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COMBATTING HATE IN NEW ZEALAND: THE PROBLEMS WITH HATE CRIME LEGISLATION AND THE IMPORTANCE OF NON-CRIMINAL ALTERNATIVES

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Abstract:

This paper discusses the Royal Commission of Inquiry's recommendation to reform New Zealand's hate crime legislation following the Christchurch terror attack. New Zealand currently uses a sentencing enhancement provision that has faced much criticism for being poorly enforced and unable to reflect the culpability of hate-motivated offending. The Commission recommended replicating the United Kingdom's approach by creating separate hate crime offences. This paper argues that this is not the most productive way to combat hateful conduct and achieve the Commission's broader goal of social cohesion. Evidence from the United Kingdom suggests that many of the benefits of separate offences do not eventuate in practice. Under separate offences, data on hate incidents remains inaccurate, and inherent difficulties proving hostility cause them to have significantly low conviction rates. This paper then considers that criminalisation is not the best way to address hateful conduct generally. Hate crime laws risk being counter-productive and are unlikely to change societal attitudes. This paper concludes it would be more beneficial to focus on non-criminal anti-hate responses, such as education. These alternative anti-hate methods will be more likely to address the root causes of hostility, prevent the development of hateful attitudes, and consequently reduce the frequency of hate-motivated offending in New Zealand.

Key Words: Hate Crime, New Zealand, Criminal Law, Sentencing Act 2002, Royal Commission, Social Cohesion.

Table of Contents:

I Introduction

On 15 March 2019, a terrorist entered Al-Noor Mosque and the Linwood Islamic Centre in Christchurch, New Zealand.[1] The terrorist murdered 51 people and attempted to murder 40 more.[2] Soon after the attack, a Royal Commission of Inquiry was established to investigate the actions of the terrorist, the actions of relevant Public sector agencies, and any changes that could prevent future attacks.[3] Given the increasing diversity of New Zealand's population, one of the issues the Commission identified was the need to improve New Zealand's social cohesion.[4] The Commission found that one way in which social cohesion could be improved was by reforming New Zealand's hate crime laws.[5]

Currently, hate crimes are dealt with by a sentence enhancement provision, which aggravates a defendant's sentence where they were motivated by hostility. As identified by the Commission, there are significant flaws with this provision in practice: it is applied inconsistently in court, it is difficult for police to gather complete and accurate data for, and it fails to reflect the culpability of hate-motivated offending. To remedy these issues, the Commission recommended creating separate hate crime offences, using the United Kingdom's approach as a model for change.

This essay sought to assess whether creating separate offences is the most effective way to improve New Zealand's anti-hate measures and achieve social cohesion. After assessing the operation of separate offences in the UK, and the general usefulness of criminal law as a response to hate within society, this essay argues that non-criminal alternatives are likely to be more productive in combatting hate.

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[1] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 7.

[2] At 7.

[3] At 48.

[4] At 653.

[5] At 704.

To begin, part II will explain the operation of New Zealand's sentence enhancement provision, and then outline the Commission's key concerns and recommendations. Part III explores the effectiveness of separate offences in the United Kingdom and finds that their value is largely undermined by their low conviction rates. Except for a modest culpability function, such offences provide no practical advantage over New Zealand's current sentence enhancement system. Considering this conclusion, Part IV determines the general adequacy of criminal law as a response to hateful conduct. It will find that hate crime laws carry unintended risks that are not worth their largely symbolic benefits. Part V will outline alternative non-criminal responses to hate which may be more effective in preventing hateful conduct.

This paper concludes that creating separate offences is not the best response to hate within society. While our current approach is inadequate, further criminalisation is unlikely to make meaningful improvements. Non-criminal alternatives will be more productive in combatting the causes of hate and achieving social cohesion.

II Hate Crime Laws in New Zealand

To lay the foundations of this paper's thesis, this part will explain how New Zealand currently addresses hate crime. Firstly, this part will briefly outline the ways in which hate can be addressed in criminal law generally. Secondly, it will clarify New Zealand's legislation by outlining the approach taken in the Sentencing Act 2002, and then by showing how the relevant provisions have been applied in practice by reference to New Zealand case law.

A Background

Hate crimes can be broken down into two elements: the conduct that constitutes the existing crime, also called the underlying offence; and the offender's motive that selects the victim based on hostility towards their identity or community.[6]

There are two ways in which hate crimes can be recognised in law generally, both of which impose harsher sentences than the underlying offence.[7] The first is through a separate aggravated offence, where the offender's hostility is an element of the offence that must be proved alongside the conduct of the underlying offence.[8] The second is through a sentencing enhancement provision, where the offender is charged under the underlying offence, but hostility is considered as a factor that can increase the offender's sentence.[9] New Zealand law currently relies exclusively on a sentencing enhancement provision to address hate crimes.

B New Zealand's Sentence Enhancement Provision

Under New Zealand's Sentencing Act, hostility must be considered as an aggravating factor at sentencing.[10] This is applied at the discretion of the judge against any mitigating factors,[11] and is provided by s 9(1)(h):[12]

> (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
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> (i) the hostility is because of the common characteristic; and

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[6] John Ip "Debating New Zealand's Hate Crime Legislation: Theory and Practice" (2005) 21 NZULR 575 at 576.
[7] At 576.
[8] At 576.
[9] At 577.
[10] Sentencing Act 2002, s 9(1).
[11] Section 9(2).
[12] Section 9(1)(h).

(ii) the offender believed that the victim has that characteristic.

In principle, this provision has a wide scope of applicability because it has the potential to enhance the sentence of all offences, and because it covers a non-exhaustive list of common characteristics which are relatively inclusive.[13] The motive requirement is also broad, as it includes offenders who commit the offence 'partly or wholly' because of hostility, encompassing a larger range of circumstances than if the provision required hostility to be the only or predominant cause of offending.[14]

However, since its enactment, the provision has been applied with uncertainty and has led to inconsistent outcomes. *R v Galloway* illustrates this uncertainty.[15] In this case, the defendants inflicted fatal injuries on the victim, a transgender female, because of her gender identity.[16] In the High Court, Dobson J treated hostility as a "serious aggravating factor" and sentenced the defendant to 10 years imprisonment for manslaughter.[17] On appeal, the Court of Appeal gave weight to different considerations and found Dobson J "overstated the seriousness of the hate crime aspect of the homicide," and reduced the sentence imposed to 9 years imprisonment.[18]

The enhancement has been applied with similar uncertainty more recently in *R v Milne.*[19] This was a racially motivated road rage attack on a New Zealand family who had emigrated from China 17 years prior.[20] At trial, Fitzgerald J distinguished *R v Galloway* to find Mr Milne's racial hostility failed to meet the threshold needed to be considered as a serious aggravating factor in this case.[21] The final sentence imposed at trial was two years and six

