

Independent Review of Hate Crime Legislation in Scotland

Final Report

Executive Summary



The problem

When, in January 2017, Annabelle Ewing, Minister for Community Safety and Legal Affairs, appointed me to conduct an independent review of hate crime legislation in Scotland, she said,

Racism, intolerance and prejudice of all kinds are a constant threat to society, and while Scotland is an open and inclusive nation, we are not immune from that threat... This review will help ensure we have the right legislative protection in place to tackle hate crime wherever and whenever it happens.

While the review was ongoing examples of hate crime and offences of stirring up hatred continued to make the news. Earlier this year there were reports of a ‘Punish a Muslim’ campaign offering point-based ‘rewards’ for those who attack and abuse Muslims, including ‘verbal abuse’, pulling head-scarves off, beating up a Muslim, ‘butchering’ a Muslim and burning a mosque. In March 2018, Amnesty International published ‘#ToxicTwitter’¹, a report about violence and abuse directed towards women on Twitter. The report, which looked around the world, included detailed case studies in relation to Scottish politicians, including First Minister Nicola Sturgeon, Conservative Party leader Ruth Davidson and former leader of the Labour Party in Scotland, Kezia Dugdale. In her interview with Amnesty International, the First Minister noted the likely impact of this abuse on others:

What makes me angry when I read abuse about me is that I worry that it puts the next generation of young women off politics. So, I feel a responsibility to challenge it, not so much on my own behalf, but on behalf of young women out there who are looking at what people say about me and thinking, I don’t want to ever be in that position.

Of course, legislation will not change attitudes on its own but it can do two things. First, clearly-defined hate crime legislation and well-developed procedures in the criminal justice system to deal with it will increase awareness of hate crime and give victims more confidence that it will be taken seriously by the police, prosecutors and the courts. Secondly, it can *contribute* to attitudinal change. Receiving an honorary degree at Newcastle University, Martin Luther King said:

1 #ToxicTwitter – Violence and Abuse Against Women Online:
<https://www.amnesty.org/download/Documents/ACT3080702018ENGLISH.PDF>

Well, it may be true that morality cannot be legislated but behaviour can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me but it can restrain him from lynching me; and I think that is pretty important also. And so, while the law may not change the hearts of men, it does change the habits of men if it is vigorously enforced, and through changes in habits, pretty soon attitudinal changes will take place and even the heart may be changed in the process.

The review

My appointment was part of the follow-up to a report by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, published in 2016. The report was wide-ranging and looked at education, public and community services and other areas, as well as the criminal justice system. Amongst other things, it recommended that the Scottish Government should lead discussion on the development of clearer terminology around hate crime and consider whether there should be any additions to the existing protected characteristics of race, religion, disability, sexual orientation and transgender identity. Part of my wide-ranging remit was to address these issues.

At every stage of the review I spent a lot of time listening to people. I met, not only with people involved in the criminal justice system, but also with those affected by hate crime. That allowed me to gain a good understanding of the impact of hate crime and what I learned has informed my review. While much of the review is of a legal and technical nature, I have tried to make it as accessible as possible. In addition to this full report, my team has prepared a leaflet explaining what the review is about and setting out its recommendations.

I recognise that not everybody will be happy with the recommendations that I make. Some may think that they fall short of their expectation; others may think that they go too far in interfering with the freedom of the individual and freedom of speech. But, all can rest assured that their views have made a valuable contribution to what has been a wide-ranging review.

Responses to prejudice-driven conduct

There is a range of responses to prejudice-driven conduct. Some low level expressions of prejudice or bias will not be subject to any legal action at all. Some regulation may be voluntary. In some situations, for example, in the workplace, or on public transport, the civil law has a role in addressing discrimination, mainly under the Equality Act 2010.

Some conduct is by its nature so morally wrong and harmful that it must be dealt with by the criminal law. Hate crime legislation has developed as the means by which the criminal law addresses prejudicial conduct.

What is hate crime?

I have used this definition of hate crime:

Offences “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.”²

The criminal law recognises a number of identity-based ‘protected’ characteristics. Currently, as noted above, these are: race, religion, disability, sexual orientation and transgender identity. The definition is qualified in the sense that it is not necessary to prove motivation: it is sufficient if, in committing an offence, the perpetrator demonstrates hostility (currently, in Scotland, referred to as ‘malice and ill-will’) in relation to the protected characteristic shared by the victim.

Why have hate crime legislation?

On the basis of all the information before my review I identified three clear reasons to justify having hate crime legislation:

- The harm which hate crime causes: it has a profound effect on the victim and the community group to which the victim belongs.
- The symbolic function which legislation fulfils: it sends a clear message to the victim, the group of which the victim is a member, and wider society, that criminal behaviour based on bias and inequality will not be tolerated.
- The practical benefits from having a clear set of rules and procedures within the criminal justice system to deal with hate crime. This should provide a structure for consistency in sentencing and rigorous recording, allowing statistics to be kept, and trends to be identified and monitored; the fact that the perpetrator has committed a hate crime should be reflected in his/her criminal record; it will increase awareness of hate crime, encouraging reporting of offences and ensuring that victims of hate crime will be supported throughout the criminal justice process.

2 N Chakraborti and J Garland, *Hate Crime* (n 12) 9; Academic Report chapter 1

My recommendations

In the course of the review, I have recognised that many parts of the current hate crime legislation work well and should be retained. Where the evidence pointed to a need for change I have made specific recommendations. I have also taken note of developments in policy and procedure which are not directly within my remit but have a bearing on the recommendations which I make.

The legislative scheme which I envisage for tackling hate crime comprises an existing baseline offence and a statutory aggravation reflecting identity hostility. Although a statutory aggravation could apply to any offence, typical examples would be assault, threatening or abusive behaviour and vandalism. I think that this is the clearest and most effective way to mark out hate crime and my recommendations reflect that. I am also recommending that there should be a suite of stirring up of hatred offences extending to all protected characteristics. In the next section I set out my recommendations with references to the relevant chapters of the report.

It will be a matter for the Scottish Ministers to decide whether to accept all or any of my recommendations. My report is intended to enable Scottish politicians to debate the issues involved and to encourage public discourse. I hope that the review has made some contribution to tackling the very real and pernicious problem of hate crime, both online and in the physical world, and I am grateful to all who participated in it.



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List of recommendations

Current statutory aggravations: chapter 3

Recommendation 1

Statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland.

Recommendation 2

The two thresholds for the statutory aggravations are effective and should be retained but with updated language. They should apply where:

- at the time of committing the offence, or immediately before or after doing so, the offender *demonstrates hostility* towards the victim based on the protected characteristic; or
- the offence is motivated (wholly or partly) by *hostility* based on the protected characteristic.

It should remain the case that evidence from a single source is sufficient evidence to establish the aggravation.

Recommendation 3

Offending behaviour which involves the exploitation of perceived vulnerabilities should not be treated as a hate crime. (But see recommendation 11.)

Recommendation 4

The drafting of any replacement for section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 should include ‘intersex’ as a separate category rather than a sub-category of transgender identity.

Consideration should be given to removing outdated terms such as ‘transvestism’ and ‘transsexualism’ from any definition of transgender identity (without restricting the scope of the definition).

Recommendation 5

The statutory aggravations should also apply where hostility based on a protected characteristic is demonstrated in relation to persons who are presumed to have the characteristic or who have an association with that particular identity.

Recommendation 6

I do not consider it necessary to create a statutory aggravation to cover hostility towards a political entity.

Recommendation 7

I do not consider it necessary to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group.

Recommendation 8

Where a statutory aggravation is proved, the court should be required to state that fact expressly and it should be included in the record of conviction. The aggravation should be taken into account in determining sentence.

There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.

Additional characteristics: chapter 4

Recommendation 9

There should be a new statutory aggravation based on gender hostility.

Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility. The court would be required to state that fact on conviction and take it into account when sentencing.

Recommendation 10

There should be a new statutory aggravation based on age hostility.

Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.

Recommendation 11

The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.

Recommendation 12

I do not consider it necessary to create a statutory aggravation to cover hostility towards any other specific new groups or characteristics.

Stirring up hatred: chapter 5

Recommendation 13

Stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.

Recommendation 14

Any new stirring up of hatred offences should (a) require conduct which is threatening or abusive; and (b) include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up thereby.

Recommendation 15

The current provisions in relation to stirring up racial hatred under the Public Order Act 1986 should be revised and consolidated in a new Act containing all hate crime and stirring up of hatred legislation.

Any replacement for the stirring up of racial hatred provisions should (a) require conduct which is threatening or abusive; and (b) include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up thereby.

Recommendation 16

A protection of freedom of expression provision similar to that in sections 29J and 29JA of the Public Order Act 1986 and section 7 OBFTCA should be included in any new legislation relating to stirring up offences.

Online hate: chapter 6

Recommendation 17

Recommendations 9 (gender hostility) and 13 (stirring up) will form part of an effective system to prosecute online hate crime and hate speech.

I do not consider any further legislative change necessary at this stage. However, I would encourage the Scottish Ministers in due course to consider whether the outcomes of the Law Commission’s work on online offensive communications identify any reforms which would be of benefit to Scots criminal law across reserved and devolved matters.

Section 50A: racially aggravated harassment: chapter 7

Recommendation 18

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.

OBFTC Act: chapter 8

Recommendation 19

No statutory replacement for section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 is required.

I do not consider it necessary to create any new offence or statutory aggravation to tackle hostility towards a sectarian identity (insofar as that is different from hostility towards a religious or racial group) at this stage. The conclusions of the working group which has been appointed to consider whether and how sectarianism can be defined in law will provide Scottish Ministers and Parliament with the basis to debate how best to deal with offences of a sectarian nature in due course. That debate might include consideration of whether any such offences should be classed as a form of hate crime or treated as something distinct.

Consolidation: chapter 9

Recommendation 20

All Scottish hate crime legislation should be consolidated.

Procedural issues: chapter 10

Recommendation 21

No legislative change is required in relation to the support given to victims of hate crime offences. However, I note and commend the practical measures being taken to create a more coordinated response to reporting, preventing and responding to hate crime offences.

Recommendation 22

No legislative change is required in relation to the provision of restorative justice and diversion from prosecution services. However, I encourage practitioners to take note of, and learn from, developing practice in this area.

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Chapter 1

Process and methodology

1.1. At the end of January 2017 I was appointed by Annabelle Ewing, Minister for Community Safety and Legal Affairs, to conduct an independent review of hate crime legislation in Scotland.

Background

1.2. The review was established following the publication in September 2016 of the report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, chaired by Dr Duncan Morrow, which recommended that the Scottish Government should:

- lead discussion on the development of clearer terminology and definitions around hate crime, prejudice and community cohesion; and
- consider whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime, for example based on gender, age or membership of other groups such as refugees and asylum seekers.

1.3. There was also a recognition that hate crime legislation had developed in a piecemeal manner over many years and the review provided an opportunity to consider whether harmonisation and consolidation would be beneficial.

1.4. During the course of the review a Bill to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (OBFTCA) was passed by the Scottish Parliament. The review has taken into account the impact of repeal of the Act on hate crime legislation.

Remit

1.5. Against that background, the remit of the review was in the following terms:

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

In particular, to 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 hate crime law should be adjusted including whether the existing 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 any new legislative framework ensuring this interacts effectively with other legislation guaranteeing human rights and equality.

Secretariat

1.6. I have been supported by a small team comprising Victoria MacDonald, Legal Secretary to the Review, and Carole Robinson, Project Manager. I am very grateful for that support and their unstinting commitment throughout the whole process of the review.

Reference Group

1.7. At the outset I set up a reference group with a range of experience and expertise. The membership of the nine strong group were:

- **Steve Allen**, former Deputy Chief Constable, Police Scotland;
- **James Chalmers**, Regius Chair of Law, University of Glasgow;
- **Ian Cruickshank**, part-time sheriff, solicitor and convenor of Law Society of Scotland criminal law committee;
- **Catherine Dyer**, former Crown Agent;
- **Cathy Jamieson**, Managing Director of Care Visions Children’s Services and former Minister for Justice;
- **Johanna Johnston QC**, sheriff;
- **Shelagh McCall QC**, member of Faculty of Advocates and part-time sheriff;
- **Alan McCloskey**, Director of Operations in Victim Support Scotland¹; and
- **John Wilkes**, Head of the Equality and Human Rights Commission Scotland.

1.8. The reference group provided independent expert advice and knowledge of the policy, legislative background and practice of existing hate crime legislation and the impact of any proposed changes. Throughout the review process the group scrutinised and challenged the developing ideas in order to ensure that recommendations would be robust and achievable. I am most grateful for their invaluable contribution to the development of the review.

1 During the course of the review Alan McCloskey took over membership of the reference group from Susan Gallagher, Acting Chief Executive of Victim Support Scotland.

Keeping people informed: website

1.9. Recognising that there was considerable interest in the review and the importance of keeping the public informed, my team set up a website: <http://www.hatecrimelegislationreview.scot>. The website formed the hub for communication with all interested parties, keeping them, and the public generally, abreast of progress and explaining how all might participate in the review.

Academic research

1.10. I commissioned Professors James Chalmers and Fiona Leverick, both of the University of Glasgow, to prepare an academic report². The academic report examined the underlying principles and justification of hate crime legislation; set out the current law in Scotland; and described the approach of other jurisdictions. It has made a huge contribution to the development of the consultation paper and the final report, providing a legal benchmark for testing recommendations.

Gathering early views: questionnaire

1.11. At the outset of the review process I sent out a letter to a large number of interested organisations explaining the purpose of the review and encouraging them and their members to engage in the process. I asked people to complete a short questionnaire to outline their understanding and experience of the impact of hate crime. The responses were analysed by Dr Rachel McPherson³. I was struck by the range and magnitude of the issues faced by many of the respondents and their communities. The responses to the questionnaire informed the development of the consultation paper.

Gathering early views: meetings

1.12. At an early stage in the review my team and I participated in a series of fact-finding meetings. These included meetings with those responsible for applying the law, including police officers, representatives of the Crown Office and Procurator Fiscal Service (COPFS) and sheriffs. I also met with a wide range of interested parties in the community, many of whom support those affected by hate crime. These included representatives of groups with an interest in the currently protected characteristics and a number of potential additional characteristics, as well as those with particular interest in the OBFTCA and its possible repeal. A list of the organisations and individuals that my team and I met with both in the early stages of the review and following the consultation process is at annex 1.

2 <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-consultation-full-version/>

3 <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-consultation-full-version/>

Learning from research and existing material

1.13. My team and I engaged in desktop research into a significant body of published material relating to hate crime. We reviewed parliamentary debates and the reports of working groups. We liaised with policy makers in both the Scottish and UK Governments and the Northern Irish administration, those in the criminal justice system, academics and those involved in initiatives from which we might learn. One example was the pilot scheme developed by a number of English police forces to flag misogynistic or gender-hostility acts as hate crimes. We also studied the annual statistics produced by COPFS and the Scottish Government in relation to hate crime in Scotland.

Public consultation

1.14. I published a consultation paper on 31 August 2017. I issued three versions:

- a full version, aimed mainly at a technical, legal audience;
- a non-technical guide, aimed at the general reader with no specialist legal knowledge; and
- an ‘easy read’ version using simple language and pictures.

The consultation paper, which was based on the information already gathered, covered all aspects of the remit, and invited responses to a wide range of questions. In particular, it sought views on what aspects of the current legislation should be retained and whether new provisions should be introduced.

1.15. I was delighted to launch the consultation paper at a community event held by Central Scotland Regional Equality Council (CSREC) in Stirling. This was the first of 17 events that I and my team undertook to raise awareness of the consultation and to encourage well-informed responses. The events took place up and down the country, from Shetland to Dumfries, and were hosted by bodies representing various equality groups and organisations with a professional interest in the operation of hate crime law. The events gave me an opportunity both to ask and receive questions from a wide range of people about the topics that mattered most to them. I am very grateful to all those who hosted events and workshops and to attendees who assured me of a warm welcome and inspiring conversation. A full list of events which the review team attended is at annex 2. In addition, I invited representatives from each of the opposition parties in the Scottish Parliament to meet me and discuss the work of the review. As a result, I met with the justice spokespersons for the Labour Party and the Liberal Democrats and the co-convenor of the Scottish Green Party. These were useful meetings and I am grateful to the MSPs for their participation.

Responses

1.16. I received a total of 457 responses to the consultation paper: 76 came from organisations and 381 from individuals. Where respondents gave permission, their responses have been published on the consultation hub platform⁴.

1.17. I commissioned external analysts, Alison Platts and Dawn Griesbach, to produce an analysis of the responses⁵. The report identifies the main themes and issues that emerged and distils the key points raised. There was a lack of consensus on many issues and clear difference between the views of organisations and individuals on a number of specific matters. Many individuals opposed the very concept of hate crime. However, there were some clear common themes, even from respondents who reached different conclusions about how the law should operate. Responses generally reflected strongly held views, particularly in relation to freedom of speech. The responses to the consultation paper have informed each of the chapters of the report and the recommendations.

Next steps

1.18. It will, of course, be for Scottish Ministers to consider how they wish to respond to my recommendations. I am pleased that the review has sparked discussion across a wide range of issues and I hope that the work that flows from this report will sustain that public interest and debate to shape meaningful action in this important area.

4 https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/consultation/published_select_respondent

5 <http://www.gov.scot/hatecrimereviewanalysisreport>

Chapter 2

Underlying principles

Introduction

2.1. In a civilised society or country people should be able to live together, respecting one another and treating each other fairly, regardless of differences. There should be no place for discrimination, prejudice, bias or bigotry. Although much has been done in Scotland, and elsewhere, to root out the manifestation of these negative elements, such conduct and behaviour persists.

2.2. In this chapter, I consider where hate crime fits in the range of legal and non-legal responses to behaviour that may reflect prejudice or discrimination. This will help to identify what sort of behaviour will, and will not, constitute ‘hate crime’ in the criminal law. I shall also examine the definition of hate crime and the justification for having hate crime legislation.

A range of responses

2.3. As a society we deal with discrimination and prejudice in a variety of ways. There is a range or spectrum of responses, depending on the nature of the issue. What constitutes a proportionate approach will depend on the circumstances. Some expressions of prejudice or bias will not be subject to legal action at all. People are free to think what they like and to express their views, even if they might be offensive to many people. Thus, for example, expressing the view that all religious people should keep their beliefs to themselves would not attract any legal response.

2.4. At some point, however, regulation of conduct becomes necessary. Some forms of regulation may be complied with on a voluntary basis. In some situations legal enforcement is required and conduct may be subject to the civil or criminal law. The legal response will depend on the nature of the conduct and the context in which it occurs.

Regulatory response

2.5. A regulatory framework sets out the rules which persons must follow if they wish to participate in a particular activity. Regulations can set standards designed to discourage conduct which might be discriminatory or prejudicial. While persons are under no obligation to take part in the activity, if they choose to do so they must abide by the rules. An example of a body which operates a regulatory scheme is the Advertising Standards Authority which regulates content of advertisements. It upheld a complaint about some posters advertising the Channel 4 series ‘Big Fat Gypsy Weddings’ on the basis that they were irresponsible, offensive and reaffirmed negative stereotypes and prejudice against the Traveller and Gypsy communities¹.

1 <https://www.asa.org.uk/rulings/channel-four-television-corporation-a12-197451.html>

Civil law response

2.6. The civil law is essentially concerned with regulating the relationship between individuals. In the context of prejudice, the civil law has a key role in addressing discrimination, for example, in the employee/employer relationship, in the provision of goods or services or on public transport. The remedy in a civil law dispute will usually be a requirement for one person to pay compensation to another or to take, or to stop taking, a particular course of action. Typical examples of the operation of the civil law in this area would be: a decision not to employ a person because he or she is a Muslim, which would be religious discrimination prohibited by the Equality Act 2010; or failing to provide disabled facilities on public transport.

Criminal law response

2.7. Some conduct is by its nature so morally wrong and harmful that it must be dealt with by the criminal law. Criminalisation involves the state taking action against the individual:

Criminal offences define acts (or omissions) which are so harmful that the wrong is thought to be against the state rather than the individual who has suffered the act; the state prosecutes and, on conviction by a court, the state punishes, by deprivation of liberty, fine or other means.²

2.8. Criminalisation as a form of regulation is a particularly serious step. It communicates condemnation and moral disapproval to convicted persons on the basis of their wrongdoing. It may lead to penalty and potential loss of liberty. A conviction will go on to the criminal record of the individual.

2.9. Hate crime legislation has developed as the means by which the criminal law addresses prejudicial conduct. In one case, a man who was annoyed at the noise his gay neighbour made putting out the bins in the early morning engaged in abusive shouting, in the course of which he made comments about the neighbour's sexual orientation including hoping that "people like you die of AIDS". This would amount to a breach of the peace aggravated by prejudice in relation to sexual orientation in terms of section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Another example would involve tipping a disabled person out of their wheelchair in the street which would amount to an assault aggravated in relation to disability in terms of section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

² House of Lords Select Committee on Communications: Social media and Criminal Offences, First report of Session 2014-15, HL Paper 37.

Hate crime

Definition

2.10. There is no single accepted definition of the term ‘hate crime’. Different definitions may be produced for different purposes. In the consultation paper I used the following working definition:

Offences “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”³.

‘Prejudice’ is expressed in terms of hostility, or, currently in Scotland, malice and ill-will. The definition is qualified in the sense that it is not necessary to prove motivation: it is sufficient if, in committing a crime the perpetrator demonstrates hostility based on a particular feature of the victim’s identity.

2.11. The concept of ‘particular features of the victim’s identity’ is expressed in terms of ‘protected characteristics’. A protected characteristic is a characteristic shared by a group. Currently, in Scotland the criminal law recognises the following protected characteristics: race, religion, disability, sexual orientation and transgender identity.

2.12. The current Scottish hate crime legislation is described in annex 3. It comprises a mixture of: (a) aggravations in relation to each of the protected characteristics which can attach to any offence; (b) a standalone offence of harassment in respect of race; and (c) offences of stirring up racial hatred.

2.13. Although the definition was subject to criticism from a number of respondents, it was supported by others and I consider that it accurately describes hate crime. In the course of the report I shall address some of the concerns raised, including the clarity of the language in the legislation, extension of the protected characteristics and the targeting of victims because of their vulnerability.

Is hate crime legislation justified?

2.14. Some respondents to the consultation paper expressed the view there was no justification for having hate crime legislation at all. They raised concerns about the creation of different classes of victims and crimes, and the perceived granting of privilege to some groups in society over others. Respondents thought that there was a danger of the perpetuation of a state of ‘victimhood’ among some groups. Arguments were made that the law should offer the same protection to all individuals regardless of protected characteristics. Some respondents disputed the claim that hate crimes had any greater impact on the victims than other sorts of crimes. Others argued that the law should not be used by a government to send out messages or make political statements.

