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# Formulating the legislative structure of a hate crime*

Jennifer Schweppe

University of Limerick
Correspondence email: jennifer.schweppe@ul.ie

ABSTRACT

While hate crime legislation is well established in England and Wales, Scotland, and Northern Ireland, Ireland has failed to address the issue of hate crime on a statutory basis. Law reform processes are currently underway across these jurisdictions, and this article seeks to explore a fundamental question in this context, that is, the relative merits of various approaches to structuring hate crime legislation.

**Keywords:** hate crime; hate studies; sentencing; law reform.

## INTRODUCTION

Across the four jurisdictions on the two islands – Ireland, Northern Ireland, Scotland, and England and Wales – law reform efforts are underway to determine the means by which the hate element of a crime should be addressed by the law. Interestingly, all four jurisdictions currently take very different approaches to the issue, from Ireland, which relies purely on judicial discretion, to England and Wales, which has what might be regarded as the most sophisticated approach to hate crime globally. Scholars have identified that there are three core questions whose relevance transcends the differences and commonalities in the construction of hate crime laws:

- the range of protected categories included in such legislation;
- the formal recognition of the hate element as either part of an aggravated offence or through the sentencing process;
- the extent to which the hate element should be present in the offence.[1]

Thus, legislating against hate is not a simple task: Rosenberg observes that, for better or worse, 'certain bias crimes represent a drastic

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1 See, for example, Kay Goodall, 'Conceptualising "racism" in criminal law' (2013) 33(2) Legal Studies 215; Jon Garland and Neil Chakraborti, 'Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union' (2012) 9(1) European Journal of Criminology 38.

doctrinal departure from a longstanding maxim of criminal law'.[2] The reason for this is that, traditionally, the motivation of the offender is dealt with at sentencing, rather than being included in a substantive offence – thus addressing the third of the commonalities above. For this reason, developing the very structure of hate crime legislation is perhaps one of the more legally contentious questions we must ask: do we keep with tradition and consider the hate element at the sentencing stage; do we insert it into the offence itself; or do we create a 'third way' of ensuring the hate element is presented in the case? The first approach – the 'enhanced sentencing' approach – provides through statute that, where a hate element is present in a case, the court must or should treat that element as an aggravating factor in sentencing. The second approach – the 'aggravated offences approach – creates new (aggravated) forms of existing offences, by attaching the hate element to the base offence as well as (typically) providing a higher maximum penalty for the aggravated offence than for the base offence. The third approach – referred to in some of the literature as the 'hybrid approach' – is to create a separate charge for the hate element of the offence which can be attached to any offence.[3] The fourth and final model is the penalty enhancement statute, common in codified systems of law, which typically treats the hate element as an aggravating factor in sentencing, whilst simultaneously enhancing the penalty which can be imposed for all offences, by increasing the maximum sentence which can be imposed, or setting up a specific enhancement to be attached to the sentence.

While there are many theoretical debates to be had regarding the necessity or justification for hate crime laws, a practical consideration which must be considered is whether the legislation will 'work': that is, will the legislation be used to ensure that hate crime is appropriately investigated, prosecuted and sentenced, or will the hate element of the crime remain 'disappeared'. This article, then, will explore the current approaches to hate crime of all four jurisdictions on these two islands, seeking to understand how such approaches might guide and inform law reform processes across the two islands. It will look to four key approaches: relying on judicial discretion; introducing statutory sentence enhancement provisions; the Scottish approach of having

2 Michael T Rosenberg, 'The continued relevance of the irrelevance-of-motive maxim' (2008) 57 Duke Law Journal 1143, 1173.

3 The term 'hybrid approach' is one coined by Goodall and Walters (Kay Goodall and Mark Walters, *Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth* (Human Dignity Trust 2019)) and adopted by Desmond Marrinan (Independent Review of Hate Crime, *Hate Crime Legislation in Northern Ireland – An Independent Review Consultation Paper* (Hate Crime Legislation in Northern Ireland 2020), and for the sake of consistency within the literature on this issue, I also use it here.

a sentencing-related charge; and the introduction of new aggravated offences. In exploring the benefits of each model, I look to the clarity of the law, its efficacy and the impact on offenders. Though the benefits of each model are clear, I ultimately advocate for the introduction of the aggravated offences model.

There is also a European context to this issue. The European Union (EU) Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (the Framework Decision) was introduced in 2008. The stated purpose of the Framework Decision is to ensure that 'certain serious manifestations of racism and xenophobia are punishable by effective, proportionate and dissuasive criminal penalties throughout the EU', and further aims to 'improve and encourage judicial cooperation' in this context. Article 4 of the Framework Decision addresses the issue of hate crime, and in this regard requires member states to 'take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties'. The report on the implementation of the Framework Decision elaborates, stating that the member states must ensure 'that racist and xenophobic motives are properly unmasked and adequately addressed'.[4]

The EU Fundamental Rights Agency observes that this requirement under article 4 reflects the rights of victims of racist crime as established and required by case law of the European Court of Human Rights (ECtHR). The Court in *Angelova and Iliev v Bulgaria*[5] set out the obligations of the state in relation to a racially motivated murder of two members of the Roma community. In the context of an application under article 2 in conjunction with article 14, the court set out the obligations of states:

> … when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.[6]

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4 European Union Agency for Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime (European Union Agency for Fundamental Rights 2013) 8.

5 App no 55523/00 (ECtHR, 26 July 2007).

6 Ibid para 115.

Importantly, as Hanek observes, while having specific legislation which addresses the hate element of a crime is beneficial, the obligation to unmask the hate element applies even in the absence of such legislation.[7] It is also important to note that the efficacy of hate crime legislation is not entirely dependent on its structure or scope: research shows, and advice from the European Commission tells us, that in the absence of structural and policy supports to bolster the legislation being implemented at a national level, the hate element of a crime disappears though the criminal process.[8] Legislation is just one element to facilitate the process, but that element cannot be underestimated: legislation will inform and drive these supportive and facilitative processes. The first part of this article will explore the manner in which courts understand and approach hate crime in the absence of legislation using Ireland as a case study. The next will explore the three legislative approaches that can be considered: aggravated sentencing provisions; aggravated offences; and the so-called hybrid model.

## MODEL 0: IRELAND – UNDERSTANDING HATE IN THE ABSENCE OF LEGISLATION

While most European countries have introduced hate crime legislation, Ireland remains an outlier, with no statutory recognition of hate crime and limited jurisprudence on the issue. The latter fact is unsurprising, given the fact that the sentencing process in Ireland is a discretionary one, with few limitations and even less guidance given either by the legislature or the appellate courts on sentencing issues: as O'Malley states, 'Ireland's sentencing system remains largely discretionary, reflecting a commitment to individualised justice for criminal offenders.'[9] It was only very recently that the Irish courts addressed the sentencing of racist crime in any way. The first written judgment in which the question as to whether a racist motivation is an aggravating factor was given in *Director of Public Prosecutions v Elders*.[10] In the case, the racist element was present at the beginning of a series of events which took place where the appellant said to the injured party: '"eff off"... "eff off Packi [sic] bastards"'. The sentencing judge assessed the offence as being at the top end of seriousness, and that 'the racist

7 Aleš Gião Hanek, 'International legal framework for "hate crimes: which law for the "new" countries' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 467.

