The consequence of these conceptual tensions is that the vast majority of reported disability hate crimes are not recorded or prosecuted as disability hate crimes, while those that are, are unlikely to attract a “declared uplift”. The fact that just 0.2 per cent of reported disability hate crimes result in a conviction, and that only 11 per cent of convictions for disability hate crime resulted in a declared “uplift” (during 2015-16),<sup>43</sup> seriously calls into question the continued utility and workability of the legislative provisions – at least in their current form. This predicament has led to a strong feeling (especially amongst disability rights groups) that the justice system is severely letting down disabled people.<sup>44</sup>

The interviews illustrated that these issues remain. Despite various justice inspections, CPS policies and training programmes, as well as a growing body of academic commentary on the relationship between perceived vulnerability and hostility, strong barriers remain to accepting that targeted victimisation of disabled people is “hate crime”. Key to this issue is the interpretation and application of the word “hostility” – central to both the CDA and CJA provisions. In responding to this obstacle, we offer an option for law reform that we believe will help to improve the operation of hate crime provisions in respect of all five protected characteristics, but especially those relating to disability (see below). Before then, we outline an option for law reform that we believe will help to create a fairer basis from which hate crimes can be prosecuted.

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<sup>42</sup> K. Quarmby, *Getting Away with Murder*; H. Mason-Bish, “Conceptual issues in the construction of disability hate crime” in A. Roulstone and H. Mason-Bish (eds), *Disability, Hate Crime and Violence* (London: Routledge, 2012).

<sup>43</sup> CPS, “Hate Crime Report 2014/2015 and 2015/16” (2016), p.14.

<sup>44</sup> A. Novis, “A life less valid – When is a hate crime not a hate crime?” *International Network for Hate Studies Blog*, 2 December 2013.

## Part 3: Reforming the Law

### A. Parity of protection under the law

During the interviews, we asked most participants whether they felt that the current legislation should be reformed and, if so, in what ways.<sup>45</sup> The majority of interviewees stated that hate crime laws were now considered a necessary part of the State's toolkit in responding to hostility-based offending. In particular, the CDA provisions were considered to be the cornerstone of the legal framework, and these provisions were generally well comprehended by most practitioners, including judges. However, as our previous analyses have suggested, there are problems with the current framework that require legislative attention. By far the most prominent critique amongst interviewees was that the CDA only covers race and religion, meaning that hostility based on disability, sexual orientation and transgender identity can only be addressed at sentencing, under the CJA. The majority of interviewees (just over half) took the view that the CDA should be amended to provide parity of protection across all five protected characteristics. Five main reasons were advanced to support this position.

#### 1. Dismantling the hierarchies of hate

As our analyses above illustrate, the disparate enforcement of hate crime provisions between the aggravated offences (CDA) and sentencing provisions (CJA) has resulted in uneven application of sentencing uplifts across the five protected characteristics, leading to a "hierarchy of hate".<sup>46</sup> This divergent approach can have drastic impacts on sentence outcomes.

"[I]magine [a] situation with two [victims] ... one of them is black and the other one is transgender. Two rocks are thrown, one hits the black boy on the forehead – he gets a cut; and the other hits the transgender girl on the forehead and she gets a cut – the ridiculous situation is the same behaviour with the same hostility produces a two-year

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<sup>45</sup> Ethical clearance by the Judiciary Office required that we did not ask judges whether the law should be reformed. Nonetheless, it was often raised by judges themselves.

<sup>46</sup> Law Commission, *Hate Crime*, p.84.

maximum sentence for one of the victims and a six-month maximum sentence in relation to the ... other.” (CPS 05)

Such a potential disparity in sentencing outcomes has prompted claims that all five of the monitored strands should be treated equally under the law, as per the obligations set out under s.149 of the Equality Act 2010.<sup>47</sup> The Law Commission, in its final report on hate crime, responded to these claims, concluding:

“To assist them in complying with their public sector equality duty, public authorities such as police forces need legislation in this area to be clear. The present system does not help in that regard, in that it treats some protected characteristics differently despite (1) all of them being protected for purposes of hostility-based offending (by the enhanced sentencing system) and (2) there being no obvious justification for the different legislative treatment.”<sup>48</sup>

The failure to treat all recognised strands of hate crime the same in law sends the message that some types of hate are more serious than others, and/or that certain victim groups are more deserving of protection under the law than others. To effectively address hate crimes committed against all five protected characteristics, the Government should treat each type as seriously as the next.

## 2. Treating *all* hate crimes seriously

Those interviewees who favoured amendment of the CDA to include all protected characteristics spoke of the ways in which this could improve case preparation and evidence gathering.

“[I]f you’ve got a racially aggravated charge, you have to ask yourself as a police officer and as a prosecutor, ‘Do I have enough evidence to prove the assault ... and the racial hostility?’ Now if you’re dealing with a sexual orientation hate crime or a disability hate crime, you don’t need to ask the same question, you know, in strictly legal terms; all you need to do is prove that an assault has happened, and then – almost as an afterthought

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<sup>47</sup> Law Commission, *Hate Crime*, p.84.

<sup>48</sup> Law Commission, *Hate Crime*, p.94.



