



**Law
Commission**
Reforming the law

HATE CRIME: BACKGROUND TO OUR REVIEW

WHAT IS THIS PAPER FOR?

The Law Commission is reviewing hate crime laws in England and Wales. We intend to publish a comprehensive Consultation Paper in early 2020, asking all interested parties what they think about our provisional proposals. This document provides an introduction to the project and has three main purposes:

1. to answer some frequently asked questions about the origins and timeline of this project;
2. to provide a general overview of the current law governing hate crime; and
3. to outline the scope of this project.

It is not intended to offer an in depth discussion of all aspects of this area of law, but rather an introduction to the main concepts and issues.

HOW DID THIS PROJECT COME ABOUT?

The law currently offers enhanced criminal protection, in different forms, for race, religion, disability, sexual orientation and transgender identity. Crimes committed against people who have these characteristics are considered to be particularly serious and can often have a disproportionate impact on the victim.

In the year 2017/18, there were **94,098 hate crime offences** – involving people with these characteristics – recorded by the police in England and Wales.¹

In that same year, **14,151 hate crime offences were prosecuted**, resulting in **11,987 convictions**.²

Hate crime laws have developed in several phases over recent decades. Since 1998, three different legal responses have been introduced to tackle hate crime: aggravated offences, enhanced sentencing powers, and “stirring up” hatred offences. However, while hate crime laws have now been in place for some time, there remains concern that they do not always work as effectively as they could. In addition, as community attitudes evolve, there have been suggestions that groups that are not currently protected by hate crime laws should be. The government has therefore asked the Law Commission to conduct a comprehensive review of how hate crime laws work, who they protect, and how they could be reformed to work more effectively.



Sir Nicholas Green, Chairman of the Law Commission commented:

At the Law Commission, we conducted a targeted review of aspects of hate crime law in 2014. Building on our earlier work, we are now beginning in depth legal research and planning public consultations about hate crime more broadly, with the goal of ensuring this crucial area of the law is fair, consistent and effective. There will be an opportunity for everyone to have their say when we publish a Consultation Paper asking everyone for their views in early 2020.

At the conclusion of this project, we will make recommendations to government on ways to improve hate crime laws, so that parliament is equipped with an independent opinion, informed by extensive public consultation.



The website for this project is www.lawcom.gov.uk/project/hate-crime.

If you would like to join our mailing list or if you have any queries, please contact the Law Commission at hate.crime@lawcommission.gov.uk.

¹ Home Office, *Hate Crime, England and Wales, 2017/18* (16 October 2018) p 7.

² Crown Prosecution Service, *Hate Crime Annual Report* (2017-18) p 22.

A GENERAL INTRODUCTION TO HATE CRIME LAW

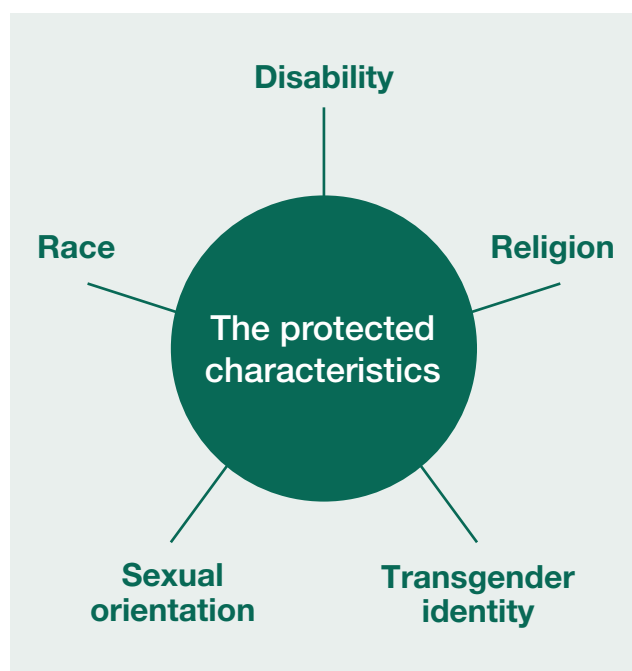
What is a hate crime?

Most instances of what people describe as hate crime involve someone committing a crime, and in the course of doing so demonstrating or being motivated by hostility towards someone on the basis of their characteristics.

There are also a small number of specific criminal offences of “stirring up” hatred which are considered hate crimes in and of themselves.

