



**Promoting Access to Justice for  
Disabled Witnesses of Disability Hate  
Crime**

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# DISABLED WITNESS PROJECT

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## ABBREVIATIONS

ABE	Achieving Best Evidence
CDA	Crime and Disorder Act 1988
CJA	Criminal Justice Act 2003
CPS	Crown Prosecution Service
GAD	Greenwich Association of Disabled People's Centre for Independent Living
HMICFRS	Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services
HMCPI	Her Majesty's Crown Prosecution Inspectorate
MPS	Metropolitan Police Service
NPCC	National Police Chiefs' Council
PEEL	Police Effectiveness, Efficiency and Legitimacy (inspection framework)
POA	Public Order Act 1986
UNCPRD	United Nations Convention on the Rights of Persons with Disabilities

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## **EXECUTIVE SUMMARY**

### **Background**

The Disabled Witness Project is an independent research project based at the University of Greenwich, School of Law. It was initially commissioned in 2012. This report is from the second phase of the Disabled Witness Project, the aim of which is to promote access to justice for disabled witnesses of Disability Hate Crime. The research for this report undertook a review of the efficacy of current legislation; examined strategies for the effective policing of Disability Hate Crime, and considered recommendations for the HMICFRS in order to include in the PEEL inspection framework<sup>1</sup> for police forces in England and Wales a measure of how effectively police forces are identifying and recording incidents of Disability Hate Crime.

The report is funded by the Peter Harris Trust.

### **Methodology**

A mixed methods approach was employed for the project which enabled an assessment of the current legislation, a comparative analysis of problem profiles from the Metropolitan Police Service, two case studies from separate police forces and semi-structured interviews with Disabled Hate Crime leads in the police, and representatives from the Cross-Government Hate Crime Management Programme, governmental and non-governmental organisations, charities and other disability stakeholders.

No distinction is made between victims and offenders of Disability Hate Crime, for the purpose of this report they are referred to as Disabled Witnesses.

### **Disability Hate Crime and the Law**

This report considers the current legal framework for Disability Hate Crime, argues that there is a need to amend the law to “ensure effective access to justice for persons with disabilities on an equal basis with others”<sup>2</sup> and considers two key recommendations for achieving legal equality.

#### **Current Legal Framework**

- Section 146 of the Criminal Justice Act 2003 (CJA) is the key legislative provision for protecting disabled witnesses of Disability Hate Crime. It establishes that, in circumstances where a person commits a crime, and it is proved that, at the time of the offence, or immediately before or after, the offender demonstrated towards the victim of the offence hostility based on that person’s disability or presumed disability, or the offence is motivated by hostility towards the person who has a disability, the court must treat those circumstances as an aggravating factor and impose an enhanced sentence for Disability Hate Crime.

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<sup>1</sup> Police Effectiveness, Efficiency and Legitimacy inspection framework.

<sup>2</sup> UNCRPD Article 13.

- This provision gives rise to certain barriers to achieving remedies for Disability Hate Crime:
  - The process set down in s.146 leads to practical challenges of recognition, reporting and recording of Disability Hate Crime which reduce the chances of enhanced sentencing at trial.
  - If the defendant is found not guilty of the original crime, then the enhanced sentencing powers cannot be used.
  - The enhanced sentence does not appear on the offender's record because the Disability Hate Crime element is part of the sentence, not the offence.
- In contrast, the Crime and Disorder Act 1988 (CDA) ss. 28-32 provide an immediate remedy for an offence which is motivated by hostility on the grounds of race or religion.
  - Once recognised as such, the initial offence becomes a separate offence with a higher maximum sentence immediately available.
  - In addition, s.145 CJA (see Annex 1) provides for enhanced sentencing for any crime "religiously or racially aggravated" not recognised as an aggravated crime by the CDA.
- Proposals for amending the law to achieve legal equality
  1. Extend the CDA to Disability Hate Crime, so that Disability Hate Crime becomes an aggravated offence with the same investigative procedures and remedies as for Race or Religious Hate Crime.

Challenges:

    - Disagreement amongst stakeholders as to which of three definitions of disability should be used. In 2014 the Law Commission recommended that this should be "physical or mental impairment" as in ss.146 (5).
    - In the interests of equal justice and in line with Government policy, the law would also need to be extended to the other two identified strands of hate crime - Transgender and Sexual Orientation - adding another layer of complexity.
    - Section 28 CDA limits the crimes which can give rise to religiously or racially aggravated offences to those listed in ss. 29-32: assaults; criminal damage; public order offences and harassment. In addition to these, property and sexual offences are relevant to Disability Hate Crime.
  2. Abolish all aggravated offences and provide remedies for all Hate Crime under ss.146 and 145 CJA.

Challenges:

    - A record of the sentence up-lift and the reason for it would need to be made on the offender's record in order to record the hate crime and to protect potential victims.
    - Removing all offences of hate crime means removing the symbolic function the current offences serve. The status of Race and Religious Hate Crime would be diminished and there would undoubtedly be political and practical consequences.

Challenges common to both proposals: the wording of the provisions which require proof of an offender being “motivated by hostility when committing a crime”.

- Disability Hate Crime is often committed because a person is disabled rather than out of hostility to that person.
- The introduction of the “by reason of” disability/personal characteristic test suggested by Professor Walters, University of Sussex, would overcome this problem.

## **Recommendations**

The following recommendations relate to the two key proposals put forward for reform:

1. A decision to extend aggravated offences to Disability Hate Crime should lead to the following amendments:
  - a. A change to the wording of s.28(1)(b) CDA to replace “motivated by hostility” to a disability/personal characteristic or disability/presumed personal characteristic to “by reason of” a disability/personal characteristic.
  - b. the inclusion of property and sexual offences as crimes so that all crimes related to Disability Hate Crime can become aggravated crimes or, alternatively, the inclusion of all crimes to ensure a remedy can be achieved for any hate crime against any personal characteristic.
  - c. Clarification on the definition of disability for the purposes of an aggravated offence.
2. A decision to abolish all hate crimes would require:
  - a. A change to the wording of s.146(2)(b) CJA to introduce a “by reason of” a personal characteristic test rather than the “motivated by hostility” test to facilitate convictions and sentence uplift for all Hate Crime.
  - b. The mandatory requirement to record sentence uplifts on the offender’s criminal record.
  - c. Consideration of the political, practical, judicial and symbolic impact of this reform on the status of Hate Crime and on the combined achievements of ss. 28-32 CDA and the police and judiciary in combatting Race and Religious Hate Crime.

## **Practical Challenges to the Application of the Law**

This report identifies three common themes that had emerged through the various reports carried out by Her Majesty’s Inspectorate of Constabulary, Fire and Rescue Service (HMICFRS) and Her Majesty’s Crown Prosecution Service Inspectorate (HMCPSI).

The themes were:

- Identification and reporting of Disability Hate Crime is problematic.



- There is a lack of recognition of Disability Hate Crime in terms of police officers recognising that the witness may be disabled or failing to ask if the witness is disabled, which would then lead to an investigation as to whether the offender was motivated by hostility based on the witnesses disability.
  - There is also a failure to recognise Disability Hate Crime in society, which means witnesses of Disability Hate Crime often fail to report it because they do not realise the actions of the offender can be punished by the law.
  - Other issues linked to reporting of Disability Hate Crime concern how the police respond to disabled witnesses in terms of taking them seriously and also responding positively to the reports of Disability Hate Crime.
  - Problem profiles from the MPS from 2009-12 and 2016-18 showed a significant range of responses to witnesses of Disability Hate Crime. All the profiles, however, indicated that a positive outcome is dependent on the individual responding officer recognising the potential for the offence to be one of Disability Hate Crime.
- The police investigative process is an issue.
    - The low recording levels of Disability Hate Crime is evident in the reports from the HMICFRS, HMCPSI, and the number of recorded Disability Hate Crimes.
    - The Disabled Witness Project found that, in 2016/17, 5,558 reports of Disability Hate Crimes were recorded, which was an increase from 2015/16 when 3,629 Disability Hate Crimes were recorded. However, the HMICFRS and HMCPSI in October 2018 found that the Disability Hate Crime flag had only been used in 63 out of 90 cases which were examined, indicating that the figures are probably inaccurate.
    - There is a huge disparity between the number of recorded Disability Hate Crimes and the number of recorded Race Hate Crimes. For example, in 2017/18 there were 71,251 Race Hate Crimes but only 7,226 recorded Disability Hate Crimes.
    - Despite being a requirement by the Home Office, police forces are not flagging Disability Hate Crime on crime recording systems. Flagging an offence of Disability Hate Crime means that it will be investigated as Disability Hate Crime and recorded as Disability Hate Crime.
  - There is a need for consistent training and awareness raising of Disability Hate Crime.
  - The examples from the problem profiles showed a need for:
    1. Awareness raising amongst police officers about Disability Hate Crime;
      - An initiative called Disability Hate Crime MATTERS launched in March 2016 and used by the MPS did increase awareness of Disability Hate Crime during the period in which it was actively used.
      - The word MATTERS spelled out exactly how and what police officers should do to record and flag Disability Hate Crime.

2. The importance of consistent and adequate training for police officers
  - Face to face training is the best form of training for Disability Hate Crime. Various examples are highlighted in this report.
  - Drawing upon a case study from work undertaken by Northumbria Police in the area of mental health, the use of people with lived experience in terms of delivering the training would have an impact and help make the training effective.
  - There is also a need for police forces to understand the local picture for Disability Hate Crime, so they know the extent of the problem. This can be achieved by engaging with local advocacy services and support services which disabled people use.
  
3. The need for national consistency in how Disability Hate Crime is policed.
  - There is a need for policing to be consistent throughout England and Wales in how the police identify, record and investigate Disability Hate Crime.
  - There have been improvements, as the problem profiles from the MPS demonstrate, but the improvement is inconsistent.
  - Training for police officers in Disability Hate Crime needs to address the identification of Disability Hate Crime at the initial report stage and during the investigative process.
  - These are the same issues that were identified in 2013, 2015 and 2018.
  - In order to achieve this, police forces need to be encouraged to police Disability Hate Crime effectively.
  - The HMICFRS could assess as part of the PEEL (Police Effectiveness, Efficiency and Legitimacy) inspection framework how effectively police forces responded to and support people with disabilities in terms of:
    - Identifying people with disabilities when they first contact the force
    - Identifying and recording the number of cases involving Disability Hate Crime and making sure expert help and support is available from other organisations, in particular, local disability groups and networks.
  - The measure for this assessment would be the number of recorded incidents with a Disability Hate Crime flag/marker over the course of a year.

## **Recommendations**

1. The HMICFRS assess as part of the PEEL inspection framework how effective police forces are at identifying and recording Disability Hate Crime.
  
2. Police forces need to understand the local picture in order to improve their training and awareness raising on Disability Hate Crime.

3. Police forces should adopt an initiative based on Disability Hate Crime MATTERS to train police officers, and work with local disabled people and disability groups to incorporate face to face training.

## Part I

# THE DISABLED WITNESS PROJECT

## 1. Background

In July 2016, the UK Government published its four year plan for tackling Hate Crime, confirming that “(a)ny crime that is motivated by hostility on the grounds of race, religion, sexual orientation, disability or transgender identity can be classed as a hate crime.”<sup>3</sup> The publication’s introductory chapter begins with two powerful statements: the first describes the “pernicious”<sup>4</sup> nature of Hate Crime while the second considers the action that must be taken to deal with it:

*“The UK has one of the strongest legislative frameworks to tackle hate crime in the world. However, legislation can only ever be part of the answer. Unless people have the confidence to come forward, unless the police are equipped to effectively deal with these crimes, unless victims are properly supported and perpetrators brought to justice, and crucially unless we take action to tackle the attitudes and beliefs that drive these crimes, too many people will continue to suffer.”<sup>5</sup>*

On 8th June 2009, the United Kingdom ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which states:

*“Article 13 Access to justice*

- 1. **States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.***
- 2. In order to help to ensure effective access to justice for persons with disabilities, **States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.**”<sup>6</sup>*

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<sup>3</sup> Home Office (2016) Action Against Hate: The UK Government’s plan for tackling Hate Crime, Chapter 3, [11] available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543679/Action\\_Against\\_Hate\\_-\\_UK\\_Government\\_s\\_Plan\\_to\\_Tackle\\_Hate\\_Crime\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf)

<sup>4</sup> Above n3, [9].

<sup>5</sup> Home Office (2016) Action Against Hate: The UK Government’s plan for tackling Hate Crime [10].

<sup>6</sup> Disabled Witness Project authors’ emphasis.