– when it comes to the point of sentence, you start thinking about can you ask the court for an uplift on the basis of the aggravating factor ...” (CPS 01).<sup>49</sup>

Similar statements were made across the cohorts of interviewees, emphasising the centrality of evidence of hostility *only* in cases where it makes up part of the substantive offence (i.e. the RRAOs). In practical terms this has left “the other strands far behind” (CPS 06) in terms of attracting sentencing uplifts.

### 3. The effects of symbolic denunciation

By creating parity of protection, new hate crime laws could serve a strong symbolic function, not only expressing that all hate crimes will be treated seriously by the CJS, but that all strands of hostility are equally morally reprehensible. The criminal law plays a fundamental role in furnishing the boundaries of (un)acceptable conduct. The additional criminalisation of certain identity-based hostilities is a form of social control that simultaneously supports positive norms (i.e. the acceptance of ‘difference’) while condemning the proscribed harmful conduct (i.e. demonstrations of prejudice). Prosecutions and successful convictions send a public declaration that the criminal law has been breached, which in turn communicates to the public about what is required of them as law-abiding citizens. The application of hate crime law may therefore serve as a form of educative deterrence, as its application repeatedly conveys to the public a message regarding the social unacceptability of prejudice-based offending.<sup>50</sup>

One of the independent barristers provided the following view on the symbolic importance of including all characteristics in the CDA:

“They need to be charged as separate offences because it sends a message out to society that these type of crimes won’t be tolerated. And also puts them on the radar, because crimes, hate crimes against people, you know, transgender people and people based on their sexual orientation ... they’re kind of more under the radar. And I think, if they were lifted so that they had their own separate offence, then they’d probably be taken much more seriously; and it would shift offenders’ attitude.” (IB 09)

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<sup>49</sup> Similar points were also made by consultees during the Law Commission review, Law Commission, *Hate Crime*, p.105.

<sup>50</sup> Symbolic denunciation in relation to hate crime is examined more fully in, M.A. Walters, “Readdressing Hate Crime: Synthesizing Law, Punishment and Restorative Justice” in T. Brudholm and B. Johansen (eds), *Hate, Politics, Law* (Oxford: OUP, 2018).

The capacity of the criminal law to shift attitudes is not easily tested. Correlated with the enactment of the aggravated offences is the significant reduction in the number of racist hate crimes, as estimated by the British Crime Survey (and CSEW). The total number of estimated racially motivated crimes in 1995 was 390,000; this reduced by 28 per cent to 280,000 in 1999<sup>51</sup> (the year after the CDA was enacted). Since then, estimated numbers of race hate crimes have continued to fall from 206,000 (2002-2004), to 179,000 (2004-2005),<sup>52</sup> to 154,000 incidents (2011-2013),<sup>53</sup> to 106,000 (2012-2014),<sup>54</sup> and further reducing to 104,000 (2014-2016).<sup>55</sup> The figures show that estimated numbers of racist hate crimes have dropped by 73 per cent since 1995. It remains unclear whether the racially aggravated offences introduced in 1998 are (partly) the cause of this drastic reduction in race hate crimes. It should also be noted that a drop in offending does not mean that there has also been a reduction in racist views or structural racism. In fact, while crime survey data has shown racist crimes significantly decreasing since the enactment of the legislation, social attitude research has shown that prejudiced attitudes towards people of other races has slightly increased over the past 15-20 years.<sup>56</sup> This indicates that while prejudiced attitudes have not necessarily improved, people's criminal *conduct* based on these attitudes has reduced. The correlation between legislation and a drop in hate crime offending is not unique to the UK; research has found clear correlations between the implementation of hate crime laws and pro-equality policies in US states and decreases in the number of hate crimes reported in the years following.<sup>57</sup>

Whether the symbolic denunciation of criminal offences serves to change attitudes and/or behaviour remains debatable. In this sense, the Law Commission was right to caution against relying solely on the potential communicative effects of the aggravated offences to justify their existence.<sup>58</sup> Neither, though, should the potential for symbolic denunciation to challenge hate and hostility be ignored. Indeed, specific criminalisation may not only send a

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<sup>51</sup> A. Clancy, M. Hough, R. Aust and C. Kershaw, *Crime, Policing and Justice: The Experience of Ethnic Minorities, Findings from the 2000 British Crime Survey* (HMSO, 2001), HORS 223.

<sup>52</sup> K. Jansson, *Black and Minority Ethnic Groups' Experiences and Perceptions of Crime, Racially Motivated Crime and the Police: Findings from the 2004/05 British Crime Survey* (Home Office Online Report 25/06, 2006).

<sup>53</sup> Home Office, Ministry of Justice and Office for National Statistics, "An overview of hate crime in England and Wales" (2013).

<sup>54</sup> Corcoran, Lader and Smith, *Hate Crime, England and Wales, 2014/15*.

<sup>55</sup> Office for National Statistics, "Number of incidents of hate crime, by strand of hate crime and percentage of those incidents reported to the police, Crime Survey for England and Wales, years ending March 2014 to March 2016, combined (12-month averages)" (ONS, 2017).

<sup>56</sup> NatCen Social Research, *30 years of British Social Attitudes self-reported racial prejudice data* (n.d.)

<sup>57</sup> B.L. Levy and D.L. Levy, "When Love Meets Hate: The Relationship between State Policies on Gay and Lesbian Rights and Hate Crime Incidence" (2016) 61 *Social Science Research* 142. The authors acknowledge that "a definitive determination of causality would require rigorous control". They tackle this by using controls and time lags to show a later reduction in hate crime/ or increase in reporting.

