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Legislating Against Hatred: The Law Commission's Report on Hate Crime

Introduction

The issue of hate crime and how to tackle it has become of increasing significance over the last two decades, particularly in light of the murder of Stephen Lawrence in 1993. Although incitement to *racial* hatred offences had been in existence under the Public Order Act 1986 (POA),¹ following Home Office consultation on racial violence and harassment in 1997,² the Government introduced specific legislation to tackle racist hate crime under the Crime and Disorder Act 1998 (CDA). These offences created aggravated versions of basic offences if an offender was motivated by or demonstrated *racial* hostility. *Religion* was added to the CDA provisions in 2001³ and to the POA in 2006,⁴ whilst the POA provisions were further extended to *sexual orientation* in 2008.⁵ The CDA also introduced a sentencing provision which in its current form under the Criminal Justice Act 2003 (CJA) requires all sentencing judges to take account of any hostility towards *race, religion, sexual orientation, disability and transgender identity* as an aggravating feature which increases the level of punishment an offender may receive.⁶ Although opinion is divided as to whether a state should introduce targeted legislation in order to tackle hate crime,⁷ hate crime statutes now appear in many jurisdictions across the world.⁸

In March 2012, the Hate Crime Action Plan was launched which sought to outline the Government's strategy for reducing the levels of hate crime experienced by victims.⁹ Combatting hate crime is seen as central to ensuring that as a society we 'embrace [the] rich mix of different races, cultures, beliefs, attitudes and lifestyles' that exist in Britain today.¹⁰ Effective legislation is at the heart of the Hate Crime Action Plan and is fundamental to its success. With

¹ The first version of this offence can be found in the Race Relations Act 1965, section 6.

² Racial Violence and Harassment: A Consultation Document, Home Office, September 1997.

³ Anti-terrorism, Crime and Security Act 2001, section 39.

⁴ Racial and Religious Hatred Act 2006.

⁵ Criminal Justice and Immigration Act 2008.

⁶ Sections 145 and 146.

⁷ There is a rich source of commentary on this, but the two sides of the debate are exemplified very well by J Jacobs and K Potter, *Hate Crimes: Criminal Law and Identity Politics* (OUP 1998) and F Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999). For UK commentators see for example P Iganski, ed., *The Hate Debate: Should Hate Be Punished as a Crime?* Profile Books Ltd, London, 2002; N Hall, *Hate Crime* (Willan Publishing 2005); I Hare, 'Legislating Against Hate: The Legal Response to Bias Crime' (1997) 17 OJLS 415; M Malik, "'Racist Crime': Racially Aggravated Offences in the [Crime and Disorder Act 1998 Part II](#)' (1999) 62 MLR 409 and F Brennan 'Crime and Disorder Act 1998: racially motivated crime: the response of the criminal justice system' *Criminal Law Review*, 1999, Jan, 17-28. On hate speech, see J Waldron, *The Harm in Hate Speech*, (Harvard University Press, 2012); I Hare 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' *Public Law* (2006) 521-538; I Loveland 'Hate Crimes and the First Amendment' *Public Law* (1994) 174-183; AW Bradley 'Free Expression and Acts of Racial Hatred' *Public Law* (1992) 357-359; T Morton 'Free Speech v Racial Aggravation' *New Law Journal* (6th August 1999) 1198; J Cooper and AM Williams 'Hate Speech, Holocaust Denial and International Human Rights Law' *European Human Rights Law Review* (1999) (vol. 6) 593-613; D Pannick 'Religious Feelings and the European Court' *Public Law* (1995) 7-10.

⁸ See for instance, *Hate Crime Laws, A Practical Guide*, OSCE, ODIHR, 2009, which contains examples of key legislation from across the world.

⁹ Policy Paper, 'Hate Crime Action Plan: Challenge it, Report it, Stop it' Home Office, March 2012.

¹⁰ Policy Paper, 'Hate Crime Action Plan: Challenge it, Report it, Stop it' Home Office, March 2012, page 3.

this in mind, the Ministry of Justice, as part of a cross-departmental Government initiative on hate crime, asked the Law Commission to consider the case for broadening the scope of the CDA and POA provisions to bring them into line with the greater range of victims protected under the CJA. The Law Commission published its final report on the matter in May 2013 in a report entitled 'Hate Crime: Should the Current Offences be Extended?'

This article seeks to assess the Law Commission recommendations. In the first section a summary of the current law will be provided, followed by a brief overview of the recommendations. The subsequent sections will deal with each of the proposals in more detail. It will be argued that the review recommended by the Law Commission of the CDA offences should be extended to include the entire legislative framework which deals with hate crime. This is because reform in this area has been piecemeal, resulting in a disordered set of laws which do not necessarily give effective protection to hate crime victims. Examining the CDA in isolation from the CJA and the POA, will not satisfactorily address the problems with the current legislation, and runs the risk of overlooking the importance of assessing these provisions as a comprehensive body of hate crime law.

The Current Law

The current legislation prohibiting hate crime can be divided into three categories.

First, there is a set of offences where the hostility forms part of the mens rea and/or actus reus of the crime. Under the CDA¹¹ basic offences such as assault and criminal damage, can be aggravated if committed whilst demonstrating hostility to someone's *race* or *religion*,¹² or where the offence is motivated, or partly motivated, by such hostility.¹³ The aggravation carries a greater maximum punishment than the maximum for the basic offence.

