

LOOK BEFORE YOU LEAP

Hate crime legislation reconsidered

BILL DIXON* AND DAVID GADD**

w.j.dixon@crim.keele.ac.uk

david.gadd@manchester.ac.uk

In this response to Duncan Breen and Juan Nel's article on the need for legislation to enhance the sentences imposed on those convicted of hate crime, we draw on the international literature and our own research on racially motivated offending to argue that South Africa ought to adopt a more circumspect approach than the UK and the USA if it wishes to deal effectively with this kind of offending. We also warn that hate crime law brings with it some significant and undesirable unintended consequences for those it is meant to protect.

LEAPING

In the December 2011 issue of *South African Crime Quarterly*, Duncan Breen and Juan Nel made the case for introducing new legislation to address 'the apparent scourge of hate and bias-motivated crimes'.¹ They argue that, notwithstanding the constitutional vision of South Africans as a people 'united in ... diversity',² the country continues to experience 'ongoing patterns of crimes specifically targeting people on the basis of their race, nationality, religion, sexual orientation or other such factors'.³ Breen and Nel explain that what are known internationally as hate crimes 'undermine social cohesion and have been shown to have an especially traumatic impact on victims'.⁴ Notwithstanding a battery of

recent legislation to combat discrimination, they argue that South Africa lacks law 'specifically tailored to address' this issue.⁵ Consequently, they endorse the Department of Justice and Constitutional Development's (DoCJD) plans to bring forward legislation in order 'to strengthen the role of police and justice officials in holding [hate crime] perpetrators accountable and as a result send a clear message to society that such crimes will not be tolerated'.⁶

When it comes to the detail of the legislation, Breen and Nel remain open-minded about which of two 'legal models of hate crime legislation' – the 'hostility' model or a more expansive 'discriminatory selection model' – South Africa should adopt, warning that 'careful consideration' would have to be given to 'past, present and future trends of hate crime' before taking a decision one way or the other.⁷ Whichever of these two models were to be adopted, an important decision would have to be taken about the characteristics to be given legislative protection. Here Breen and Nel take the constitutional prohibition of discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion,

* Bill Dixon is a Senior Lecturer in Criminology and Head of the School of Sociology and Criminology at Keele University in the UK. He is a member of the editorial board of *SACQ*.

** David Gadd is Professor of Criminology and Director of the Centre for Criminology and Criminal Justice in the School of Law at the University of Manchester, also in the UK. He is on the editorial board of the *British Journal of Criminology*. They are joint authors of *Losing the Race: Thinking Psychosocially about Racially Motivated Crime*, published by Karnac in 2011.

conscience, belief, culture, language and birth contained in section 9(4) of the Bill of Rights as a starting point. But they suggest that some additional characteristics, such as gender identity and expression and HIV status also merit protection.⁸ Finally they reserve judgement on how best to achieve the objective of punishing hate crimes more severely either by creating new substantive offences or providing for evidence of the presence of ‘hate’ or ‘bias’ to be treated as an aggravating circumstance in sentencing for existing ones (or even, as has been done in England and Wales, by combining both approaches).⁹

LOOKING

Breen and Nel cite, in passing, what is probably the most celebrated book-length critique of sentence-enhancement laws, Jacobs and Potter’s *Hate Crimes: Criminal Law and Identity Politics*, but they give no sense of either the extent or the asperity of what is often referred to as ‘the hate debate’.¹⁰ In response, we urge the DoJCD and civil society supporters of further law-making to take stock of several key elements of this debate. Breen and Nel also take great care not to make exaggerated claims about the extent of the hate crime problem in contemporary South Africa. They call for more data to be collected before either of the legal models – ‘hostility’ or ‘discriminatory selection’ – is adopted.¹¹ We endorse this approach. But, based on our own research on racially motivated offenders in the UK and our reading of the international literature, we anticipate that data of this kind are likely to raise further doubts about whether legislation is either a necessary or a sufficient response to hate or bias-motivated offending.