8 Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (Irish Council for Civil Liberties 2018).

9 Thomas O'Malley, *Sentencing Law and Practice* 3rd edn (Round Hall 2016) 1.

10 [2014] IECA 6.

element was an aggravating factor' and sentenced the appellant to a term of five years' imprisonment, the maximum sentence available for that offence.

In assessing whether the sentence imposed was appropriate, Birmingham J discussed the aggravating factors:

> Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.

While accepting the very serious nature of the offence, the Court of Appeal found that the sentencing court had failed to take appropriate account of the mitigating factors and suspended the final 12 months of the sentence, subject to an offer of €4000 compensation being paid to the injured party.

Whilst there have been some – though no more than a handful – of reported cases since *Elders* which considered racism as an aggravating factor, *Elders* is considered the core precedent on the issue. However, it leaves a number of questions unanswered: as discussed above, two of the key issues which hate crime legislation addresses are (1) the personal or protected characteristics relevant in the context of such legislation; and (2) the extent to which the hate element must be present in the offence (eg whether motivation of hostility or demonstration of hostility is required) . *Elders* offers no advice on either of these issues, even by way of *obiter* statements. With respect to the first question, in the context of disablist hate crime, Kilcommins et al[11] observe that, while there is little jurisprudence on the question, there is 'no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor'.[12] That said, there is, of course, nothing *requiring* a court to take it into account as an aggravating factor either. In this context, Kilcommins et al recommend that a statutory provision be introduced which 'provides that an offence committed against a vulnerable person such as a person with a disability may be considered an aggravating factor at sentencing stage'.[13] The same line of argument applies in the context of other commonly protected characteristics, such as sexual orientation, gender identity or expression, religion, or age.

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11 Shane Kilcommins, Claire Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Irish Council for Civil Liberties 2013).

12 *Elders* (n 10 above) 51

13 Ibid 228.

With respect to the second question, it is not clear what level of proof is required in order to establish the racist element, and this issue has not been clarified by later reported cases. In *Director of Public Prosecutions v Collins*,[14] for example, the trial judge seems to have taken into account the fact that the offence 'may have been racially motivated'.[15] Birmingham J stated:

> He was prompted to do this by a sentence in the probation report which quotes their client as saying 'he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend.' By reference to this sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.[16]

The Court of Appeal did not take the opportunity to consider whether this amounted to proof of racist motivation on the part of the accused, nor whether such evidence was appropriate to consider as proof of a racist motivation. While the court did not explicitly criticise the sentencing judge for treating statements in the probation report as proof of a racist motivation to the offence, it did state that it was 'not clear' what role, if any, this concern regarding a racist motivation had when it came to determining the sentence.

Aside from the legal issues which arise, there are also practical issues relating to the absence of hate crime legislation in an Irish context. Quite simply, the Irish criminal justice process has been shown to be incapable of addressing or even recognising hate crime in the absence of legislation. Indeed, Haynes and Schweppe have clearly shown that the hate element of a crime is 'disappeared' from the process as the offence makes its way through the criminal justice system.[17] So, while the understanding of the courts of hate and hate crime is not terribly sophisticated, this lack of understanding is matched across the process, and, indeed, it is only in rare cases that the court will have an opportunity to review the hate element of a crime.[18]

I believe that the Irish situation is currently untenable. In the absence of clear guidance from the appellate courts, offenders are labelled as criminal racists where the offence 'may have been racially motivated', a standard of proof far too low. The lack of clarity regarding the range of categories to which the aggravation applies is equally problematic. After years of inaction and outright rejection of the claim that hate

14 [2016] IECA 35.
15 Ibid para 15.
16 Ibid.
17 Schweppe et al (n 8 above).
18 Ibid.

crime was a problem in Ireland, the state has come to accept that the introduction of hate crime legislation is required.[19]

Indeed, the question as to whether introducing hate crime legislation in this context would be useful or not is one which has not just troubled Ireland, but is a well-rehearsed issue globally.[20] It is now generally accepted that, in order to address hate crime, legislation is required to ensure that the criminal justice process responds to the phenomenon effectively.[21] One of the key questions which then remains is what structure such legislation should take. The remainder of this article will reflect upon the manner in which three key legislative provisions operate in practice and consider each from a law reform perspective. The aim is to inform the law reform processes across all four jurisdictions, though of course cultural, legal and policy differences will influence the ultimate recommendations for legal developments in each jurisdiction. Across Northern Ireland, England and Wales, and Scotland, three models of legislation are in operation. These three models will now be considered in turn.

## MODEL 1: ENGLAND AND WALES – AGGRAVATED OFFENCES

While legislators and courts in the United States have been grappling with concepts and constructions of hate crime for decades, they have a more recent pedigree in England and Wales.[22] The initial legislative vehicle for recognising hate crime was part 2 of the Crime and Disorder Act 1998. It introduced the concept of the racially aggravated offence which carried a higher penalty than its non-racially motivated counterpart.[23] As Malik notes, the Act does more than simply bolt on the aggravating factor to the existing offences: rather, 'the new racially aggravated offences are aimed at conduct which causes harm of a qualitatively different type to that caused by the basic offences'.[24]

19 See Department of Justice, *Legislating for Hate Speech and Hate Crime in Ireland Report* (Department of Justice 2020).

20 It is not proposed to explore these arguments in any detail in this article given its focus, but on this issue see, for example, Benjamin Bowling and Coretta Phillips, *Race, Crime and Justice* (Pearson Education 2002); James B Jacobs and Kimberly Potter, *Hate Crimes* (Oxford University Press 1998).

21 See, for example, Schweppe et al (n 8 above).

22 Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage 2015).

23 In England and Wales, a model of aggravated sentencing is also used: this section will explore the aggravated offences only for the purposes of illustrating the legislative approaches.

