Written Evidence submitted by Dr Abenaa Owusu-Bempah

This is a response to a request for evidence on the issue of hate crime and its violent consequences by Dr Abenaa Owusu-Bempah, Lecturer in Law, City, University of London.

My research focuses on criminal law, criminal evidence and criminal procedure. I have been researching hate crime legislation for a number of years and am currently involved as co-investigator in a research study, titled ‘The Life Cycle of a Hate Crime’. The study is funded by the EU DG Justice, and led by Dr Mark Austin Walters at the University of Sussex. The study aims to examine the application of criminal laws and sentencing provisions for hate crime, including the application of the racially and religiously aggravated offences under the Crime and Disorder Act 1998 and the enhanced sentencing provisions under the Criminal Justice Act 2003. As part of the study, we are collating quantitative data on hate crime prosecutions and conducting qualitative interviews with prosecutors, defence lawyers, magistrates, judges, victims and defendants in order to examine the operational realities of hate crime laws in England and Wales. The aim of the study is to identify good practices as well as the limitations in the application of hate crime legislation.

This response focuses on the effectiveness of current legislation for prosecuting hate crime, particularly the racially and religiously aggravated offences under the Crime and Disorder Act 1998 and the enhanced sentencing provisions under the Criminal Justice Act 2003. The evidence is being submitted due to my concerns that hate crime offences are not prosecuted effectively and that existing law, policy and procedures can cause unfairness to both complainants and defendants, and mislead the public. The opinions given in this response are my own.

Summary

- There is persistent confusion as to the substantive elements of the racially and religiously aggravated offences.
- There are significant procedural problems which can arise during the prosecution of racially and religiously aggravated offences.
- There is uncertainty as to the relationship between racially and religiously aggravated offences and sentencing provisions for hate crime.
- The definition of ‘hate crime’ is often presented in a misleading manner.
- Further evidence of the operational realities of hate crime law is required, before amending the legislation.

1. Confusion as to the substantive elements of racially and religiously aggravated offences

1.1. The racially and religiously aggravated offences are more serious versions of certain pre-existing, or ‘basic’, offences. There are eleven basic offences which can become aggravated under the Crime and Disorder Act 1998 (‘the 1998 Act’), as set out in sections 29 to 32. Under section 28 of the 1998 Act, a basic offence can be prosecuted as racially or religiously aggravated if there was either a demonstration of racial or religious hostility towards the victim (section 28(1)(a)) or the offender was motivated by racial or religious hostility (section 28(1)(b)). A demonstration of hostility can be completely outwards, for example, racist terminology used during an assault. No proof of motivation is necessary.
1.2. The requirements of section 28 are mirrored in sections 145 and 146 of the Criminal Justice Act 2003, which requires judges to treat hostility on the basis of race, religion, disability, sexual orientation or transgender identity as an aggravating factor at sentencing for any offence other than one under sections 29 to 32 of the 1998 Act.

1.3. However, there has been persistent confusion as to the distinction between sections 28(1)(a) and (b). Numerous reported cases indicate that some trial judges, particularly magistrates, mistakenly proceed on the basis that a subjective motivation must be proved even where there is a clear demonstration of hostility (see, for example, SH [2010] EWCA 1931 (Admin); Jones v DPP [2010] EWHC 523 (Admin); RG v DPP [2004] EWHC 183 (Admin); DPP v M [2004] EWHC 1453 (Admin). This indicates that at least some hate crime cases are not being prosecuted appropriately or effectively.

1.4. The way in which the legislative requirements are presented in official publications and reports is likely to perpetuate confusion as to the requirements of the aggravated offences (and sections 145 and 146 of the Criminal Justice Act 2003). For example, at ch 3.12 of the 2016 Hate Crime Action Plan, aggravated offences are defined as 'specific racially and religiously motivated criminal offences (such as common assault)' (emphasis added). There is no reference to the alternative, and less onerous, requirement of a demonstration of hostility.

1.5. The law should be stated accurately and comprehensively in all official reports and publications on hate crime, to ensure that the general public as well as criminal justice professionals understand the statutory hate crime offences.

2. Procedural problems during the prosecution stage

2.1. There are a number of procedural problems which can arise during the prosecution of racially and religiously aggravated offences. A detailed evaluation of these problems can be found in Owusu-Bempah (2015), where it is argued that serious consideration should be given to whether the aggravated offences should be retained. Two of the most concerning issues are charge bargaining and double convictions.

2.2. Where there is evidence that a racially or religiously aggravated offence has been committed, CPS guidance suggests that both the basic and aggravated version of the offence should be charged in the alternative. One benefit of this is that if there is insufficient evidence to secure a conviction for the aggravated version of the offence, liability for the basic offence will not necessarily be lost. This is important in summary trials, as magistrates do not have the power to return alternative verdicts. However, charging both offences can lead to charge bargaining and double convictions.

