

Independent Review of Hate Crime Legislation in Scotland

Consultation - non-technical guide

Foreword



Recent events both at home and abroad have highlighted the continuing incidence of hate crime. The violent clashes between white nationalists and counter-protesters at Charlottesville USA provoked global controversy. Closer to home, recent examples of racist, homophobic and sectarian behaviour have been in the news.

Offences to tackle racist behaviour were first introduced in 1965. Since then legislation in Scotland has developed in a piecemeal way, currently covering offences targeting criminal conduct in relation to race, religion, disability, sexual orientation and transgender identity. The report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, published in September 2016, noted the lack of clarity in the definition of hate crime and raised the question as to whether additional groups should be protected. Following the recommendations of the Advisory Group's Report, Annabelle Ewing, Minister for Community Safety and Legal Affairs, asked me to conduct a review of hate crime in Scotland.

I am sure that tackling hate crime is an important element in the drive towards creating a society in Scotland where people live together respecting one another, regardless of differences. My remit is wide and is designed to include whether the law should be clarified and harmonised, and whether additional protected groups should be included. In addition, it allows for consideration of aspects of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. I intend to explore a wide range options and ideas. In order to do so I seek the assistance of all who have an interest, whether engaged in the criminal justice system, or as members of existing or potential protected groups, or as members of the public generally.

I would, therefore, be very grateful if you would take the opportunity to consider carefully the issues which are raised in this paper and give my review the benefit of your knowledge, expertise and experience.

A handwritten signature in black ink, appearing to read 'APC' followed by a flourish.

Alastair P. Campbell
(Lord Bracadale)

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Non-technical guide

This non-technical guide, which is being issued along with the full consultation paper, is intended for the general reader with no specialist legal knowledge. Annex A contains a glossary of legal terms.

Introduction

The independent review of hate crime legislation was announced on 26 January 2017 by Annabelle Ewing, Minister for Community Safety and Legal Affairs. The review is conducted by Lord Bracadale, a retired judge of the Court of Session.

The review follows the work of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, chaired by Dr Duncan Morrow, which reported in September 2016. The Independent Advisory Group looked at a wide range of factors that could combat hate crime and prejudice. It concluded that the language used around hate crime was unclear and recommended that Scottish Government should explore this further. It also recommended that further consideration should be given to the scope of existing hate crime legislation and whether it should be extended. Hate crime laws have been created in a number of different pieces of legislation over the last 50 years, and this may be part of the reason why they are not now well understood.

There have been other recent developments which are also relevant to the decision to hold the review. These include a murder case with a religious motivation which did not fall within the current law on hate crime and concerns expressed in the Scottish Parliament and elsewhere about how the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 is working in practice.

The remit for this review is:

To consider whether existing hate crime law represent the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

In particular, Lord Bracadale will consider and provide recommendations on:

- Whether the current mix of statutory aggravations, common law powers and specific hate crime offences is the most appropriate criminal law approach to take
- Whether the scope of existing laws should be adjusted, including whether the religious statutory aggravation should be adjusted to reflect further aspects of religiously motivated offending

- Whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered)
- Whether existing legislation can be simplified, rationalised and harmonised in any way, such as through the introduction of a single consolidated hate crime act
- How any identified gaps, anomalies and inconsistencies can be addressed in a new legislative framework, ensuring this interacts effectively with other legislation guaranteeing human rights and equality

How the review is being carried out

Lord Bracadale has set out the process which he intends to follow on his website:

<http://www.hatecrimelegislationreview.scot>.

At the outset of the review process, Lord Bracadale took a number of steps to obtain initial information and evidence about what people consider to be hate crime and how well the current criminal justice system deals with this.

He sent out a letter to a large number of interested organisations explaining the purpose of the review and encouraging them and their members to participate in the consultation exercise in due course and to complete a short questionnaire about their understanding, experience and impact of hate crime. The review received 180 responses to the questionnaire. These have been analysed by Dr Rachel McPherson of Glasgow University, and the analysis report is available on the review website.

Lord Bracadale and his team held a series of fact-finding meetings with police officers, prosecutors from the Crown Office and Procurator Fiscal Service (COPFS) and sheriffs. They also met or have had discussions with a wider range of interested parties in the community. A list of the organisations is set out at Annex B.

Lord Bracadale asked Professors James Chalmers and Fiona Leverick of Glasgow University to prepare an academic report analysing the current law in Scotland and considering the relevant law in other countries. The report is available on the review website.

The review has also considered a large range of reports and existing material which has been published on the subject of hate crime, including the annual statistics about hate crime prosecutions published by COPFS and the Scottish Government.

Lord Bracadale is now seeking views through an extensive consultation exercise. The intention is to explore what type of conduct the criminal law should identify as hate crime and whether the current set of offences adequately covers such conduct. Lord Bracadale has produced three versions of the consultation paper:

- a full version, aimed mainly at a technical, legal audience;
- this non-technical guide, which is intended for the general reader with no specialist legal knowledge;
- an ‘easyread’ guide using simple language and pictures.

The questions in the consultation paper are deliberately open and we have not set out provisional proposals at this stage. We would welcome input from anyone with an interest in hate crime legislation. We recognise that this is a wide topic and that many people will have a specific interest in one or more elements of this. You are welcome to provide answers to any or all questions.

Some of the topics which are discussed in the full consultation document are not specifically covered in this version because we think their technical, legal nature means that they may be of more limited interest to a wide audience. We set out below a list of these topics and where the discussion in the full document may be found.

- A proposal to consolidate hate crime in one piece of legislation [chapter 4]
- the International Holocaust Remembrance Alliance approach to defining antisemitism [chapter 4]
- Sentencing and recording [chapter 4]
- Freedom of expression and stirring up of hatred [chapter 6]
- Alternative means to regulate social media platforms [chapter 6]
- The relevance of public disorder to the offence in section 1 of the Offensive Behaviour at Football and Threatening Communication (Scotland) Act 2012 [chapter 7]
- The application of other offences to the behaviour covered by section 1 of the 2012 Act [chapter 7]

In addition, if you wish to raise any relevant points that are not the focus of questions within either paper please contact Lord Bracadale’s team at secretariat@hatecrimelegislationreview.scot.

The consultation exercise will run from 31 August to 23 November 2017. During that period, Lord Bracadale and members of his team will be attending a number of events in order to raise awareness of the consultation paper, answer questions and encourage well-informed responses to shape the review’s final recommendations. A list of the events, which are open to the public, is included on the review website.

Once the consultation period closes, the responses will be analysed and Lord Bracadale will consider whether there is a need for any further information before preparing his report. The report will be published in early 2018. It will then be for the Scottish Ministers to decide how to take forward Lord Bracadale’s recommendations.

Chapter 1: What do we mean by hate crime legislation and why does it exist?

This chapter is in two parts: Part 1 explores what is meant by the term “hate crime” in Scotland; Part 2 examines the justification for having hate crime legislation.

Part 1: What is meant by hate crime

“Hate crime” is a well-used term in Scotland and elsewhere, but what does it mean? It can mean different things to different people and for different purposes. In this paper we want to know what it means for the purpose of prosecuting persons who have committed what is described as a hate crime.

In the full consultation paper we have used the following as a working definition, which comes from *Hate Crime: Impact, Causes and Responses*, by the academics Neil Chakraborti and Jon Garland:

“...the creation of offences, or sentencing provisions, ‘which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim’s identity should be treated differently from ‘ordinary’ crimes’ although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim’s identity, or the selection of the victim on the basis of a particular feature.”

There are two important aspects to this definition. First, not every crime committed by a person who hated the victim can be called a hate crime. Assaulting someone just because you hate them as a person does not make it a hate crime. What makes it a hate crime is if you committed the crime due to your hate or prejudice against the victim because of their race, religion, disability, sexual orientation or transgender identity. These groups are described as “protected characteristics”.