In line with the UNCRPD, the Equality Act 2010 established the public sector duty in English and Welsh Law:

*“(1)A public authority must, in the exercise of its functions, have due regard to the need to—*

*(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(b) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

In March 2012, the Government published Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime in which it reaffirmed and justified its “policy approach to hate crime” as being “based on a human rights approach”:

*“It is not, as some would claim, a sign of misguided political correctness. Protection from targeted abuse, regardless of how it manifests, is a right we all share whether we are part of the minority or majority population. We believe that it is right to focus our efforts on those who are most at risk, and to aspire to a position where we all share the same right, to live free from abuse based on our personal characteristic.”<sup>7</sup>*

In October 2018, Sarah Newton MP, then Minister for Disabled People, Health and Work<sup>8</sup> recognised the importance of the UNCRPD in her opening statement reporting on the “progress on the UK’s vision to build a society which is fully inclusive of disabled people”:

*“The UK has a clear vision – to create a society that works for everyone, where all can participate fully. The UN Convention on the rights of Persons with Disabilities (the convention) guiding principles are integral to our approach, and we are committed to tackling the barriers faced by disabled people across all aspects of life.*

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<sup>7</sup> Home Office (2012), Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime [1.6] p6, available at <https://www.gov.uk/government/publications/challenge-it-report-it-stop-it>

<sup>8</sup>Sarah Newton resigned from the Government on 13<sup>th</sup> March 2019: “Today, I resigned from the Government so that I could vote for a motion that honours my commitment to my constituents, to leave the EU with ‘a deal’”. Newton, S (2019) available at <https://twitter.com/SNewtonUK/status/1105967832108621824> accessed 2 April 2019. Justin Tomlinson succeeded Ms Newton on 4 April 2019.

*The UK has achieved a great deal and has been at the forefront of developments in equality and disability rights. But we are clear that more needs to be done. We will continuously develop and deliver real and practical improvements to ensure disabled people have the same opportunities for inclusion as people who are not disabled.”<sup>9</sup>*

The Minister reported that a new Inter-Ministerial Group on Disability and Society had been set up “to drive forward co-ordinated action across government departments...to tackle barriers to disabled people’s full participation,”<sup>10</sup> and that progress had been made in areas such as transport, housing, health, employment and even international development. There was, however, no consideration of initiatives to facilitate access to justice for disabled witnesses and victims of Disability Hate Crime, despite the fact that for at least a decade, access to justice had been a key concern of disabled stakeholders and, more recently in February 2018 had formed an important part of the evidence offered to the House of Commons Petitions Committee investigating online abuse and the experience of disabled people.<sup>11</sup>

In a recent interview with the Disabled Witness Project, Assistant Chief Constable Mark Hamilton, national policing lead for Hate Crime<sup>12</sup> agreed that Disability Hate Crime remains “*the Cinderella of Hate Crime*”. He suggested one reason for this was that “*Brexit (has) created a single narrative around Hate Crime primarily around race and religion....The effect of the situation is that disability voices are being lost. They are the silent victims of an offence which is not understood.*”<sup>13</sup> The fact that the main emphasis of the Home Office’s update, Action Against Hate, The UK Government’s Plan to tackle Hate Crime – ‘two years on’, published in October 2018, is on race and religion seems to support this view. Nevertheless, there was a specific commitment to “*increase and broaden our engagement with stakeholders representing disabled people*” and an announcement that there would be a review of Hate Crime legislation.

In October 2018, the Law Commission announced that it would be starting a “wide-ranging review of hate crime”. The terms of reference are: “*To review the adequacy and parity of protection offered by the law relating to hate crime and to make recommendations for its reform.*”<sup>14</sup>

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<sup>9</sup> Office of Disability Issues, Progress on the UK’s vision to build a society which is fully inclusive of disabled people: letter from the Minister for Disabled People, Health and Work (Updated 3rd October 2018) <https://www.gov.uk/government/publications/disabled-peoples-rights-information-following-the-uks-first-periodic-review/progress-on-the-uks-vision-to-build-a-society-which-is-fully-inclusive-of-disabled-people-letter-from-the-minister-for-disabled-people-health-and-w> accessed 1 April 2019. Since this policy document there has been no further update.

<sup>10</sup> Above n9.

<sup>11</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people <https://www.parliamentlive.tv/Event/Index/e2cf146d-4840-4558-aca3-bed718478182> accessed 4 April 2019.

<sup>12</sup> National policing lead refers to the National Police Chiefs Council lead on a particular strand of work, in this case Hate Crime.

<sup>13</sup> February 2019.

<sup>14</sup> Law Commission, Law Commission Review into Hate Crime Announced, <https://www.lawcom.gov.uk/law-commission-review-into-hate-crime-announced/> accessed 4 April 2019.

In January 2019, the House of Commons Petitions Committee made the following recommendation in its report:

***“Disability hate crime is not fully recognised and perpetrators are not appropriately punished. The law on hate crime must give disabled people the same protections as those who suffer hate crime due to race or religion.”***<sup>15</sup>

## **2. Project Origins**

The Disabled Witness Project is an independent research project based in the University of Greenwich, School of Law. It was initially commissioned in 2012 (following the publication of the Coalition Government’s plan to tackle Hate Crime ) by the Greenwich Association of Disabled People’s Centre for Independent Living (GAD)<sup>16</sup>, supported by the Metropolitan Police Service (MPS), to examine the operation of the law through a study of how far the current legislation, common law, codes of practice, pre-trial procedures do, in fact, provide the necessary support to facilitate the giving of evidence in court by disabled witnesses to Disability Hate Crime. Central to the initial Disabled Witness Project investigation (2012-18) was the analysis of how closed cases were handled through the examination of police reports and the first-hand experience of those involved in the pre-trial process.<sup>17</sup>

The first phase of the Disabled Witness Project identified two key areas for improving access to justice for disabled witnesses of Disability Hate Crime: firstly, a need for a change in legislation to give victims of Disability Hate Crime the same protection as victims of other hate crimes, and secondly, for innovative strategies for effective policing of Disability Hate Crime at a force level, which could provide the foundations for changes in national police policy and procedure. In August 2018, the Disabled Witness Project was granted funds by the Peter Harris Trust to continue its work. The Disabled Witness Project has also received extensive practical support from GAD, Her Majesty’s Inspectorate of Constabulary, and Fire & Rescue Services (HMICFRS) and the National Police Chiefs’ Council (NPCC).

## **3. Project Terms of Reference**

### **3.1 Aim**

The second phase of the Disabled Witness Project aims to promote access to justice for disabled witnesses of Disability Hate Crime through a review of the efficacy of current legislation; an investigation of strategies for the effective policing of Disability

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<sup>15</sup> House of Commons Petitions Committee (2019), Online abuse and the experience of disabled people p 3 available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcompetitions/759/759.pdf>; emphasis House of Commons Petitions Committee – the only summary recommendation in bold type.

<sup>16</sup> Joined Metro on 1<sup>st</sup> March 2019 to become ‘METRO GAD’: a charitable organisation to “provide advice and information, advocacy and volunteering opportunities for disabled people who live, work or study in the Royal Borough of Greenwich”.

<sup>17</sup>Laycock A and Hewitt L (eds) Disabled Witness Project: Monitoring Access to Justice for Disabled Witnesses of Hate Crime (2019) Publication date August 2019.

Hate Crime, and the development of recommendations for Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) in order to include in the PEEL inspection framework<sup>18</sup> for police forces in England and Wales a measure of how effectively police forces are identifying and recording incidents of Disability Hate Crime.

### 3.2 Scope

Given that this work was of a year's duration, the Disabled Witness Project team has focused their research on the potential efficacy of aggravated offences under ss. 28-32 Crime and Disorder Act 1988 and of enhanced sentencing under s.146 Criminal Justice Act 2003, as these directly relate to the work of the police in combatting Disability Hate Crime, which forms the second part of the Disabled Witness Project's investigation. A further candidate for reform to achieve legal parity with Race and Religious Hate Crime would be the Public Order Act 1986 (POA) incitement to hatred offences. These require conduct which is either threatening, abusive or insulting. In 2014 the Law Commission recommended "not extending the stirring up offences on grounds of disability or transgender identity" on the grounds that "such offences would rarely, if ever, be prosecuted, and their communicative or deterrent effect would therefore be negligible."<sup>19</sup> However, the Law Commission have included in its terms of reference for the current review, the question, "Should crimes of stirring up hatred in the POA be extended or reformed?"

At the beginning of 2019, the House of Commons Petitions Committee, Online abuse and the experience of disabled people reported:

*"Multiple participants in our events spoke about a culture of "demonising" disabled people. The hostile language associated with benefits and using blue badges came up at all the events we ran.... People we met described a "culture of fear" for disabled people who post about their daily life and activities, due to being accused of faking their disability for benefits and threatened with being reported to the Department for Work and Pensions for fraud."<sup>20</sup>*

This evidence suggests that there are grounds for revisiting the case for extension of the offence for disability.

### 3.3 Methodology

In order to achieve this, the Disabled Witness Project team have adopted a mixed-method approach, which has included: (i) assessment of current legislation; policy documents and publicly available statistics; (ii) a comparative analysis of two sets of problem profiles from the MPS; iii) two case studies of good practice from police forces

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<sup>18</sup> Police Effectiveness, Efficiency and Legitimacy inspection framework.

<sup>19</sup> Law Commission summary, available at <https://www.lawcom.gov.uk/project/hate-crime-completed-report-2014/>

<sup>20</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people above n15 [41] & [42] p16, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cm petitions/759/759.pdf>



(iv) in-depth qualitative semi-structured interviews with national police leads for Hate Crime, Mental Impairment and Disability; the Cross-Government Hate Crime Programme Manager; Disability Hate Crime witnesses; staff of non-governmental organisations and charities that support victims of Disability Hate Crime and trainers in Disability Hate Crime.

### 3.4 Terminology

The terminology of ‘*Disability Hate Crime*’ and ‘*Disabled Witness*’ is integral to the work of the Disabled Witness Project, and therefore, an explanation of their use in this report is offered below.

#### 3.4.1 Disability Hate Crime

Launching its review of hate crime laws in England and Wales in March 2019, the Law Commission stated:

*“Hate crimes are **acts** of violence or hostility directed at people because of who they are.”<sup>21</sup>*

Currently, five specific characteristics are protected under hate crime laws: Race, Religion, Sexual Orientation, Transgender Identity and Disability. However, unlike Race and Religious Hate Crime, Disability Hate Crime is not a criminal offence. There is no definition of Disability Hate Crime in English Law. A person “*demonstrating or being motivated by hostility towards*”<sup>22</sup> a disabled person cannot be prosecuted and convicted of Disability Hate Crime. Victims of Disability Hate Crime are protected only by enhanced sentencing powers provided that a crime has been committed and hostility towards that person because of his/her disability is identified, reported and recorded. The Law Commission definition of Hate Crime can be applied to all Hate Crime since the use of the word “acts” overcomes the existing distinction between the aggravated crimes of Race and Religion and Disability Hate Crime. The term “hostility”, however, could prove problematical if this definition were to be used when legislating to establish Disability Hate Crime as a criminal offence: though a person might have been **targeted** for his/her disability, “**hostility**” is not always present in Disability Hate Crime. Giving evidence to the House of Commons Petitions Committee, Professor Mark Walters, Criminal Law and Criminology, University of Sussex, submitted that the “motivation of hostility” test should be replaced with a “by

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<sup>21</sup> Law Commission, ‘Current Project Status’ *Hate Crime* <http://www.lawcom.gov.uk/project/hate-crime/> accessed 19<sup>th</sup> March 2019; Disabled Witness Project authors’ emphasis.

<sup>22</sup> Law Commission, *Hate Crime: Background to our Review* [https://s3-eu-west-2.amazonaws.com/lawcom-production-11jxou24uy7q/uploads/2019/03/6.5286-LC\\_Hate-Crime\\_Information-Paper\\_A4\\_FINAL\\_260219\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-production-11jxou24uy7q/uploads/2019/03/6.5286-LC_Hate-Crime_Information-Paper_A4_FINAL_260219_WEB.pdf) accessed 19 March 2019.

reason of” test. If a victim has been selected “by reason of” his/her disability, that should be enough to demonstrate a hate crime.”<sup>23</sup>

The definition agreed by the NPCC (formerly the Association of Chief Police Officers) and the Crown Prosecution Service (CPS) in 2013 was confirmed in the HMFICRS 2018 report as:

***“Any incident/crime which is perceived, by the victim or any other person, to be motivated by hostility or prejudice based on a person’s disability or perceived disability.”***<sup>24</sup>

The phrase “*prejudice based on a person’s disability or perceived disability*” provides an alternative to the requirement of “hostility” similar to Professor Walters’ “by reason of” test, while the definition itself recognises Disability Hate Crime as an incident as well as a crime. **For these reasons this report will use the NPCC/CPS definition.**<sup>25</sup>

### 3.4.2 Disabled Witness

According to the Equality Act 2010 s.6(1)

*“A person (P) has a disability if—*  
*(a) P has a physical or mental impairment, and*  
*(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”*

Section 2 states:

*“A reference to a disabled person is a reference to a person who has a disability.”*

However, under s.146 of the Criminal Justice Act 2003, an increase in sentence for aggravation related to disability is imposed, providing that “*disability means any physical or mental impairment*”.<sup>26</sup> Since the s.146 CJA is currently the key provision facilitating access to justice for disabled witnesses of Disability Hate Crime, **for the purposes of this report, a disabled witness is a person who has a “physical or mental impairment” and who has witnessed a Disability Hate Crime.** No distinction is made between defendant and victim, since the disabled witness of Disability Hate Crime, whether defendant or victim, has, guaranteed in UK law through the Human Rights Act 1998, a human right to a fair trial.<sup>27</sup>

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<sup>23</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people above n15 [110] p38; see discussion below at 4.2.