Do hate crimes hurt more?

One area of uncertainty surrounding hate crimes anywhere is whether, as Breen and Nel claim, they have an ‘especially traumatic effect on victims’.¹² Or, to put it more broadly, do ‘hate crimes hurt more’ than crimes that are not motivated in this way?¹³ Opinion is divided on this point. Some studies suggest that victims of hate crime suffer

greater psychological trauma than those who have experienced other forms of crime.¹⁴ Other scholars struggle to identify enough reliable data to support the view that hate crimes have a qualitatively different impact on their victims.¹⁵

Persuasive evidence of greater hurt being caused by hate crimes might justify stiffer punishment on retributive grounds. But it is worth remembering the lessons of South Africa’s past here and how the desire for retribution, however understandable, may bring with it a risk of exacerbating conflicts with deep historical roots. It is also the case that, as many survivors of sexual assault – a hate crime that is rarely recognised as such – have long argued, the traumatic effects of violence may more readily be alleviated by providing better support, understanding, security and aftercare to those who have experienced it than by punishing the minority of offenders who are successfully prosecuted more severely.

Improving professional practice?

Another line of argument implicit in Breen and Nel’s article is that hate crime legislation is needed to encourage police, prosecutors, judicial officers and other professionals to recognise this kind of offending for what it is, treat it seriously and respond to victims appropriately. Here again there are good reasons to be sceptical about the connection between legislation, the development of ‘related service provider guidelines’ and observable improvements in official responses to hate crimes and their victims.¹⁶

In reality, recording and other official practices in relation to hate crime can be improved without passing new legislation. For example, the critical factor in sensitising the police in England and Wales to the problem of racially motivated crime and improving recording practices was not the creation of a new category of racially aggravated offences under the *Crime and Disorder Act 1998*, but the recommendation contained in the report of an inquiry into the murder of a black teenager, Stephen Lawrence, that the police should adopt a subjective definition of a racist incident as ‘any incident which is perceived to be racist by the

victim or any other person.¹⁷ Indeed, experience in England and Wales and various jurisdictions in the United States suggests that the police are often reluctant to enforce sentence-enhancing hate crime legislation that runs counter to deeply ingrained cultural prejudices, and compels them to make difficult judgements about offender motivations in what may turn out to be politically and ethically charged situations.¹⁸ Whether the South African Police Service will prove more amenable is doubtful if Steinberg is correct in arguing that the xenophobic violence of May 2008 was in many ways a re-enactment of police action:

[W]hen the mobs sang of foreigners stealing jobs, houses and women, their distinctive language, which equated the use of urban goods by foreigners with crime, was borrowed from a decade of observing police action.¹⁹

South Africa's experience with legislative innovation in other areas provides further grounds for caution. At a recent conference organised by the Institute for Security Studies, Stefanie Röhrs presented findings from a recent study of the implementation of the Sexual Offences Act 32 of 2007.²⁰ Based on 27 interviews with police officers and data on 131 rape survivors, Röhrs and her colleagues found that service delivery by the South African Police Service routinely failed to meet the standards set out in the new law. Similarly, and more instructively for those who want to enhance the sentences imposed by the courts on hate crime offenders, the impact on judicial behaviour of the mandatory and minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 have been much debated and found to be less significant than legislators might have hoped. Sloth Nielsen and Ehlers, for example, come to the conclusion that the legislation had not brought more consistency to the sentencing of those convicted of the most serious offences, nor had it succeeded in its wider aim of reducing levels of serious and violent crime.²¹

Sending a message?

In the conclusion to their article, Breen and Nel indicate that what is of the 'utmost importance' is

that the "symbolism" of law' is mobilised in the drive to 'condemn violating behaviours': 'introducing hate crime legislation will send a clear message that hate will not be tolerated.'²² We have discussed the notion that hate crimes are 'message' crimes to which society needs to respond, using the criminal law, elsewhere.²³ So we will add only a few comments here with South Africa's situation specifically in mind.