Secondly, hostility can act as an aggravating factor at the sentencing stage. Sections 145 and 146 of the CJA require sentencing judges to consider hostility on the basis of *race*, *religion*, *disability*, *sexual orientation* or *transgender identity* as an aggravating factor which goes to the seriousness of the offence and which can, therefore, attract a higher penalty. Unlike the aggravated offences, s. 145 and s. 146 apply to all offences except those covered in the CDA on the basis that hostility is already addressed by the aggravated offences, but there remains a problematic co-existence between these provisions which will be considered in more detail below. There are three important distinctions to bear in mind between the CDA offences and the enhanced sentencing regime under the CJA. The first is that the CDA allows for a higher maximum sentence if the basic offence has been aggravated. For example, s.20 of the Offences Against the Person Act 1861 has a maximum imprisonment of five years, which is increased to seven years if aggravated under the CDA. By contrast, the CJA enables the sentencing judge to impose a higher sentence, but only within the statutory maximum. The second distinction is that under the CDA, the fact of aggravation will be assessed by a jury at the liability stage, whereas under the CJA the hostility

¹¹ Crime and Disorder Act 1998, sections 28-32.

¹² The aggravated offences initially only applied to race. Religion was added to the Crime and Disorder Act by the Anti-Terrorism, Crime and Security Act 2001, section 39.

¹³ The basic offences which can be aggravated are: section 20 and section 47 of the Offences Against the Person Act 1861, common assault, criminal damage, offences under sections 4, 4A, 5 Public Order Act 1986, and offences under sections 2, 2A, 4 and 4A of the Protection from Harassment Act 1997.

element will be determined by a judge at the sentencing stage. The third difference is that with the CDA offences, the fact of aggravation will appear on an offender's criminal record as it forms part of the mens rea and actus reus of the offence they have committed, whereas it will not appear on the record of an offender whose sentence has been increased because of hostility under the CJA. All three of these distinctions are relevant to the Law Commission's final recommendations.

Finally, there are the stirring up hatred offences under the POA.¹⁴ These offences initially only applied to the stirring up of *racial* hatred and criminalised conduct which was threatening, abusive or insulting and which was intended to stir up racial hatred or was likely to stir up racial hatred. These offences have now been extended to *religion* and *sexual orientation*¹⁵ but in a slightly more restricted form so that the conduct must be threatening, and there must be an intention on the part of the perpetrator to intend to stir up racial hatred.¹⁶

Although there are other statutes under which 'hate crime' can be prosecuted,¹⁷ these three sets of legislation form the core of the Law Commission's report. As can be seen from this brief description, there is uneven protection afforded to the different types of characteristic. Although the CJA covers all five characteristics (race, religion, sexual orientation, disability and transgender), the CDA applies only to race and religion, whilst the POA offences protect race, religion and sexual orientation. The unequal treatment of the different victim groups was the trigger for the Ministry of Justice's request to the Law Commission to consider extending the POA and CDA to cover all five characteristics.

Overview of the Law Commission's Recommendations

Despite the range of debates which surround the issue of hate crime,¹⁸ the Law Commission was given a very limited remit by the Ministry of Justice. The brief was to look at two very specific issues:

¹⁴ Public Order Act 1986 sections 18-23.

¹⁵ The incitement to religious hatred offences were added by the Racial and Religious Hatred Act 2006; and the offences relating to sexual orientation were added by the Criminal Justice and Immigration Act 2008.

¹⁶ There are also provisions which relate to the protection of freedom of expression under certain circumstances under POA, section 29J (religion) and section 29JA (sexual orientation).

¹⁷ For example, Communications Act 2003, section 127, Malicious Communications Act 1988, section 1 and the Football (Offences) Act 1991, section 3.

¹⁸ A non-exhaustive list of examples of debates within hate crime law: a) whether hate crime legislation should exist - J Jacobs and K Potter, *Hate Crimes: Criminal Law and Identity Politics* (OUP 1998); F Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999). For UK commentators on the same topic see for example P Iganski, ed., *The Hate Debate: Should Hate Be Punished as a Crime?* Profile Books Ltd, London, 2002; b) what form hate crime law should take - Ivan Hare, 'Legislating Against Hate – The Legal Response to Bias Crimes' *Oxford Journal of Legal Studies*, 1997, 17 (3) 415 and Maleiha Malik, "Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II, *Modern Law Review*, 1999, 62(3), 409-424; c) how the law should be interpreted - M Walters, 'Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' *Oxford Journal of Legal Studies*, (2014) 34(1), 47-74, K Goodall, 'Conceptualising "Racism" in Criminal Law' (2013) 33 LS 215; d) which characteristics of victims should be given protection - Schweppe, J (2012) 'Defining Characteristics and Politicising Victims: A Legal Perspective'. *Journal of Hate Studies*, 10 (1):173-198; N Chakraborti and J Garland, 'Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'' *Theoretical Criminology*, 2012 16:499; G Mason, 'Victim Attributes in Hate Crime Law: Difference and the Politics of Justice' *British Journal of Criminology*, 54(2), 161-179; G Mason 'The

- a) To consider the extension of the CDA 1998 to include hostility demonstrated towards people of disability, sexual orientation or transgender identity;
- b) To consider the case for extension of the stirring up offences under the POA 1986 to include stirring up of hatred on the grounds of disability or transgender identity.¹⁹

Thus, it was not within the Law Commission's terms of reference to consider the rationale for the current legislation, or to repeal or amend any details of the law beyond the issue of which victims should be included. However, the Law Commission recognised that the questions set by the Ministry of Justice could not be answered without a broader discussion of the context within which these offences exist. As a result, the Law Commission read the brief as expansively as possible. This enabled them to cover a wider range of issues that went beyond the victims of hate crime, and thus to produce a better grounded set of recommendations. In June 2013 an initial Consultation Paper was produced which contained a number of proposals and alternative proposals which, broadly speaking, advocated the extension of both sets of offences.²⁰ After extensive and wide consultation, the final report was published in May 2014 and put forward the following recommendations.