We consider both these forms of “hate crimes” in this paper.

Finally, there are a small number of other specific offences, such as racist chanting at a football match.³ We do not consider these in detail in this paper, but they do form part of the review.



THE EXISTING HATE CRIME FRAMEWORK⁴

Five specific characteristics are protected under hate crime laws. However, there is inconsistency in the way that the five characteristics are treated. Some of these characteristics are protected by specific crimes, but others are not. Other characteristics, such as gender and age, are not specifically protected by the criminal law.

There are three ways in which the criminal law addresses hate crime.

1. **Aggravated offences** allow for the offender to be prosecuted and convicted of a specified hate crime.
2. **Enhanced sentencing powers** require judges to reflect the hate element of a crime in the sentence imposed.
3. There are offences prohibiting **stirring up hatred** against people with particular characteristics.

We outline these measures further below.

The five protected characteristics

The five “protected characteristics” in hate crime laws are, as noted: race, religion, sexual orientation, transgender identity and disability. In broad terms, the legislation defines these as follows:

Race: A group’s race, colour, nationality (including citizenship) or ethnic or national origins.

Religion: A group’s religious belief or lack of religious belief.

Sexual orientation: A person’s orientation towards people of the same sex, the opposite sex, or both.

Transgender identity: Includes (but is not limited to) identifying as transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

Disability: Any physical or mental impairment.

³ See: section 3 of the Football (Offences) Act 1991.

⁴ For more in depth information about hate crime laws generally, see Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348.



Aggravated offences

The Crime and Disorder Act 1998 ('CDA') provides that certain listed offences can be racially or religiously aggravated. If a person commits one of these offences and, in doing so, demonstrates, or was motivated by, hostility on the grounds of race or religion, that offence becomes a separate and additional 'aggravated' offence.

What's included?

Offences that can be aggravated include: different types of assaults; criminal damage to property; public order offences – such as causing fear or provocation of violence; and harassment and stalking. There are currently 11 offences that can be aggravated in this way.

The effect of the aggravated offences

Aggravated offences have a higher maximum sentence available than for the basic form of the offence. For example, the offence of assault occasioning actual bodily harm has a maximum sentence of five years' imprisonment, while the racially or religiously aggravated version of the offence has a maximum sentence of seven years' imprisonment.

If an offence is racially or religiously aggravated, it is labelled as such, and this appears on the offender's criminal record.

What's not covered?

Currently, offences motivated by hostility based on sexual orientation, transgender identity or disability do not become 'aggravated' offences under the CDA.

Enhanced sentencing powers

There are special sentencing powers set out in sections 145 and 146 of the Criminal Justice Act 2003 ('CJA'). These apply much more broadly than the aggravated offences regime.

What's included?

When determining the sentence for any offence, the judge must treat the fact that the offence involved hostility on the basis of race, religion, disability, sexual orientation or transgender identity as an aggravating factor.

The effect of the enhanced sentencing powers

The enhanced sentencing powers under the CJA require the judge to increase the sentence and to state in open court that the offence was aggravated on this basis.

Whereas the aggravated offences require the prosecution to prove racial or religious aggravation as an element of the offence before the magistrates or jury, the enhanced sentencing powers mean aggravation is not considered until the sentencing stage of proceedings and is considered only by the judge.

What's not covered?

The enhanced sentencing powers do not allow the judge to raise a sentence above the available maximum that already exists for that offence. For example, with assault occasioning actual bodily harm, the maximum sentence in the Crown Court would be five years' imprisonment.

If an offence has already been charged as an aggravated offence under the CDA, and the offender was found not guilty, the enhanced sentencing provisions cannot be used to increase the sentence for the basic form of the offence if there was a finding of guilt on that charge.

Also, unlike aggravated offences, if an enhanced sentence is imposed, the fact that it was enhanced does not currently appear on the offender's criminal record.

Stirring up hatred offences

Offences of stirring up hatred are contained in the Public Order Act 1986 ('POA'). The offences prohibit a range of conduct that is either intended or likely to stir up hatred on grounds of race, or intended to stir up hatred on grounds of religion or sexual orientation.

What's included?

The six forms of relevant conduct for stirring up hatred offences include:

1. using words or behaviour;
2. displaying, publishing or distributing written material;
3. presenting or directing the public performance of a play;
4. distributing, showing or playing a recording;
5. producing or directing a programme; or
6. producing written, visual or sound material with a view to it being displayed, published, distributed, shown, played or included in a cable programme service.