Secondly, in terms of the working definition, a hate crime does not even need to be motivated by hate. It is enough to amount to a hate crime if the person shows prejudice or hostility towards the victim because of the victim’s membership of a group. That will very often be shown by making, for example, a racist remark while committing an offence such as breach of the peace or assault.

It is important to understand this because sometimes neither the victim nor the perpetrator recognises the incident to be based on, or driven by, hate. Sheriffs have told us that many hate crimes are committed by relatively ordinary people in the course of other incidents, rather than people who set out to act in a deliberately bigoted way.

The existing law will be examined in more detail in chapter 3. You may also wish to read the whole of this paper before answering this question.

Question:

Do you consider that the working definition, discussed in this chapter, adequately covers what should be regarded as hate crime by the law of Scotland? Please give reasons for your answer.

A victim oriented approach

The recommendations in the Macpherson report into the murder of Stephen Lawrence led to a change in the approach adopted by police forces across the United Kingdom in relation to the investigation and recording of hate crime. The report reflected concern that the police and wider criminal justice system made decisions about what had happened, and why, without listening effectively to victims' and families' fears that this was a hate crime. Sir William Macpherson therefore recommended that any incident which is perceived as racist by the victim or any other person should be recorded as a racist incident. He also recommended that the term "racist incident" should be used for all incidents reported as such by the public, whether or not the police initially considered them to be crimes, and that all should be reported, recorded and investigated with equal commitment.

This recommendation led Police Scotland to record "hate crime" and "hate incidents". Hate crime is recorded as "Any offence which is perceived by the victim or any other person as being motivated by malice or ill-will towards a social group" (see Police Scotland: "Hate Crime Standard Operating Procedure"). The intention is that recording in this way will require investigators to take seriously the possibility that a crime might be hate-motivated and ensure they secure and preserve any relevant evidence which may show that. If the allegation does not amount to a crime, the police will record it as a "hate incident". This is described as being "any incident that is not a criminal offence, but something which is perceived by the victim or any other person to be motivated by hate or prejudice". Members of the public are encouraged to report any such incidents as well as hate crimes.

This approach can, however, give rise to a certain tension. There are some circumstances where the police initially record a crime as a hate crime because the victim or another person perceived it as such, but there turns out to be insufficient evidence to proceed with prosecuting it as a hate crime. Prosecutors have told us that this can result in dissatisfaction for victims. Similarly, the recording of hate incidents can give rise to misunderstandings as to what amounts to hate crime.

The upholding of the post-Macpherson approach is seen by many as essential because it was designed to ensure that perceived 'hate-fuelled' behaviour is properly investigated. However, it appears that the attempt to record information about the two categories may also contribute to the lack of understanding about the definition of hate crime which was detected by the Independent Advisory Group.

Question:

How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be hate crime, and what can be proved as hate crime? Please give reasons for your answer.

Part 2: Justification for hate crime law

The Academic Report identifies two reasons why hate crime should be punished more severely than non-hate crime. First, hate crimes are more likely to cause harm both to the direct victim and to members of the group to which the victim belongs than non-hate crimes. Secondly, it is important to send a message, both to victims and to wider society, that bias and inequality of treatment will not be tolerated. Such a message may also be viewed as positively encouraging community cohesion, where people have a common vision and sense of belonging, regardless of any differences between them. Many other countries share the view that legislating against hate crime is justified for similar reasons.

The responses to the Questionnaire broadly reflected these reasons. We asked about the impact that the experience of hate crime had on people. The effects included: emotional effects; mental health impact; social and practical impacts. The emotional effects included: feeling scared and fearful, hurt or upset; feeling powerless and helpless; feeling intimidated; feeling panicked; being shocked or horrified; feeling ashamed or guilty; experiencing anger and annoyance; being offended/disgusted; feeling vulnerable, frustrated, resentful, unsettled and uncomfortable. The mental health impacts included stress, depression and anxiety. The social and practical impacts included: social isolation; feeling disengaged from society; losing trust; having to move house to a different area; moving job; altering behaviour.

On the other hand, critics of hate crime legislation argue that it amounts to punishment of opinions and leads to particular groups being singled out for special treatment under the law. Some claim that it represents an extreme form of “political correctness”.

Question:

Should we have specific hate crime legislation? Please give reasons for your answer.

Chapter 2: Human rights context

Human rights are basic rights and freedoms that belong to everyone. The United Nations' Universal Declaration of Human Rights was adopted following the Second World War and sets out a common standard of achievements for all people and all nations. It includes rights such as the right to life and liberty, and equality before the law.

Since the Universal Declaration, many more specific human rights agreements have been agreed between countries. A number of these are relevant to hate crime:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention on the Rights of the Child (CRC)
- Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)
- Framework Convention for the Protection of National Minorities

The rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) have been adopted in Scots law. That means that individuals can rely on these rights in the courts. The other agreements do not apply directly, but the Scottish Government and wider civil society are committed to exploring how Scotland can go beyond the rights set out in the ECHR. This includes using human rights principles to tackle injustice and exclusion in order to improve lives. In 2013, a group from across the public and voluntary sectors worked to produce Scotland's National Action Plan for Human Rights (2013-17). The Plan was used to co-ordinate action by a wide range of public bodies and voluntary organisations towards achieving the vision of a Scotland where everyone can live with human dignity, where social justice, equality and empowerment are the hallmarks of our society. It identified the need for priority action to 'enhance respect, protection and fulfilment of human rights to achieve justice and safety for all'. This includes recognising the importance of raising awareness of hate crime and ensuring that it can be tackled effectively.

It is sometimes necessary to strike a balance between different people's rights. For example, article 9 ECHR protects freedom of thought, conscience and religion, which includes the right to manifest religion or belief. However, that right is not absolute: it can be limited by laws which are proportionate to protect the rights and freedoms of others.

Likewise, article 10 ECHR protects freedom of expression, which includes the freedom to express ideas which shock, offend or disturb others. However, Parliament can choose to limit that right where it is necessary to protect others – for example, by prohibiting the publication of material which incites violence.

It is therefore important to recognise that the freedom to practice or observe one's religion or belief, or to express one's opinions, does not provide protection for conduct (including speech) which is contrary to the fundamental principles and values of the Convention on Human Rights.

Chapter 3: Current hate crime legislation in Scotland

As explained in chapter 1, hate crime is behaviour which is motivated by, or shows, hatred, malice, ill-will or prejudice towards people because they form part of a specific group, such as people of a particular race or sexual orientation.

When a court finds a person guilty of an offence, it can take a number of factors into account in deciding how to sentence them. These are called ‘aggravations’ where they make the offence more serious (for example, the fact that the accused had previously threatened the victim) or ‘mitigation’ where they make it less serious (for example, if the offender was provoked by the victim). The existence of an aggravating or mitigating factor has no impact on whether the person is guilty of the underlying offence; just how they are punished for it. Under common law, it has always been possible for courts to take prejudice into account as an aggravating factor.

However, Parliament passed legislation which goes further and states that certain factors must be treated as aggravations. Where the factors apply, the court must record this and take the aggravation into account when sentencing. These are known as statutory aggravations. Scottish criminal law currently includes statutory aggravations based on the following forms of prejudice:

- **race:** section 96 of the Crime and Disorder Act 1998
- **religion:** section 74 of the Criminal Justice (Scotland) Act 2003
- **disability:** section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009
- **sexual orientation and transgender identity:** section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

(There are also some statutory aggravations which relate to other factors, such as domestic violence, but they are not relevant here.)

So, for example, a person might attack someone outside a nightclub. If it is proved in court that the accused carried out the attack and intended to injure the victim, then the accused will be found guilty of assault. That offence is ‘general’, in the sense that it could be committed against any victim. If it is shown that the accused attacked the victim because it was a gay nightclub and the accused had a particular dislike for lesbians, then the court must find that the assault was aggravated by prejudice related to sexual orientation. The accused’s criminal record would specifically show that he had committed a hate crime, and the court would be required to take that factor into account when sentencing.