In relation to the first question, the Law Commission concluded that the case for extension of the aggravated offences cannot be answered without at the outset considering the effectiveness of the enhanced sentencing regime which came under a great deal of criticism from practitioners during the initial fact-finding stages of the project. They made two recommendations in relation to the CJA powers: the first is that the Sentencing Council should issue guidance on the hostility element both for the CDA offences and the CJA provisions; and the second is that the use of enhanced sentencing should be recorded on the police national computer (PNC) so that when an offender's sentence has been aggravated as a result of hostility, this information will appear on their criminal record.²¹

The next set of recommendations relate more directly to the first question by focusing on the aggravated offences themselves. In the consultation paper, the Law Commission favoured extending the aggravated offences to include sexual orientation, disability and transgender. However, the consultation process uncovered a number of problems with the aggravated offences which led the Commission to recommend in the final report that, before a decision is made about extending the law, a comprehensive review of the aggravated offences should first be undertaken. However, in recognition that this may not be taken up by the Government because of the time and cost involved, the Law Commission have taken a pragmatic approach by also recommending that if a review is not undertaken, the aggravated offences should be extended to include sexual orientation, disability and transgender identity in order to rectify the current inequity in the protection of the different characteristics under the existing regime.²² The Law Commission also considered the definitions of 'disability', 'sexual orientation' and

symbolic purpose of hate crime law: Ideal victims and emotion; *Theoretical Criminology*, 18(1), 75-92; M Walters and J Tumath 'Gender "Hostility", Rape, and the Hate Crime Paradigm', *Modern Law Review*, 2014, 77(4), 563-596.

¹⁹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 2.

²⁰ 'Hate Crime: The Case for Extending the Existing Offences', Law Commission Consultation Paper No 213, June 2013.

²¹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, Chapter Three.

²² 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, Chapter Four and Five.

‘transgender identity’ should these new offences be created, and recommended that the current definitions used under s. 146 should be used.²³

Insofar as the second question is concerned, having initially been broadly in favour of the extension of the stirring up offences to other grounds in the consultation paper, in the final report, the Law Commission has reversed its position and recommends instead that there should be no change to the POA provisions. The reason given for this is that there is little or no evidence that behaviour of the sort that would be captured by the creation of new offences of stirring up hatred against disability or transgender is in fact occurring or is not already covered under other legislation.²⁴

In the following sections, each of the above proposals will be analysed in more detail.

The Enhanced Sentencing Regime

Although reform of the sentencing provisions under s. 145 and s. 146 of the CJA 2003 was not directly within the terms of reference set by the Ministry of Justice, the Law Commission took the view that it could not properly consider the case for extension of the aggravated offences without also examining the enhanced sentencing regime. This was a reasonable course to take given the technical issues which arise from the relationship between the CJA sentencing powers and the aggravated offences, but also because the Commission’s own fact-finding discussion preceding the Consultation Paper revealed widespread dissatisfaction with the inadequate use of the sentencing powers by judges. The underlying premise of the assessment of the CJA was to explore whether the enhanced sentencing regime could provide an adequate alternative to extension of the aggravated offences. The two recommendations made in relation to the enhanced sentencing regime were aimed at improving the CJA powers so that the main benefits which currently flow from the aggravated offences could be transposed to the enhanced sentencing regime, and thus obviate the need to extend the CDA provisions.

a) Sentencing Council Guidelines

In exploring the problems with the current sentencing regime, the report identified the lack of guidance on the interpretation of the hostility element and its application as an aggravating factor, as a particular cause for concern²⁵. This was because the absence of clear guidance has led to inconsistent decisions being reached by sentencing judges, and also to what consultees perceived to be the imposition of unduly lenient sentences.²⁶ In combination, these factors have undermined the success of the regime and have weakened confidence in its effectiveness. The first proposal, therefore, is to recommend that the Sentencing Council produce new guidelines

²³ ‘Hate Crime: Should the Current offences be Extended?’, Law Commission (no. 348), May 2014, Chapter Six.

²⁴ ‘Hate Crime: Should the Current offences be Extended?’, Law Commission (no. 348), May 2014, Chapter Seven.

²⁵ ‘Hate Crime: Should the Current offences be Extended?’, Law Commission (no. 348), May 2014, page 56, paragraph 3.13.

²⁶ ‘Hate Crime: Should the Current offences be Extended?’, Law Commission (no. 348), May 2014, page 57, paragraphs 3.16-3.17.

on the element of hostility in order to clarify areas of uncertainty.²⁷ In the original consultation paper, this proposal had been limited to the enhanced sentencing regime powers, but in the final report, it was suggested that the guidance should also be applied to sentencing of the aggravated offences as well.

At the consultation stage, the proposal in its more limited form met with solid support²⁸ and this is likely to also be the case with the more extended version. However, some may question whether clearer guidance will necessarily lead to an increased use of the enhanced sentencing powers. More importantly, whilst guidance is clearly necessary in this area, it is less clear what principles the Sentencing Council should use to determine the content of their advice. The inconsistencies in the interpretation of the hostility element mirror a deeper lack of consensus about the appropriate use of the term in the aggravated offences which has led some judges to be reluctant to find an offender guilty in cases where the hostility is incidental to the commission of the offence.²⁹ This is a practical manifestation of a much wider principled debate about what hostility should mean, and is an example of the unease felt by some that law allows the prosecution of offenders who use racist language casually, without malice.³⁰ The creation of any guidelines will, therefore, be less straightforward than the Law Commission suggests. It is important to note that the issues of principle which lie at the heart of the question about the definition of hostility are identified later on in the report but only in relation to the aggravated offences, even though it is clear that they apply equally to the enhanced sentencing regime. Given that the Law Commission recommends a broader review of the aggravated offences which would examine these questions, it would be unfortunate if the Sentencing Council published advice that ran counter to the conclusions reached in the review. As such, it would be preferable if the question of sentencing guidelines forms part of, and is informed by, this broader review rather than be generated separately from it. This is a good illustration of why it is important to consider the different pieces of legislation as a comprehensive body of hate crime. Persisting with incremental law reform of each provision separately without regard for developments in the other areas will exacerbate the existing problems of inconsistency and ineffectiveness.

b) Enhanced Sentencing and recording on the PNC

The next recommendation in relation to the enhanced sentencing regime is concerned with the labelling of offending behaviour. Currently, if an offender is convicted of an aggravated offence, this will appear on his or her criminal record. However, if an offender is convicted of an offence

²⁷ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 64, paragraph 3.49.

