

# A Hierarchy of Hate

Does the current state of the Law give the same level of protection to each of the protected characteristics where instances of Hate Crime occur?

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# Introduction

In legal terms, hate crime is a crime that, perceived by both the victim, another person, or relevant agencies, has been motivated by hostility or prejudice based on a person's race, religion, sexual orientation, disability, or transgender identity.<sup>1</sup> This all began when racially aggravated offences was included under the Crime and Disorder Act 1988, and had thus created the first hate crime offences.<sup>2</sup> This was later updated in 2001 to include religiously aggravated offences, not including hate speech offences, that were already included under the Public Order Act 1986. It wasn't until the Criminal Justice Act 2003 that required the Courts to increase a sentence where there was evidence of sexual orientation, disability, or transgender hostility.<sup>3</sup>

Whilst the law surrounding hate crime has continuously made efforts as to be more inclusive of the 5 main protected characteristics, it cannot be ignored that the method in which these groups have been applied into legislation has led to differing levels of protection. This has resulted in some critics believing that there is a 'hierarchy of hate' within English and Welsh Law.<sup>4</sup> In fact, research indicates that there is a substantive justice gap, where over half of the 184,000 incidents of hate crime that occurred do not come to the attention of the police.<sup>5</sup> Furthermore, in 2017 alone only 8% of the 97,520 reported crimes resulted in a sentencing uplift, creating a 92 percent justice gap.<sup>6</sup>

The evident justice gap has led the Commission to publish a report in 2014, recommending that a wider review of hate crime laws be carried out in order to

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<sup>1</sup> Hate Crime: The Case for Legal Reform' (Equallyours.org.uk, 2019) <<https://www.equallyours.org.uk/wp-content/uploads/2019/06/Hate-crime-the-case-for-legal-reform.pdf>> accessed 5 March 2020.

<sup>2</sup> Mark Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka, 'Hate Crime and the "Justice Gap": The Case for Law Reform' (Sussex Research Online 2018) <<http://sro.sussex.ac.uk/id/eprint/78596/3/CLR%20-%20Hate%20Crime%20and%20the%20Justice%20Gap%20-%20The%20Case%20for%20Law%20Reform%20-%20AMENDED%20VERSION.pdf>> accessed 11 January 2020.

<sup>3</sup> *Ibid.*

<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> Home Office (2018). Hate Crime, England and Wales, 2017/18 Statistical Bulletin 20/18 . 16 October, Home Office.

<sup>6</sup> (N.1) (2019) (page.4)

determine whether the law should be amended, abolished or extended.<sup>7</sup> This report had subsequently failed, which has developed into the Commission publishing a final report, which provides the basis for this paper.

This paper presents a thorough examination of the current legislative frameworks involved within hate crime law, and how these statutes apply into common law in the UK. Furthermore, there will be critical analysis of these statutory provisions, including judgement of their effectiveness, and how they reinforce the disparities and the justice gap. This paper will further take academic and legal expert advice, combined with the Law commissions paper, as to what specific disparities are occurring within UK law. In a culmination of all prior knowledge, the last chapter will handle the recommended reforms on behalf of other academics and legal experts alike, in an effort to reform the law of hate crime.

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<sup>7</sup> (N2) (page 3)

## Chapter 1) The Current Law

A hate crime surge has occurred during the past couple of decades, with more Acts of Parliament being brought forward, and recognising the protection victims should receive and the level, or type, of protection that should be provided. Ultimately, this has increased levels of disparities occurring within the legal system, the Courts, and relevant legislative frameworks. In essence, their failure lies within the provision of giving consistent amount of protection to the five protected characteristics. This issue becomes more prominent amongst those “tasked with actually responding to the problem of hate crime in the world”.<sup>8</sup> This chapter aims to highlight the legislation that tackles hate crime, including the protected characteristics being called into question, and will critically evaluate the effectiveness of these statutes.

### **A Trip Through History**

The Government first introduced legislation to deal with “incitement to commit racial hatred” with the Race Relation Act 1965 which had subsequently been amended by the Public Order Act 1986.<sup>9</sup> The Public Order Act 1986 was one of the first significant pieces of legislation to include definitions of the meanings behind racial hatred, but, awarded no amount of protection or increased sentences. The Public Order Act 1986 was amended by the Racial and Religious Hatred Act 2006 to include offences of stirring up racial hatred, and the Criminal Justice and Immigration Act 2008 added offences based on sexual orientation.<sup>10</sup>

Despite racial violence being embedded within history throughout the UK,<sup>11</sup> it was not until the newly elected Labour government in 1997 when “racially aggravated criminal offences” became a part of the political agenda.<sup>12</sup> This brought forward the Crime and Disorder Act 1998, which created legislation against racially aggravated

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<sup>8</sup> Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013).

<sup>9</sup> Maleiha Malik, 'Racist Crime': Racially Aggravated Offences in The Crime And Disorder Act 1998 Part II' (1999) 62 *Modern Law Review*.

<sup>10</sup> Mark Walters and others, 'Hate Crime and The Legal Process - Options for Law Reform' (University of Sussex 2017). (pp.37)

<sup>11</sup> Ben Bowling, *Violent Racism, Victimization, Policing and Social Context* (OUP 1998).