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[13] Ip, above n 6, at 578.
[14] See *Solicitor General v Milne* [2020] NZCA 134 at [29] and [38].
[15] *R v Galloway* [2011] NZCA 309, see also Rochelle Rolston "Addressing Hate Crime in New Zealand: A Separate Offence?" (LLB (Hons) Dissertation, Victoria University of Wellington, 2019) at 27.
[16] *R v Galloway*, above n 15, at [3] and [12].
[17] At [27] and [30].
[18] At [38]-[40], [44] and [55].
[19] *R v Milne* [2019] NZHC 1703; *Solicitor General v Milne* [2020] NZCA 134.
[20] *Solicitor General v Milne*, above n 19, at [4].
[21] *R v Milne*, above n 19, at [48].

months imprisonment.[22] The Crown successfully appealed to the Court of Appeal, where it was found Mr Milne's offending did constitute a hate crime, and that the sentence imposed by Fitzgerald J was "manifestly inadequate."[23] The final sentence on appeal was four years and nine months' imprisonment.[24]

A further example is *R v Landon*, where the District Court judge failed to expressly refer to the hostility enhancement when sentencing the defendants for a homophobic attack.[25] On appeal, the Court of Appeal held this attack was undoubtedly a hate crime, and that hostility was a "serious aggravating feature" that should have been considered.[26]

These examples show that the application of the sentencing enhancement provision has been inconsistent and uncertain. While this alone is a significant problem, the Commission identified several further issues with the provision during their investigation.

C The Royal Commission's Findings

Part 9 of the Commission's report addresses the steps that must be taken to address the underlying vulnerabilities that are hindering social cohesion.[27] According to the Commission, a socially cohesive society is one where individuals have a sense of belonging, inclusion, participation, recognition, and legitimacy.[28] The Commission engaged with minority communities to investigate the adequacy of New Zealand's current anti-hate system. Their key criticisms are set out below.

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[22] *R v Milne*, above n 19, at [72].
[23] *Solicitor General v Milne*, above n 19, at [63].
[24] At [64].
[25] *R v Landon* [2017] NZDC 15598.
[26] *Landon v R* [2018] NZCA 264 at [59].
[27] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 653.
[28] At 654.

1 Lack of data

A "recurring theme" that emerged during the Commission's discussions with minority communities was the lack of data on hate crimes.[29] Indeed, hate crime data is often incomplete and inaccurate, which makes it difficult to both analyse trends in offending and determine what anti-hate measures are necessary.[30]

A key explanation for this lack of data is the low reporting rates of hate crimes, which is due to several factors. The Commission found many victims felt the incidents "may not necessarily reach a threshold where reporting the incident is a priority."[31] This is often because prior experiences with police reporting often failed to achieve practical results.[32] Other practical issues were often encountered in these incidents, for example where the offender is unknown to the victim and couldn't be identified.[33]

Another explanation is the failure of police to record hate incidents accurately and consistently. Because hostility is not an element of an offender's initial charge, police do not specifically record hate crimes on their databases.[34] Instead, they may note on their database that the offence was motivated by hostility, and this information may be used by police during investigations and/or by the judge at sentencing.[35] Whether to note hostility is done at the discretion of the officer, which can create inconsistencies.[36]

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[29] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 714.
[30] Jamie Ensor "Hate-motivated crime data collection being strengthened as Muslim leaders demand action" (15 March 2020) Newshub <www.newshub.co.nz>.
[31] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 715.
[32] At 715.
[33] At 715.
[34] Katie Kenny "Despite promises, there is still no official record of hate crimes committed in New Zealand" Stuff <www.stuff.co.nz>.
[35] Kenny, above n 34; Ensor, above n 30.
[36] Kenny, above n 34; Human Rights Commission *Reports of Race and Religious Hate Crime in New Zealand 2004-2012* (June 2019) at 1.

While calls for improving this system have been reignited in the wake of the Christchurch attack, there have been international pressures for change since 2004.[37] Police have reportedly made improvements since 2018, by introducing a "hate crime flag" in their database to make it easier to record offences as hate crimes, and by making these hostility flags compulsory where they were previously optional.[38] However, the Commission identified there is still a long way to go.[39] The 2020 Annual Police Report showed that 46 per cent of hate crime offences that should have been recorded in the National Intelligence Application were not.[40] Even when hate crimes were recorded, they were often downgraded and coded as incidents of public order offending.[41] The Commission suggested this may partly be due to the limited training of officers in using their discretion to recognise and record hostility.[42]

2 Culpability

The Commission also criticised the ability of the sentencing enhancement to properly reflect the culpability of offending.[43] Because the offender is not charged under a separate hate crime offence, an offender's criminal record does not indicate hostility, therefore failing to capture the "full blameworthiness" of the offending.[44] This is particularly problematic as hate crime offences cause increased harm through community victimisation.[45] The Commission found that failing to recognise this increased blameworthiness limits the "signalling effect of prosecution and conviction and means

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[37] Human Rights Commission, above n 36, at 1; see also United Nations *Report of the Committee on the Elimination of Racial Discriminaltion* (A/62/18, 2007) at 88.
[38] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 715.
[39] At 715.
[40] New Zealand Police *Annual report on Police data quality* (October 2020) at 9.
[41] At 20.
[42] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 716.
[43] At 703.
[44] At 703.
[45] Kathryn Benier "The harms of hate: Comparing the neighbouring practices and interactions of hate crime victims, non-hate crime victims and non-victims" (2017) 23(2) Int Rev Vict 179 at 181.

possible needs for rehabilitative interventions are not highlighted."[46] They also state it limits the deterrent value of the provision.[47]

3 Recommendations

After outlining these criticisms, the Commission sets out its recommendations for hate crime reform. They suggest the United Kingdom's approach to separate offences should be "substantially replicated" in New Zealand as this would address many of the problems with the current sentencing enhancement provision.[48] For example, they suggest that creating separate offences would help the police record hate incidents accurately and consistently, although they recognise improvements within current police systems are possible.[49] They also suggest that separate offences would be more effective in reflecting the culpability of hate-motivated offending.[50]

As a result, they recommend creating hate-motivated offences in various sections in the Crimes Act 1961 (assault, arson, intentional damage) and Summary Offences Act 1981 (offensive behaviour, assault, wilful damage, intimidation).[51]

It is necessary to assess the operation of hate crime laws in the United Kingdom to determine whether creating separate offences would be the best way to rectify the issues identified with New Zealand's sentence enhancement.[52] This paper will consider whether adopting the United Kingdom's approach in New Zealand would improve police data accuracy, help reflect the culpability of the offending, and ensure judicial consistency.

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[46] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 703.
[47] At 704.
[48] At 704 and 762.
[49] At 716.
[50] At 703.
[51] At 704.
[52] At 704.