3 N Chakraborti and J Garland, *Hate Crime* (n 12) 9; Academic Report chapter 1

2.15. While recognising that the views held by those who oppose hate crime legislation are strongly felt, I am not persuaded by their arguments. From all the material considered by the review, including the Academic Report and the report of the analysis of the responses to the consultation paper, I consider that there are three clear bases for justifying hate crime legislation: (a) the harm which hate crime causes; (b) the symbolic function which legislation fulfils; and (c) the practical benefits which flow from it.

Harm

2.16. On the basis of all the material available to my review I am satisfied that hate crimes are likely to cause harm which is additional to the harm caused by the underlying offence. This involves harm both to the direct victim and to members of the group to which the victim belongs. Harm to the victim may include physical injury as well as mental distress leading to depression, anger, or anxiety. It may have a social impact such as to change the behaviour of the individual to avoid further victimisation. This may include moving home or job, avoiding public spaces and becoming socially isolated. In relation to the group to which the victim belongs, hate crime can reinforce in the minds of members that they are potential targets and they may become fearful of those with the same identity as the perpetrator. It can also have an impact on wider society: it may undermine moral values; create a less tolerant society and may increase social unrest. If not challenged, behaviour of this kind may become accepted as the norm. I conclude that the nature and extent of the harm caused by hate crime is a particularly strong justification for having hate crime legislation.

Symbolic function

2.17. Hate crime can fulfil a symbolic function in stating society's disapproval of the deliberate targeting of a member or members of a particular protected group. It is important to send a message to victims, offenders and wider society that hate crime behaviour will not be tolerated. While, of course, hate crime legislation on its own cannot change minds, it has the potential to contribute to long-term cultural change and the acceptance of diverse communities.

Practical benefits

2.18. Having specific hate crime legislation requires sentencers to take the aggravation into account in sentencing and the court to record the aggravation. This means that it will feature on the criminal record of the perpetrator and may be taken into account in the event of repeated offending. In addition, the maintenance of records provides statistical information which gives an indication of the scale of the problem and allows the monitoring of trends.

2.19. Having hate crime legislation on its own will not eradicate behaviour driven by prejudice. There needs to be understanding in society of what hate crime is and an effective process for dealing with it. Clearly defined hate crime legislation and well-developed procedures in the criminal justice system to deal with it will increase awareness of hate crime and give victims more confidence that it will be taken seriously by the police, prosecutors and the courts. This should encourage reporting of offences and ensure that victims of hate crime will be supported throughout the process.

Chapter 3

Current Statutory Aggravations

Introduction

3.1. In this chapter I examine how effectively the current statutory aggravations operate. I consider the current thresholds and whether they can be improved. I explore whether a third threshold should be added, which would capture offending based on perceived vulnerability. I examine a number of specific issues in relation to statutory aggravations and I look at the statutory requirements in relation to sentencing where a statutory aggravation is admitted or proved.

The statutory aggravation model

3.2. At the core of the current scheme of hate crime legislation is the model that allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. This model was first introduced in relation to race in 1998. Later, it was extended to cover first, religion, and subsequently the remaining protected characteristics. The legislation is set out in annex 3. It is important to understand that this approach does not involve the creation of new offences; rather, it involves an existing offence, such as an assault, being motivated by, or demonstrating, hostility in respect of one or more protected characteristics.

3.3. Where a person is convicted of an offence with a statutory aggravation in respect of a protected characteristic a number of consequences follow. First, the aggravation will be recorded and taken into account in sentencing. Secondly, the maintenance of records allows statistics to be kept and trends identified and monitored. Thirdly, and importantly, the aggravation will appear on the criminal record of the individual. This means that, if the person commits a further offence, the earlier aggravated conviction may be taken into account. I shall look in more detail at the requirements in relation to sentencing later in this chapter.

3.4. Over the years since their introduction, these provisions have been extensively used. Having express provisions requires the police (and wider criminal justice system) to be aware of the need to take potential identity hostility into account when investigating crime. Records have been maintained and annual statistics have been published. From the totality of the information available to the review I am satisfied that this approach has worked reasonably well and I recommend that the scheme of statutory aggravations should be retained and developed to form the basis of a clear and comprehensible scheme of hate crime legislation.

Recommendation 1

Statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland.

Current thresholds

3.5. Currently, there are two thresholds for proving the aggravation of prejudice:

- if at the time of committing the offence, or immediately before or after doing so, the offender evinces malice and ill-will towards the victim based on the protected characteristic; or
- if the offence is motivated (wholly or partly) by malice and ill-will towards members of a group defined by reference to the protected characteristic.

Thresholds: Responses to consultation paper

3.6. The consultation paper included a question as to whether the current thresholds were appropriate; 64% of organisations thought that thresholds were appropriate compared with 43% of individuals. Those who endorse the current thresholds considered that they provided clear and objective tests; it was appropriate to have the two thresholds; they allowed for flexibility. The thresholds provided an appropriate balance between protecting individuals and protecting free speech. Those who thought that the thresholds were too low were often concerned that ‘simply’ demonstrating hostility should not be marked out as hate crime. They considered that there might be an impact on free speech and the expression of individual views; hostility or prejudice (as perceived by a third party) should not be sufficient to constitute hate crime and a threshold of hatred would be more appropriate. Those who thought that the thresholds were too high considered that there could be difficulties in providing evidence to meet the required thresholds and the evidential timeframe of ‘immediately before or after the offence’ was too restrictive. Others considered that the threshold excluded particular types of crime, including crimes in which members of particular groups, for example older or disabled people, were targeted because of their vulnerability rather than because of any hostility towards the group in general. Others considered that it was important in determining whether an offence should be classed as a hate crime to understand the context of incidents and not focus solely on the use of specific offensive words or terms.

Current thresholds: conclusions

3.7. I accept the view expressed by the majority of organisations that the current thresholds are appropriate. I do not accept the criticism that the thresholds are too low. Requiring a threshold of *motivation* in every case would exclude many cases which should appropriately be marked as hate crimes.

3.8. The threshold of evincing malice and ill-will, or *demonstrating hostility*, may well catch words uttered ‘in the heat of the moment’. But that should be no excuse. This threshold does not require the court or jury to make a judgment about the accused’s character generally; what is significant is the fact of what has been said (or otherwise evinced) and the potential impact that has on the victim and the wider group who share

the relevant protected characteristic. It is worth remembering here that this is not just a question of a person demonstrating hostility or using bad language towards another. The underlying conduct must amount to an offence (for example, threatening or abusive behaviour, contrary to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010). The significance of the demonstration of hostility is that it highlights the context of that offending behaviour. The impact of a particular remark or action has to be taken into account: it upsets people in a direct way and targets the core identity of the individual or group. It is vital to send a message that this will not be tolerated or shrugged off as ‘mere banter’. To do that risks undermining the principles of equality and respect.

3.9. The motivation test is also important, though much less commonly used in practice. However, because a case motivated by hostility may be particularly serious it is desirable to retain this specific test. For example, the first convictions for racially-aggravated murder in Scotland related to the murder of Kriss Donald in 2004. Kriss Donald was a white 15 year old boy who was abducted and murdered. Five men of Pakistani origin were convicted of racially aggravated murder. The evidence demonstrated that this was a deliberate and intentional attack on the victim only because he was white. In this instance the jury was satisfied that the crime was motivated by malice and ill-will against white persons.

Language

3.10. The consultation responses indicated a need for simpler, ‘user-friendly’ language in the legislation. When the first aggravation, in relation to race, was introduced in 1998 the phrase ‘evinced malice and ill-will’ was used in the Scottish provision and the phrase ‘demonstrating hostility’ was used in the equivalent provision for England and Wales. During the passage of the 1998 Bill, the Lord Advocate explained that the two phrases were intended to have the same effect, but on balance the phrase ‘evinced malice and ill-will’ was chosen because it had a historical place in Scottish criminal law and it was familiar to the Scottish courts¹. The review has found strong evidence about the confusion which surrounds the concept of hate crime and the level of behaviour that constitutes a hate crime in the eyes of the law. That confusion makes it less likely that people will report or challenge their experience. I conclude that these considerations make it important for the legislation to be as clear as possible for those who may be affected by it, whether as victims or potential offenders. I take the view that to a layperson a phrase such as ‘demonstrating hostility’ is more easily understood than ‘evinced malice and ill-will’. I stress that in recommending this change in the language I am not suggesting that there should be any change in the meaning or the legal definition of the thresholds.

¹ Hansard, House of Lords, 12 February 1998, col 1305.

Corroboration

3.11. As a general rule, no person may be convicted of a criminal offence in Scotland in the absence of corroborated evidence. This means that there must be at least two sources of evidence in respect of each essential element of the crime². However, under the statutory aggravation provisions, it is sufficient to have evidence from a single source to establish the aggravation of prejudice. In other words, no corroboration is required.

3.12. It has always been the case that the courts could consider aggravating factors as a matter of common law where those factors are proved by just one source of evidence. This is because the factor goes to the consequences of conviction rather than whether the offence itself has been committed. This principle has been carried forward and applied to the statutory aggravations.

3.13. I am satisfied that it is appropriate that a statutory aggravation should be capable of being proved by a single source of evidence. I received no evidence that the rule causes any difficulty in practice.

Recommendation 2

The two thresholds for the statutory aggravations are effective and should be retained but with updated language. They should apply where:

- at the time of committing the offence, or immediately before or after doing so, the offender *demonstrates hostility* towards the victim based on the protected characteristic; or
- the offence is motivated (wholly or partly) by *hostility* based on the protected characteristic.

It should remain the case that evidence from a single source is sufficient evidence to establish the aggravation.

2 Scottish Ministers have considered abolishing the requirement of corroboration, and commissioned Lord Bonomy to carry out a review of the safeguards that might need to be put in place if this were to happen. Lord Bonomy and his reference group reported in April 2015. The question of whether corroboration should be abolished generally, and whether any safeguards would be needed if that were to happen, is currently with Ministers. Questions about whether baseline offences should require more than one source of evidence do not fall within the remit of this review.

Possible third threshold: ‘By reason of’

3.14. As noted previously, some respondents pointed out that the current thresholds would not apply to offences in which victims were targeted because of their vulnerability but where there was no express hostility involved. Some have advocated the introduction of a third threshold in which an offence is committed ‘by reason of’ the victim’s membership of the group with the protected characteristic. This involves selecting a victim because of the group to which the victim belongs. It is based on identity rather than hostility. I recognise that the adoption of this threshold would allow the inclusion, as hate crime, of offences committed because of the perceived vulnerability of the individual arising from a protected characteristic. I consider this to be a serious issue and one which requires to be carefully examined. I do so under reference to the Academic Report and the recent report of work done by researchers in the University of Sussex: *Hate Crime and the Legal Process: Options for Law Reform*³.

3.15. Chapter 4 of the Academic Report identified two models of hate crime legislation. First, the animus model, in which a hate crime is committed where the offender is motivated by, or demonstrates, prejudice against a protected group. Secondly, the discriminatory selection model, in which a hate crime is committed where the victim has been selected because of their membership of a protected group. Most jurisdictions, including Scotland (as well as England and Wales), have legislated on the basis of the animus model. The current thresholds in the Scottish provisions reflect this.

3.16. In chapter 5, the Academic Report examines the alternative approach of defining protected groups around the notion of vulnerability. The advocates of this approach argue that what is important is not whether a group has historically suffered discrimination or oppression, but whether the group is vulnerable to violence because of their perceived difference.

3.17. Recently, a team of researchers at the University of Sussex, led by Professor Mark A. Walters, conducted research in relation to hate crime and the legal process in England and Wales. While the consultation period of the review was in progress, they issued their final report. The aim of the study was to assess the application of criminal laws in sentencing provisions for hate crime in England and Wales. The issue of perceived vulnerability arose in the context of the report’s examination of the basis on which offences relating to disability are dealt with. The authors were particularly concerned with the small number of reported incidents which resulted in a sentence uplift in practice.

3 <https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>.

3.18. The report identified a type of discriminatory selection model used in certain states in the USA known as a 'group selection' model. Under this model, the offender must have 'selected' their victim from a particular protected group. Specific evidence of verbalised prejudice, bias, or hostility was not required. Instead, it was considered that, by virtue of specifically targeting a victim because of the victim's identity characteristics, the offender has evinced prejudice or bias towards that individual.

3.19. The report recognises that group selection models can be both broader and narrower than laws which incorporate an animus model. They are broader because they may capture cases where no outward manifestation of prejudice or bias is demonstrated by the offender. But they are narrower than 'demonstration of hostility' provisions because the prosecution needs to prove the reason underlying the behaviour, namely, that the offence was committed because of the victim's identity.

3.20. The report argues that the key to understanding the reasons for protecting certain groups from targeted victimisation in this way is to understand why certain groups are protected under hate crime law in the first place. Certain identity characteristics have been identified by the legislature as requiring special protection in the criminal law. Certain characteristics are protected in recognition that members of identity groups have been historically victimised and oppressed. The report identifies individual and community harm which may result from crime committed against such groups and the need to protect these groups from targeted abuse. The "decision to select a member of a protected group as his victim makes the perpetrator more blameworthy: he knowingly or recklessly joins other wrongdoers in a demonstration of bias and discrimination that ultimately harms our society"⁴.

3.21. Thus, the report concludes, the perceived vulnerability cannot be disentangled from the judgements that offenders make about the worthiness of their victim's value as human beings. Victims are 'selected' because their 'difference' means that they are deemed to be somehow of less value, and their worth as equal members of society is therefore diminished. The perceived vulnerability is based on a prejudice that the offender holds towards the victim. Hence, evidence showing that an offender purposively selects a perceivably vulnerable victim by reason of their protected characteristics is evidence of identity-based prejudice.

4 Danner A.M., 'Bias crimes and crimes against humanity: culpability in context' (2002) 6 Buffalo Crim LR 389, 406.

Problems with the perceived vulnerability approach

3.22. The principal difficulty with defining hate crime around vulnerability is that the message conveyed by labelling the crime as hate crime becomes diluted and the category of hate crime ‘loses its special symbolic power’. Although there may be instances where a decision to target an individual because of their perceived vulnerability involves the offender making a value judgement about the individual’s ‘worthiness’ based on their characteristic, as suggested in the Sussex report, I am not convinced that this will always be the case.

3.23. Vulnerability will usually arise from issues associated with a characteristic rather than from the identity characteristic itself. For example, some older people may be frail and have memory difficulties; others do not. An offender who deliberately targets a person they know to be vulnerable may well be doing so because of what they know of the specific individual rather than their views or value judgments about the wider group.

3.24. It is also difficult to apply this approach to cases where the characteristic is not the reason for the victim being targeted, but instead is associated with the reason the crime succeeds. For example, a bogus workman might target a number of people on a street and be successful in defrauding some of the neighbours but not others. This may be because the particular individuals are more easily deceived, and this could be considered to be related to their age or disability. However, it is not clear to me that this type of crime is what society would wish to mark out specifically as a *hate* crime.

3.25. These examples illustrate why I think an approach which considers why an offender selects victims risks mischaracterising exploitation as a hate crime.

3.26. There is also the danger that this approach could have practical difficulties and raise false expectations. It would be difficult for prosecutors to prove an intention to select a victim on grounds of an identity characteristic and the number of cases caught might be significantly less than hoped for.

3.27. This is a controversial issue and I suspect that many people will have differing views. While I was initially attracted by the approach, for the reasons outlined above I ultimately decided not to recommend it. I have, however, set out the argument so that Ministers may judge it for themselves. I shall revisit this issue in the context of whether age should be added as an additional protected characteristic and I propose an alternative approach which could be used to recognise and tackle the phenomenon of targeting people who are, or are perceived to be, vulnerable without treating this as a form of hate crime.

Recommendation 3

Offending behaviour which involves the exploitation of perceived vulnerabilities should not be treated as a hate crime. (But see recommendation 11.)

Statutory aggravation: transgender identity and intersex

3.28. In the course of the fact-finding stage of the review, concern was raised by some interested parties as to whether the language used in the reference to ‘transgender identity’ in section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 was now out of date. Since 2009, understanding of gender identity has developed and it is likely to continue to do so in the future. Section 2 provides for the aggravation of an offence by prejudice relating to sexual orientation or transgender identity. Section 2(8) defines transgender identity as:

- a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or
- b) any other gender identity that is not standard male or female gender identity.

3.29. The Explanatory Notes in respect of section 2(8) say:

... the definition gives four specific examples: transvestism (often referred to as ‘cross-dressing’); transsexualism; intersexuality; and where a person has changed gender in terms of the Gender Recognition Act 2004. However, the definition also extends expressly to cover other persons under the generality of broad reference to non-standard gender identity. For example, those who are androgynous, of non-binary gender or otherwise exhibit a characteristic, behaviour or appearance which does not conform with conventional understandings of gender identity.

3.30. In the light of these concerns the consultation paper asked: Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?

3.31. Two issues emerged. The first is that in section 2(8), as currently framed, ‘intersex’ is included as part of the definition of ‘transgender’. While recognising that the 2009 Act remains progressive in that it covers intersex status and a wide definition of transgender people, including non-binary people, Equality Network contended that the language used in the Act does not reflect current understanding or best practice. In particular, intersex should be seen as a separate characteristic rather than as a sub-category of transgender identity.

3.32. Equality Network explained that they and the Scottish Trans Alliance (STA) use the term ‘transgender’ and its shortened form ‘trans’ interchangeably, as an umbrella term for people who find their gender identity or gender expression differs from the gender they were assigned at birth. This includes, among other identities, non-binary people, trans women, trans men and cross-dressing people.

3.33. They use the term ‘intersex’ as an umbrella term for people who are born with variations of sex characteristics, which do not always fit society’s perception of male or female bodies. Intersex is not the same as gender identity or sexual orientation.

3.34. A second issue was focused in the response of Stonewall Scotland who also recommended that the definition of ‘transgender identity’ be updated in line with current best practice. They explained that the terms ‘transvestism’ and ‘transsexualism’ are now widely viewed as outdated, and, indeed, some people find these terms offensive. These proposals were also supported by other respondents including Central Scotland Regional Equality Council and the Humanist Society Scotland.

3.35. The Scottish Government has recently completed a consultation on gender recognition, which could potentially lead to a modification of the Gender Recognition Act.

3.36. I consider that it would be desirable for the language of any future provision to reflect up-to-date terminology and usage and, as far as possible, relate directly to the issue rather than using labels which may again become outdated.

Recommendation 4

The drafting of any replacement for section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 should include ‘intersex’ as a separate category rather than a sub-category of transgender identity.

Consideration should be given to removing outdated terms such as ‘transvestism’ and ‘transsexualism’ from any definition of transgender identity (without restricting the scope of the definition).

Association with members of a protected group

3.37. Section 96 of the Crime and Disorder Act 1998 provides that an offence is racially aggravated if the offender evinces malice and ill-will based on the victim’s membership (or presumed membership) of a racial group or the offence is motivated by malice and ill-will towards members of a racial group based on membership of that group. Section 74 of the Criminal Justice (Scotland) Act 2003 makes a similar provision in respect of membership (or presumed membership) of a religious group or of a social or cultural group with a perceived religious affiliation. In each case, ‘presumed’ means presumed by the offender and ‘membership’ includes association with members of the group. Thus, a person who does not actually have the protected characteristic could come within these provisions if (a) the perpetrator presumed that the person had the protected characteristic even if they did not; or (b) the victim had an association with members of the group.

3.38. When the aggravations in respect of the remaining protected characteristics of disability, sexual orientation and transgender identity were introduced in the Offences (Aggravation by Prejudice) (Scotland) Act 2009, the reference to “presumed by the offender” was retained, but the concept of association was not expressly included. Research into the 2009 Bill materials has not yielded any explanation as to why this approach was adopted.

3.39. It would seem appropriate for legislation to apply in cases where hostility is demonstrated because of a protected characteristic, even if the person to whom the hostility is expressed does not actually have the characteristic. In their submission to the Justice Committee considering the 2009 Bill, Action on Hearing Loss Scotland (the Royal National Institute for Deaf People) referred to examples of deaf families being the victims of crimes, and gave anecdotal evidence that such crimes also affected hearing members of the family. Such a provision would also catch offending behaviour against individuals who act as advocates or champions for groups with one of the protected characteristics.

Recommendation 5

The statutory aggravations should also apply where hostility based on a protected characteristic is demonstrated in relation to persons who are presumed to have the characteristic or who have an association with the protected characteristic.

Political/religious/racial cross-over

3.40. This section addresses an issue arising in relation to aggravations based on membership of a racial or religious group. It features in cases in which an offence is motivated by malice and ill-will towards a political entity (e.g. foreign country, overseas movement) with which the victim is perceived to be associated by virtue of their racial or religious group.

3.41. The consultation paper cited examples of Jewish people being targeted because of a perceived association with the state of Israel, and Muslims being targeted because of a perceived association with Isis. Question 7 asked:

“Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group?”

3.42. Those respondents who supported the introduction of an aggravation of this type argued that victims in such cases may be subject to attack because of the perpetrator’s perception of the victim’s membership of a religious or racial group, and such cases should therefore come within the law. They considered that it would be difficult to distinguish such attacks from other attacks motivated by malice and ill-will towards a racial or religious group per se.

3.43. A number of powerful arguments were advanced by those opposed to an aggravation of this type. There was a concern that the introduction of an aggravation based on malice and ill-will towards political entities would represent a move away from the principle of protected characteristics reflecting intrinsic personal characteristics. A new aggravation in this area would be difficult to legislate for and potentially contentious, and would therefore introduce complexity and uncertainty into the law. In addition, a new aggravation would be open to interpretation and abuse for political ends, and open to change over time, depending on the political climate.

3.44. A further argument was based on freedom of speech. Freedom to hold differing political views, and to debate those views, was fundamental to a democratic society and should be protected. This included freedom to subject political entities and foreign states to legitimate criticism. A new aggravation of this type could, therefore, have unintended consequences regarding the curtailment of freedom of expression and freedom of political debate.

Discussion

3.45. The right to engage in legitimate political protest is fundamental in a democratic society. There is a tension between, on the one hand, freedom of expression, which protects legitimate political protest, and, on the other hand, conduct which is racially aggravated. In the abstract, it can be difficult to distinguish political protest or criticism from racially/religiously aggravated conduct. In chapter 5 I examine the significance, in the context of stirring up of hatred offences, of article 10 of the European Convention on Human Rights (ECHR). What emerges is that context and content of the conduct in any particular case is critical. Freedom of expression carries with it duties and responsibilities. There is an obligation to avoid, as far as possible, expressions of opinion or belief that are gratuitously offensive to others and thus an infringement of their rights (for example freedom of religion), and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

3.46. It may be helpful to explore this issue through examples based on cases which have come before the court. In one case, members of the Scottish Palestine Solidarity Campaign shouted slogans during a concert at which the Jerusalem string quartet was performing. These included “they are Israeli army musicians”; “genocide in Gaza”; “end genocide in Gaza”; “boycott Israel”. The accused were members of a political organisation which campaigns against Israeli occupation of the Palestinian Territories and advocates boycott. The content of their remarks was political in nature, including a call for a boycott. The evidence did not permit the inference that their comments were made because they presumed the musicians to be Israeli or Jewish.