<sup>12</sup> New Labour Party 'Manifesto: New Labour because Britain deserves better' (1997) <<http://www.politicsresources.net/area/uk/man/lab97.htm>>

offences including assault, criminal damage, harassment, and various other public order offences between sections 28-32.<sup>13</sup> Three years later in 2001, the Crime and Disorder Act 1998 was amended to incorporate religiously aggravated offences to mirror that of its racial counter-part.<sup>14</sup> With this Act, the Courts observed that it is not necessary to prove that the accused was “ideologically racist”, the question was more focussed on the racist behaviour on the occasion in question.<sup>15</sup> In the case of *RG & LT v DPP* (2004) May LJ said “it may be possible to demonstrate racial hostility by, for instance, holding up a banner with racially offensive language on it”.<sup>16</sup> This is further reinforcement that the prosecution look to the racial behaviour of the defendant rather than a requirement to prove ideology. Courts have also observed that the necessary hostility could be demonstrated by branding certain items, such as swastikas, and singing certain songs.<sup>17</sup>

The next significant piece of legislation that came into force was the Criminal Justice Act 2003, which was implemented in 2005.<sup>18</sup> This Act prescribed that all courts must treat as an aggravating factor any offence that is motivated by, or demonstrates hostility, based on the victims sexual orientation or disability under s.146.<sup>19</sup> This had been further amended in 2012 to cover transgender hostility.<sup>20</sup> The Criminal Justice Act 2003 was the first Act to protect all five of the Hate Crime strands – race, religion, sexual orientation, disability, and transgender identity. In comparison, the Crime and Disorder Act 1998 only covers race and religion when instances of hate crime occur. Finally, the Coroners and Justice Act 2009, s.125(1) provides sentencing guidelines that every court must apply in the instance of a hate crime.

There had been numerous statutes implemented over the course of history, each handling either individual, or a collection of, protected characteristics. In 2010, the Equality Act was introduced which aimed to “bring all the protected characteristics into a single statute [...] and introduce a number of procedural and remedial

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<sup>13</sup> Mark Walters and others, 'Hate Crime And The Legal Process - Options For Law Reform' (University of Sussex 2017). (pp.38)

<sup>14</sup> *Ibid.* (p.38)

<sup>15</sup> *Brown v HM Advocate* [2000] SCCR 736.

<sup>16</sup> *RG & LT v DPP* [2004] EWHC 183

<sup>17</sup> *R v Rogers* [2007] 2 WLR 280

<sup>18</sup> (N.6) (p.38)

<sup>19</sup> (N.6) (p.38)

<sup>20</sup> (N.6) (p.38)

reforms”.<sup>21</sup> The main reform involved was to group together and categorise every characteristic protected under Law. However, only certain characteristics have been called into question for law reform. These are; age, disability, gender re-assignment, race, religion or belief, sex, and sexual orientation. While this Act protects more characteristics than what has been listed, these characteristics have been chosen for the purpose of this chapter based on those highlighted in the Law Commission Report. Further ambitions towards “transformative equality”<sup>22</sup>, also more commonly referred to as “equality of capabilities”,<sup>23</sup> where everyone, no matter their characteristic should receive equal opportunities. Evidently, whilst the aspiration for this equality was there, this had not been executed in any currently enforced legislation.

### **An equality Act promoting inequality.**

Esteemed legal academics, however, have heavily criticised the Equality Act 2010 for possessing sections that could be considered as discriminatory, or inherently difficult for individuals to be protected under. For example, one major criticism of the 2012 Act is the provision of dual characteristics under Part 2, Chapter 14, section 1. The Act states that the victim must prove each characteristic separately, and such given characteristics must be ranked.<sup>24</sup> A victim must decide which characteristic defines them in the first place, which results in a heavier workload for the Courts or the prosecution and defence in deciding what characteristic may reward the victim with a higher level of protection. Additionally, evidence and expense are also contributing to the heavy workload issue.<sup>25</sup> Furthermore, these victims are not covered for a third characteristic should this occur, thereby only increasing the level of an already prevalent difficulty.<sup>26</sup> These criticisms surrounding the Equality Act 2010 will continue in Chapter 3, which handles the disparities within the protected characteristics.

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<sup>21</sup> Simon Deakin and Gillian Morris, *Labour Law* (6th edn, Butterworths 2012).5

<sup>22</sup> Aileen McColgan, *Discrimination, Equality And The Law* (Hart Publishing 2014).

<sup>23</sup> Irene van Staveren and Des Gasper, *Development As Freedom* (1st edn, ISS 2002).

<sup>24</sup> Jennifer Gardner, 'Equality For The Few: A Critical Analysis Of The Equality Act 2010 From The Perspective Of Gender Equality In The Workplace' (Masters, UMEA University 2018) (pp.21)

<sup>25</sup> *Ibid* (n.15)

<sup>26</sup> *Ibid*. (n.15)

## **A definition**

Since the introduction of these various statutes, hate crime has become an increasingly prevalent topic in modern society. A wider variety of offences are being committed, and legal professionals are struggling in keeping up with the ever-changing climate of aggravated crimes. Unfortunately, this task has become even more difficult as there is no single accepted definition.<sup>27</sup> Some academics have attempted to define hate crime, with one of the most recognised definitions of hate crime from Barbara Perry;

“Hate Crime... involves acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order”.<sup>28</sup>

This definition was synonymous amongst other academics in the field of hate crime. Unlike other academics before her, Perry does not limit the definition of hate crime to a specific group, but rather suggests this victim pool is infinite.<sup>29</sup> This had been supported by Chakraborti and Garland, who criticised the idea of only having certain characteristics protected within the law.<sup>30</sup> Further reinforcement of the Chakraborti and Garland perspective indicates a wider margin of individuals who can be protected under the Act, and possibly, inclusion of any extra inhibitions a victim may possess, e.g. height, weight, or certain birth defects. However, this perspective is subsequently criticised, suggesting that the idea of a large victim pool could result in the hate crime term “becoming too coterminous with crime in general”.<sup>31</sup> This is one area amongst hate crime that requires further discussion,<sup>32</sup> whether the current characteristics are sufficient in covering all those in need of protection, and if so, should more characteristics be added to these existing Acts.