III Hate Crime in the United Kingdom

This part aims to analyse the operation of separate offences in the United Kingdom to predict whether their creation in New Zealand would address the issues identified by the Royal Commission. This part will outline the United Kingdom's hate crime legislation and then evaluate the effectiveness of the provisions.

As discussed further below, evidence suggests that separate offences have some benefits which may help to address some of the problems the Commission found with New Zealand's sentence enhancement. Separate offences likely assist the police in identifying and recording hate incidents correctly, and they may be more effective in reflecting the culpability of offending. They may also promote fair trial procedures, help achieve judicial consistency, and allow the rehabilitative needs of the offender to be more easily identified.

However, significant flaws in the United Kingdom's approach become apparent after further investigation. While separate offences may somewhat assist police in collecting complete data, there remain to be considerable inaccuracies in police processes. Further difficulties cause such offences to have extremely low conviction rates, which largely frustrates their culpability and deterrent functions. Based on this evidence, this paper finds that the benefits of separate offences in relation to a sentencing enhancement are not significant enough to justify their enactment in New Zealand.

A Legislation

The United Kingdom uses both separate aggravated offences and sentencing enhancement provisions to address hate crimes. The separate aggravated offences are listed in the Crime and Disorder Act 1998 (UK) and apply where the commission of an underlying offence displayed racial or religious hostility.[53] The underlying offences include assaults (s 29); criminal damage (s 30); public order offences (s 31); and harassment (s 32). For the aggravated version of the offence to apply, the offender must either demonstrate hostility

[53] Crime and Disorder Act 1998 (UK), ss 28-32.

towards the victim's actual or perceived membership of a racial or religious group,[54] or be motivated wholly or partly by hostility towards members of a racial or religious group because of their membership of that group.[55] Committing the aggravated version of the offence brings a harsher sentence than the non-aggravated version.[56]

Until recently, the United Kingdom's sentence enhancement provisions were covered by the Criminal Justice Act 2003 (UK). Section 145 allowed the court to aggravate an offenders sentence where the offender either demonstrated or was motivated by racial or religious hostility, but the offence committed was not listed as a separate aggravated offence.[57] This Act was amended in 2012 to include sentence enhancements for offences motivated by hostility towards the victim's sexual orientation, transgender identity, or disability.[58] For convenience, all of these enhancements are now covered by s 66 of the Sentencing Act 2020, although they operate in the same way.[59]

The finder of fact determines whether the offender 'demonstrated' hostility or was 'motivated' by hostility.[60] In finding the offender 'demonstrated' hostility, the court is interested in the defendant's "outward manifestation" of hostility, which includes the words or gestures used in the commission of the offence. If found, the intentions of the offender are irrelevant, including whether the victim is mistakenly identified as having a particular characteristic or belonging to a particular community.[61]

Finding the offender was motivated wholly or partly by hostility is harder, as it involves an analysis of the offender's mind. While evidence of previous conduct or association may be

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[54] Section 28(1)(a).
[55] Section 28(1)(b).
[56] United Kingdom Law Commission *Hate Crime: Should the Current Offences Be Extended?* (Law Com No 348, 2014) at 139.
[57] Criminal Justice Act 2003 (UK), s 145.
[58] Section 146.
[59] Sentencing Act 2020 (UK), s 66(4); see also Ministry of Justice *The Sentencing Act 2020* (Circular No 2020/3, 25 November 2020).
[60] Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah *Hate Crime and the Legal Process* (University of Sussex, October 2017) at 115.
[61] At 117-119.

admissible,[62] proving evidential motive is inherently "elusive and complex."[63] For this reason, prosecutors will often rely on proving the offender 'demonstrated' hostility instead, where possible.[64] Hostility does not need to be the main motivation, so difficulties often arise where hostility is "masked" by other emotions like anger or frustration.[65]

B Effectiveness

The Royal Commission predicts the creation of separate offences in New Zealand would reflect the culpability of hate-motivated offences and signal that they are taken seriously.[66] As a result, they suggest that the reporting rates to police would improve, police would record incidents more appropriately, the rehabilitative needs of the offenders would be highlighted, and a deterrent effect would be likely.[67] However, evidence from the United Kingdom suggests that the Commission's predicted benefits may not eventuate. The next part of this paper explores how the United Kingdom's approach functions in five different respects. Apart from a limited culpability function, it does not seem in practice that the benefits of this approach are significant.

1 Police data

Despite the Commission's proposition that the creation of separate offences will improve the accuracy of police data in New Zealand, targeted communities have raised recurring concerns regarding the accuracy of police data in the United Kingdom, despite being protected by separate offences.[68] This paper identifies two key factors that contribute to inaccurate police data: the first being the inaccurate recording of hate incidents on police

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[62] United Kingdom Law Commission, above n 56, at 21; *G v DPP* [2004] EWHC 283.
[63] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 117; *DPP v Green* [2004] EWHC 283.
[64] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 117; United Kingdom Law Commission, above n 56, at 22.
[65] At 116.
[66] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 704.
[67] At 703-704 and 762.
[68] United Kingdom Law Commission *Hate crimes laws consultation paper* (2020) at 155-156.

databases, the second being the low reporting rates of hate incidents to police.[69] This part will examine each factor in turn.

(a) Inaccurate data

A recent inspection of police practice in the United Kingdom has outlined the potential causes for recording inaccuracies.[70] In hate-motivated incidents, the experience of the victim is unique to their characteristics and can only be truly understood by those in the same minority community who have shared similar experiences.[71] This means that hate crimes will often be perceived differently by the victim than by a police officer or other bystander.

For the initial reporting and recording of a hate crime, the victim does not need to bring any evidence or justification for their belief that the incident was motivated by hostility.[72] While the police officer should not let their own perception influence the incident record, confusion over who needs to perceive the hostility can still arise, particularly where the victim provides no justification for their belief.[73] Consequently, different police officers may record hate incidents differently.[74] When hostility is identified, police must 'flag' this on their database when recording the incident.[75] This enables both the police and the government to identify trends in hate crime data, allocate resources appropriately, and provide adequate support to victims.[76]

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[69] See United Kingdom Law Commission, above n 68, at 159.

[70] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services *Understanding the difference: The initial police response to hate crime* (July 2018) at 13.

[71] Mark Austin Walters "The Harms of Hate Crime: From Structural Disadvantage to Individual Identity" in *Hate Crime and Restorative Justice* (Oxford University Press, Oxford, 2014) at 73.

[72] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 14.

[73] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 14; United Kingdom Law Commission, above n 68, at 3.

[74] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 14.

[75] At 52.

[76] At 51-52.