<sup>24</sup> HMFICRS, Joint Inspection of the Handling of Cases Involving Disability Hate Crime [4.1] p9 (October 2018); available at [https://www.justiceinspectores.gov.uk/cji/wp-content/uploads/sites/2/2018/10/CJJI\\_DHC\\_thm\\_Oct18\\_rpt.pdf](https://www.justiceinspectores.gov.uk/cji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18_rpt.pdf) accessed 5 April 2019.

<sup>25</sup> For further consideration of definition see 4.2.

<sup>26</sup> Section 146(5) CJA.

<sup>27</sup> Human Rights Act 1998 s.1 and schedule 1 incorporating European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 6; established at common law in *R v Killick* [2011] EWCA Crim 1608.

Similarly, the term “disabled” rather than “vulnerable” witness is used in this report. While it is recognised that the term “vulnerable” had its origins in an attempt to provide access to justice for disabled persons through the provision of special measures to aid witnesses in giving evidence, the term “vulnerable witness” is frequently inaccurate or misleading and often inappropriate in the context of Disability Hate Crime. It has the effect of setting the disabled witness apart from other witnesses. As one wheelchair user with a speech impairment, interviewed by the Disabled Witness Project regarding her experiences of reporting such a crime, objected:

*“Although this<sup>28</sup> is about being vulnerable, I don’t actually feel vulnerable...but people perceive me as vulnerable until they know...if people perceive me as vulnerable they will try it on....I am still important and I need to say what it is like to be disabled and when people perceive me as vulnerable but luckily I don’t feel vulnerable. I stand up in life.”<sup>29</sup>*

The problematic nature of the term “vulnerable” for disabled witnesses was officially recognised by the House of Commons Petitions Committee in its report, Online abuse and the experience of disabled people, 8<sup>th</sup> January 2019:

*“The criminal justice system is too quick to categorise disabled people as “vulnerable”. Hostility towards disabled people is often based on a perception that they are an easy target who can’t contribute to society.”<sup>30</sup>*

Accepting Professor Walters’ evidence that:

*“(t)he vulnerability designation perpetuates damaging stereotypes about disabled people, which in turn may reinforce the beliefs and attitudes that lead to disabled people being marginalised and abused,”*

the Committee recommended that, since the CPS and the police could only work within the existing legal framework, the Government should review the law consulting disabled stakeholders with *“the aim of ensuring hate crimes are properly reported and sentenced as such and that “vulnerability” is only used when appropriate.”<sup>31</sup>*

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<sup>28</sup> The Disabled Witness Project then called the “Vulnerable Witness Project”.

<sup>29</sup> Interviewee for Disabled Witness Project 2017.

<sup>30</sup> House of Commons Petitions Committee Online abuse and the experience of disabled people n15 [117] p41.

<sup>31</sup> Above n30 [118].

## Part II

# DISABILITY HATE CRIME AND THE LAW

## 4. The Current Legislative Framework

### **4.1 Section 146 CJA: Enhanced Sentence for Aggravation Related to Disability**

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—....

(i) a disability (or presumed disability) of the victim, or....

(b) that the offence is motivated (wholly or partly)—

(i) by hostility towards persons who have a disability or a particular disability

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section "disability" means any physical or mental impairment.

Section 146 CJA is the key legislative provision for protecting disabled witnesses of Disability Hate Crime from "discrimination, harassment or victimisation" and providing equality of opportunity under the law. Unlike victims of Race<sup>32</sup> and Religious Hate Crime<sup>33</sup>, who are additionally protected by offences under the Public Order Act 1986 (POA), there is no offence of stirring up hatred on grounds of disability.<sup>34</sup>

Section 146 establishes that, in circumstances where a person commits a crime, and it is proved that, at the time of the offence, or immediately before or after (s.2(a)), the offender demonstrated towards the victim of the offence hostility based on that person's disability or presumed disability, or the offence is motivated by hostility towards the person who has a disability (s.2(b)), the court must treat those circumstances as an aggravating factor. In summary, a crime must be committed, reported and the perpetrator recorded as being motivated by hostility towards the

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<sup>32</sup> Public Order Act 1986 Part 111 ss.17-29.

<sup>33</sup> Above Part 3A s.29.

<sup>34</sup> See 3.2 for note on POA which is outside the terms of reference of this report.

disabled person when committing the crime and, only then, will this lead to enhanced sentencing power and “sentence uplift”. The practical challenges afforded by the process of gaining a remedy for Disability Hate Crime set down in s.146 are many and go a long way to explain the low number of convictions for Disability Hate Crime - these will be discussed in Part III of this report.

In contrast, the Crime and Disorder Act 1988 ss. 28-32 (CDA) provide an immediate remedy for an offence which is motivated by hostility on the grounds of race or religion. Once recognised as such, the initial offence<sup>35</sup> becomes a separate offence with a higher maximum sentence immediately available. In addition, s.145 CJA (see Annex 1) provides for enhanced sentencing for any crime “religiously or racially aggravated” not recognised as an aggravated crime by the CDA. As one participant at an event organised by the House of Commons Petitions Committee Online abuse and the experience of disabled people observed: *“It’s only a disability hate crime if someone remembers at sentencing. No one is investigating people for disability hate crime.”*<sup>36</sup>

The fact that Disability Hate Crime is not considered until the sentencing stage has certain consequences which go towards explaining the disparity between the number of convictions for Race and Religious Hate Crime and the much smaller number of enhanced sentencing cases for Disability Hate Crime. Under s.146 if the defendant is found not guilty of the original crime, then the enhanced sentencing powers cannot be used. Giving evidence to the House of Commons Petitions Committee both the CPS and Detective Inspector John Donovan, Online Hate Crime Hub, cited the University of Sussex study which concluded that the way the law is currently framed is partly responsible for the under-reporting and under-prosecution of Disability Hate Crime. Only *“0.02% of an estimated 34,840 disability hate crime cases reported to police in 2015-16 resulted in a conviction and an uplift in sentencing. The gap between reported hate crime and convictions that result in a sentencing uplift is particularly big for disability hate crime, when compared to other hate crimes.”*<sup>37</sup>

A further difficulty in gaining a remedy for Disability Hate Crime under the current legislation is that Disability Hate Crime does not appear on the offender’s record because the hate crime element is part of the sentencing, and not the aggravated offence. As Paul Giannasi, UK Cross-Government Hate Crime Programme Manager<sup>38</sup>, explained in his evidence to the House of Commons Petitions Committee:

*“With any crime the court is obligated to increase the sentence and say why it has done so, if it is satisfied that the offender demonstrated, or was motivated partly by, hostility. That is currently not recorded on people’s criminal conviction*

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<sup>35</sup> Crime and Disorder Act 1998 ss.28-32 records the offences that can become aggravated offences; see below for further discussion at 4.2.

<sup>36</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people n15 [105] p37.

<sup>37</sup> Written evidence provided by Professor Mark Walters, University of Sussex, to the House of Commons Petitions Committee, Online abuse and the experience of disabled people n15 [109] p3.8.

<sup>38</sup> 2007-2018; since 1 January 2019 Police Hate Crime Policy Lead.

*record; the core offence of assault may be, but not the hostility element, so we can look at people's records and not see that.*<sup>39</sup>

The petitioner, Katie Price, had requested that a register of offenders be introduced so that it would be possible to check whether potential employees had been convicted of Disability Hate Crime. However, the Petitions Committee argued *“that a sensible criminal law, which covered online abuse and included proper recognition of hate crimes against disabled people, will achieve what the petition is looking for from a register, as criminal convictions will show up as part of a Disclosure and Barring Service check”*.<sup>40</sup> The Committee made a recommendation accordingly,<sup>41</sup> a recommendation which was dependent on legislative change to *“give disabled people the same protections as those who suffer hate crime due to race or religion.”*<sup>42</sup>

## 4.2 Achieving Legal Equality for Witnesses of Disability Hate Crime

The recommendations of the House of Commons Petitions Committee reflect a growing consensus that there is a need for legislative reform to ensure that hate crime law works equally for disabled people as it does for victims of Religious and Race Hate Crime. There also seems to be agreement between all stakeholders that a review of current Disability Hate Crime legislation to achieve greater clarity is a necessary prequel to reform. Giving evidence to the House of Commons Petitions Committee, Andie Gbedemah, Public Affairs Officer, Dimensions,<sup>43</sup> representing the disabled community, observed:

*“The legislation just isn't fit for purpose when it comes to the type of offending that we see against people with disabilities for various reasons....It's not clear enough in helping police and prosecutors to be able to get a criminal justice outcome for disabled people that reflects that this was a hate crime rather than a crime against a vulnerable person or something different.”*<sup>44</sup>

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<sup>39</sup>Paul Giannasi, House of Commons Petitions Committee, Online abuse and the experience of disabled people above n [15 [120] p127-8; The UK Cross-Government Programme was set up in 2007 to bring all parts of the justice system into a single programme focusing predominantly on race. The programme was responsible for identifying the five strands of hate crime to measure and monitor and for setting up an independent advisory group which includes experts on disability and hate crime.

<sup>40</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people above n15, [121] p12.8

<sup>41</sup> Above n15 [122] p129.

<sup>42</sup> Above n15 p.7

<sup>43</sup> A not-for-profit organisation supporting people with learning disabilities and autism <https://www.dimensions-uk.org/>

<sup>44</sup>House of Commons Petitions Committee, Online abuse and the experience of disabled people hearing at 15.57.12-18 <https://www.parliamentlive.tv/Event/Index/e2cf146d-4840-4558-aca3-bed718478182> accessed 8 May 2019.

More specifically, in an interview with the Disabled Witness Project, Paul Giannasi, then UK Cross-Government Hate Programme Manager and currently Police Hate Crime Policy lead, argued that *“clarity around that (the ‘motivated by hostility’ test to establish hate crime) is probably the most important factor that we would want and need to see.”*<sup>45</sup>

There is, however, little agreement as to what reforms should be made to the legislation to achieve “equal justice” for victims of Disability Hate Crime. Anne Novis, Chair of the Board of Trustees of Inclusion London,<sup>46</sup> touched on the issue when giving evidence as a representative of disabled people to the House of Commons Petitions Committee:

*“Why not make this law equal for everybody and it is common sense. If you cannot make that law equal, then you ...amend it so that it is equal justice...it is a human right to have the same access to justice as everybody else”*<sup>47</sup>

There are two main suggestions for reforming the law to achieve “equal justice” for witnesses of Disability Hate Crime with witnesses of Race and Religious Hate Crime. The first, favoured by disabled stakeholders, is to make all Hate Crime an aggravated offence under s.28 CDA. The second, put forward by the police, is to abolish aggravated offences for Race and Religious Hate Crime and to amend ss.145 and 146 CJA to include sentence uplift for all forms of hate crime.

#### 4.2.1 Making Disability Hate Crime an Aggravated Offence

The Law Commission in 2014 reported that “a substantial majority of consultees, many with experience and influence in the criminal justice system, considered that the aggravated offences should be extended.”<sup>48</sup> The list included HMCPs Inspectorate, the CPS, non-governmental organizations including the Equality and Human Rights Commission, Victim Support, several disability charities and some academics. There continues to be considerable support for the extension of aggravated offences in 2019. Jemma Tyson<sup>49</sup>, Principal Lecturer, University of Portsmouth, for example, specialising in policing and learning in relation to Disability Hate Crime told the Disabled Witness Project that for her, a change to the legislation in that all hate crimes become aggravated offences,<sup>50</sup> is one of the solutions to the issues surrounding police failure to record and investigate Disability Hate Crime properly.

All four of the disabled stakeholder representatives giving evidence to the House of Commons Petitions Committee, Online abuse and the experience of disabled people,

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<sup>45</sup> September 2018.

<sup>46</sup> A charitable organisation which “supports 70 Deaf and Disabled organisations across every London Borough” <https://www.inclusionlondon.org.uk/about-us/> accessed 27 June 2019.