2.3. Charge bargaining occurs where the defendant either offers or accepts a plea of guilty to the basic offence on the condition that the charge for the aggravated offence is dropped. Where this occurs, not only has hate crime legislation not been utilised or applied effectively, but it may also leave victims and the wider community with the impression that hate crime is not taken seriously, which could lead to further feelings of marginalisation. Additionally, innocent defendants may feel pressured to offer or accept a plea of guilty to the basic offence in order to avoid a harsher
sentence if convicted, and to avoid being labelled as a racist. Since 2003, it has been CPS policy not to accept a plea to the basic offence alone, unless there are proper reasons for doing so. However, available statistics reveal that conviction ratios for individual aggravated offences tend to be significantly lower than for the corresponding individual basic offences. For example, in 2012, the conviction ratio for racially or religiously aggravated ‘assault with injury’ was 51%, compared to 85% for the basic offence (An Overview of Hate Crime in England and Wales: Appendix Tables (2013) Table 3.12). It is noted in the Overview of Hate Crime that the CPS can decide to downgrade the aggravated charge to the basic offence, to ‘increase the chances of a conviction’ (p.37). The most assured method of increasing the chances of a conviction would be to initiate or accept a charge bargain.

2.4. Ongoing scrutiny of charging decisions is required. Where aggravated offences are downgraded to the basic offence, a record should be kept, providing the reason for the decision.

2.5. Double convictions can occur in the magistrates’ court. If it is proved that the defendant committed the aggravated offence, then they must also have committed the underlying basic offence. Convicting the defendant of both offences means that if there is a successful appeal against the aggravated element, the conviction for the underlying basic offence will still stand. However, the obvious consequence is that the defendant is left with two separate convictions on his record for the same crime, even if he receives only one sentence. In the case of R (on the application of Dyer) v Watford Magistrates’ Court [2013] EWHC 547 (Admin), the Divisional Court was critical of the practice, finding that it was unfair and disproportionate for a defendant to be convicted twice for a single wrong. Unfortunately, following Dyer, magistrates continued the practice of double convictions. Earlier this year, in Henderson v CPS [2016] EWHC 464 (Admin), the Divisional Court once again held that, where a defendant faces two charges which are properly characterised as alternatives, there should not be findings of guilt on both charges. The proper course is to adjourn the lesser charge before conviction under section 10 of the Magistrates’ Courts Act 1980, so that if an appeal against the aggravated offences was successful, the lesser charge could subsequently be dealt with.

2.6. The decision in Henderson must be enforced in order to prevent unfairness to defendants. Alternatively, the problems associated with alternative charges could be alleviated by according magistrates the power to return alternative verdicts in hate crime cases, as can be done in the Crown Court. If magistrates had this power, in all cases, the aggravated offence could be charged alone, and if not satisfied of the aggravated element, the defendant could still be convicted of the basic offence.

3. Uncertainty as to the relationship between offences and sentencing provisions for hate crime

3.1. Sections 145 and 146 of the Criminal Justice Act 2003 require sentencing judges to increase the sentence for any offence where the offender demonstrated hostility or was motivated by hostility on the basis of race or religion (section 145), or disability, sexual orientation or transgender identity (section 146).

3.2. As there are no specific aggravated offences on the basis of disability, sexual orientation or transgender identity, the issue is the relationship between the racially
and religiously aggravated offences and section 145 of the 2003 Act. Section 145 ‘applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998’ (emphasis added). The wording of section 145 has created confusion as to whether the provision can be applied to an offence which could have been, but was not, charged as an aggravated offence (e.g. a common assault which was not charged as a racially aggravated common assault).

3.3. **Practitioner guidance** suggests that section 145 should not be applied to basic offences which could have been, but were not, charged as aggravated offences. However, the Court of Appeal recently took a literal approach to section 145 (O’Leary [2015] EWCA Crim 1306), finding that, while it excludes the aggravated offences, it does not necessarily exclude the basic offences. In consequence of the court’s decision and reasoning, where an aggravated offence could have been, but was not, charged, racial or religious aggravation can sometimes be dealt with at sentencing. However, the precise circumstances in which this can happen remain unclear.

3.4. In Owusu-Bempah and Walters (2016), it is argued that the decision in O’Leary is contrary to the principle that an offender should not be sentenced for a more serious offence than the offence of which he has been convicted. To sentence an assault on the basis that it was racially aggravated, for example, is equivalent to passing sentence for the more serious offence of racially aggravated assault. In addition, the decision in O’Leary could lead to prosecutors side-stepping the aggravated offences and waiting until sentencing to raise the issue of racial or religious aggravation. This would undermine the existence of the aggravated offences and create the impression that hate crime is not taken as seriously as it could be.

3.5. Greater clarification is needed as to the relationship between the aggravated offences and section 145. Alternatively, to alleviate the complexity and the problems arising from a combined system of specific criminal offences to deal with some conduct and sentencing legislation to deal with other conduct, there could be a single legislative response to hostility-based offending. In practical terms, the most straightforward route would be to repeal the aggravated offences and rely solely on sentencing legislation. In all cases, the basic offence would be charged and the hostility element could be taken into account at sentencing. This would create consistency across protected characteristics and the type of conduct covered by the legislation. It would be unlikely to impact on the sentences passed, as the vast majority of sentences for aggravated offences fall within the range available for the basic version of the offence. However, there is evidence that the sentencing provisions are not currently applied consistently or rigorously, as expressed in the **Law Commission’s report**, Hate Crime: Should the Current Offences be Extended? (Law Com No 348, 2014). Again, this suggests that hate crime legislation is not being applied effectively. Increased understanding and application of the sentencing provisions is, therefore, needed.