However, evidence shows police are often incorrectly omitting to use flags, using the wrong flags, or using flags without apparent justification.[77] A recent estimation reported that only 57 per cent of reported hate crimes in England and Wales were actually recorded.[78] While this may be due to a number of reasons, there is a concern that the police have "powerful incentives" to undercount hate crimes, for example, because they do not want to take on extra paperwork and investigations, or because of a desire to avoid negative publicity.[79] When a reported hate crime is not recorded, the file will not receive the necessary investigation and the victim will not be referred to support services.[80]

Despite all hate crimes being poorly recorded, statistics show police are comparatively better at recognising hostility in incidents covered by separate offences.[81] This is because the police know from the outset that hostility is an element in the offence they need to prove.[82] Conversely, when they are investigating a hate incident covered only by a sentencing enhancement, their focus is on finding evidence for the underlying offence, and they often do not turn their mind to whether an enhancement will apply.[83]

Despite this comparative advantage, recording hostility under separate offences is still not done adequately. Confusion can still arise where one flag is applicable to the same offence, and how they will be flagged in each situation will depend on the approach taken by the attending officer.[84] Sometimes there is a failure to record racially or religiously aggravated offences as hate crimes altogether.[85] Between 2016-2017, 3,316 racially or religiously aggravated offences were not flagged as a hate crime at all.[86]

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[77] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 14.
[78] Mark Austin Walters, Abenaa Owusu-Bempah and Susann Wiedlitzka "Hate Crime and the "Justice Gap": The Case for Law Reform" (2018) 12 Crim LR 961 at 967.
[79] Terry Maroney "The Struggle Against Hate Crime: Movement at a Crossroads" (1998) 73 NYU L Rev 564 at 600.
[80] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 50.
[81] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 83.
[82] At 83.
[83] At 83.
[84] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, above n 70, at 31.
[85] At 55.
[86] At 56.

(b) Low reporting rates

The inaccurate recording of hate crimes likely contributes to a general feeling of mistrust towards police and prevent many victims from reporting their experiences. In a recent study of hate crimes in England and Wales, at least 60 per cent of hate crime victims never reported it to the police.[87] The predominant reasons for not reporting were: because they believed the police would either not take it seriously or not be able to do anything; because they didn't feel it was serious enough to report; because they didn't want to deal with the police at all; and because they didn't want to deal with the experience more than they had to.[88]

Mistrusting police is a theme that has particularly prominent implications for the under-reporting of homophobic and transphobic hate crimes. LGBTQ+ victims often fear they will be 'outed' if they report these incidents to police, and do not feel comfortable with official information denoting their sexuality.[89]

Another barrier to reporting is the normalisation of hate offences in targeted communities. Victims that grow up being frequently targeted will often accept hate crime as a normal part of life.[90] This contributes to the "systemic harms of hate," as victims and their communities "internalise the consequences of exclusion," preventing them from accessing support and making them feel as though their experiences aren't 'serious enough' to report.[91]

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[87] Farhan Samanani and Sylvie Pope *Overcoming everyday hate in the UK: Hate crime, oppression and the law* (Citizens UK, 2020) at 18.
[88] At 20.
[89] Stevie-Jade Hardy and Neil Chakraborti *LGB&T Hate Crime Reporting: Identifying Barriers and Solutions* (University of Leicester, 2015) at 9.
[90] Samanani and Pope, above n 87, at 18.
[91] At 15.

2 Reaching a conviction

Only approximately 4 per cent of all reported hate crimes in the United Kingdom result in a conviction.[92] While this suggests both separate offences and sentence enhancements are generally unsuccessful in court, separate offences may be comparatively advantageous over sentence enhancements because they promote procedural fairness.[93] When charged under a separate offence in the Crime and Disorder Act, the defendant has the opportunity to bring evidence to challenge the hostility element of the charge.[94] The finder of fact, often the jury, will need to be satisfied beyond reasonable doubt that the defendant was either motivated wholly or in part by hostility, or that the defendant demonstrated hostility, thus committing the aggravated offence.[95]

There is a different procedure for cases where a sentencing enhancement under the Sentencing Act may apply.[96] In these cases, evidence of hostility may only be raised at sentencing.[97] Contesting the enhancement therefore usually takes place at a judge-alone trial, only giving the defendant the right to trial in front of the fact finder for the substantive offence, not the aggravation.[98] A defendant will have less incentive to challenge the evidence of hostility at sentencing, as they risk the challenge failing, thus losing any sentence-reducing credit for a guilty plea.[99]

Separate offences have also been more consistently applied in court than sentence enhancement provisions.[100] Because hostility is not an element of the offences where the enhancements apply, it is often not considered by legal professionals until sentencing,

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[92] Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 967.
[93] United Kingdom Law Commission, above n 56, at 114.
[94] Crime and Disorder Act 1998 (UK), ss 28-32; United Kingdom Law Commission, above n 56, at 114-115.
[95] United Kingdom Law Commission, above n 56, at 115; Crime and Disorder Act 1998 (UK), s 28(1).
[96] Sentencing Act 2020 (UK), s 66.
[97] United Kingdom Law Commission, above n 56, at 115.
[98] At 115.
[99] At 115.
[100] Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 969.

where it often "takes them by surprise".[101] There is less confusion dealing with separate offences because hostility is dealt with as part of the offence.[102]

While this evidence shows that separate offences have some procedural benefits in comparison to sentence enhancements, prosecutions under separate offences still face their own significant challenges. For example, separate offences tend to be downgraded to their non-aggravated counterparts. In most hate crime cases, it is desirable for prosecutors to bring charges under both the non-aggravated and aggravated version of the offence.[103] Statistically, however, the basic offence achieves a significantly higher conviction rate than the aggravated version.[104] This is partly due to the defendant often being reluctant to admit they were motivated by racial or religious hostility.[105] This leads many prosecutors to accept a guilty plea to the non-aggravated version in order to get a conviction.[106] While downgrading to the non-aggravated version should not be done for expediency, plea bargaining remains to be a concern, particularly where there is strong evidence for the underlying offence, but not for the aggravated version.[107]

Another example is the reluctance of juries in finding guilt under separate offences.[108] This may be because they do not perceive the incident as a "racial" or "religious" attack, and/or they do not understand what they need to recognise to make out the hostility element. Evidence suggests juries often conflate what it means to 'commit an offence while demonstrating hostility' with 'being a hostile person'.[109] For example, there is a "huge reluctance" to label someone as a "racist," particularly where hostility is not the primary

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[101] Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 969.

[102] At 969.

[103] United Kingdom Law Commission, above n 56, at 122; See also Walters, Wiedlitzka and Owusu-Bempah, above n 78, at 92 for the exception where only the aggravated offence is made out, often in public order offences.

[104] United Kingdom Law Commission, above n 56, at 131-132; see also Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 966.

[105] United Kingdom Law Commission, above n 56, at 120-121.

[106] At 121.

[107] United Kingdom Law Commission, above n 56, at 121; Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 96-99.

[108] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 91.

