**The Strengths and Limitations of Enhanced Sentencing for Hate Crimes**

By Marian Duggan

BetweenJune and September 2013 the UK [Law Commission](http://lawcommission.justice.gov.uk/) consulted with a range of community, voluntary, academic, statutory and lay representatives on Government proposals to alter parts of the existing hate crime legislative framework in England and Wales. This followed the Coalition Government’s publication of [*Challenge It, Report It, Stop It: The Government’s Plan to Tackle Hate Crime*](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf). In May 2014, the Law Commission published [*Hate Crime: should the current offences be extended?*](http://lawcommission.justice.gov.uk/docs/lc348_hate_crime.pdf)in which they detailed their findings. This blog focuses on one aspect of the report: whether existing measures to enhance sentences for hate crime offenders may be the stymieing factor in rendering ‘hate crime’ legislation effective.

**Reasons and Rationales for Enhanced Penalties**

‘Enhanced sentencing’ is applicable in cases whereby hostility has been successfully established by the prosecution. This provision currently applies to all five recognised characteristics under sections 145-146 of the [Criminal Justice Act 2003](http://www.legislation.gov.uk/ukpga/2003/44/contents) (race, religion, disability, sexual orientation and gender identity) where the issue is *motivations* or *demonstrations* of hostility in offences, but the implementation of this provision has been questionable. Furthermore, the eventual conviction will not necessarily indicate the prejudicial motivator on the offender’s record or anywhere else.

By contrast, the [Crime and Disorder Act 1998](http://www.legislation.gov.uk/ukpga/1998/37/contents) recognises offences *aggravated* by hostility, but only for racial or religious offences. The Commission assessed the scope of extending the 1998 Act to apply equally to all five currently protected characteristics (thus being amended to include sexual orientation, disability and gender identity). They suggested that in principle this would be a good idea to enhance equality, but noted that a full-scale review of how both the 1998 and 2003 Acts works in practice to assess whether the enhanced sentencing systems are fit for purpose or in need of amendment and/or equalising.

In its recommendations, the Law Commission recognised that the provision for enhanced sentencing provides a ‘potentially powerful weapon in the fight against hate crime’. This has also been noted in the hate crime literature. Prominent hate crime scholars such as [Joanna Perry (2014),](http://www.policypress.co.uk/display.asp?ISB=9781447308768&) [Mark Walters (2014),](http://www.sussex.ac.uk/profiles/112655/publications) and [Paul Iganski (2014)](http://www.research.lancs.ac.uk/portal/en/people/paul-iganski(67c050a0-edf8-4223-aabc-e3726fbe1d95)/publications.html) who expand on [Gregory Herek and others’ (1998)](http://www.ncbi.nlm.nih.gov/pubmed/10596515) early research that the emotional impact of hate crime ‘hurts’ victims more, illustrate that the enhanced sentencing aspect of hate crime legislation symbolically addresses this additional layer of harm. However, the limitations of the Criminal Justice System are vast and the resulting impact on victims can mean that their engagement with it as a person affected by hate crime has the potential to do more damage.

For example, this ‘weapon’, as outlined by the Commission, has its shortcomings. In cases brought under the 2003 Act, the judge is required to declare to the court that the sentence has been enhanced due to the hate element. However, it is rarely – if ever – recorded elsewhere, thus for researchers seeking to assess the prevalence and efficacy of this sentencing provision, little data are available for review. Speculation also abounds whether this provision is being under-used due to several factors such as the motivation or hostility element being difficult to prove; the current system of plea-bargaining making the ‘standard’ sentence look more favourable than the enhanced version; or the absence of a stigmatic labelling if the enhanced element is dropped in return for a guilty plea to the base offence. This latter point is important as to be an assailant is one thing, but a racist assailant quite another.

In effect, such a ‘weapon’ is largely tokenistic if it is being deployed in the manner for which it was designed. However, symbolism is important – especially to victims. Offering victims an *additional* level of recognition though sentence uplifts that are subsequently *unlikely* to be implemented suggests that the system is not working in the victim’s interests when it matters. If it is (criminal) justice that a victim wants, then in many cases a successful conviction may provide this. However, if this is at the cost of recognising and *then rejecting* the existence of the targeted or hostile element there is a danger that the victim may well be left in a worse emotional state exiting the criminal justice process than when they entered.

**Enhancement Provisions: Improve or Remove?**

The Law Commission suggested that new sentencing approach guidance from the [Sentencing Council](http://sentencingcouncil.judiciary.gov.uk/)  coupled with a more robust recording practice of enhanced sentencing cases would address the provision’s shortcoming. If adopted, the Police National Computer record will begin to show an offence prosecuted under the 2003 Act as being motivated by hostility, just as it would show a conviction for an aggravated offence prosecuted under the 1998 Act. These reforms have been proposed regardless of whether the 1998 Act is amended. However, this requires keeping the enhanced sentence provision.

On the other hand, if the uplift were to be removed but the charge (and subsequent conviction) were to state that it was for a ‘hate crime’, the recognition of the harm faced by the victim would still be there (and, if recording practices changed, it would also be on the offender’s record) thus the symbolism would still be in place for those in whose favour it works. Better data would be available for researchers and offenders would be more easily identified for programmes seeking to address hostility and prejudice with a view to preventing reoffending (see Northern Ireland’s [*Challenge Hate Crimes project*](http://www.niacro.co.uk/challenge-hate-crime/)).

Is enhanced sentencing is proving more reductive than productive in addressing hate crime? In the Republic of Ireland, consultations are currently ongoing with a number of statutory, community, voluntary and academic organisations regarding the establishment of hate crime legislation. Therefore, the country is in a strategic position to learn from comparable areas what works when it comes to effective and impactful hate crime laws. Having them sends a symbolic message both that a particular form of hostility exists in a society and those in positions of power tasked with governance of that society are committed to addressing it. However, such laws will remain merely symbolic if the desire – or ability – to fully implement them is absent.

**References**

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