Chapter 7: Hate Crime

7.1. Hate crimes are offences motivated by hostility towards a victim’s race, religion, sexual orientation or disability. When a hate crime comes before a court, the judge can increase the sentence to reflect that motivation. However, there are concerns that this power is under-used.

7.2. In 2013 the Northern Ireland Human Rights Commission reported that, between April 2007 and January 2012, Northern Ireland Courts and Tribunals Service statistics recorded only 5 cases where racially motivated crimes received enhanced sentences.\(^1\) In response to the Department’s 2015 consultation on the unduly lenient sentencing scheme\(^2\) the Commission again raised this issue; suggesting extending the scheme to offences which have been pursued as aggravated would address the under-utilisation of the power to give an enhanced sentence.

7.3. This chapter outlines the current hate crime sentencing arrangements; considers the effectiveness of the changes that have been made within the criminal justice system to ensure the recognition of hate crime and that it is dealt with appropriately; and seeks views on the need for any further refinement.

A Crime ‘Aggravated by Hostility’

7.4. There is no single offence of ‘hate crime’ in Northern Ireland. It is an umbrella term used to describe a number of specific hate offences as well as any other offence which has been ‘aggravated by hostility’.

7.5. In this context an offence is ‘aggravated by hostility’ where:

- the offender demonstrates hostility based on the victim’s membership or presumed membership of a racial group, a religious group or a sexual orientation group, or his disability or presumed disability; or

- the offence is motivated by hostility towards any of those groups.

---


\(^2\) Details of the scheme can be found at chapter 5.
7.6. These elements of the crime can be difficult to prove, but where they are proven, Northern Ireland courts are required to state in open court that the offence was so aggravated.³

7.7. Courts are not empowered to impose a sentence which exceeds the maximum permitted for the particular offence. However, in taking aggravation into account, they may give a higher sentence than they would have done otherwise. It is this power that the Human Rights Commission considered as being under-utilised.

7.8. The Northern Ireland Magistrates’ Courts Sentencing Guidelines⁴ remind judges of their duties in relation to sentencing for hate crime, citing aggravation by hostility in the list of possible aggravating factors. The guidelines also note the requirement to state that the offence was so aggravated, if this is the court’s finding.

7.9. In addition, following the publication of the Human Rights Commission report, the Lord Chief Justice’s Sentencing Group asked the Judicial Studies Board to draw sentencers’ attention to the importance of ensuring that all potential hate crimes are properly identified, to allow this to be taken into account in sentencing where the crime is found to have been motivated by hatred.⁵

**Hate Crime in Other Jurisdictions**

7.10. In Scotland,⁶ England and Wales, as in Northern Ireland, the courts are required to treat hostility based on specified characteristics of the victim⁷ as an aggravating factor and to state in open court that the offence was so aggravated.⁸ There are also some additional requirements in those jurisdictions which do not apply in Northern Ireland.

---

⁴ https://judiciaryni.uk/sentencing-guidelines-magistrates-court
⁵ https://judiciaryni.uk/sentencing-guidelines-northern-ireland
⁶ The terminology in the Scottish legislation refers to the offender evincing malice or ill will, rather than demonstrating hostility. Review of this wording was under consideration at the time of publication of this consultation: https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/5/
⁷ Those already set out for Northern Ireland and transgender characteristics.
England and Wales

7.11. Sentencing guidelines in England and Wales are more prescriptive than their Northern Ireland equivalents, stating that:

- the court should first decide on the appropriate sentence without the element of ‘hate’ aggravation, but including any other aggravating or mitigating features;
- the sentence should then be enhanced to take account of the ‘hate’ aggravation;
- the enhancement may be an increase in the same type of sentence, or it may be enough to move to a more serious type of sentence;
- the judge must say publicly that the offence was aggravated; and
- the judge should say publicly what the appropriate sentence would have been without the ‘hate’ aggravation.\(^9\)

7.12. Legislation in England and Wales has also made provision for certain ‘statutory aggravated offences’.\(^10\) These offences are separate from, and carry higher maximum penalties than, the equivalent non-aggravated offences.

Scotland

7.13. In Scotland there are presently no relevant sentencing guidelines. However, the statutory duties placed on the courts are more detailed than elsewhere in the UK.

7.14. In addition to treating hostility as an aggravating factor and stating that the offence was so aggravated, the courts must also:

- record the conviction in a way that shows that the offence was aggravated; and
- state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference.

---

\(^9\) Guidelines reflect the judgment in R-v-Kelly and Donnelly [2001] 2 Cr App R (S) 73 CA
https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/hate-crime/3-approach-to-sentencing/

7.15. Like England and Wales, Scotland also has a statutory aggravated offence of racially aggravated harassment.\(^\text{11}\)

**Scottish Review of Hate Crime Legislation**

7.16. The 2017/18 Independent Review of Hate Crime Legislation in Scotland\(^\text{12}\) noted a number of issues with the existing arrangements, including particular difficulties with the requirements placed on courts to record and specify the difference in sentence due to aggravation.