In addition to the statutory aggravations, there are also a number of specific hate crime offences. We have referred to these as ‘standalone offences’. These are different from the general offences, in that they specifically target behaviour motivated by hatred, malice, ill-will or prejudice towards people because of the group they belong to. Parliament has created these standalone offences to tackle particular forms of hate or prejudice-related behaviour.

At present, these offences are:

- racially aggravated harassment and conduct: section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995;
- offensive behaviour in relation to a regulated football match which is likely or would be likely to incite public disorder: section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012;
- threatening communications: section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012;
- offences under sections 18, 19 and 23 of the Public Order Act 1986 which prohibit the use of threatening, abusive or insulting words, behaviour or written material which will stir up racial hatred. For example, there have been successful prosecutions under these provisions in relation to the publication of material relating to Holocaust denial.

Chapter 4: Statutory aggravations: some issues

In this chapter we cover a number of issues on the statutory aggravation provisions which arose during the initial stages of this review. (The current statutory aggravations were outlined in chapter 3.)

The current thresholds and the use of the phrase “evincing malice and ill-will”

As we explained in chapter 1, there are two alternative ways in which an act may be considered to be a hate crime. These tests are set out in the legislation.

One threshold is that at the time of the offence or immediately before or after, the offender “evinces” towards the victim “malice and ill-will” relating to their group. For example, even if there is no other evidence that the accused was motivated by malice and ill-will, they may still use hostile language about the person’s race or sexuality.

The phrase “evincing malice and ill-will” is well-known to Scottish criminal lawyers. For generations, courts have treated murders as more serious (or aggravated) where the perpetrator “previously evinced malice and ill-will” against the victim: for example, if the accused had made threats prior to the murder. The phrase may, however, not be particularly accessible. There may be an argument that it would be better replaced with a more easily understood alternative, such as “demonstrating hostility”.

The other threshold is that the offence is motivated by malice and ill-will towards persons who have a particular characteristic. In other words, the reason why the person committed the offence was because of malice and ill-will in relation to a protected group. Motivation can be difficult to prove.

So, the statutory aggravation provisions mean that a general offence will be considered aggravated as a hate crime if (a) the perpetrator showed malice or ill-will based on the protected characteristic, either before, during or after committing the offence; or (b) there is some other evidence that the perpetrator was motivated by such malice and ill-will.

Question:

Do you consider that the current Scottish thresholds are appropriate? Please give reasons for your answer.

Should “evincing malice and ill-will” be replaced by a more accessible form of words? If so, please give examples of what might be appropriate.

Perceived associations of certain groups

In our initial evidence gathering, we have heard of cases where individuals feel that they have been subject to criminal conduct because of the perceived associations or connections between a group to which they belong and another group.

A specific example relates to the perceived links between the Jewish community and Israel. Some within the Jewish community report that the level of threatening behaviour which they experience in relation to political discourse about the state of Israel is much greater than would have been the case if they were not Jewish. They report a sense of feeling ‘held to account’ for the actions of a political state for which they have no responsibility.

Under existing hate crime law, an offence is aggravated if it is motivated by malice and ill-will against a religious group, but there is no equivalent aggravation if an offence is politically motivated. There may be some circumstances in which acts are motivated both by antipathy towards a political idea and towards a religious group which is thought to be connected to that idea.

Similar issues arise in relation to perceived links between Muslims and Islamist terrorist organisations, or indeed between Catholics and the IRA and between Protestants and the UVF. Existing Scottish provisions on religiously aggravated offending specifically cover ‘a social or cultural group with a perceived religious affiliation’ (which might, for example, cover the Orange Order). However, there is no equivalent provision relating to a religious group with a perceived political or social association.

Question:

Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity (e.g. foreign country, overseas movement) which the victim is perceived to be associated with by virtue of their racial or religious group? Please give reasons for your answer.

Religiously motivated offending

A specific issue about religiously motivated offending is raised in the review’s remit. This arises from a murder case in 2016.

On 7 July 2016, at the High Court in Glasgow, Tanveer Ahmed pled guilty to the murder of Asad Shah, a shopkeeper in Glasgow. Mr Shah was a member of the Ahmadi sect of Islam. Most Muslims believe that Muhammad was the final Prophet and many consider that any statement to the contrary is blasphemous, but Ahmadis believe that Muhammad was not the final Prophet. Mr Shah had used social media to publish messages which were capable of being interpreted as meaning that he himself claimed to be a prophet.

When Tanveer Ahmed pled guilty to the murder, he issued a statement explaining that he had committed the murder because he felt Mr Shah had disrespected the Prophet Muhammad and had claimed to be a prophet himself. There was no suggestion that other members of the Ahmadi sect considered Mr Shah to be a prophet. Therefore, Tanveer Ahmed's statement could be interpreted in terms of his attitude of malice and ill-will against the individual religious beliefs of his victim and the way in which the victim had expressed those beliefs.

The current religious statutory aggravation only applies where the offence is motivated by malice and ill-will towards members of a religious group. It does not apply where the malice and ill-will is directed towards individual religious beliefs or practices. Accordingly, prosecutors took the view that the case did not fall within the current definition of hate crime in Scotland.

The current law assumes that individuals always form part of a wider religious, social or cultural group when practising their religion or belief. However, it has been suggested that this approach is too narrow, and the law should also apply to offences motivated by intolerance of the expression of an individual's beliefs.

The counter argument is that it does not matter whether the specific religious aggravation applies to this kind of offence because the judge was able to impose a strict sentence anyway. In passing sentence, Lady Rae specifically commented:

This was a brutal, barbaric and horrific crime, resulting from intolerance and which led to the death of a wholly innocent man - who openly expressed beliefs which differed from yours - but - who also exercised an understanding and tolerance of others whose religious beliefs might be different from his own.

It is accepted by you in the agreed narrative that this was a religiously motivated crime, although it was not directed towards the Ahmadi community.

However, this approach means that the conviction would not be recorded as religiously aggravated. It would not appear as a hate crime on the offender's criminal record and would not be included in hate crime statistics, so the overall picture of hate offending may not be clear.

Question:

Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group? Please give reasons for your answer.

Transgender and intersex

The statutory aggravation in section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 includes aggravation by prejudice against transgender or intersex people.

Transgender is an inclusive umbrella term for anyone whose gender identity (our internal sense of our gender) or gender expression (how we express our gender, for example through clothing, speech and social interactions) do not fully correspond with the sex they were assigned at birth.

We heard from the Equality Network and the Scottish Trans Alliance that the language used within the definition of transgender identity in section 2 needs to be updated. The definition is welcomed as inclusive, but is considered to be out of date in its detailed language.

The definition also incorrectly suggests that intersex is a form of transgender identity. Intersex is an umbrella term used for people who are born with variations of physical sex characteristics that do not always fit society's perception of male or female bodies. It is important to be clear that intersex (which is about our physical body) is not the same as gender identity (which is about our sense of self).

Question:

Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?

Intersectionality

'Intersectionality' is the idea that an individual's experience is not governed solely by one aspect of their identity, but by a number of elements. So, for example, a Muslim woman's experience of discrimination or hate crime might be very different from the experience of a Muslim man or a non-Muslim woman.

Hate crime legislation in Scotland has been developed over time through the creation of a series of provisions which each 'protect' a specific group. Many of the campaigning organisations with an interest in hate crime have a focus on one particular group, and some academics have argued that the 'silo' approach in existing legislation – focusing on specific identities - can lead to competition between groups for resources or recognition and confusion for victims.

There are undoubtedly important questions for criminal justice authorities and policy makers about how to deal effectively with criminal conduct which affects victims differently because of multiple aspects of a person's identity. However, the important question for this review is whether the offences set down in legislation are an effective means to tackle such conduct.