<sup>47</sup> House of Commons Petitions Committee Online abuse and the experience of disabled people above n44 see Government statement regarding hate crime policy being based on human rights above at Part I 1.

<sup>48</sup> Law Commission No: 348, Hate Crime: should the current offences be extended? (May 2014) [1.29] available <https://www.gov.uk/government/publications/hate-crime-should-the-current-offences-be-extended>

<sup>49</sup> Member of the UK Cross-Government Hate Crime Programme Independent Advisory Board.

<sup>50</sup> Disabled Witness Project March 2019; Ms Tyson also mentioned the need for improvements in reporting and recording Disability Hate Crime.



individually put forward arguments for the extension of aggravated offences to include Disability Hate Crime. Rob Holland, Parliamentary Manger Mencap<sup>51</sup>, set out the key reasons for such an extension:

*“It’s about strengthening the law so that disabled people are treated as the same as other groups and, as Andie has said, there is no specific offence for Disability Hate Crime at the moment, so, if there was to be parity in that respect, then there would be that same level of protection whether it is online or offline, and hopefully that would lead to more prosecutions and more people having that on their record, so, for us, it is very much about getting equality in law. That’s very much the focus for us.”<sup>52</sup>*

Making Disability Hate Crime a criminal offence under the s.28 CDA would indeed go a long way to establish legal equality for witnesses of Disability Hate Crime in that it would establish the same investigative procedure and remedy for disabled people as for witnesses of Religious and Race Hate Crime. Perhaps the most important tangible consequence for the protection of disabled people would be that the conviction would be recorded. To the Committee’s question, *“What effect making Disability Hate Crime an offence would have for the people you are here to represent?”* Rob Holland explained that, such a reform would send a strong message that the law takes Disability Hate Crime as seriously as Race or Religious Hate Crime, which is likely, in turn, to lead to increased reporting, flagging, investigation and convictions:

*“Firstly, it would send a very strong message that the law takes Disability Hate Crime as it does other forms of hate crime and I think that’s an important message that would go out to police forces but also the public as well and I think that would raise the issue in the public conscience. That’s important because I think certainly it is something that is hugely under-reported. The Disability Hate Crimes that are out there are, we think, kind of scratching the surface really and so that might also encourage more people to come forward and report it and see it rise up the agenda and might hopefully see Disability Hate Crimes fall.”<sup>53</sup>*

However, potential barriers have been identified to amending the CDA to include Disability Hate Crime as an aggravated offence. One issue discussed in the Law Commission’s 2014 report is the problem of what definition of disability should be adopted if Disability Hate Crime became an aggravated offence. The main objections

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<sup>51</sup> The Royal Mencap Society is a charity based in the UK that works with people with a learning disability.

<sup>52</sup> Rob Holland, Parliamentary Manager Mencap, House of Commons Petitions Committee [Online abuse and the experience of disabled people](#) 15..31.33-15.32.20 n44 accessed 8 May 2019; see also Mark Walters, Susann Wiedlitska, Abenaa Owusu-Bemba with Kay Goodall, [Hate Crime and the Legal Process](#), University of Sussex 2017 Part C: The Case for Law Reform, available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>

<sup>53</sup> Above n52 accessed 8 May 2019.



to the use of the s.146(5) CJA definition (“disability” means any physical or mental impairment”) were;

(i) that it was not sufficiently explicit about which impairments or conditions the definition covered and

(ii) that it failed to reflect the social model of disability. The social model of disability distinguishes between an “impairment”, that is “a functional limitation” and a “disability”, “the result of a specific set of social or economic structures which hinder the equal participation in everyday life of a person who has an impairment.”<sup>54</sup>

These concerns will need to be reviewed further as some stakeholders continue to hold them, despite the Law Commission’s recommendation that s.146(5) CJA should be used in preference to the UNCRPD or Equality Act 2010 definitions on the following grounds:

*(i) “that adopting either the Equality Act or the CRPD definitions of disability may in fact risk excluding certain impairments or conditions, notably those that amount to physical or mental impairments, but do not comply with the further requirements of the Equality Act or CRPD definitions as to, for example, being long term or hindering participation in normal activities. In our view, it is the breadth of the section 146 definition that is its chief benefit in the hate crime context. For hate crime purposes it should be irrelevant whether a particular impairment or that condition makes it impossible or difficult to live a normal life.”<sup>55</sup>*

*(ii) “It might be argued in the particular context of hate crime, that it is the section 146 definition that better vindicates the “social model”. Using that definition, it is sufficient that the defendant was motivated by hostility towards disabled people or demonstrated hostility towards the complainant due to his or her disability (or presumed disability). The definition of disability would be any form of physical or mental impairment. This must be interpreted using its ordinary meaning and would be a low threshold to establish. This therefore places the focus on the attitude and behaviour of the defendant, rather than on the degree or specific nature of the disability. By contrast, under the Equality Act and CRPD models, more focus would be placed on the nature of the complainant’s disability, which could detract from the significance of the defendant’s hostility.”<sup>56</sup>*

A further argument raised against extending the aggravated offences to Disability Hate Crime is that to achieve equal protection across all groups, such a reform would necessitate extension not only to the two other identified strands, Transgender and Sexual Orientation, but also to other characteristics such as, for example, age or gender, and that this would make the law too complex, unwieldy and difficult for professionals to administer. In 2017, Professor Walters and the University of Sussex

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<sup>54</sup> Law Commission No: 348 above n48 [6.12] p153.

<sup>55</sup> Above n52 [6.27].

<sup>56</sup> Above n52 [6.26].

research team reported that just under half of the interviewees who mentioned law reform believed that the CDA should not be extended for two reasons:

*“1. The aggravated offences are overly complex and could lead to defendants being acquitted of both the basic and aggravated version of the offence.*

*2. “Low-level” hate crimes are “clogging up” the Crown Court and adding further characteristics would result in further costs and delays in the criminal justice system.”<sup>57</sup>*

In the 2014 Law Commission reported:

*“Reservations were also expressed about simply grafting onto three distinct characteristics a set of offences designed two decades ago to address racial hostility.”<sup>58</sup>*

However, since the terms of reference for the 2019 Hate Crime review are much broader than in 2014, enabling the Law Commission to review aggravated offences and the enhanced sentencing system to make recommendations for reform, it is more likely that, should the Law Commission recommend extending the aggravated offences to all three characteristics or indeed all witnesses of Hate Crime, appropriate recommendations will be made to facilitate their inclusion. Furthermore, an extension of the aggravated offences to include Disability Hate Crime and indeed other characteristics is a logical corollary to acceptance of a need for legal equality and the Government’s “Human Rights policy approach” to Hate Crime “to aspire to a position where we all share the same right, to live free from abuse based on our personal characteristic.”<sup>59</sup> Arguably, as Anne Novis of Inclusion London has pointed out, there is a need for a change of culture at all levels of the community including Parliament to recognise Disability Hate Crime as universal rather than limited to particular characteristics:

*“You are all going to be disabled as you get older...so it is understanding that rather than seeing it (disability) as a separate category as another group in society, it is integral, it’s intersectional...it’s all of us.”<sup>60</sup>*

The main challenge to extending aggravated offences to Disability Hate Crime is the criteria for an aggravated offence set out in the CDA.

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<sup>57</sup> Mark Walters et al *Hate Crime and the Legal Process*, University of Sussex 2017 p23-24 available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>

<sup>58</sup> Law Commission No: 348 above n48 [1.33].

<sup>59</sup> Home Office (2012), *Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime* [1.6] p6 available at <https://www.gov.uk/government/publications/challenge-it-report-it-stop-it> accessed 28 June 2019.

<sup>60</sup> Anne Novis MBE House of Commons Petitions Committee *Online abuse and the experience of disabled people*, above n44 at 16.01.29-16.01.48.

Section 28(1) CDA states:

*“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*

*(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.”*

Firstly, s.28 limits the crimes which can give rise to religiously or racially aggravated offences to those listed in ss.29-32: assaults; criminal damage; public order offences and harassment. While all these offences are relevant to Disability Hate Crime, there are other offences which are committed against disabled people because of their disability: property offences such as theft and fraud and sexual offences. According to the 2017 Hate Crime and the Legal Process report, “these categories of offences made up 38% of all disability hate crimes proceeded against in court.”<sup>61</sup> Under s.146 CJA, any crime can be eligible for sentence uplift if when it is committed, there is proof that the offender demonstrates or was motivated by hostility to the person because of his disability or perceived disability.

A second more complex issue raised by lawyers is the proof required under s.28 CDA to establish an aggravated offence, which is exacerbated by the lack of a legal definition of hostility. At the time of committing the offence, the offender must “demonstrate hostility”<sup>62</sup> or be “motivated by hostility”.<sup>63</sup> Not all Disability Hate Crime is “motivated by hostility” or is it possible to show that the offender “demonstrated hostility”. In 2010, the Director of Public Prosecutions advised the use of the dictionary definition of hostility when establishing Disability Hate Crime. This remains current practice:

*“The protocol is that we use the dictionary definition of the word and the dictionary definition of hostility includes unfriendliness, meanness and antagonism so that would be very easy to see how that fits.”<sup>64</sup>*

Use of the two latter terms should be sufficient to establish evidence of “hostility” in cases where a disabled person has been deliberately targeted because of their vulnerability.

Some legal professionals argue that Disability Hate Crime can be distinguished from Race or Religious Hate Crime because, for certain crimes, such as theft, though the perpetrator might have targeted a disabled person because of his/her perceived

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<sup>61</sup> Mark Walters et al Hate Crime and the Legal Process, University of Sussex 2017 p21 above n57.

<sup>62</sup> Section 28(1)(a) CDA.

<sup>63</sup> Section 28(1)(b) CDA.

<sup>64</sup> Paul Giannasi, Disabled Witness Project Interview September 2018.

vulnerability, the crime was not committed with any hostility and consequently would not qualify under s.28 as an aggravated offence. Disability Hate Crime can be targeting somebody because of his/her perceived vulnerability, for example, stealing a blind person's wallet or – as was the case in one of the MPS problem profiles scrutinised by the Disabled Witness Project - persuading a person with learning disabilities to invite her in and then stealing from him.<sup>65</sup> As recently as October 2018, this problem was reported by HMICFRS and HMCPPI in their Joint Inspection of Handling of Cases involving Disability Hate Crime report:

*“The difficulties prosecutors have in applying the definition is demonstrated by some of the review notes on the files examined. For example:*

*Offence 3 – Can we prove S was a trespasser and stole: It is a difficult offence. V has learning difficulties and it is his mother that has provided a statement. Although V is vulnerable (I have flagged it as a disability hate crime – there is no suggestion that the burglary was committed as a hostile act based on that disability.”*

And

*I am not satisfied that we can prove that the offence was either motivated by hostility or that the suspect has demonstrated hostility based on disability because although the victims are disabled and very vulnerable and he is alleged to have abused them both verbally and physically it is not clear that he has demonstrated hostility to them based on their disabilities or that his actions are motivated by hostility to disabled people. I have though flagged it for monitoring as a disability hate crime and also crime against older person.<sup>66</sup>*

Walters *et al* point out that lack of a legal definition of “hostility” renders Disability Hate Crime particularly difficult to establish in situations where the offender has, or has had, a personal relationship with the disabled person:

*“Without any specific legislative guidance, the literal (dictionary) meaning of hostility will not fit well with cases that involve some form of pre-existing relationship with the victim; cases that are likely to involve some form of grooming; faux friendships; a carer's role; or those just opportunistically “taking advantage” of someone.”<sup>67</sup>*

More importantly, Walters *et al* report that s.28(1)(b) has proved “highly difficult to evidence in court for all types of hate crime”, not just Disability Hate Crime, describing its effect as “making this part of the Act almost impotent in addressing aggravated offences.” By way of evidence they quote two interviewees, an independent barrister;

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<sup>65</sup> See 5.2.2 below for further details.

<sup>66</sup> HMICFRS and HMCPPI Joint Inspection of Handling of Cases involving Disability Hate Crime, October 2018, [4.14] available at [https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2018/10/CJJI\\_DHC\\_thm\\_Oct18\\_rpt.pdf](https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18_rpt.pdf)

<sup>67</sup> Mark Walters *et al* Hate Crime and the Legal Process, University of Sussex 2017 above n57 p25.