7.17. Reasons for poor compliance included:

- an absence of guidance on the appropriate amount by which to increase the sentence;
- the sentence is often adjusted to take account of other aggravating or mitigating factors;
- there is a limited amount of time to deal with each case;
- determining a sentence is ultimately a matter of judgment; and
- an overly mathematical approach is not helpful.

7.18. The Review identified strong support for recording that a sentence was aggravated for the following key reasons:

- the requirement enhances the transparency of the justice system;
- it shows that hate crime is taken seriously;
- it would increase confidence in the justice system;
- it would encourage reporting;
- it is important to ensure that records are kept so that the offending appears on the offender’s criminal record; and
- good records allow for monitoring the impact of legislation and the maintenance of statistics. This can inform the development of effective policy and practice.

7.19. Views were mixed regarding the requirement to state the amount of the aggravation: Some suggested that announcing the increase in sentence might


have a deterrent effect on further offending. However others, including, importantly, those who operate the system, felt that sentencing is already a complex process and that separating the sentence and aggravation is artificial and not necessarily helpful. It could lead to misunderstanding or disappointment, particularly where the aggravation was considered to be of a low level.

7.20. Recognizing that requirements must be practical and workable, the Review recommended\(^{13}\) that, where a statutory aggravation is proved, the court should be required to include this in the record of conviction. The requirement to state the difference in sentence to reflect any aggravation was considered over-complicated and not to serve a clear purpose.

7.21. While a sentencer could still include any details considered relevant, this should not be required in legislation. Therefore, there should no longer be a requirement to state the extent to which the sentence imposed is different from that which would have been imposed in the absence of aggravation.

7.22. The Scottish Government consulted publicly on the Review recommendations early in 2019. The outcomes of that consultation have not yet been published.

Ireland

7.23. In Ireland there is no express requirement to factor motivation by hostility into sentencing decisions. New legislation, mirroring the Scottish model, has been proposed to address this gap,\(^{14}\) although, at the time of writing there was no indication of when this might become law.

Facts and Figures

7.24. Statistical data for Northern Ireland between 2015 and 2018, compiled by the Public Prosecution Service for Northern Ireland,\(^{15}\) shows a downward trend in the number of cases where the prosecution considered offences aggravated by hostility to have occurred.

7.25. The number of court prosecutions brought over the 3 years, where aggravation by hostility was highlighted to the court, has fallen from 251 to 170 to 142 (the majority being for racially aggravated offences), currently representing less than 1% of all prosecutions.

\(^{13}\) [http://www.gov.scot/Publications/2018/05/2988](http://www.gov.scot/Publications/2018/05/2988)


7.26. In contrast to the Human Rights Commission’s earlier findings, that only 5 racially aggravated crimes received enhanced sentences between 2007 and 2012. The Public Prosecution Service for Northern Ireland’s figures show 52 defendants, prosecuted in the Magistrates’ Courts in 2017/18, were recorded as receiving an enhanced sentence on the ground that aggravation had been established.16

7.27. In the Crown Court for the same period one defendant was recorded as having received an enhanced sentence. Public Prosecution Service figures for the previous two years showed a total of 134 enhanced sentences in the Magistrates’ Courts, and a further 3 in the Crown Court.

7.28. While these figures are not broken down for each category of hate crime, they nonetheless illustrate an improvement on the earlier records found by the Human Rights Commission.

7.29. However, for the year 2017/18, in England and Wales, where guidelines require the court to say what the appropriate sentence would have been without the aggravation, 56.7% of hate crime prosecutions received enhanced sentences, a significantly higher proportion than that recorded in Northern Ireland.17

**Developments in Northern Ireland**

7.30. Concerns that hate crimes may not be identified as such were highlighted in a Criminal Justice Inspection Northern Ireland report in 2007.18 This resulted in new arrangements within PSNI, the Public Prosecution Service and the Courts’ Service, aimed at ensuring that any case involving hate crime is highlighted as such throughout the prosecution process, and flagged to the court as being motivated by hostility.19 This work also included new administrative processes designed to improve the recording of sentences which have been enhanced where hostility is proven.

7.31. A further development has been the 2016 introduction of victim personal statements which, where made, must be considered by the courts in their

---

16 PPSNI Figures show the numbers of prosecution decisions. These may differ from the numbers convicted due to time lapse between prosecution and sentencing and those cases where no conviction was made. The numbers where aggravation was recorded are low in comparison to those prosecuted or otherwise convicted. This may be due in part to a lack of requirement to record, but also reflects the difficulty the prosecution faces in proving to the criminal standard that the offence was aggravated by hostility.


sentencing deliberations.20 While not aimed specifically at hate crimes, the submission of a victim personal statement may serve to highlight any element of hatred, helping to ensure that this is not overlooked in the sentencing decision. In addition, the Probation Board is currently working to enable probation officers to access statements taken from the victim during the investigation process to ensure that victim issues are adequately addressed in pre-sentence reports.