[109] At 91.

motivation, and the non-aggravated offence is available in the form of a compromise.[110] However, racially-aggravated hate crime laws do not necessarily purport to label someone as a "racist", but rather to recognise the offence was committed with "racial hostility."[111] While there have been recommendations to improve juries' understanding of hate crime laws,[112] confusion will likely remain when proving hostility due to the inherent "complexity of hate crime legislation and the accompanying policies."[113]

Therefore, despite separate offences having some procedural advantages, they are still "surprisingly complex to interpret and apply [and] notoriously difficult to litigate."[114] As the total conviction rate for both separate offences and sentence enhancements is only around 4 per cent,[115] the procedural benefits of separate offences are unlikely to be significant in practice. This suggests that such offences are not, at least by themselves, a particularly useful method for combatting hate-motivated offending.

3 Culpability

It is important to have laws with adequate accountability mechanisms to both reflect the offender's moral blameworthiness and recognise the harm caused to victims and their communities.[116] Separate hate crime offences give a symbolic appreciation of the increased harms suffered by victim communities through their offence label and harsher sentences.[117] This "symbolic denunciation" may support positive social norms.[118]

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[110] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 123 and 116; United Kingdom Law Commission, above n 56, at 131.
[111] Walters, Wiedlitzka and Owusu-Bempah, above n 60, at 123.
[112] At 131.
[113] At 113.
[114] United Kingdom Law Commission, above n 56, at 120; see also *G and T v DPP* [2004] EWHC 183; *DPP v M* [2004] EWHC 1463.
[115] Walters, Owusu-Bempah and Wiedlitzka , above n 78, at 967.
[116] See Ip, above n 6, at 593; see also Stevie-Jade Hardy and Neil Chakraborti *Healing the Harms: Identifying How to Best Support Hate Crime Victims* (University of Leicester, 2016); Samanani and Pope, above n 87.
[117] See United Kingdom Law Commission, above n 56, at 96.
[118] At 97.

However, the United Kingdom Law Commission did note that aggravated offences may not be necessary to give a symbolic recognition of culpability, as sentence enhancements may adequately fulfil this function.[119] While sentence enhancements do not have the communicative function of labelling hostility in a conviction, their proper use can arguably still communicate the severity of a hate crime to the victim and their community, the defendant, and the wider public.[120] So long as the reason for the enhancement is stated in open court, aggravated offences are arguably not the only means for providing symbolic culpability.[121]

Further, there may be alternative ways to strengthen the culpability of a sentence enhancement. For example, the United Kingdom Law Commission recommended hostility should be recorded on an offender's criminal record where a sentence enhancement was used.[122] Although the Royal Commission did not make this recommendation in their report, this could be a useful way to counter the issue that recorded convictions for hate-motivated offences are not recorded in charges and convictions.[123]

4 Deterrence

It is difficult to draw a reliable conclusion on the deterrent value of hate crimes. Recently there has been an increase in reported and recorded hate crimes in the United Kingdom.[124] However, this is not reliable evidence that hate crimes are becoming more frequent, and therefore that deterrence is not working. Instead, these statistics may be due to improved recording methods and greater victim awareness and reporting.[125]

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[119] United Kingdom Law Commission, above n 56, at 97-98; See also James B Jacobs and Kimberly Potter *Hate Crimes Criminal Law and Identity Politics* (Oxford University Press, New York, 1998) at 185.
[120] United Kingdom Law Commission, above n 56, at 99-100.
[121] At 101.
[122] At 11.
[123] See Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 703.
[124] Grahame Allen, Yago Zayed and Rebecca Lees *Hate Crime Statistics* (House of Commons Briefing Paper Number 8537, 10 December 2020) at 3.
[125] At 3.

However, it is still arguable that separate offences have little deterrent value. The additional threat of an aggravated sentence is unlikely to deter offenders since the conduct that amounts to the underlying offence is already criminal.[126] Further, their deterrent value may also be undermined by the inconsistent policing of hate crimes and their low conviction rates. The United Kingdom Law Commission believes separate offences would have a better deterrent value if they were more widely and successfully applied.[127] Currently, however, deterrence is unlikely.

5 Flagging rehabilitative needs

A benefit of separate offences is the heightened ability of the state to monitor whether an offender needs to join a rehabilitative programme.[128] Conviction under a separate offence communicates to criminal justice agencies that hostility was an element of the offence.[129] The rehabilitative needs of offenders in New Zealand are currently difficult to identify due the inconsistent application of the sentencing enhancement, and the lack of separate hate crime offences. There is not enough data on hate offences to warrant the development of these programmes.[130] In comparison, programmes in the United Kingdom have been successful. For example, the Promoting Human Dignity (UK) programme improved the attitudes of offenders who had committed racially aggravated hate crimes.[131] The participants reported they improved how they expressed their anger and became more sensitised to the outcomes of their behaviour.[132]

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[126] Jacobs and Potter, above n 119, at 163; United Kingdom Law Commission, above n 56, at 103; Andrea Guzman "Lawmakers Love Hate Crime Laws, But Do They Really Protect Anyone?" (23 April 2021) Mother Jones <www.motherjones.com>.

[127] United Kingdom Law Commission, above n 56, at 103.

[128] Madeline Ash "Aotearoa's Hate Crime Legislation: Principled and Practical Reasons for Change (LLB (Hons) Dissertation, Victoria University of Wellington, 2020) at 76.

[129] Rolston, above n 15, at 40.

[130] Paul Iganski and David Smith *Rehabilitation of hate crime offenders* (Equality and Human Rights Commission Scotland, 2011) at 21.

[131] At 33.

[132] At 33.

C Conclusion

Evidence from the United Kingdom allows us to examine both the benefits and drawbacks of separate offences in practice. As the Royal Commission predicted, creating separate offences would likely help the police identify and record hate incidents correctly. Evidence also suggests that, at least theoretically, the Commission is correct in finding that separate offences better reflect the culpability of the offending. Separate offences may also have procedural benefits during trial, help promote judicial certainty, and allow the rehabilitative needs of offenders to be more easily identified.

However, these benefits may not eventuate, as many of the practical advantages of separate offences are being frustrated in practice. The United Kingdom still has incomplete hate crime data due to further policing challenges. Further, hostility is inherently difficult to prove, making cases under separate offences difficult to prosecute. Despite having both separate offences and sentence enhancement provisions, the United Kingdom has a hate crime conviction rate of just around 4 per cent.[133] Consequently, the ability of hate crime laws to signal culpability is limited. This suggests that the benefits of separate offences are largely insignificant in practice, and it is unlikely that introducing separate offences in New Zealand would provide meaningful benefits over the existing sentence enhancement regime.

Indeed, there remains to be a "significant unhappiness among many groups affected by hate crime" regarding the effectiveness of hate crime laws in the United Kingdom.[134] This is despite many of these groups being protected by separate aggravated offences and despite previous efforts to improve hate crime policy.[135] As discussed, this paper finds significant issues with both the application of New Zealand's current sentence enhancement regime and the use of separate offences under the United Kingdom's approach. Therefore, this paper turns to the wider question of whether hate crime

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[133] Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 967.