Unlike the British, who live in a country with a famously unwritten non-constitution, few South Africans can be in much doubt about their society's foundational values. It follows then that hate crime legislation can do no more than add force to the already unambiguous statements contained in the preamble to the Constitution and the equality provisions of section 9. It also follows that, insofar as any new law would only enhance the punishment attached to conduct that is already sanctioned as a crime, the additional deterrent effects of that punishment are likely to be marginal, far outweighed by those resulting from the institution of criminal law itself and potentially negated by inefficiency and delay in enforcement.²⁴

But what of the denunciatory message of hate crime legislation that Breen and Nel seem to have uppermost in their minds? The evidence we collected from potential members of the target audience for this kind of message in England suggests that what civil society hears is not necessarily what the legislature intends.²⁵ Very few people pay much attention to the fine detail of court reports and, when they do, whether they believe what they are told depends on their assessment of the credibility of the medium and their own life experiences. So, when, in our own research, we discussed a local newspaper story about the prison sentences imposed on three brothers for a racially aggravated attack on a Turkish man with a group of young white British offenders, their reactions ranged from thinly disguised approval for what the brothers had done, to attempts to explain how an apparently unprovoked assault might be an understandable reaction to a chance remark or a 'funny look', particularly if the assailants had been drinking. Victim-blaming was paramount.

No less problematic in the context of the denunciatory effects of hate crime legislation are the terms in which it is framed. Valerie Jenness captures the problem well:

Hate crime laws are written in a way that elides the historical basis and meanings of such crimes by translating specific categories of persons (such as Blacks, Jews, gays and lesbians, Mexicans etc.) into all-encompassing and seemingly neutral categories (such as race, religion, sexual orientation and national origin). In doing so, the laws do not offer these groups any remedies or protections that are not simultaneously available to all other races, religions, genders, sexual orientations, nationalities and so on. Minorities are treated the same as their counterparts.²⁶

The implications for South Africa of what Jenness calls the ‘norm of sameness’ are easy to imagine. Controversies over so-called ‘farm attacks’ and suburban robberies, not to mention the claims to victimhood advanced by Brandon Huntley, the self-styled white refugee who sought shelter in Canada, give some indication of how hate crime legislation might further inflame a national debate about crime that is already over-heated and racially charged. There is also a danger that resentful locals, encouraged by populist politicians, might seek to interpret offences committed by foreign nationals against South Africans as hate crimes perpetrated by malevolent *makwerekwere*.

Unintended consequences

It is at this point that we begin to stray into the unintended consequences of hate crime legislation; for unintended consequences there will surely be. In the United States, for example, ‘laws appear to be contributing to increased penalties against African Americans, one of the groups they were designed to protect.’²⁷ Similarly, in England and Wales, we found that the hate crime provisions of the *Crime and Disorder Act 1998* were often used by the police against multiply disadvantaged people, including members of minority ethnic groups.²⁸

The use of hate crime laws against minorities and other relatively disadvantaged groups raises a wider problem that Breen and Nel are anxious to avoid: the creation of what they call a “‘prejudice hierarchy’”, where some experiences are valued over others.²⁹ Unfortunately, this is an almost inevitable consequence of selecting certain characteristics – ‘race’, ethnicity, nationality, sexual orientation and so on – for protection under hate crime laws while ignoring others. Precisely which characteristics should be protected, and the somewhat arbitrary way in which these matters are decided, has been much discussed in the literature, with one critic, having considered the ‘hurt’ caused by unacknowledged ‘hate crimes’ against the homeless and high school ‘geeks’, suggesting that:

... there are forms of crime not picked out by our current conception of hate crimes which are structurally similar and as morally serious as the crimes we currently recognise as bias crimes.³⁰

Some US states have sought to address such concerns by extending protection to homeless people,³¹ and a British judge has recently expressed the view that attacking two young Goths solely because of their unusual appearance was a ‘serious aggravating feature.’³² It was, he said, equivalent to ‘other hate crimes where people of different races, religions or sexual orientation are attacked because they are different’. Meanwhile other US states, with more conservative electorates, continue to refuse to recognise sexual orientation as a protected characteristic.³³