4. **Definition of hate crime**

4.1. The definition of hate crime which is used by police, the CPS and other criminal justice agencies is, ‘any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s race or perceived race; religion or perceived religion; sexual orientation or perceived sexual
orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender.’ While the definition is useful for the reporting of hate crime and supporting policies to prevent hate crime, it is not consistent with the requirements of any of the statutory hate crime offences.

4.2. There are three significant differences between the operational definition of hate crime and the legislative requirements of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 (aside from the fact that the 1998 Act applies only to race and religion, and there is an exhaustive list of offences that can be prosecuted as racially or religiously aggravated):

4.2.1. First, under the operational definition, it is sufficient that the ‘victim or any other person’ perceives the offence to be a hate crime. Under the 1998 Act and the 2003 Act, the perception of the victim or any other person is not sufficient. There must be a proven demonstration or motivation of hostility.

4.2.2. Second, under the operational definition, a hate crime occurs where the offence is perceived to be motivated by hostility or prejudice. Under the 1998 Act and the 2003 Act, a hostile motivation is one way in which an offence can become aggravated, but it is not the only way. Alternatively, an offence can become aggravated if there was a demonstration of hostility based on the victim’s membership or presumed membership of a particular group.

4.2.3. Third, under the operational definition, a hate crime occurs where the offence is perceived to be motivated by hostility or prejudice towards certain personal characteristics. The legislation, on the other hand, refers only to hostility.

4.3. The significant differences between the operational definition of hate crime and the requirements for establishing liability for a racially or religiously aggravated offence (or applying sentencing legislation) may cause confusion. Because it is based on perception, the operational definition falls very far below the standard of what is ordinarily required for someone to be convicted of a crime, let alone a specific hate crime offence. This is seldom explained in official publications, or by the media when reporting on hate crime, which might create a misleading impression as to the requirements for criminal liability or the law’s response to hate crime.

4.4. Additionally, where, for example, prosecution and conviction statistics are presented on the basis of the operational definition, it may create an impression that far more people are convicted and sentenced pursuant to hate crime legislation than is the case, or generally create a misleading impression about the performance of criminal justice agencies. The CPS Hate Crime Report 2014/15 and 2015/16 reports 10,920 convictions for racially and religiously aggravated crimes in 2015/16. At least some of the incidents that make up this number would not, or could not, be prosecuted or sentenced pursuant to hate crime legislation. For example, the CPS report that in 2011-12, there were 10,412 convictions for racially and religiously aggravated crimes, whereas the Overview of Hate Crime in England and Wales reported that, in 2012, 6,458 defendants were convicted of the offences under the Crime and Disorder Act 1998.
4.5. Greater transparency and understanding of the response to hate crime could be achieved through a clear explanation of the purpose of the operational definition, and a clear explanation of when statistics do not represent the number of times individuals were charged/prosecuted/convicted/sentenced under hate crime legislation.

5. Conclusions

5.1. There are many issues with existing hate crime legislation which fall outside of the scope of this submission. For example, there is a lack of uniformity with regards to what offences are covered by legislation and which characteristics are protected. These issues have been considered in a Law Commission consultation paper and report. There are also broader issues around the purpose of hate crime legislation, whether it has any deterrent or communicative effect, and whether the criminal law should be used as an educative tool.

5.2. As it stands, there is insufficient evidence of the operational realities of hate crime law on which to base informed and effective reform to the legislation. The Law Commission recommended that a full-scale review of the operation of the existing aggravated offences and the sentencing provisions be carried out, in order to ‘establish whether aggravated offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be treated as protected.’ (Law Com. No.348, para 5.102). The Government is yet to respond to the Commission’s recommendation for a full-scale review. However, the ‘Life Cycle of a Hate Crime’ study aims to respond to issues raised by the Law Commission; gather experiential accounts of hate crime legislation in action; identify the shortfalls in the existing legislation; and identify best practice models of hate crime legislation and policy. The results of the study will be published in mid-2017.

6. Recommendations

6.1. Further evidence of the operational realities of hate crime law is needed, before any amendments are made to existing legislation. Such evidence will be provided by the ‘Life Cycle of a Hate Crime’ study, and the Government may benefit from awaiting the results of the study, before amending the law.

6.2. In the meantime, improved understanding and application of existing hate crime legislation could be achieved by:

- Accurate and comprehensive statements of the law in official reports and publications on hate crime.
- A requirement for prosecutors to keep a record of charges proceeded with after initial hearings in cases involving racially and religiously aggravated offences, and the reasons for downgrading charges in individual cases.
- According magistrates with the power to return alternative verdicts in cases involving racially and religiously aggravated offences.
- Greater recognition and clarity of the differences between the operational and legislative definitions of hate crime.
References