[134] United Kingdom Law Commission, above n 68, at 155.

[135] United Kingdom Law Commission, above n 68, at 155; United Kingdom Government "Hate crime action plan 2016-2020" (26 July 2016) <www.gov.uk>.

interventions, of the kind recommended by the Royal Commission, are the best way to address hateful behaviour and achieve social cohesion.

IV Adequacy of Criminalisation

In practice, the extent to which hate crime legislation has utility in combatting hate seems to be largely limited to a symbolic culpability function. If this is correct, it should be assessed whether using the criminal law is the best way to address hate within society. This part will firstly determine the risks of hate crime legislation and whether it carries unintended consequences. Then it will consider to what extent hate crime legislation is effective, at least theoretically, in changing societal attitudes and preventing hateful conduct.

A Risk of being counter-productive

Jacobs and Potter argue that hate crime legislation, while well-intentioned, undermines "social solidarity" as it encourages people to think of themselves within their identity groups.[136] The needs of each group become politicised, which fragments society and leaves it vulnerable to conflict as groups compete against each other for criminal justice protection and support.[137] Chakraborti and Garland sympathise with this idea, arguing that it "merely exacerbates existing problems, creating divisions among communities of identity rather than highlighting the shared nature of their victimization."[138]

Perry disagrees with this proposition, arguing that hate crime laws are a consequence of systemic injustices rather than a cause of societal division.[139] However, there is support for Jacobs and Potters' view that they at least exacerbate existing tensions. This can be

[136] Jacobs and Potter, above n 119, at 164; Beverly McPhail "Hating Hate: Policy Implications of Hate Crime Legislation (2000) 74(4) Soc Serv Rev 635 at 646.
[137] McPhail, above n 136, at 646.
[138] Neil Chakraborti and Jon Garland "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference' (2012) 16(4) Theor Criminol 499 at 501.
[139] Barbara Perry "Hate Crime and Identity Politics" (2002) 6(4) Theor Criminol 485 at 488.

illustrated by the conflict over whether to expand the list of protected characteristics in the United Kingdom. Currently, the United Kingdom protects different characteristics to different extents. The Crime and Disorder Act protects victims of racial or religious hate crimes in separate offences, while the characteristics of sexual orientation, transgender identity, and disability are only covered by a sentencing enhancement provision in the Sentencing Act.[140] This has created a 'hierarchy of hate', causing many to argue that all characteristics should be protected by separate offences as this will denounce all hate-motivated offending equally.[141]

The United Kingdom is also experiencing a wider debate over which characteristics should be protected by hate crime laws at all, whether by a sentence enhancement or a separate offence. This can be illustrated by the controversy over whether to include victims of misogyny, a non-minority group, as a protected characteristic.[142] By continuing to add groups to the list of protected characteristics (particularly large, non-minority groups), there is a risk that "better funded and more vocal" groups will be more likely to successfully persuade politicians that they should be protected, to the exclusion of vulnerable groups who are equally or more in need of it.[143]

This evidence from the United Kingdom warns that if New Zealand introduces separate offences, there will be an inevitable controversy as to the scope of protection. Politicians will have incentives to respond to this controversy by expanding the list of protected characteristics. Politicians can appease conservative constituents by sustaining a 'tough on crime' rhetoric while broadcasting a 'caring' facade to victim communities, an approach that carries little political risk.[144] This may unduly expand the ambit of anti-hate crime legislation, diluting the symbolic significance of inclusion and eventually reverting its

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[140] Crime and Disorder Act 1998 (UK), ss 28-32; Sentencing Act 2020 (UK), s 66.

[141] See United Kingdom Law Commission, above n 56, at 84; see also Walters, Owusu-Bempah and Wiedlitzka, above n 78, at 962.

[142] On 18 March 2021, the UK Home Office announced that misogyny will be recorded as a hate crime by police as part of an experimental pilot. See Alisha Gupta "Misogyny Fuels Violence Against Women. Should it Be A Hate Crime?" The New York Times <www.nytimes.com>; Jamie Grierson "Misogyny 'should become a hate crime in England and Wales'" The Guardian <www.theguardian.com>.

[143] McPhail, above n 136, at 646.

[144] Maroney, above n 79, at 583; see also Perry, above n 139, at 489.

effectiveness to that of the generic criminal law.[145] Public and political attention will be diverted away from bias and hateful conduct in other areas, like employment and education.[146]

Raj, speaking on behalf of victim communities affected by homophobic and transphobic violence, showed support for this argument.[147] He argued that hate crime laws can mask the social and structural realities of victim experiences, as they only capture a small number of cases that do not reflect the complexity and extent of hostile behaviour.[148] Passing hate crime legislation may lift pressures on the government to address hateful conduct more generally, allowing these social and structural realities to exist underneath.

Jacobs and Potter also warn of the danger of hate crime laws to be disproportionately enforced against minorities who already experience injustices under criminal law, a danger that intensifies as the number of protected groups increases.[149] Due to the significant discretionary role of the police in determining whether an incident constitutes a hate crime, there is an inherent risk for "potential arbitrariness and manipulation."[150]

Lawrence is of a different view. He concedes that discriminatory enforcement is a valid concern, but argues it is a general assertion that does not "support an assertion to undo the criminal justice system generally."[151] He believes it would be "painfully ironic" if hate crime laws, which purport to protect minority groups, should be abandoned due to a general disproportionality assertion.[152] He argues the focus should instead be on obtaining more

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[145] See United Kingdom Law Commission, above n 56, at 98; See also Jacobs and Potter, above n 119, at 182.
[146] Frederick Lawrence "The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement" *Social Consciousness in Legal Decision Making* (Springer, New York, 2007) 209 at 213.
[147] Senthorun Raj "Contested feelings: Mapping emotional journeys of LGBTI rights and reforms" (2020) 45(2) Altern Law J 125 at 127.
[148] Guzman, above n 126; see also Raj, above n 147, at 127.
[149] See Jacobs and Potter, above n 119, at 168; see also McPhail, above n 136, at 647-648; Lawrence, above n 146, at 214.
[150] Eugene McLaughlin "Rocks and hard places: the politics of hate crime" (2002)6(4) Theor Criminol 493 at 495.
[151] Lawrence, above n 146, at 221.
[152] At 221.

reliable data to see whether hate crime laws are indeed being enforced disproportionately, and whether this would warrant their abandonment.[153]

Despite Lawrence's concern, there is weight to the view that alternatives to criminalisation should be preferred. Raj contends that hate crime legislation "sustains a penal logic that already harms marginalised groups of people."[154] He cautions against the use of legislation as a means to address the root causes of hostile violence, arguing that "accountability that addresses, not entrenches, inequality" should be provided instead.[155]