²⁸ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 58, paragraph 3.20.

²⁹ M Walters, 'Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' *Oxford Journal of Legal Studies*, (2014) 34(1), 47-74. See also D Ormerod, 'Public order: respondent using word "Paki" once during incident lasting about half an hour', *Criminal Law Review*, 2009, 6, 449-452.

³⁰ B Dixon and D Gadd, 'Getting the Message? "New" Labour and the Criminalization of "Hate"' (2006) 6 *Criminology and Criminal Justice* 309 and D Gadd, 'Aggravating Racism and Elusive Motivation' (2009) 49 *Brit J Criminology* 755, D Ormerod, 'Public order: respondent using word "Paki" once during incident lasting about half an hour', *Criminal Law Review*, 2009, 6, 449-452.

to which s. 145 or s. 146 is applied at the sentencing stage, the fact of aggravation is not recorded on the PNC. This means that the aggravated offences provide an obvious advantage in terms of 'labelling' as the hostility element of an offender's conduct is officially recorded, whereas it is not under the CJA. The Law Commission proposes to remove this discrepancy by recommending that in all cases where s. 145 or s. 146 is applied, the aggravation should automatically be recorded on the PNC.³¹ The benefit of such a system, the Report argues, is that this information will be useful to criminal justice agencies such as the police, courts, probation service and prison service.³² It will also mean that the aggravation will appear whenever a Disclosure and Barring Services criminal records check is made, thus ensuring that 'hostile' offenders are not able to work in jobs where this hostility could be an issue.³³

The Commission reports that this proposal met with 'overwhelming support'³⁴ from consultees who agreed that this improvement in information sharing would help with matters such as safeguarding, rehabilitation, detection, investigation and sentencing. Undoubtedly, inclusion of hostility on the PNC will bear many of the advantages outlined in the report³⁵ such as giving agencies greater knowledge of an offender's past behaviour, and providing employer's with information they find useful. However, this recommendation needs to be treated with an element of caution as there are important points of principle and practice which must be considered before the PNC is extended in this way.

Insofar as the recording of the aggravation is concerned, it should be noted that including information about the aggravation at sentencing would be a novel use of the PNC, and as such, necessitates careful thought about whether labelling an offender in this way is appropriate. A particular issue in this regard is the fact that unlike the CDA where the aggravation is determined at the liability stage under trial conditions and often by a jury, under the CJA, the aggravation is decided at the sentencing stage by a judge, after guilt has been established to the criminal standard of proof at trial. There may, therefore, be a point of principle to be explored here about the suitability of labelling at the sentencing stage as offenders are not given the same opportunity to defend themselves as they are at trial. The report does allude to this potential issue by making it clear that if aggravation is to be assessed at the sentencing stage, then an offender should be given notice of this in order to give them time to prepare their case, and a *Newton* hearing should take place which will give the offender many of the protections he or she would get during a trial. However, although this suggestion would go some way towards ensuring offenders are given ample opportunity to defend themselves against any accusations of hostility at the sentencing stage, this still does not deal with the deeper point of principle involved in mixing the fundamentally different functions of the liability and sentencing stage. The liability stage involves the scrutiny of the defendant's conduct and mental state under strict

³¹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 74, paragraph 3.104.

³² 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 72, paragraphs 3.90 – 3.94.

³³ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 72, paragraph 3.93.

³⁴ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 66, paragraph 3.57.

³⁵ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 66-69, paragraphs 3.59-3.77.

procedures in order to determine whether that behaviour falls under a particular criminal label; sentencing, on the other hand, is the point at which the level of punishment is determined. Imposing a label on the offender at the sentencing stage as the Law Commission is proposing, is a *prima facie* subversion of this central difference, and therefore must be explored in greater depth before this recommendation is implemented.

Even if a good case could be put forward for overriding any principled concerns with including the fact of aggravation on the PNC for use by the police and other criminal justice agencies, there may be objections to allowing this information to be available to employers. The report draws attention to serious questions currently being asked about the types of information which can be accessed by employers through a criminal records check.³⁶ In *Re T*, the Court of Appeal ruled that the blanket inclusion of all conviction information in the Criminal Records Certificates (CRCs) and Enhanced Criminal Records Certificate (ESRC)³⁷ was incompatible with Article 8 rights. Since the decision in *Re T* in 2013, the Government has introduced a filtering system which excludes information if it is a person's only conviction, the sentence imposed was non-custodial or it was more than 11 years old.³⁸ *Re T* is currently on appeal with the Supreme Court, but irrespective of the outcome of that case, it is clear that there are wider concerns in relation to the information that should be made available to employers because of the implications this may have for offender's ability to gain employment and re-integrate successfully into society after they have served their sentence. The issue requires a complex balance to be struck between the needs of the offender and that of society more generally. The report seems to assume that the availability of such information would be useful to employers without also considering what repercussions this may have for offenders.

There are other broader issues that also need to be examined before the Government decides whether to implement the recommendation on the PNC. First, it is necessary to consider whether the stigmatisation of offenders through their criminal records is the most appropriate way of dealing with perpetrators of hate crime. Criminologists are circumspect about the net-widening effect that such labelling has, and the negative impact it has on crime reduction.³⁹ There is also a practical concern here. If inclusion on the PNC becomes mandatory, sentencing judges may become more cautious about attaching a hostility element in their sentencing decisions because of the awareness that this will have serious implications for the offender's criminal record. The current structure of the CJA compounds this problem as the hostility element is wide and can be established in cases which consist of no more than an offhand comment made during the course of committing another offence.⁴⁰ If the matter is dealt with at sentencing, without the additional aggravation appearing on the offender's record, a sentencing judge can capture the different levels of hostility in the level of punishment he or she imposes.