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<sup>27</sup> James Chalmers and Fiona Leverick, *A Comparative Analysis on Hate Crime Legislation* (Scottish Government 2017).

<sup>28</sup> Barbara Perry, *In the Name Of Hate: Understanding Hate Crimes* (Routledge 2002).

<sup>29</sup> Anna Waistnage, 'Hate Crime In The UK' (HEA Fellowship, University Centre Grimsby 2018).

<sup>30</sup> Chakraborti, N. and Garland, J. (2012). Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'. *Theoretical Criminology*, 16(4), pp.499-514.

<sup>31</sup> James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law And Identity Politics* (Oxford University Press 1998).

<sup>32</sup> Anna Waistnage, 'Hate Crime In The UK' (HEA Fellowship, University Centre Grimsby 2018).



Disparities within hate crime legislation are already becoming more evident, as the five protected characteristics (age, sexual orientation, race, religion, and transgender identity) under the Act are not equally protected under the three main legislative frameworks,<sup>33</sup> such as the Criminal Justice Act 2003, the Public Order Act 1986, and the Crime and Disorder Act 1998. Currently, the Law Commission are in discussion about certain Acts as to whether they should all be extended to cover disability and transgender identity,<sup>34</sup> and providing the same level of protection. These highlighted issues will also be further explored in Chapter 3; a chapter created for the sole purpose of highlighting the social, political, and legal inequalities that the legislation responsible for hate crime create, and consistently enforce.

To summarise, and ultimately conclude this chapter, the three main legislative frameworks; the Crime and Disorder Act, the Public Order Act, and the Criminal Justice Act, all include and attempt at protecting the five characteristics under law. They are further assisted with the Equality Act and the Coroners and Justice Act, which in their own way, confirm the characteristics and how the Courts should protect victims who identify with these characteristics should instances of hate crime occur. Moreover, the field of hate crime specifically hard to define, despite Perry's unanimously accepted definition. Inequality is already becoming a continuous theme, showing through the current state of the law, and will be evident through case law analysis of hate crimes, to be further explored in later Chapters.

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<sup>33</sup> Mark Walters and others, 'Hate Crime And The Legal Process - Options For Law Reform' (University of Sussex 2017). (pp.38)

<sup>34</sup> Law Commission, Hate Crime: Should the Current Offences be Extended? (Law Com No 348, 2014)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316103/9781474104852\\_Print.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316103/9781474104852_Print.pdf)>

## Chapter 2) Case Law

It is fundamental that analysis upon how this legislation has been applied in modern cases to investigate how the law operates. Case law is a crucial element in the functioning of the legal justice system, and specifically with hate crime, it allows us to focus on examples of injustice where this legislation has either been applied incorrectly or the legislation is in itself at fault. This chapter is going to examine the relevant case law in relation to the previously mentioned Acts, and also include any relevant functions shown through those cases. Furthermore, as disparities are prevalent within the area of case law, this will also be further analysed.

### How the Acts Operate

One of the most important cases in relation to hate crime Law was the Public Order Act 1986, where the Act provided that the prosecution “must prove that hatred was intended to be stirred up or that it was likely to be stirred up”.<sup>35</sup> Due to the specific wording of ‘likely’, this means that certain aspects of behaviour have to be examined very carefully.<sup>36</sup> Referring back to the case of *RG & LT v DPP* (2004), it was reinforced that the defendants behaviour must be examined as racist based upon their actions.<sup>37</sup> Furthermore, it was not necessary to prove that the defendant had been “ideologically racist”.<sup>38</sup> Thus, it is important to carefully consider the defendant’s actions and behaviours when securing a conviction under the 1986 Act.

A specific concern with the Public Order Act 1986 is its implications against the European Convention of Human Rights, specifically Article 10, which allows the freedom of expression, save in limited circumstances. For a conviction to be secured under the 1986 Act, there has to be “threatening, abusive, or insulting” behaviour or

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<sup>35</sup> 'Racist and Religious Hate Crime - Prosecution Guidance | The Crown Prosecution Service' (Cps.gov.uk, 2019) <<https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>> accessed 15 January 2020.

<sup>36</sup> *Ibid.*

<sup>37</sup> *RG & LT v DPP* [2004] EWHC 183

<sup>38</sup> *Brown v HM Advocate* [2000] SCCR 736.

actions, and it has to be intended to, or likely to, stir up racial hatred.<sup>39</sup> This would limit the freedom of expression as protected under Article 10. However, Article 17 of the convention states;

Nothing in this convention may be interpreted as implying for any state, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for the convention.<sup>40</sup>

Article 17 states that if the expression was used to diminish another individual's rights, then it is not included under Article 10, and an individual does not have that right to express that hatred.<sup>41</sup> If a Court allowed an individual appealing under Article 10 after using derogatory language, then it would be contrary to the text and spirit of the convention, and if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.<sup>42</sup> The human rights element of these offences are necessary to analyse how the Human Rights Act 1998, and other relevant legislative frameworks, protect individuals who have experienced hatred based on a characteristic, against applications made under the freedom of expression.

In relation to sentencing, provided under section 145 of the Criminal Justice Act 2003, the law imposes a general duty on criminal courts, when sentencing an offender, to treat any offence more seriously than –[ can be shown to be stirring up hatred.<sup>43</sup> In cases where offences that could be specifically charged as an aggravated offence, it would not be appropriate for the prosecution to charge the defendant for the “basic” offence, and then later introduce the stirring up of hatred as an aggravating offence, as it would introduce a more serious offence.<sup>44</sup>

However, in *R v O’Leary* (2015) the Court of Appeal held that a sentencing judge was entitled in certain exceptional circumstances to apply a section 145 sentencing

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<sup>39</sup> 'Racist and Religious Hate Crime - Prosecution Guidance | The Crown Prosecution Service' (Cps.gov.uk, 2019) <<https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>> accessed 15 January 2020.