24 Maleiha Malik, 'Racist crime: racially aggravated offences in the Crime and Disorder Act 1998 part II' (1999) 62 Modern Law Review 409, 419.

| Section no | Offence | Max penalty non-aggravated | Max penalty aggravated |
|---|---|---|---|
| OAPA, s 20 | Malicious wounding/grievous bodily harm | 5 years | 7 years |
| OAPA, s 47 | Actual bodily harm | 5 years | 7 years |
| CJA, s 39 | Common assault | 6 months | 2 years |
| CDG, s 1 | Criminal damage | 10 years | 14 years |
| POA, s 4 | Fear of provocation of violence | 6 months | 2 years |
| POA, s 4A | Intentional harassment, alarm or distress | 6 months | 2 years |
| POA, s 5 | Harassment, alarm or distress | £1000 fine | £2500 fine |
| PHA, s 2 | Harassment | 6 months | 2 years |
| PHA, s 2A | Stalking | 6 months | 2 years |
| PHA, s 4 | Putting people in fear of violence | 5 years | 7 years |
| PHA, s 4A | Stalking involving fear of violence or serious alarm or distress | 10 years | 14 years |

**Table 1:** Offence type and maximum penalty (hate and non-hate aggravation) under Crime and Disorder Act 1998.[25] **Key:** OAPA = Offences Against the Person Act 1861; CDG = Criminal Damage Act 1971; PHA = Protection from Harassment Act 1997; CJA = Criminal Justice Act 1988; POA = Public Order Act 1986

The Act, under sections 28–32, created new forms of racially aggravated offences, which include assault, assault occasioning actual bodily harm, malicious wounding/grievous bodily harm, harassment and stalking, as well as various public order offences (see Table 1). The Act was later amended to include religiously aggravated offences under the Anti-terrorism, Crime and Security Act 2001. The Act does not use the term 'hate crime', but rather addresses the hate element by reference to the identity characteristics protected, for example in the creation in section 29 of 'racially or religiously aggravated assault'. Section 28 of the Crime and Disorder Act states:

> (1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below 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

25 Table adapted from Law Commission, *Hate Crime: The Case for Extending the Existing Offences – A Consultation Paper* (Law Com CP No 213 2014) 24.

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

Following this definition, in the offences set out in sections 29–32, the maximum sentence available to the court in sentencing, for example, racially aggravated assault, is increased as compared to the sentence available on a non-aggravated charge. For some offences, the penalty enhancement is substantial, as is evident in Table 1. For example, the offence of assault currently carries a maximum sentence of six months' imprisonment which is increased by 400 per cent to two years imprisonment for cases aggravated by racial or religious hostility.

It is useful to note in this context that the Criminal Justice Act 2003 in England and Wales utilises a sentence enhancement model to address hate crime in relation to hate crime against individuals relating to their transgender identity, disability, or sexual orientation, thus creating a hierarchy of victims in that jurisdiction. The Law Commission of England and Wales conducted a consultation process and then published a report on hate crime in that jurisdiction in 2013–2014.[26] In the context of the present discussion, the primary question was whether the aggravated offences should be extended to the grounds of hostility protected under the 2003 Act. The Law Commission highlighted that one of the primary advantages of having aggravated offences as compared to the enhanced sentencing model is the fact that the former carry a 'unique descriptor', reflecting the fact that aggravated offences are considered more serious than their basic counterparts:

> The 'aggravated' label is designed to carry and communicate a stigma which 'stings' more deeply than the mere fact of conviction for the basic offence, even with an enhanced sentence.[27]

In this context, in its Consultation Paper, the Commission highlighted the fact that, with aggravated offences, the label will attach to the offender's criminal record. The offences also, as the Commission highlights in its Report, can be seen as giving recognition to 'the particular seriousness of hate crime, the greater culpability of its perpetrators and the greater harms it can cause'.[28] While in the Consultation Paper the Commission seemed in favour of extending the offences, it took a more cautious view in its Report, ultimately suggesting that a wider review of the aggravated offences was necessary, but that in the absence of such a review, the offences should be extended to the crimes committed on

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26 For details of this process, see Law Commission, 'Hate Crime'.

27 Law Commission (n 25 above) 68.

28 Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014) 96.

the basis of sexual orientation, disability and transgender identity, primarily for reasons based on ensuring equality across the grounds.

Linked to this issue, in a report published before the Consultation Paper, Burney and Rose note that defence lawyers emphasised the 'vehemence' with which racial aggravation was denied by defendants, highlighted in the fact that, in 1999, not-guilty pleas were entered for over 83 per cent of racially aggravated offences, and for only 47 per cent of substantive offences.[29] In its 2014 Consultation Paper, the Law Commission observed that one of the problems identified in prosecuting hate crime is the fact that defendants will plead only to the non-aggravated form of the offence, leading to charges being downgraded or even dropped.[30] However, for England and Wales, the conviction rate for racially and religiously aggravated offences is relatively high at 83.8 per cent.[31] Yet, in their recent study, Walters et al note that, when a more holistic analysis of the process is conducted, the very high conviction rates as set out by the Crown Prosecution Service are flattened somewhat.[32] They observe that prosecution outcomes for disability hate crime (73.13%) and religious hate crime (79.1%) are lower than homophobic and transphobic (82.98%) and race hate crime (84.07%).[33] The rate of guilty pleas also varies across categories, with only 63.44 per cent guilty pleas for disability hate crime, and 74.27 per cent guilty pleas for racist hate crime.[34]

In its Report, the Commission discussed the arguments in favour of extending the offences under 10 headings, the first of which related to the need to treat the protected characteristics equally.[35] The other nine, however, addressed the function of aggravated offences in the criminal justice process, including: labelling; the communicative and deterrent effects of aggravated offences; the potentiality for increased public confidence; and other procedural aspects. A number of arguments against the extension of the offences were also addressed, including: the current complexity of aggravated offences; the interrelationship between the aggravated offences and aggravated sentencing provisions; and the adequacy of sentencing provisions to address the mischief.

Despite these extensive considerations, Bakalis helpfully observes that there were ultimately two primary reasons the Commission was

29 Elizabeth Burney and Gerry Rose, *Racist Offences: How Is the Law Working? The Implementation of the Legislation on Racially Aggravated Offences in the Crime and Disorder Act 1998* (Home Office 2002) 89–90.

30 Law Commission (n 28 above) 131.

31 Hate Crime Annual Report 2016–2017 (Crown Prosecution Service 2016–2017) 8.

32 Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

33 Ibid 60.

34 Ibid.

35 Law Commission (n 28 above).

swayed in its view between consultation and report stage.[36] The first relates to the benefits of the proposed extension. While it was accepted that there may well be symbolic, communicative and fair-labelling benefits to the extension, it was also accepted that these benefits are speculative, and could potentially be achieved through the development of the enhanced sentencing regime. Second, and Bakalis suggests, most importantly, the consultation process brought to light a number of procedural and practical problems in relation to the operation of the aggravated offences which undermine their effectiveness:

> The unduly complex nature of the offences which allow for either the demonstration of hostility or the motivation of hostility causes problems in practice for prosecutors, and results in plea-bargaining, or the dropping or downgrading of aggravation charges. In many cases, it has also led to the aggravated charges not being brought in the first place as they are deemed too difficult to prosecute.[37]

Bakalis observes that the combined effect of these practical problems has led to aggravated offences not being used 'effectively', and not ultimately achieving the purposes for which they were designed.[38]

In their most recent study, Walters et al utilised rich empirical data to highlight some of the issues relating to the current legislative models in England Wales. In that study, they observe that the aggravated offences provisions were considered to be the 'cornerstone of the legal framework', and they found that those provisions were 'generally well comprehended by most practitioners, including judges'.[39] Indeed, the most significant criticism of the Crime and Disorder Act 1998 was that it did not apply across all protected characteristics.[40] A new issue identified in their research was the perception by some barristers and judges that the Crown Prosecution Service was engaging in 'over-charging', and had adopted an 'overly-zealous "pro-charge" policy'.[41] Though they highlighted a number of procedural issues which can cause 'injustice and unfairness', which their research uncovered with reference to the operation of the aggravated offences provisions of the Crime and Disorder Act, they were of the view that it was possible to rectify these procedural problems. Ultimately, when compared with

36 Chara Bakalis, 'Legislating against hatred: the Law Commission's report on hate crime' (2015) Criminal Law Review 192, 201.