³⁶ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 50-52, paragraphs 2.117-2.120.

³⁷ As per Part V of the Police Act 1997.

³⁸ *R (T) v Chief Constable of the Greater Manchester Police* [2013] EWCA Civ 25, [2013] 1 WLR 2515, [38].

³⁹ See for example S Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity Press 1985).

⁴⁰ There is an increasing awareness that the breadth of the hostility element in the CDA has caused some judges and magistrates to be reluctant to find hostility in such cases: see 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' *Oxford Journal of Legal Studies*, (2014) 34(1), 47-74, D Ormerod, 'Public order: respondent using word "Paki" once during incident lasting about half an hour', *Criminal Law Review*, 2009, 6, 449-452.

However, these nuances will be lost if the aggravation is simply included on the PNC, and might, therefore, deter sentencing judges from considering the hostility because of the high stakes involved for the offender. There are, therefore, a number of factors that need to be assessed in much more depth before a decision can be made to include the fact of aggravation on the PNC, and it is suggested that the recommendation of the Law Commission is not taken up without a broader examination of these issues.

A final matter of concern is that the report has not discussed how inclusion on the PNC will affect the aggravated offences. This is another example of the report focussing on the different pieces of legislation separately rather than treating them as an interconnected corpus of hate crime law. The report suggests that the recommendation regarding the PNC should be implemented whether or not the aggravated offences are extended.⁴¹ However, part of the rationale for including aggravation on the PNC was to strengthen the CJA powers in order to make them an effective alternative to the CDA offences. If this is the case, then it does not make sense to consider the PNC recommendation in isolation from the discussion on the aggravated offences as the two are obviously linked. This becomes obvious when we consider what would happen if both the PNC recommendation were implemented and the aggravated offences were extended (both would be possible under the Law Commission's proposals). If this were to take place, this would effectively render the CDA provisions obsolete, as there would be very little motivation for the prosecution to charge the aggravated offences as the CJA powers would allow for virtually the same result, but without the need to prove the aggravation during a trial. The only circumstances under which the prosecution might prefer the CDA charge is where a higher maximum sentence is sought, but as they Law Commission points out, in practice it is very rare for sentencing judges to impose sentences for the aggravated offences that go above the maximum for the basic offence.⁴² This observation is of significance as it further demonstrates the importance of considering any reform of the CDA and CJA together and not in isolation from each other. The Law Commission's central recommendation is that the CDA provisions undergo a thorough review, however, it is suggested that this review should also be extended to the CJA in order to ensure that an integrated approach is taken in any proposed reforms to either area of the law.

Thus, although the recommendation in relation to the CJA powers might be of value, it requires further reflection. More thought needs to be given to whether labelling at the sentencing stage is appropriate in principle but also whether inclusion of aggravation on the PNC will genuinely lead to a higher use of hate crime powers by judges. This recommendation also needs to be scrutinised in the broader context of other hate crime laws in order to ensure a cohesive approach to law reform is adopted.

Aggravated Offences

⁴¹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 74, paragraph 3.105.

⁴² 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 109, paragraphs 4.122.

The next set of recommendations relates to the aggravated offences. One of the reform options in the Consultation Paper was to extend the CDA offences to sexual orientation, disability and transgender in order to bring them in line with the characteristics protected under the CJA.⁴³ However, in the final Report, the Law Commission is more cautious about endorsing such an extension and their primary recommendation is that a comprehensive review of the aggravated offences is required before any change in the law is advocated.⁴⁴ Although the report puts forward a strong argument for a wider review it recognises that further review will be costly in terms of time and money, and concedes that this may dissuade the Government from this undertaking. If this is the case, they recommend as a second option that in the interests of equality, the aggravated offences should be extended to sexuality, transgender and disability.⁴⁵ They do, however, point out that this would be a 'less valuable'⁴⁶ route as the aggravated offences in their current state are not able to deal effectively with the problem of hate crime.

There were two main issues that swayed the Law Commission against immediate extension and towards wider review. The first was the belief that many of the practical benefits that consultees suggested would occur as a result of the extension of the aggravated offences were not only speculative, but also could be achieved in other ways, such as through the enhanced sentencing regime. An example of this is the belief that the symbolic, communicative and 'fair labelling' functions of the aggravated offences could be achieved equally well through a reform of the enhanced sentencing regime as per their first recommendation (namely inclusion of aggravation at the sentencing stage on the PNC).⁴⁷

The second, and arguably the most important reason against immediate extension was the fact that the consultation process brought to light a number of problems with the current structure and practical working of the aggravated offences which undermined their effectiveness. The unduly complex nature of the offences which allow for either the demonstration of hostility or the motivation of hostility was causing problems in practice for prosecutors, and was resulting in plea-bargaining, or the dropping or downgrading of aggravation charges.⁴⁸ In many cases, it has also led to the aggravated charges not being brought in the first place as they are deemed too difficult to prosecute.⁴⁹ This means that the aggravated offences are not being used effectively, and therefore are not achieving the purposes for which they were enacted.

The Law Commission also highlighted important areas of principle which need to be analysed further.⁵⁰ For example, currently, there is no theoretical framework for deciding which

⁴³ 'Hate Crime: The Case for Extending the Existing Offences', Law Commission Consultation Paper No 213, June 2013, Chapter Three.

⁴⁴ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, Chapter Five.

⁴⁵ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 151, paragraphs 5.105.

⁴⁶ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 126, paragraph 4.203.

⁴⁷ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 100-101, paragraphs 4.86-4.88.

⁴⁸ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 117-119, paragraphs 4.159-4.167 and pages 120- 122, paragraphs – 4.173 -4.185.

⁴⁹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 117-119, paragraphs 4.159-4.167 and pages 120- 122, paragraphs – 4.173 -4.185.