<sup>58</sup> Law Commission, *Hate Crime*, p.98.

message of denunciation, but also plays an important role in helping targeted communities to feel protected.<sup>59</sup>

#### 4. “Flagging” hate crimes on criminal justice records

In addition to the principled justifications for extension of the law, interviewees identified practical reasons for amending the CDA that went beyond the trial and sentencing stage of the criminal process. Most important amongst these was the perceived benefits of “flagging” aggravated offences in criminal justice records so that statutory agencies were aware of the hostility element of an individual’s criminal history. This was one of the Law Commission’s recommendations 4 years ago. Currently, the flagging of hostility aggravation only occurs if an individual is convicted of a RRAO under the CDA; meaning that sexual orientation, disability and transgender aggravation is not marked on the offender’s record. Recording hostility on the Police National Database (PNC) has two important functions. First, interviewees noted that flagging helps to identify repeat offenders. Without a record of previous acts of hostility, evidence can be omitted that is probative of a defendant’s guilt.

“At the moment you wouldn’t ... necessarily see an uplift on sentence recorded on somebody’s PNC record, so when they come before the court for further offences you wouldn’t necessarily know that the burglary, the theft, the assault that’s on their record was an offence that was dealt with by the court that received an aggravated or an increased and uplifted sentence. If they had committed an offence under the Crime and Disorder Act, then very clearly it’s on the record that that’s what it is. So from a practical point of view, things like that make a difference to how they’re dealt with in the future. If they commit further offences then it’s clear that they’ve got a previous history of it”.

(CPS 15)

Second, the PNC helps the Probation Service and Community Rehabilitation Companies to tailor programmes to address offending behaviour post-sentence. Failure to include ss.145 and 146 crimes on the PNC means that the CPS and other justice agencies must do additional work to ensure that the hostility element of the offence is identified by these agencies.

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<sup>59</sup> Some question however whether the criminal law can affect positive social change; many believe that it should be a last resort. See D. Husak, “Criminal Law as a Last Resort” (2004) 24(2) O.J.L.S. 207.

## 5. Defendants' interests will be better protected under the CDA

The fifth reason offered in support of amending the CDA was that the interests of the defendant are better served by the CDA than the CJA<sup>60</sup>:

“[the CDA] gives defendants a safeguard if they happen to be charged with those offences, that they can only be dealt with more severely if a court, a jury or otherwise is satisfied to the criminal standard following a trial... .” (CCJ 01)

Interviewees provided several reasons why it may be better for defendants to be tried for an aggravated offence under the CDA than have hostility determined at sentencing, despite the aggravated offences having higher maximum sentences than available through application of the CJA. One reason was that the CDA provides greater transparency than the CJA. Where a defendant is charged with a RRAO, it is clear from the outset that racial or religious aggravation will be an issue, and the defence can prepare to challenge the evidence of hostility. Another reason was that most of the RRAOs are triable either-way,<sup>61</sup> meaning that the defendant can opt for trial by jury in the Crown Court. It was suggested by a number of interviewees that juries are more willing to scrutinise evidence of hostility than magistrates and judges, thus ensuring that the prosecution meet the required standard of proof.

Interviewees also suggested that jurors can be very reluctant to convict defendants of racially and religiously aggravated offences, as jurors (even more so than judges) do not want to label defendants as a “hater” or “racist” in cases where a defendant has lost their temper and said something regrettable in the heat of the moment.<sup>62</sup> Defence counsel can use this reluctance to their advantage by, for example, focussing on the good character of the defendant and calling the defendant's Black and Asian friends to show that the defendant is not racist. This tactic had been successfully employed by some interviewees, despite the fact that “not being a racist” is irrelevant to the application of s 28(1)(a) of the CDA; all that is required is an outward demonstration of identity-based hostility. A more principled reason offered for trial by jury was that juries represent and apply societal norms and values, as these are closely connected to the issue of hostility in hate crime cases. Thus, juries may be best placed to determine what does and does not (or should and should not) amount to a hate crime. This, in turn, may help to legitimise the verdict in the eyes of both the defendant and the wider community.

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<sup>60</sup> This issue will be explored in greater detail in A. Owusu-Bempah, M.A. Walters, and S. Wiedlitzka, “Racially and Religiously Aggravated Offences: ‘God’s gift to defence’?” in preparation.

<sup>61</sup> The aggravated s.5 public order offence remains summary.

<sup>62</sup> Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.8.2.

We appreciate that there are real difficulties with the procedure for prosecuting RRAOs,<sup>63</sup> as well as persistent misinterpretation and misunderstanding of s.28 of the CDA.<sup>64</sup> Moreover, we do not overlook the fact that trials for aggravated offences are much more resource-intensive than application of sentencing provisions. In fact, some interviewees cited administrative burdens and pressures to cut costs as reasons for not extending the CDA.<sup>65</sup> However, such concerns cannot come at the expense of pursuing the most effective methods of addressing, or responding to, the targeted victimisation of minority groups. Neither should cost savings be put ahead of ensuring that the rights and interests of defendants are sufficiently safeguarded.

