

Hate crime and the law

A briefing paper

February 2016

This briefing paper explains the law in relation to hate crime in the UK. It has been produced by the Anti-Bullying Alliance with support from Milbank Tweed Hadley & McCloy LLP.

This paper is a summary only of relevant legislation and case law in England and Wales and is for general guidance only. It does not purport to be an exhaustive summary of the law in this area and it does not constitute legal advice.

If you think you may have been the victim of a hate crime you should contact the police. True Vision is a police funded website, which provides information about hate crime incidents and on how to report it <http://www.report-it.org.uk/home>

WHAT CONSTITUTES A HATE CRIME?

There is no legal definition of a hate crime. However, the police and the CPS have an agreed definition of hate crime as:

“any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by hostility or prejudice against a person who is transgender or perceived to be transgender.”¹

There is a distinction between a hate crime and a hate incident. “A hate incident is any incident which the victim, or anyone else, thinks is based on someone’s prejudice towards them because of their race, religion, sexual orientation, disability or because they are transgender.”² However, a hate incident does not necessarily break the law. Where a hate incident amounts to a criminal offence, and is based on one of the five protected characteristics, it is known as a hate crime.

The type of conduct which will be considered as a hate incident is wide ranging and includes the following: verbal abuse; harassment; bullying or intimidation; physical attacks; threats of violence; hoax calls, abusive phone or text messages, hate mail; online abuse; displaying or circulating discriminatory literature or posters; graffiti; arson; throwing rubbish in a garden; and malicious complaints.³

¹ The Crown Prosecution Service - http://www.cps.gov.uk/northeast/victims_and_witnesses/hate_crime/

² The Crown Prosecution Service - http://www.cps.gov.uk/northeast/victims_and_witnesses/hate_crime/

³ Citizens Advice - <https://www.citizensadvice.org.uk/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>

WHAT DOES THE LAW SAY IN RELATION TO HATE CRIME IN ENGLAND, SCOTLAND, WALES AND NORTHERN IRELAND?

- 1 The legal implication of something being a hate crime is:
 - (a) that the penalty imposed may be higher because (i) the offence is considered as an aggravated offence, which is subject to a higher maximum penalty; or (ii) the offence is subject to the enhanced sentencing regime, under which the higher penalties within the range of penalties for that offence will be imposed; or
 - (b) that the hate crime will be a criminal offence under the category of offences of “stirring up hatred”.

1.2 Aggravated Offences

The Crime and Disorder Act 1998 (“CDA”), applies to an offence motivated by the personal characteristics of either race or religion. At present, the aggravated offences do not apply to hostility based on the other three personal characteristics of sexual orientation, transgender identity or disability.

(a) Summary of legal position

- (i) The CDA applies only to racially or religiously aggravated offences. The law applying to these offences is contained within CDA Part II (sections 28 to 36 inclusive).
- (ii) The Law Commission has summarised aggravated offences as follows: “if a person commits one of a list of offences and, in doing so, demonstrates, or was motivated by, hostility on the grounds of race or religion, that offence becomes a separate “aggravated” offence, with a higher sentence available.”⁴
- (iii) The list of offences covered is set out in the CDA Part II and includes the following: assault; criminal damage; public order offences; and harassment (NB. in Scotland, there is an offence of racially aggravated harassment).

(b) Certain relevant case law

The CDA does not define “demonstrating or motivated by hostility”. The case law in this area is highly fact specific to the individual cases. However, the following case law provides some examples of where language and/or conduct have been considered as either demonstrating or motivated by hostility:

(i) Demonstrating hostility

(A) DPP V MCFARLANE (2002) EWHC 485

- (1) *Facts*: a dispute arose between two individual over the use of a disabled parking bay. One individual addressed the other as a “black bastard”, a “jungle bunny” and a “wog”.

⁴ Law Commission, “hate crime: should the current offences be extended? Summary for non-specialists” (May 2014)

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- (2) *Held*: hostility was demonstrated because the language used was threatening, abusive and/or insulting with intent to cause the victim to believe unlawful violence would be used against him. It is immaterial that the language was used for an additional reason (being anger in relation to the parking).
- (B) *R v Babbs* [2007] EWCA Crim 2737
 - (1) *Facts*: the victim and his companion suffered verbal abuse in the queue for a fast-food restaurant. When leaving the restaurant a few minutes later, the victim was head-butted.
 - (2) *Held*: hostility was demonstrated in the conduct by the words used before the offence was committed, albeit not necessarily directly before the offence.
- (C) *Parry v DPP* [2004] EWHC 3112 (Admin)
 - (1) *Facts*: P threw nail varnish against a neighbour's door. When the police questioned him about the incident, P demonstrated hostility based on the victim's racial group.
 - (2) *Held*: demonstrating that the conduct itself was hostile can occur after the offence is committed and such conduct may be hostile even if the victim is not present.
- (ii) Motivated by hostility:
 - (A) *G v DPP* [2004] EWHC 183 (Admin) – motivation is capable of being established by evidence relating to what the defendant may have said or done on another or other occasions; and
 - (B) *R v White* [2001] EWCA Crim 216 – motivation may be established even where the defendant and victim are of the same racial group.