For stirring up racial hatred, the conduct must involve an element which is either threatening, abusive or insulting. By contrast, the range of conduct that can amount to stirring up of hatred on the basis of religion and sexual orientation is narrower.

This conduct must be threatening; being abusive or insulting is insufficient. No proof is required that hatred has in fact been stirred up. Rather, the offences require proof that hatred was intended (or in the case of race, likely) to be stirred up.

The effect of the stirring up hatred offences

Each of the six offences have the same maximum penalty of seven years' imprisonment or an unlimited fine (or both), regardless of which form of hatred (racial, religious or sexual orientation) it relates to.

What's not covered?

Currently, transgender identity and disability are not captured by these stirring up offences. In addition, conduct which stirs up hatred on the grounds of religion or sexual orientation, but is merely abusive or insulting – not threatening – is not captured by the legislation.

There are also specific provisions which create exemptions to protect freedom of expression in relation to religious beliefs – including “antipathy, dislike, ridicule, insult or abuse” – and in relation to criticism of sexual conduct or same-sex marriage. No such exemptions exist in relation to racial hatred.



THE PROCESS: HOW DOES THE LEGAL SYSTEM DEAL WITH HATE CRIMES?⁵

Example One: Religiously or racially aggravated offences under the Crime and Disorder Act 1998

Andrew, who is of Afro-Caribbean origin, has his car damaged when it is parked outside one night. The tyres are punctured, the left side rear door is scratched with a key and white spray paint has been used to write racial slurs across the bonnet of the car. Andrew's neighbour Brad, sees a man, whom he recognises as another neighbour, Corey, vandalising the vehicle.

The report

Brad calls the police and the police establish that a hate crime under the CDA, criminal damage involving the demonstration of racial hostility, may have been committed.



The police

A police officer applies a hate crime flag to the online case file to trigger a hate crime investigation. Police then collate evidence to prove motivation / demonstration of race-based hostility. In this case the evidence would be based on the language used in vandalising Andrew's vehicle. The police conduct interviews with Brad and Andrew.



The arrest

Police arrest and interview Corey. He is either released on bail or remanded in custody.



The prosecutor

The Crown Prosecution Service ("CPS") receive the hate crime file from the police. They must be satisfied that there is a realistic prospect of conviction on a charge of racially aggravated criminal damage and that it is in the "public interest" to charge that offence. For all racially (and religiously) aggravated offences charged under the CDA, the CPS has a policy that it will not accept a guilty plea by the defendant to the non-aggravated version of the offence (in this case, criminal damage) merely to speed up the process.



The court

The CDA's aggravated offences, such as racially aggravated criminal damage, can be heard in either the Crown Court or magistrates' court – depending on how serious the offence is and whether or not the accused wants to be tried by a jury. The exception is the offence of racially or religiously aggravated harassment, alarm or distress, which can only be tried in the magistrates' court.

⁵ See, generally: M.A. Walters et al, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, October 2017), pp 75 to 114.

The plea

Corey will attend the magistrates' court and be asked to enter a plea of guilty or not guilty.

Guilty plea: Corey will be sentenced at the magistrates' court unless it is considered a serious case requiring greater sentencing power than the maximum six months that the magistrates can impose. In that case, Corey will be committed for sentence at the Crown Court.

Not guilty plea: The magistrates' court will allocate the case for trial at either the magistrates' court or the Crown Court.

The trial

Magistrates' court: In this court, if only racially aggravated criminal damage is charged, and the prosecution can prove that Corey committed criminal damage, but not that it was racially or religiously aggravated, Corey must be acquitted. Because of this, Corey would be likely to be charged with both the aggravated offence and the basic, underlying offence of criminal damage.

Crown Court: If Corey is only charged with racially aggravated criminal damage, and the judge finds there is insufficient proof of racial hostility, the jury may be allowed to return an alternative verdict regarding the basic, underlying offence of criminal damage. Alternatively, if Corey is charged with both versions of the offence, the jury must consider both.

Special measures: In both courts, Andrew and Brad may be eligible for special measures if they are fearful or distressed about testifying, under 18 years of age, or lack capacity. Special measures may include giving evidence from behind a screen (shielded from Corey and the public gallery), giving pre-recorded evidence, and being examined through live video-link from another room. However, victims of hate crime are not automatically eligible for such assistance during criminal cases.