## B. A new Hate Crime Act?

The fragmented nature of the hate crime provisions, and the crossover between criminal offences and sentencing provisions,<sup>66</sup> has resulted in confusion, disagreement, and disparity in application of laws for different strands of hate crime. A district judge interviewed for this study reflected:

“if you’ve got trained criminal lawyers who are a little bit confused by it – and they are sometimes – then how do you expect the public, whether they be victims, witnesses, relatives of victims and witnesses, victim support advisers and, of course, defendants, to understand it? And I don’t think there’s any justification for it anymore. It should be clearer.” (DJ 06)

What then should be the first option for law reform in this area? Our analysis, so far, might indicate that the solution is simply to amend the CDA so that it includes the three characteristics currently covered only by the CJA. This was recommended by the Law Commission if a wider review was not forthcoming. While such an option is appealing for the five reasons outlined above, it would leave only some offences covered by the CDA, while all other criminal offences would remain “basic offences” to which the CJA could apply at sentencing. This would, in effect, still leave a hierarchy of hate crimes in place. It is clear that

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<sup>63</sup> See A. Owusu-Bempah, “Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences” (2015) 35(3) L.S. 443. For changes in practice and further guidance, see Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, Part B.

<sup>64</sup> See further Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, Part B.

<sup>65</sup> See further Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, Part C.

<sup>66</sup> On the unclear relationship between the CDA and CJA, see A. Owusu-Bempah and M.A. Walters, “Racially Aggravated Offences: When Does Section 145 of the Criminal Justice Act 2003 Apply?” [2016] Crim. L.R. 116.

the same issues of filtering are likely to occur where the hostility element does not make up part of the substantial offence. Moreover, as noted above, property offences and sexual offences fall outside the ambit of the CDA, meaning that 38 per cent of disability hate crimes would still be left outside of the CDA framework. One option would be simply to increase the number of offences prescribed under the CDA to include more of the common types of offences motivated by hostility.<sup>67</sup> However, this risks bloating the provision and entails the establishment of new sentencing maxima for a long list of new offences. Inevitably, some types of hate crimes would still fall outside the CDA.

A bolder option would be to combine both CDA and CJA provisions into a single Act that would aggravate *any* offence where there is sufficient evidence of hostility. A similar approach is already in operation in Scotland whereby statutory aggravations in relation to each of the five protected characteristics can attach to any offence. For instance, under s.96(5) of the CDA (Scotland):

“The court must—

- (a) state on conviction that the offence was racially aggravated,
- (b) record the conviction in a way that shows that the offence was so aggravated,
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
  - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
  - (ii) otherwise, the reasons for there being no such difference.”<sup>68</sup>

This approach ensures that aggravation is stated on conviction and recorded accurately, meeting some of the concerns outlined above in relation to the PNC. Such an approach would enable juries and magistrates in England and Wales to “make up their mind about [hostility aggravation] during the trial.” (CPS 03). It would also have the potential for reducing confusion and helping to ensure that all hostility aggravated offences are taken seriously by the police, CPS and the judiciary.

The main question that would arise were all crimes to have a potential aggravated version is whether new sentencing maxima would be required for every criminal offence on the statute books. To avoid what would be an administratively unfeasible task, sentencing maxima for

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<sup>67</sup> See further Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.11.4.

<sup>68</sup> See also Criminal Justice (Scotland) Act 2003 s.74 and Offences (Aggravation by Prejudice) (Scotland) Act 2009 ss.1 and 2.

the aggravated offences must be set the same as for the basic offences (as is done in Scotland and is currently the case under the CJA provisions in England and Wales). The legislation, however, would contain an additional provision that the sentence must be aggravated and the amount of uplift declared in court (similar to the approach taken in Scotland and under the current ss.145 and 146 CJA provisions). Sentencing guidelines would include race, religion, sexual orientation, disability and transgender identity aggravation as statutory aggravating factors that must be taken into consideration when sentencing. Essential, though, is that the aggravation make up part of the substantive offence which appears on the charge sheet. This ensures that the hostility element forms part of the prosecution's case and is dealt with at trial as well as sentencing.

Beyond the administrative feasibility of creating new sentencing maxima for all offences, we highlight four additional reasons why new aggravated offences would work without being accompanied by new higher sentencing maxima. The first is that official statistics show that the courts rarely enhance the sentence of RRAOs above the sentencing maximum that is set for the basic offence.<sup>69</sup> Moreover, average sentences for RRAOs go nowhere near the maximum, indicating that the higher range is simply not needed in practice. Second, as we have argued elsewhere,<sup>70</sup> judges should put more focus on community, restorative, and rehabilitation-based interventions as part of their "uplifts", thereby avoiding unduly long prison sentences that fail to adequately challenge the root causes of hate and hostility (a key goal of the Government's hate crime action plan).<sup>71</sup> Third, the single statute approach would avoid a lengthy evaluation to determine which offence categories should fall under the CDA,<sup>72</sup> and circumvent the current confusion between when the CDA and/or the CJA provisions should apply in court.<sup>73</sup> Fourth, there are a myriad of justifications for specific aggravated offences beyond that of creating penalties that extend beyond the basic offence, including practical reasons such as ensuring hate crimes are taken seriously by the CJS and that offences are flagged properly post-conviction, and also symbolic justification. This includes the value of expressed denunciation that labelling offences in the criminal law conveys, and the message of support that this also provides to targeted communities.

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<sup>69</sup> Table 3.13 in Home Office, Ministry of Justice and Office for National Statistics, "An overview of hate crime in England and Wales" (2013).