3.47. Another case took place in student halls of residence in which both the accused and the complainer lived. The complainer was Jewish. Above his bed he had pinned an Israeli flag given to him by his brother, who was in the Israeli Defence Force. After a night out, the accused, who was very drunk, placed his hands inside his trousers onto his genitals and then rubbed his hand onto the Israeli flag and made comments of an offensive nature to a fellow student, saying, “Israel is a terrorist state, the flag is a terrorist symbol and you are a terrorist”. This conduct went far beyond uttering expressions of protest about the actions of the Israeli state, and descended into actions that may easily be considered gratuitously offensive. That cannot be said to contribute in any way to a debate of public interest. In addition, he directed the phrase “you are a terrorist” directly at the complainer. There were no connections between the complainer and the actions of the State of Israel, and thus the hostility was manifestly directed towards him because of his perceived nationality or religion.

3.48. I accept the arguments advanced by those respondents who contended that hate crime legislation should not extend to political entities as protected characteristics. I consider that such an approach would extend the concept of hate crime too far and dilute its impact. The freedom of speech to engage in political protest is vitally important. For these reasons I do not recommend extending the range of protected characteristics to include political entities.

3.49. I consider that in most cases the conduct and the context in which it is engaged will indicate whether the circumstances are such that an offence is committed at all, and, if an offence is committed, such that an aggravation in respect of race or religion should properly be attached. The examples noted above illustrate this point.

Recommendation 6

I do not consider it necessary to create a statutory aggravation to cover hostility towards a political entity.

Religiously aggravated offending: belief held by individual rather than the group and non-religious beliefs

3.50. The remit of the review included consideration as to whether the existing religious statutory aggravation should be adjusted to reflect further aspects of religiously motivated offending. The background to this aspect of the remit was the murder of Asad Shah by Tanveer Ahmed in 2016. At the time that he pled guilty to the murder, Tanveer Ahmed 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. However, this did not indicate malice and ill-will against the deceased based on his membership (or presumed membership) of a religious *group*. There was no suggestion that any religious group (including the Ahmadi sect to which Mr Shah belonged) considered Mr Shah to be a prophet. Rather, it could be interpreted in terms of the perpetrator's attitude of malice and ill-will to the *individual* religious beliefs of the victim and the way in which the victim had expressed those beliefs. Accordingly, the Crown took the view that the case did not fall within section 74 of the 2003 Act.

3.51. In the light of that, the consultation paper posed the 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? Of the organisations which responded, 68% supported the proposition while 30% of individuals did so. Those supporting the extension of this aggravation felt it was important that the law protected people from being targeted because of their beliefs, regardless of how widely held those beliefs were. It was argued that religion, or other belief, forms part of an individual's personal identity, and the law should apply if a person is attacked because of who they are, or who they are perceived to be; the motivation of the perpetrator was the same, regardless of whether the beliefs were held by an individual or a group. Some respondents argued that the attack on Mr Shah had been clearly religiously motivated and it was therefore no different from other religiously motivated hate crimes. They also thought it was difficult to explain to the public why this case had not been classed as a hate crime.

3.52. Those who did not think there should be an aggravation based on malice and ill-will towards religious or other beliefs held by an individual rather than a group offered a range of reasons for their views, including the following:

- Hate crime legislation was specifically intended to demonstrate society's intolerance of prejudice and hatred towards identifiable groups with protected characteristics. Cases involving individually held beliefs fell outwith this remit.
- It would be too difficult to define individual religious and other beliefs for the purposes of the law.
- A new or revised aggravation was not required. It would make no material difference to how cases were prosecuted; existing judicial discretion allowed relevant factors to be taken into account in sentencing. This had been the approach of the judge in the case of Tanveer Ahmed.

3.53. The consultation paper also noted that in an article entitled *The Lord Advocate’s Lacuna*⁵, Dr Phil Glover of Aberdeen University argued that section 74 was drafted too narrowly and on the assumption that individual religious practitioners inevitably form part of a wider religious, social or cultural group. Dr Glover noted that religious expression was an individual act of expression. The freedom of thought, conscience or religion enshrined in article 9(1) ECHR may be exercised “either alone or in community with others”.

Accordingly, Dr Glover argued, section 74 should also be capable of applying in relation to offences motivated by intolerance of the expression of an individual’s beliefs as well as malice and ill-will based on membership of a religious group.

3.54. I have carefully considered the arguments advanced on each side of this debate. In my view, a consistent approach across the protected characteristics is highly desirable. This allows for a clear understanding of what is meant by hate crime. At its core is the concept of a *shared* protected characteristic. It would require strong arguments to depart from that principle. I am not persuaded that these are made out here. The Tanveer Ahmed case was a highly unusual one. I note that, in the event, it is clear from her sentencing statement that the judge in that case was able to take the particular religious motivation into account using the common law. Accordingly, I am not persuaded that there is any gap that requires to be filled by departing from the core approach of recognising hate crime in relation to a group with a protected characteristic. Accordingly, I do not propose to make a recommendation in respect of this particular issue.

3.55. In their response to the issue raised by the Tanveer Ahmed case, the Humanist Society Scotland argued that the law should recognise the manifestations of an individual’s belief rather than membership of a set group. Where it could be shown that the manifestation of an individual’s belief was an aggravating factor in the offence the court should be able to take that into account. This should extend to a person being targeted for being a humanist or an atheist. For the reasons explained above, I have rejected the contention that the religious belief of the individual should found a hate crime. In my view, the same would apply to the non-religious beliefs of an individual.

3.56. The Humanist Society Scotland also pointed out that section 74 of the Criminal Justice (Scotland) Act 2003 was restricted to offences aggravated by religious prejudice. By contrast, the civil law provisions of the Equality Act 2010 recognised ‘belief’ as comprising ‘any religious or philosophical belief’. It was of concern to the Society that the criminal law did not extend protection to non-theistic beliefs such as humanism or atheism. I note that the background to the introduction of section 74 was the Report of the Cross-Party Working Group on Religious Hatred which reported in 2002.⁶ The work of the group arose out of concerns about religious intolerance in Scotland. While in principle I consider

5 Juridical Review, November 2016.

6 *Tackling Religious Hatred: Report of Cross-Party Working Group on Religious Hatred, 5 December 2002*

that hostility towards members of a group based on non-theistic beliefs could give rise to hate crime, there was no evidence before the review to suggest that such an extension was required. This may be because individuals with non-theistic beliefs are less likely to form a group and consider themselves to be associated with one another through those beliefs. I am not satisfied that there is a gap in the law which requires to be addressed. In these circumstances I do not propose to make any recommendation along these lines.

Recommendation 7

I do not consider it necessary to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group.

Sentencing and recording

3.57. At the outset of this chapter I referred briefly to the statutory requirements in relation to sentencing cases where a statutory aggravation is admitted or proved. I now examine these in more detail. In each of the aggravation provisions there is a requirement on the sentencing court to:

- take the aggravation into account in determining the appropriate sentence;
- state on conviction that the offence was aggravated in relation to the particular characteristic;
- record the conviction in a way that shows that the offence was so aggravated; and
- to state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or, otherwise, the reasons for there being no such difference.

3.58. As I mentioned in chapter 1 (process and methodology), I produced three versions of the consultation paper. In the full consultation paper (which was aimed mainly at the technical or legal audience), I asked two specific questions on the issues in relation to the process and recording of sentence where a statutory aggravation was admitted or proved.

Consistent recording of the aggravation

3.59. From those who supported the concept of a hate crime there was very strong support in favour of clear and consistent recording of the aggravation. The following reasons were given. The requirement to record enhanced the transparency of the justice system. It showed that hate crime was being taken seriously; it would increase confidence in the justice system; and encourage reporting. It was also important to ensure that records were kept so that the offending appeared on the criminal record of the perpetrator. Good records allowed for monitoring the impact of legislation and the maintenance of statistics. This informed the development of effective policy and practice.

3.60. I strongly agree with these responses. It is fundamental to the scheme that the sentencing judge takes the aggravation into account in determining the appropriate sentence. It is also essential that, first, the sentencer states in court that the aggravation has been taken into account, in order that all may be aware of this; and, secondly, there is consistent compliance with the requirement to record the conviction in a way that shows that the offence is aggravated so that that will appear on the schedule of previous convictions and can be taken into account in any future case. I consider these requirements to be crucial to the effective operation of the statutory aggravation approach. In addition, good recording allows for the maintenance of statistics and monitoring the impact of legislation.

Recording difference in sentence

3.61. The consultation paper also asked whether it was necessary to maintain the rule that the sentencing judge should state the difference between the sentence and what it would have been, but for the aggravation. Only 18 organisations responded to this question, and 28 individuals. The majority of those organisations which responded favoured this rule while about one third of individuals did so. Those in favour of it considered that it promoted understanding of the law and increased transparency of the judicial process. It encouraged consistency in sentencing and allowed for the monitoring of sentencing practices. It sent out a message to victims and society that the crime was being taken seriously. It might have a deterrent function.

3.62. Others, including some legal bodies, argued that sentencing was already a complex process and that disaggregating sentences was not always realistic or helpful and potentially left sentences open to criticism or appeal. This reflected some disquiet about this requirement which had been expressed to the review at an earlier stage by some sheriffs who explained that a sentence is often being adjusted in a number of different directions take account of, for example, a guilty plea or backdating. They argued that, particularly where other such factors are at play or where the aggravation is at a relatively low level, the overall difference in sentence might be small. Determining a sentence was ultimately a matter of judgement and an overly mathematical approach was not consistent with that. It was not therefore clear what is to be gained from spelling out the precise difference in sentence, and the process in doing so might become misunderstood. Separately, some sheriffs indicated that there was an absence of guidance on the appropriate amount by which to increase the sentence.

3.63. I consider that the first three requirements listed in paragraph 3.57, namely, to take the aggravation into account in determining the appropriate sentence, to state on conviction that the offence was aggravated in relation to the particular characteristic, and to record the conviction in a way that shows that the offence was so aggravated, are the vital requirements to promote understanding of the law, transparency of the judicial process and consistency in sentencing. It is these requirements that send a message and permit meaningful records to be kept.

3.64. I recognise that the introduction of the requirement to state the difference in sentence was well-intentioned. However, to be effective such provisions must be practical and workable. I consider that there is force in the arguments advanced by those operating the scheme that the requirement to state the difference in sentence expressly gives rise to difficulty. Sentencing is a matter of judgement and the sentencer requires to take into account a range of considerations in assessing the appropriate sentence in a particular case. Some factors may point in different directions. In some cases the difference in sentence attributable to the aggravation may lead to disappointment and disillusionment on the part of the victim. I conclude that this requirement is over-complicated and does not serve a clear purpose so should be repealed. There may of course be circumstances in which a sentencer chooses to set out this detail, but that should be a decision for them in the individual case rather than a blanket requirement.

3.65. It is also worth noting the role of the Scottish Sentencing Council here. The Scottish Sentencing Council was established in October 2015 as an independent advisory body. Its statutory objectives are to promote consistency in sentencing, assist the development of sentencing policy and to promote greater awareness and understanding of sentencing. It may do this through preparing sentencing guidelines, conducting research and providing information and general advice and guidance about sentencing matters.

3.66. The establishment of the Scottish Sentencing Council reflects a shift in the way that sentencing is dealt with in Scotland. This reinforces my view that the requirement to state expressly what the difference in sentence has been in a particular case is not a matter which is necessary to cover *in legislation*. In relation to the representations that there was an absence of guidance in relation to the level of sentence in aggravated cases, I consider that they raise an issue that should appropriately be considered by the Scottish Sentencing Council.

Recommendation 8

Where a statutory aggravation is proved, the court should be required to state that fact expressly and it should be included in the record of conviction. The aggravation should be taken into account in determining sentence.

There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.

Chapter 4

Additional characteristics

4.1. This chapter considers whether new categories of hate crime should be created in relation to groups or identity characteristics which are not expressly covered in the current suite of hate crime laws. Part one of the chapter sets out the general approach that I have taken to this question, including the way I identified potential new groups, key issues that arose from the consultation and the principles which I have applied. Parts two and three set out my specific analysis and conclusions in relation to the two areas where I am recommending that new categories of hate crime be created: gender and age. Part four sets out my conclusions in relation to those groups where I think no change is necessary: for some groups, this is because I have concluded that the existing legislation already applies; for others, it is because I have concluded that it would be inappropriate to treat the conduct in question as ‘hate crime’.

PART ONE: GENERAL APPROACH

4.2. In chapter 2 of this report, I have set out why I consider it important that the criminal law should be capable of dealing with hate crime in a way which is distinct from offending which does not have an element of hostility related to identity. There are three broad reasons for this:

- recognition of the additional harm which hate crime offending causes to the victim, others who share the protected characteristic and wider society;
- the important symbolic message which the law can send;
- the practical benefits which arise from having a clear set of rules and procedures within the criminal justice system to deal with hate crime.

4.3. I have found it important to keep these ideas in mind when considering whether any new form of hate crime legislation is appropriate to cover offending relating to a group or identity characteristic which is not already covered by existing laws. I set out my analysis in relation to the different characteristics in the separate parts of this chapter. However, in broad terms, I have looked at whether there is evidence that hostility in relation to the characteristic is manifested through offending behaviour, whether the characteristic and form of hostility are such that society (through Parliament) would wish to make specific provision, and what the practical consequence of such a provision would be.

4.4. I was asked by the Scottish Ministers to consider whether there should be new statutory aggravations created in hate crime legislation. The terms of reference specifically mentioned the personal characteristics of age and gender. Various other characteristics were suggested during the initial information gathering phase of the review and through my questionnaire. I also identified a number of groups or identity characteristics which are covered by hate crime legislation in other jurisdictions, as outlined in chapter 5 of the Academic Report.

4.5. In the consultation document, I therefore invited views on whether legislation was needed to deal with offences involving malice and ill-will (or hostility) based on a number of characteristics. These were age, gender, immigration status, socio-economic status and membership of the travelling community. The consultation question also allowed respondents to indicate any other groups or identity characteristics which they considered should be covered and why.

4.6. The consultation responses generally focused on the likely impact of having legislation in relation to each individual characteristic, and I discuss these responses further in the relevant part of the chapter below. However, there was also a clear theme in some responses that there should be no new hate crime legislation because all victims of crime should have equal protection under the law and that it was inappropriate to give some groups greater protection than others. A number of responses considered that other routes would be more successful in changing attitudes in society and encouraging respect between people.

4.7. I recognise the underlying sentiment expressed in these responses. I do not think that hate crime legislation is about giving some individuals greater or lesser 'protection' than others in comparable situations, simply because of an identity characteristic. If a new offence were to be created which would mean that a particular form of behaviour is lawful when committed against one person and unlawful when committed against another, that would require very careful scrutiny. In my view, such a situation could only be justified if there was something about the latter set of circumstances which is sufficiently serious to warrant criminal sanction.

4.8. However, I think it is important to emphasise here that there is already a suite of offences in Scots law which may be relevant where a person commits abusive, threatening or violent behaviour against another, regardless of the motivation for that behaviour. I have mentioned the main relevant offences in annex 3, which sets out a summary of the current law. Some of these are common law offences (such as breach of the peace or assault) which have been developed by the courts over a long period; others are more recent statutory offences which have been created by Parliament to prohibit particular conduct (for example, threatening or abusive behaviour contrary to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA)). As explained in chapter 3, any statutory aggravations apply in conjunction with those existing offences to recognise the hate crime element. They do not make any behaviour criminal if it was not already criminal under the existing law. They simply mean that, where the offending behaviour is motivated by, or demonstrates, hostility, it is 'labelled' as hate crime and the aggravation will be taken into account when the court determines the appropriate sentence.

PART TWO: GENDER

4.9. This part considers whether offending which involves hostility or malice and ill-will related to gender should be covered by new hate crime legislation. This issue was considered by the working group on hate crime in 2004, and by the Scottish Parliament when considering the Offences (Aggravation by Prejudice) Bill in 2008. On each occasion, it was concluded that hate crime legislation was not the best route to tackle gender-based offending at that time, but that this should be kept under review. I have therefore considered the evidence and arguments which have emerged in the intervening period. I have noted two significant changes. The first is the increased prevalence of online abuse related to gender. The second is a significant cultural shift in the sense that women are not now prepared to tolerate sexual harassment that might have been put up with in the past.

4.10. It is important to understand that, in the context of this chapter, the practical impact of gender-based offending falls almost exclusively on women. This is reflected in the discussion and examples set out below.

4.11. I am aware that existing discrimination legislation refers to discrimination based on ‘sex’, but that reporting obligations on the differences in the pay of male and female employees refer to the ‘gender pay gap’. I have used the term ‘gender’ rather than ‘sex’ throughout this part, because that is the term used by most (though not all) organisations and consultation respondents.

4.12. The term ‘misogyny’ is used a lot in the context of the debate about offending based on gender. This is a term which has changed in usage over time. In its second edition (1989), the Shorter Oxford English Dictionary defined misogyny as “hatred of women”. This was updated in the third edition (2002) to “hatred or dislike of, or prejudice against women.” Many women’s organisations incorporate a sense of imbalance of power when articulating what is meant by misogyny. For example, Engender define it as “systems or actions that deliberately subordinate women, and reflect the actor’s understanding that women are not their equals.” Some people treat the terms ‘misogyny’ and ‘sexism’ as synonymous, while others would argue that misogyny is often more targeted or negative and used to assert male dominance over women. It was apparent to me in the course of this review that different people use the term misogyny to mean slightly different things, and I suspect that its meaning may continue to evolve over time. I have used this language in the remainder of this part to reflect what I have heard, but where it is used in debate and discussion I would urge caution in considering exactly what is meant in the particular context.

Reponses to the Consultation Paper

4.13. Although the consultation responses did not demonstrate any clear consensus on the general principle of extending hate crime legislation, there was strong support among both individual and organisational respondents for some kind of provision relating to gender or misogyny.

4.14. The broad reasons given in support of such a provision are a recognition that women are routinely subjected to verbal and physical harassment as a result of their gender, whether in the workplace, education settings, in public places or online. In recent months, the revelations about sexual intimidation by some men in positions of power (film producers, politicians etc) have led to high profile campaigns to encourage women to recognise and challenge incidents of sexual harassment. The #metoo hashtag has been used by women and men on social media to highlight examples of sexual assault and harassment in an attempt to demonstrate its magnitude.

4.15. Respondents expressed concern about the level of online abuse, including a sense that it is particularly directed against women who are prepared to enter into public debate. The Law Society referred to abuse against Caroline Criado-Perez (where messages were re-tweeted threatening to sexually assault her after she backed the Jane Austen banknote campaign) and Stella Creasy MP (who campaigned for women from Northern Ireland to be able to access abortions through the English NHS and received a death threat telling her ‘hopefully she will die like Jo Cox’).

4.16. There is a strong sense that online abuse can be used as a mechanism to express and incite prejudice and hatred on a number of grounds, and that this requires some renewed focus to change behaviour. Online abuse is discussed more fully in chapter 6. Given the extent to which people now interact and conduct their business online, the disruption of an individual’s ability to function online as a result of abuse has a real social and economic impact. The issue is certainly not confined to prejudice on grounds of gender, but respondents identified that it manifests itself particularly in relation to women.

4.17. Many respondents noted that misogynistic behaviour is normalised and reluctantly accepted. As a result, sexist bullying and sexual harassment are very likely to be under-reported because women who are subject to them do not see them as significant enough to be taken seriously by the authorities.

4.18. Respondents expressed a concern that gender-hostility crimes affect women collectively, in addition to the impact they have on the individual woman targeted in a particular instance. They can result in women feeling that they have to change their behaviour or act in a particular way. Respondents argued that the acceptance of attitudes that lead to low-level expressions of misogyny against women forms part of a continuum leading to more serious incidents of violence against women and girls.

Other developments

4.19. I have also taken into account a number of further developments that have occurred since the publication of my consultation paper.

4.20. The Fawcett Society published a comprehensive and authoritative Sex Discrimination Law Review in January 2018¹. That Review included discussion of effective means to tackle violence against women and girls. It considered the practical steps that have been taken by some police forces in England to record misogyny as a hate crime and noted this was thought to raise awareness of the seriousness of these incidents and encourage women to report them. These exercises did not change the law, but the intention was to enable the police to gather better intelligence, to disrupt activities and perpetrators, improve risk management and support the women affected. The long-term aim is to nudge people towards a culture shift and to reframe misogynist behaviour as socially undesirable. The Sex Discrimination Law Review recommended that this approach should be adopted more widely and that the law should be changed to require misogyny to be considered as a hate crime within the legal framework. I shall explore this in more detail later in the chapter.

4.21. In March 2018, Amnesty International published ‘#ToxicTwitter’², which set out qualitative and quantitative research it had carried out over 16 months about women’s experiences on social media platforms including the scale, nature and impact of violence and abuse directed towards women on Twitter. The research focused on the UK and USA and included detailed case studies in relation to Scottish politicians including Nicola Sturgeon, Ruth Davidson and Kezia Dugdale. In her interview with Amnesty International, Nicola Sturgeon noted the likely impact of this abuse on others:

What makes me angry when I read abuse about me is that I worry that it puts the next generation of young women off politics. So, I feel a responsibility to challenge it, not so much on my own behalf, but on behalf of young women out there who are looking at what people say about me and thinking, “I don’t want to ever be in that position”.

4.22. I noted the provisions in Chapter V of the Istanbul Convention³ which set out forms of gender-based violence which are required to be criminalised under that Convention. The United Kingdom has signed but not yet ratified the Convention. As a result of a private member’s Bill brought forward by Dr Eilidh Whiteford MP, the UK Government is required to lay an annual report before the Westminster Parliament which sets out the administrative and legislative measures being taken that would allow the requirements of the Convention

1 <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116>.

2 #ToxicTwitter – Violence and Abuse Against Women Online: <https://www.amnesty.org/download/Documents/ACT3080702018ENGLISH.PDF>

3 The Council of Europe Convention on Combating Violence Against Women and Domestic Violence.

to be met. The first such report was laid in November 2017⁴. In relation to Scotland, the report set out a wide range of measures under *Equally Safe*, which is the strategy and delivery plan developed by the Scottish Government, COSLA and partners to prevent and eradicate all forms of violence against women and girls. It also noted the range of offences which exist in Scots law to tackle crimes of violence against women and girls.