On the other hand, there are strong arguments against the complete abolishment of hate crime laws as Jacobs and Potter suggest. Abolishing hate crime laws may symbolise a disregard for the "struggle that has had to be mounted by advocacy groups to make these crimes visible, and to persuade politicians, the police and the media to take their concerns seriously."[156] While wishing not to exacerbate societal tensions through hate crime legislation is understandable, the law ought not to dismiss or invalidate the increased harms it causes to victims.[157] Lawrence argues that abolishing hate crime laws would be "more than a passive failure to validate harm; it is a powerful, and dangerous, statement rejecting the validity of those perceived harms."[158] McLaughlin agrees, arguing the law can be a powerful tool to connect identities in a society that is inevitably multicultural and pluralistic, and can give recognition to previously subordinated communities that their rights are appreciated.[159]

This discussion has highlighted the risks of using criminal law to address hateful conduct. Political incentives to expand the ambit of hate crime laws may lead to the over-inclusion of protected groups, which would dilute the value of legal protection and mask the underlying causes of hateful conduct. While hate crime laws should not be abolished

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[153] Lawrence, above n 146, at 221.
[154] Raj, above n 147, at 127.
[155] At 127.
[156] McLaughlin, above n 150, at 496.
[157] Lawrence, above n 146, at 219.
[158] Lawrence, above n 146, at 219.
[159] McLaughlin, above n 150, at 497.

completely, these risks suggest that the criminal law's ability to combat hate in society is limited. To complete this discussion, this part will now discuss the extent to which hate crime legislation can be effective in preventing hostile behaviour and changing societal attitudes.

B Ability of hate crime laws to change societal attitudes

As discussed in part III, it is difficult to conclude whether hate crime laws are effective in reducing the levels of hate offending due to incomplete data. While statistics have shown an increase in the number of reported hate incidents, greater victim awareness and improvements in police reporting policy make it difficult to determine whether this reflects an actual increase in hate offending. Regardless, it is still important to investigate the adequacy of hate crime laws in terms of their ability to change societal norms and prevent the attitudes that give rise to hate offending. This part will outline the key arguments that suggest hate crime laws are ineffective in changing hateful attitudes.

It has been argued that "forced tolerance", such as trying to change societal attitudes through hate crime laws, is ineffective.[160] Hurd argues that hatred and bias are character traits that are generally dispossessed over a long period of time, so are distinguishable to the specific intent required for other crimes.[161] This means that, unlike perpetrators of specific intent crimes, perpetrators of hate crimes are punished solely because of their bad character through increased sentences, whether by a separate aggravated offence or a sentencing enhancement.[162]

While not impossible, changing character disposition is difficult. It involves a choice to subject oneself to experiences that will develop their character for the better.[163] One's ability to affect their character in this way has mixed success, as they must take indirect

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[160] McPhail, above n 136, at 650; see also Lori Spillane "Hate crime: a legal perspective" *Multicultural perspectives in criminal justice and criminology* (Charles C Thomas Pub Ltd, Springfield, 2011) at 243.
[161] Heidi Hurd "Why Liberals Should Hate Hate Crime Legislation" (2001) 20(2) Law Philos 215 at 222.
[162] At 223-224.
[163] At 225.

measures that have non-immediate results.[164] For example, they may improve their dispositional character by repeatedly "putting themselves in circumstances which challenge them to behave in ways that, over time, affect their beliefs, emotional reactions, and dispositional responses".[165]

Hunt also doubts the utility of the law in changing attitudes. She argues hate crime laws may falsely assume that all offenders are "aware of their negative attitudes and beliefs and, because of them, consciously intend to do harm to an individual based on group membership."[166] Because dispositional beliefs are not readily and immediately in control of a defendant, it is argued that hate crime laws may punish defendants for things they cannot autonomously control.[167]

These arguments raise uncertainty about the effectiveness of the criminal law in altering dispositional attitudes in society. While the criminal law can punish certain attitudes, it is unlikely to prevent or change them. While incomplete hate crime data makes it difficult to draw these conclusions, there are likely more productive alternatives to criminalisation that will be more effective in combatting the hateful ideologies that lead to hate offending.

C Conclusion

This paper argues that hate crime laws may be a useful indicator of societal ideals, and may provide a means through which the government can support victim communities who have experienced historic injustices under the criminal law. However, since sentence enhancement provisions already go some way to fulfil this function, this paper doubts the practical and theoretical effectiveness of enacting separate offences as a response to hate in New Zealand.

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[164] Hurd, above n 161, at 225.
[165] At 225.
[166] Jennifer Hunt "Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis" *Social Consciousness in Legal Decision Making* (Springer, New York, 2007) 247 at 249.
[167] Hurd, above n 161, at 226.

While the symbolic culpability function of separate offences is theoretically stronger than that of a sentence enhancement, they carry increased risks. As discussed above, separate offences tend to lose their symbolic effectiveness by becoming politicised and unduly extended. They also may exacerbate societal tensions by placing targeted communities in a hierarchy and creating competition between victim groups. Considering these risks alongside their enforcement difficulties and low conviction rates, this paper finds that the risks of their introduction are not outweighed by their symbolic benefits.

Further, the effectiveness of hate crime legislation in changing societal attitudes should be doubted. Forcing tolerance through criminal law is unlikely to be effective in preventing the hateful ideologies that lead to hate-offending. Due to the dispositional nature of hateful attitudes, change requires one to commit willingly and consciously to challenging their character. It may be more productive to focus on ways to prevent people from developing these dispositions in the first place.

This is not to say that New Zealand's sentencing enhancement scheme should be abandoned completely, but rather that hate crime legislation should not be seen as an exclusive answer to hate offending. Attention must be turned to non-criminal methods which may be more effective in combatting hate and promoting social cohesion.

V Non-Criminal Alternatives

Without using the criminal law, this part will outline effective ways society can achieve social cohesion and prevent people from developing hateful ideologies. These non-criminal alternatives are likely to be more effective in disrupting the "institutional and cultural assumptions that condition hate crime in the first place."[168] It is outside the scope of this paper to analyse all possible responses other than legislation that will meet these ends. Instead, this paper will highlight three key areas where improvements can be made which will avoid the risks associated with criminal law. These are to strengthen anti-hate

[168] Perry, above n 139, at 490.

movements outside of institutional entities, invest in youth education programmes, and improve strategies to counter institutional discrimination. The latter two areas have already been included in the Royal Commission's broader scheme towards social cohesion.