1.3 Enhanced sentencing

The Criminal Justice Act 2003 (“CJA”) provides for enhanced sentencing for any of the five protected characteristics. The CJA is the only piece of legislation which covers hate crimes relating to disability and transgender identity, as well as covering offences relating to race, religion and sexual orientation.

(a) Summary of legal position

- (i) When applying any sentence, the CJA section 142 sets out that the courts must have regard to the five fundamental purposes of sentencing: the punishment of offenders; the reduction of crime; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offence.
- (ii) Taking into account the purposes of sentencing, courts must then specifically consider the hate crime element of the offence in determining the sentence. The Law Commission has summarised the enhanced sentencing provisions as

follows “The CJA specifically requires certain aggravating factors, if present, to be taken into account in assessing seriousness. These include hostility on the basis of race or religion (section 145) and on the basis of sexual orientation, disability, or transgender identity (section 146).”⁵

- (iii) The CJA aggravating factors (whether statutory or general) operate to guide the courts as to where a sentence should fall within the range for the relevant offence. They cannot operate to raise a sentence above the available maximum prescribed by the substantive offence provision. As we have explained, this sets enhanced sentencing apart from aggravated offences, which carry higher maximum sentences. The court has a duty to “state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence”.⁶

(b) **Certain relevant case law**

- (i) Denomination of a group has been given wide application. It is taken as a question of fact for the jury to decide upon:

(A) *DPP v M* [2004] EWHC 1453 (Admin)

- (1) *Facts*: during an argument over payment for food in a restaurant, the defendant used the words “bloody foreigners”, then caused physical damage to the shop window.
- (2) *Held*: the word “foreigner” is capable of describing a racial group, whilst “bloody” demonstrates hostility based on a presumed membership of that racial group. The size of the racial group is immaterial.

(B) *R v Cooke (Steven)* [2015] EWCA Crim 1414

- (1) *Facts*: at a demonstration by the English Defence League and counter-demonstration by the group United Against Facism, the defendant was present at three occurrences of violent disorder.
- (2) *Held*: whilst there was no evidence that the defendant engaged in anti-Muslim chants, his actions of violent disorder were directed at Asian counter-demonstrators and thereby aggravated by religious hostility.

(C) *R v D* [2005] EWCA Crim 889

- (1) *Facts*: the Attorney General raised a question on a point of law as to whether the use of the word “immigrant” to a victim demonstrated hostility based on (perceived) membership of a racial group.

⁵ Law Commission, “hate crime: should the current offences be extended?” (May 2014)

⁶ Law Commission, “hate crime: should the current offences be extended?” (May 2014)

- (2) *Held:* CDA 1998, section 28(4) has wide application. “immigrant doctor” can denote membership of a racial group and, as a question of fact; it should be for the jury to determine if an aggravated offence has occurred.

1.4 Stirring up hatred

Under the Public Order Act 1986 (“POA”), conduct that is intended or likely to stir up hatred on grounds of race, religion and sexual orientation can result in criminal liability. The POA does not prohibit or restrict freedom of expression. The POA does not apply to transgender identity or disability.

(a) Summary of legal position

- (i) The POA applies only to racial hatred and religion or sexual orientation. Racial hatred is covered by the POA Part III (sections 17 to 29 inclusive), and religion or sexual orientation is covered by the POA Part IIIA (sections 29A to 29N inclusive).
- (ii) The Law Commission has summarised the law as follows: “the offences based on stirring up racial hatred apply where a person engages in certain forms of threatening, abusive or insulting conduct and either their intention was thereby to stir up racial hatred or, having regard to all the circumstances, racial hatred was likely to be stirred up thereby. The offences do not criminalise conduct expressing hostility or hatred towards specific individuals. Rather, they address conduct intended or likely to cause others to hate entire national or ethnic groups. They do not require proof that hatred has in fact been stirred up, merely that it was either intended or likely to be stirred up.”⁷
- (iii) The offences under the POA cover the six following types of conduct:
 - (A) using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting;
 - (B) publishing or distributing written material which is threatening, abusive or insulting;
 - (C) presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour;
 - (D) distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting;
 - (E) providing a programme service, or producing or directing a programme, where the programme involves threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein; or