4.23. I followed with interest the evidence given to the Westminster Women and Equalities Select Committee in its inquiry into sexual harassment of women and girls in public places, and the Westminster Hall debate on misogyny as a hate crime which took place on 7 March 2018. Insofar as these considered the law, they tended to be focused on the law of England and Wales rather than Scotland. However, I found the practical examples given useful in considering how Scots law could or should apply in equivalent circumstances.

Other jurisdictions

4.24. Chapter 5 of the Academic Report lists the characteristics that are ‘protected’ in hate crime legislation in the jurisdictions which were studied. Of those characteristics that are not currently protected in Scots law, the two that are most commonly protected in other jurisdictions are age and sex/gender.

4.25. Specific provisions about offending based on prejudice/hatred related to sex or gender are found in Canada; South Africa (draft Bill) and the following states of the USA: District of Columbia; Iowa, Maine, Vermont, West Virginia; Louisiana; Maryland.

4.26. In addition, the sentencing aggravation provisions in New Zealand do not list sex or gender expressly, but cover any other group with an ‘enduring common characteristic’, and the report notes a case where the judge stated that the offender’s ‘hostility to women’ was an aggravating factor in sentencing⁵.

4.27. None of the provisions noted in the Academic Report relate specifically to misogyny rather than to gender/sex.

Need for action

4.28. I am persuaded that there are patterns of offending which relate particularly to the victim’s gender and which should be addressed through legislation which might be seen as falling under the hate crime umbrella.

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656561/CCS207_CCS1017309396-1_HO_Istanbul_Convention_report_WEB_ACCESSIBLE.PDF

5 R v Johnston, 05/08/03, Priestly J, HC Auckland, T023336

4.29. However, I agree with respondents such as Engender who highlight that this is a complicated area: there is a wide range of views about how gender hostility or misogyny is to be identified and dealt with. It was interesting, for example, that some consultation respondents argued that a hate crime provision should be drafted in terms of ‘misogyny’ rather than ‘gender’ to ensure that it did not unintentionally lead to all violence against women being considered a hate crime. By contrast, other respondents argued that all violence against women is rooted in misogyny and no distinctions should be drawn. These two groups of respondents therefore appeared to have very different views about what would be the practical consequence of defining offending behaviour by reference to misogyny. As I have noted above, this is a topic where the language used can unintentionally mask what is meant, as similar language is used by different people to mean different things.

4.30. I have therefore considered carefully how the criminal law currently addresses types of offending which particularly affect women, where there might be gaps based on the expectations expressed in the consultation responses, political debates and wider literature, and how those gaps should best be dealt with.

4.31. The Istanbul Convention defines gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately”. Over recent years, the Scottish Parliament has passed a large amount of criminal legislation which can be used to tackle such violence:

- Prohibition of Female Genital Mutilation (Scotland) Act 2005;
- Sexual Offences (Scotland) Act 2009, which sets out a modern suite of sexual offences including rape, sexual assault, voyeurism and indecent sexual communications;
- Forced Marriages etc (Protection and Jurisdiction) (Scotland) Act 2011;
- Abusive Behaviour and Sexual Harm (Scotland) Act 2016, section 2 of which deals with the so-called ‘revenge porn’ offence of disclosing or threatening to disclose an intimate photograph or film;
- Domestic Abuse (Scotland) Act 2018, which creates a new offence of abusive behaviour towards a partner or ex-partner.

4.32. This suite of offences appears to work effectively. They are kept under review in terms of the Scottish Government’s *Equally Safe* strategy, and have been amended and updated as necessary. For example, the offence of voyeurism in section 9 of the Sexual Offences (Scotland) Act 2009 was specifically amended in 2010 to deal with the phenomenon of ‘upskirting’.

4.33. The arguments generally made in favour of hate crime legislation would appear to be less relevant in the context of this type of focused offence. The nature of the conduct is clear from the offence itself and so an aggravation is not necessary to provide clarity in the offender’s record or inform any subsequent criminal justice intervention. The offences implicitly involve the concept of gender, are already treated very seriously by society so the penalties imposed reflect this. It might therefore be concluded that there is no need to send an additional ‘message’ through hate crime legislation that the conduct is unacceptable.

4.34. Some behaviours which were highlighted in consultation responses are undoubtedly sexist or misogynistic, but involve a relatively limited degree of harm which means that a specific criminal sanction would be inappropriate (and probably also ineffective). This might include the use of sexist language which does not in fact cause fear or alarm, or most workplace discrimination. I fully recognise and agree that these are behaviours which need to be tackled in order to ensure true gender equality. However, there is a range of responses (both legal and non-legal) which may be more appropriate to deal with such behaviours, as described in chapter 2 (underlying principles). Criminalising low-level misogynistic behaviour is not a proportionate response.

4.35. By contrast, the evidence demonstrates that there is a very significant problem of abuse (both online and offline), assault and harassment which is directed at women for a reason related to their gender, and which could be dealt with more effectively by the criminal law than it is at present. Such behaviour could generally be prosecuted already under existing offences, such as section 38 (threatening or abusive behaviour) or 39 (stalking) of the Criminal Justice and Licensing (Scotland) Act 2010, or section 127 of the Communications Act (misuse of a public electronic communications network). However, the scale of the existing behaviour has led me to conclude that an additional response is necessary. By categorising this behaviour as hate crime, I consider that we would achieve certain important results:

- It would make it more culturally acceptable to object to the behaviour – victims would have more confidence that it will be taken seriously by the criminal justice system (whether the police, prosecutors or the courts).
- It would recognise the additional harm caused to the individuals involved and others who identify with them.
- It would have a symbolic value – giving security to community and ‘send a message’.
- It would allow for record keeping, the collection of data, and a targeted response to offenders.

Discussion

Lessons learned from police practice in England

4.36. A number of consultation respondents and the Fawcett Society Sex Discrimination Law Review referred to the exercises being conducted by certain police forces in England to flag misogynistic or gender-hostility incidents as hate crimes. I have considered the information available in relation to these exercises. To date, four forces have adopted new recording processes. Nottinghamshire and North Yorkshire forces focus specifically on misogyny; Northamptonshire and Avon and Somerset record events based on gender. In practice, the nature of the incidents recorded under both approaches are the same. They have generally been concerned with public order offences, harassment and stalking.

4.37. These projects have involved no change in the criminal law. Police officers have flagged incidents as involving either misogyny or gender hostility, but prosecutors and the courts continue to deal with each case reported to them as they would have done previously. The projects are therefore different from the statutory aggravation approach being advocated by a number of respondents to my consultation. However, they may be used to obtain an insight into what the consequences of creating a new statutory aggravation might be.

4.38. No formal evaluation has yet been completed in relation to the projects⁶. The data from the Nottinghamshire pilot shows that there have been approximately 170 incidents reported to the police over 18 months, of which slightly under half were identified as crimes. There have been very few arrests or charges, and this is thought likely to be because most incidents involve strangers and the police therefore find it difficult to identify specific offenders. Notwithstanding that, the satisfaction rate amongst complainers is apparently relatively high. There are anecdotal reports that complainers feel that the behaviour in question is now taken more seriously by the police and it is possible to do something about it rather than simply having to accept it.

Aggravation building on existing baseline offences

4.39. Most of the consultation responses which advocated the inclusion of a new provision related to misogyny or gender hostility argued that this should be through the creation of a new statutory aggravation based on the existing model used for race, religion, disability, sexual orientation and transgender identity.

⁶ Nottingham Women's Centre has commissioned research to evaluate the success of the misogyny hate crime policy in Nottinghamshire, funded by Nottinghamshire PCC. The research is being led by Dr Loretta Trickett from Nottingham Trent University, with Professor Louise Mullany from the University of Nottingham and the research findings are expected to be launched in May 2018.

4.40. I recognise the arguments that it may be difficult to identify what amounts to hostility based on gender, and accept that there will be a difference of opinion on this. Some will argue that any offending which deliberately subordinates women or seeks to exert power over them implies some kind of hostility whereas others disagree. As we have seen in other areas of hate crime, there will be cases where individuals perceive behaviour to have been motivated by or demonstrated gender hostility but it is not possible to prosecute with an aggravation because there is insufficient evidence to support that.

4.41. I considered whether a statutory aggravation which applied where an offence had taken place ‘by reason of’ the gender of the victim would be more appropriate. The concept of a ‘by reason of’ aggravation is set out in detail at paragraph 3.14 to 3.27 (existing statutory aggravations). Such an approach might catch conduct which is motivated by stereotypical attitudes towards women, such as a belief that women should not hold certain positions of power. However, for the reasons set out in the previous chapter, I have concluded that this approach takes the focus too far away from what is generally understood by society to be hate crime. I suspect that it may also be difficult to find appropriate evidence to support a hypothesis that a particular offence occurred because of the victim’s gender in many cases. On balance, I think that an approach which is consistent with the other existing hostility aggravations is more appropriate and will be more easily understood by practitioners and the public. It would have a significant advantage in cases where hostility is based on more than one protected characteristic – for example, an assault on a hijab-wearing Muslim woman – because the sheriff or jury would be asked to apply the same test when deciding whether the offence involved hostility on both religious and gender grounds.

4.42. I consider that the identification of hostility based on gender can be dealt with through the careful consideration of the evidence available in each individual case, the development of training and awareness materials, and learning from the experience of others. I am aware that Nottinghamshire police developed a comprehensive package of training materials with the involvement of local stakeholders, and their experience suggests that the very act of putting together the policy, training those who will apply it, and raising awareness with the public can have a positive effect in tackling behaviour and expectations, regardless of the number of successful prosecutions. I would propose that it be left to the prosecutor’s discretion whether it is appropriate to add an aggravation to any offence at the point that it is charged, including a sexual offence.

4.43. I have carefully considered the arguments whether an aggravation should apply to all forms of gender hostility, or whether it should be ‘one-way’ and only cover hostility or malice and ill-will towards women. Although I agree that the essence of the conduct which we are seeking to cover is usually against women, it is not inconceivable that there could be hostility against a man (or non-binary person) based on their gender. I have some concern that an approach which focused only on hostility towards women would risk

stereotyping (all) men as perpetrators and (all) women as victims, which I do not consider to be an accurate or helpful message. A human rights-based approach suggests that having a consistent approach which is capable of applying in equivalent cases, regardless of the sex of the victim, is better. Some consultation responses argue that it is nonsensical to have a provision based on gender/sex because that would then cover everyone in the population and make any offence a potential hate crime. It is important to be clear here that it is not just a question of the identity of the victim: there must also be evidence of *hostility* based on gender. Having a provision which is capable of applying to everyone and not just to women should help to reinforce that point.

4.44. Some stakeholders have indicated concerns that there could be vexatious claims, but I do not agree with this; similar concerns were expressed about whether heterosexual people might raise unfounded complaints under the sexual orientation provisions introduced in 2009, but there has been no evidence that this has occurred. There would always need to be an underlying baseline offence for a prosecution with a gender aggravation to proceed. If a complaint is genuinely vexatious and there is no element of gender-based hostility, then this will not happen.

Standalone offence – misogynistic harassment

4.45. The alternative approach, proposed by Engender (supported by Scottish Women's Aid and Rape Crisis Scotland), is that the problem would be better tackled through a new standalone offence to tackle misogynistic harassment and abuse. In this context, they use the term 'harassment' to cover a wide range of gendered constraints on women's freedom. Engender argued that there is insufficient data at present to say precisely how the offence should operate, but that this should be developed through a participatory process of relevant organisations, similar to that used to develop the concept of coercive control in the recent Domestic Abuse (Scotland) Act 2018. Such a process would take a number of years.

4.46. Engender expressed concern about the capacity of police and prosecutors to recognise and respond to gender-based hate crime, and therefore considered it would be better to take time to create something specific which identifies the particular behaviour in question rather than attempting to apply some kind of statutory aggravation which would not be well understood. Engender did not want there to be any distinction in how the system categorises crimes such as rape or domestic abuse (which are by their nature often inflected with misogyny) are treated and other general offences with a misogynistic element.

4.47. I am grateful for the thorough and thoughtful way in which these proposals were advanced, but am not convinced that they are the best way to tackle the problem of criminal misogynistic harassment.

4.48. In general terms, I think the clearest and most effective way to mark out hate crime is a scheme involving baseline offences and statutory aggravations which reflect identity hostility. That is the underlying philosophy which I have applied throughout the scheme which I am recommending. I would depart from that approach if I felt that it was necessary in order to achieve effective recognition of gender-based hate crime. However, based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against women which ought to be criminal but are not. Any new standalone offence would therefore have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data. I understand the concerns which have been voiced about the way that a statutory aggravation might work but, for the reasons set out at paragraph 4.42, I consider that such concerns can be managed through appropriate implementation measures. I do not think the concerns warrant taking a materially different approach to gender when compared to any other protected characteristic.

4.49. I also have some doubts about whether a collaborative, participatory approach could result in meaningful change within a realistic time frame. I consider that there is currently some momentum and political will to take renewed action in relation to offending involving gender hostility, and there is a risk that would be lost.

Conclusion

4.50. I have considered the alternative options, and am recommending a new statutory aggravation based on gender hostility, following the pattern used in the existing statutory aggravations for race, religion, disability, sexual orientation and transgender identity. Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility. The court would be required to state that fact on conviction and take it into account when sentencing.

Recommendation 9

There should be a new statutory aggravation based on gender hostility.

Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it will be recorded as aggravated by gender hostility. The court would be required to state that fact on conviction and take it into account when sentencing.

PART THREE: AGE

Introduction

4.51. In this part of the chapter, I examine whether age should be included as a protected characteristic in the suite of hate crimes. This raises issues both in relation to old-age and youth.

The issues

The elderly

4.52. There is clearly considerable support for some form of recognition that offences against the elderly do constitute a type of offence which the criminal law should mark in a particular way. This emerged from my meetings with Age Scotland and a meeting which I attended of the Scottish Older People's Assembly (SOPA), as well as from responses to the consultation paper. The difficulty which emerges from all these sources is that, although some offences committed against the elderly are motivated by, or demonstrate, hostility, the majority are committed because of the frailty and vulnerability of the elderly victims.

4.53. The UK-wide charity Action on Elder Abuse has campaigned for a new offence of 'elder abuse' since June 2016. 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 similar to hate crimes based on race, religion or disability. The survey also showed that 95% of respondents agreed or strongly agreed that older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.

Responses to Consultation Paper: the elderly

4.54. In their response to the consultation paper Action on Elder Abuse noted that in relation to crimes such as theft, fraud or assault (and many more), older people were often specifically targeted due to their actual or perceived vulnerability. This might be based on physical frailty, mental capacity, memory difficulties, loneliness and isolation, or dependency on others for basic care needs. While in some cases older people may experience malice or ill-will on the basis of their age, the vast majority of crimes against older people were driven by the perpetrator's perception of the victim's vulnerability due to their age.

4.55. Action on Elder Abuse indicated that their preference would be for elder abuse to be a standalone offence. They contended that this would send a stronger message to perpetrators about the seriousness of such crimes and that the concept of a separate offence would be an easier concept for the public to grasp. They went on, however, to state that as an alternative they believed that the current list of statutory aggravations should be extended to include old age. Recognising that it might not be obvious that crime driven by the perpetrator's perception of the victim's vulnerability due to their age was a hate crime, they suggested that consideration should be given to an alternative name for the offence. They suggested possible titles: 'targeted crime', 'motivated crime', or 'prejudicial crime' with 'age' or 'old age' being included as a specific aggravating factor.

4.56. They went on to submit that while crimes against older people which are committed due to the victim's perceived vulnerability comprise a much bigger problem than crimes motivated by hatred or prejudice due to the person's age, they were nevertheless aware that the latter type of crime can also be an issue for many older people. This might be due to perceptions that older people receive more state support (including financial support) than younger people, generational hostility or disrespect towards older people. They often received calls to their Helpline regarding verbal abuse, harassment or general anti-social behaviour from younger people, with many older people telling the charity that they believe they are being targeted because of their age.

4.57. A number of other organisations noted that many crimes committed against the elderly were committed because of their perceived vulnerability and that that should be the basis for an aggravation. Police Scotland observed:

If one adopts the working definition's reference to 'selection of the victim on the basis of a particular feature', then crimes that target elderly people can be considered a form of ill-will or malice towards elderly people.

COPFS noted that:

Many stakeholder groups make compelling arguments in favour of creating legislation to deal with crimes that specifically target older people, such as bogus workmen, breach of financial trust, neglect in care homes or any behaviour that dehumanises or shows complete disregard for the health and wellbeing of the elderly – essentially a legal recognition of 'elder abuse'.

A number of individual respondents supported an extension in respect of old age.

4.58. Other respondents opposed adding old age as a protected characteristic. Some, including City of Edinburgh Council, the Faculty of Advocates, the Law Society of Scotland and the Glasgow Bar Association, pointed out that the existing law was robust enough to deal with offences committed because of the perceived vulnerability of the elderly. Sentencers could take the vulnerability into account in the sentencing process. Others, such as CRER, suggested that it might be better to create a vulnerability related aggravation separate from the offences motivated by malice and ill-will.

Children and young people

4.59. The Equalities and Human Rights committee of the Scottish Parliament (EHRiC) and the Equalities and Human Rights committee of the Scottish Youth Parliament (EQU) submitted a joint response to the consultation paper. In July 2017 EHRiC published a report of an inquiry into human rights of children and young people in Scotland, entitled *It's Not Cool to be Cruel: Prejudice-based bullying and harassment of children and young people in schools*⁷. The report, which was endorsed by EQU, identified a major issue of concern as being the unrecognised and unrecorded level of hate crime which seemed to be occurring in the school environment in Scotland. The report highlighted numerous incidents of racism, sexism, disability prejudice, religious and ethnic prejudice, homophobic bullying, hate speech, and physical and sexual harassment in schools. These appeared equally widespread in both the physical and the digital school environment. The committee expressed concern that several of the cases which had been reported to the police were not being recognised as a hate crime and were not being recorded. The report recommended that there should be better training for those working in schools to deal with bullying and encourage reporting cases to the police. There should be clarity for all involved in the education system in relation to hate crimes and sexual offences.

4.60. The consultation paper asked whether any change in the criminal law was required to ensure that there was clarity about when bullying behaviour-based prejudice became a hate crime. A range of views was expressed. Some respondents pointed out that 'bullying' is commonly used to refer to a very wide range of behaviours: from physical violence and damage to property at one end of the scale, to exclusion from social activities at the other. Some believed that bullying behaviour-based prejudice was always wrong and should be seen and treated as a hate crime. Some respondents expressed concern that any legislative response should prevent the unnecessary criminalisation of young people. Dealing with hate crime by children required a multi-agency response. The focus should be on diversionary and behavioural change programmes in order to avoid putting children and young people through the criminal justice system.

7 5th Report 2017 (Session 5), SP Paper 185.

4.61. In their response, Together (Scottish Alliance for Children’s Rights) stated that they had not been made aware of offences involving malice or ill-will based solely on the victim’s youth. All issues regarding hate crime reported to them by members had related to children who possessed another characteristic – such as characteristics of race, religion, sexuality, disability or transgender identity. They added that this was not to suggest that no crimes were committed against children due to age-based prejudice, but simply that no such offences had been reported to them.

4.62. Young people who took part in a workshop involving Young Scot, Youthlink Scotland and the Scottish Youth Parliament expressed a feeling that young people were treated differently because of their young age, whether it was that they were not taken seriously, paid less well or treated with suspicion. They felt stereotyped by their young age and pre-judged for negative behaviour expected of them as young people. They give as an example a situation where young people met to socialise as a group and an assumption was made that they would cause trouble.

Other jurisdictions

4.63. The Academic Report noted that a number of other jurisdictions include age as a protected characteristic. These include New South Wales, Canada, New Zealand, District of Columbia, Florida, Iowa, Louisiana and Vermont. Of these, only Florida specifically refers to ‘advanced age’.

Conclusions

4.64. As noted, I found considerable support for some form of recognition that offences against the elderly do constitute a type of offence which the criminal law should mark in a particular way. There is, however, also a recognition that while some offences committed against the elderly reflect hostility or malice and ill-will, and could therefore fit the current definition of hate crime in the Scottish legislation, offences committed on the basis of perceived vulnerability do not meet the thresholds based on hostility. In chapter 3 I examined the case for the introduction of a third threshold as a result of which an offence is committed ‘by reason of’ the victim’s membership of the group with the protected characteristic. This involves selecting a victim because of the group to which the victim belongs. It is based on identity rather than hostility. I recognise that the adoption of this threshold would allow the inclusion, as hate crime, of offences committed because of the perceived vulnerability of the individual, arising from a protected characteristic. I came to the view, however, that this approach would take the focus too far away from what is generally understood by society to be hate crime. I also considered that it might be difficult to find appropriate evidence that there was an intention to select the victim because of vulnerability due to old age.

4.65. As I noted in relation to gender, in general terms, I think the clearest and most effective way to mark out hate crime is a scheme involving baseline offences and statutory aggravations which reflect identity hostility. That is the underlying philosophy which I have applied throughout the scheme which I am recommending. I would depart from that approach if I felt that it was necessary in order to achieve effective recognition of age-based hate crime. However, based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against the elderly which ought to be criminal but are not. Rather, the desire is to mark the criminal behaviour in a particular way. Just as in relation to gender, any new standalone offence would therefore have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data.

4.66. I consider that there is sufficient evidence of hostility-based offences against the elderly, particularly in the light of the information provided by Action for Elder Abuse, to include age as a protected characteristic based on the current model of hostility.

4.67. The main issue that emerged in relation to youth is bullying. That is a matter for very real concern. Having considered the report prepared by EHRiC and the responses to the consultation paper on this issue, I agree with the proposition that bullying covers a range of behaviour and can amount to hate crime. I do not, however, consider that any change in the law is required. It seems to me that the problem of bullying raises issues of policy and implementation of policy which are outwith the remit of my review. I have no doubt that it is an issue which the Scottish Government takes extremely seriously.

4.68. The responses did not identify offences being committed against young people *because* they are young people. The issues regarding hate crime were in relation to children who came within one of the current protected characteristics. That said, while there is little evidence that there is a problem of hostility against youth in and of itself, it is conceivable that such behaviour could occur.

4.69. While I would expect, therefore, that most hostility-based offences based on age would be committed against elderly persons, I consider that it is appropriate to adopt an approach where a protected characteristic of age generally is introduced. Whether a particular offence is motivated by hostility in relation to age, or in the course of an offence hostility to age is demonstrated, would be a matter for consideration on a case-by-case basis.