<sup>40</sup> *Ibid.* (ECHR)

<sup>41</sup> *Glimmerveen and Hagenbeck v Netherlands* [1987] 18 DR

<sup>42</sup> *Kuhnen v Germany* [1988] 56 DR

<sup>43</sup> 'Racist and Religious Hate Crime - Prosecution Guidance | The Crown Prosecution Service' (Cps.gov.uk, 2019) <<https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>> accessed 15 January 2020.

<sup>44</sup> *R v Davies* [1998] Cr App R (S) 380

uplift when dealing with an underlying offence.<sup>45</sup> This mirrors the guidance given in *R v Kelly and Donnelly* (2001), which addressed the appropriate increase in sentence for racial aggravation and endorsed an approach.<sup>46</sup> Furthermore, in *R v Fitzgerald* (2003), the Court of Appeal acknowledged the previous guidance, but had distinguished it by noting that the Court must assess the seriousness of the conduct involved and its criminality as a whole.<sup>47</sup> This position was further considered in *R v Higgins* (2009), where it was noted that this approach was adopted in assault cases for sentencing guidelines.<sup>48</sup>

Overall, the application of these legislative frameworks protecting individuals in instances of hate crime have applied into case law. In their provision, this has shown how certain statutes operate by providing these examples, and how it has evolved alongside the state of UK law.

### **Relevant Functions**

Whilst legislation is undoubtedly the driving force of common law principles, in some instance's cases have proved that they can provide strong *ratio decidendi*, which can ultimately influence statutes themselves or the way the Courts handle certain precedents and future cases.

For instance, the requirement of evidence involving spoken or written words and actions that show hostility to the victim and how they are demonstrated derives from case law.<sup>49</sup> Additionally, the demonstration of hostility need not be based on any malevolence towards the group in question. In *R v Rogers* (2007), the House of Lords upheld the defendant's conviction and held that the definition of a racial group went beyond groups defined by their colour or ethnic origin.<sup>50</sup> The House of Lords had also further added that the fact the offenders hostility was based on other factors in addition to racist hostility or xenophobia was irrelevant.<sup>51</sup> Another relevant function will be the factor of disposition, as it was ruled that disposition at the time was

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<sup>45</sup> *R v O'Leary* [2015] EWCA Crim 1306

<sup>46</sup> *R v Kelly and Donnelly* [2001] 2 Cr App R (s) 73

<sup>47</sup> *R v Fitzgerald* [2003] EWCA Crim 2875

<sup>48</sup> *R v Higgins* [2009] EWCA Crim 708

<sup>49</sup> *R v Woods* [2002] EWHC 85

<sup>50</sup> *R v Rogers* [2007] 2 WLR 280

<sup>51</sup> *Ibid.*

irrelevant, and if the defendant abused someone upon a certain characteristic, then they might well have abused anyone standing in the victim's place by reference to any obvious physical characteristic.<sup>52</sup>

In reference to the defendant's motivation, hostility does not need to be the sole or main motivation for the offence, and can be motivated by other reasons, and it is immaterial the defendant may have an ulterior reason for uttering hostile words or performing hostile actions.<sup>53</sup> Furthermore, the victim's reaction to certain hostility is not relevant. Referring back to *R v Woods* (2002) even if the victim was unbothered by the comments, the Court still found that the use of racist abuse during the commission of the offence still sufficed as racial aggravation.<sup>54</sup>

From examining these relevant functions, it is clear case law very much can stand on its own, and also creates strong precedents in assistance of the statutory provisions that are currently in place.

### **Missing Characteristics**

From analysing the case law, it has become a trend that characteristics such as race and religion are placed in higher regard compared to other characteristics. This is primarily noticeable due to their reoccurrence within important case law surrounding the law of hate crime, showing in fact, how the Courts place a higher importance upon cases involving these matters.

This can also be placed down to a matter of attrition, which means that only a small percentage of cases result in a conviction.<sup>55</sup> It has been argued that "attrition is a common feature within the criminal justice process, as potential offences, charges and convictions make their way through the systems many gateways".<sup>56</sup> This issue of attrition has been described as a justice gap, and it is believed that the reason that so many cases related to other protected characteristics, such as disability,

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<sup>52</sup> DPP v Green [2004] EWHC 1225

<sup>53</sup> DPP v McFarlane [2002] EWHC 485

<sup>54</sup> R v Woods [2002] EWHC 85

<sup>55</sup> Mark Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka, 'Hate Crime And The "Justice Gap": The Case For Law Reform' (Sussex Research Online 2018) <<http://sro.sussex.ac.uk/id/eprint/78596/3/CLR%20-%20Hate%20Crime%20and%20the%20Justice%20Gap%20-%20The%20Case%20for%20Law%20Reform%20-%20AMENDED%20VERSION.pdf>> accessed 11 January 2020.

<sup>56</sup> E. Burney and G. Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002), HORS 244, p.25.

transgender or sexual identity, are not mentioned within the operation of caselaw within the Acts, are because they have not been declared as hate crimes. It has been recorded that approximately the justice gap for hate crime is 96 percent, meaning just 4 percent of reported hate crimes resulted in a conviction and the declared sentence uplift.<sup>57</sup>

The issue of attrition can explain how these characteristics are missing in relation to case law being applied by certain Acts; not because crimes of this nature do not occur, but that they are not being recorded as hate crimes. This is a failure on behalf of both the police and the criminal courts. Overall, it is clear to see that, while objectively focussed on racial and religious hostility, case law has continually applied to the current Acts. However, the fact that cases involving certain characteristics are missing from case law applied to the five main legislative frameworks, only goes to further reinforce the disparities that occur within the English legal system and ties in with the next chapter highlighting exactly what these disparities are.