⁷ Law Commission, “hate crime: should the current offences be extended?” (May 2014)

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- (F) possessing written material, or a recording of visual images or sounds, which is threatening, abusive or insulting, with a view to it being displayed, published, distributed, shown, played or included in a cable programme service.
- (iv) Where the offence relates to religion or sexual orientation, the conduct covered is narrower in scope,
 - (A) the words or conduct must be threatening (not merely abusive or insulting);
 - (B) there must have been an intention to stir up hatred (a likelihood that it might be stirred up is not enough); and
 - (C) there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.⁸
- (b) **Certain relevant case law**
 - (i) *R v Sheppard* [2010] EWCA Crim 65 held that it is an offence to publish material online that is prohibited by the POA where it is available to the public or section of the public.

WHAT DOES THE LAW SAY WITH REGARD TO ONLINE HATE CRIME?

In England and Wales, as far as we can tell, there is no law specifically addressing online hate crime. However, existing offences have been extended to include online hate crime, as set out below.

1.5 Malicious Communications Act 1988 (“MCA”)

(a) Summary of legal position

- (i) Under the MCA, it is an offence to send either physical or electronic communication that is indecent or grossly offensive; threatening; or information that sender knows or believes to be false.
- (ii) The DPP has indicated that where there is a hate crime element to communication, a prosecution under the MCA may be in the public interest, particularly if the offence is repeated.

1.6 Offence of stirring up hatred

(a) Summary of legal position – see 2.4(a) above.

In England and Wales, the offence of stirring up hatred includes where such conduct occurs online. For example, as above at 2.4(b), publication of material which is intended to stir up hatred has been taken to include information published online.

⁸ Law Commission, “hate crime: should the current offences be extended?” (May 2014)

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However, the offence of stirring up hatred only covers race, religion and sexual orientation.

1.7 International comparisons

This international comparison not exhaustive: it is intended to be only illustrative of how other countries are seeking to prosecute online hate crime. We have not considered all jurisdictions. Canada is used as it has demonstrated a particular willingness to prosecute cyber-hate, whilst the Australian case highlighted may prove to be persuasive in English law as the law develops.

- (a) Canada has sought to adapt and use its hate crime legislation to prosecute cyberhate:
 - (i) Canada's Human Rights Act, section 13 and Criminal Code, section 319 are both used to shut down hate sites. Numerous cases have come to Court under these provisions, fining individuals and removing sites from Internet.
 - (ii) Aug 2002, Canadian Human Rights Tribunal upheld complaint against Machiavelli and Associates that they used their website to promote hatred against homosexuals. Also decided against neo-Nazi Ernst Zundel, who used his site to promote antisemitism.
 - (iii) Canada's Human Rights Commission (which has executive powers) asserted jurisdiction over the Internet by analogy to other forms of telephonic communication, and amended its criminal code accordingly.
- (b) Australian case law may also influence developments in cyberhate, with *Dow Jones and Company v Gutnick*, which held that the place of publication of an internet article is the country in which it is read and not the country where the publisher's server is based or where the material is uploaded.

IS THERE ANY EUROPEAN LAW RELEVANT TO HATE CRIME?

1.8 European Convention of Human Rights

(a) Summary of legal position

The European Convention of Human Rights, Article 14 prohibits discrimination. A challenge under the ECHR must be on the basis of an individual challenging the law of a state: it cannot be based solely on two individuals as parties. In the context of hate crime, Article 14 "is to be read as obliging EU Member States to render visible bias motives leading to criminal offences by highlighting and punishing hate crimes more severely than others."⁹

⁹ European Union agency for fundamental rights, making hate crime visible in the European Union - acknowledging victim's rights (2012)

(b) Certain relevant case law

The European Court of Human Rights (“ECtHR”) emphasises the obligation on the authorities of an EU Member State to investigate racially motivated crimes. The following cases are illustrative of the emphasis the ECtHR has placed on effective investigation of crimes that demonstrate, or were motivated by, hate crime.

- (i) *Nachova and others v Bulgaria*, No 43577/98, 26 February 2004 –
 - (A) *Facts*: a member of the Bulgarian military police killed two Bulgarian nationals of Roma origin during an arrest.
 - (B) *Held*: the duty on the state to investigate possible hate crimes was breached as the State failed in their duty to take all possible steps to establish whether or not discriminatory attitudes may have played a role in events.
- (ii) *Milanovic v Serbia*, No 74832/01, 14 December 2010 – the ECtHR covers religious affiliation, with state authorities having an additional duty to take all reasonable steps to unmask any religious motive and establish whether or not religious hatred or prejudice played a role in the events.¹⁰

1.9 European legislation

- (a) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.
 - (i) A Council Framework Decision requires a member state to achieve particular results but do not have direct effect. As such, if they are not implemented, the member state cannot be compelled to enforce the Decision.
 - (ii) The Framework Decision sought to define a common criminal-law approach to racism and xenophobia where conduct was either likely to disturb public order, or that is threatening, abusive or insulting. Motivation should be considered as an aggravating circumstance and/or taken into account by Courts in determining the applicable penalties.
 - (iii) The Framework Decision is much narrower than the cumulative legal regulation in the UK. The UK sets out five protected characteristics, whereas the Framework Decision applies only to racism and xenophobia.