<sup>70</sup> Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.9.1.3. See also Walters, *Hate Crime and Restorative Justice*.

<sup>71</sup> Home Office, *Action against Hate: The UK Government's plan for tackling hate crime* (2016).

<sup>72</sup> If this approach is adopted, however, then on the types of offences that should be considered, see Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, para.11.4.

<sup>73</sup> If there remains an exhaustive list of these offences, all others will need to remain under the sentencing legislation. The improved operation of these provisions must be sustained as recommended by the Law Commission: all hate crime outcomes should be monitored via the PNC, and the CPS (or the courts) should record whether an offence is aggravated by identity-based hostility, and that an uplift has been imposed.

A new Act should emulate the wording as set out in ss.145 and 146 CJA in so far as the courts “must” take into consideration hostility (or *by reason* of the selection of the victim, explained directly below) and state in open court how the sentence has been affected by the aggravation. This position would simplify the law, do away with the vexed problems associated with a dual system of criminal and sentencing provisions, and would ensure that identity-based hostilities are included as part of the basic offence in the criminal law. Were Parliament to pursue this option for law reform, the CJA would no longer be required and should be abolished.

Creating parity in law under a new Hate Crime Act is one way in which the application of hate crime laws could be improved, which may, in turn, reduce the justice gap for hate crime. Nonetheless, parity of protection does not necessarily equate to parity in enforcement for all types of hate crime. As we have illustrated above, there are numerous issues affecting the prosecution and sentencing of disability hate crimes. The data (both statistical and qualitative) revealed a vast difference between the way that disability hate crimes are dealt with by the CJS compared with other strands of hate crime. A key issue limiting the successful application of hate crime laws for disability aggravated offences was the issue of perceived vulnerability and its relationship with the legal term “hostility”. Distinguishing between vulnerability and hostility is so fraught with complexity that, in most cases, prosecutors sought some additional element, beyond the victim’s perceived vulnerability, to establish the presence of hostility. Without it (and in many cases even with such evidence) the vast majority of prosecutions did not result in application of s.146. One CPS hate crime lead summarised the problem as follows:

“As far as disability hate crime is concerned and s.146 ... we’re very much trying to knock a square peg into a round hole trying to fit the facts into a form of language in the legislation that is not really designed to fit.” (CPS 20)

Our data suggests that more must be done to address what has become a complex and vexing problem for the successful application of hate crime legislation and policy. However, it is not only disability hate crime that the legislation is failing. The motivation part of the legal test under s.28(1)(b) and ss.145 and 146 has proved highly difficult to evidence in court for all types of hate crime, making this part of the Act almost impotent in addressing aggravated offences. One Crown Court judge noted:

“I’ve never ... seen an indictment in [county X] or [county Y] which alleges someone whose crime was motivated by the relevant kind of hatred.” (CCJ 06)



The paucity of s.28(1)(b) cases relates to the difficulties in proving “motivation”, as well as the literal interpretation that is given to “hostility” when deciding hate crime cases. A different legal test and wording within hate crime law, therefore, is needed if it is to encompass more incidents involving discriminatory and prejudice-based offending that do not otherwise demonstrate an outward manifestation of identity-based hostility. In this regard, and using further theorisation of different models of hate crime laws below, we offer our second proposal for law reform that we believe will help to transform the operationalisation of hate crime legislation for disability hate crime and beyond.

### C. Introducing a “by reason” test

There are two main models of hate crime legislation that have been enacted globally.<sup>74</sup> The most commonly used model is known as the “hatred motivation model” (also commonly referred to as the “racial animus model”). Under this model, provisions are designed so as to prescribe prejudice or bias as a specific element of the offence. The inclusion of identity-based hostility in the CDA and CJA reflects this approach.

A second model of hate crime legislation that has proliferated mostly within the US is the “group selection” model (also referred to as the discriminatory model). Under group selection hate crime provisions, an offender must have “selected” his or her victim *because of* the victim’s protected group characteristics. Evidence of the offender’s prejudiced or bias motivation is not required. Instead, it is considered that, by virtue of specifically targeting a victim because of the victim’s identity characteristics, the offender has evinced prejudice or bias towards that individual. For example, the Criminal Code in Illinois reads as follows:

“Sec. 12-7.1. Hate crime.

(a) A person commits hate crime when, **by reason** of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real

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<sup>74</sup> Lawrence, *Punishing Hate*.

property, mob action, disorderly conduct, harassment by telephone, or harassment through electronic communications ...”<sup>75</sup>

A penalty enhancement is applied where the offender has committed a basic offence by reason of one of the specified group identity characteristics.<sup>76</sup>

Group selection provisions can be both broader and narrower than laws that directly incorporate a hate element into the text of the statute. They are broader because they may capture cases where no *outward* manifestation of prejudice or bias is demonstrated by the offender. In practical terms, this means that a defendant can be prosecuted for a “hate crime” despite there being no clear motivation or demonstration of identity-based hostility during the commission of the offence. At the same time, group selection provisions are narrower than the hostility requirements in the CDA and CJA, as the prosecution must adduce evidence to prove the defendant’s behaviour was committed *because of* the victim’s identity.

