

HATE CRIME BULLETIN

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Crime bulletin

Editor: Claire Harden
Enquiries: John Kerr

9 Gough Square
London EC4A 3DG

Tel: 020 7832 0500
Fax: 020 7353 1344
DX LDE 439

Email:
clerk@9goughsquare.co.uk

Web: www.9goughsquare.co.uk

Racially Aggravated Offences



Claire Harden

Introduction

The murder of Stephen Lawrence in 1993, The Soho Brixton and Brick Lane nail bombings in 1999 and the murder of Stephen Hoskin in St Austell, Cornwall in 2006. These 3 disgraceful crimes were all committed by offenders motivated by hate. Stephen Lawrence by racists, the London nail bombings by a man obsessed with harming the gay community and Stephen Austell, a man with severe learning difficulties, murdered by teenagers motivated by hatred of his disabilities. In the case of Stephen Austell his killers burnt him with cigarettes, made him walk around on a dog lead, and confess to being a "paedophile" before forcing him over a viaduct where he fell 100ft to his death; this against a man with a reading age of 6.

The Police and CPS policy on Hate Crime is that any report of it must be treated seriously and appropriately with special account taken of the needs and fears of any victim and witnesses. The ACPO Guidelines published after the Stephen Lawrence Inquiry Report show a philosophical change in police policy from "treating everyone the same" to adopting a "needs based approach". The idea being that in order to reduce and effectively tackle hate crime special account must be taken of it and its impact of victims and witnesses.

Hate Crime is defined by the Home Office as any incident which constitutes a criminal offence, which is perceived by the victim or any other person as being motivated by prejudice or hate. This bulletin aims to give the reader an introduction to the specific legislation enacted to deal with Hate Crime, the CPS and Police approach to such matters and the current sentencing regime.

Racist and Religious Crime

In their "Guidance on Prosecuting Cases of Racist and Religious Crime", the CPS state that "Racist and Religious Crime is particularly hurtful to victims as they are targeted solely because of their personal identity, their actual or perceived racial or ethnic origin or their actual or perceived belief or faith."

The impact on victims is different for each individual but common problems are experienced by victims of racist or religiously aggravated crime. They may feel isolated, fearful of going out or staying home, some will become withdrawn and suspicious of strangers. In more serious cases a person's physical or mental

health may suffer. The confusion and fear and lack of safety felt by individuals have a ripple effect on the community of their racial or religious group. Communities can feel victimised and vulnerable to attack. Victims or witnesses may experience "Secondary Victimization" where investigating authorities fail to treat offences seriously.

The Main Legislative Tools

The Crime and Disorder Act 1998 (CDA) came into force on 30th September 1998 and created a number of specific offences s.29-32 of racially aggravated crime, based on offences of wounding, assault, damage, harassment and threatening/abusive behaviour (the most commonly experienced crimes). In order to be found guilty an offender must have committed the basic offence and the offence must be racially aggravated. An offence is racially aggravated 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 group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

Presumed means presumed by the offender. If an offender assaults a person because he believed mistakenly that the victim is a member of a racial group the offence is made out.

The CDA was amended by the Anti-terrorism Crime and Security Act 2001. It created new specific religiously aggravated offences (the same as above).

A racial group is defined as a group of persons defined by reference to race, colour, nationality or ethnic or national origins. Jews and Sikhs are included in the definition (see *Mandla v. Dowell-Lee* [1983] 2 AC 548). A religious group means a group of persons defined by reference to religious belief or **lack** of religious belief.

Additionally the Public Order Act 1986 Part III created a number of offences where acts are done by offenders that are threatening, abusive and insulting and are intended to **or are likely** in all the

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circumstances to stir up **racial** hatred. The Racial and Religious Hatred Act 2006 created new offences of stirring up **religious** hatred which are significantly different from those contained in the Public Order Act 1986 and amends the same. The offence is committed if a person uses threatening words or behaviour, or displays any written material which is threatening, if he **intends** thereby to stir up religious hatred. Possession, publication or distribution of inflammatory material is also an offence. The offence can be committed in a public or private place, but not within a dwelling. Importantly the Defendant must intend to stir up religious hatred rendering it more difficult to prosecute for inciting religious hatred as opposed to racial hatred. Reports of these offences must be referred to the Counter Terrorism Division and cases can only proceed with the consent of the Attorney General.