We have heard from members of the Crown Office and Procurator Fiscal Service that charges can have more than one statutory aggravation – for example, in cases where the conduct in question is motivated by malice and ill-will relating to both religion and disability. In this context, it is important to remember that statutory aggravations can apply where the offence was *partially* motivated by the form of prejudice – it does not need to be the only motivation. The annual COPFS hate crime statistics also recognise this. Where a charge has more than one hate crime aggravation, it is included in the overall figures for each type of hate crime into which it falls.

Question:

Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic? Please give reasons for your answer.

Chapter 5: Standalone offence: section 50A Criminal Law (Consolidation) (Scotland) Act 1995: racially-aggravated harassment and conduct

Racial crime remains the most commonly reported hate crime, although the most recent figures from the Crown Office show that the number of racial charges in 2016-17 was at its lowest level since 2003-04.

In chapter 3 we noted that in addition to the statutory aggravation of racial prejudice which can apply to any offence, there is a standalone offence of racially aggravated harassment and conduct under Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

There are two ways in which this offence may be committed:

1. A racially-aggravated course of conduct which amounts to harassment of a person. “Harassment of a person” includes causing the person alarm or distress. “Conduct” is defined as including speech and a “course of conduct” must involve conduct on at least two occasions.
2. Acting in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

In each case the course of conduct or the behaviour is racially aggravated if one of the same two thresholds which feature in the statutory aggravation provisions described in the previous chapter is met: (a) in the course of conduct the offender “evinces” towards the victim “malice and ill-will” relating to race; or (b) the behaviour is motivated by malice and ill-will on a racial basis.

The offence might apply, for example, where one person shouts racial abuse at another in the street and causes distress as a result. This offence was created because of concerns that the problems of racial harassment and racially motivated violence were not treated seriously enough by the criminal justice system.

In many situations the conduct caught by section 50A could also be prosecuted as another offence such as abusive and threatening behaviour with a statutory race aggravation attached. In the light of that, in the full paper we indicated that we would welcome the views of consultees as to whether there are any circumstances in which conduct presently prosecuted under section 50A could not also be prosecuted as some other offence with a statutory aggravation.

Generally speaking, in Scotland a crime has to be proved in court by evidence coming from more than one source pointing to the guilt of the accused person. This is called the need for corroboration. This applies to the standalone offence of racially aggravated harassment or conduct under section 50A. This means there must be evidence coming from more than one source pointing to the racial element in the charge. By contrast, where another offence such as assault or breach of the peace is charged with a racial aggravation, only one source of evidence is needed to prove the aggravation. This may make it easier to prove such a racially aggravated offence than a charge under section 50A.

At present, there is only a standalone harassment offence for race, and no equivalent standalone offence for harassment aggravated by religion, disability, sexual orientation or transgender identity.

Question:

Is this provision necessary? Please give reasons for your answer.

Should the concept of a standalone charge be extended to other groups? If so, which groups? Please give reasons for your answer.

Chapter 6: Stirring up hatred and online hate crime

Stirring up hatred

Offences related to stirring up hatred are sometimes referred to as ‘hate speech’, although they can also be committed through behaviour other than speech, such as the publication of documents. The behaviour is often directed at society at large, rather than a specific individual with a particular ‘protected’ characteristic.

The first hate crime offences in Scotland were brought in in 1965 and related to stirring up hatred on grounds of race. No further ‘stirring up’ offences were created until the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (‘the 2012 Act’). That Act created offences relating to threatening communications which stir up religious hatred (section 6) and behaviour at regulated football matches which stirs up hatred against individuals or groups based on certain characteristics and is or would be likely to incite public disorder (section 1).

The Scottish Parliament is currently considering a Member’s Bill introduced by James Kelly MSP with the aim of repealing the 2012 Act. The main arguments supporting the proposed repeal are that the offences are unnecessary and illiberal and, so far as offences under section 1 are concerned, they unfairly target football fans.

The annual Scottish Government crime statistics show that there are very few prosecutions under the stirring up offences when compared with other hate crimes, such as racially aggravated harassment. There have only been 9 cases under the laws on stirring up racial hatred between 2006 and 2016. There have been a total of 32 cases of threatening communications under the 2012 Act since that legislation came into force. That covers both cases involving the stirring up of religious hatred, but also cases involving the threat of seriously violent acts. Official statistics do not distinguish between the two.

It may be argued that the low number of prosecutions indicates that there is not a significant problem in society of people stirring up hatred on racial, religious or other grounds. Against that, it could be argued that the low number of prosecutions is because the law has been successful in making certain types of discriminatory speech and conduct unacceptable in society, and that it therefore has an important role to play.

It may also be the case that the type of behaviour which stirs up hatred in society will also amount to an offence against a specific individual with a particular ‘protected’ characteristic. For example, a racially inflammatory speech might also result in a breach of the peace or threatening or abusive behaviour. Such a breach of the peace might be charged with a statutory aggravation if the perpetrator demonstrated, or was motivated by, malice and ill-will against a racial group.

Some might consider some speech blasphemous and capable of stirring up hatred on religious grounds. There may be a common law offence of blasphemy in Scots law, but there have been no cases brought under it for over 170 years.

One concern about criminalising the stirring up of hatred on a wide range of grounds is that it could result in the stifling of public debate, and people not being able to express critical opinions – for example, of religious practices or certain sexual behaviour. Two separate working groups considered the extension of hate crime laws in 2002 and 2004, and both concluded that it would be best not to create new stirring up offences because of concern about the impact on freedom of expression.

When the Scottish Parliament passed the law on threatening communications which incite religious hatred in 2012, it tried to deal with these concerns in two ways. First, the religious provision is narrower than the earlier race provisions. The race provisions apply to behaviour which is “threatening, abusive and insulting”, whereas the religious provisions only apply to “threatening communications”. Communications which are just abusive or insulting are not covered. The religious offence can only be committed by a person who intends to stir up hatred on religious grounds. By contrast, the race offence also applies where the racial hatred is likely to be stirred up, even if the perpetrator did not specifically intend that to happen.

The Scottish Parliament also included a specific provision which says, for the avoidance of doubt, that the offence does not stop certain criticism or discussion of religious practices. However, the policy document which accompany James Kelly’s repeal Bill argues that there is no clear boundary between what is and is not permitted, making it difficult to identify what constitutes the offence.

When Parliament passed the 2012 Act, it included a provision which would allow the Scottish Ministers to extend the threatening communications offence to communications which stir up hatred against other groups if Parliament approved. This could be used to extend to groups defined by sexual orientation, disability or transgender identity, but the offence has not been extended to date.

Question:

Should there be offences relating to the stirring up of hatred against groups? If so, which groups? Please give reasons for your answer.

Online hate crime

This part of the chapter explores issues specific to hate crime and hate speech which takes place online. Every minute on the internet, there are approximately 500 new websites, 300,000 tweets, 40,000 Facebook updates and 600 hours of YouTube video posted. Social media can be a positive means of communication and is a part of modern society. However, it can also be used to harass others and spread prejudice. There have been a number of cases reported in the press involving racist tweets etc.

Online hate crime can take many forms. The Coalition for Racial Equality and Rights have published a guide to responding to online hate speech and hate crime which states that online hate crime in particular can include:

- online abuse, including verbal, emotional or psychological abuse;
- offensive literature and websites;
- abusive private messages and hate mail; and
- threatening behaviour and online bullying.

Such conduct can therefore be targeted at specific individuals, or be published to the world at large.

The current legal position

Hate crimes which occur online are subject to the same laws which would apply if the crime occurred in person – for example, they may amount to the offence of threatening or abusive behaviour or breach of the peace. There is also a specific offence of “improper use of a public electronic communications network” which applies where a person uses such a network to send a message which is grossly offensive or indecent, obscene or menacing.

In our information gathering phase, we have heard views that online activity is not taken as seriously as physical crime. We have also heard that the speed and potential anonymity of activity online means that it can have a significant impact. We have been told that young people are particularly affected. Some people have suggested to us that the existing law is not appropriate to keep up with technological developments.