The main criticism levelled at the group selection model is that it potentially captures offenders who have no conscious feelings of hatred or hostility against someone’s characteristic.<sup>77</sup> Take for example the robber who targets victims who live in a predominantly Jewish area believing that Jewish people will be carrying more money on them. The offender may have no “conscious” ill-will or hatred of Jewish people, but simply thinks that targeting Jewish people will provide him with a higher financial return. In such a situation, can we accurately describe the offender’s actions as hostility-based? The answer to this question is found within a more detailed exploration of the mechanics of such provisions, and a more comprehensive understanding of the purpose of hate crime legislation.

In relation to the mechanics of the legislation, we need to understand the circumstances in which an offender would fall foul of the law. To adequately reflect the culpability of the targeted selection, we might ask first whether the victim’s identity characteristic was a *sine qua non* of the offence. The relevant question to ask is: “but for” the victim’s protected characteristics would the offence have occurred?<sup>78</sup> The characteristic need not be the sole reason for selection, but, following current rules on legal causation, we might ask whether

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<sup>75</sup> Emphasis added. France, Bulgaria and Denmark use a version of the discriminatory selection model: see OSCE, *Hate Crime Laws - A Practical Guide* (Warsaw: OSCE, 2009).

<sup>76</sup> Goodall notes that not all group selection models are applied in practice the way that they are prescribed in law, with some judgments inferring that additional hatred or animus might be required. K. Goodall, “Conceptualising ‘racism’ in criminal law” (2013) 33(2) L.S. 214, pp.224-226.

<sup>77</sup> Lawrence, *Punishing Hate*.

<sup>78</sup> Lawrence, *Punishing Hate*.

the victim's protected characteristic was a "substantial" reason (cause)<sup>79</sup> for committing the offence. Where the answer is in the affirmative, then the aggravated version of the offence is made out. Crimes that are committed against individuals where their characteristic is incidental to the offence, should not fall within the meaning of the "by reason" test. It is important that identity remain the focus of hate crime legislation and that preventing and addressing targeted victimisation is the goal of such laws.

Returning to the question of whether targeted victimisation should be considered as "hate crime", regardless of whether there is a demonstration of hostility, we need to first understand *why* the intentional targeting of certain "protected" victim groups is additionally criminalised (punished) in law. The first point to note is that selection of a victim *by reason* of their protected characteristic is, in and of itself, *prima facie* evidence of bias and discrimination.<sup>80</sup> This is not to suggest that any intentional selection of any individual because of their identity should be categorised as a hate crime. The key to understanding the reasons for protecting certain groups from targeted victimisation in this way is to understand *why* certain groups (as against others) are protected under hate crime law.<sup>81</sup> Certain characteristics are protected partly in recognition that members of identity groups have been historically victimised and oppressed and that the law is required to address the continuation of targeted victimisation.<sup>82</sup> Disproportionate levels of targeted victimisation against these groups are likely to cause heightened levels of individual and community harm.<sup>83</sup> Historically, minority group members have been persecuted based on race, religious beliefs, and sexual orientation (amongst others) and continue to experience disproportionate levels of violence. This means that certain groups are more susceptible to targeted victimisation and the traumas that expressions of this type of violence carry.<sup>84</sup> Hate crime laws are, therefore, an attempt to recognise these histories of violence and to protect these groups from future abuse.<sup>85</sup>

The intentional targeting of members from these protected groups "by reason" of their identity characteristics is to subjugate those individuals because of who they are. Such actions feed directly into the negative stereotyping of certain groups and build upon the

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<sup>79</sup> See e.g. *R v Smith* [1959] 2 Q.B. 35.

<sup>80</sup> See L. Wang, "Recognizing opportunistic bias crimes" (2000) 80 *Boston University L.R.* 1399.

<sup>81</sup> See also Walters, Wiedlitzka and Owusu-Bempah, *Hate Crime and the Legal Process*, Appendix A. For more detailed discussion, see M. Walters, "Redrawing the boundaries of hate crime law", *Studies in Law, Politics, and Society* (forthcoming, 2019).

<sup>82</sup> Lawrence, *Punishing Hate*.

<sup>83</sup> P. Iganski and S. Lagou, "Hate crimes hurt some more than others: implications for the just sentencing of offenders" (2015) 30(10) *Journal of Interpersonal Violence* 1696; J. Paterson, M.A. Walters, R. Brown and H. Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex, 2018).

<sup>84</sup> P. Iganski, "Hate crimes hurt more" (2001) 45(4) *American Behavioral Scientist* 626.

<sup>85</sup> A. Harel and G. Parchomovsky, "On Hate and Equality" (1999) 109(3) *Yale Law Journal* 507.

social oppression that they have experienced historically. Wang argues that “[t]hese malevolent stereotypes often include beliefs that successful minority groups gained at the expense of others because they achieved their success illegitimately, through scrupulous business practices or special government ‘handouts’”.<sup>86</sup>

Viewed in this context, the original example of the selection of the Jewish victim who is perceived to carry more cash is likely to reflect the biased (antisemitic) stereotypes attached to Jewish people.<sup>87</sup> Danner argues that in this type of case, the “decision to select a member of a protected group as his victim makes the perpetrator more blameworthy: he knowingly or recklessly joins other wrongdoers in a demonstration of bias and discrimination that ultimately harms our society”.<sup>88</sup>

In his recent report to the Scottish Government, Lord Bracadale dedicates a section of the report to our recommendation that the law should be modified to include a “by reason” test.<sup>89</sup> The report disagrees with our recommendation, stating that “[t]he advocates of this approach argue that what is important is not whether a group has historically suffered discrimination or oppression, but whether the group is vulnerable to violence because of their perceived difference.”<sup>90</sup>