⁵⁰ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 135- 145, paragraphs 5.36 – 5.81

characteristic should be included within hate crime legislation. This is something that requires greater thought, and needs to be linked to the underlying justification for hate crimes. There is also the broader question of whether it is more appropriate to deal with hate crime at the liability stage or the sentencing stage, and whether we can continue with the current system that tries to do both. Another area that was emphasised in the report was that of the limited nature of the basic offences which underpin the aggravated offences. These basic offences do not necessarily cover the most prevalent offences sustained by victims of hate crime on the basis of sexual orientation, transgender identity and disability. For example, sexual offences are often perpetrated against victims of sexual orientation hate crime, but sexual offences are not basic offences for the purposes of the CDA.⁵¹ Furthermore, many hate crimes are now committed over the internet, but the offences that would capture such behaviour such as the Malicious Communications Act 1998 and the Communications Act 2003, are not included in the list of basic offences.

These are all good reasons why a comprehensive examination of the aggravated offences is necessary, although there will be many who might be disappointed with this recommendation as it will inevitably delay any reform of the law.⁵² However, it will also ensure that any changes that are made to the legislation are not purely symbolic, but will generate a set of provisions that are able to provide efficient and effective protection to the victims of hate crime. Proceeding with extension of the aggravated offences without such a review would ignore the problems with the existing regime and would, therefore, be unlikely to achieve the ultimate goal of reducing hate crime. It is also important to note that this broader review of the aggravated offences is not intended as an opportunity to re-open entirely the debate about whether targeted legislation to combat hate crime should exist.⁵³ Rather, what is proposed is a consideration of the most effective way of dealing with hate crime. Thus, the suggestion for wider review is something that should be welcomed by hate crime proponents because it is the best long-term option for victims of hate crime, even if in the shorter term reform will happen at a slower pace.

Thus far, it has been suggested that the Law Commission has responded appropriately to the range of issues. However, there is one concern that should be highlighted and given greater prominence than is currently the case in the report, and this is the so-called mutual exclusivity issue. Currently, the s. 145 duty to include aggravation for race and religion as part of sentencing applies to all offences except where a CDA offence has been prosecuted. Thus s. 145 and the CDA provisions are mutually exclusive in order to ensure there is no double-counting of the aggravation. Mutual exclusivity has also been taken to apply in situations where a CDA offence was prosecuted but was not ultimately successful,⁵⁴ or was withdrawn from the indictment,⁵⁵ so as to comply with the general sentencing principle that an offender should not be sentenced as though they have committed an offence for which they have been found not guilty. However,

⁵¹ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 117-119, paragraphs 4.159-4.167 and page 122, paragraph 4.187.

⁵² A large number of consultees were in favour of immediate extension (115 out of 134 people who responded) 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 81, paragraph 4.5.

⁵³ The parameters of the wider review are set out in 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, Chapter Five.

⁵⁴ *McGillivray* [2005] EWCA Crim 604, [2005] 2 Cr App R (S) 60.

⁵⁵ *Kentsch* [2005] EWCA Crim 2851.

there is some dispute as to whether this mutual exclusivity should also apply in cases where an offender is being sentenced for a basic underlying offence, but where the CDA version was not charged at all. The Magistrates' Court Sentencing Guidelines (MCSG) and CPS guidance have adopted the view that mutual exclusivity should extend this far, thus s.145 should not be used in cases involving the non-aggravated versions of the basic offences under the CDA. However, Taylor⁵⁶ has suggested that this interpretation of the law is wrong and the case of *O'Callaghan*⁵⁷ which deals with this point should be read to mean that s. 145 should apply to the non-aggravated versions of basic offences as long as the defence is given notice that aggravation will be taken into account at sentencing, and the offender is given the opportunity to argue his or her case in a *Newton* hearing. The Law Commission appear to agree with Taylor on this point.⁵⁸

However, there is an inherent problem with the existing regime whereby aggravation can occur both at the liability stage and the sentencing stage because whichever of the two readings of the law is adopted, the very existence of two alternative regimes undermines the ability of the law to deal effectively with hate crime. If we take Taylor and the Law Commission's view that s. 145 and the non-aggravated basic offences are not mutually exclusive, this effectively undermines the CDA because it means there is little incentive for prosecutors to charge the harder to prove aggravated offences when they can reach virtually the same result by prosecuting a basic offence and proving aggravation at the sentencing stage using the CJA.⁵⁹ One of the only reasons the prosecution might have for opting for a CDA offence in such circumstances is in order to make use of the higher maximum penalty for the aggravated offences; however, given that it is rare for sentencers of the aggravated offences to go beyond the maximum for the underlying basic offence,⁶⁰ there is little motivation to do so. If, on the other hand, we adopt the MCSG and CPS view which takes a much broader view of mutually exclusive, then this leads to the paradoxical result that whenever a hostility issue arises in relation to a non-aggravated version of a CDA offence, this has to be proven at the liability stage with the accompanying difficulties this entails, whilst if hostility occurs during an offence not covered by the CDA, then this only needs to be proven at the sentencing stage. Thus either interpretation of the mutual exclusivity issue has unfortunate results given that the point of the CDA was to create offences that would allow prosecutors to punish hate crime offenders more effectively. This raises questions about the efficacy of the mixed approach and suggests that serious thought has to be given to which approach is preferable.⁶¹ This also reinforces the need for the wider review proposed by the Law Commission to include a broader more holistic examination of how hate crime laws hang together rather than considering the different regimes in isolation.

⁵⁶ Richard Taylor, "The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?" (2014) 13 *Contemporary Issues in Law* 76.

⁵⁷ *O'Callaghan* [2005] EWCA Crim 317, [2005] 2 Cr App R (S) 514.

⁵⁸ "Hate Crime: Should the Current offences be Extended?", Law Commission (no. 348), May 2014, pages 36-57, paragraph 2.70.