4.70. I recognise, however, that this approach is likely to capture a relatively small proportion of the offences committed against elderly persons. I am conscious of the strength of feeling supporting the introduction of a statutory aggravation which would capture the bulk of the offences committed against the elderly on the basis of perceived vulnerability. I also note that a proportion of offences committed against disabled persons are based, not on hostility, but on perceived vulnerability. For these reasons, although noting that it would not fall within the hate crime scheme which I envisage, I invite the Scottish Government to consider the option of introducing a wider aggravation that would cover exploitation and vulnerability generally. This would have the advantage of including opportunistic crimes committed against the elderly and disabled persons.

Recommendation 10

There should be a new statutory aggravation based on age hostility.

Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence, it will be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.

Recommendation 11

The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.

PART FOUR: OTHER GROUPS/CHARACTERISTICS

4.71. The final part of this chapter sets out the conclusions I have reached in relation to certain groups where I do not think any change to the law is appropriate.

Immigration status

4.72. At present, there is no central collection of data in relation to the immigration status of victims of crime. It is therefore not possible to reach firm conclusions about patterns of offending against those who are refugees, asylum seekers or migrant workers. However, I consider it is likely to be the case that some offending against those who are not British nationals is motivated by hostility relating to their immigration status or involves the demonstration of such hostility. Refugees, asylum seekers and former asylum seekers whose applications have been rejected are often in a particularly vulnerable situation.

4.73. Consultation respondents who commented about immigration status generally agreed that offending involving hostility relating to immigration status should be treated as a hate crime. Some thought that there should be a new and specific provision to deal with this group, while others thought that it would already be covered by the existing racial aggravation provisions.

4.74. I have concluded that offending behaviour which is motivated by hostility relating to immigration status or involves the demonstration of such hostility should be a hate crime. However, I do not think any change in the law is needed to achieve this: such offending should already be treated as racially aggravated under the existing law. The current race aggravation is concerned with malice and ill-will towards a racial group, and racial group is defined by reference to “race, colour, nationality (including citizenship) or ethnic or national origins.”

4.75. The House of Lords was asked to consider the equivalent test in the English racially-aggravated offending provisions in the case of *R v Rogers*⁸. Baroness Hale endorsed arguments that a flexible, non-technical approach should be taken to the definition. Taking account of both the language of the definition and the policy intent behind racially-aggravated provisions, she noted: “Whether the group is defined exclusively by reference to what its members are not or inclusively by reference to what they are, the criterion by which the group is defined – nationality or colour – is the same.”

4.76. Although the House of Lords judgment relates to an English law provision, I consider it would be persuasive in relation to the interpretation of the current Scots law race aggravation. A person’s immigration status is inevitably related to their nationality or national origins, and so hostility based on immigration status amounts to hostility towards a racial group.

8 [2007] 2 AC 62.

Membership of the Gypsy/Traveller community

4.77. The consultation process highlighted evidence of significant discrimination against the Gypsy/Traveller community, often fuelled by negative stereotypes portrayed in the media. Much of the conduct which was described amounts to discrimination which can and should be tackled under the civil law (for example, the refusal by a GP practice to register a new patient; barring from pubs etc.). However, there was also anecdotal evidence of significant criminal conduct against members of the Gypsy/Traveller community.

4.78. During the consultation period, the Traveller Movement published *The Last Acceptable Form of Racism?*⁹, a report documenting the pervasive discrimination and prejudice experienced by Gypsy, Roma and Traveller communities across the UK. This included examples of abuse, physical attacks on individuals and property and online abuse which indicated hostility towards the community.

4.79. Romany gypsies have long been recognised as an ethnic racial group¹⁰, and other more recent court decisions have treated Irish travellers and Scottish Gypsy/Travellers as ethnic groups too¹¹. While these decisions have been made in relation to the civil law definition of ‘race’ in the Race Relations Act (the pre-cursor to the Equality Act 2010), I can see no reason why the same analysis would not apply to the criminal legislation. I note also that Gypsy/Traveller was included as a sub-category of ‘white’ ethnicity in the 2011 census. I am therefore satisfied that such offending behaviour can and should be treated as racially aggravated under the existing race aggravation.

Gaelic speakers

4.80. Some consultation responses considered the extent of discrimination and prejudice against Gaelic speakers. These responses recognised that attitudes towards Gaelic speakers had improved in Scotland, not least as a result of the Gaelic Language (Scotland) Act 2005 and the work of Bòrd na Gàidhlig. However, they also noted that there were fairly common examples in social media and in mainstream print media in which hostility to the language and its speakers is expressed, and that prejudice towards the language and its speakers remains. It was suggested that mockery and criticism of the Gaelic language were not taken as seriously as equivalent statements towards other protected groups would be. The specific examples which were highlighted generally involved debate and disagreement about public spending decisions, but could be expressed in intemperate terms. The evidence put forward highlights some deeply unpleasant behaviour but would not generally appear to reach the threshold of criminal behaviour. In order for a statutory aggravation to attach there requires to be underlying criminal conduct.

9 <http://travellermovement.org.uk/wp-content/uploads/TMreportFinalWeb1.pdf>

10 Commission for Racial Equality v Dutton [1989] QB 783.

11 O’Leary v Punch Retail, HHJ Goldstein, Westminster County Court, 29 August 2000; MacLennan v Gypsy Traveller Education and Information Project, Employment Tribunal, S/13291/07.

4.81. I consider that there is a fairly strong argument that Gaelic speaking Gaels belong to an ‘ethnic group’ within the meaning of the current race aggravation. That means that, in a case in which hostility towards Gaelic speakers did amount to a criminal offence, COPFS could consider prosecuting the offence as a hate crime with the statutory race aggravation.

4.82. The meaning of the term ‘ethnic group’ in the Race Relations Act 1976 was considered by the House of Lords in *Mandla v Dowell Lee*.¹² Lord Fraser of Tullybelton stated that an ethnic group must have (a) a long shared history and (b) a cultural tradition of its own, and that it would commonly also have one or more of the following: (c) a common geographical origin; (d) a common language; (e) a common literature; (f) a common religion; (g) be a minority or oppressed or dominant group within a larger community.

4.83. I recognise that there will be some Gaelic speakers who may not consider themselves (or be considered by others) to be members of a Gaelic ‘ethnic group’ but who use the language in aspects of their daily lives. This might include those who learned the language at school or in adulthood, rather than as their mother tongue. However, as I have noted earlier in this report at recommendation 5, the concept of hostility should not be limited to the cases where the victim does in fact have the relevant protected characteristic. It should also cover cases where the hostility occurs because the victim is presumed to have the characteristic or has an association with those who do. I consider that would very likely be the case in relation to such Gaelic speakers.

4.84. On balance, therefore, I do not think any change in the law is required to ensure that COPFS and the courts could respond appropriately if cases were to arise of criminal offences motivated by or demonstrating hostility towards Gaelic speakers.

Socioeconomic status

4.85. In the consultation document, I asked whether there was a justification for hate crime categories to include socioeconomic status. An Amnesty International UK briefing paper had recommended that such an extension be made, though it had not set out substantive arguments in favour.

4.86. The responses on this point were limited and mixed. Some respondents noted that there was an increasing vilification of people experiencing poverty, and referred to examples of verbal abuse, harassment and physical assaults, particularly against homeless people. The contrary argument was that socioeconomic status is a very difficult concept to define and not an inherent personal characteristic: an individual’s socioeconomic status is likely to change over time.

12 [1983] 2 AC 548

4.87. I am not persuaded that a person's socioeconomic position can be equated with any kind of identity characteristic: it is a matter of fact determined by a number of factors (employment, poverty, security of housing etc.) which will change over time. These factors may well render an individual vulnerable to particular offending patterns, but I think it would stretch the concept of 'hate crime' too far from what is readily understood by society to treat offending based on hostility to these factors as hate crime.

4.88. It seems likely that much offending which affects individuals who are economically disadvantaged is really related to the exploitation of vulnerability rather than hostility. If the Scottish Government takes forward my recommendation 11 to develop a statutory aggravation which applies where the offender exploits vulnerability, that may apply to such offending.

4.89. I also note that other means to tackle discrimination or disadvantage based on socioeconomic status are likely to arise through the implementation of section 1 of the Equality Act 2010, which came into force in Scotland on 1 April 2018. That section imposes a duty on certain public authorities to pay due regard to narrowing inequalities of outcome, caused by socioeconomic disadvantage, when making strategic decisions. The duty is to be known in practice as the 'Fairer Scotland' duty.

4.90. I have therefore concluded that it would not be appropriate to recommend a new statutory aggravation to deal with hostility related to socioeconomic status.

Other groups

4.91. Paragraph 8.44 of the consultation analysis report records a number of further groups which were suggested by consultation respondents to be covered by hate crime legislation.

4.92. Some of these groups are clearly covered by existing legislation so no change is required. These include disabled people, people with non-binary gender identity and Christians.

4.93. The remaining groups are, in my opinion, not appropriate to be covered within a scheme of hate crime legislation. The characteristic which has been highlighted by respondents is often a lifestyle choice, rather than something which forms an inherent part of the individual's identity. For example, reference was made to those who choose not to drink alcohol and to members of alternative sub-cultures (such as goths, emos, punks). I do accept that there have been instances of very serious offending against individuals based on this kind of transient characteristic (notably the murder of Sophie Lancaster in England in 2007¹³, targeted because of her goth appearance). However, this was a very unusual case, and I am of the view that the Scottish courts would be able to pass an appropriate sentence in such a case as a matter of common law.

13 <http://news.bbc.co.uk/1/hi/7370637.stm>

4.94. Some consultation respondents specifically highlighted groups or characteristics which they argued should *not* be covered under any hate crime legislation. This was on the basis that the characteristics in question were not desirable to single out, and that Parliament should not be signalling (on society’s behalf) that such characteristics are worthy of respect. These arguments were made in relation to paedophiles, drug users and alcoholics.

4.95. I agree that extending hate crime to these characteristics would stretch the concept too far from what is readily understood by society and risk undermining confidence in the scheme. I also consider that the arguments about hate crime causing harm to the wider group which shares the characteristic with the victim or to wider society are much less compelling in the context of characteristics which do not form an inherent part of the individual’s identity.

Recommendation 12

I do not consider it necessary to create a statutory aggravation to cover hostility towards any other specific new groups or characteristics.

Chapter 5

Stirring up Offences

Introduction

5.1. Currently, in Scotland there are statutory offences of stirring up hatred in relation only to race. These are contained in sections 18 to 22 of the Public Order Act 1986, which is a UK statute extending to Scotland. These provisions deal with conduct which is threatening, abusive or insulting and is intended, or in all the circumstances is likely, to stir up racial hatred. The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, which was repealed in 2018, did provide for additional stirring up of hatred offences in Scotland: first, the types of behaviour forming offences in relation to a regulated football match under section 1 included stirring up of hatred in respect of all the protected characteristics; and, secondly, under section 6 there was a stirring up of hatred offence of general application in relation to religion.

5.2. This chapter explores the merits of having stirring up offences and whether new stirring up of hatred offences should be introduced in respect of the other protected characteristics, in addition to race.

What is meant by stirring up of hatred offences

5.3. Stirring up hatred is conduct which encourages others to hate a particular group. It is dealt with as a standalone offence in our current legislation. This is distinct, and different from the concept of a baseline offence directed at a member or members of the group (e.g. harassment or assault) with a statutory aggravation in relation to a protected characteristic. In the case of the latter, the baseline conduct is already criminal; it is the motive or demonstration of hostility that marks it out as a hate crime. The offence is directed against a member, or members, of the group. In the context of stirring up hatred, the intention of the perpetrator is that hatred of the group as a whole is aroused *in other persons*. Hate is primarily relevant, not as the motive for the crime, but as a possible effect of the perpetrator's conduct. It is not necessary that the perpetrator incites others to commit an offence.

5.4. Unlike an aggravated offence, where the underlying conduct is itself criminal, a stirring up of hatred offence may criminalise conduct which would not otherwise be criminal. As noted in chapter 2, criminalising conduct is a serious step, not taken lightly. In deciding whether to recommend extension of stirring up offences a number of considerations have to be taken into account. These include:

- whether stirring up hatred of a group with a protected characteristic is morally wrong;
- the harm caused by stirring up of hatred offences;
- their seriousness;
- whether they fulfil a strong symbolic function;
- whether there is a gap in the law; and
- whether there are practical benefits flowing from them.

There is also the very significant issue of freedom of speech to be considered. I shall examine these issues in the course of this chapter.

Responses to the consultation paper

5.5. The consultation paper asked whether there should be offences relating to the stirring up of hatred against groups. The majority of individual respondents opposed the introduction of stirring up offences in legislation. Reflecting a view expressed in relation to hate crime generally, some argued that all people should be protected from threats, not just privileged groups of people. Others suggested that the word ‘hatred’ was too subjective to be used in criminal law, particularly in relation to religion.

5.6. The majority of organisations favoured the existence of stirring up of hatred offences. A relatively common view among those respondents was that they should be extended to all groups with a protected characteristic. Others identified specific characteristics for protection. Some argued that stirring up of hatred should be restricted to inciting violence or expressing actual threats of violence.

5.7. Some respondents pointed out that stirring up hatred online was an increasingly severe threat and a major concern within some sectors of society, in particular religious communities. Respondents pointed out that such behaviour could lead to great harm, exacerbate prejudice, and result in actual physical threat or attack. It also had the potential to cause division within targeted communities. When it appeared, it could spread quickly and communities might feel powerless against it.

5.8. The issue of freedom of speech featured in many of the responses. I discuss this issue later.

The merits of having stirring up offences

Wrongfulness

5.9. There is a general consensus that stirring up racial hatred is morally wrong. I think that there would be broad agreement that stirring up of hatred in relation to any of the protected characteristics is wrongful.

Harm

5.10. Stirring up of hatred may lead to violence or public disorder. It may incite people to commit offences such as assault against individuals in the group. Sentencing Darren Osborne in relation to the murder and attempted murder of Muslims near the Finsbury Park Mosque in June 2017, the judge said, “Your research and joining Twitter early in June 2017 exposed you to a great deal of extreme racist and anti-Islamic ideology. You were rapidly radicalised over the Internet, encountering and consuming material put out...from those determined to spread hatred of Muslims on the basis of their religion”.

5.11. Even where not resulting in offences, the stirring up of hatred can contribute to a social atmosphere in which prejudice and discrimination are accepted as normal. Behaviour which may stir up hatred can cause members of the group to feel vulnerable to attack and excluded from the wider community. There may be an impact on the dignity of the group. The Academic Report quotes from Jeremy Waldron¹:

... Dignity and the assurance that comes with it are public goods constituted by what thousands or millions of individuals say and do. Our society is heavily invested in the provision of those goods. The point of hate speech is to detract from that provision – to undermine it and establish rival goods that indicate (to fellow racists, to members of vulnerable groups, and to society generally) that the position of some minority or other is by no means as secure as the rest of the world would like to affirm. The point of hate speech restrictions...is to protect the first set of public goods from being undermined in this way.

Although, as is explained in the Academic Report, the empirical studies in relation to the harm caused by stirring up of hatred offences are not as robust as those in relation to other hate crime offences, such as assault or threatening or abusive conduct aggravated in relation to a protected characteristic, I am satisfied that the potential for harm from such conduct is significant. The harm caused by stirring up of hatred offences can be particularly severe and it is an important consideration pointing towards the extension of such offences.²

Seriousness

5.12. Offences of stirring up of hatred in relation to a protected characteristic are particularly serious. They attack the group generally rather than individual members of the group. The following examples illustrate the serious nature of stirring up offences:

- In March 2018, a letter was circulated online entitled *Punish a Muslim*³ in which points were offered for carrying out a variety of acts against Muslim persons on a particular day of action.
- In a case reported by the BBC in January 2018 a self-proclaimed Nazi was convicted of stirring up racial hatred. In a speech he declared that Britain had taken the wrong side in World War II by choosing to fight “National Socialists who were there to remove Jewry from Europe once and for all”. He made a number of highly derogatory remarks about Jewish people generally, including, “We let these parasites live among us, and they still do”. The prosecutor was quoted as saying that the man clearly intended to stir up hatred and wanted others to hate Jewish people in the same way as he did.⁴

1 Waldron, *The Harm in Hate Speech* 154

2 For a fuller discussion of harm see Academic Report paras 6.2.1 – 6.2.3

3 <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-43544155>

4 <http://www.bbc.co.uk/news/uk-england-lancashire-42603439>

- In the one case of stirring up religious hatred prosecuted on indictment under section 6 OBFTCA, the accused posted remarks on Twitter stating that he hated Shia and Kurds and called for them to die “like the Jews did at the hands of Nazi Germany”.⁵
- In another section 6 OBFTCA case, the accused posted on Facebook showing support for the IRA including a picture of a person with a gun saying “Where is the Orange walk?”

Symbolic function

5.13. The labelling of the particular behaviour in terms of stirring up of hatred is symbolically important. They are particularly serious offences and the conviction and sentence for stirring up hatred should carry a stigma. Stirring up of hatred offences communicate to those convicted and to those who might be tempted to engage in such conduct that society particularly condemns it. A stirring up of hatred offence will be a highly significant entry on the record of previous convictions of the offender. It also communicates to the groups with protected characteristics, and to society in general, that the law has taken steps to protect those with a protected characteristic from hatred. This may have an educative function and encourage reporting of offences. I consider that the symbolic function is a persuasive argument in favour of having stirring up of hatred offences.

Frequency of prosecutions for stirring up offences

5.14. Stirring up of hatred offences directed against the group are likely to be much less common than aggravated offences directed against one or more individual member(s) of the group. The number of prosecutions for stirring up racial hatred under the Public Order Act 1986, and, when it was in force, section 6 OBFTCA, is small when compared with the other hate crime provisions. Between 2006 and 2016 in Scotland there were only 9 cases involving charges of stirring up racial hatred under the Public Order Act 1986. Between 2012 and 2017 there were a total of 32 cases involving charges under section 6 OBFTCA. Section 6 also contained an offence involving the threat of seriously violent acts (condition A) as well as stirring up of religious hatred (condition B). As there is no breakdown between the two in the statistics, only a proportion of the 32 cases will have involved stirring up religious hatred. The limited number of prosecutions does not, however, necessarily mean that there is under-prosecution of these offences, or that they do not have a useful function. It may simply reflect the reality that the type of conduct that merits prosecution as stirring up of hatred is less common than the sort of communication which might be more appropriately prosecuted using a baseline offence and a relevant aggravation. I do not consider that the argument that there might not be many prosecutions is persuasive against having a regime of stirring up hatred offences. Indeed, their relative rarity may only enhance their symbolic value.

5 http://www.heraldscotland.com/news/13181481.Jail_for_man_who_wanted_genocide/

Is there a gap in the law?

5.15. I recognise that almost every case which could be prosecuted as a stirring up offence could also be prosecuted using a baseline offence and an aggravation: most, for example, could be prosecuted as threatening or abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA), along with an aggravation. This argument was advanced at the Stage 3 debate on the Bill to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (OBFTCA) as the basis on which the majority took the view that section 6 OBFTCA was not necessary. In my view this argument goes only so far. Much will turn on the circumstances and context in a particular case. In one case it might be appropriate to proceed by an aggravated offence, while in another, even if the conduct could also be prosecuted as an aggravated offence, the facts might point towards proceeding by way of a charge of stirring up of hatred. No doubt in each of the examples cited at paragraph 5.12 the case could have been prosecuted using an aggravated offence. But in each case the nature of the offence, which was directed against the group rather than individual members of it, called out for it to be more appropriately marked by a specific stirring up of hatred offence. I conclude that there is a gap in the law in the absence of stirring up offences in relation to the protected characteristics apart from race.

Practical benefits

5.16. The practical benefits are similar to those identified in relation to aggravated offences. The seriousness of the offence of stirring up of hatred is likely to be reflected in increased sentence. The perpetrator will have on his/her criminal record a particularly egregious conviction. Recording of conviction and sentence will allow statistics to be kept and trends to be identified and monitored.

Freedom of expression

5.17. The potential risk to freedom of expression from the introduction of stirring up hatred offences is well recognised. The (now-repealed) offence of stirring up religious hatred in section 6 OBFTCA included express exceptions in section 7 to ensure that the freedom to debate and express views relating to religion was protected. Nothing in the section 6 provision of stirring up of religious hatred prohibited or restricted: (a) discussion or criticism of religions or the beliefs or practices of adherents of religions; (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters; (c) proselytising (persuading others to share the same view or belief); or (d) urging of adherents of religions to cease practising their religions. When the Westminster Parliament legislated to prohibit stirring up of hatred on religious and sexual orientation grounds in England and Wales, it included similar protection in relation to the discussion of religion. In relation to sexual orientation, it expressly provided that the discussion or criticism of sexual conduct, practices or marriage, or urging people to alter their behaviour was not in itself to be treated as threatening or intending to stir up hatred⁶.

6 See sections 29J and 29JA of the Public Order Act 1986.

5.18. This concern about freedom of speech was widely reflected in the responses to the consultation paper, both by those in favour and those against the principle of stirring up offences. Respondents argued that there was a danger with such legislation that genuine and legitimate criticism could be construed as stirring up hatred. There was a risk that such legislation could prevent legitimate demonstrations against the actions of a particular group. Some pointed to the potential ‘chilling effect’⁷ on freedom of speech and freedom of religion and belief. The criminal law must not be used to stifle legitimate views or seriously hinder words and debate. “In a plural, public square all ideas, concepts and beliefs should be subject to robust challenge and debate”.⁸

5.19. In other responses it was pointed out that freedom of speech was not absolute and that there was a clear delineation between, on the one hand, acceptable and even robust criticism amounting to insulting behaviour, and, on the other hand, illegitimate threatening or grossly offensive behaviour. There was a clear distinction between rational argument and rabble-rousing. Context, demeanour, vocabulary and previous conduct contributed to making that judgement. It should be possible to frame legislation that captures deliberate stirring up without also criminalising rational discussion or even humour.

5.20. I am very conscious of, and share, the concerns articulated in the responses to the consultation paper. But I also recognise the point made by some respondents that there is a clear distinction between rational argument and rabble-rousing. In this regard it is, I think, necessary to examine the issue of freedom of expression in more detail, particularly in terms of the European Convention on Human Rights (ECHR).

Human rights legislation

5.21. Article 10 ECHR, which protects freedom of expression, stipulates:

10.1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

10.2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

7 Evangelical Alliance response to the consultation document.

8 Christian Institute response to the consultation document.

5.22. Article 10 protects a wide range of expression, including spoken and written words, internet content, acts of protest and artistic performances. It covers the expression of both facts and opinions, and can apply not only to the substance of the ideas and information expressed, but also to the tone and manner in which they are expressed. The courts have expressly noted that it protects expression which shocks, offends and disturbs other people.