Only time will tell if the ‘balkanisation’ argument advanced by Jacobs and Potter in the United States presents a real danger, but there are undeniable risks associated with encouraging people to think of themselves as ‘black’ or ‘white’, ‘coloured’ or ‘Indian’, ‘gay’ or ‘straight’ in a society still struggling to ‘heal the divisions of the past’ (as the preamble to the Constitution has it). While such cases are relatively rare, there have been occasions in the British courts when those passing sentence have had to mediate what Freud memorably called the ‘narcissism of minor

differences.³⁴ In *R v White*, for example, a man born in the West Indies who self-identified as African was convicted of a racially aggravated offence after he called a bus conductress of Sierra Leonean origin an 'African bitch'.³⁵ Similarly, in our own research, we encountered a woman of mixed heritage who had been put on probation for a 'racially aggravated assault' on four male shop-workers she had referred to as 'Pakis' after they had called her a 'dirty lesbian'.

CONCLUSION

In contemplating the prospect of hate crime legislation South Africa finds itself in the position of someone who has already had a few drinks but is considering 'just one more for the road'. Passing a new law, or emptying that final glass, can seem a good idea at the time; but the longer term effects may give cause for regret. If South Africa is not to suffer from an unpleasant legislative hangover, now is the time to pause for thought. As we have tried to show, law-making may prove to be neither a necessary nor a sufficient response to the problem of hate crime. And it may have some very undesirable unintended consequences too.

As Barbara Perry, a North American criminologist by no means unsympathetic to the case for hate crime legislation, has observed:

[T]he past two decades of the 20th century saw a flurry of hate crime legislation and other state activities, none of which have had an appreciable effect on the frequency or, certainly, the severity of hate crime. Such initiatives are insufficient responses to bias-motivated violence in that they do not touch the underlying structures that support hate crime.³⁶

Hate crime legislation might see some of those who attack foreign nationals or rape lesbian women languishing behind bars for longer. But it would do nothing to relieve the multiple deprivations suffered by the residents of Diepsloot and Du Noon – South Africans and 'foreigners' alike – or deal with the homophobia, misogyny, racism and embattled masculinity implicated in incidents of 'corrective' or 'curative' rape.³⁷



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NOTES

1. D Breen and JA Nel, South Africa – a home for all? The need for hate crime legislation, *South African Crime Quarterly*, 38, 2011, 33-43.
2. The Constitution of the Republic of South Africa, Act 108 of 1996.
3. Breen and Nel, South Africa – a home for all?, 33.
4. Ibid.
5. Ibid. A legal brief prepared by a firm of attorneys is cited in support of this: see K Williams, *Legal Brief on Hate Crimes in South Africa*, Johannesburg: Webber Wentzel, 2010. <http://www.cormsa.org.za/wp-content/uploads/2010/07/cormsa-hate-crimes-legal-brief.pdf> (accessed 3 March 2012).
6. Ibid.
7. Breen and Nel, South Africa – a home for all?, 34-5.
8. Breen and Nel, South Africa – a home for all?, 37.
9. Ibid.
10. J Jacobs and K Potter, *Hate Crimes: Criminal Law and Identity Politics*, New York: Oxford University Press, 1998, cited in Breen and Nel, South Africa – a home for all, 34 and 37. See P. Iganski, *The Hate Debate: Should Hate Be Punished as a Crime?*, London: Profile Books, 2002, for pithy contributions from leading participants in the debate from both sides of the Atlantic.
11. Breen and Nel, South Africa – a home for all?, 33, 35.
12. Breen and Nel, South Africa – a home for all?, 33.
13. A standard citation here is P Iganski, Hate crimes hurt more, *American Behavioral Scientist*, 45(4) (2001), 626-638.
14. See, for example J McDevitt, J Balbonic, L Garcia and J Gui, Consequences for victims: a comparison of bias and non-bias motivated assaults, *American Behavioral Scientist*, 45(4) (2001), 626-63 and G Herek, J Gillis and J Cogan, Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults, *Journal of Consulting and Clinical Psychology*, 67(6) (1999), 945-951.
15. P Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, Thousand Oaks: Sage, 2004.
16. Breen and Nel, South Africa – a home for all?, 39.
17. W Macpherson, *The Stephen Lawrence Inquiry*, CM-4262-I, London: The Stationery Office. Available online at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm> (accessed 4 March 2012). The Crime and Disorder Act 1998 also provided for evidence of racism to be treated as an aggravating circumstance in sentencing.
18. N Hall, Law enforcement and hate crime: theoretical perspectives on the complexities of policing 'hatred' in N Chakraborti, *Hate Crime: Concepts, Policy, Future Directions*, Cullompton: Willan, 2010, 158-159.
19. J Steinberg, Security and disappointment: policing, freedom and xenophobia in South Africa, *British Journal of Criminology*, 52(2) (2012), 357.
20. S Röhrs, Mind the gap: implementation of the Sexual Offences Act by the South African Police Service, Paper presented at *National and International*