## Chapter 3) Disparities in Treatment

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<sup>57</sup> Mark Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka, 'Hate Crime And The "Justice Gap": The Case For Law Reform' (Sussex Research Online 2018) <<http://sro.sussex.ac.uk/id/eprint/78596/3/CLR%20-%20Hate%20Crime%20and%20the%20Justice%20Gap%20-%20The%20Case%20for%20Law%20Reform%20-%20AMENDED%20VERSION.pdf>> accessed 11 January 2020.

Throughout previous chapters, the inequality embedded within the law of hate crime has increasingly become an increasingly ubiquitous theme. Both legislation and case law have shown a trend of disparity between the level of protection that the Courts will provide to individuals who possess one or more protected characteristics. Whilst the Courts may experience issues with both defining and handling hate crime when cases arise, this does not explain the clear disparities that have occurred. Various academics have taken it upon themselves to highlight these disparities in an effort to raise awareness of how this legislation needs to be improved and future cases do not repeat the same mistakes. As a whole, this chapter will use these academic arguments and perspectives to further reinforce the issues as previously highlighted, alongside critically analysing such perspectives and evaluating the authors and academics' remarks of their criticism of the law.

### **Law Commission recognition**

A recent example of legal academics attempting to highlight, and subsequently reform, the current law is a report on behalf of the Law Commission, which serves as the basis for this subheading entitled the recognition of this legal body. This report raised the issue that "criminal law does not treat all of [the] protected characteristics equally".<sup>58</sup> Additionally, they aimed to reform the law to "ensure that the criminal law provides consistent and effective protection from conduct motivated by hatred of protected groups or characteristics".<sup>59</sup> The Law Commission have also directed their focus towards certain Acts of Parliament in particular, as they had recently conducted an investigation as to whether "the Public Order Act should be extended to cover the categories of disability and transgender identity".<sup>60</sup> The Commission had further recommended that, in the absence of a wider review of the legislative framework for hate crime, "those [traits] not currently protected under the Crime and Disorder Act 1988, such as sexual orientation, disability, and transgender identity, should be included under s.28 to s.32 of the 1998 Act".<sup>61</sup>

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<sup>58</sup> Penney Lewis, 'Hate Crime | Law Commission' (Lawcom.gov.uk, 2019)  
<<https://www.lawcom.gov.uk/project/hate-crime/>> accessed 9 March 2020.

<sup>59</sup> *Ibid.*

<sup>60</sup> Law Commission, 'Hate Crime: Should the Current Offences Be Extended?' (Law Commission 2014)  
<[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc348\\_hate\\_crime.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc348_hate_crime.pdf)> accessed 9 March 2020.

<sup>61</sup> Mark Walters and others, 'Hate Crime and The Legal Process - Options for Law Reform' (University of Sussex 2017). (page 43)

However, the Commission contradicts its perspective of equalising these protected characteristics within the Law, suggesting that “those characteristics currently not covered under the legislation, such as disability and transgender identity, should not be incorporated”.<sup>62</sup> This is in relation to Part 3 and Part 3A of the Public Order Act 1986 of stirring up hatred offences, for example hate speech. The reasoning for this statement was due to the belief that the law is rarely enforced successfully for these types of offences, and so it was not practical nor necessary to include these offences.<sup>63</sup> In addition, the Commission asserts its position of not including such offenses under the 1986 Act stating that the issue surrounding disablist and transphobic hate speeches can be dealt with under other legal provisions, such as ss.4 and ss.5 of the 1986 Act.<sup>64</sup>

Evidently, the Commission, as the heart of inducing reformations within the Law, has identified the clear issue with these disparities within the level of protection that the Courts provide. Legislation that covers these offences does so in a discriminatory, or unfair way, which has consequences of an unequal level of protection, and certain characteristics not even being protected under Law, such as transgender identity or disability. It has been argued that the process of determining whether or not these group characteristics should be incorporated within the Crime and Disorder Act 1998, or potentially a new Hate Crime Act, “must start with a careful consideration of the purpose of criminal law”.<sup>65</sup> This is because of the strong belief that criminal law “is one of the gravest forms of social control”.<sup>66</sup> In essence, if Parliament were to include these provisions within an existing Act, or create a new Act, this would not only further act as a deterrent, but the Courts and relative legislation would act as guidance to protect victims who experience hate crime offences, and reduce the prevalence of these highlighted inequalities.

### **When academics get involved**

From the Law Commission’s report, it is clear that the issue of how to determine which groups should be protected under what current legislative frameworks has

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Law Commission, 'Hate Crime: Should the Current Offences Be Extended?' (Law Commission 2014) <[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348\\_hate\\_crime.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348_hate_crime.pdf)> accessed 9 March 2020.

<sup>65</sup> Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 Oxford Journal of Legal Studies.