Racist chanting at football matches is an offence contrary to s.3 Football Offences Act 1991. This offence is committed when a group of people or person acting alone chants something of a racial nature at a **designated**

football match. The crime does not apply to chanting of a religious nature. CPS guidance makes clear this offence should not be seen in isolation and as demonstrated above is by no means the only legislative tool available.

Prosecuting Cases of Racist and Religious Crime

CPS Guidance stresses that it is important that cases are handled in a timely manner. Any case must be referred to the appropriate crime co-ordinator to be reviewed by a particularly experienced or "specialist" prosecutor. **Counsel** instructed to prosecute should have a clear understanding of the policy and act in accordance with it. The aim of these measures is to ensure the CPS plays its part in stopping racially and religiously aggravated offences and in bringing offenders to justice.

Claire Harden

Homophobic and Transphobic Hate Crime



Jennifer Scott

Although racially and religiously aggravated offences have been on the statute books for some time, the only statute in force that deals with crimes motivated by sexual orientation is section 146 of the Criminal Justice Act 2003, which makes such motivation for committing crimes an aggravating factor. There is no definition in the Act of a homophobic or transphobic incident. However, the CPS definition is 'any incident which is perceived to be homophobic or transphobic by the victim or any other person'. In 2002, the CPS embarked on a campaign to increase the reporting of and convictions for, homophobic and transphobic crime: it considers such crimes particularly serious because they undermine people's right to feel safe about and be safe in their sexual orientation.

Historic reasons for the lack of reporting and/or convictions for crimes motivated by a person's sexual orientation still stand true today. A lack of confidence in the criminal justice system, stemming from the fear of the treatment of homosexual and transgender communities by the police, prosecutors and courts has meant that victims and witnesses of crimes often decide not to report them. Some individuals are concerned that by reporting a crime committed against them, and in particular by giving evidence in a public court, they might be 'outed' to a greater degree than they ever intended in their lifetimes. Others are wary of reporting such crimes because their actions at the time of the alleged offence might become the subject of a criminal investigation themselves, for minor sexual criminal offences such as cruising or cottaging.

Although the CPS claims some success from their campaign, such concerns are not easily overcome. There can be no guarantee of immunity from prosecution, although the CPS Guidance on such crimes states that where a person who commits a minor offence becomes the victim of, or a witness to, a more serious crime, it is right, as a matter of public policy, that the more serious crime is investigated and, where appropriate, prosecuted, even if it means that the minor offending of the victim or witness is not prosecuted.

For those concerned about their private lives being put on public display through the court process, there is the possibility of an application for reporting restrictions under s.46 of the Youth Justice and Criminal Evidence Act 1999. Applications can also be made for special measures to be put in place at trial. For those concerned about retaliation from those individuals whom they have reported, bail conditions to prevent a Defendant from entering a certain area or contacting certain people might go some way to reassuring victims and witnesses of their safety. However, none of these measures is capable of guaranteeing an individual that their fears relating to reporting crimes or giving evidence will not be borne out in the future.

If a victim or witness reports a crime but then withdraws their statement or refuses to attend court, the CPS will undertake an investigation into the reasons for the withdrawal and take steps that they hope will reassure those individuals and encourage them to give evidence in court. If they still refuse, the CPS will have to decide whether they have grounds for a hearsay application for the statement to be used in court, whether they can proceed without the evidence of the victim, whether they wish to compel the victim to attend court or whether they will withdraw the prosecution. While the Prosecution will take the views of the victim and his or her family into account when deciding whether it is in the public interest to continue a prosecution, the final word does not rest with the victim, and witness summonses will be used if considered necessary by the CPS.