7.32. The wider issue of how the criminal justice system deals with hate crime was the subject of a further Criminal Justice Inspection report entitled ‘Hate Crime - An inspection of the Criminal Justice System’s response to Hate Crime in Northern Ireland’, published in December 2017.21 One of the Report's recommendations was that the Department of Justice should, as soon as possible, conduct a review of the existing legislative response to hate crime.

7.33. In response, an independent judge-led review commenced in May 2019 with a view to considering and making recommendations on the effectiveness of the legislation, including:

- whether the current enhanced sentence approach is the most appropriate to take, and to determine if there is an evidential basis to support the introduction of statutory aggravated offences; and

- whether new categories of hate crime should be created for characteristics such as gender and any other characteristics which are not currently covered.22

7.34. The Criminal Justice Inspection report also touched on the issue of court recording of instances of enhanced sentencing. It recognised that this had improved, but commented that there remained a risk that recording could be missed in busy courts.23

Analysis

7.35. Statistics from the Public Prosecution Service show a significant increase in the number of hate crime convictions receiving an enhanced sentence. This improvement has come about as a result of administrative adjustments made within the investigation, prosecution and courts’ systems to ensure courts are made aware of offences motivated by hostility and to improve the recording of enhanced sentences. The recent introduction of victim personal statements

21 http://www.cjini.org/getattachment/a48b8a89-f32f-4b02-bd3c-8f77989630eb/report.aspx
22 The Review is ongoing at the time of publication of this consultation.
23 CJINI report at para.2.33.
has provided a further opportunity to focus courts’ attention on hostility motivation as part of the sentencing exercise.

7.36. In its 2017 report, the Criminal Justice Inspection recognised the progress that has been made; however, it also noted concerns that there was still a risk that recording could be missed.

7.37. Across the rest of the UK and Ireland a requirement for the court to state the extent to which the sentence was enhanced exists in statute; in sentencing guidelines; or is proposed. Such a requirement did not enjoy universal support in the Scottish hate crime legislation Review for the reasons outlined above.

7.38. The further requirement to record that a crime was aggravated by hostility, which currently exists in Scotland and is proposed in Ireland, was strongly supported in that Review.

7.39. While administrative improvements have been made in Northern Ireland, a reliable picture of the courts’ use of increased sentencing powers would be essential in identifying whether such powers are currently under-utilised, as was previously submitted by the Human Rights Commission. Additional statutory requirements would help to ensure that aggravation by hostility is taken fully into account in all cases, and, importantly, that this would be seen to be so.

7.40. In considering possible options for Northern Ireland, the Review noted the provisions of the Domestic Abuse Bill (currently before Parliament) which proposes that, where domestic abuse has been aggravated by reason of involving a child, the court must:

- state on conviction that the offence is so aggravated;
- record the conviction in a way that shows that the offence is so aggravated;
- in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence; and
- in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.

7.41. This model differs from those examined above in its treatment of how the courts should explain the effect of any aggravation. Requiring the court to explain how the sentence is affected, rather than requiring it to state the amount by which the sentence has been adjusted, avoids the concerns voiced in the Scottish
Review. At the same time it ensures that the court makes public that it has factored any such aggravation into the sentence calculation.

7.42. A similar approach for hate crime would allow the system to recognise offences aggravated by hostility, bringing with it a number of benefits. In particular, this could inform rehabilitative work with such offenders. Programmes such as Probation Board’s ‘Accepting Differences’ and NIACRO’s ‘Get Real’, both of which aim to address hostility motivated behaviour and reduce or prevent repeat offending, could be better targeted and utilised as a result.

7.43. When combined with the PSNI and Public Prosecution Service’s processes to ensure that hostility is brought to the courts’ attention, such an approach would address concerns raised by the Criminal Justice Inspection and the Human Rights Commission; ensuring that in every case aggravation was considered, publicly acknowledged and, where appropriate, recorded.

7.44. Further benefits, similarly identified in the Scottish Review, would include:

- increasing confidence in the justice system by improving parties’ and the wider public’s understanding that such motivations to offend are taken seriously;
- potentially enhancing the deterrent effect of sentencing, further helping to protect the public;
- in the longer term, recording could also assist policy makers to target strategies to address hate crime appropriately; and
- promoting consistency of approach across the statute book in Northern Ireland.

Review of Sentences

7.45. The Human Rights Commission and the former Northern Ireland Commission for Ethnic Minorities both made representation to extend the unduly lenient sentencing (ULS) referral provisions to racial hate crime.

7.46. The power of the Director of Public Prosecutions to refer a sentence to the Northern Ireland Court of Appeal on the grounds of undue leniency is intended to address the most serious cases where a sentence is significantly lower than would be expected. The Department has recently extended the ULS scheme to cover a large number of additional offences tried in the Crown Court, including assault, burglary, theft, criminal damage and stirring up hatred or
fear. This extension should capture the majority of hate crimes tried in the Crown Court.

7.47. Those changes to the scheme, together with any further changes taken forward as a result of Chapter 5 and this chapter should strengthen the justice system’s response to hate crime. In addition the current independent, judge-led, review into hate crime laws in Northern Ireland will provide a further opportunity to refine hate crime legislation.

Please see Consultation Questions: No. 41 - 44

---