<sup>66</sup> C. M. V Clarkson and others, Criminal Law (Sweet & Maxwell 2010) (page 419)



surfaced. Various principles have arisen, one of which is that protection serves a symbolic purpose, both in terms of victims and offenders.<sup>67</sup> One academic, Jennifer Schweppe, stated that;

“By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection – legal protection which has an enormous impact on the offender [...] When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind”.<sup>68</sup>

In other words, Schweppe is arguing that by incorporating such groups, such as disability or transgender identity into existing or new hate crime legislation, it may send a message to members of that protected characteristic that they are worthy of protection.<sup>69</sup> However, it is also argued that should certain characteristics not be included, whether expressly or by implication, it also sends a message to those excluded groups that they are not worthy of protection.<sup>70</sup> Additionally, it may further imply that they are, as Brown puts it, “second class citizens”.<sup>71</sup> For these reasons, consistency within the Law is important. If the law was to provide an equal amount of protection to each of the protected characteristics, this would “label the offender who has targeted a protected group specifically as someone who has committed a ‘hate crime’”.<sup>72</sup> Consistency and protection act as a symbolic function, and if the law recognised the importance of each protected characteristic, this would also seem to

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<sup>67</sup> James Chalmers and Fiona Leverick, *A Comparative Analysis on Hate Crime Legislation* (Scottish Government 2017).

<sup>68</sup> Jennifer Schweppe, 'Defining Characteristics and Politicising Victims: A Legal Perspective' (2012) 10 *Journal of Hate Studies*.

<sup>69</sup> James Chalmers and Fiona Leverick, *A Comparative Analysis on Hate Crime Legislation* (Scottish Government 2017).

<sup>70</sup> M Blake, “Geeks and monsters: bias crimes and social identity” (2001) 20 *Law and Philosophy* 121;

<sup>71</sup> A Brown, “The ‘who?’ question in the hate speech debate: part 2: functional and democratic approaches” (2017) 30 *Canadian Journal of Law and Jurisprudence* 23 at 25.

<sup>72</sup> A Brown, “The ‘who?’ question in the hate speech debate: part 1: consistency, practical, and formal approaches” (2016) 29 *Canadian Journal of Law and Jurisprudence* 275 at 284; F Lawrence, *Punishing Hate: Bias Crime Under American Law* (1999) 14.

mitigate against selecting groups solely because they experience on the basis the majority of (or a substantial number of) hate based incidents in practice.<sup>73</sup>

### **Legislation enforcing inequality.**

As mentioned previously in Chapter 1, the Equality Act 2010, part 2, chapter 14 handles the issue of dual characteristics, where it was highlighted that victims who fit under this provision would experience difficulty in securing a conviction as they must prove each characteristic separately and also a ranking system must take place.<sup>74</sup> Further elaboration of this point shows that hate crime is intersectional, and victims are not necessarily only targeted on a single characteristic.<sup>75</sup> Walters and Trumath further note that offenders are also commonly “motivated by multiple and intersecting prejudices”.<sup>76</sup> For example, an individual may be a victim of hate crime on the basis of both their race and religion, or gender and sexuality, and will not be covered under current legislation. This proves that a re-drafting of hate crime law so that it does not require the offender to have even motivated by prejudice against a single protected group will prove an effective reform.<sup>77</sup>

The 2010 Act was not the sole legislative framework that was held accountable for possessing and enforcing disparities within the law of hate crime. In fact, the Crime and Disorder Act 1998 has also been similarly criticised. Section 96, subsection 2 of the 1998 Act had provided that evidence from a single source is sufficient to establish that an offence is racially aggravated. The Courts made observations that it was not necessary to prove the accused is in some way “ideologically racist”, rather the question was simply whether there was racist behaviour on the occasion in general.<sup>78</sup> This had been subsequently criticised as an apparent departure from the requirement of corroboration, as intention to commit a racist or discriminatory act is a necessary foundation to a hate crime offence.<sup>79</sup>

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<sup>73</sup> *Ibid.*

<sup>74</sup> Jennifer Gardner, 'Equality For The Few: A Critical Analysis Of The Equality Act 2010 From The Perspective Of Gender Equality In The Workplace' (Masters, UMEA University 2018) (pp.21)

<sup>75</sup> Chakraborti and Garland at 504; E Vipond, “Trans rights will not protect us: the limits of equal rights discourse, antidiscrimination laws, and hate crime legislation” (2015) 6 Western Journal of Legal Studies 1 at 18.

<sup>76</sup> Walters and Tumath (page 590)

<sup>77</sup> James Chalmers and Fiona Leverick, A Comparative Analysis on Hate Crime Legislation (Scottish Government 2017).

<sup>78</sup> *Brown v HM Advocate* [2000] SCCR 736.

<sup>79</sup> *Yates v HM Advocate* [1977] SLT

However, one commendable trait of the 1998 Act was that, subsequent to 2010, subsection 5, as initially enacted, provided only that “the court shall, on convicting a person, take the aggression into account in determining the appropriate sentence”. This was replaced with the current test in 2010, following the creation of sentence aggravations in respect of disability, sexual orientation, and transgender identity. This ensures a consistent approach across the legislative frameworks in relation to sentence aggravation for hate crimes. On first examination, this appears to show the law surrounding hate crime to be adopting a level of consistency with the aggravation of sentences. Nevertheless, as evident from prior examinations, it is clear that the law lacks the consistency trait when handling the overall law of hate crime, despite the 1998 Act being amended in 2010.

Evidently, consistency of the law is the foundations for equal treatment, and the lack thereof is the root of the disparities that these Acts possess and enforce. The Law Commission has clearly highlighted all of the disparities in how hate crime law is practiced, and acts as the main source of presenting these legal controversies. Many academics, such as Jennifer Schweppe, have taken it upon themselves to project these inequalities to the wider world by explaining the impact that these disparities can have on individuals within certain protected groups. Nevertheless, despite academics and Law Commissions bringing attention to these issues, as of today, statutes such as the Equality Act, or the Crime and Disorder Act 1998, and other legislative frameworks still enforce these unequal provisions. Chapter 4 of this essay will begin to explain, using the Law Commission and other academics, how these disparities and legislative frameworks can be reformed.