37 Ibid 201–202.

38 Ibid 202.

39 Mark Austin Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka, 'Hate crime and the "justice gap": the case for law reform' (2018) 12 Criminal Law Review 961, 972.

40 Ibid.

41 Abenaa Owusu-Bempah, Mark Walters and Susann Wiedlitzka, 'Racially and religiously aggravated offences: "God's gift to defence"?' (2019) 6 Criminal Law Review 463, 473.

the aggravated sentencing model, they conclude that 'the rights and interests of defendants can be better protected through prosecution of specific hate crime offences (particularly where there is a trial by jury) than through the application of enhanced sentencing provisions.[42]

In its most recent Consultation Paper, *Hate Crime Laws: A Consultation Paper*[43] the Commission highlighted a number of criticisms regarding the legislation. What is interesting to note in this context is that no explicit concerns were expressed with respect to the legislative structure, other than the disquiet regarding the disparity in the way in which groups were treated under the legislation. One justification given by the Commission for retaining aggravated offences was to ensure that the increased maximum sentence available under those provisions was still available, though it admitted that the sentences imposed rarely exceed the sentence for the non-aggravated version. The Commission went on, however to state that adopting enhanced sentencing only 'is likely to send the wrong message ... and undermine the overall deterrent effect of hate crime laws'.[44]

This most recent Law Commission Consultation Paper referred to aggravated offences as 'among the most powerful forms of condemnation of characteristic-based criminal hostility'.[45] It further noted that repealing these provisions and relying only on the aggravated sentencing model would be problematic, 'particularly as one of the key purposes of hate crime laws is to signal the unacceptability of this conduct'.[46] Ultimately, the Commission provisionally proposes in this Consultation Paper that aggravated offences be retained, given their symbolic and deterrent effect. It is unclear in the Paper, however, the extent to which this recommendation is made given the symbolic effect of *repealing* such provisions, or whether it is based on the inherent deterrent and symbolic effect of legislation.

## MODEL 2: NORTHERN IRELAND – ENHANCED SENTENCING

While the substance of legislative developments in the area of crime and criminal justice matters in England and Wales is often followed in Northern Ireland a few years later by domestic legislation which takes

42 Ibid 484.
43 Law Commission, *Hate Crime Laws: A Consultation Paper* (Law Com CP 250, 2020).
44 Ibid 175.
45 Ibid 381.
46 Ibid.

account of any local differences applicable in Northern Ireland,[47] it was not until 2004 that legislation was introduced in Northern Ireland to address hate crime. Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 provides that, where an offence was aggravated by hostility, the court must treat that as an aggravating factor in sentencing, which increases the seriousness of the offence, and must state in open court that this is the case.[48] Here the legislation is based on the model from England and Wales, providing that the offence is aggravated by hostility if:

> ... at the time of committing the offence, or immediately after doing so, the offender demonstrates towards the victim of the offence hostility based on:
>
> (i) The victim's membership[49] (or presumed[50] membership) of a racial group;[51]
>
> (ii) The victim's membership (or presumed membership) of a religious group;[52]

47 The Crime and Disorder Act 1998, for example, was not extended to Northern Ireland 'because of the technical difficulties of doing so which made it impossible either to extend directly the provisions in their entirety or to introduce them by negative resolution procedure'. See *Race Crime and Sectarian Crime Legislation in Northern Ireland: A Consultation Paper* (Northern Ireland Office 2002).

48 For context, it is important to note that as well as considering the question as to whether the range of aggravated offences should be extended, the Law Commission in England and Wales considered the operation of the enhanced sentencing system in that jurisdiction. Legislation in England and Wales does not provide for specific offences where hostility is demonstrated towards a victim's sexual orientation, gender-identity or disability. Instead, s 146 of the Criminal Justice Act 2003 provides for sentencing provisions allowing judges to increase the penalty for an offender where there is evidence that proves he or she demonstrated hostility towards the victim based on the victim's sexual orientation, transgender identity and/or disability. Importantly, there is no corresponding aggravated offence in the context of these protected characteristics. Further, the Criminal Justice Act 2003 provides that where a court is considering the seriousness of an offence other than one provided for in ss 29 to 32 of the Crime and Disorder Act 1998, and the offence is racially or religiously aggravated, the court must treat that as an aggravating factor, and state in open court that the offence was so aggravated.

49 'Membership' includes association with members of that group, art 2(5).

50 'Presumed' means presumed by the offender, art 2(5).

51 'Racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls. See art 2(5) and art 5, Race Relations (Northern Ireland) Order 1997 (SI 1997/869, NI 6).

52 'Religious group' means a group of persons defined by reference to a religious belief or lack of religious belief.

(iii) The victim's membership (or presumed membership) of a sexual orientation group;[53]

(iv) A disability[54] or presumed disability of the victim.[55]

The legislation goes on to provide that if 'the offence is motivated (wholly or partly) by hostility' towards any of the above, the offence will also be one aggravated by hostility. Article 2(4) goes on to provide that it is immaterial whether the hostility is based to any extent on any other factor. The Order also makes provision for an increase in the maximum penalties available for certain offences, but these increases apply generally, and are not limited to cases which are aggravated by hostility, as was made clear in *R v Massey and Hawkins*.[56]

Jarman observes that police detection levels for hate crime in Northern Ireland have 'persistently' remained lower than for hate crime offences in other parts of the United Kingdom.[57] Further, Jarman notes that; when contrasted to comparable offences in Northern Ireland, detections have also remained persistently low.[58] When traced through the system, the attrition of the hate element of the offence is pronounced. As McVeigh articulates, things that were being labelled a 'hate crime' by the Police Service of Northern Ireland (PSNI) 'were not being processed as such by the criminal justice system'.[59] Jarman describes the attrition process:

> In the five years from 2007–2008 to 2011–2012 the PSNI recorded 13,655 hate incidents, including 9,376 hate crimes. These translated into 4.689 cases where the PSNI had gathered sufficient evidence to

53 'Sexual orientation group' means a group of persons defined by reference to sexual orientation. While transgender persons would not usually fall within this category, Criminal Justice Inspection Northern Ireland (CJINI) considers hate crimes against transgender persons to fall within the ambit of the legislation. See *Hate Crime: A Follow-up Inspection of Hate Crime by the Criminal Justice System in Northern Ireland* (CJINI 2010).