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21. J Sloth-Nielsen and L Ehlers, Assessing the impact; mandatory and minimum sentences in South Africa, *South African Crime Quarterly*, 14, 2005, 15-22.
22. Breen and Nel, South Africa – a home for all?, 39.
23. D Gadd and B Dixon, *Losing the Race*, London: Karnac, 2011, chapter 4, and B Dixon and D Gadd, Getting the Message? ‘New’ Labour and the Criminalisation of ‘Hate’, *Criminology and Criminal Justice*, 6(3) (2006): 309-328.
24. See Gadd and Dixon, *Losing the Race*, 96-7, for further discussion of these points.
25. Gadd and Dixon, *Losing the Race*, 99-105.
26. V Jenness, Hate crime politics and the law in the United States, in P Iganski, *The Hate Debate*, 24-25.
27. K Franklin, Good intentions: the enforcement of hate crime penalty-enhancement statutes, in P. Gerstenfeld and D Grant, *Crimes of Hate: Selected Readings*, Thousand Oaks: Sage, 2004, 88.
28. Gadd and Dixon, *Losing the Race*, 95-6. See also L Ray, D Smith and L Wastell, Understanding racist violence, in E Stanko, *The Meanings of Violence*, London: Routledge, 2003, for the reporting of racist hate crime by minorities in the town of Oldham north of Manchester.
29. Breen and Nel, South Africa – a home for all?, 39.
30. M Blake, Geeks and monsters: bias crimes and social identity, *Law and Philosophy* 20, 2001, 133.
31. J Henry, Hate crime laws: a critical assessment, in B Perry and B Levin, *Hate Crimes, Vol. 1 Understanding and Defining Hate Crime*, Westport: Praeger, 2009, 189.
32. Quoted by Lord Judge CJ in *R v Ryan Herbert and Others*, [2009] 2 Cr App R (S) 9, para. 20. And see J Garland, The victimisation of goths and the boundaries of hate crime, in N Chakraborti, *Hate Crime*. Goths are members of a distinctive sub-culture readily identifiable by their hair, make-up and clothing.
33. J Henry, Hate crime laws: a critical assessment, 189.
34. S Freud, The Taboo of Virginity, translated from the German and edited by James Strachey in A Richards (ed) *On Sexuality*, The Penguin Freud Library Vol. 7, 261-283, Harmondsworth: Penguin, 1991 (1917), 261-283.
35. [2001] 1 WLR 1352 (CA).
36. B Perry, Hate crime and identity politics, *Theoretical Criminology*, 6(4) (2002), 489.
37. N Mkhize, J Bennett, V Reddy and R Moletsane, *The Country We Want To Live In: Hate Crimes and Homophobia in the Lives of Black Lesbian South Africans*, Cape Town, HSRC Press, 2010.