This is a misinterpretation of our recommendation. Indeed, we explicitly state in our original report that in determining what groups should be “protected” under hate crime law, reference to historical marginalisation and oppression is key to understanding why groups have been selected for protection. With groups selected based on these criteria, we note the importance that future *targeted* victimisation of group members compounds their social marginalisation and serves to further subjugate group members. We argue that one way in which this commonly occurs is through the selection of disabled people who are perceived to be vulnerable and that such selection is tantamount to a form of bias towards disabled people. Hence, the group selection model is not an attempt to make *vulnerability* central to prosecuting hate crime, but rather it is an understanding that protected groups can be

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<sup>86</sup> Wang, “Recognizing opportunistic bias crimes”, 1431.

<sup>87</sup> K. Franklin, “Unassuming Motivations: Contextualizing the Narratives of Antigay Assailants” in G.M. Herek (ed.), *Stigma and Sexual Orientation: Understanding Prejudice Against Lesbian, Gay Men, and Bisexuals* (Thousand Oaks, CA: Sage 1998), discusses the stereotype that gay men are “ideal targets” because they are economically privileged, having more money, nicer cars, posh apartments with nice “stuff in ‘em’”: cited in Wang, “Recognizing opportunistic bias crimes”, 1431.

<sup>88</sup> A.M. Danner, “Bias crimes and crimes against humanity: culpability in context” (2002) 6 *Buffalo Crim. L.R.* 389, 406. Also cited in J. Chalmers and F. Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, 2017), p.43.

<sup>89</sup> Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Scottish Government, 2018), paras.3.14-3.27.

<sup>90</sup> Bracadale, *Review of Hate Crime Legislation in Scotland*, para.3.16.

perceived to be vulnerable based on their group characteristics, which is linked to a belief that disabled people are worth less than other human beings. Lord Bracadale fears that “the principal difficulty with defining hate crime around vulnerability is that the message conveyed by labelling the crime as hate crime becomes diluted and the category of hate crime ‘loses it [sic] special symbolic power’”.<sup>91</sup> We do not disagree with such a conclusion. However, this is not the aim of our recommendation. The “by reason” test does not include any reference to vulnerability but instead relies on the decision by the offender to select a victim based on their protected characteristic. The importance of perceived vulnerability and difference<sup>92</sup> is that it helps us to understand *why* selecting people with certain characteristics should be included in hate crime legislation – however, it does *not* make up the test for inclusion.

Our exploration of disability hate crime provides abundant evidence of victims being targeted because of discriminatory beliefs. There will be many other examples of hate crimes where victims are selected by reason of an identity which is linked to both vulnerability and “difference”.<sup>93</sup> The transgender woman who is sexually assaulted and beaten because the offender knows she can do nothing to protect herself, or the young Muslim girl whose head scarf is torn from her head because she is seen as an easy target, are but two examples of “hate crimes” committed by reason of the victim’s identity. In many of these types of cases, there is no *clear-cut* outward (i.e. verbal) manifestation of hostility, neither will there always be sufficient proof to show that the defendant was “motivated” by hostility. Yet, these kinds of cases illustrate how often certain groups of people are brutalised, sometimes tortured, and often abused, simply because of who they are. Their perceived vulnerability cannot be disentangled from the judgements that offenders make about the worthiness of their victim’s value as human beings.<sup>94</sup> Victims are “selected” because their “difference” means that they are deemed to be somehow less, and their worth as equal members of society is therefore diminished.

Still, Lord Bracadale reflects further that a group selection model may be too broad and potentially unworkable in practice.<sup>95</sup> He sets out an example of the potential limitations of the “by reason” test, noting:

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<sup>91</sup> Bracadale, *Review of Hate Crime Legislation in Scotland*, para.3.22.

<sup>92</sup> See N. Chakraborti and J. Garland, “Reconceptualising hate crime victimization through the lens of vulnerability and ‘difference’” (2012) 16(4) *Theoretical Criminology* 499.

<sup>93</sup> On race hate crime and intersectionality, see M.A. Walters, “Why the Rochdale Gang should have been sentenced as “hate crime” offenders” [2013] 2 Crim. L.R. 131.

<sup>94</sup> K. Quarmby, *Getting Away with Murder*; Equality and Human Rights Commission, *Hidden in Plain Sight: Inquiry into Disability-related Harassment* (2011).

<sup>95</sup> See also H.M. Hurd and M.S. Moore, “Punishing Hatred and Prejudice” (2004) 56(5) *Stanford Law Review* 1081.

“For example, a bogus workman might target a number of people on a street and be successful in defrauding some of the neighbours but not others. This may be because the particular individuals are more easily deceived, and this could be considered to be related to their age or disability. However, it is not clear to me that this type of crime is what society would wish to mark out specifically as a hate crime.”<sup>96</sup>

Were the “by reason” test to be applied here, the prosecution would need to prove that the bogus workman purposefully targeted his victims by reason of them being disabled. The fact that some of his targets were disabled and, therefore, more easily deceived would not be sufficient evidence that he had committed a hate crime. Only if he were to have selected them *because* they were disabled would this meet the test. He would, then, be selecting his victims based on discriminatory motives (i.e., the belief that disabled victims are weaker) which would show that his actions are based on prejudice towards disabled people. Applying unfair advantage theory, Woods argues that this type of targeted victimisation is “distinctly deplorable because unlike typical robberies, they contain a rationally calculative element to exploit unjust economic and social conditions that cause group ostracism and discrimination for personal gain.”<sup>97</sup> He reflects further that “[t]his position does not hold perpetrators fully responsible for the environment of discrimination in which they act, but rather holds perpetrators responsible for their decisions to participate in that discrimination.”<sup>98</sup> Indeed, in giving effect to group selection hate crime laws, we need to remember that we are not targeting offenders who “hate” people because of their characteristic, but we are instead addressing offending that contributes (through acts of crime) to the subjugation of people who are vulnerable because of their “difference”.