## **Chapter 4) Reforms**

History has continually proven that without full recognition and consideration of an institutionalised fault within the legal system, this issue will only further replicate miscarriages of justice. In consideration of disparities existing within the current law, examples of this injustice and how legal bodies have recognised these inequalities within previous chapters, this has all culminated into the final chapter. The most important method of solving a problem is not only recognising there is one but building a solution. This chapter is aiming to do exactly that; provide a solution and is going to include suggestions that institutions and academics have recommended in order to reform this area of law.

### **Academic comments**

There is a general agreement that what a requirement for hate crime law is a group that share a common characteristic or characteristics.<sup>80</sup> This calls forward a suggested academic reform, the requirement of a 'group identity'.<sup>81</sup> One academic, Frederick Lawrence, had argued that protection should be limited to what he terms as "self-regarding groups", as opposed to "random collections of people".<sup>82</sup> In reinforcement of this approach alternate descriptions from other legal experts have suggested this is a requirement for a group based on "constitutive" or "integral characteristics".<sup>83</sup> However, this has been contested on the basis this requirement is either over-inclusive or under-inclusive, depending on the perspective. With relation to over-inclusivity, the idea of a required identity group could potentially bring groups such as "the wealthy" or "members of a particular profession" into the realm of protection.<sup>84</sup> This is not necessarily an issue, as these particular individuals may use their wealth or occupation as the core of their identity, however there is a certain danger to protecting these groups under the auspices of hate crime as it could diminish the significance of protection if the categories are stretched too far.<sup>85</sup> This is not the first time that a concern relating to the significance of hate crime protection

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<sup>80</sup> F Lawrence, *Punishing Hate: Bias Crime Under American Law* (1999) (page 14)

<sup>81</sup> James Chalmers and Fiona Leverick, *A Comparative Analysis on Hate Crime Legislation* (Scottish Government 2017).

<sup>82</sup> F. Lawrence (n.1) (page 12 – 14)

<sup>83</sup> A Brown, "The 'who?' question in the hate speech debate: part 1: consistency, practical, and formal approaches" (2016) 29 *Canadian Journal of Law and Jurisprudence* 275 at 284;

<sup>84</sup> M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2015) 30 *Journal of Interpersonal Violence* 1755;

<sup>85</sup> JV Roberts and AJA Hastings, "Sentencing in cases of hate-motivated crime: an analysis of subparagraph 718.2(a)(i) of the Criminal Code" (2001) 27 *Queen's LJ* 93

being diminished has appeared, as Jacobs and Potter had highlighted the same issue from Perry's definition, suggesting that hate crime was "becoming to conterminous with crime in general".<sup>86</sup>

In relation to under-inclusivity, another academic argued against the previous requirement for an identity group arguing that it would rule out those who are homeless. It is argued that a homeless person would not regard his or her homelessness "as a key aspect of their self-understanding".<sup>87</sup> Whilst the idea of imposing a group identity requirement may, on the face of it, seem effective in reforming the disparities within hate crime law, it is clear that instead it reinforces the current issue.

Another recommendation on behalf of legal academics is the concept of 'immutability', where it is argued that protection should be limited to groups whose characteristics are "immutable" or "difficult/impossible to change".<sup>88</sup> The argument for this requirement is that harm would be worse if there is nothing that one can do to change their identity and avoid being targeted.<sup>89</sup> In essence, this may limit the victim pool, easing the stress that the Courts face about who to provide protection and to what level, as if one's protected characteristic is immutable the same level of protection can be awarded. However, this argument can be quickly dismissed as it implies that members of certain groups, such as religious groups, should not be protected because they can change or conceal their identity in order to avoid being a victim.<sup>90</sup>

There is another provision similar to immutability, with the notion of characteristics of characteristics that are "unchosen" have also been put on the canvas as a possible reform, with relevance to determining which groups can be protected.<sup>91</sup> However, this suffers from the same disadvantages as immutability, which as a suggestion for

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<sup>86</sup> James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law And Identity Politics* (Oxford University Press 1998).

<sup>87</sup> M Blake, "Geeks and monsters: bias crimes and social identity" (2001) 20 *Law and Philosophy* 121

<sup>88</sup> FM Lawrence, "The punishment of hate: toward a normative theory of bias-motivated crimes" (1994) 93 *Michigan LR* 320 at 343;

<sup>89</sup> (N.7)

<sup>90</sup> Organization for Security and Cooperation in Europe (OSCE), *Hate Crime Laws: A Practical Guide* (2009) 37-46.

<sup>91</sup> A Brown, "The 'who?' question in the hate speech debate: part 1: consistency, practical, and formal approaches" (2016) 29 *Canadian Journal of Law and Jurisprudence* 275 at 284;

reform is clearly an unacceptable message for the Courts to send, and does nothing to actually reform the law to remove these disparities.

### **Improving Old Acts**

Whilst several academics have contributed towards fighting against these disparities by suggesting their own recommended suggestions, their attention has also been drawn to improving existing statutes as a way of reforming the law of hate crime.

One option for reform is as a minimum, Parliament amend s.28 of the Crime and Disorder Act 1998 to include the missing characteristics of transgender identity and sexual orientation. Reasoning for this is that the current framework of legislation creates a “hierarchy of hate”,<sup>92</sup> as their failure to ensure that hate crime laws apply equally to all protected characteristics may send the message that some types of hate crime are more serious than others, or that certain groups are more deserving of protection under law than others.<sup>93</sup> It is believed that inclusion of all five characteristics under the 1988 Act would ensure that all strands of hate crime are taken seriously by authorities.

Secondly, based on statistics and analysis of interviewee data many more offences should be considered for inclusion under the 1988 Act. This is believed to be because the categories under the Act do not map out precisely onto the most common types of offences committed against victims of these protected groups, such as homicide offences or sexual offences.<sup>94</sup> From these judgements, it appears the direct aim is to improve and reform the Crime and Disorder Act 1998 in order to be more inclusive of all the Acts, thereby treating these characteristics under Law equally.