The Crown Office and Procurator Fiscal Service has published guidance setting out how it deals with offences involving communications sent by social media. The guidance distinguishes between different categories of communications. If the communication in question specifically targets an individual or group, and is considered to be hate crime, domestic abuse or stalking, then it is very likely that court proceedings will be brought. The same applies if the communications involve threats of violence or incite public disorder. By contrast, communications which are grossly offensive, indecent, obscene or false but do not involve a credible threat of violence or activity targeted at individuals are treated

differently. This category might include offensive jokes about a particular group online. In such cases, prosecutors must consider the context of the communication, and whether it goes beyond merely being offensive, rude etc. As with all cases reported to COPFS, even where there is sufficient evidence, prosecutors must consider whether it is in the public interest to prosecute. In making that decision, they may also take into account any expression of genuine remorse, whether the person responsible for the communication had taken action to remove it and the effect on any identifiable victim.

Prosecutors and sheriffs have told us that the current legal framework is broadly sufficient. There can be difficulties in prosecuting due to problems in proving who actually made a particular post, but once that stage is passed the current law does not cause a problem in practice.

A contrary view has been expressed by some women's organisations and academics. In our initial information gathering, it has been suggested that online harassment and incitement to hatred online is a material problem which is not properly dealt with by the criminal justice system at present. Online forums allow people to gather around a particular idea or topic, particularly with the use of hashtags. This can result in a phenomenon described as 'crowdsourced harassment' or 'dogpiling', where a large number of people join in an outpouring of criticism or condemnation in a way which can be extremely intimidating for those subject to it. One recent example has been the 'gamergate' activity online in the USA, where various female journalists and video game developers were subject to significant harassment. Some individual acts of harassment were very minor and others were much more serious (e.g. death threats, arranging for SWAT teams to attend the subject's house etc) but all were co-ordinated through the use of the 'gamergate' hashtag. Gender equality campaigners Engender suggested that similar campaigns of 'crowdsourced harassment' are becoming more common in the UK – referring to Caroline Criado-Perez and Stella Creasy MP who were subject to online harassment after having campaigned to get more women depicted on banknotes. The argument is that this kind of online harassment is much more common in relation to prominent women online than it is in relation to men, and that therefore indicates that the harassment is in part motivated by malice and ill-will based on the subject's gender.

Question:

Does the current law deal effectively with online hate? Please give reasons for your answer.

Are there specific forms of online activity which should be criminal but are not covered by the existing law? Please give reasons for your answer.

Chapter 7: Offensive behaviour at football

The purpose of the 2012 Act and its possible repeal

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“the 2012 Act”) came into force on 1 March 2012. Section 1 creates the offence of “offensive behaviour at regulated football matches”. It was introduced against a background of certain football related events in 2011, which are described in detail in the full paper. Since its introduction there has been significant opposition to the Act. On 21 June 2017 James Kelly MSP introduced a member’s Bill in the Scottish Parliament to repeal it. Given the cross party support among opposition parties and the parliamentary arithmetic, there is a prospect that the Act will be repealed.

The Act was targeted at:

“...a small often determined minority for whom provoking, antagonising, threatening and offending are seen as part and parcel of what it means to support a football team. Whatever their motivation, this Bill seeks to demonstrate that such a view is mistaken and will no longer be accepted.” (Policy Memorandum paragraph 12)

While recognising that disorderly and offensive behaviour at football matches could, in certain circumstances, be prosecuted under the existing law, the government was concerned that a substantial proportion of offensive behaviour related to football which led to public disorder was not explicitly caught by the pre-existing law. It considered that the offence would serve to clarify rather than complicate the law and would provide reassurance to the public. It would send a clear and powerful signal to football fans and the public more generally that such behaviour at football matches was simply unacceptable. It would also mean that the offender’s criminal record would clearly show that he or she had engaged in offensive behaviour specifically related to football, rather than to any more general offence.

In addition, the government considered that there was no evidence of a significant problem in relation to sports other than football and decided that the new offence should apply only to football matches. It was also to apply to problems of disorder outside stadia and on the way to and from matches on public transport and in the streets as well as in pubs and other venues where matches were being televised.

Those who support repeal of the Act say that it is illiberal, confusing and unclear. They argue that the public do not understand what is, and what is not, allowed, and it is liable to be unfair and arbitrary in its application.

The second main criticism of the operation of the Act is that section 1 unfairly targeted football supporters and meant that the law treated exactly the same (sectarian) behaviour differently if it took place in relation to a football match than if it occurred in any other situation.

The approach of the Scottish Premier Football League Limited (SPFL) and the Scottish Football Association (SFA)

Each of the SPFL and the SFA has an identical code and a similar structure for dealing with “unacceptable conduct” in relation to the football matches falling within its jurisdiction. Over the years these have undergone revision.

Unacceptable conduct includes conduct which stirs up hatred against the following: female or male gender; colour, race, nationality (including citizenship) or ethnic or national origin; membership of a religious group or of a social or cultural group with a perceived religious affiliation; sexual orientation; transgender identity; and disability.

The rules require that every club must ensure, so far as is reasonably practicable, that its supporters do not engage in unacceptable conduct at the stadium on the occasion of an official match; and it must take steps to identify and discipline any of its supporters who engage in unacceptable conduct. These could include, for example, confiscation of the person’s season ticket, or exclusion from club buses. If a club fails to do this, a range of sanctions can be imposed. These range from a warning as to future conduct to expulsion from the League.

For the 2017-2018 football season particular stress has been placed on the responsibility of each club to maintain discipline among its supporters. Clubs will be expected to take steps, including examining CCTV footage, to identify anyone engaging in unacceptable conduct such as singing sectarian songs. It is expected that such people will be disciplined, for example, by being deprived of their season ticket. Clubs must report incidents to the football governing bodies.

We were advised that some clubs considered it would be useful when dealing with unacceptable conduct if they could make an application to a court for a football banning order. A person who is subject to a football banning order is prohibited from attending football matches for a set period. Such an order could apply, even if the person banned has not committed an offence, if the court thinks that the person has been involved in violence or disorder in the past and that banning the person would help to prevent future violence or disorder at football matches. This would be similar to the law which allows the police to apply to the court for such an order. We shall return to this issue later in the chapter.

Views of fans' groups

Some of the fans' groups to whom we spoke are sceptical about how well the rules will operate in practice.

The view was expressed to us that many fans did not understand the 2012 Act or how it worked in practice. There was a lack of clarity about what was, and was not, acceptable. While most fans understood that certain forms of behaviour were clearly unacceptable and other forms of behaviour were clearly acceptable, the difficulty arose in making decisions about the middle ground. Who should decide what was offensive? More clarity was required. Some contrasted the vagueness of the 2012 Act compared with the specific list of songs which had been compiled by UEFA and which were not permitted to be sung. The groups expressed the view that it was not appropriate to have legislation which targeted football and football supporters in a specific way. There had been a very recent incident on an Orange march in Glasgow where spectators to the march had been filmed singing "The Famine Song" and the video had been posted on social media. It was noted that nothing had been done to stop that at the time of the march. Fans did not like double standards and there was a risk that they would lose their faith in a system where behaviour was tolerated elsewhere but not at football. This was reflected in surveys of fans.

Approach of the review

It is clear that the progress of the member's Bill through the Parliament is likely to coincide with the consultation period of the review and perhaps extend beyond it. The Justice Committee has issued a call for evidence and will begin to consider the repeal Bill during the period that this consultation exercise is ongoing. No doubt that parliamentary process will inform and assist the consultation exercise. While the issues which are likely to emerge in the arguments as to whether or not the 2012 Act should be repealed overlap with those raised in the review consultation in relation to section 1, they are not exactly the same. It is important to understand that not all the behaviour covered by section 1 falls into the category of hate crime motivated by prejudice. In addition, some of the broader arguments advanced in favour of repeal may be outwith the remit of the review.