5.23. Not all speech or expression is protected by article 10. Under article 17, activities aimed at the destruction of the rights and freedoms of the Convention fall outside the protection of the Convention. Article 17 provides:

17. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

5.24. Recent cases suggest that, applying article 17, the court is unwilling to ascribe article 10 protection to extreme conduct or speech that incites violence against the ‘general’ population based on extremist religious or racial views, for example, advocating the violent overthrow of secular government and the instigation of a caliphate, or promoting the re-instatement of Nazi policies in relation to the destruction of the Jewish people.⁹

5.25. In cases to which article 10 does apply, a restriction may be imposed if it is prescribed by law; meets one of the legitimate aims set out in article 10.2; is necessary in a democratic society in the sense of there being a pressing social need; and is proportionate to the legitimate aim pursued.

5.26. In relation to whether and to what extent expression is protected by article 10, content and context are important. Freedom of expression carries with it duties and responsibilities. There is an obligation to avoid as far as possible expressions of opinion or belief that are gratuitously offensive to others and thus an infringement of their rights (for example freedom of religion), and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs¹⁰. The court has found interference with article 10 rights permissible in relation to the publication of a book with extreme comments about Islam¹¹, electoral leaflets exhorting foreigners to be sent home¹² and the distribution of leaflets in students’ lockers at a school stating that homosexuality is morally destructive and responsible for the spread of HIV/AIDS¹³.

9 *Ivanov v Russia* (app. No. 35222/04)(Dec.) 20 February 2007; *Paksas v Lithuania* (2014) 59 EHRR 30 at [87]

10 e.g. *Otto-Preminger-Institut v Austria* 20/9/94, Series A no.295A, para [49]; *Ginieswki v France* (2007) 45 EHRR 589

11 *Soulas v France* 10 July 2008

12 *Feret v Belgium* (app. No. 15615/07) 16 July 2009

13 *Vejdeland and others v Sweden* (app. No. 1813/07) 9 February 2012

5.27. In England and Wales there are stirring up of hatred offences in relation to race, religion and sexual orientation. In 2014, the Law Commission considered whether stirring up offences in relation to disability and transgender identity should be added.¹⁴ Although, for reasons which I mention later, it did not recommend extending the law to include these characteristics, the Commission expressed the view that stirring up of hatred offences were not infringements of the right to free expression. The Commission considered that stirring up offences pursued the legitimate objectives of securing public safety, preventing disorder and crime and protecting the rights of others.

5.28. I agree with the view of the Law Commission and am satisfied that extending the stirring up offences in Scotland would not infringe the article 10 right to freedom of expression. In addition to its content, the context in which communication is made is highly significant. In the case about distributing homophobic leaflets, the court considered the context important:

...the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them.

5.29. The tone and the choice of language will also be relevant. In most cases it is likely to be quite obvious that the conduct is stirring up hatred of a group rather than contributing to meaningful public debate. It would be open to the Lord Advocate to give guidance to prosecutors in making judgements whether to prosecute. At the end of the day the court will decide whether in a particular case an offence was being committed. A protection of freedom of expression provision, similar to those described at paragraph 5.17 above, could be included in legislation. I do not consider that new stirring up of hatred offences would have the effect of stifling legitimate views or seriously hindering robust debate. I conclude that concerns about freedom of expression should not preclude the extending of stirring up hatred offences.

Which protected characteristics should be included?

5.30. The strongest case for extending stirring up cases to other protected characteristics may be made in respect of religion. The repeal of section 6 OBFTCA has left a gap in the law. Stirring up of hatred in relation to religion is an offence in the rest of the United Kingdom. It is an offence in Canada and most Australian jurisdictions. It features in international instruments which clearly outlaw the stirring up of religious hatred. I note the terms of EU Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The Framework Decision highlights the link which often exists in practice between stirring up

¹⁴ Law Commission, *Hate Crime: Should the Current Offences be Extended?* Law Com 348

hatred on racial grounds and stirring up hatred on religious grounds¹⁵. Article 1 of the Framework Decision stipulates:

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
 - a. publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin; [...]
3. For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

I also note the United Nations International Covenant on Civil and Political rights article 20.2:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

I consider that the arguments in favour of extending stirring up of hatred offences to include religion are strong.

5.31. In considering whether stirring up of hatred offences should extend to the other protected characteristics in addition to race and religion, it is worth exploring why section 6 OBFTCA was restricted to stirring up religious hatred only and whether, in particular, this was a decision based on principle. The issue was canvassed in the evidence before the Justice Committee during the parliamentary progress of the 2012 Act. The Minister indicated to the committee that the Scottish Government was open to extending section 6 OBFTCA to all the protected characteristics if the Committee decided to recommend that course. The Committee considered that this was an issue that would require more consideration and invited the Scottish Government to consult on widening the offence at an appropriate point should the Bill be passed. It is clear, therefore, that the decision not to include the other protected characteristics was not one taken on principle.

5.32. In 2010 in England and Wales the stirring up offences were extended to cover not only race and religion, but also stirring up hatred on the ground of sexual orientation. In 2014 the Law Commission did not recommend the extension of stirring up of hatred offences to include disability and transgender identity. They considered that the type of hate speech typically found in relation to disability and transgender status was far less likely to satisfy the requirements for stirring up offence than that found in relation to race

15 The Framework Decision does not impose any legal obligations on the UK, but UK Government Ministers have indicated to Parliament that they intend to meet its requirements as a matter of policy: Hansard: House of Lords, 23 September 2013, col WA422.

and religion.¹⁶ In Northern Ireland there are stirring up offences extending to sexual orientation and disability, as well as race and religion. The Academic Report notes that in Canada there are offences of public incitement of hatred and the wilful promotion of hatred in relation to identifiable groups. These include age, sex, sexual orientation, and mental or physical disability. Thus, of all the countries considered, Scotland has the least provision for offences of stirring up hatred.

5.33. A number of respondents argued in favour of extending stirring up of hatred offences to all protected characteristics. I consider that the argument that there should be parity between all protected characteristics is strong. It is highly undesirable to have a hierarchy of protected characteristics. I do not consider that the fact that there might be fewer convictions in respect of one characteristic rather than another to be particularly significant. I conclude that, if stirring up offences are to be extended to other protected characteristics, they should extend to all, including any new protected characteristics.

Miscellaneous

Thresholds

5.34. The provisions in the Public Order Act 1986 for stirring up racial hatred require conduct or material that must be ‘threatening, abusive or insulting’. There must also be either: (a) an intention to stir up racial hatred; or (b) having regard to all the circumstances it is likely that racial hatred will be stirred up (which I refer to below as ‘the likelihood formula’).

5.35. In England and Wales, the threshold for the stirring up offences in relation to religion and sexual orientation are different to those for stirring up racial hatred. First, the conduct or material require to be ‘threatening’ rather than merely ‘threatening, abusive or insulting’. Secondly, intention to stir up hatred is required; a likelihood that it will be stirred up is not sufficient. Thirdly, the express condition protecting freedom of expression was introduced (sections 29J and 29JA). In Scotland, section 6 OBFTCA contained similar restrictions in scope.

5.36. In the parliamentary debates on the Bill to repeal OBFTCA, calls were made by some MSPs for the thresholds in section 6 to be lowered though no suggestions were advanced as to how that might be achieved.

¹⁶ Law Commission, *Hate Crime: Should the Current Offences be Extended?* Law Com 348. See also Academic Report para 6.4.5

5.37. I consider that the requirement for threatening behaviour sets the threshold too high. Abusive conduct which was not necessarily threatening could still be intended to stir up hatred in relation to a protected characteristic or could give rise to the likelihood that hatred could be stirred up. The use of the phrase ‘threatening or abusive’ would be consistent with the approach in section 38 CJLSA. I recommend that the threshold about the nature of the conduct in a stirring up of hatred offence should use the words ‘threatening or abusive’.

5.38. As to whether the offences should be restricted to an *intention* to stir up hatred, or should also include the *likelihood* formula used in the stirring up of racial hatred offences, I consider that the wider test including both of these would give more flexibility. It is relevant to note why the alternative *likelihood* threshold of “having regard to all the circumstances racial hatred is likely to be stirred up thereby” appears in the Public Order Act 1986. It was inserted in 1976 into the Race Relations Act 1965 following criticism by Lord Scarman in his report into the disorder in Red Lion Square in 1974 that the requirement for proof of intent in the Race Relations Act 1965 was too onerous and rendered the offence “useless to a policeman on the street”.¹⁷ In 2007 and 2010 the UK government introduced the stirring up offences in relation to religion and sexual orientation the Bills contained both legs of intention and likelihood. When the Bill was in the House of Lords the likelihood leg was removed by amendment and the government did not attempt to reinstate it. I do not consider that including the likelihood leg would interfere with freedom of speech.

5.39. In chapter 9 I recommend that the law on hate crime should be consolidated. If the stirring up of racial hatred provisions in the Public Order Act 1986 are to be consolidated along with any new provisions it would be desirable that the tests would be consistent in relation to each protected characteristic. I therefore recommend that any new stirring up of hatred offences should include a requirement of an intention to stir up hatred or that having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up thereby.

Should the stirring up of racial hatred provisions be revised?

5.40. Sections 18 to 22 of the Public Order Act 1986, which is a United Kingdom statute extending to Scotland, provides for stirring up of hatred offences in five situations:

- using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting (section 18);
- publishing or distributing written material which is threatening, abusive or insulting (section 19);
- presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour (section 20);

¹⁷ The Red Lion Square Disorders of 15 June 1974: Report of Inquiry by the Rt Hon Lord Justice Scarman (Cmnd 5919: 1975 para 125; see Academic Report para 6.3.1

- distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting (section 21); and
- providing a programme service, or producing or directing a programme, where the programme involves threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein (section 22).

5.41. These provisions are somewhat complicated and cumbersome. If my recommendation for consolidation is adopted, it would provide an opportunity to simplify the provisions in sections 18 to 22. I also recommend that consistency with the other protected characteristics requires the stirring up of racial hatred offences to be limited to threatening or abusive conduct or material. The reference to ‘insulting’ should be deleted. In this regard it is worth noting what happened in 2013 when the word ‘insulting’ was deleted from the English harassment offence under section 5 of the Public Order Act 1986. The Director of Public Prosecutions advised that the Crown Prosecution Service (CPS) had been unable to find any case that could not be characterised as ‘abusive’ as well as ‘insulting’ and took the view that from the perspective of the prosecution the word ‘insulting’ could safely be removed without undermining the ability of the CPS to bring prosecutions. I consider that an equivalent analysis would apply in relation to the offences on stirring up racial hatred, particularly given the very low level of prosecutions that there are in any event.

Conclusions

5.42. In reaching a conclusion as to whether stirring up of hatred offences should be extended to any of the protected characteristics in addition to race, I have taken account of all the material examined in this chapter. The responses in support of the introduction of additional stirring up of hatred offences were persuasive. The conduct is morally wrong. I have taken account of the harm caused by this type of conduct, both to the group and to society as a whole. This type of offending is particularly serious. The symbolic function of having a specific offence to mark such offences is powerful. I am not persuaded that the fact that stirring up hatred offences are likely to be much less common than public order offences with a protected characteristic aggravation is compelling against the introduction of stirring up offences. I consider that there is a gap in the law, albeit there may be alternative ways of prosecuting. There are practical benefits in terms of sentencing, recording of previous convictions and the maintenance of statistics. I am satisfied that such provisions would not breach article 10 ECHR. The case for extending to include stirring up offences in relation to religion is particularly strong. Parity and the avoidance of a hierarchy of protected characteristics point to including all protected characteristics. Having regard to all the considerations, I conclude that stirring up of hatred offences should be extended beyond the stirring up of racial hatred. I also make certain recommendations in relation to thresholds.

Recommendation 13

Stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.

Recommendation 14

Any new stirring up of hatred offences should (a) require conduct which is threatening or abusive; and (b) include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up thereby.

Recommendation 15

The current provisions in relation to race under the Public Order Act 1986 should be revised and consolidated in a new Act containing all hate crime and stirring up of hatred legislation.

Any replacement for the stirring up of racial hatred provisions should (a) require conduct which is threatening or abusive; and (b) include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up thereby.

Recommendation 16

A protection of freedom of expression provision similar to that in sections 29J and 29JA of the Public Order Act 1986 and section 7 OBFTCA should be included in any new legislation.

Chapter 6

Online hate crime

Introduction

6.1. The internet is a powerful tool which enables communication on a scale which would have been unimaginable by previous generations. That communication has enabled many positive developments, but also allows negative behaviour to take place in new and different ways.

6.2. This chapter considers how well the current law operates in relation to the commission of hate crime and hate speech¹ online, and whether any changes are necessary. I discuss how recommendations made elsewhere in my report (in relation to stirring up of hatred and gender hostility) might impact on online behaviour.

6.3. I flag up various policy and legal developments which are taking place outside the context of this review which are likely to impact upon how harmful online behaviour is dealt with.

Summary of main themes from consultation responses

6.4. In the consultation paper, I reflected views which had been raised in the initial information gathering phase of the review that online activity is not taken as seriously as that which occurs ‘in real life’ and that the speed and potential anonymity of activity online mean that it can have an impact which is greater than similar offline activity. I noted steps that social media providers were being encouraged to take to deal with the commission of hate crime and hate speech online. I asked for views on whether the current law deals effectively with online hate, whether there were particular forms of online activity that required a different response, and whether this should be dealt with through prosecution of individuals, action by social media providers or both.

6.5. Consultation responses indicated a concern that the online environment was becoming increasingly hostile, with significant harm caused to individuals and groups as a result of online hate and harassment, and a perception that it is not taken as seriously as equivalent face-to-face conduct.

6.6. Areas where respondents felt the law does not respond at all, or responds inadequately, include: online bullying and harassment (including ‘crowd-sourced harassment’); misogyny and incitement to misogyny; inciting self-harm or suicide; enabling pornography to be viewed by children; online paedophilia; publication of ‘fake’ news; expressions of hate through gaming platforms and sites; impersonating another person

1 The term ‘hate speech’ is not used consistently in practice. Chapter 6 of the Academic Report gives some examples and notes the term is something of a misnomer as it can also include non-verbal communication, such as the publication of material online. In this chapter, I am using the term to refer to behaviour which expresses hatred in a way which has particular negative consequences, such as causing individuals fear or alarm, or stirring up hatred in others.

online; posting photographs or personal information without consent and with intention to harass, demean or degrade; threats to an individual's life, family or home. I would note here that some of the conduct described goes beyond what might be thought of as identity-based hate crime or hate speech. Respondents were concerned about more general forms of abuse and offensive communication.

6.7. There was recognition of some specific difficulties in prosecuting offences which can arise from online technology. This included the identification and location of suspects (who might not be located in Scotland), obtaining information from service providers and having offensive material removed from websites. There were suggestions for practical and technological measures which could be taken to tackle online hate and harassment.

6.8. The need to safeguard individuals' rights of freedom of expression was emphasised, as it had been in the responses to all the consultation questions. However, in the context of online behaviour in particular, there was a reflection that unfettered freedom of expression for some could result in a situation where others feel unable to express their views.

Identifying the nature and extent of the harm to be tackled

6.9. In approaching this issue, I have taken as a starting point the principle that what is unacceptable offline should also be unacceptable online. However, I found it useful to bear in mind four different categories of harm which arise from online hate crime. These were identified by the academic Chara Bakalis in a recently published article². Although the article is focused on provisions which extend to England and Wales, her analysis is useful in considering the effectiveness of the provisions which exist in Scots law. She identified:

- Harm caused to an individual when the harassment they experience takes place online but in a private form (for example, through emails or text messages). This may take the form of fear, alarm or distress.
- Harm caused to an individual when hate is communicated on social media or another public forum. As well as fear, alarm or distress, a victim may suffer reputational harm (which may result in broken relationships, harm to their career and or to their ability to maintain a presence on the internet).
- Harm caused by speech that is not directed at any one person in particular, but involves generalised hateful comments which 'poison the atmosphere' and demonise particular groups of individuals who share a protected characteristic.
- The potential radicalisation of individuals or the entrenching of global hate movements.

Potential routes to prosecute online behaviour

² Bakalis, C. , 'Rethinking cyberhate laws', *Information & Communications Technology Law*, 27:1 (2018), p.p. 86-110.

6.10. At present, prosecutors in Scotland could deal with online hate crime and hate speech under a number of different offences. The route chosen would obviously depend on the precise nature of the conduct in question. In this section, I set out the main options available to prosecutors and discuss issues which have been raised about how they operate in practice. I also consider some more general issues raised about prosecuting online behaviour under any of the offences: difficulties in obtaining evidence; dealing with ‘crowd-sourced’ behaviour; and territorial jurisdiction.

Section 127 of the Communications Act 2003

6.11. The main offence which is specifically directed at online communications is the improper use of a public electronic communications network, contrary to section 127 of the Communications Act 2003. The offence may be committed in two ways. The first alternative is if a person sends a message or other matter by public electronic communications network that is grossly offensive or of an indecent, obscene or menacing character, or causes such a message or material to be sent. The second is if a person sends a message by public electronic communications network that he or she knows to be false, or causes such a message or matter to be sent, or persistently makes use of a public electronic communications network, in each case for the purpose of causing annoyance, inconvenience or needless anxiety to another.

6.12. This offence is used in practice alongside the statutory aggravations to deal with instances of online hate. It is likely to be of particular significance in relation to the second and third forms of harm identified by Bakalis. Figures obtained from the Scottish Government Criminal Proceedings dataset show a steady increase in the number of prosecutions under section 127 which are accompanied by a statutory aggravation, with 70 such prosecutions (around 11% of the total number of section 127 prosecutions) in 2014-15 and 2015-16. The offence has been used in some high-profile instances of online hate crime, including the conviction and imprisonment of the 4th Viscount St Davids, Rhodri Philipps, in England for racist and menacing comments in relation to the anti-Brexit campaigner, Gina Miller³.

Breadth of offence – meaning of ‘grossly offensive’

6.13. The potential breadth of the ‘grossly offensive’ element of the offence is worth noting. There is no requirement in the offence that there is an actual recipient of the message who is grossly offended. The offence is committed when such a message or other matter is sent. Bakalis notes that this is therefore a ‘conduct crime’ rather than a ‘result crime’ and could catch, for example, an online but private conversation between two racists on holocaust denial. She suggests that it might not be compatible with their rights of freedom of expression under article 10 of the ECHR to prosecute the sending of

3 Judgment and sentencing remarks may be found here:
<https://www.judiciary.gov.uk/judgments/r-v-viscount-st-davids/>

grossly offensive material where no harm had in fact been caused.

6.14. Bakalis notes that the CPS in England and Wales has published guidelines about prosecuting cases involving communications sent by social media, in part to ensure that such offences will only be prosecuted where that is compatible with Convention rights. The COPFS has published equivalent guidance in Scotland, and this was discussed in the review’s consultation paper.

6.15. In its consultation response, the COPFS noted that there may be circumstances which would satisfy the evidential test but where, given the whole circumstances, which include the nature of the comments and their context, it would not be in the public interest for a criminal prosecution to take place.

6.16. I have considered the need to safeguard rights of freedom of expression at length elsewhere in this report (in particular, chapter 5 on stirring up of hatred). I conclude there that, while it can be difficult *in the abstract* to balance rights of freedom of expression against the rights of others not to be harmed, it is generally much easier to do this once the facts, context and language of a particular instance are considered. The same analysis applies to the prosecution of an individual for sending ‘grossly offensive’ material in terms of section 127. In deciding whether it is in the public interest to prosecute, the COPFS would of course need to take into account the impact of such a prosecution on the individual’s rights under article 10 of the ECHR, and how those rights may be balanced against the rights of others. Likewise, the sheriff will need to take article 10 rights into account in deciding whether the offence has been committed. From the evidence which I have received in the course of this review, I am satisfied that the COPFS and courts are very aware of the need to do this. I do not think this points to any defect in the application of the section 127 offence in practice.

Forums to which the section 127 offence may be applied

6.17. When the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill was introduced in 2010, the policy memorandum accompanying the Bill noted: “Case law has left some doubt about whether the Communications Act offence can be used to prosecute people who create offensive websites or ‘groups’ on social networks, as opposed to sending threatening emails or other communications.” This was stated as part of the reason why the proposed offence of threatening communications with intent to stir up religious hatred (which became section 6 OBFTCA) was required.

6.18. The review has not been able to track down the specific case law, but it is possible that the policy memorandum was referring to a statement by Lord Bingham of Cornhill about telephone messages in *DPP v Collins*⁴. Some commentators thought the approach taken by Lord Bingham might imply that the section 127 offence could only be used in relation to direct messages such as emails or telephone messages, and not more indirect methods communication such as posting a message on a forum. However, the offence is now regularly used in practice in relation to information posted on social media platforms such as Facebook or Twitter. In *Chambers v DPP*⁵, the English Divisional Court considered arguments that a tweet should be considered as ‘internet content’ and not a message which had been ‘sent’ in terms of the section 127 offence. The Court appears to have considered this an unnecessarily technical argument: they considered what Lord Bingham had said in the earlier case but did not accept that led to a narrow construction of the section. It was plainly capable of applying to internet content as well as emails: such content was a ‘message sent’ at the point that it was posted. The Court noted that “It is immaterial that the appellant may have intended only that his message should be read by a limited class of people, that is, his followers, who, knowing him, would be neither fearful nor apprehensive when they read it.”

6.19. I am therefore satisfied that section 127 can be (and is) used in relation to a wide range of online content, and that the doubts expressed in the policy memorandum in 2010 do not require to be dealt with through a separate form of offence.

Sentencing limitations of section 127

6.20. The offence in section 127 may only be prosecuted summarily (i.e. before a sheriff sitting without a jury), and is subject to a maximum penalty of 6 months’ imprisonment, or a fine up to £5,000 or both. The COPFS have noted that the fact that section 127 can only be prosecuted summarily can lead to limitations on its application in practice. In their evidence to the Justice Committee on the Offensive Behaviour and Threatening Communications (Scotland) (Repeal) Bill, the COPFS noted one case which had not been proceeded with under section 127 because it was considered so serious that it should be prosecuted on indictment. The accused in that case had used Twitter to express his hatred of Shias and Kurds and call for them to be killed as the Jews had been in Nazi Germany. It appears that he also sought information on how to join ISIS. He was instead prosecuted in respect of threatening communications with an intent to stir up religious hatred under section 6 OBFTCA⁶, a prosecution noted in the stirring up chapter of this report at paragraph 5.12. He pled guilty and was sentenced to 16 months imprisonment, a sentence which would not have been possible if he had been prosecuted under section 127.

4 [2006] 1 WLR 2223.

5 [2012] EWHC 2157 (Admin).