⁵⁹ There would be even less incentive if the Law Commission's recommendation that the fact of aggravation appear on an offender's record were implemented. A similar point was made above in the section on the PNC proposal.

⁶⁰ "Hate Crime: Should the Current offences be Extended?", Law Commission (no. 348), May 2014, page 109, paragraphs 4.122.

⁶¹ R Taylor provides a number of reasons why the sentencing option might be preferable in his article "The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?" (2014) 13 *Contemporary Issues in Law* 76.

Overall, the proposal for a wider review is to be welcomed. There is the fear that the Law Commission undermined its own recommendation by giving the Government a much easier alternative proposal to extend the CDA offences, but the Law Commission's rationale for suggesting both is understandable from a pragmatic point of view. However, it is very clear that the CDA provisions, and their inter-relationship with the CJA are problematic, and if the Government opts for a 'quick win' by extending the aggravated offences, it runs the risk of missing the opportunity to reform a legal regime that currently does not enjoy the confidence of practitioners and which is not achieving favourable outcomes for the victims of hate crime.

Stirring Up Offences

The final recommendation in the report relates to the stirring up offences found in the POA. Currently, the stirring up offences apply to race, religion and sexual orientation, and the question put to the Law Commission by the Ministry of Justice was whether protection should also be extended to transgender and disability. In the Consultation Paper, the Law Commission had provisionally recommended extending the law on the basis that there was a *principled* case in favour of doing so.⁶² This finding was reiterated in the final report where the Law Commission examined factors such as the effect on freedom of expression, the Equality Act 2010, the issue of parity between characteristics, and the symbolic importance of such an extension and any deterrent effects it may have.⁶³ However, one of the key questions put to consultees in the Consultation Paper was whether there was also a *practical* need for extension. The Law Commission concluded, from the examples provided by consultees, that there was little or no evidence of a practical need to reform the POA. This was because the sorts of behaviour that consultees suggested might be covered by the new offences were either not strong enough to reach the high threshold required under the stirring up provisions, or were already covered by other offences such as section 4 or 5 of the POA or the Serious Offences Act 2007. Consequently, the Law Commission determined that the stirring up offences should not be extended to transgender and disability.

The Law Commission was right to frame its discussion within the wider question about the practical need for the creation of new provisions because the principle of minimal criminalisation requires that any new laws must be 'absolutely necessary'.⁶⁴ However, given that the existing stirring up offences in relation to race, religion and sexual orientation are rarely successfully prosecuted because of the high threshold that needs to be passed,⁶⁵ it was no surprise that the consultation process did not elicit a vast array of examples of behaviour that would be covered if the provisions were extended to transgender and disability. A more useful approach would have been to question how effective the current POA offences are at outlawing harmful hate speech. This would have been particularly pertinent given that the consultation process itself highlighted

⁶² 'Hate Crime: The Case for Extending the Existing Offences', Law Commission Consultation Paper No 213, June 2013, Chapter Four.

⁶³ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 171 – 192, paragraphs 7.9 – 7.102.

⁶⁴ A Ashworth and J Horder, *Principle of Criminal Law*, (OUP, 2013), Chapter One.

⁶⁵ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 193, paragraph 7.107.

some of the gaps in the current legislation on hate speech. In the report, it is noted that consultees contended that much of the harmful behaviour experienced by victims of hate crime occurs over the internet, but existing laws are insufficient to combat all manifestations of such hate speech.⁶⁶ Although the stirring up offences can deal with instances where an offender has deliberately incited hatred in others,⁶⁷ and offences such as the Malicious Communications Act 1998 and the Communications Act 2003 are aimed at cases where hostility has been targeted at a particular individual, neither of these sets of offences prevent the harm that may be caused to those who read hate-filled material on the internet, regardless of whether they belong to the target group. Discussions about whether and what type of hate speech should be prohibited is a matter of immense academic debate, not least because of the freedom of expression issues which arise.⁶⁸ However, it is a debate that has not been resolved, and particular attention needs to be paid to online hate speech. Jeremy Waldron has put forward an argument in favour of the prohibition of hate speech on the basis that it poisons the environment in which we live and generates fear and insecurity in target groups.⁶⁹ In relation to internet hate speech in particular, Perry and Olsson have argued that the dissemination of hate on the internet reinforces the legitimacy of racist groups and spreads the problem to a wider group of people.⁷⁰ Both Waldron and Perry and Olsson's articulation of the harm caused by hate speech do not fall into the traditional categories of harm as encompassed by the POA or the other offences. This is not the place to discuss these issues in detail, but it does demonstrate that it is necessary to explore the arguments in favour of expanding the law to cover such harm, and suggests that there may be a need to reconceptualise the wrong that is caused by this particular type of hate speech. Moreover, the Ministry of Justice is currently investigating the most effective ways of combatting hate over the internet,⁷¹ and it is suggested that this should take place within the context of a wider review of hate crime more generally rather than concentrating on piecemeal reform outside a broader framework.

A further problem with the analysis of the stirring up offences is the fact that the outcome of the discussion is based on the discrete approach adopted by the Law Commission in relation to hate crime offences, rather than on an overall examination of the available statutory regime. Although the decision not to extend the stirring up offences seems inevitable given the lack of examples provided by consultees, it is nevertheless surprising that the Law Commission placed so little weight on the need to provide equal protection to all five characteristics, particularly inasmuch as the need for equality of treatment played such a prominent role in their decision

⁶⁶ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, page 197, paragraphs 7.126 and page 199, paragraph 7.132.

⁶⁷ Or was likely to, in the case of race.