The review will therefore consider how the law should best deal with the type of hate crime behaviour covered by section 1 in parallel with the Parliament's consideration of James Kelly's repeal bill. The final recommendations made by the review will take into account the law as it exists or is anticipated at that point.

Evidence of conduct prosecuted under section 1

Based on the information provided to us in the fact-finding phase and the recently published statistics by the Scottish Government we found that there were three broad categories of behaviour which have consistently given rise to offences under section 1 since its introduction:

- threatening behaviour;
- behaviour which expresses hatred of various groups, stirs up hatred or is motivated by hatred. The groups are based on religion, race, sexual orientation, transgender identity and disability, but the significant majority of cases involve religion. Generally, this behaviour involved singing, speech, the waving of banners and making of gestures;
- other offensive behaviour. This generally involved singing, speech, the waving of banners and making of gestures all in support of proscribed terrorist organisations such as the IRA or the UVF.

The police and courts tend to deal with the use of pyrotechnics as culpable and reckless conduct rather than using the section 1 offence.

Offences in the first category, those involving threatening behaviour, do not generally fall within the remit of this Review. We were told, for example, that most of the cases following the disruption after the 2016 Scottish Cup Final between Hibs and Rangers were related to threatening behaviour and involved no obvious prejudice. Another example given was an altercation within the crowd over seating arrangements: this could amount to threatening behaviour. Offences in the two other categories described above do come within the remit.

“In relation to a regulated football match”

The offence applies to behaviour “in relation to a regulated football match”. This applies in the ground where the match is being held but also while the person is entering or leaving or trying to enter or leave the ground, or on a journey to or from the match. A journey includes breaks, including overnight breaks. It also includes premises, such as a pub, where the match is being televised.

The statistics show that the majority of the cases prosecuted related to behaviour within the stadium. A minority of cases involved behaviour outwith the stadium. Very few cases came from pubs in which the match was being televised. Some incidents occurred on trains on which fans were travelling to matches.

The approach in other parts of the UK

There are laws in force in England and Wales and Northern Ireland which specifically relate to “chanting”. Chanting is defined as meaning the repeated uttering of any words or sounds, whether alone or together with others. In England and Wales the target is chanting

of an indecent or racist nature, while in Northern Ireland the chanting may be of an indecent nature, a sectarian or indecent nature, or consists of or includes matter which is threatening, abusive or insulting to a person by reason of their colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability. We wish to consider whether anything is to be learned from these provisions for application in the Scottish context.

Conclusion on type of conduct prosecuted under section 1

When the threatening behaviour charges are left out of account (as explained above, these do not come within the remit), the history of the operation of section 1 of the 2012 Act makes it clear that the remaining charges have overwhelmingly been of a sectarian nature. The conduct giving rise to these charges comprised singing, speech, waving of banners and making of gestures. The charges which were brought involved either the expressing or stirring up of hatred of religion, or offensive behaviour by glorifying proscribed terrorist organisations.

Question:

How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?

Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all? If so, what kind of behaviour should be criminalised?

Does equivalent behaviour exist in a non-football context?

If so, should it be subject to the same criminal law provisions? Please give reasons for your answer.

Application of section 1 to conduct outwith Scotland

The 2012 Act permits prosecution in Scotland of an offence under section 1 committed outside Scotland by a person who usually lives in Scotland. This provision was used in a case in Glasgow in 2013 when a person was prosecuted in the Sheriff Court for singing offensive songs at a football match in Berwick between Berwick Rangers and Rangers.

Question:

Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? Please give reasons for your answer.

Should a similar provision apply to non-football related hate crime? Please give reasons for your answer.

Diversion

Diversion schemes are voluntary schemes which can be used, where the COPFS considers it appropriate, in place of prosecution. If a person agrees to attend such a scheme and completes it satisfactorily, the prosecution does not go ahead. One such scheme relates to offences such as offensive singing. The community justice organisation, Sacro, operates a nationwide scheme for young people (aged 12 and over) charged under the 2012 Act. Under the scheme, young people can be offered diversion from prosecution in the form of a structured programme based on behavioural and attitudinal change, using Cognitive Behavioural Intervention techniques. The sessions support the individual to understand why they behave in a specific way and take ownership of their attitude and behaviours to ensure positive changes so as not to repeat the offence. It was suggested to us that this was the preferred course of action in relation to people with offending behaviours where violence was not involved and it was considered that a football banning order was not necessary. The requirement of the scheme was that the person should voluntarily attend and successfully complete it. If they did not do so then they could still be prosecuted.

The use of systems which allow for diversion from prosecution is discussed in more detail in chapter 9.

Football Banning Orders

Where a person commits an offence involving violence or disorder at a football match, or in some way associated with a football match, the sentencing court may impose a football banning order prohibiting the person from attending any regulated football matches in the United Kingdom and even abroad. The ban may be for periods of 3, 5 or 10 years, depending on the circumstances. Where a person is convicted under section 1 of the 2012 Act a football banning order is usually imposed. A ban can also be imposed for other offences involving violence and disorder. It has been suggested that football banning orders are an effective deterrent as supporters do not wish to be prevented from attending matches.

It is also possible for the police to apply to the court for a football banning order for someone who has not committed an offence. These are not common. This applies if the court thinks that the person has been involved in violence or disorder in the past and that banning the person would help to prevent future violence or disorder at football matches. Some football clubs have expressed the view that a similar provision which would allow a football club to apply for a football banning order would be a useful tool in maintaining discipline as required by the governing bodies of football.

Question:

Should a football club be able to apply to the court for a football banning order?
Please give reasons for your answer.

Chapter 8: Should the law be extended to other groups?

The review has been asked to consider, in particular, whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered). In the course of our initial information gathering, we have identified a number of characteristics that people have argued should be covered by new standalone offences or statutory aggravations. This information has come from responses to our questionnaire, a consideration of the characteristics covered in other jurisdictions in the Academic Report and campaigns by organisations or interest groups. We have also taken into account the conclusions of the Independent Advisory Group on hate crime, prejudice and community cohesion, and the working group which considered hate crime in 2004.

Before going on to consider the individual characteristics, it is worth reviewing the general arguments for and against the existence and extension of hate crime legislation as set out in chapter 1. It has been argued that there should be a 'level playing field' between different groups who are protected in existing equality law, and that hate crime laws jeopardise the principle of equality by providing additional protection to some groups but not others. On the other hand, it has been suggested that extending legislation to a wide range of new characteristics means creating so many different priorities that nothing is truly a priority. This could make provisions difficult to apply in practice and risks undermining the purpose of having hate crime provisions.

Age (older people):

We have heard concerns about offences committed against the elderly because they are perceived to be vulnerable. Commonly cited examples are fraud, breach of trust and neglect in care homes. There is some anecdotal evidence of older people being subject to verbal and other abuse for moving slowly in the street, or for being perceived as having particular political affiliations.

Action on Elder Abuse is a UK-wide charity which has campaigned for a new aggravated offence of elder abuse since June 2016. It considers elder abuse to include being targeted by scammers, neglect, abuse of Powers of Attorney, physical abuse and psychological intimidation. In February 2017, it conducted a poll of 3,183 people across the UK to assess attitudes to making elder abuse a hate crime. Almost 95% of respondents considered that the abuse of older people should be an aggravated offence like hate crimes based on race, religion or disability. The survey also showed that 95% of respondents agreed (40%) or strongly agreed (55%) that older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.

The Amnesty International UK briefing paper ‘Tackling hate crime in the UK’ also includes a recommendation that existing categories of hate crime should be extended to include age, though the paper itself does not include substantive evidence or arguments in favour of such an extension.

The examples given of offending against the elderly may suggest that the offending is motivated by the perceived vulnerability of those offended against, rather than any particular hatred of or animosity towards them.