6 As explained in chapter 5, that offence has now been repealed.

6.21. There is an argument that section 127 should be amended to make it triable both summarily and on indictment. There is an offence in section 1 of the Malicious Communications Act 1998, which covers similar conduct but extends to England and Wales only. That offence was amended to become triable either way by the Criminal Justice and Courts Act 2015 and is now subject to a maximum penalty of two years imprisonment or fine or both. The amendment was proposed by Angie Bray MP in response to a particular constituency case which, she successfully argued, demonstrated the need for prosecution on indictment before a jury. It would appear that the arguments in favour of widening the prosecution options for the section 1 offence could also have been applied to section 127, but the MP's focus was specifically on the section 1 offence.

6.22. Section 127 is specifically concerned with public electronic communications networks, and telecommunications and internet services are matters which are reserved under the Scotland Act 1998. An amendment to the sentencing levels in section 127 in particular would probably not be within the legislative competence of the Scottish Parliament, and I therefore do not propose to make a recommendation about this in this report. However, as I explain in more detail below, the offence in section 127 is currently being analysed by the Law Commission in England and Wales in the context of a project looking at online offensive communications generally (i.e. not just offensive communication which amounts to hate crime). I anticipate that the Law Commission will consider sentencing limitations in the course of that project. I am confident that the UK and Scottish Governments will act to ensure that any amendments to reserved legislation as a result of that project take proper account of the way that they will apply in a Scots law context.

Other more general offences

6.23. The offences in sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010 are also likely to be relevant to the type of hostile and harassing behaviour directed at individuals or groups. This, too, has been reflected in the consultation responses. Section 38 applies to threatening or abusive behaviour; section 39 is the offence of stalking. The nature of these offences is described in more detail in annex 3 (current law). Either offence can be charged with one of the existing statutory aggravations where it is motivated by, or involves the demonstration of, hostility based on one of the protected characteristics.

6.24. I consider that these offences are likely to be relevant to deal with a significant amount of the online abuse which I have been made aware of; in particular, the online abuse with an element of gender hostility which was highlighted in Amnesty International's '#Toxic Twitter' report, discussed at chapter 4 above. If the recommendation which I have made in that chapter to create a new statutory aggravation relating to gender hostility is accepted, I anticipate that might be used in conjunction with one of these baseline offences to deal with egregious online abuse which causes fear or alarm.

6.25. Stonewall Scotland raised a specific concern about cases which they feel are not properly covered by either section 127 or section 38. In their consultation response, they argued that section 38 is too restrictive:

The actor must have acted in a way that is ‘threatening or abusive’, and in a way that would cause reasonable people fear or alarm (or is reckless to whether they have done so). However, where online abuse causes distress, rather than fear, or incites hatred rather than violence, this abuse slides under the radar. Amending the requirement for actions to cause ‘fear and alarm’ in order to be criminalised to ‘fear, alarm, or significant distress’ would ensure that language that was abusive, caused distress (either deliberately or recklessly as to whether distress would be caused) would be considered criminal.

6.26. I have carefully considered the arguments raised about the degree of distress or alarm which is appropriate to lead to a criminal sanction. I understand that the distress caused by unpleasant, prejudiced online content may be exacerbated by the risk of reputational harm which it may cause, as discussed in Chara Bakalis’ research above. However, I do not think it is necessary or appropriate to alter the threshold in section 38 or to create a new offence to apply in relation to ‘lower-level’ online behaviour. As I noted in chapter 2 (underlying principles), criminalising behaviour has significant consequences and should be done with care in order to target specific harm. I am satisfied that the Scottish Parliament gave very careful consideration to the degree of harm caused by behaviour falling under the section 38 offence and adopted language (‘fear or alarm’) which reflects agreed social norms. In any event, in the context of an offence charged with a statutory hate crime aggravation (i.e. one involving *hostility* based on a protected characteristic), I find it difficult to envisage realistic circumstances which would cause ‘distress’ but not also ‘alarm’.

6.27. If there are instances where online hate behaviour causes distress, but no actual fear or alarm, there are other mechanisms (short of criminalisation) which may be appropriate to deal with it. These might include improved mechanisms to ensure that such material is removed from the online space quickly to avoid further reputational damage, and this is discussed further below. However, I do not consider a criminal response is needed.

6.28. Stonewall also raised a concern about incidents of incitement to hatred rather than violence. That concern would be met if my recommendations in relation to stirring up of hatred offences are accepted.

Offensive material online which is not directed at an individual but stirs up hatred based on a protected characteristic

6.29. Chapter 5 of this report considers offences relating to the incitement of hatred. These may be particularly relevant to the third and fourth categories of harm identified above (comments intended to demonise particular groups, online radicalisation and the entrenchment of global hate movements). As noted in chapter 5, Scots law includes offences in Part 3 of the Public Order Act 1986 related to the stirring up of racial hatred. However, there are at present no offences relating to the stirring up of hatred on other grounds.

6.30. The offences on the stirring up of racial hatred have been used successfully to prosecute online hate speech. For example, in one English case the two accused were convicted of stirring up racial hatred through the distribution of Holocaust-denial material on the internet⁷. I am satisfied from the evidence before the review that the internet is used in practice by people who wish to spread hateful attitudes and opinions in relation to a number of groups. In addition to the type of material which could be covered by the existing racial hatred offences, I was told about the extent of abusive material online which it would appear is intended to stir up hatred of certain religious groups and of women.

6.31. I have set out my reasons for recommending that there be a suite of stirring up offences fully in chapter 5, and do not repeat those here. Suffice it to say that I consider there is an important place in Scots law for an offence which allows the courts to mark out the particularly egregious behaviour of arousing hatred of a group as a whole *in other persons*. This goes beyond activity where harassment or threats are directed at individuals or groups with protected characteristics. If the recommendations which I have made in chapter 5 are implemented, I anticipate that the resulting offences will be of use in the context of online hate speech.

Specific challenges in bringing prosecutions under these provisions for online behaviour

6.32. As noted above, there are some specific features of online offending which have been raised with the review.

Obtaining appropriate evidence

6.33. Two consultation responses specifically highlighted difficulties posed in proceeding with a prosecution in their case because of the technology used to commit the offence. They highlighted the difficulties in proving who had actually sent the message in question and felt that the requirement for corroboration in Scotland posed particular challenges.

⁷ Sheppard and Whittle [2010] EWCA Crim 824.

6.34. I discussed rules on corroboration in chapter 3 (current statutory aggravations). As a general rule, no person may be convicted of a criminal offence in Scotland in the absence of corroborated evidence. This means that there must be at least two sources of evidence in respect of each essential element of the crime. Scottish Ministers have considered abolishing the requirement of corroboration, and commissioned Lord Bonython to carry out a review of the safeguards that might need to be put in place if this were to happen. Lord Bonython and his reference group reported in April 2015⁸. The question of whether corroboration should be abolished generally, and whether any safeguards would be needed if that were to happen, is currently with Ministers.

6.35. I have not identified any element of hate crime offending which would justify a different approach to the question of corroboration in this context when compared with any other offence. Questions about whether baseline offences should require more than one source of evidence do not therefore fall within the remit of this review. While I recognise the practical challenges of establishing appropriate evidence in online cases, I am not persuaded that any change to the legislation is appropriate here.

Dealing with crowd-sourced harassment /‘virtual mobbing’

6.36. A particular feature of online communication is that it may involve correspondence on a ‘many to many’ rather than ‘one to one’ basis. This can result in the phenomenon of crowd-sourced harassment or virtual mobbing. The House of Lords Select Committee on Communications issued a report in session 2014/15 entitled *Social Media and Criminal Offences*⁹. The Committee concluded (in relation to the law of England and Wales) that existing offences were generally appropriate to deal with the nature of offending which had been identified, although there were certain aspects that may be adjusted and gaps filled.

6.37. The Select Committee recognised the concern about identifying and prosecuting individuals in cases where the initial harassment might be fairly innocuous, but becomes magnified through the sheer volume of abuse which develops over time. The Committee concluded that the English common law principle of joint enterprise could apply, enabling the prosecution of members of a group acting with common purpose and intention. The courts would determine whether joint enterprise catches instances in which the people involved did not know each other and acted at different times and in different places.

6.38. I agree with this general approach. It is possible in Scots law for concerted action to arise spontaneously and give rise to art and part liability for the offence. I therefore do not think any recommendation for change in the law is required at this stage.

8 <http://www.gov.scot/Resource/0047/00475400.pdf>

9 <https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf>

Jurisdiction/extra-territorial application

6.39. The global nature of the internet can give rise to specific challenges in establishing the jurisdiction of the courts of any particular country over accused persons. These were discussed in the context of debate on the Bill to repeal the OBFTCA, and it was suggested by some witnesses and MSPs that a provision to found extra-territorial jurisdiction for the courts could be justified to ensure that offences committed on the internet could be prosecuted in Scotland.

6.40. The English case of *Sheppard and Whittle*¹⁰ illustrates the challenges in the context of a prosecution for stirring up racial hatred through the distribution of Holocaust-denial material on the internet. Sheppard uploaded the material to a website which he had set up but was hosted by a server in California. The material was accessible within the jurisdiction of England and Wales and the accused were convicted of offences under Part 3 of the Public Order Act 1986. They appealed on the basis that the material was published in the USA rather than England and Wales. The Court of Appeal mentioned three possible theories in relation to how a court's jurisdiction might apply to publications on the internet:

- that jurisdiction lies with the country in which the server is hosted;
- that jurisdiction lies with the country in which the material is downloadable;
- that jurisdiction lies with the country which was targeted by the material.

The Court of Appeal did not need to express a preference between these theories, as it considered that there was no question that it had jurisdiction in the case, since the defendants were based in England, the material was written, edited and uploaded there and the defendants had control of the website in question.

6.41. I have considered the case law of the Scottish courts relating to jurisdiction in similar cases. In the case of a common law crime, the Scottish courts have jurisdiction if an act done outside Scotland has a practical effect in Scotland¹¹. This rule has been considered in relation to statutory offences, the key decision being *Clements v HM Advocate*¹², which related to the supply of drugs where the activities in question took place in both Scotland and England. The evidence led by the Crown was solely to the effect that both accused had been involved in collecting drugs in London and in giving them to a co-accused who had travelled from Scotland, and who thereafter returned to Scotland by train. Both accused were convicted and appealed on the ground that the Scottish courts did not have jurisdiction to try them because the only evidence against them related to what they had done in London and there was nothing in the Misuse of Drugs Act 1971 which overcame the presumption that a criminal statute was not intended to have

10 [2010] EWCA Crim 824.

11 Macdonald, J.H.A., *A practical treatise on the criminal law in Scotland* (5th edition), (Edinburgh: W. Green & Son, 1948), p. 191.

12 1991 JC 62 at 73.

extraterritorial effect. The High Court of Justiciary was satisfied that conduct which occurs in Scotland, or conduct abroad which has had its result in Scotland, should be treated as amounting to a crime committed in Scotland. The court was satisfied that this result followed from the application of the accepted rules governing questions of jurisdiction, and did not require the assertion of any extra-territorial jurisdiction.

6.42. Applying an equivalent reasoning to online hate cases, I am satisfied that the Scottish courts would have jurisdiction where the harm arising from the act occurs in Scotland, even if acts leading to that harm in fact took place elsewhere. I do not therefore see any need to recommend a provision to confer extra-territorial jurisdiction in relation to hate crime or hate speech which is committed online.

Measures short of criminalisation: the role of social media providers

6.43. If the online environment is to change, and be less of a place where some people feel that the wanton abuse of others is not just acceptable but also a way to demonstrate their superiority, then this requires a shift in attitudes. The prosecution of individuals will help in serious cases. However, as we have seen in chapter 2 (underlying principles), criminalisation is just one way in which attitudes may be shifted. It is important to bear in mind the whole suite of potential responses. I therefore highlight here certain other developments which may be relevant.

6.44. I am not arguing for the sanitisation of the internet: freedom of expression is important, even when it offends. However, it is also important to recognise that gratuitously offensive comments can create an environment where freedom of speech is a reality for some but not others. The Westminster Home Affairs Select Committee concluded:

It is essential that the principles of free speech and open public debate in democracy are maintained—but protecting democracy also means ensuring that some voices are not drowned out by harassment and persecution, by the promotion of violence against particular groups, or by terrorism and extremism.¹³

6.45. The problem is pernicious and requires a wider approach to ensure that the material in question is removed speedily. In practice, this requires the involvement of social media providers to act more proactively in removing unacceptable content.

6.46. The precise way in which social media providers should become aware of relevant content and be encouraged or required to deal with it goes beyond the scope of this review. The Home Affairs Select Committee at Westminster is continuing its inquiry into hate crime and its violent consequences (which it had started before the May 2017 general election) and has taken evidence from social media providers, academics and regulators about the use of social media to perpetrate hate crime and how this might be tackled.

13 [Abuse, hate and extremism online](#), interim report May 2017, paragraph 56.

6.47. The UK Government also published its Internet Safety Strategy green paper in October 2017¹⁴. This discussed a number of measures designed to improve online safety, with a particular focus on protecting users from harm which does not reach a criminal threshold. Two policy developments which I consider might be particularly relevant here are a proposed voluntary code of practice for social media providers under section 103 of the Digital Economy Act 2017, and a possible annual internet safety transparency report.

6.48. Section 103 of the Digital Economy Act 2017 requires the Secretary of State to publish a code of practice giving guidance to social media providers. The guidance should concern the action which it is appropriate for social media providers to take against the use of their platforms for online conduct directed against individuals which involves bullying, insults or behaviour likely to intimidate and humiliate. The guidance must deal with arrangements allowing users to notify the provider of the conduct and processes for dealing with such notifications. Effectively, the code of conduct is therefore intended to cover the relationship between social media users and providers when the platform is used for bullying etc behaviour, which could include online expressions of hatred. The code of practice would not affect how unlawful conduct is dealt with but might provide an alternative means for users to deal with online hatred.

6.49. If the transparency reporting proposals are adopted, social media providers would be encouraged to produce an annual report with UK-wide data showing:

- the volume of content reported to companies, the proportion of content that has been taken down from the service, and the handling of users' complaints;
- categories of complaints received by platforms (including by groups and categories including under 18s, women, LGBT, and on religious grounds) and volume of content taken down;
- information about how each site approaches moderation and any changes in policy and resourcing.

6.50. The green paper was consulted upon between October and December 2017, and a Government response is expected shortly.

14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650949/Internet_Safety_Strategy_green_paper.pdf

Conclusions

6.51. Having reviewed the existing legislation, I consider that the current suite of offences (if supplemented in accordance with my recommendations for a gender hostility aggravation and stirring up offences) are capable of being used to prosecute all of the examples of online hate crime and hate speech drawn to my attention which justify a criminal response.

6.52. It is worth noting that some of the examples of online behaviour which were noted by respondents to the consultation, while undoubtedly harmful, distressing and offensive, would not amount to hate crime falling within the scope of this review. Examples include incitement to self-harm and suicide, online fraud and impersonating another person online. A number of the forms of harm identified by Bakalis could apply to online abuse which is not also hate crime.

6.53. I have mentioned above that the UK Government has requested the Law Commission of England and Wales to carry out a review of the law relating to online offensive communications. The review is not focused on prejudice/hate communications, but will cover all forms of trolling, harassment and cyber-bullying¹⁵. The first phase will run from April 2018 and lead to a report before the end of 2018 analysing the effect of the existing law. If deficiencies in the current law are identified, the Commission has agreed to further work looking at potential options for reform. The Law Commission's role is limited to the law of England and Wales. However, it is recognised that various offences in this area also extend to Scotland: the conclusions of that review should therefore also inform UK Government policy development which applies across the UK in relation to reserved matters. They may also be relevant to provisions of Scots criminal law which apply across reserved and devolved matters.

Recommendation 17

Recommendations 9 (gender hostility) and 13 (stirring up) will form part of an effective system to prosecute online hate crime and hate speech.

I do not consider any further legislative change necessary at this stage. However, I would encourage the Scottish Ministers in due course to consider whether the outcomes of the Law Commission's work on online offensive communications identify any reforms which would be of benefit to Scots criminal law across reserved and devolved matters.

15 <https://www.lawcom.gov.uk/project/offensive-online-communications/>

Chapter 7

**Standalone Offence:
Racially Aggravated Harassment and
Conduct – Section 50A of the Criminal
Law (Consolidation) (Scotland) Act 1995**

Introduction

7.1. This chapter considers the offence contained in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 and whether it should be retained. Section 50A is unusual within the context of the current hate crime laws in Scotland: it incorporates the element of hostility as a core part of the offence, rather than operating as a baseline offence with a separate statutory aggravation. It is therefore referred to here as a ‘standalone offence’. There is no equivalent offence relating to any of the other protected characteristics. I therefore asked specific questions in the consultation document about what practical effect it had in the race context, and how that related to equivalent hostility towards other characteristics.

7.2. The nature of the section 50A offence, the requirements of corroboration and the sentencing options will be compared to an alternative option of a combination of a baseline offence with a statutory aggravation. In determining whether section 50A is still necessary, consideration will be given to its historical significance and whether it offers any unique provision which is not covered by existing common law offences and later statutory offences introduced by subsequent legislation.

History of section 50A

7.3. Section 50A incorporates two separate offences:

- a) racially aggravated course of conduct which amounts to harassment of a person and is intended to amount to harassment or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment; and
- b) a single racially aggravated act which causes, or is intended to cause, a person alarm or distress.

7.4. In each case the offence is racially aggravated if the offender is motivated by malice and ill-will towards members of a racial group based on their membership of that group, or evinces malice and ill-will towards the person affected based on that person’s membership, presumed membership or association with a racial group.

7.5. Section 50A was created by the Crime and Disorder Act 1998 which introduced the new offence by way of amendment to the 1995 Act. The 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. The race provisions in the Crime and Disorder Bill were drafted in anticipation of the Macpherson inquiry into the death of Stephen Lawrence, which highlighted patterns of racial violence, intimidation and harassment directed at ethnic minorities which had not been subject to active police investigation or prosecution. The Macpherson report resulted in a seismic shift in the policing of hate crime, and the development of new offences were an important part in achieving this.

7.6. It is worth noting that the Crime and Disorder Act 1998 also introduced the race statutory aggravation provision discussed at chapter 3. Section 96 of the 1998 Act provides that if any offence has been racially aggravated, the court must note that in the conviction and take the aggravation into account when determining sentence. The test of when an offence is racially aggravated under section 96 is in all respects equivalent to that which applies as a key element of the section 50A offences (i.e. motivation by, or evincing, malice and ill-will related to race). The statutory aggravation could be used in conjunction with any baseline offence, including the common law breach of the peace.

7.7. During the Committee stage of the 1998 Bill, the then Lord Advocate noted that much of the behaviour which would be covered by the new standalone offence would also be covered by the crime of breach of the peace. However, he considered that there may be instances where the new offence fitted the facts of the case better, particularly in cases where there was a course of conduct amounting to harassment rather than a one-off incident. He also suggested that the new offence would also help to clarify – both to victims and potential offenders – what behaviour is properly deemed to be criminal. He quoted from the Commission for Racial Equality, who argued that: “While the common law may have certain advantages, its use has not sent out a clear public message that racial harassment and racially motivated violence is wholly unacceptable in Scotland.”¹

7.8. One factor which may have been significant in developing the section 50A offence as an alternative to the common law breach of the peace is that a breach of the peace requires a public element: there must be a risk of serious disturbance to the community. However, a section 50A offence is not limited in such a way and can be committed in private. For example, in *King v Webster*², the offence was committed where the complainer overheard racially harassing comments expressed in the course of a private telephone conversation.

Use of section 50A in practice

7.9. It is clear from the evidence which the review has gathered through conversations, the questionnaire and consultation responses that hate crime related to race remains a significant issue in Scotland. The 2004 Working Group on Hate Crime noted research into hate crime that ‘lower-level’ behaviour such as hate-based abuse and harassment were more common than serious assaults, and that such behaviour was often prosecuted under the offences in section 50A. This is borne out by the anecdotal evidence which we have received. The Coalition for Racial Equality and Rights made detailed submissions to the review emphasising the importance of the existence of a standalone charge in conveying the serious nature and State condemnation of racial harassment. It argued that it is significant to society that racial harassment is sufficiently serious to justify a standalone offence.

1 Hansard, House of Lords, 12 February 1998, col 1308.

2 2012 SLT 342.

7.10. The Scottish Government Criminal Proceedings database statistics show that the vast majority of convictions which have been secured under section 50A since it was created relate to one-off incidents (section 50A(1)(b) offence: 97% of the total) rather than course of conduct (section 50A(1)(a) offence: 3% of the total). Almost all were prosecuted summarily rather than on indictment before a jury (12,771 convictions following summary complaint; 99 on indictment).

7.11. The Crown Office hate crime figures distinguish charges reported to them under section 50A and charges reported under other offences with a racial aggravation. The figures show a very high number of charges under section 50A, although this number has diminished on an annual basis (2574 charges in 2010-11, falling to 1463 in 2016-17).

Offence of threatening or abusive behaviour: section 38 of the Criminal Justice and Licensing (Scotland) Act 2010

7.12. In 2010, the Scottish Parliament enacted the offence of threatening or abusive behaviour. The offence is committed if a person behaves in a threatening or abusive manner, the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and the perpetrator intends to cause fear or alarm or is reckless about doing so. The behaviour can consist of a single act or a course of conduct. The offence is sometimes referred to as a 'statutory breach of the peace', but differs from the common law offence of breach of the peace in some important respects. First, breach of the peace involves some public element, whereas a section 38 offence can be committed in private. As with the section 50A offence, it does not require any risk of serious disturbance to the wider community. Second, the offence is more specific in identifying the behaviour which is made criminal.

7.13. It is possible to charge the section 38 offence with any of the statutory aggravations. According to the Scottish Government Criminal Proceedings database statistics the number of convictions for section 50A offences reached a peak during the years 2011/12 and 2012/13 when 929 and 933 convictions were recorded. There then appears to be a noticeable decline, because by 2016/17 there were only 626 convictions under section 50A. Looking at similar statistics for convictions under section 38 with a racial aggravation there has been an increase in the number of convictions since the 2010 Act came into force with 125 convictions in 2011/12 and 433 convictions in 2016/2017. A reasonable conclusion which can be drawn from the numbers is that the decline in the convictions under section 50A has been accompanied by a corresponding increase in convictions under section 38 with a racial aggravation. The figures suggest that the newer offence of section 38 with a racial aggravation has been recognised and brought into use.

7.14. I have considered the wording of the section 50A and section 38 offences and concluded that they are very nearly identical when the racial aggravation provision is added. The section 38 offence requires threatening or abusive behaviour which would be likely to cause a reasonable person fear or alarm. The section 50A offence requires behaviour involving malice and ill-will which is intended to harass (defined as including alarm or distress) or to cause alarm or distress.