*“the Crown and Disorder Act section (b), ‘the offence is motivated...’ I have never seen that charged...I must admit in my entire career I’ve not come across a case where s.28(1)(b) was used.”*

and a Crown Court judge;

*“I’ve never had...seen an indictment in [county X] or [county Y] which alleges someone whose crime was motivated by the relevant kind of hatred.”<sup>68</sup>*

On grounds of “greater flexibility in addressing all types of hate crime”, the University of Sussex research team made the following proposal:

*“We propose that the successful prosecution of all types of hate crime will be improved by amending s. 28(1)(b) (or equivalent in a new Hate Crime Act) so that the provision reads as follows:*

*(1) An offence is racially or religiously aggravated [or aggravated in relation to disability, sexual orientation or transgender identity] for the purposes of sections 29 to 32 if ....*

*(b) the offence is committed by reason of the victim’s membership (or presumed membership) of a racial or religious group, or by reason of the victim’s sexual orientation (or presumed sexual orientation), disability (or presumed disability), or transgender identity (or presumed transgender identity). ”<sup>69</sup>*

Such a reform of the wording of s.28 would not only facilitate equal access to justice for witnesses of Disability Hate Crime but would provide equality of protection for all five strands of Hate Crime and the potential for the addition of new strands when the need for protection arose.

“But then”, observed one Disabled Witness Project professional interviewee, “the question is that of threshold”. The Supreme Court decision in *R v Rogers*<sup>70</sup> regarding Race Hate Crime suggests that the threshold could be low enough to accommodate Disability Hate Crime as an aggravated offence. The judges agreed unanimously that to call a person a “bloody foreigner” and to tell him/her to “go back to your own country” was sufficient “to transform the offence of using abusive words and behaviour with intent to cause fear or provoke violence, contrary to s. 4 of the Public Order Act 1986, into the racially aggravated form of that offence, contrary to s.31(1)(a) of the Crime and Disorder Act 1998.”<sup>71</sup> Handing down this judgment, Baroness Hale reasoned:

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<sup>68</sup> Above n57 p201

<sup>69</sup> Mark Walters et al [Hate Crime and the Legal Process](#), University of Sussex 2017 above n57 p206.

<sup>70</sup> [2007] UKHL 8.

<sup>71</sup> Above n70 [4].

*“This flexible, non-technical approach makes sense, not only as a matter of language, but also in policy terms.... Their essence is the denial of equal respect and dignity to people who are seen as ‘other’. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.”<sup>72</sup>*

Much of the ‘othering’ behaviour, such as name-calling and harassment aimed at disabled people, could give rise to an aggravated offence should the aggravated offences be extended to Disability Hate Crime.

#### **4.2.2 Abolish All Aggravated Hate Crime Offences**

Interviewed by the Disabled Witness Project, Assistant Chief Constable Mark Hamilton suggested parity could be achieved by abolishing all aggravated offences and providing a remedy for all hate crime through ss.145 and 146 CJA:

*“The limitations with an offence of Disability Hate Crime is that currently only criminal damage, assault and harassment are covered, therefore the question remains, are these three areas the only areas needed for a Disability Hate Crime offence? There needs to be recognition of the crime for what it is - all categories of crime need to be available for an offence of Disability Hate Crime and indeed all hate crimes. By flattening the landscape through a sentencing uplift for all hate crimes, this would bring a sense of equality and a recognition of seeing hate crime for what it is.”<sup>73</sup>*

Paul Giannasi is also of the opinion that, despite the challenges particularly for Disability Hate Crime, ss.145 and 146 CJA could be sufficient to deal with all hate crime and that there exists an underlying principle of equality that would justify such a reform:

*“For me, the principle of the legislation is that, any crime can be a hate crime when it’s motivated by hostility and the provision of the enhanced sentencing is the foundation of the policy.”<sup>74</sup>*

The advantages of such a reform are clear. It would indeed establish “equal justice” and recognition for all hate crime. It would also be a move away from the current approach of identifying particular groups in society as being subject to hate crime towards a more “*integral, ... intersectional*” approach.

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<sup>72</sup> Above n70 [12].

<sup>73</sup> February 2019.

<sup>74</sup> September 2018.

Since the test established for enhanced sentencing for Disability Hate Crime under s.146 CJA is the same as that for establishing religiously and racially aggravated offences under s.28 CDA, it would seem that there is a need for reform of the test regardless of whether Disability Hate Crime becomes an aggravated offence or continues to be remedied by enhanced sentencing. To quote one contributor to the Hate Crime and Legal Process report, “As far a disability hate crime is concerned and s.146...we’re very much trying to knock a square peg into a round hole trying to fit the facts into a form of language in the legislation that is not really designed to fit.”<sup>75</sup> Paul Giannasi told the Disabled Witness Project that he thought that the Law Commission were likely to work on establishing some clarity around the “motivated by hostility” test in the next review. “*Demonstrated*”, he argued, “*is easy because if somebody says something and they use a derogatory term, then it’s made out really if you can prove that. The part about the motivation is difficult.*” Getting a conviction for Disability Hate Crime perpetrated by offenders, whom the disabled person believed to be friends was particularly problematic:

*“When you’ve got friends committing offences and are escalating abuse, which is what you saw with Brent Martin’s tragic murder, Steven Hoskins, and so many other victims, that kind of abusive relationship, where they go back as they are clinging onto something they perceive to be a friendship, is more difficult to prove as hostility rather than opportunity or some other factor.”<sup>76</sup>*

In the same way that has been suggested for making Disability Hate Crime an aggravated offence, amending s.146(2)(b) to introduce a “by reason of” test rather than the “motivated by hostility” test would facilitate convictions and sentence uplift for Disability Hate Crime. In these circumstances the Disabled Witness Project team propose s.146(2) should read:

*“(2) Those circumstances are—*

*(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—....*

*(ii) a disability (or presumed disability) of the victim, or....*

*(b) that the offence is committed by reason of a disability or presumed disability.”*

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<sup>75</sup> Interview CPS 20, Mark Walters et al Hate Crime and the Legal Process, University of Sussex 2017 above n57 p177.

<sup>76</sup> Disabled Witness Project Interview September 2018.

To achieve legal equality and equal protection for all witnesses of hate crime through s.146, as proposed by the national police leads on hate crime and policy hate crime, the wording of s.146 would have to be changed further:

*“(2) Those circumstances are—*

*(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on a personal characteristic or presumed personal characteristic of the victim or*

*(b) that the offence is motivated (wholly or partly) by reason of the victim’s personal characteristic or presumed personal characteristic.”*

As reported above (4.1) under s.146 CJA before sentence uplift can even be considered, Disability Hate Crime must be identified, reported and recorded before the courts. This requirement gives rise to inter-related practical challenges to achieving access to justice for witnesses of Disability Hate Crime, many of which the Disabled Witness Project argue can be overcome without legislative change and which are discussed in Part III. However, one further legislative amendment the Disabled Witness Project would recommend is the introduction of a mandatory requirement to record sentence uplift and the reason for it on an offender’s record in order to provide greater protection for disabled people when employing staff.

Though in practice the above amendments to the legislation, together with improvements in identification, reporting and recording of Disability Hate Crime, will afford greater protection from Disability Hate Crime or Hate Crime, abolishing all aggravated offences in favour of enhanced sentencing for all hate crime to achieve “equal justice” could have serious consequences for combatting Hate Crime. The criminal offences under the CDA not only help to ensure that police forces and the CPS take hate crime seriously but, as Walters *et al* reported, “serve a symbolic function, with the potential to send messages of social denunciation for hostility based conduct, as well as ensuring that victimised communities feel protected from such an abuse.”<sup>77</sup> Legal equality might be achieved but such a reform would diminish the status not just of Race and Religious Hate Crime but of all Hate Crime, while politically it would be “seen as rolling back on the commitment to eradicate racism.”<sup>78</sup>

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<sup>77</sup> Mark Walters et al Hate Crime and the Legal Process, University of Sussex 2017 above n57 p117.

<sup>78</sup> Paul Giannasi, Disabled Witness Project Interview September 2018.



## Part III

### PRACTICAL CHALLENGES TO THE APPLICATION OF THE LAW

#### 5. Background

The deaths of Fiona Pilkington and her daughter, Francesca Hardwick, in Leicestershire in October 2007 demonstrated the effect of police and other public services' failure to provide the service they should for witnesses of Disability Hate Crime. A subsequent report by the Independent Police Complaints Commission (IPCC) in relation to the deaths of these two victims, published in May 2011, made a number of findings relating to shortcomings in handling these cases: the police's failure to use information already available to them; the lack of a structured approach in evaluating the reports that had been made and a failure to consider their treatment as a hate crime. In June the same year, Mencap produced a report on the response to Disability Hate Crime by 14 police forces in England and Wales.<sup>79</sup> The findings included: a lack of understanding of how to identify different disabilities, and language that was discriminatory and needed challenging. The report also recommended that Disability Hate Crime should be identified as a specific crime and thus dealt with in that context.

Her Majesty's Crown Prosecution Service Inspectorate (HMCPPI) and HMICFRS carried out joint inspections into Disability Hate Crime in 2013,<sup>80</sup> 2015<sup>81</sup> and 2018<sup>82</sup>. Also, in 2018 the HMICFRS published a report following an inspection of six police forces and their methods for dealing with hate incidents and crimes, concentrating on police activity before an investigation.<sup>83</sup> Three key findings, initially identified in the 2013 report remain common themes running through the later reports. These are also the common themes that were identified in the first Disabled Witness Project report,<sup>84</sup> and which have been further investigated for this second report: identification and reporting of Disability Hate Crime; the police investigation process<sup>85</sup> and training and leadership.

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<sup>79</sup> Sanah Sheikh, Robert Pralat, Chris Reed and Dr Chih Hoong Sin, *Don't stand by: Hate crime research report*, Mencap, June 2010, available at <https://www.mencap.org.uk/sites/default/files/2016-08/Don%27t%20stand%20by-research-report%20%281%29.pdf>

<sup>80</sup> HMCPPI, HMIC, HMI Probation *Living in a Different World. Joint Review of Disability Hate Crime*, March 2013, available at <https://www.justiceinspectorates.gov.uk/hmicfrs/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf>

<sup>81</sup> HMCPPI, HMIC, HMI Probation *Joint Review of Disability Hate Crime Follow-Up*, May 2015, available at [https://www.justiceinspectorates.gov.uk/cji/wp-content/uploads/sites/2/2015/05/CJJI\\_DHCFU\\_May15\\_rpt.pdf](https://www.justiceinspectorates.gov.uk/cji/wp-content/uploads/sites/2/2015/05/CJJI_DHCFU_May15_rpt.pdf)

<sup>82</sup> HMICFRS and HMCPPI *Joint Inspection of Handling of Cases involving Disability Hate Crime*, October 2018, n66 available at [https://www.justiceinspectorates.gov.uk/cji/wp-content/uploads/sites/2/2018/10/CJJI\\_DHC\\_thm\\_Oct18\\_rpt.pdf](https://www.justiceinspectorates.gov.uk/cji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18_rpt.pdf)

<sup>83</sup> HMICFRS *Understanding the difference. The initial police response to hate crime*, July 2018, available at <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/understanding-the-difference-the-initial-police-response-to-hate-crime.pdf>

<sup>84</sup> Laycock A and Hewitt L (eds) *Disabled Witness Project: Monitoring Access to Justice for Disabled Witnesses of Disability Hate Crime* above n17

<sup>85</sup> The theme in full was police investigation and prosecution process but for the purpose of this report the focus has been on the police investigation process.

## 5.1 Identification and Reporting of Disability Hate Crime

### 5.1.1 Lack of Recognition of Disability Hate Crime

The joint HMICFRS and HMCPSI report in 2013 highlighted how there was a lack of clarity and understanding as to what constituted Disability Hate Crime<sup>86</sup> which included confusion around definitions in policy and statutes.<sup>87</sup> Following the report, the existing definition of Disability Hate Crime was retained by the Association of Chief Police Officers (now the NPCC) and the CPS:

*“Any incident/crime, which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s disability or perceived disability.”<sup>88</sup>*

The National Policing Hate Crime Strategy was published by the NPCC and College of Policing in 2014.<sup>89</sup> Whilst it is evident in the recent report from the joint inspection in 2018, that significant progress has been made by the police in recognising Disability Hate Crime<sup>90</sup> it still remains a problem. The report highlighted cases which had been identified as Disability Hate Crime but not referred to the CPS, or where there was a perception that Disability Hate Crime had not taken place.<sup>91</sup>

When interviewed by the Disabled Witness Project, Paul Giannasi, Cross-Government Hate Crime Programme Manager, cited the lack of recognition of Disability Hate Crime as one of the key differences between it and other hate crimes:

*“So in terms of legislation, the nature of disability and crime, I would suggest it is significantly different in that victims are more likely to be repeats; victims are more likely to know the perpetrators and they are less likely to understand their rights to be protected and less likely to recognise if what’s happening to them is a crime”*

Mr Giannasi followed this observation with an example which, as he himself observed, makes “you realise the kind of magnitude of the challenge of people who might not have the best access to information, services.”