Verdict

Magistrates' court: The lay magistrates or district judge will make a determination as to whether or not Corey is guilty.

Crown Court: The jury will deliver a verdict of guilty or not guilty.

If guilty – the sentence

Magistrates' court: The lay magistrates or district judge may sentence Corey to a penalty of up to a level five (unlimited) fine and / or six months' custody, subject to guidance from the Sentencing Council.

Crown Court: The judge (sometimes after a break to obtain additional reports) may sentence Corey to a maximum of 14 years' imprisonment, subject to guidance from the Sentencing Council.

Example Two: Enhanced sentencing under the Criminal Justice Act 2003

In a separate incident, another of Corey's neighbours, Emily, who is gay, steps outside her home to find Corey vandalising her car. Emily sees Corey smashing her front and rear windscreens, and driver side mirror. Corey then retrieves a can of black spray paint from his backpack and writes homophobic slurs on the passenger side doors.

The report

Emily calls the police and they establish that a crime of destroying or damaging property (criminal damage), under section 1 of the Criminal Damage Act 1971, may have been committed.



The police

After attending the scene and observing the homophobic slurs on Emily's car, a police officer applies a hate crime flag to the online case file to trigger a hate crime investigation. Police collate evidence to prove motivation / demonstration of sexual orientation-based hostility. Again, the evidence would be the language on the vehicle.

The police interview Emily.



The arrest

Police arrest and interview Corey. He is either released on bail or remanded in custody.



The prosecutor

The CPS receive the hate crime file from the police. They must be satisfied that there is a realistic prospect of conviction on a charge of criminal damage, and that it is in the "public interest" to charge that offence.



The court

Criminal damage is an offence which – depending on the circumstances – can be heard in either the Crown Court or magistrates' court. If the value of the damage caused by Corey is less than £5000, he must be tried in the magistrates' court. If the value is more than £5000, he can be tried in either court.

The plea

Corey will attend the magistrates' court and be asked to enter a plea of guilty or not guilty to the charge of criminal damage.

Guilty plea: Corey will be sentenced at the magistrates' court. However, if it is a serious case requiring greater sentencing power than the maximum three months (value under £5000) or six months (for value over £5000) that the magistrates can impose, then the accused may be committed for sentence at the Crown Court.

Not guilty plea: The magistrates' court will allocate the case for trial at either the magistrates' court or the Crown Court.

The trial

In either the magistrates' court or the Crown Court, Emily may be eligible for special measures to assist with testifying.

Verdict

Magistrates' court: The lay magistrates or district judge will make a determination as to whether or not Corey is guilty.

Crown Court: The jury will deliver a verdict of guilty or not guilty.