### **A New Act?**

Improving a pre-existing Act could be enough to reform the Law and remove these disparities, however, it could also pose a serious challenge. It may be easier to instead, create a new hate crime Act, as the third option under this report suggests. It is recommended that this Act is based on the relevant provisions currently

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<sup>92</sup> Mark Walters and others, 'Hate Crime and The Legal Process - Options For Law Reform' (University of Sussex 2017). (pp.24)

<sup>93</sup> *Ibid.*

<sup>94</sup> (n.17) (p.25)

contained under the Crime Disorder Act 1998 but extending these provisions to all categories of crime. A single Act could contain all relevant legislative provisions for hate crime under a single code, and can also help protect all protected groups equally and also replicate the procedures under s.145 and 146 of the Criminal Justice Act 2003, in so far that the Courts must take into consideration how the sentence has been aggravated by such hostility.<sup>95</sup>

This has all culminated into the rough drafting of a provision that would either be included within the redrafting of the Crime and Disorder Act 1998, or a new Hate Crime Act should one be implemented. This provision is set out below;

- (1) An offence is racially or religiously aggravated (or aggravated in relation to disability, sexual orientation, or transgender identity) for the purposes of section 29 to 32 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 based on the victim's sexual orientation (or presumed sexual orientation), disability (or presumed disability), or transgender identity (or presumed transgender identity); or
  - b) The offence is committed by reasons 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);<sup>96</sup>

This provision, while temporary, provides a sufficient basis for what could be a reformation of the law of hate crime, and in its application could cover all of the protected characteristics and provide an equal level of protection to them all. Overall, it is clear that both Parliament and the Courts are spoiled for choice in terms of how to reform the law, and should they choose these options as recommended by various academics, these disparities that have been so prevalent throughout all of this report, could be removed within the legal justice system.

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<sup>95</sup> (n.17) (page.26)

<sup>96</sup> (n.17) (page 27)

## **Conclusion**

As this paper reaches its ultimate conclusion, the evidence that has been presented in relation to the disparities existing within hate crime law have been explained, analysed, and evaluated in terms of relevance, prominence, and its prevalence.



In relation to the legislative frameworks, it is clear that the current statutory provisions have created a 'hierarchy of hate' and a clear justice gap.<sup>97</sup> It had become increasingly evident that the five protected characteristics were not protected equally under law,<sup>98</sup> which enforced the inequality amongst Acts, such as the Crime and Disorder Act 1998, the Public Order Act 1986, and the Criminal Justice Act 2003.

Whilst case law has served as an effective basis for racial and religious aggravation, and the uplift in sentencing that follows suit, the issue of attrition also reinforces this inequality.<sup>99</sup> The issue of attrition shows that while hate crime cases occur, the legal system does not recognise these as hate crime offences, thus they are not recorded and recognised as statutory application into common law.

Both common law and statutes have proven that hate crime law is rife with inequality in relation to the amount of protection that is provided to the 5 protected groups. Academics have recognised that by Acts not being all inclusive of these protected groups, it is sending a clear message that those groups are not worthy of protection.<sup>100</sup> For example, the Commission argues that the Public Order Act 1986 should be extended to include both disability and transgender identity.<sup>101</sup> However, not only do certain provisions need to be added into the current Acts, but also, they need to be reformed and redrafted themselves. This is specifically mentioning Acts such as the Equality Act 2010, where provisions involving dual characteristics are especially discriminatory and unequal in nature.<sup>102</sup>

Both the Commission and legal academics alike have worked together in the surfacing of these disparities to bring forward their own suggested reforms. These reforms include the redrafting of old legislation as to be inclusive of the other

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<sup>97</sup> Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com No.348, Cm 8865, p.84.

<sup>98</sup> Mark Walters and others, 'Hate Crime and The Legal Process - Options For Law Reform' (University of Sussex 2017). (pp.38)

<sup>99</sup> Mark Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka, 'Hate Crime And The "Justice Gap": The Case For Law Reform' (Sussex Research Online 2018) <<http://sro.sussex.ac.uk/id/eprint/78596/3/CLR%20-%20Hate%20Crime%20and%20the%20Justice%20Gap%20-%20The%20Case%20for%20Law%20Reform%20-%20AMENDED%20VERSION.pdf>> accessed 11 January 2020.

<sup>100</sup> M Blake, "Geeks and monsters: bias crimes and social identity" (2001) 20 *Law and Philosophy* 121;

<sup>101</sup> Law Commission, 'Hate Crime: Should the Current Offences Be Extended?' (Law Commission 2014) <[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348\\_hate\\_crime.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348_hate_crime.pdf)> accessed 9 March 2020.

<sup>102</sup> A Brown, "The 'who?' question in the hate speech debate: part 1: consistency, practical, and formal approaches" (2016) 29 *Canadian Journal of Law and Jurisprudence* 275 at 284; F Lawrence, *Punishing Hate: Bias Crime Under American Law* (1999) 14.

protected characteristics, such as amending the Crime and Disorder Act 1998 to include transgender identity and disability.<sup>103</sup> Additionally, there is the possibility of creating a new Hate Crime Act, to include all 5 protected characteristics, and will act as a combination of all other Acts, as the Equality Act 2010 had also intended to do.<sup>104</sup>

To conclude this paper, these disparities are clearly affecting justice and the rule of law, as the current statutory provisions fail to protect all those in need of protection equally. Should the law be reformed, in however way as suggested within this paper, then there is hope for a more positive future and the collapse of this hierarchy of hate.

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