*“There was a lad who became a friend, who has Down syndrome who was working as an advocate for a charity, who was quite often in the audience and the first time I met him, he stood up in the audience, and he says,*

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<sup>86</sup> HMCPSI, HMIC, HMI Probation Living in a Different World. Joint Review of Disability Hate Crime above n80

<sup>87</sup> Above n80 p3.

<sup>88</sup> See ‘Terms of Reference above at 3.4 for discussion of definition.

<sup>89</sup> College of Policing, National Policing Hate Crime Strategy, May 2014, available at

<http://library.college.police.uk/docs/college-of-policing/National-Policing-Hate-Crime-strategy.pdf>

<sup>90</sup> HMICFRS and HMCPSI Joint Inspection of Handling of Cases involving Disability Hate Crime, October 2018 n66.

<sup>91</sup> Above n66 [4.22-4.24] p 15.

*“Obviously if people just spit at me at the bus stop, I shouldn’t tell the police about that because I’d be wasting their time, but if what they did to my friend last week, they put a firework in his pocket and set it off and told him that if he touches it, that they’re going to beat him up, and if he becomes injured then we should tell the police about that?”*

*And I said, that’s completely not true, I wouldn’t tolerate being spat at at the bus stop, so why should you? .... we talked about that later, he was saying that his life was that he thought that if we went upstairs on the bus, then we would all face people moving to the middle seat and people would put bags on the seat so you couldn’t sit next to them. He thought that being spat at is a normal thing.”<sup>92</sup>*

Failure to recognise Disability Hate Crime is common across society. A key aim of the Cross-Government Hate Crime Programme was to “raise awareness amongst professionals and the public as well as people who have influence.”<sup>93</sup> Colin Finch, 1-2-1 Advocacy Coordinator, Crime and Hate Crime Advocate, for Lewisham Speaking Up, a charity for people with learning disabilities, also cited lack of recognition of Disability Hate Crime as one of the key challenges to combatting it:

*“I think where...the problem still lies is with the public. And I would say that that applies to both, generally and also the disabled community... I think if you were to stop people in a shopping centre and ask them to name a type of discrimination or type of hate crime, I would expect that certainly anybody that wasn’t themselves disabled or didn’t personally know someone with a disability or impairment that had been a victim, would probably name disability last, if they named it at all. Now I think part of that is almost the disbelief among people that it actually happens.”<sup>94</sup>*

The Cross-Government Hate Crime Programme, using data from a 2015 survey, discovered that in over 50% of the cases identified as Disability Hate Crime, it was a police officer who triggered the identification rather than carers, personal assistants or victims. This seems to support Colin Finch’s observation that *“there have been improvements...in terms of professionals within the criminal justice system, certainly the police and undoubtedly the Crown Prosecution Service.”*<sup>95</sup> Meanwhile, the Cross-Government Hate Crime Programme has undertaken to produce a document aimed at carers and family members and disabled persons themselves, to raise awareness of their rights and how to report Disability Hate Crime.

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<sup>92</sup> Paul Giannasi OBE, Disabled Witness Project September 2018.

<sup>93</sup> Above n92.

<sup>94</sup> Disabled Witness Project Interview August 2018.

<sup>95</sup> Above n92.

### 5.1.2 Lack of Reporting of Disability Hate Crime

Disability Hate Crime can only be recorded if recognised and reported. The Government, the police and disability stakeholders all agree that lack of reporting to the police of Disability Hate Crime is a key factor in the comparatively low number of sentence uplifts under s.146 CJA for Disability Hate Crime as compared with convictions for Race Crime. Giving evidence to the House of Commons Petitions Committee, Online abuse and the experience of disabled people in February 2018, Detective Inspector John Donovan observed that hate crime was badly under-reported and Disability Hate Crime “very badly” under-reported:

*“Only 4% of our work is identifiably disability hate crime; 49% is racial. Disability hate crime is heavily under-reported, and that is a disappointment to me.”<sup>96</sup>*

There are many reasons for under-reporting, apart from lack of recognition that the treatment is a hate crime that should be reported.<sup>97</sup> One is that it happens too frequently to report. As one Disability Hate Crime Advocate explained:

*“When we ask them,  
“Did you report it, if not, why not?”  
“If I were to report it, I’d be doing it most weeks, if not every day, that might be an exaggeration but most weeks. It goes with the territory.”<sup>98</sup>*

Another is the use of the internet for reporting Disability Hate Crime, such as the reporting tool, True Vision. Some impairments make reporting online difficult. More importantly, since many disabled witnesses are on low incomes, they may not have access to the internet at home.<sup>99</sup>

All stakeholders seem to be in agreement that inconsistency in response to reporting of Disability Hate Crime is the main reason for lack of reporting and consequently the relative paucity of convictions for Disability Hate Crime. A poor response can deter a witness to Disability Hate Crime from reporting. One interviewee told the Disabled Witness Project about her negative experience of reporting a Disability Hate Crime to the police. When she telephoned the police to report being knocked out of her wheelchair, she was told that they were too busy to attend the scene. On her way home, she called in to Brixton police station to give them a statement about what had happened, at which point the police became embarrassed and apologised. She told the Disabled Witness Project that she believed this to be part of a bigger issue: the criminal justice system perceived her not to have credibility as a witness because of her disability.<sup>100</sup> This latter observation that disabled people are not perceived to have credibility as witnesses is supported by the evidence given to the House of Commons

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<sup>96</sup> House of Commons Petitions Committee, Online abuse and the experience of disabled people above n15 [32] p34

<sup>97</sup> Discussed above at 5.1.

<sup>98</sup> Disabled Witness Project Interview August 2018.

<sup>99</sup> Above n98.

<sup>100</sup> Disabled Witness Project Interview September 2016.

Petitions Committee enquiry into online abuse and the experience of disabled people as key reasons for lack of reporting:

*“Believing people is really important and not seeing the disability but seeing the person”<sup>101</sup>; “The biggest barrier we face is disbelief by professionals and the belittling of what we experience and the impact of it.”<sup>102</sup>*

A second key factor for under-reporting by witnesses is the lack of remedy once Disability Hate Crime is reported due to the inadequacy of the existing legislation. Andie Gbedemah, Public Affairs, Officer for Dimensions, summarised both these factors:

*“I think there is very low confidence and trust around the system of reporting because people feel they won’t be believed. They perhaps think what’s happened to them is not serious enough to bother the police with and that’s exacerbated when someone comes forward, they report and there isn’t anything that the perpetrator can be charged with; so a lot of it comes back to the law and issues around the law and the fact that, with the best will in the world, police and the prosecutors aren’t then going to be able to give people the outcome they are looking for when they report if they don’t have the mechanism to do that in legislation.”<sup>103</sup>*

## **5.2 The Police Investigation Process**

### **5.2.1 Lack of Recording of Disability Hate Crime**

In the HMICFRS report in 2015, errors were found in the recording of data relating to Disability Hate Crime by the police and the CPS. A number of reports lacked information to show they complied with the agreed definition of Disability Hate Crime because it was not made explicit who had perceived the crime to be motivated by hostility or prejudice against the victim’s disability or perceived disability.

The total number of Disability Hate Crimes recorded by the police in 2016/17 were 5,558<sup>104</sup> compared with 3,629 in 2015/16.<sup>105</sup> This shows an increase of 53%. However, the Joint Inspection of the Handling of Cases involving Disability Hate Crime by the HMICFRS and HMCPSI in October 2018, found that the Disability Hate Crime flag had only been used in 63 of the 90 cases that were examined.<sup>106</sup> The HMICFRS inspection in July 2018 into how police forces deal with hate incidents and crimes also identified the same findings.<sup>107</sup> This indicates that the recording of Disability Hate Crime has not

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<sup>101</sup> Amy Clarke, Digital Assistant, Mencap, House of Commons Petitions Committee, Online abuse and the experience of disabled people n44 above at 15.11.00 accessed 7 May 2019.

<sup>102</sup> Anne Novis MBE, disability campaigner, Inclusion London n44 above.

<sup>103</sup> Andie Gbedemah, Public Affairs Officer, Dimensions above n44 accessed 7 May 2019.

<sup>104</sup> Police recorded crime, Home Office 2016/17.

<sup>105</sup> Police recorded crime, Home Office 2015/16.

<sup>106</sup> HMICFRS and HMCPSI Joint Inspection of the Handling of cases involving Disability Hate Crime, above n66 [2.6] p6.

<sup>107</sup> HMICFRS Understanding the difference. The initial police response to hate crime, above n83 [4.5] p9.

been accurate and potentially the figures are higher than those recorded due to the fact that a number of Disability Hate Crimes are going unrecorded. Therefore, the figure of 7,226 as the total number of Disability Hate Crimes recorded by the police in 2017/18 could also be inaccurate.<sup>108</sup>

Mike Smith, former Commissioner at the Equality and Human Rights Commission and author of the inquiry into disability-related harassment, entitled *Hidden in Plain Sight*<sup>109</sup>, suggested that a lack of recognition of Disability Hate Crime by the police leads to a lack of recording of Disability Hate Crime. It could also be argued that a lack of recognition by the CPS has led to fewer convictions.

Since April 2019, the Home Office have required the police service to flag hate crime in accordance with the counting rules for recorded crime.<sup>110</sup> It is the job of the police to record an offence/incident as Disability Hate Crime by “flagging” it as such on the computer records. It is only when “flagged” that the court “*must treat the fact that the offence was committed in any of those circumstances as an aggravating factor*”.<sup>111</sup> Despite the fact that the 2016-17 figures showed a 53% increase in recording Disability Hate Crime from 2015-16, which in turn was the largest increase in the recording of hate crime for all five characteristics,<sup>112</sup> there still seems to be a disparity between the figures for Race Hate Crime and those for Disability Hate Crime. The Home Office publication, Hate Crime, England and Wales 2017/18, shows that, whereas there were 71,251 Race Hate Crimes recorded in 2017-18, there were only 7,226 recorded Disability Hate Crimes. When broken down into different subgroups, the disparity seems even more marked. For example, out of the 33,332 violence against the person hate crimes recorded in 2017-18, 22,135 were flagged as Race Hate Crime but only 3,124 as Disability Hate Crime. Further evidence that recording is too low is the Crime Survey for England and Wales’ estimate that there are 52,000 disability motivated hate crimes per year.<sup>113</sup>

Similarly, a comparison of the figures for specific areas for 2017-18 show that there “*can be significant fluctuations in performance from quarter to quarter*”.<sup>114</sup> For example, the 2017-18 figures for recorded incidents of Disability Hate Crime in London, the area with the most recorded incidents of hate crime, 20,806 in total, was 462, while the figure for the North West<sup>115</sup>, the area with the second most recorded incidents at 16,168, was 1,023. As Colin Finch observed, “*The inconsistencies still*

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<sup>108</sup> Police recorded crime, Home Office 2017/18.

<sup>109</sup> Equality and Human Rights Commission 2011.

<sup>110</sup> The Home Office counting rules for recorded crime help to ensure that crimes are recorded consistently and accurately by all police forces in England and Wales.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/791106/count-flags-apr-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791106/count-flags-apr-2019.pdf) accessed 24 May 2019.

<sup>111</sup> Section 146(3)(a) CJA.

<sup>112</sup> HMICFRS and HMCPSP Joint Inspection of the Handling of cases involving Disability Hate Crime, above n66 [2.6] p6.

<sup>113</sup> Quoted in House of Commons Petitions Committee, Online abuse and the experience of disabled people above n15 [31] p31.

<sup>114</sup> HMICFRS and HMCPSP Joint Inspection of the Handling of cases involving Disability Hate Crime [2.8] p6 above n66.

<sup>115</sup> Cheshire, Cumbria, Greater Manchester, Lancashire and Merseyside.



*exist.... asking the right questions and flagging things is still one of the biggest issues.*<sup>116</sup>

### 5.2.2 Police Responses to Disabled Witnesses

In Phase 1, the Disabled Witness Project examined two sets of MPS problem profiles (2009-12 and 2016-18 respectively), in which the individuals concerned were disabled witnesses. These showed a range of responses from the investigating police officers. All the profiles, however, indicate that positive action in this context is dependent on the individual responding police officer. However, where the police identified a witness as requiring support and help, they also engaged the relevant departments from the local council and other agencies.

For example, in the first set of case studies, one witness disclosed his mental health issues amidst allegations of anti-social behaviour against him, and also allegations he made about his neighbours. The police worked closely with the housing officer at the local council to try to resolve the issues. It was evident that the police recognised how the witness's condition affected his behaviour, making it clear that he "must feel victimised and unhappy enough to make these allegations." In the second, more recent, set of case studies, recognition of the witness' disability was more frequent even when the disability was not obvious. For example, an elderly man living in semi-independent housing who had vascular dementia, as well as heart disease and Type 2 diabetes, while sitting outside his block of flats, was approached by a 47-year old woman who convinced the victim that they knew each other. She persuaded him to invite her up to his flat for a cup of tea and, whilst inside, she searched the flat and stole money. The investigating officer immediately recognised that the man was targeted because of his disability and engaged the help of the victim's carers to support the victim during the investigation. The officer also applied for special measures for the trial and made contact with the victim's general practitioner, who wrote a letter to the court explaining why the victim would find giving evidence extremely distressing. As a result, the suspect was identified after an extensive trawl through CCTV footage and found guilty at court.