Age (younger people):

From the information we have received so far, we do not understand there to be a significant problem of offending against younger people which is motivated by malice or ill-will based on age. There are a number of existing offences where the age of the victim is fundamental to the offence (e.g. sexual offences involving young people), but these may not amount to ‘hate crime’ as currently understood.

When we issued the questionnaire, we received a large number of responses from young people (77), which indicates the strength of feeling from young people about this topic. Responses outlined experiences largely around prejudice or harassment relating to race, religion, disability and sexual orientation. Those surveyed also reported that they had witnessed hate crime against others. Online hate crime was also a feature as noted in chapter 6, part 2 of this paper.

We have heard concerns about the effectiveness of the legal system to protect young people from criminal behaviour motivated by malice and ill-will based on the existing protected characteristics, and the extent to which conduct against young people is taken seriously. We have heard that incidents may be recorded as anti-social behaviour or bullying rather than hate crime.

This is especially the case where the conduct is carried out by other children, where issues about the scope for criminal responsibility arise. The Scottish Parliament Equal Opportunity Committee has recently published a report on bullying on 6 July 2017, and recommended that there needs to be more clarity about when bullying behaviour constitutes a crime (in particular a hate crime or sexual offence). The Scottish Government National Anti-Bullying Approach is currently under revision in light of the Equal Opportunities Committee’s report.

Question:

Do you consider any change to existing criminal law is required to ensure that there is clarity about when bullying behaviour based on prejudice becomes a hate crime? If so, what would you suggest?

Gender:

For some time, women's organisations have debated whether a statutory aggravation based on gender would be beneficial. When Parliament considered this in 2008 a statutory aggravation was not thought to be the correct way to address the complexities of violence against women. In particular, women's organisations were concerned that an aggravation would create a two-tier system where some cases of violence against women were thought to be motivated by gender hatred but others were not. This would be incompatible with the view that all gender-based violence against women is due to the endemic misogyny in society. If some offences of violence against women were considered to be caused by misogyny and others not, it would be difficult to draw the distinction and obtain appropriate evidence. At the time of the 2008 Bill, Engender noted that some jurisdictions had adopted gender aggravations (in particular, Canada and 19 US states), but these had resulted in few gender-based crimes being reported.

These concerns about the implications of a gender aggravation continue to apply, although there continues to be debate on the topic. Some argue that the lack of any specific provision relating to gender hate crime sends an inappropriate message when violence against women is the most common form of human rights violation in Scotland. Some jurisdictions have adopted gender aggravation/incitement legislation because of the important message it sends even if it has little impact in practice. Amnesty International UK briefing paper 'Tackling hate crime in the UK' includes a recommendation that existing categories of hate crime should be extended to include gender.

We know that some police forces in England have started to record offences which are motivated by hostility on grounds of gender as hate crime. This does not alter the criminal offences or sentencing powers which are available in respect of those offences, but it has been suggested that classifying offences in this way means that they are taken more seriously by the relevant police force.

In our initial information gathering phase, we heard from Engender and Scottish Women's Aid that the main issue which has changed since a gender aggravation was last considered in 2008 is that of online harassment and incitement to hatred online (see chapter 6, part 2).

Refugees/immigration status/asylum seekers:

The Scottish Refugee Council have expressed the view that refugees are often targeted because of their immigration status rather than because of their race. It is difficult to quantify this because Police Scotland do not record the immigration status of victims. However, the Scottish Refugee Council did some work in the past which showed a correlation between areas where racially aggravated offending occurred and areas where there was a high concentration of refugees and asylum seekers.

We have heard anecdotal evidence of cases in England where refugees or asylum seekers were targeted specifically as a consequence of their immigration status rather than as a result of the victim being of a particular nationality.

Socioeconomic status:

Amnesty International UK briefing paper ‘Tackling hate crime in the UK’ includes a recommendation that existing categories of hate crime should be extended to include socio-economic status. The paper itself does not include substantive evidence or arguments in favour of this extension, but it is thought this might be intended to cover the homeless, recipients of state benefits, users of food banks etc.

Travelling community:

The term ‘Gypsy/Travellers’ is used by the Scottish Government and refers to distinct groups – such as Romany Gypsies, Scottish and Irish Travellers – who regard the travelling lifestyle as being part of their ethnic identity.

The Scottish Government recognises Gypsy/Travellers as an ethnic group in its work and encourages others to do likewise. The Equality Act 2010 (which deals with discrimination by employers, service providers etc rather than criminal matters) covers discrimination against Gypsy/Travellers. This follows an Employment Tribunal ruling in 2008 which concluded that Scottish Gypsy/Travellers are a group which can be defined by reference to their ethnic origins and can therefore be afforded legal protection under race discrimination law.

The term ‘racial group’ in existing hate crime legislation means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins. We are not aware of any criminal cases where it has been considered whether this definition covers Gypsy/Travellers. However, it is expected that the criminal courts would interpret this definition in line with the approach taken by the civil courts, so as to treat those within the travelling community who travel as part of their ethnic identity as a racial group protected by the hate crime legislation.

The Scottish Government recognises that there are other travellers who would not regard themselves as Gypsy/Travellers – for example, occupational travellers, showpeople and New Age Travellers. It is unlikely that these travellers would fall within the existing race provisions as a ‘racial group’.

Other groups:

We have heard from sheriffs that other groups who are often targeted for abuse include paedophiles (whether known or suspected) and drug users.

Question:

Do you think that specific legislation should be created to deal with offences involving malice or ill-will based on:

- age
- gender
- immigration status
- socioeconomic status
- membership of gypsy/traveller community
- other groups (please specify).

For each group in respect of which you consider specific legislation is necessary, please indicate why and what you think the legislation should cover.

Chapter 9: Other specific issues

Under-reporting

From our discussions with representatives of groups in the community who represent or deal with people with the existing protected characteristics it is clear that there is a serious issue of underreporting of incidents of hate crime. We repeatedly heard similar reasons in relation to each of the characteristics. These included:

- lack of awareness of what hate crime is;
- people did not recognise the particular conduct as a crime;
- people accepted that certain types of conduct just happened to ‘people like them’;
- an expectation that being abused was just part of daily life;
- people did not consider the behaviour perpetrated against them serious enough to report;
- people thought that nothing could be done to prevent low-level harassment on the street;
- a feeling that they do not have a strong enough case to take to the police;
- people questioned whether there would be any benefit in reporting a crime;
- not knowing to whom to speak in order to report the crime;
- a general lack of confidence in the police;
- concern that no action will be taken by the criminal justice authorities;
- a lack of understanding about the criminal justice system;
- concern about the implications if action is taken – e.g. having to go to court and potentially being ‘outed’ as transgender, leading to sensationalist press reporting;
- people were not prepared to go through the process of reporting when it is something that happens to them frequently;
- sometimes people had an awareness of negative experiences that others have had in the context of criminal proceedings;
- fear of victimisation, retribution or reprisals;
- concerns about deportation in the case of refugees and asylum seekers;
- by reporting hate crime asylum seekers could be portraying their community, or indeed Scotland, in a bad light;
- feelings of isolation and lack of confidence;
- communication barriers.

This level of under-reporting raises a very serious problem. A criminal justice system designed to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice can only make a meaningful impact if the victims of such offences are willing to report the offence to the authorities. We note that the issue of under-reporting of hate crime has been recognised by the Scottish Ministers. On 13 June 2017, Angela Constance, Cabinet Secretary for Communities, Social Security and Equalities, made a statement on the report of the Independent Advisory Group. She noted that under-reporting was raised as an issue time and time again in relation to hate crime and announced the creation of a multi-agency delivery group to be chaired by herself. The issues to be addressed included under-reporting.