It is for these reasons, amongst others, that homophobic and transphobic crimes remain under-reported and under-represented in the statute books. However, in May 2008, the first statutory provision creating criminal offences specifically concerned with hatred on the grounds of sexual orientation was introduced by section 74 of the Criminal Justice and Immigration Act 2008, which inserts new criminal offences into the Public Order Act 1986. That section is not yet in force. For now, those individuals who have campaigned for more accountability for those who commit crimes related to homophobia or transphobia will have to make do with s.146 CJA 2003.

Jennifer Scott



Hate Crime against the disabled



James Thacker

Charities report that crime against the disabled is worryingly common. The Disability Rights Commission's Attitudes and Awareness Survey in 2003 revealed that 22% of disabled respondents had experienced harassment in public because of their impairment. Research by Mencap demonstrated that 90% of people with a learning disability had experienced bullying and harassment.

Safety and security, and the right to live free from fear and harassment, are fundamental human rights and the CPS recognises the wider community impact of disabled hate crime where it strikes at all disabled people by undermining their sense of safety and security in the community. Such crimes are based on ignorance, prejudice, discrimination and hate and they have no place in an open and democratic society.

In April 2005 the law was changed by *section 146 of the Criminal Justice Act 2003 ("CJA")*. Section 146 did not create any new offences; it imposed a duty upon courts to increase the sentence for **any** offence (for example, assault or criminal damage) aggravated by hostility based on the victim's disability (or presumed disability).



“Disability”

This means any physical or mental impairment (see section 146(5) of the CJA). It is important to note that the definition under the CJA is not the same as that defined within the Disability Discrimination Act 2005 which covers people with a wide variety of disabilities, including those people living with HIV or AIDS, or who have cancer or multiple sclerosis.

“Hostility”

Hostility is not defined in the Act. The ordinary dictionary definition of hostile includes simply being “unfriendly”. One will see from the case law on racially aggravated offences that “demonstrations” of hostility often involve swear words. Proving that there was a “demonstration” of hostility requires evidence of words or actions

which show hostility towards the victim. This may be in the form of spoken or written words. The case of *Parry v DPP [2004] EWHC 3112* confirmed that hostility can be demonstrated even if the victim is absent, as long as it occurs in the immediate context of the substantive offence; and the word “immediately” qualifies both the words “before” and “after” and accordingly hostility has to be demonstrated immediately in either case.

When does section 146 CJA apply?

The section applies in either of the following circumstances:

At the time of committing the offence or immediately before or after doing so, the offender demonstrated toward the victim of the offence hostility based on a disability or presumed disability of the victim

OR

the offence was motivated (wholly or partly) by hostility towards persons who have a disability or a particular disability.

Special Measures

It is important to remember that special measures were introduced by the *Youth Justice and Criminal Evidence Act 1999* and are available in both the Crown and Magistrates Courts. These provide for video evidence to be given in chief; the use of screens in court; giving evidence via live-link; clearing the public gallery in sexual offence cases or cases involving intimidation; the use of communication aids, for example, an alphabet board, sign and signal boards, or hearing loop; giving evidence through an intermediary (such as a speech and language therapist or a deaf intermediary) and finally in the Crown Court, advocates and the judge removing their wigs and gowns. Among those particular witnesses that special measures are designed to assist are adults (17 years and over) who may be considered vulnerable because of incapacity, such as a physical or mental disorder; or learning disability; and witnesses whose evidence is likely to be affected because they are intimidated (for example, afraid or distressed about giving evidence).

How seriously should crimes against the disabled be viewed?

When an offender has pleaded guilty or been found guilty and the court is deciding on the sentence to be imposed, it must treat evidence of hostility based on disability as something that makes the offence more serious. The court must also state that fact openly. Section 146 is designed to ensure that these offences are treated seriously by the police, prosecutors and the courts and brings them in line with offences that are aggravated by racial or religious hostility or hostility based on sexual orientation.