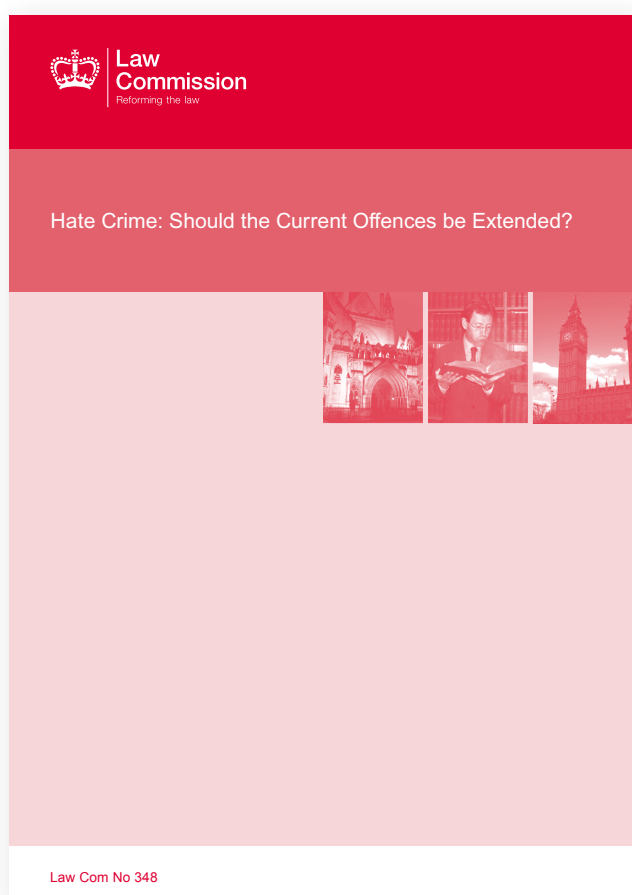
If guilty – the sentence

Magistrates' court: The lay magistrates or district judge will sentence Corey. Presented with evidence of hostility based on sexual orientation, the judge must treat the offence as aggravated and state this in open court. They must increase the sentence, but are restricted by the maximum sentence for criminal damage in the magistrates' court. If the value of damage is less than £5000, the maximum available sentence is a level four fine (£2500) and / or three months' custody. If the value exceeds £5000, the maximum sentence is a level five (unlimited) fine and / or six months' custody, subject to guidance from the Sentencing Council.

Crown Court: The judge (sometimes after a break to obtain additional reports) will sentence Corey. The judge must also, if presented with evidence of hostility based on sexual orientation, treat the offence as aggravated and state this in open court. The judge will be restricted by the maximum sentence available for criminal damage in the Crown Court, which is 10 years' imprisonment, subject to guidance from the Sentencing Council.

OUR PREVIOUS WORK

**“ Professor David Ormerod QC,
Commissioner for Criminal Law:**
We published our first review of hate crime in 2014, entitled “Hate Crime: should the current offences be extended?” This review focused solely on the fact that existing hate crimes – aggravated and stirring up hatred offences – do not cover hostility or hatred in respect of all five existing protected characteristics. ”



In 2014, we recommended:

- In the absence of a wider review, that the aggravated offences in the CDA be extended to disability, sexual orientation and transgender identity.
- As stirring up hatred offences would rarely, if ever, be prosecuted, that they should not be extended to encompass the grounds of disability or transgender identity.
- New guidance should be issued from the Sentencing Council on the enhanced sentencing approach in hate crime cases.
- That every time enhanced sentencing is applied, it should be recorded on the offender's criminal record in the Police National Computer (as it is for the CDA's aggravated offences).
- A full-scale review of aggravated offences and the enhanced sentencing system to see if they should be retained in their current form or amended. This review would also examine what characteristics need to be protected and on which basis. Our terms of reference prevented us from doing this in our 2014 review.

THE SCOPE OF THIS PROJECT

In October 2018, we were tasked with undertaking the wide-ranging review into hate crime that we recommended in 2014. Our terms of reference require that we review the adequacy of protection offered by the law relating to hate crime and make recommendations for its reform.

Broadly, we will be reviewing the current range of offences and aggravating factors in sentencing, and making recommendations on the most appropriate ways to ensure that the criminal law provides consistent and effective protection from behaviour motivated by hatred of protected groups or characteristics.

We will also be reviewing the existing range of protected characteristics, identifying gaps in the protection currently offered, and making recommendations to promote a consistent approach.

Key questions will include:

- How has the law developed since our review in 2014? For example, what changes, if any, have been made to the hate crime framework and legislation? How, and to what effect, have existing provisions been used throughout England and Wales since 2014?
 - Should hate crime include offences demonstrating hostility based on characteristics such as sex and gender, being an older person or other characteristics? How should we determine if a particular characteristic should be protected? Similarly, what is the threshold incidence of hostile, targeted criminal behaviour required before a characteristic should be protected by hate crime laws? Are there characteristics that have not yet been widely considered, which really should be protected by the law?
 - How would any changes impact on the concept of hate crime itself? For example, would hate crime be regarded as less grave an offence if it was available more readily and in more contexts? What would be the practical implications for the community and the criminal justice system – such as effects on other offences and sentencing?
- Should crimes of stirring up hatred in the POA be extended or reformed? Does the relatively low prosecution rate of these offences suggest they are not working as effectively as they should?
 - What impact do human rights obligations have on reform? For example, obligations under Articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the European Convention on Human Rights.
 - What would the implications of any recommendations be for other areas of law, for example, the Equality Act 2010?

How can you contribute?

We will publish a Consultation Paper in early 2020, at the start of a period of extensive public consultation. During the consultation period we will invite stakeholders from across England and Wales to submit responses to the Consultation Paper and to meet with staff from the Law Commission to express their views. The publication of our Final Report is planned for early 2021.

The website for this project is
www.lawcom.gov.uk/project/hate-crime.

If you would like to join our mailing list or if you have any queries, please contact the Law Commission at
hate.crime@lawcommission.gov.uk.