⁶⁸ See the following for arguments made by UK academics against and in favour of an incitement to religious/racial hatred offence based on freedom of expression: I Hare 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' *Public Law* (2006) 521-538; I Loveland 'Hate Crimes and the First Amendment' *Public Law* (1994) 174-183; AW Bradley 'Free Expression and Acts of Racial Hatred' *Public Law* (1992) 357-359; T Morton 'Free Speech v Racial Aggravation' *New Law Journal* (6th August 1999) 1198; J Cooper and AM Williams 'Hate Speech, Holocaust Denial and International Human Rights Law' *European Human Rights Law Review* (1999) (vol. 6) 593-613; D Pannick 'Religious Feelings and the European Court' *Public Law* (1995) 7-10. For an example of the debate in the US, see J Waldron, *The Harm in Hate Speech*, (Harvard University Press, 2012).

⁶⁹ J Waldron, *The Harm in Hate Speech*, (Harvard University Press, 2012).

⁷⁰ B Perry and Pa Olsson 'Cyberhate: the globalization of hate' *Information & Communications Technology Law*, Volume 18, No 2, 2009, 185-199.

⁷¹ Policy Paper, 'Hate Crime Action Plan: Challenge it, Report it, Stop it' Home Office, March 2012, page 13.

about the aggravated offences.⁷² The reason the Law Commission gives for the discrepancy is that the aggravated offences and the enhanced sentencing regime form part of a single scheme and so it is important that they give equal protection to the different characteristics; the stirring up offences, on the other hand, are a separate regime enacted for very different purposes, and so the need for parity with the other offences is not as strong.⁷³ However, there are problems with this reasoning.

To begin with, the arguments in favour of parity could be said to be weaker in relation to the aggravated offences and enhanced sentencing given that Parliament explicitly refused to extend the aggravated offences to sexual orientation, disability and transgender when they extended s. 145 power to these characteristics under s.146. The Law Commission are right to point out that Parliament's reasoning on this point is weak given that there is no principled or practical reason given for why race and religion should be treated differently. However, this still means that using the 'single scheme' argument does not make sense as it demonstrates that the Law Commission's argument for considering the stirring up offences separately on the basis of when the offences were enacted is not conclusive of the matter as we need to go further and ask whether the law is sound.

Furthermore, the question of whether or not the two schemes should be considered separately requires further thought. Whilst it is true that the aggravated offences and the stirring up offences were enacted at different times and for different purposes, the underlying core of both is how to deal with hatred or hostility against certain groups in society. They do this in different ways – the aggravated offences deal with harm caused to individuals, whereas the POA provisions are concerned with the stirring up of hatred against groups – but fundamentally they have a shared aim. Admittedly these offences have developed separately from each other, but the same can be said of the CDA provisions and the enhanced sentencing regime which the Law Commission regard as a 'single scheme'. In fact, the differences between the offences are a result of the haphazard fashion in which these laws have developed, rather than the result of a well-thought out strategy by Parliament. This demonstrates that there has been a conspicuous absence of a systematic analysis and assessment of these provisions as a coherent body of 'hate crime' law. By treating the stirring up offences as a separate scheme, the report compounds this problem. This discussion confirms what has been argued earlier about the need to examine how these offences interact with each other in order to judge whether together they combine to form an effective response to hate crime. Therefore, it is argued that the wider review recommended in relation to the aggravated offences also needs to include the POA provisions.

In summary, the Law Commission's analysis of the POA offences occurred within a very narrow frame of reference. Although this was in part a result of the limited brief assigned to them by the Ministry of Justice, it would have been possible to broaden out the discussion by emphasising the problems with the operation of the current law in much the same way as occurred with the examination of the aggravated offences. The apparent rarity of prosecutions of the POA offences along with the Law Commission's own observations about the proliferation

⁷² 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 83-96, paragraphs 4.14-4.64.

⁷³ 'Hate Crime: Should the Current offences be Extended?', Law Commission (no. 348), May 2014, pages 172 – 173, paragraphs 7.12 – 7.18.

of internet hate speech are factors that could have been emphasised more to underline the shortcomings of the POA offences. This is a matter which has already been highlighted by academics, but this would have been a good opportunity to discuss it at greater length in order to reach an effective response to the issue of hate speech.⁷⁴

Conclusion

Overall, the report on hate crime has been very carefully considered, and it is clear that the Law Commission has been meticulous in its efforts to consult widely. It has reflected thoroughly on the responses generated by the consultation process, and it has made a concerted effort to come up with a set of proposals that strike a balance between on the one hand keeping within the very narrow terms of reference set by the Ministry of Justice, and on the other recognising the need to take a wider and more principled approach to the question of law reform. The proposals, therefore, represent an attempt to combine both principle and pragmatism by examining the issue in a thoughtful manner, but also to generate proposals that are likely to result in reform that will act as an effective solution to the problem of hate crime.

However, there are problems with the recommendations. The creation of guidelines on the hostility issue by the Sentencing Council cannot be undertaken separately from the wider review on the aggravated offences. The recommendation to include the fact of aggravation on the Police National Computer is potentially more complicated and controversial than the Law Commission's report implies, and thus requires further debate. The problem of the inter-relationship with the CDA and CJA powers, along with the apparent gap in the law in relation to hate speech (particularly in relation to conduct perpetrated over the internet), raises the wider question of whether the legislation forms a coherent body of hate crime law. Finally, the POA recommendation did not take account of the effectiveness of the stirring up offences, and nor did it give sufficient regard to the need to consider the POA alongside the CDA and CJA powers. All these issues indicate that the wider review recommended by the Law Commission needs to go further than the aggravated offences, and needs to include a more wide-ranging examination of the existing legislation in order to determine its overall effectiveness at combatting hate crime.

⁷⁴ See K Goodall 'Incitement to Religious Hatred: All Talk and No Substance?' *Modern Law Review* (2007) 70(1) 89 at p. 97-100; I Hare 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' *Public Law* (2006) 521-538; M Mazher Idriss 'Religion and the Anti-Terrorism, Crime and Security Act 2001' *Criminal Law Review* (2002) 890; M Malik "'Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998, Part II' *Modern Law Review*, (May 1999) vol. 62, p.409.