The first set of case studies showed that where the police were told about a disabled witness's condition through a housing officer, carer or mental health support team, they were able to utilise the existing support that was already in place for the witness. One example is where police worked with a mental health recovery team for a planned arrest of a disabled witness so he could be sectioned. When, however, he went missing 24 hours before, the recovery team wanted to know what actions the police were taking to find him. The second set of case studies demonstrated how identification of Disability Hate Crime early in the investigation, could lead to an effective resolution for both the victim and the offender. A 45-year old disabled man in a wheelchair reported being approached by an older man who took hold of his ankles and then used an object to touch his chest whilst mumbling. The victim shouted at the man to let go and the police were called. The suspect was located in a local shop using

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<sup>116</sup> Disabled Witness Project August 2018.

CCTV and was arrested and taken into police custody. The police officer identified the incident as a Disability Hate Crime, and when he spoke to the suspect, he recognised that he was himself vulnerable and discovered he suffered from schizophrenia. The suspect was extremely apologetic, and the officer completed a community resolution, giving the victim and the suspect an opportunity to meet, where the victim had a chance to have his voice heard and the suspect was able to apologise.

In the first set of case studies, there were situations where the police did not identify the witness's disability, and subsequently the multi-agency assistance provided was limited. There were at least two problem profiles which provided evidence of this, notably concerning disputes between a disabled witness and his neighbours. There was no mention in these profiles of partners being engaged to support either the witness, or the other individuals who had been affected. This is quite stark when compared to the extent of the support disabled witnesses received when their disabilities were recognised. In the second set of case studies, the incident in each profile was recognised as a Disability Hate Crime, however, two highlighted how more could have been done to either support or help the victim during the investigation. For example, the officer investigating the incident concerning the elderly man living in semi-independent housing who suffered from vascular dementia, did not complete an Achieving Best Evidence (ABE) interview with an intermediary and it is unclear from the investigation whether this was offered to the victim in place of a written statement. A disabled witness with dwarfism, who reported an assault occasioning actual bodily harm, was not visited by the officer investigating the offence, instead the police tried to contact her by letter or by a telephone call.

These examples demonstrate the importance in practice of the wording of the NPCC/CPS approved definition of Disability Hate Crime. The officer recognised the theft as a Disability Hate Crime: the offender targeting the man with vascular dementia for the purposes of theft could not be said to be "motivated by hostility" but could arguably be "*motivated by... prejudice based on a person's disability or perceived disability*" and thus fall within the NPCC/CPS definition of Disability Hate Crime. A lack of consistency in applying the definition may also explain the comparatively low number of cases flagged as Disability Hate Crime which receive sentence uplift. HMICFRS and HMCPSI reported:

*"In the 12 months to December 2017, the uplift was applied in 68.6% of cases where an application was made.... This continues a positive performance trend, with year-on-year improvements since 2015-16 when the application rate was only 33.8%."*<sup>117</sup>

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<sup>117</sup> HMICFRS and HMCPSI Joint Inspection of the Handling of cases involving Disability Hate Crime, above n66 [5.6] p16.



While commending “a much greater awareness now amongst prosecutors of s.146 in 2018 than there had been in 2015, HMICFRS reported:

*“There is still some confusion, as demonstrated by an endorsement on a file examined: Objectively this could be perceived as a hate crime, however I am not certain the motivation is due to a hostility towards the disabilities of the patients. The Court should they deem this to be a disability hate crime can reflect this in the sentencing uplift.”<sup>118</sup>*

A change in the wording to Professor Walters’ “motivated by reason of disability” would reduce still further potential for confusion as to whether a crime could be flagged as a Disability Hate Crime.<sup>119</sup> The Disabled Witness Project has been made aware of situations where the responding officer has not recognised a crime as a Disability Hate Crime and, consequently, has failed to record it as such, thus depriving the victims of a remedy, sometimes even when advised by a Disability Hate Crime professional that the crime should be flagged as such. One recent example was the painting of the words “child molesters” in white paint on the blue front door of the home of several adults with learning impairments. Not only was the crime recorded as criminal damage without a flag for Disability Hate Crime but, in addition, only one victim was recorded, the registered owner. This did not reflect the true victims of the hate crime in the multi-occupancy property. The assistance of the local Crime and Hate Crime Advocacy Service meant that the incident was eventually flagged as a hate crime. Flagging in this way meant that the investigating officer was able to speak to the local hate crime advocate who was then able to represent the victims and demonstrate how the crime had affected them. This could lead to an aggravated sentence under s.146 CJA, which, in turn, would mean that the disabled witnesses will be represented in the crime figures as victims of Disability Hate Crime.<sup>120</sup>

### **5.3 Training and Leadership: the need for consistent training and awareness raising**

The examples from the problem profiles above highlight three key points: the importance of raising awareness of Disability Hate Crime amongst police officers, the importance of the training being consistent and adequate and the need for national consistency in how Disability Hate Crime is policed.

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<sup>118</sup> HMICFRS and HMCPSI Joint Inspection of the Handling of cases involving Disability Hate Crime, above n66 [5.5] p16.

<sup>119</sup> See discussion above on the definition of Disability Hate Crime at 3.4.1 and 4.2

<sup>120</sup> Disabled Witness Project Interview August 2018.

### 5.3.1 Raising awareness: Disability Hate Crime MATTERS

The Disabled Witness Project has identified one initiative that has sought to increase awareness of Disability Hate Crime, whilst at the same time providing training aimed at increasing the recording of Disability Hate Crime. In March 2016, the Metropolitan Police Service and Inclusion London, launched an initiative called Disability Hate Crime MATTERS<sup>121</sup>. The word “MATTERS” was an acronym which spelled out exactly how disability hate crime reports should be recorded and flagged by police officers:

**M=must use vulnerability framework**

**A=ask the victim the right questions**

**T= take immediate safeguarding action**

**T=think DHC and flag VH**

**E=ensure corroborative evidence is captured**

**R=record all DHC as CRIS not Airspace**

**S=supervisor MUST be informed**

The initiative was delivered in the form of a briefing which aimed to raise awareness of Disability Hate Crime. The briefing was cascaded by Disability Hate Crime champions to both front-line officers and investigators. The briefing adopted the definition of disability from the Equality Act 2010 and highlighted how society creates barriers for people with disabilities, “disabling” rather than enabling them from using various facilities. It provided a local perspective as to how the initiative could support the police force by showing that against the 12,587 total hate crime incidents that had been recorded only 132 had been flagged as Disability Hate Crime.<sup>122</sup> It demonstrates the need to ensure that Disability Hate Crime incidents were recorded and flagged correctly. The briefing provided police officers with an indication as to the impact of Disability Hate Crime not only on disabled witnesses but also on the local community and their perception of crime more generally. For example, perpetrators of Disability Hate Crime are more likely to be involved in other crimes, and success in identifying and tackling Disability Hate Crime will not only give disabled witnesses confidence in the police but will also give the community confidence in the police. The briefing also provided indications of the type of evidence that could be gathered to demonstrate motivation of hostility towards someone with a disability such as social media posts or previous incidents.

The **M** stands for **MUST** use the Vulnerability Assessment Framework (VAF),<sup>123</sup> which is a toolkit the MPS use to identify vulnerable individuals who have come into contact

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<sup>121</sup>Inclusion London and MPS, Report, *Disability Hate Crime Matters: Report of event held at Scotland Yard on 31<sup>st</sup> March 2016 and next steps*, available at <https://www.inclusionlondon.org.uk/campaigns-and-policy/facts-and-information/hate-crime/disability-hate-crime-matters-event-report-next-steps/> accessed on 18 June 2019.

<sup>122</sup> Figures for the Metropolitan Police Service for reports of Disability Hate Crime: 2011 131 reports, 2012- 128 reports, 2013 110 reports, 2014 131 reports. Total hate crime reports of 12,587 for an unspecified period but indicated to be between 2011 and 2014.

<sup>123</sup> Vulnerability may result from an environmental or an individual’s circumstance or a person’s behaviour indicating that there may be a risk to that person or another.

with the police and they can then provide the most appropriate response, which could include other agencies.<sup>124</sup> Whilst use of the term vulnerability to Disabled Witnesses has been criticised, the VAF should be viewed as a toolkit use by police for a positive outcome<sup>125</sup> in this context to encourage police officers to consider the language they use towards people. Whilst disabled witnesses do not like the notion of being identified as vulnerable, the framework places emphasis on providing the best response possible and in the day-to-day work of a police officer, provides a prompt for him/her to engage in a conversation with the disabled witness to identify whether that witness has been the victim of Disability Hate Crime.

The **A** prompts police officers to Ask the right questions in the right way. The briefings highlight the importance of talking to the disabled witness directly, asking him/her whether he/she has a disability if it is not obvious and also asking him/her if they feel they have been targeted because of their disability. Emphasis is placed on building a dialogue with the disabled witness, by asking open questions, especially whether they have any access needs or if they require any support in the police station.

The **T** is to Take immediate safeguarding action, which is for the police to consider if the victim is at risk of further attacks and whether they can be removed from that risk, and to offer further support to the witness.

The second **T** is to Think Disability Hate Crime by putting a flag against the incident so that it can be investigated with Disability Hate Crime in mind. Police officers are given information as to the correct flags to use. Earlier on in this report reference was made to the Home Office requirement of all police forces to flag hate crime incidents in accordance with the counting rules for recorded crime.<sup>126</sup> The process of flagging means that the investigating officer can consider the motivation of the perpetrator when investigating the incident.

The **E** is to Ensure corroborating evidence is obtained from CCTV, the disabled witness and other witness statements if relevant. Police officers are also directed to research other computer systems to which they have access, in order to build a better picture of the situation.

The **R** is to Record the Disability Hate Crime on the crime reporting system (CHRIS) and not Airspace, a system for recording anti-social behaviour. This means that incidents of Disability Hate Crime can be identified and assessed properly.

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<sup>124</sup> This is a national requirement according to the NPCC, however, there is no agreed definition of vulnerability, therefore, each police force can define this according to their force area.

<sup>125</sup> How each police force defines vulnerability is part of a wider piece of work by the NPCC.

<sup>126</sup> The Home Office counting rules above n110.

Finally, the **S** states that a Supervisor must be informed so that the Supervisor can ensure that the MATTERS acronym has been completed properly and that s.146 of the CJA is considered during the investigation.

Following the launch of Disability Hate Crime MATTERS, the MPS saw an increase in the number of recorded Disability Hate Crimes from 357 in 2015/16<sup>127</sup> to 666 in 2016/17.<sup>128</sup> In 2017/18, however, they recorded only 462 Disability Hate Crimes because the initiative stalled.<sup>129</sup> Two reasons have been suggested for this, the first described in the first phase of the Disabled Witness Project as “initiative fatigue”<sup>130</sup> as a result of the police being consistently asked to change their priorities without having nearly enough time to put into practice what they have been asked to learn. The second reason we have been told was that the officers responsible for delivering the briefings left or changed roles with the result that the training was either not delivered or not delivered properly. The Disability Hate Crime MATTERS initiative was described by one interviewee as an improvement on the previous online training, something of which the HMICFRS has been critical, because often people would skip to the end of the training in order simply to pass the assessment without actually learning or retaining the information.<sup>131</sup> It is clear, however, that whilst such an initiative has merit and can have an impact in raising awareness of Disability Hate Crime amongst police officers, it must be maintained in order for that impact to be consistent.

### 5.3.2 Adequate and Consistent Training

Currently, the training provided for police officers to help them recognise Disability Hate Crime is very localised, which is a reflection of the current Authorised Professional Practice from the College of Policing.<sup>132</sup> Paul Giannasi spoke about training for police officers being rolled out for hate crime in general with a couple of case studies focusing on Disability Hate Crime.<sup>133</sup> The training is called Facing Facts and is delivered via a virtual learning environment through three modules.<sup>134</sup> The first module considers the nature and impact of hate crime and the importance of recording, the second module examines identifying hate crime and the third module concerns identifying evidence of hostility and assessing risk. The second module contains a case study specifically on Disability Hate Crime. Paul accepts that computer-based training was not always the best form of training but that this was a middle ground that would be accessible to everyone who works in the police from call handlers to police officers.

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<sup>127</sup> Police recorded crime, Home Office 2015/16.

<sup>128</sup> Police recorded crime, Home Office 2016/17.