Academic discourse that illustrates how targeting perceived vulnerability can also amount to a form of identity-based bias which should be interpreted as “hostility” is unlikely to be applied in practice. Parliament must ask the following question: will 12 lay jurors be able to grasp the complexities of the relationship between the concepts of “hostility” and “perceived vulnerability”, when legal practitioners remain confused and/or divided on the issue? Without any specific legislative guidance, the literal (dictionary) meaning of hostility, as applied by jurors and magistrates, will not fit well with: cases that involve some form of pre-existing relationship with the complainant; cases that are likely to involve some form of grooming; faux friendships; a carer’s role; or those just opportunistically “taking advantage” of someone because of their “difference”.

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<sup>96</sup> Bracadale, *Review of Hate Crime Legislation in Scotland*, para.3.24.

<sup>97</sup> J.B. Woods, “Taking the Hate out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crime”, (2008) 56 *UCLA L. Rev.* 489, 511.

<sup>98</sup> Woods, “Taking the Hate out”, 511.

Because the group selection model is consistent with the purpose of hate crime legislation, and because it is so difficult to establish motive in hate crime cases (with motive not being a common feature of the criminal law) we recommend that s.28(1)(b) of the CDA be replaced with a new “by reason” test. Indeed, we found support for this type of legal reform amongst several interviewees.

“My main bugbear about hate crime is the inadequacy of s.146 to deal with disability hate crime, and what would make it easier for prosecutors and what I would love to see in the legislation – new legislation ... is for disability hate crime to be targeting of a disabled person, for the legislation to say that and make it clear.” (CPS 20)

The introduction of a “by reason” test would be unlikely to significantly extend the scope of the criminal law (or punishments). Rather, its aim would be to provide greater flexibility for prosecutors to pursue certain forms of prejudice-based crimes, which the current motivation of hostility test fails to achieve. Thus, where a defendant is convicted of a basic offence against a disabled victim because of the victim’s perceived “vulnerability”, under our proposal, the offence could more accurately be labelled and disposed of as a hate crime, as against a judge enhancing sentence and labelling the offence as one aggravated by “vulnerability”. We, therefore, submit that the successful prosecution of *all* types of hate crime would be improved by amending s.28(1)(b) (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).

Section 28(1)(a) should be maintained as it is currently prescribed. The majority of hate crime cases would continue to fall within s.28(1)(a), which is, and would remain, an important tool when tackling *most* hate crimes where an outward manifestation of hostility has been expressed.

## Conclusion

Our empirical study confirms that the current legislative framework for hate crime in England and Wales is overly-complex, confusing, and of unequal application. In particular, the sentencing provisions in the CJA are not consistently applied. This means that hostility based on sexual orientation, transgender identity and disability is treated differently from,

and not as seriously as, hostility based on race and religion. Moreover, difficulties in applying the dictionary definition of “hostility” and establishing motive mean that most disability aggravated offences are not treated as “hate crimes”.

Legislation aimed at preventing and addressing hate crime should not divide the groups it aims to protect, nor should it create further inequalities. This is not simply a point of principle, but has symbolic importance and significant practical relevance. We, therefore, have recommended the enactment of a new Hate Crime Act to consolidate the current framework of offences and sentencing provisions. This would avoid many of the complexities that the CDA and the CJA provisions currently display, and would offer much-needed simplicity to the comprehension of the law. We propose that the new Hate Crime Act should proscribe any offence in the criminal law as aggravated by one of the five currently protected strands. Instead of prescribing separate enhanced penalties for every “aggravated” offence, the Act would state that the judge “must” treat the offence as aggravated (as set out in the current CJA provisions). The maximum sentence set for the basic version of the offence would apply for the aggravated offences, and judges should enhance sentences by, at least partly, using community and rehabilitation programmes, and restorative justice initiatives.

Beyond these changes, we have proposed the implementation of a new “by reason” test within either the CDA (and CJA) or the new Hate Crime Act, if enacted. This test would replace the current motivation of hostility test set out under s.28(1)(b) of the CDA (as replicated under the CJA provisions). As we have argued above, the targeting of individuals because they are “different” (based on a protected characteristic) is a form of prejudice and hostility in and of itself. Yet, despite numerous guidance documents, training programmes, criminal justice reports and academic studies explaining that this is the case, legal practitioners and jurors continue to reject such cases as providing sufficient evidence of “hostility”. We are not confident that further guidance or training on this matter will be sufficient to challenge the huge justice gap that exists for hate crime – that which especially affects victims of disability hate crime. Legal amendments to the model of hate crime are, therefore, required if the CJS is to finally get to grips with effectively addressing all forms of hate crime.