54 Disability for the purposes of the legislation means any physical or mental impairment, art 2(5).

55 Art 2, Criminal Justice (No 2) (Northern Ireland) Order 2004 (SI 2004/1991, NI 15)

56 [2008] NICC 2. These offences are, *inter alia*: malicious wounding or grievous bodily harm, increased from five years to seven years; assault occasioning actual bodily harm, increased from five years to seven years; common assault increased from 12 months and/or £5000 fine on summary conviction to maximum of two years and/or unlimited fine on conviction on indictment; criminal damage increased from 10 years maximum to 14 years maximum; putting in fear of violence increased from five years to seven years.

57 Neil Jarman, 'Acknowledgment, recognition and response: the criminal justice system and hate crime in Northern Ireland' in Haynes et al (n 7 above).

58 Ibid.

59 Robbie McVeigh, 'Hate and the state: Northern Ireland, sectarian violence and "perpetrator-less crime"' in Haynes et al (n 7 above) 406.

> pass a file to the PPS [Public Prosecution Service]. However, the PPS decided that in 2,743 of these cases, there was insufficient evidence for the crime to be considered 'aggravated by hostility'... This left 1,946 files that were potentially prosecutable as a 'hate crime', culminating in just 71 successful prosecutions ... Twelve cases were successfully prosecuted under [the 2004 Order] ... A hate crime recorded by the PSNI had less than a one per cent chance of resulting in a conviction aggravated by hostility.[60]

That said, the rates of recorded convictions have increased substantially since 2011–2012. For example, in its 2014–2015 Report the Public Prosecution Service shows that 53 defendants received an enhanced sentence under the 2004 Order,[61] and the 2015–2016 Report shows that, in 89 cases, an enhanced sentence was recorded where the aggravating element was proven.[62] Jarman speculates that this increase could be due to a number of factors: improvements in the quality of the evidence gathered; a greater awareness in the prosecution service and improvements in the preparation and presentation of cases; more effective 'joined up work' across the criminal process which allows cases to be tracked; and the increased attention given to the issue by the Department of Justice 'which holds the different criminal justice agencies to account'.[63] However, echoing Haynes and Schweppe's description of the 'disappearing' of hate crime in the current process in Ireland, McVeigh, argues that current legislation and policy are not effective across the criminal process:

> ... the legislation does not frame racist violence appropriately; the police do not police it appropriately; the PPS does not process it appropriately; the courts do not penalise it appropriately and the official statistics do not record it appropriately.[64]

The message that is thus being sent by the criminal justice agencies in Northern Ireland, McVeigh argues, is that while hate crime is a 'bad thing', it is not something which the criminal justice process is equipped to address. He concludes:

> Other criminal justice systems serious about addressing racist violence – including crucially the Republic of Ireland – should learn from the

60 Of the 71 prosecutions, the other 59 involved use of the Public Order (NI) Order 1987, the Protection from Harassment (NI) Order 1997 and the Criminal Attempts and Conspiracy (NI) Order 1983. Jarman (n 57 above) 61–62.

61 *Statistical Bulletin: Cases Involving Hate Crime 2014/2015* (Public Prosecution Service for Northern Ireland 2015).

62 *Statistical Bulletin: Cases Involving Hate Crime 2015/2016* (Public Prosecution Service for Northern Ireland 2016).

63 Jarman (n 57 above) 65.

64 McVeigh (n 59 above) 408.

> palpable failure of the Northern Ireland model. Northern Ireland provides a textbook example of how *not* to address hate crime.[65]

It is difficult to argue with McVeigh's argument that, to be effective, hate crime legislation must be both operational and effective: the enhanced sentencing model in Northern Ireland, he suggests, is incapable of being either.

The Independent Review of Hate Crime Legislation in Northern Ireland published its Consultation Paper, authored by Judge Desmond Marrinan, in January 2020.[66] The Review team found the statistics regarding the application of the 2004 order – and particularly that in 2018/2019, 'none of the 13 defendants received an increased sentence where the judge accepted that the aggravating feature ... had been proven beyond a reasonable doubt' – so troubling that they reviewed the transcripts of the 16 Crown Court cases referred to in statistics published by the Public Prosecution Service[67] in which the prosecutor considered the case to involve a hate crime aggravated by hostility. In fact, when the transcripts were analysed, the Review found that only four were prosecuted on the basis that the offence was aggravated by hostility: and in those four cases, the judges 'accepted the aggravating features' but either did not enhance the sentence, or, if they did, did not state that they were doing so.[68] This, the Review found, raised issues relating to the statistics published by the Public Prosecution Service, as well as how such cases are prosecuted and sentenced, though it was noted that these concerns were not new.[69]

Responses to the Consultation Process called for 'significant' changes in the law, and the introduction of aggravated offences, or for the introduction of the hybrid model, referred to by Marrinan as 'a statutory aggravation model'.[70] He recommends moving from an enhanced sentencing model to an aggravated offences one, going so far as to say 'that an aggravated offence model is the only means by which it can be consistently ensured that the hate element of a crime will be effectively addressed'.[71] This approach will, he suggests, 'have a much

65 Ibid 413 (original emphasis).

66 Independent Review of Hate Crime Legislation (n 3 above). For the purposes of transparency, it is to be noted that the author is a member of the Core Expert Group of the Review, though this group is advisory only.

67 *Statistical Bulletin: Cases Involving Hate Crime 2018/2019* (Public Prosecution Service for Northern Ireland Service 2019) 21.

68 Independent Review of Hate Crime Legislation (n 3 above) 59.

69 In particular, the review referred to *Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland* (Northern Ireland Human Rights Commission 2013).

70 Desmond Marrinan, *Hate Crime Legislation in Northern Ireland: Independent Review – Final Report Volume 1* (Department of Justice 2020) 113.

71 Ibid 125.

better chance of providing an effective approach' to dealing with hate crime, encouraging the police, as it will, to collect evidence at an early stage, and also ensure that the aggravation will be on the record of the defendant.

## MODEL 3: SCOTLAND – THE 'HYBRID' MODEL

The Crime and Disorder Act 1998 also included legislation for addressing hate crime in Scotland, but utilised a very different model to that provided for in England and Wales. Section 96 of the 1998 Act is different to the aggravated offences created under sections 29–32 in that it can be applied to *any* offence. In this way, it is similar to an aggravated sentencing model. However, under the Scottish approach, the hate element is presented at the charge stage rather than at sentencing, which differentiates it from the aggravated sentencing model. Finally, and perhaps most importantly for the offender, like the aggravated offences model, where proven, the hate element is recorded on the criminal record of the offender. Table 2 illustrates the differences.