Among the list of bullet points above is the concern expressed that giving evidence may lead to sensationalist and unwelcome press coverage. The example cited to us was of a transgender person who had such an experience after reporting a hate crime, being “outed” in a local newspaper. This had discouraged others from reporting hate crime. There is a tension between, on the one hand, the general rule that proceedings in court should be open to the public and be subject to open press reporting and, on the other hand, the need to protect witnesses in certain situations.

The review would welcome views as to whether any legislative steps may be taken to improve the current levels of under-reporting.

Question:

Do you have any views as to how levels of under-reporting might be improved?
Please give reasons for your answer.

Do you consider that in certain circumstances press reporting of the identity of the complainant in a hate crime should not be permitted?

If so, in what circumstances should restriction be permissible?

Third party reporting

A related issue which arose in discussions with the interested party groups was how well the system of third-party reporting, which has been put in place by Police Scotland, worked. The Police Scotland website states:

“To ensure all victims/witnesses are able to report Hate Crimes, Police Scotland works in partnership with a wide variety of partners who perform the role of 3rd Party Reporting Centres. Staff within 3rd Party Reporting Centres have been trained to assist a victim or witness in submitting a report to the police and can make such a report on the victim/witnesses behalf.”

While most of those to whom we spoke thought that the third party reporting centres were a good idea, many of them identified difficulties in practice. The ambition of Police Scotland for the scheme did not match the capacity of individual centres to deal properly with reports. The number of case workers was limited and the quality of training might be

improved. A concern was voiced by the Coalition for Racial Equality and Rights (CRER) that if low-level incidents were reported and handled badly it was likely that people might be deterred from reporting more serious incidents. According to Stonewall, the reporting rates through third party reporting centres was relatively low. Others observed that it is unclear whether people knew that the centres were there or what their role was. Not all the centres which were listed were in fact operational. It was often the case that staff in the centres were unclear how to deal with victims who attended at third party reporting centres.

Question:

Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime?

If so, how might the current scheme be improved?

Diversion from prosecution and restorative justice

As noted in chapter 7 Sacro offer a nationwide diversion scheme for young people charged under section 1 of the 2012 Act. In addition:

- Sacro also offer a scheme in Glasgow and Lanarkshire which deals with hate crime more generally. The scheme (STOP: SACRO Tackling Offending Prejudices) was initially run as a pilot and focused specifically on sectarianism, but has been widened out and now accepts referrals for all forms of low-level hate crime.
- Sacro have an adult restorative justice programme which can operate as a diversion to prosecution in relation to any minor offences, considered suitable by COPFS, where the person responsible accepts that they committed the offence and the victim is willing to be involved.

The programmes described above apply instead of prosecution before the court. If the person does not engage with the programme effectively, the COPFS can decide to proceed with the prosecution.

Sacro are also consulting on the possibility of applying a similar programme as a form of community order following conviction. This might mean that, instead of imposing a fine or prison sentence on a person who was found guilty of an offence, the sheriff could require the person to undertake some kind of programme to understand the impact of the offence on the victim. It is important to recognise that because of the risk of re-traumatisation such a programme could only apply where the victim was willing to be involved.

Question:

Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime? Please give reasons for your answer.

Should such schemes be placed on a statutory footing? Please give reasons for your answer.

Annex A: Glossary

Bias

A strong feeling in favour of or against a group of people, often not based on fair judgment.

Breach of the peace

An offence which is committed where a person acts in a way which is extreme enough to cause alarm to ordinary people and threaten serious disturbance to the community.

Conduct

The manner in which a person behaves, especially in a particular place or situation.

Common law

The system of law which is based on judges' decisions, principles and custom rather than on written laws passed by Parliament.

Consolidation

The process of combining two or more pieces of legislation in one place.

Crown Office and Procurator Fiscal Service (COPFS)

The Crown Office and Procurator Fiscal Service (COPFS) is Scotland's prosecution service. They receive reports about crimes from the police and other reporting agencies and then decide what action to take, including whether a case should proceed to court.

Evincing malice and ill will

To clearly demonstrate evil or hostile feelings or intentions towards someone.

Football banning order

Football Banning Orders (FBOs) are a measure designed to stop potential troublemakers from engaging in football-related violence or disorder. A person who is subject to a football banning order is prohibited from attending football matches for a set period.

Harassment

Behaviour which causes another person alarm or distress. Harassment usually involves behaviour which is repeated on more than one occasion.

Hatred

A feeling of intense dislike or loathing towards a person or their lifestyle or beliefs.

Hostility

Showing or feeling unfriendly behaviour; ill-will, spite, prejudice, antagonism, resentment or dislike.

Motivation

The reason or reasons for acting or behaving in a particular way.

Offence

An action that breaks the criminal law.

Perception

The way that you think about something or the impression you have of it.

Perpetrator

A person who carries out a harmful or illegal act.

Prejudice

An attitude held towards a person or group that is not justified by facts. Prejudice includes negative attitudes towards people solely on the basis of their race, disability or sexual orientation, for example.

Procurator Fiscal

The Procurator Fiscal is the prosecutor who decides whether a criminal case is brought or presents the arguments in court. See also COPFS.

Repeal

To officially cancel a law or Act of Parliament.

Sheriff

Full-time salaried judges who sit in sheriff courts. They can hear criminal cases on their own or in conjunction with a jury, depending on the seriousness of the case.

Standalone offence

In this context, we mean an offence which has been created by Parliament to tackle specific hate crime activity. A person will only be found guilty of this kind of offence where the act in question involved hatred or prejudice.

This can be contrasted with statutory aggravations (see below) which are ‘added on’ to other, general offences such as assault or breach of the peace. For example, a person who assaults another will be guilty of the offence of assault. If that assault was motivated by, or showed, malice and ill-will based on racial prejudice, the conviction for the assault will be recorded as having been racially aggravated and the penalty may be more severe.

Statutory aggravation

In law an aggravating factor is any fact or circumstance that increases the severity of a criminal act and is used to increase the sentence imposed on an accused if they are found guilty of a crime. A statutory aggravation is a rule laid down by Parliament which requires a court to treat a particular fact or circumstance as an aggravating factor where a person has been convicted of another offence (for example, the fact that an assault was racially motivated).

Stirring up offences/provisions

These offences apply where a person does certain acts with the intention of encouraging others to hate individuals or a group of people because of who they are.

Threshold

Certain elements of an offence which the prosecutor must prove to the court in order for a person to be found guilty.

Victim

A person suffered, harmed, injured, or killed as a result of a crime, accident, or other event or action.

Annex B: Meetings and discussions

Lord Bracadale and/or his review team have met or held discussions with a large number of organisations including:

Action on Elder Abuse
Age Scotland
Article 12
Amnesty International
BEMIS
British Deaf Association Scotland
Central Scotland Regional Equality Council
CRER (Coalition for Racial Equality and Rights)
Commissioner for Children and Young People
Community Security Trust
COSLA
Representatives from the Crown Office and Procurator Fiscal Service
Disability Agenda Scotland
Dumfries and Galloway Multicultural Association
Edinburgh Interfaith Alliance
Education Scotland
Engender
Equality and Human Rights Commission
Equality Network
FRAE Fife: Fairness Race Awareness & Equality
Glasgow Women's Library
Grampian Regional Equality Council
I am Me
Inclusion Scotland
Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion
Interfaith Scotland
LGBT Youth
Northern Ireland Assembly
People First (Scotland)
Police Scotland including the Football Coordination Unit Scotland (FoCUS)
Religious Leaders' Forum
Sacro
Scottish Council for Learning Disabilities
Scottish Council of Jewish Communities (SCoJeC)
Scottish Government
Scottish Older People's Assembly

Scottish Refugee Council
Scottish Football Association
Scottish Football Supporters Association
Scottish Human Rights Commission
Scottish Professional Football League
Scottish Trans Alliance
Scottish Women's Aid
Scottish Youth Parliament
Sheriffs
Stonewall Scotland
STUC
Supporters Direct Scotland
Victim Support Scotland
Young Scot
Youthlink Scotland



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