James Thacker

Sentencing Hate Crime



Eleanor Mawrey

Is it easy to think of the specific racially/religiously aggravated offences contained within the *Crime and Disorder Act 1998*, but it is important to remember that by virtue of s.145 of the *Criminal Justice Act 2003* (and s.146 for aggravation relating to disability or sexual orientation) all offences can and indeed should receive an uplift in sentence if they were so aggravated.

The Crime and Disorder Act 1998

The *Crime and Disorder Act 1998* introduced certain offences, namely racially or religiously aggravated assaults (s.29), criminal damage (s.30), public order offences (s.31) and harassment (s.32) each of which has its own sentencing provisions, providing an uplift on the maximum term of the original offence.

	Standard Offence	Racially/Religiously aggravated
Common Assault	6 months	2 years
ABH	5 years	7 years
Criminal Damage	10 years	14 years
s.4 and s.4A Public Order offence	6 months	2 years
s.5 Public order Offence	Fine not exceeding level 3	Fine not exceeding level 5
s.2 Harassment	6 months	2 years
s.4 Harassment	5 years	7 years

Criminal Justice Act 2003, s.145 and s.146

Any other offence, which has been racially or religiously aggravated is dealt with under s.145 of the *Criminal Justice Act 2003*, with aggravation related to disability or sexual orientation being dealt with under s.146. These sections compel the judge to deal with the aggravated behaviour as an aggravating factor when sentencing and to state in open court that the offence is so aggravated. If there is a dispute about whether the offence was aggravated this must be resolved in a Newton hearing and it is important to note that the Prosecution can call evidence after conviction to establish the aggravating feature (it should not be adduced as part of the trial unless it goes towards proving the elements of the original offence charged).

Sentencing Process

The court should normally embark on a two stage process. Firstly the judge should indicate the sentence he or she would have imposed but for the aggravating feature, then add an appropriate amount to reflect the racial aggravation. *R v Kelly & Donnelly [2001] 2 Cr App.R. (S) 73*.

Serious aggravating factors

- (i) nature of the hostile demonstration whether by language, gestures or weapons

- (ii) its length;
- (iii) planning;
- (iv) a pattern of racist offending;
- (v) membership of a group promoting racist activities;
- (vi) deliberately setting the victim up for the purposes of humiliation or to be offensive;
- (vii) if the offence took place at the victim's home;
- (viii) if the victim was particularly vulnerable or providing services to the public;
- (ix) if the timing or location of the offence maximized the harm or distress it caused;
- (x) if the expressions of racial hostility were repeated or prolonged;
- (xi) if fear and distress throughout a particular community resulted from the offence; and
- (xii) if particular distress was caused to the victim or the victim's family.

Less seriously aggravating factors

- (xiii) if the racist element was limited in scope or duration;
- (xiv) if the motivation for the offence was not racial; and
- (xv) if the element of racial hostility or abuse was minor or incidental.

Ancillary orders

ASBOs:

Restraining Orders: under the *Protection from Harassment Act 1997* again a range of prohibitions can be applied

Football Banning Orders: Under the *Football (Disorder) Act 2000*, where a person is convicted of an offence contained within schedule 1 of the *Football Spectators Act 1999* a banning order must be made if the court is satisfied that there are reasonable grounds to believe it would help to prevent violence or disorder at, or in connection with, any regulated football match. This will obviously be of relevance if it is a case of racist chanting but in fact any offence, such as the racially aggravated public order offences or any offences of violence to people or property can be supported by an order if it takes place in the context of football (see the full schedule for the offences covered).

Compensation Orders

Confiscation/ Forfeiture Orders: Under s.143 of the *Powers of Criminal Courts (Sentencing) Act 2000*, the court is entitled to deprive the Defendant of any property seized from him or under his possession at the time of the offence if it was used for the purpose of committing, or facilitating the commission of the offence, or was intended by him to be used for that purpose. This obviously applies to weapons etc. used during the course of aggravated offences. Furthermore, s.25 *Public Order Act 1986* states that following a conviction for possession of racially inflammatory material under s.23 the court must order the forfeiture of said material.

Eleanor Mawrey