The legislation in place in Scotland applies where the section is specified in a complaint or labelled in an indictment, and where it is proved that the offence has been racially aggravated. In this model, the hate element of the offence is a sentencing matter, but is inserted into the case by way of a specific sentencing charge. Section 96(2) provides that an offence is racially aggravated for the purposes of the section if:

> (a) at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a racial group; or

| | **Aggravated offences** | **Aggravated sentencing** | **Hybrid model** |
|---|---|---|---|
| Applies to any offence | | **x** | **x** |
| Included at charge stage | **x** | | **x** |
| Appears on criminal record of accused | **x** | | **x** |
| Maximum penalty increased? | **x** | | |

**Table 2:** The Scottish 'hybrid' sentencing model

(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group, and evidence from a single source shall be sufficient evidence to establish, for the purposes of this subsection, that an offence is racially aggravated.[72]

Where it is proved that the offence was racially aggravated, according to section 96(5), the court must:

(a) State on conviction that the offence was racially aggravated;

(b) Record the conviction in such a way that shows that the offence was racially aggravated;

(c) Take the aggravation into account when determining the appropriate sentence;

(d) And state what the sentence would have been if it was not so aggravated, and the extent or reasons for the difference, or the reasons for there being no such difference.

As is noted in the Bracadale Report, where an individual is convicted of an offence with a statutory aggravation, it will be recorded and taken into account at sentencing, will appear on the criminal record of the individual, and can be taken into account if the individual reoffends.[73] Bracadale was of the view that this statutory approach works well in practice: is extensively used; the approach has ensured that police and prosecutors are aware of the need to take a hate element into account; and it has facilitated the collation and publication of statistics.[74] That said, Chalmers and Leverick note that there is little reported case law on the provisions.[75] As well as the general provisions, Scottish law has created further aggravated offences: racially aggravated harassment under section 50A(1)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 and a further offence of racially aggravated behaviour created by section 50A(1)(b) of the Act.[76] It could be that the unusual approach taken to hate crime in Scotland is a product of the range of common law offences which still apply in that jurisdiction: it would be presumably

72 The provisions have now been extended to prejudice in relation to religion (s 74(2A) Criminal Justice (Scotland) Act 2003), disability (s 1(3) Offences (Aggravation by Prejudice) (Scotland) Act 2009), sexual orientation and transgender identity (s 2(3) Offences (Aggravation by Prejudice) (Scotland) Act 2009).

73 Alexander Campbell, Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Scottish Government 2018) (Bracadale Report).

74 Ibid.

75 James Chalmers and Fiona Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (Scottish Government 2017).

76 See Bracadale Report (n 73 above) for a further analysis of these provisions.

impossible to create aggravated versions of these offences without equally making the base offence a statutory offence.[77]

From the review on statistics relating to hate crime conducted by the Crown Office and Procurator Fiscal Service, a number of observations can be made in relation to the operation of the Scottish legislation. This Report notes that, while racial hate crime is the most commonly reported hate crime, the number of charges reported is 33 per cent lower than the peak in 2011–2012.[78] Worryingly, 2018–2019 was in fact the lowest annual total since such figures were made available in 2003, and the first time that such figures went below 3000. The figures for 2019–2020 are only marginally higher. When we compare the numbers of charges of race crimes in relation to section 50A offences, and other charges made using the hybrid model, we see that, until 2014–2015, there were in fact *more* charges made under section 50A for aggravated harassment and behaviour than there were for all other offences prosecuted with a racial aggravation under the hybrid model. From 2014 to date, the trend is reversing, but there is still a large proportion of offences being prosecuted under the aggravated categories (see Table 3).

Though he does not refer to any statistics in relation to reported or recorded hate crime in Scotland, nor the number of prosecutions taken and the relative number of sentences imposed, Lord Bracadale states that he is 'satisfied that this approach has worked reasonably well', and he recommended that the approach be maintained.[79] However, in so recommending, the Bracadale report does not explore in any detail *how* the legislation is operating, or specify any indicators of effectiveness

| Year | 2010–11 | 2011–12 | 2012–13 | 2013–14 | 2014–15 | 2015–16 | 2016–17 | 2017–18 | 2018–19 | 2019–20 |
|---|---|---|---|---|---|---|---|---|---|---|
| **Total no of race crimes** | **4178** | **4547** | **4034** | **4160** | **3820** | **3721** | **3367** | **3278** | **2921** | **3038** |
| Section 50A | 2574 | 2792 | 2376 | 2300 | 1969 | 1757 | 1462 | 1370 | 1204 | 1208 |
| Hybrid | 1604 | 1755 | 1658 | 1860 | 1851 | 1964 | 1905 | 1908 | 1717 | 1830 |

**Table 3:** Crown Office and Procurator Fiscal Service hate crime statistics

77 In the Bracadale Report (ibid), it is noted that common law breach of the peace and common law threats are two of the most commonly charged offences in conjunction with statutory aggravations.

78 *Hate Crime in Scotland 2018–2019* (Crown Office and Procurator Fiscal Service 2019).

79 Bracadale Report (n 73 above) 14. Indeed, Lord Bracadale dedicates only three paragraphs to his analysis of the model for statutory aggravation in his 148-page report.

against which it might be considered. There is no analysis of the justice gap between the prevalence of hate crime, reports, prosecutions and convictions with respect to hate crime, nor any indications as to what those operating in the criminal justice system feel about the current regime.

Further, there is no analysis of the reasons for the relatively high rates of racially aggravated harassment and behaviour under section 50A(1) of the Act as compared to the figures relating to the hybrid model. This might simply be a product of the reported crimes, which would reflect police statistics for those offences. It might also be because those acting within the criminal justice process see the section 50A(1) offences as a more expedient, effective or pragmatic means of addressing hate crime when compared to the hybrid approach. This is particularly the case when we consider section 50A(1)(b), which has a similar non-aggravated offence in 'threatening and abusive behaviour'. Indeed, the fact that the usual rules requiring corroboration apply in relation to a prosecution under section 50A – that is, that more than one piece of evidence must be adduced to prove all parts of the offence – makes these figures even more difficult to understand: as the hybrid charge is a sentencing provision, only one piece of evidence is required under Scottish law, making it surely easier to prosecute. Indeed, Bracadale recommended the repeal of section 50A because existing legislation (and the utilisation of the hybrid charge) can fully address the mischiefs which section 50A seeks to address. Indeed, he refers to them in his Report as 'the two *alternative* routes'.[80] Further, in introducing the legislation, the then Lord Advocate noted that 'much of the behaviour which would be covered by the new standalone offence would also be covered by the crime of breach of the peace'.[81] While it may be the case that there are good reasons as to why prosecutors, in spite of the more onerous proof requirements, prosecute under section 50A, there are no reasons given, or any discussion had, as to the reasons for this.