<sup>129</sup> Police recorded crime, Home Office 2017/18.

<sup>130</sup> Colin Finch, Disabled Witness Project Interview August 2018.

<sup>131</sup> HMCPSI, HMICFRS, HMI Probation, Joint Review of Disability Hate Crime Follow-Up, May 2015 p29 onwards.

<sup>132</sup> College of Policing, Hate Crime Operational Guidance 2014, available at <https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>

<sup>133</sup> Paul Giannasi, Disabled Witness Project Interview 2018.

<sup>134</sup> Hate Crime Training for Police, Facing Facts Online <https://www.facingfactsonline.eu>

Face to face training, led by a person with lived experience, has been considered to be the best form of training for Disability Hate Crime by Andie Gbedemah, Public Affairs Manager for Dimensions, who has spoken to the Disabled Witness Project. Dimensions led a seven-month training programme with Surrey Police which focused on learning disability and autism hate crime.<sup>135</sup> The training was delivered by someone with lived experience of having a disability. The positive results displayed an increase in the recording of Disability Hate Crime alongside an increase of police officers feeling confident in engaging with someone with a learning disability.<sup>136</sup> Face to Face training could be incorporated into Disability Hate Crime MATTERS, to enhance what appears to be an effective training initiative.

The benefits of face-to-face training can be seen in other areas of policing. Northumbria Police is one of the forces which has adopted a model for mental health training which is undertaken alongside partner organisations and experts by experience. Experts by experience are people who have personal experience of using, or caring for someone who uses, health, mental health and/or social care services. They are an essential part of the training and help to improve the systems they have been part of in the past. The unique training package is called RESPOND: hypothetical scenarios place professionals involved in mental health crisis care in different roles in order to share the learning and experience of responding to people with mental ill-health. The immersive training provides an opportunity to explore real situations and decision making in a safe environment. It aims to lead to a streamlined process of crisis care, which reduces the stress of a crisis for all involved. An evaluation of the training indicated that RESPOND trained participants take their learning forward with a clearer understanding of each other's roles so that each agency can respond quickly and effectively reducing the aspect of being unsure of how to respond which can cause delays.

It is clear from this research that training is most effective when it is provided face to face and delivered by disabled witnesses. The first phase of the Disabled Witness Project initially identified this, and the second phase of the project has confirmed it. This finding is supported by the recommendations in the House of Commons Petitions Committee in its report, Online abuse and the experience of disabled people, 8<sup>th</sup> January 2019, which states that:

*“The Government and social media companies must directly consult with disabled people on digital strategy and hate crime law. It is not enough to just provide alternative formats—though that is crucially important—or consult self-appointed representatives.”<sup>137</sup>*

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<sup>135</sup> Dimensions, I'm with Sam Police Training Report 2016, <https://www.dimensions-uk.org/wp.../Im With Sam Final Dossier REDUCED.pdf> accessed 24 June 2019.

<sup>136</sup> Dimensions, I'm with Sam Police Training Report 2016 above n133.

<sup>137</sup> House of Commons Petitions Committee Online abuse and the experience of disabled people above n15 p6.

This is in line with the Government's commitment in Action Against Hate, The UK Government's plan to tackle Hate Crime – 'two years on' published in October 2018 to:

*"increase and broaden our engagement with stakeholders representing disabled people"* <sup>138</sup>

Adequate and consistent training is essential to raising awareness of Disability Hate Crime amongst police officers.

### 5.3.3 Understanding Disability Hate Crime Locally

The 2018 report Picking up the Pieces by the HMICFRS<sup>139</sup> on policing and mental health identified the need for police forces to assess the extent to which people with mental health problems place demands on the police at a local level.<sup>140</sup>

Understanding this data will assist police forces in making improvements to planning their approach where mental health is concerned.<sup>141</sup> Similarly, there is a need for forces to understand the scale of the problem at a local level concerning Disability Hate Crime. In much the same way that understanding the demand at a local level for mental health can affect where police focus their resources. The same can be said for understanding how and when Disability Hate Crime occurs, particularly if there are repeat crimes in a particular area and, if so, why this is the case.

In the same way that police forces need to understand what percentage of calls are mental ill-health related,<sup>142</sup> they need to understand what percentage of calls are related to Disability Hate Crime. This links directly to improved recording of Disability Hate Crime, which can only be achieved when police officers are confident in identifying Disability Hate Crime. Where police forces have been recommended to use partners and their data to produce an accurate scale of the local mental health demand, they need to do the same for local Disability Hate Crimes. As highlighted above, disabled witnesses often report Disability Hate Crimes to service providers, and therefore, working alongside them is essential if police forces are to gain a full understanding of the local picture.

### 5.3.4 Generating national consistency

Police responses to mental health are now assessed as part of the PEEL inspection programme. The HMICFRS have integrated an examination of how effectively police

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<sup>138</sup> Home Office (2016) Action Against Hate: The UK Government's plan for tackling Hate Crime available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/748175/Hate\\_crime\\_refresh\\_2018\\_FINAL\\_WEB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748175/Hate_crime_refresh_2018_FINAL_WEB.PDF)

<sup>139</sup> HMICFRS, Policing and Mental Health: Picking Up the Pieces, November 2018, available at <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/policing-and-mental-health-picking-up-the-pieces.pdf>

<sup>140</sup> Above n139 p18.

<sup>141</sup> Above n139.

<sup>142</sup> Above n139.



respond to and support people with mental health impairments.<sup>143</sup> The Mental Health examination falls within the Effectiveness strand to facilitate the HMICFRS' inspection of how well the police cut crime, protect the vulnerable, tackle anti-social behaviour, and deal with emergencies and other calls for service.<sup>144</sup> This will actively encourage police forces to ensure they are effective in how they respond to and support people with mental health disabilities. The inspection includes an assessment of how well forces:

- identify people with mental health problems when they first contact the force
- identify and record the number of cases involving people with mental health problems to provide the right support and
- make sure expert help is available from other organisations, in particular, health professionals.

The assessment criteria will encourage police forces to put in place effective training for police officers where they can learn, not only to identify people with mental health problems, but also to know how to provide the right support according to the local area. The measure for the assessment criteria was to identify the number of police recorded incidents with a mental health flag/marker over the course of a year. Another was to record the number of individuals detailed under the Mental Health Act 1983 over the same time period<sup>145</sup> as well as the number of times custody was used as a place of safety.<sup>146</sup>

The same approach could be adopted for policing Disability Hate Crime. The HMICFRS could integrate an examination of how effectively police respond to and support disabled people. Under the Effectiveness strand through which the HMICFRS inspect how well the police protect those who are vulnerable, and support victims,<sup>147</sup> they could assess how well forces:

- identify people with disabilities when they first contact the force;
- identify and record the number of cases involving Disability Hate Crime and make sure expert help and support is available from other organisations, in particular, from local disability groups or networks

The measure for this assessment criteria could mirror that which is used for mental health, specifically to identify the number of police recorded incidents with a Disability Hate Crime flag/marker over the course of a year. Incorporating how effectively the police respond to and support disabled witnesses of Disability Hate Crime into the PEEL inspection programme could help to encourage forces to ensure they become more effective in identifying and responding to Disability Hate Crime.

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<sup>143</sup> Above n139 at p7.

<sup>144</sup> HMICFRS 2017 PEEL assessment questions [www.justiceinspectorates.gov.uk/hmicfrs/peel-assessments/how-we-inspect/](http://www.justiceinspectorates.gov.uk/hmicfrs/peel-assessments/how-we-inspect/) accessed June 2019.

<sup>145</sup> Section 136 Mental Health Act 1983.

<sup>146</sup> Section 13 (6) Mental Health Act 1983.

<sup>147</sup> HMICFRS 2017 PEEL assessment questions above n144.

## Part IV

### RECOMMENDATIONS

#### 6. Achieving Parity in Access to Justice for Witnesses of Disability Hate Crime

Having ratified the United Nations Convention on Rights of Persons with Disabilities the UK Government has made a commitment to “ensure effective access to justice for persons with disabilities on an equal basis with others ....in all legal proceedings, including at investigative and other preliminary stages.”<sup>148</sup> Changes in Hate Crime legislation, together with greater public understanding and consistency in identification, recording and investigation of Disability Hate Crime could achieve this. The following recommendations relate to the two key proposals put forward for reforming the law to achieve “equal justice” for witnesses of Disability Hate Crime with witnesses of Race and Religious Hate Crime. They also take into account the Government’s policy approach to Hate Crime based on human rights and its aspiration to achieve “a position where we all share the same right, to live free from abuse based on our personal characteristic.”<sup>149</sup>

Recommendation One: A decision to extend the aggravated offences to Disability Hate Crime should lead to consideration of the following amendments:

1. The inclusion of property and sexual offences as crimes so that all crimes related to Disability Hate Crime can become aggravated crimes or, alternatively, the inclusion of all crimes to ensure a remedy can be achieved for hate crime against any personal characteristic.
2. A change in the wording of s.28(1)(b) CDA to the wording recommended by the University of Sussex research team

*“(1) An offence is racially or religiously aggravated [or aggravated in relation to disability, sexual orientation or transgender identity] for the purposes of sections 29 to 32 if ....*

*(b) the offence is committed by reason of the victim’s membership (or presumed membership) of a racial or religious group, or by reason of the victim’s sexual orientation (or presumed sexual orientation), disability (or presumed disability), or transgender identity (or presumed transgender identity).”<sup>150</sup>*

3. Clarification of the definition of the term disability for the purposes of the aggravated offence of Disability Hate Crime.

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<sup>148</sup> Article 13.

<sup>149</sup> Home Office (2012), Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime [1.6] p6, available at <https://www.gov.uk/government/publications/challenge-it-report-it-stop-it>

<sup>150</sup>Mark Walters et al Hate Crime and the Legal Process, University of Sussex 2017, p207 n57 available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>



Recommendation Two: A decision to abolish all hate crime offences and achieve a remedy for hate crime through enhanced sentencing would require:

1. Amending s.146(2)(b) to introduce a “by reason of” test rather than the “motivated by hostility” test to facilitate convictions and sentence uplift for Disability Hate Crime.

In these circumstances the Disabled Witness Project team propose that s.146(2) should read:

*“(2) Those circumstances are—*

*(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—....*

*(ii) a disability (or presumed disability) of the victim, or....*

*(b) that the offence is committed by reason of a disability or presumed disability.”*

2. To achieve legal equality and equal protection for all witnesses of hate crime, the Disabled Witness Project team propose the following amendment to s.146(2):

*(2) Those circumstances are—*

*(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on a personal characteristic or presumed personal characteristic of the victim or*

*(b) that the offence is motivated (wholly or partly) by reason of the victim’s personal characteristic or presumed personal characteristic.”*

3. An additional section to provide for the recording of sentence uplift on the offender’s record to protect potential disabled employers.
4. Serious consideration of the political, practical, judicial and symbolic impact of this reform on the status of Hate Crime and on the combined achievements of ss.28-32 CDA and the police and judiciary in combatting Race and Religious Hate Crime.

## 7. Achieving National Consistency in Combatting Disability Hate Crime

The research carried out by the Disabled Witness Project phase two shows an urgent need to achieve national consistency in how the police identify, record and investigate Disability Hate Crime. Whilst the analysis of problem profiles from the MPS show that there have been improvements in the identification and recording of Disability Hate Crime, there remains a need for this to be consistent across all police forces in England and Wales. In particular, there is a need to develop consistent training so that all police officers throughout England and Wales can identify incidents of Disability Hate Crime at both the initial report stage and during the investigative process. Whilst this echoes the recommendations from the HMICFRS inspections in 2013, 2015 and 2018,<sup>151</sup> it also shows that these issues are still to be addressed.

There are three recommendations that could achieve national consistency in how the police identify and record Disability Hate Crime. The first recommendation could potentially act as a driver for the three subsequent recommendations.

Recommendation One: The HMICFRS assess, as part of the PEEL inspection programme how effective police forces are at identifying and recording Disability Hate Crime.

Recommendation Two: Police forces need to understand the local profile of Disability Hate Crime in order to provide good quality training to police officers and to work with local partners (see Recommendation Three below).

Recommendation Three: Police forces should adopt an initiative based on Disability Hate Crime MATTERS in identifying disabled witnesses, working with disabled people and local disability groups to incorporate face to face training. In addition, this training should set out how to record and investigate Disability Hate Crime.

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<sup>151</sup>HMCPSP, HMIC, HMI Probation, Living in a Different World. Joint Review of Disability Hate Crime, above n78; HMCPSP, HMIC, HMI Probation Joint Review of Disability Hate Crime Follow-Up, above n79; HMICFRS and HMCPSP Joint Inspection of the Handling of cases involving Disability Hate Crime, above n66.

## Annex 1

### Section 145. Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under ss.29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of ss.29 to 32 of that Act.