A Strengthening the anti-hate movement outside institutions

Maroney argues that, because hate crime laws apply in the realm of the "very criminal justice system they seek to challenge," they have little capacity to influence actual change within it.[169] Once implemented, hate crime laws are within the institutional control of governmental entities, enforcement agencies, and judicial bodies.[170] In other words, legislative anti-hate efforts are "only giving all the tools to the wrong people,"[171] because a "police officer, prosecutor, or judge can always find a way to evade the requirements of anti-hate crime schemes" due to inadequate discretion control mechanisms within the criminal justice process.[172] If anti-hate measures can be diversified outside these institutions, current anti-hate legislation may be more effective.[173]

Maroney also argues that current anti-hate crime movements lack internal strength.[174] He believes that the anti-hate crime movement must "conceptualise itself as a permanent force worth investing in".[175] A permanent force is necessary to provide ongoing pressure to the criminal justice system.[176] Anti-hate crime movements are currently made up of fragmented groups that are only strengthened in the aftermath of an "extraordinary case" that commands media attention.[177] Indeed, it took the tragedy of the Christchurch attack to prompt the first review of New Zealand's regulatory response to hate crime since the passing of the Sentencing Act in 2002,[178] despite hate crime undoubtedly being a pre-existing issue. He also notes that many movement organisations target one community,

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[169] Maroney, above n 79, at 597.
[170] At 597.
[171] Guzman, above n 126.
[172] Maroney, above n 79, at 599 and 604.
[173] Perry, above n 139, at 489; Maroney, above n 79, at 620.
[174] Maroney, above n 79, at 617.
[175] At 617.
[176] At 617.
[177] At 617.
[178] Rolston, above n 15, at 1.

leaving gaps between different victim groups that must be bridged to create a strong and permanent movement with a common strategy.[179]

B Education

The Federation of Islamic Associations of New Zealand (FIANZ) recommended in their submission to the Royal Commission that the United Kingdom National Hate Crime Action Plan (NHCAP) should be viewed as a model of best practice.[180] The NHCAP aimed to plan improvements to the Government's response to hate crimes throughout 2016-2020.[181] While it may be too soon to consider the conclusive effectiveness of the NHCAP, it provides a useful starting point to consider ways in which New Zealand can improve anti-hate crime policy outside of legislative redress.

A key solution identified by FIANZ, the NHCAP, and the Royal Commission, was to teach tolerance to young children in schools.[182] This is an alternative to 'forcing tolerance' through legislation and focuses on preventing the development of dispositional character traits of bias and hatred in society altogether. As discussed in part IV, this is likely to be comparatively easier than trying to re-educate offenders on their long-standing dispositional beliefs. FIANZ stressed the need for identifying and intervening when racist behaviours in children and youth are observed in schools.[183] The Royal Commission recognised this could have a "significant impact" on social cohesion,[184] and recommended that the government invest in educational opportunities for New Zealanders to understand the importance of inclusivity, and their responsibility in facilitating it.[185]

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[179] Maroney, above n 79, at 618.

[180] Federation of Islamic Associations of New Zealand *FIANZ Submission to the Royal Commission of Inquiry into the Attack on Christchurch Mosques* (24 February 2020) at 126-127; see also United Kingdom Government, above n 135.

[181] Home Office *Action Against Hate: The UK Government's plan for tackling hate crime* (July 2016).

[182] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 681; Federation of Islamic Associations of New Zealand, above n 180, at 137; Home Office, above n 181, at [4].

[183] Federation of Islamic Associations of New Zealand, above n 180, at 137.

[184] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 681.

[185] At 759-760.

The NHCAP set initial goals in 2016 to implement new educational programmes in schools to help teachers teach and discuss 'difficult topics', assess the levels of racist, homophobic or bullying behaviours in schools, and work with community partners to provide educational projects which help students challenge prejudice and discrimination.[186] A review of the NHCAP in 2018 showed great progress, with 99 per cent of participants in one programme reporting they now understand what a hate crime is, how to report it, and how to challenge it themselves.[187] The review identified further funding is to be put towards anti-bullying interventions and anti-prejudice projects, and also aimed to implement new compulsory subjects within Relationships and Sex Education, which will teach broad themes of tolerance and respect.[188]

C Attacking institutional discrimination

The weighted and inherently discretionary role of the police in responding to incidents is a particular concern. Aside from improving their data collection strategies as discussed in part III, other areas of improvement have been identified that may be more effective in addressing the root causes of institutional and systemic inequities. FIANZ recommended the creation of effective programmes and policies targeted to eliminate institutionalised discrimination and ethno-centric bias within the police, involving human rights, cultural competency, and unconscious bias training.[189] These programmes may help with the initial identification and flagging of hostility and bias.

Improving workplace diversity within the police and public sector agencies may also help remove institutional discrimination. This was recommended both by FIANZ in their submission,[190] and by the Royal Commission in their report.[191]

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[186] Home Office, above n 181, at [4].
[187] Her Majesty's Government *Action Against Hate the UK Government's plan for tackling hate crime - 'two years on'* (October 2018) at 10.
[188] At 11.
[189] Federation of Islamic Associations of New Zealand, above n 180, at 126 and 138.
[190] At146.
[191] Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, above n 1, at 759.

VI Conclusion

The Christchurch terror attack highlighted the need to address hateful conduct in New Zealand. For the reasons identified by the Royal Commission and as illustrated by New Zealand case law, the current sentencing enhancement scheme is not effective in reflecting the culpability of the offending or in preventing hateful conduct in society. To address these inadequacies, the Commission recommended adopting the United Kingdom's approach by creating separate offences. They suggested separate offences would improve New Zealand's legal response to hate offending and help achieve social cohesion, ultimately creating a tolerant society where targeted communities feel safe.

However, evidence from the United Kingdom suggests that these benefits may not eventuate. At best, separate offences in the United Kingdom have achieved a symbolic culpability function, but this is largely frustrated by poor conviction rates. These offences have also encountered many of the issues New Zealand already faces with its sentence enhancement provision. Police records are often incomplete or inaccurate, hostility is inherently difficult to prove, and the deterrent value of such offences is minimal.

Generally, criminal law also has some significant flaws as a response to hate. Introducing hate crime laws can alleviate pressures on political actors to advocate for alternative measures that may be more effective in combatting hate. There is also a tendency for hate crime laws to lose their symbolic and practical value as more groups compete for protection. To the extent the law is a valuable tool in indicating societal behavioural ideas, it is likely sentencing enhancements already go some way to fulfil this function. Further, criminalisation is unlikely to have the ability to influence societal attitudes and prevent hateful ideologies. For these reasons, the marginal symbolic benefit of enacting separate offences is unlikely to be worth the risks posed by further criminalisation.

It may be more productive to focus on non-criminal alternative responses to hate. The Royal Commission suggested methods that may be more effective in promoting social

cohesion. These include implementing education programmes to prevent youth from developing character traits such as bias and hatred, and developing initiatives to improve workplace diversity within the police and public sector agencies. Ensuring strong and united anti-hate movements exist outside the realm of the criminal justice system will put pressure on institutional entities to develop such programmes and initiatives. Shifting anti-hate policy to focus on these non-criminal alternatives would more effectively promote the Commission's broader goal of social cohesion and address the underlying conditions that give rise to hateful conduct in society.

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