## PROPOSALS FOR LAW REFORM[82]

In considering models for law reform in England and Wales, whilst Walters et al note that the aggravated offences model was a useful one and, with some changes, could operate more effectively, they also note that creating a large number of aggravated offences risks 'bloating' the provision, would entail the creation of new statutory sentencing

80 Ibid 89 (emphasis added).

81 As cited in ibid 85.

82 At the time of writing, the Law Commission of England and Wales has yet to publish its consultation paper.

maxima and, ultimately, that some crimes would remain outside the aggravated offences model.[83] They recommend adopting the Scottish approach, which would aggravate any offence where there is sufficient evidence of hostility. This approach, they speculate, would address the concerns highlighted in their research, allowing juries and magistrates to determine whether an offence was in fact aggravated by hostility during the trial. They are clear, however, that, in order for this to operate as they suggest, it is essential that the aggravation 'make up part of the substantive offence which appears on the charge sheet'.[84] This, they state, is the only way to ensure that the hostility element forms part of the case and is addressed at trial as well as at sentencing.[85]

The Law Commission in its recent Consultation Paper considered this concern, as well as the issue that, by moving to a hybrid model, the increased maximum penalties would be removed. With respect to the first issue, the Commission observes that, while there are advantages to this approach, replacing an enhanced sentencing model with a hybrid model would mean that the hate element would have to be proven before a jury, resulting in aggravations being more difficult to secure and jury trials being longer. This issue, the Commission opined, was not present with respect to aggravated sentencing provisions. Removing the increased penalties, the Commission felt, would be undesirable, principally because of the negative message it would send. That said, this latter argument applies only where existing increased maxima exist.

In considering a model for Northern Ireland, Marrinan agrees that the Scottish approach would be a useful model to consider. His reasons for supporting this model are that: first, it applies to all protected characteristics; second, it can attach to any offence; and third, the aggravation is stated on conviction and accurately recorded. Agreeing with Walters et al,[86] he states that this approach would not require the extension of penalties across all offences, but rather that the legislation would provide that the sentence must be aggravated, and the extent of that uplift must be declared by the court.[87] Marrinan went on to propose that any new offence would include the following provisions where the offence was found to be aggravated by hostility:

83 Walters et al (n 39 above) 977.
84 Ibid. The authors do not provide any proposed wording for such a statutory provision.
85 Ibid.
86 Walters et al (n 32 above).
87 Independent Review of Hate Crime Legislation (n 3 above) 138.

- a requirement that the court 'shall' treat it as an aggravating factor;
- a requirement to state in open court that the offence was aggravated by hostility;
- a requirement that the conviction be recorded in such a way as to capture the aggravation;
- state the extent of and reasons for the difference in penalty which the court would have imposed if there were no such aggravation (and if there is no difference, the reason for there being no difference in cases of exceptional mitigation).[88]

Marrinan's recommendations thus are made on the basis of these criteria which he considers are what 'effective' hate crime legislation would look like. First, he clearly articulates the need for the equal treatment of protected characteristics, thus rejecting the approach in England and Wales and Scotland which creates a hierarchy of victims. Second, he suggests that the legislation should be applicable across a range of offences. Third, the legislation should facilitate and indeed require the 'message' of hate crime legislation to be delivered clearly – to the defendant in terms of the offence that is imposed and to society by stating that the offence was so aggravated in open court. Legislation should also facilitate the hate element of the crime being presented to the court, thus ensuring it is not 'disappeared' through the process; and it should ensure that the sentence is aggravated where a hate element is found to be present in the offence. Finally, the fact that an individual has been convicted of a hate crime should be recorded on the criminal record of the defendant to capture recidivistic behaviour.

In Ireland, the Scottish model was adapted as part of the (now lapsed) Private Members Criminal Justice (Aggravation by Prejudice) Bill 2016.[89] In responding to the provisions, with particular reference to the hybrid approach, the Minister for Justice had questions regarding how the proposal would operate in the context of a jury trial, and particularly observed that the Bill 'does not create an offence per se'.[90] This is, of course, true. The hybrid model, which facilitates the attachment of an aggravated sentencing provision onto any criminal offence by way of a specific charge, is not an offence which can be prosecuted independently, and does not have any specific penalty associated with it. Fundamentally, it is a sentencing provision. This point was also made by the South African Human Rights Commission in its consideration of the use of the model in the draft South African

88 Marrinan (n 70 above) 132.
89 Criminal Justice (Aggravation by Prejudice) Bill 2016.
90 Francis Fitzgerald, Dáil Debates Tuesday, 4 October 2016.

legislation.[91] Indeed Chalmers and Leverick note that the general rule in Scottish law is that an aggravating element – as opposed to an element of the offence itself – 'need not be proved by corroborated evidence',[92] and they frame the provisions as an example of a sentencing aggravation model.[93] In parliamentary debates on the Irish Bill, the Minister for Justice had a number of practical concerns regarding the proposal:

> When a trial involves a jury, it makes a determination on the offence with which the person is charged, such as assault. Under what circumstances would the motivation be determined? If it is not a matter for the jury, and I do not see how it can be, it seems difficult to envisage how this would operate in practice. It does not seem appropriate for a court following a verdict of guilty from a jury to state that the offence was aggravated in the manner set out in the Bill where this was not a matter determined by the jury.

Given the emphasis placed by Walters et al on the importance of the hostility element being dealt with at trial as well as sentencing in their proposed hybrid model,[94] these questions are particularly relevant and, as yet, unanswered. The hybrid model does not, in one fell swoop, create an aggravated version of all criminal offences, much as it might seek to act that way.

That said, if we accept Marrinan's criteria for what is expected of hate crime legislation, only the hybrid model is operational across all criteria. However, if we remove one – that is, the requirement that the legislation is operative across all offences – then the aggravated offences model is equally effective. Indeed, given the wealth of information we have in relation to the operation of that model in England and Wales as compared to the dearth of information we have in relation to the operation of the hybrid model, then it could easily be argued that the aggravated offences model is – on balance – more effective across all his criteria. Further, if we look to the operation of legislation in Scotland, we see that at least some of the racially aggravated offences under section 50A are prosecuted in preference to taking a prosecution for a simple offence using the hybrid aggravation. Despite Lord Bracadale's assertions, we cannot draw any conclusions as to the effectiveness of the operation of the model in Scotland in the absence of research. Indeed, the model seems unique at least across the Commonwealth,[95] and so there is no other means of considering its operation for the

91 SAHRC Submission to DOJCS regarding Hate Crimes and Hate Speech Bill (South African Human Rights Commission 2017).
92 Chalmers and Leverick (n 75 above) 9.
93 Ibid 44.
94 Walters et al (n 39 above) 977.
95 Goodall and Walters (n 3 above) 33.

purposes of law reform. Thus, we can only speculate that it might provide an appropriate and more effective response to hate crime than the aggravated offences model. Indeed, responses to the Bracadale consultation might suggest that aggravated offences (or what he calls 'standalone offences') are more appropriate than the hybrid model. The Coalition for Racial Equality and Rights, for example, emphasised the importance of the so-called standalone offence 'in conveying the serious nature and State condemnation of racial harassment'.[96]

Taking a cautious approach to law reform might lead us to a conclusion that the aggravated offences model is to be preferred. Indeed, Walters et al admit that the interests of defendants are best protected under the aggravated offences model[97] and note that interviewees in their study were of the view that it is more appropriate for defendants to be charged and prosecuted for an aggravated offence than have a judge determine the issue at sentencing, an issue which is particularly relevant in light of the Irish Minister for Justice's comments.[98] If the Scottish model is in fact simply an aggravated sentencing model which is different only because the hate element is in the charge, then one might well wonder if the issues highlighted by Walters et al[99] and Owusu-Bempah et al[100] which are associated with the sentencing model would apply in the context of the Scottish approach also. While recommending an aggravated offences model might be considered a conservative approach, I think that it is also a considered and evidence-based one. Thus, I favour a model of legislative reform which would create a range of aggravated offences, accompanied by a broader sentence enhancement model, which would operate in parallel to the aggravated offences model.