IS THERE ANY INTERNATIONAL LAW RELEVANT TO HATE CRIME?

1.10 International Human Rights

The UK is a party to the International Convention on the Elimination of all form of Racial Discrimination and the International Covenant on Civil and Political Rights. The Conventions cover conduct motivated by or intending to incite racial and religious hatred

¹⁰ Case as summarised in European Union agency for fundamental rights, making hate crime visible in the European Union - acknowledging victim's rights (2012)

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and discrimination. The Conventions set a legal standard, rather than forming the basis of regulation.

ANY DUTIES OF SCHOOLS WITH REGARD TO HATE CRIME – ENGLAND/SCOTLAND/WALES/NORTHERN IRELAND

As far as we can tell, there are no specific obligations on schools regarding hate crime. Schools retain their obligations with regards to bullying generally¹¹ (including having an anti-bullying policy and duty of care to ensure student reasonably safe during school hours).

ANY DUTIES OF LOCAL AUTHORITIES WITH REGARD TO HATE CRIME – ENGLAND/SCOTLAND/WALES/NORTHERN IRELAND

Same as with regards to schools, see above. As far as we can tell, there are no specific requirements, but there are general duties to promote anti-bullying.¹²

WHAT SHOULD YOU DO IF YOU ARE A VICTIM OF HATE CRIME (INCLUDING ONLINE)?

1.11 Reporting hate crime

- (a) Both Government policy and the recent Law Commission report have emphasised the importance of reporting hate incidents as a means of “challenging and changing the attitudes and behaviours that lead to hatred, and intervening early to stop tensions or incidents escalating.”¹³
- (b) Victims should state to the police (or other person they report the crime to) that they believe the offence was motivated by hostility or prejudice based on a personal characteristic.
- (c) The person recording the incident should then record it as a hate incident. All police forces record hate incidents based on the five personal characteristics.

SUPPORT FOR VICTIMS OF HATE CRIME (FROM LEGAL PERSPECTIVE)

- (d) True Vision is a police funded website, which provides information about hate crime or incidents and on how to report it - <http://www.report-it.org.uk/home>
- (e) Citizens Advice Bureau - <https://www.citizensadvice.org.uk/discrimination/hate-crime/how-to-report-a-hate-incident-or-hate-crime/>
- (f) Equality Advisory Support Service - <http://www.equalityadvisoryservice.com/app/help>

¹¹ The Children Act 2004, section 10.2 requires schools to have in place arrangements that improve the well-being of children. The Education and Inspections Act 2006, section 89 requires a head teacher to determine measures to be taken with a view to encouraging good behaviour and prevent all forms of bullying. The Education (Independent School Standards) (England) Regulations 2010 require an anti-bullying strategy to be drawn-up and implemented.

¹² The Children Act 2004 applies to a local authority and under the Education Act 2002, section 175 a local authority must ensure education functions are exercised with a view to safeguarding and promoting the welfare of children.

¹³ Government policy paper, “challenge it, report it, stop it: the Government’s plan to tackle hate crime” (March 2012)

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- (g) The government website also lists support available for victims - <https://www.gov.uk/get-support-as-a-victim-of-crime>

This paper has been prepared based on the following publically available resources

1. European Union agency for fundamental rights, making hate crime visible in the European Union - acknowledging victim's rights (2012)
2. Government policy paper, "challenge it, report it, stop it: the Government's plan to tackle hate crime" (March 2012)
3. Law Commission, "hate crime: should the current offences be extended?" (May 2014)
4. Law Commission, "hate crime: should the current offences be extended? Summary for non-specialists" (May 2014)
5. Citizens advice summary of hate crime as stated on their website as of 3 February 2016 and at the following address –
<https://www.citizensadvice.org.uk/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>
6. The Crown Prosecution Service summary of hate crime as stated on their website as of 3 February 2016 and at the following address –
http://www.cps.gov.uk/northeast/victims_and_witnesses/hate_crime/
7. The case law and legislation as mentioned within this note. The legislation and case law is not intended to provide an exhaustive list, only a general overview of some legislation and case law relating to hate crime.