For these reasons, it is perhaps useful to consider the one outstanding criteria highlighted by Marrinan: that is, the applicability of the legislation across offences, which cannot be addressed using the aggravated offences model. If the aggravated offences model is preferred, the question as to which offences should be included in such legislation thus requires consideration. It can be argued that the list should include those types of offences most commonly perpetrated against the protected grounds identified in the legislation. We have seen in England and Wales, for example, that, while racist hate crime most commonly takes the form of offences against the person, criminal

96 Bracadale Report (n 73 above) 85.

97 Walters et al (n 39 above).

98 Abenaa Owusu-Bempah, Mark Walters, and Susann Wiedlitzka, 'Racially and religiously aggravated offences: 'God's gift to defence'?' (2019) 6 Criminal Law Review 463.

99 Walters et al (n 39 above).

100 Bempah et al (n 98 above).

damage and public order offences, in the context of disablist hate crime, fraud and forgery offences, robbery, burglary, and theft and handling offences are more common (see Table 4).[101]

If it is accepted that creating aggravated offences is the preferred approach, I argue that a range of aggravated offences should be introduced across all categories of protected grounds. The Law Commission sets out criteria for determining whether an aggravated version of an offence should be created, which are:

- the overall numbers and relative prevalence of hate crime offending as a proportion of an offence;
- the need to ensure consistency across the criminal law;
- the adequacy of the existing maximum penalty for the base offence; and
- whether the offence is of a type where the imposition of additional elements of the offence requiring proof before a jury may prove particularly burdensome.

While useful, these criteria cannot be considered exhaustive or determinative. If we assess the inclusion of aggravated forms of sexual offences, for example, as recommended by Walters et al, these might be considered particularly controversial, given the difficulties associated with the prosecution of such offences in the absence of an additional factor. Thus, according to the last criterion, these should be excluded. However, given that literature suggests that the crimes

| **Offence** | **Racial and religious hate crime %** | **Homophobic /transphobic hate crime %** | **Disability hate crime %** |
|---|---|---|---|
| Homicide | 0.06 | 0.00 | 0.55 |
| Offences against person | 76.45 | 59.23 | 48.01 |
| Sexual offences | 0.25 | 1.34 | 3.64 |
| Burglary | 0.34 | 0.28 | 8.72 |
| Robbery | 0.58 | 1.13 | 6.73 |
| Theft and handling | 1.69 | 1.69 | 12.14 |
| Fraud and forgery | 0.08 | 0.07 | 6.40 |
| Criminal damage | 3.27 | 3.94 | 2.87 |
| Drugs offences | 0.60 | 1.20 | 0.44 |
| Public order offences | 15.11 | 29.79 | 9.27 |

**Table 4:** Crown Prosecution Service data[102]

101 Fewer offences are listed as commonly attracting statutory aggravations in Scotland by Bracadale (n 73 above). The offences so listed are: common law breach of the peace; common law issuing threats; threatening or abusive behaviour; stalking; improper use of a public electronic communications network; and communicating indecently.

102 As set out in Walters et al (n 32 above) 57.

of sexual assault and corrective rape are particular manifestations of hate crime towards the LGBTQI community in particular, these acts should be capable of being recognised in any hate crime legislation.[103] Indeed, when we look across protected groups, theft and fraud offences are particularly prevalent with respect to disability hate crime, and, arguably, this would justify the creation of aggravated offences, though this might not be in compliance with the first criteria.

The approach that I advocate also allows the maximum sentence to be increased, to allow for a significantly higher sentence to be imposed, if that is what is desired on the part of lawmakers. Owusu-Bempah et al provide recommendations to enhance the operation of such offences, which could usefully be employed in both policing and training for criminal justice professionals. It is unquestionable that such legislation would be long and somewhat complex to draft and might be considered legislatively unwieldy, or 'bloated'. It is also unquestionable that the hybrid approach is more legislatively elegant and simple to construct. That said, simple statutory tools of construction might be used to alleviate some of this bloating, such as using a definitions section to define 'protected characteristic' to be used throughout, rather than create separate offences for each protected ground, and using a schedule to list the change in statutory maxima, if that is required. Ultimately, I would suggest that, while there is no evidence to suggest that the hybrid approach provides a statutory approach which is more effective than the aggravated offences model, there is ample evidence establishing that the aggravated offences model is effective when assessed against Marrinan's criteria.

## CONCLUSION

It is generally accepted that, whilst more pragmatic, simple, and in keeping with the general operation of the criminal law, the enhanced sentencing approach to legislating against hate crime is not enormously effective. Further, as the Office for Democratic Institutions and Human Rights observes, 'a penalty enhancement, while easier to implement, may not fulfil the expressive function of recognizing and condemning a prohibited bias'.[104] From an operational perspective, we have seen in, for example, the Law Commission's recent Report in England and Wales, that the aggravated offences model produces a more effective

103 Laura C Hein and Kathleen M Scharer, 'Who cares if it is a hate crime? Lesbian, gay, bisexual, and transgender hate crimes – mental health implications and interventions' (2013) 49 Perspectives in Psychiatric Care 84.

104 *Hate Crime Laws: A Practical Guide* (Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights 2009) 36.

response by the criminal justice process as compared to those offences in which the hate element is addressed only at sentencing.[105] Qualitative research conducted by Haynes et al in an Irish context indicates that the process most consistently recognises named offences: put simply, it was argued, addressing hate crime through sentencing provisions will not ensure that the hate element of a crime will be consistently addressed from the point of recording through to sentencing.[106] When compared to the enhanced sentencing model, the aggravated offences model has been shown to be more effective. Whilst theoretically, the 'hybrid model' has much to commend it, little analysis has been conducted on its operation and effectiveness, either in Scotland or elsewhere. While the question as to whether hate crime legislation should be introduced can be a politically sensitive one, the manner in which such legislation is framed is legally complex. A cautious and conservative approach to law reform is, I argue here, one which is most likely to be effective.

105 Law Commission (n 28 above).
106 Ibid.