7.15. The tests of ‘fear or alarm’ and ‘alarm or distress’ are not identical, but it is difficult to envisage a realistic circumstance which could be prosecuted under section 50A and not also under section 38 with a racial statutory aggravation. No such examples have emerged from the review’s consultation or research. I am aware of comments made in the decision in *RR v PF Aberdeen*³, an appeal against sentence, which might be read as suggesting that section 38 is not an appropriate charge where there was no threatening or abusive behaviour other than the racially abusive language. That case involved abusive comments by a door steward who used a racist phrase when refusing the complainer entry to a club. However, this decision must be read in the light of the later decision in *Mack v PF Falkirk*⁴ which confirmed that section 38 could be used in such circumstances. In that case, a hospital patient referred to a German doctor as a ‘Nazi bastard’ and ‘Nazi German’, and continued to do so when asked to stop. *Mack* was an appeal against conviction heard by three judges. I am satisfied that the approach taken in *Mack* is correct, and that it is possible for the specific threatening or abusive behaviour which gives rise to the section 38 offence to also be relied upon to prove the aggravation. An approach which is too rigid in identifying each element risks undermining the policy intent of the legislation.

7.16. It is notable that there is no equivalent to the section 50A offence in relation to any other area of hate crime. Hate-based harassment against other groups is in fact prosecuted under section 38 or common law breach of the peace with a statutory aggravation, as envisaged by the 2004 Working Group. Given the existence of both the section 38 offence and the section 96 racial aggravation, I have considered whether there are any differences in effect or presentation which mean that a section 50A offence is still necessary in relation to race.

3 [2015] HCJAC 34.

4 [2015] HCJAC 113.

Sentencing differences

7.17. The section 50A offence allows for a maximum sentence of 12 months on summary complaint and seven years on indictment. In comparison, a section 38 offence allows for a maximum sentence of 12 months on summary complaint and five years on indictment. If the section 50A offence were repealed, allowing section 38 to remain, then arguably it may reduce the scope for sentencing by two years on indictment. However, the review has consulted the Criminal Proceedings Statistics office of the Scottish Government and has been advised that there have been no instances where a custodial sentence exceeded five years on a section 50A conviction. On that basis, the sentencing provisions provided by section 38, with a maximum of five years on indictment would have covered all previous cases. It is somewhat unusual to see sentencing provisions for seven years, it is a figure not often seen in other statutes. The maximum sentence a Sheriff may impose is five years, which may explain why there have been no convictions with a sentence greater than five years for a section 50A offence.

7.18. It is of note that the vast proportion of section 50A and section 38/section 96 cases are prosecuted on summary complaint rather than indictment. With sentencing ceilings being identical on summary complaint between section 50A and section 38 and the majority of such cases proceeding on that basis, any difference between maximum sentencing on indictment will have little practical impact.

Corroboration implications

7.19. In terms of sufficiency of evidence required to prove a section 50A offence, it must be corroborated which means that there must be more than one piece of evidence to prove all parts of the offence. This is a requirement of proof in any criminal proceedings in Scotland.

7.20. There is a difference in the sufficiency of evidence required to prove a statutory aggravation because corroboration is not essential. While the baseline offence attached to any statutory aggravation must be corroborated, the evidence to prove the racial aggravation does not need to be. From a prosecution perspective, the extent of evidence required to prove a section 38 offence with a section 96 racial aggravation attached is slightly less onerous in terms of corroboration than that required of a section 50A offence where the entire element of the offence must be corroborated.

Consultation responses

7.21. The consultation exercise asked whether the standalone offence in section 50A was necessary in view of other developments and, if so, whether it should be extended to other groups. The responses are described and analysed at chapter 5 of the consultation analysis report. As with many of the consultation questions, there was a divergence of opinion about the best way forward. However, there was some commonality in the themes raised, even among respondents who reached different ultimate conclusions.

7.22. Many respondents noted the historical and structural nature of racism. A number of respondents who had reservations about hate crime generally thought that racial hatred was somewhat different as it was described as more 'objective'; there were comments about the deep-rooted nature of racism. There were arguments that everyone should be protected against harassment (regardless of the reason for it), and for parity between the protected groups.

Conclusion

7.23. At the time section 50A was introduced in 1998 it was a significant statutory development in that it was part of a suite of provisions intended to deal with racially aggravated offending. However, I have concluded that it is no longer needed to meet the aims which it was intended to achieve when it was created in 1998. In particular, the advent of the offence of threatening or abusive behaviour contrary to section 38 means that there is an alternative route to target the behaviour, which is well understood by the criminal justice authorities and which is clear about the nature of the conduct in question. The statistics demonstrate that this route is being used in practice in conjunction with statutory aggravations to tackle hate-based prejudice on different grounds.

7.24. I am concerned that the continued use of section 50A has a potentially negative effect. It makes the scheme of hate crime legislation more complicated than it needs to be, which risks causing confusion to the public. It also complicates the statistics and makes it difficult to identify trends. The way in which Police Scotland record an incident may depend on whether there is corroborating evidence of any racial element, rather than the nature of the offence itself. I do not think there is a sound, principled basis to maintain the two alternative routes.

7.25. I recognise the force of the arguments that section 50A had a very important symbolic significance when it was enacted. However, I consider that the symbolism of section 50A should be considered in the light of other developments in equality and hate crime law since 1998, which now cover a number of protected characteristics. I consider that a consistency of approach is important to avoid a perception of there being a counter-productive 'hierarchy' between the different protected characteristics. A human-rights based approach would suggest that legislation should apply consistently to protected groups unless there is a strong reason to do otherwise.

7.26. I do not detract in any way from the seriousness of racial harassment. Racially aggravated offending remains a very significant issue, with a corrosive impact of society. I understand the arguments made by some parties that removing a specific legislation provision risks reducing the emphasis which is placed on tackling that form of offending or diluting the message that it is condemned by the State. However, I do not agree that is a necessary or likely consequence of repeal, particularly when Scots law includes a clear and focused alternative charge which can be used. It remains important that crimes of racial violence and racial harassment are dealt with seriously, but this is achieved more through the resources and procedures which are devoted to the issue than the specific form of legislation applied. Effective action to tackle racial harassment and to convey its seriousness to the public does not require a separate legislative framework. I therefore recommend the repeal of section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

Recommendation 18

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.

Chapter 8

The impact of the repeal of section 1
of the Offensive Behaviour at Football
and Threatening Communications
(Scotland) Act 2012

Introduction

8.1. This chapter is concerned with the impact on hate crime legislation of the repeal of section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the 2012 Act). In it I trace the history of the Act and its repeal. In relation to the hate crime aspects of section 1, I explore whether existing offences are adequate to deal with the conduct which was formerly prosecuted under the section and whether there is any gap in the law left by its repeal. I also explore a number of particular issues related to the repeal of section 1.

History of the 2012 Act

8.2. The Act was brought into force on 1 March 2012. It was introduced in the light of concerns about a history of football related events culminating in a number of serious incidents in 2011. The history is described in the consultation paper and the Academic Report. Suffice to say that these concerns led to a meeting in March 2011 involving Scottish Ministers, the police, football clubs and football associations. Subsequently, the Scottish Government introduced the Bill that became the 2012 Act.

8.3. As more fully discussed in the consultation paper, following its introduction there was significant opposition to the Act, including disapproval by opposition parties in the Scottish Parliament. On 2 November 2016, a motion by Douglas Ross MSP urging the Scottish Government to repeal the Act was passed. On 21 June 2017, James Kelly MSP introduced a member's Bill to repeal the 2012 Act. After the Repeal Bill passed through its parliamentary stages, the Act was repealed on 20 April 2018 and its provisions are no longer in force.

The view of Parliament in support of repeal of section 1

8.4. In the written and oral evidence submitted to the Justice Committee at stage 1 a wide range of conflicting and strongly held views were expressed about the proposed repeal of section 1 of the 2012 Act. This was also a feature of the consultation conducted by the review.

8.5. The central criticism of section 1 of the 2012 Act, repeatedly expressed in the course of the parliamentary process and reflected in the responses to the consultation paper, was that it focused solely on regulated football matches. Although some views were expressed that the singing of sectarian songs etc. should not be the subject of sanction under the criminal law, that view was not widely held. The Justice Committee unanimously condemned sectarianism, hate crime and offensive behaviour and considered that it was unacceptable. The majority view as expressed in evidence to the Justice Committee, in the parliamentary debates and in response to the review was that criminal sectarian behaviour should be the subject of prosecution, not just in relation to regulated football matches, but *wherever* it occurred .

8.6. The majority view expressed in the parliamentary debate was that the pre-existing criminal law adequately covered the conduct struck at by section 1. Reliance was placed by a number of MSPs on the evidence of the Law Society of Scotland that all convictions under section 1 in the previous year could have been prosecuted under existing criminal law, namely, breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA), which deals with threatening or abusive behaviour. I shall explore whether that contention is correct in relation to the hate crime aspects of section 1.

Section 1 and hate crime

8.7. Before doing so, it is necessary first to be clear as to which of the behaviours identified in section 1 fall within the remit of the review. Section 1 created an offence which is committed when an individual engages in behaviour in relation to a regulated football match which is likely, or would be likely, to incite public disorder. The section identifies five categories of behaviour:

- behaviour expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of a religious group, a social or cultural group with a perceived religious affiliation or a group defined by reference to colour, race, nationality (including citizenship), ethnic or national origins, sexual orientation, transgender identity or disability (section 1(2)(a));
- behaviour expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of such a group (section 1(2)(b));
- behaviour that is motivated (wholly or partly) by hatred of such a group (section 1(2)(c));
- behaviour that is threatening (section 1(2)(d)); or
- other behaviour that a reasonable person would be likely to consider offensive (section 1(2)(e)).

8.8. Not all the behaviour targeted in section 1 relates to hostility based on identity characteristics. The types of behaviour identified in section 1(2)(a)-(c) clearly do fall within the remit of the review. These behaviours involve expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of a specified group, or motivated (wholly or partly) by hatred of such a group. Section 1(2)(d) of the 2012 Act, which strikes at behaviour which is threatening, does not fall within the remit of the review as there is in relation to this particular subsection no qualification of hatred or prejudice. Subsection (2)(e) identifies “other behaviour that a reasonable person would be likely to consider offensive”. Although this subsection is very widely drafted and consequently could include behaviour which has nothing to do with hostility, I took the view that I should include this subsection in the remit of the review. This was because, no doubt reflecting the Lord Advocate's Guidelines on prosecution of offences under section 1, the vast majority of prosecutions under this subsection related to songs, speech or gestures

that glorify terrorist organisations such as the IRA. Whether such behaviour does come within the ambit of hate crime will be explored in more detail later in this chapter.

8.9. When the threatening behaviour charges are left out of account, the history of the operation of section 1 of the 2012 Act makes it clear that the conduct giving rise to these charges largely comprised singing, speech, waving of banners and making of gestures. The charges which were brought generally involved either the expressing or stirring up of hatred of the Roman Catholic or Protestant religions or offensive behaviour with a connection to Irish politics, particularly the politics of Northern Ireland.

Consequences of the repeal of section 1: relevant pre-existing law

8.10. As the majority view in the parliamentary debates was that the pre-existing law was adequate to deal with the types of behaviour falling within section 1, it is necessary for the review to explore the pre-existing common law and statutory provisions in order to test this view in relation to hate crime. This involves exploring whether breach of the peace and/or section 38 CJLSA aggravated by one of the statutory aggravations in relation to protected characteristics, would cover offences currently caught by section 1.

Breach of the peace

8.11. The common law crime of breach of the peace has evolved over many years. In 2002 the High Court was satisfied that the crime was formulated with sufficient certainty to meet the requirements of the European Convention on Human Rights. Its nature is now well understood. What is required to constitute the crime of breach of the peace is conduct:

severe enough to cause alarm to ordinary people and threaten serious disturbance to the community... What is required ... is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person...¹

8.12. The test is conjunctive: both elements (potential alarm and potential disturbance to the community) require to be present for the offence to be established². The test is an objective one and must involve some public element³. The disturbance may arise directly from the conduct itself or may arise from the response of third parties to it: persons may be “tempted to make reprisals at their own hand”⁴; or the conduct may be “likely to cause a serious reaction among other adults” (*Paterson*). If there is no evidence of actual alarm, the conduct must be ‘flagrant’ in the sense of being alarming and seriously disturbing to any reasonable person.⁵

1 *Smith v Donnelly* 2002 JC 65 at para [18].

2 *Paterson v HM Advocate* 2008 JC 327 at para [23]; *Harris v HM Advocate* 2010 JC 245 at para [15].

3 *Montgomery v Harvie* 2015 JC 223 LJC, (Carloway), delivering the opinion of the court at para [13].

4 *Raffaelli v Heatly* 1949 JC 101 per LJC (Thompson).

5 *Wotherspoon v PF Glasgow* 2017 SCCR 505; [2017] HCJAC 69.

8.13. Breach of the peace may be subject to one or more of the statutory aggravations in relation to protected characteristics. The maximum sentence for breach of the peace is 12 months on summary complaint and, on indictment, life imprisonment.

8.14. An example of a conviction for breach of the peace in the context of a football match is found in *Walls v Brown*⁶. Mr Walls was convicted at the sheriff court at Kilmarnock on a summary complaint specifying racially and religiously aggravated breach of the peace committed at a Kilmarnock v Rangers game. He sang sectarian songs and made remarks of a racial nature: he sang the Famine Song which included the words, "The famine is over why don't you go home"; he was standing up and encouraging others to sing; he shouted "Fenian bastards" and "F*** the Pope". He persisted in his conduct after being warned by stewards. Although no one had complained to the stewards about his behaviour, in their evidence they described his conduct as being offensive and 'badgering' other supporters.

8.15. Applying the test in *Smith v Donnelly*, quoted above, the High Court upheld the conviction. It was in no doubt that the conduct of Mr Walls did amount to a breach of the peace, even in the context of a football match where at least shouting and singing, or hearing shouting and singing, were part of the match experience expected by all attending the stadium. What was shouted by the appellant was an expression of religious prejudice, or racial bigotry, or both. The court considered that the lyrics of the Famine Song were racist in calling upon people native to Scotland to leave the country because of their racial origins.

8.16. The court concluded that Mr Walls' behaviour would be considered by many people to be offensive. Such use of offensive and abusive language might in itself may be sufficient to merit a conviction for a breach of the peace since, even in the context of a football match, such conduct may be so flagrant that it can be regarded as severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community. It may be 'genuinely alarming and disturbing, in its context, to any reasonable person', given that there are many spectators at football matches who actually want to watch the game rather than spend their time abusing the opposition support.

8.17. In relation to the aggravations, the court held that the conduct displayed malice and ill-will towards those of the Roman Catholic faith and malice and ill-will towards people of Irish descent living in Scotland.

6 2009 SCCR 711.

Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010

8.18. Section 38 of CJLSA provides for an offence of behaving in a threatening or abusive manner which would be likely to cause a reasonable person to suffer fear or alarm, either intending to cause that, or reckless about whether fear or alarm might be caused. The behaviour captured by section 38 can be of any kind, including, in particular, things said or otherwise communicated as well as things done. It may consist of a single act or a course of conduct. Thus, a wide range of conduct is caught by this provision. Again, a statutory aggravation can be applied to this baseline offence. A person guilty of the offence is liable on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

Conclusion in relation to protected characteristics

8.19. It seems clear, therefore, that singing and shouting words of a racist or religiously aggravated nature, or aggravated in relation to other protected characteristics may, in the context of a football match, constitute a charge of breach of the peace or a contravention of section 38, appropriately aggravated with a statutory aggravation. Thus, hate crime offences committed in the context of a regulated football match held in Scotland could be prosecuted in Scotland under pre-existing criminal law. This would extend to the circumstances provided in section 2(2) of the 2012 Act in respect of behaviour occurring outside the football ground or on a journey to or from a match.

Songs in support of proscribed organisations

8.20. The issue may become more problematic in relation to singing songs in support of proscribed organisations. The UVF, IRA and the INLA are all proscribed terrorist organisations under the Terrorism Act 2000.⁷ A question arises as to whether, in circumstances where the singing of songs such as the ‘Roll of Honour’ constitutes an offence, an appropriate statutory aggravation in relation to a protected characteristic could apply. As was noted by the court in *Donnelly and Walsh v PF Edinburgh*⁸, the lyrics of the ‘Roll of Honour’ proclaim support for members of the Irish Republican Army and the Irish National Liberation Army who died during the hunger strike at the Maze Prison near Belfast in 1981. The lyrics contain such lines as “England you’re a monster. Don’t think that you have won. We will never be defeated while Ireland has such sons” and “Your souls cry out. Remember our deaths were not in vain. Fight and make our Homeland a nation once again”. In prosecutions under section 1 this behaviour was prosecuted under section 1(2) (e), namely, behaviour that a reasonable person would be likely to consider offensive which is or would be likely to incite public disorder.

7 Terrorism Act 2000 s 3 and schedule 2

8 2015 SCCR 214.

8.21. The singing of this song in the context of a football match or in certain other circumstances might well constitute a breach of the peace or a contravention of section 38 CJLSA. Many people would find the singing of it, or similar songs in support of proscribed organisations, offensive and alarming. At least one attempt has been made in the past by the Crown to argue that the Roll of Honour may be interpreted as being anti-Protestant and therefore come within the ambit of the religious aggravation in section 74 CJLSA⁹. As far as the review is aware, this issue has not been examined by the court of criminal appeal. Thus, a question arises as to whether singing an IRA song could constitute hate crime in the sense of being an offence targeting a protected characteristic.

8.22. In chapter 3, I rejected the proposition that hate crime should extend to political statements. If it is accepted that the words of the Roll of Honour are of a political rather than a religious nature, then in circumstances in which singing of the song would constitute a criminal offence, none of the statutory aggravations could apply and the offence would not come within the ambit of hate crime. The point about the IRA and the INLA is that they are proscribed organisations as, indeed, are the UVF and certain other loyalist organisations. Where the singing of songs in support of proscribed organisations constitutes a criminal offence, the common law aggravation of glorifying a proscribed organisation can be applied. I was advised by the police that this was the practice prior to the introduction of the 2012 Act.

Sectarianism

8.23. In its report at Stage 1, the Justice Committee noted that scrutiny of the Repeal Bill had sparked a new debate on sectarian behaviour. It believed that this parliamentary process presented an opportunity to make progress on tackling sectarianism. The Committee considered that it was important that the Scottish Government gave consideration to introducing a definition of sectarianism in Scots Law, which, whether or not the 2012 Act was repealed, would help any future parliaments and governments in taking forward laws to tackle sectarianism. In response, at the Stage 1 debate the Minister explained that the government were working on a definition. The Scottish Ministers have appointed a working group chaired by Professor Duncan Morrow to take that forward.

Definition

8.24. A number of definitions have been advanced in the past. The Report of the Cross-party Working Group on Religious Hatred published in 2002¹⁰ suggested that in the context of football, “sectarian fan rivalry is a modelled combination of Catholic/Protestant religious differences, Northern Ireland politics and nationalistic iconography”.

9 *Halaka v PF Dundee* 25 March 2011. The sheriff rejected the Crown contention that the singing of songs in support of the IRA came within section 74.

10 Tackling Religious Hatred: Report of Cross-Party Working Group on Religious Hatred, December 2002

8.25. In its final report published in 2015 the Advisory Group on Tackling Sectarianism in Scotland¹¹ suggested a definition in the following terms:

...Sectarianism in Scotland is a mixture of perceptions, attitudes, actions, and structures that involves overlooking, excluding, discriminating against or being abusive or violent towards others on the basis of their perceived Christian denominational background. This perception is always mixed with other factors such as, but not confined to, politics, football allegiance and national identity...

8.26. Another view that was expressed to the review sees sectarianism in Scotland as purely a political and cultural phenomenon, rather than a religious one. While historically sectarianism may be rooted in religious prejudice, the argument is that it has developed into a political and cultural divide between a relatively small number of protagonists. On this view it would be wrong to conflate sectarianism with hostility directed at a religion and it would not be appropriate to apply an aggravation of religious prejudice to an offence of a sectarian nature, even if expressed in anti-religious language.

8.27. The view that there is a political aspect to sectarianism is not universally held. Giving evidence in 2011 to the Justice Committee considering the Bill founding the 2012 Act, Professor Tom Devine contended that the phrase 'political sectarianism' was a contradiction in terms. The professor told the review that the definition which he considered to be appropriate was based on that advanced in 2004 by Bruce and others in *Sectarianism in Scotland*:

An extended and general culture of improperly treating people in terms of their real or assumed religious belief.

8.28. The group identity had been informed by historical religious divisions.

Prosecution practice in Scotland

8.29. When section 1 was in force the practice of the Crown in Scotland was to prosecute cases involving hostility towards either the Roman Catholic or Protestant religions as behaviour motivated by hatred of a religious group, or expressing hatred of, or stirring up hatred against, an individual because of the individual's membership of a religious group. Behaviour which comprised glorifying a proscribed organisation, such as the IRA or the UVF was prosecuted as "other behaviour that a reasonable person would be likely to consider offensive". Prior to the introduction of section 1, the practice was to prosecute an offence, such as breach of the peace, aggravated by a statutory aggravation of religious prejudice or a common law aggravation of glorifying a proscribed organisation.

11 Tackling Sectarianism and its Consequences in Scotland: Final Report of The Advisory Group on Tackling Sectarianism in Scotland – April 2015

Northern Ireland

8.30. Section 37 of the Justice Act (Northern Ireland) 2011 creates an offence of chanting at a regulated football match where the chanting is of an indecent nature; a sectarian or indecent nature; or is threatening, abusive or insulting to a person by reason of colour, race, nationality, ethnic or national origins, religious belief, sexual orientation or disability. As is explained in the Academic Report, the reference to sectarian chanting was not included in the Bill as introduced but was added at a later stage. There is no definition of the term ‘sectarian’ in the Act, although in the course of the parliamentary procedure an attempt was made to introduce one in the following terms: “chanting is of a sectarian nature if it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s religious belief or political opinion”.

8.31. When the Police Service of Northern Ireland (PSNI) record hate crime they distinguish between ‘sectarian’ hate crime and ‘faith/religious (non-sectarian)’ hate crime and maintain separate records for each. In the annual bulletin of PSNI statistics on hate crime published 12 January 2018, *Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2016/17* sectarianism is described in the following terms:

The term ‘sectarian’, whilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents of bigoted dislike or hatred of members of a different religious or political group. It is broadly accepted that within the Northern Ireland context an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, or Loyalist or Republican. However sectarianism can also relate to other religious denominations, for example, Sunni and Shi’ite in Islam.

8.32. In relation to religiously motivated crimes the document states:

A faith or religious group can be defined as a group of persons defined by reference to religious belief or lack of religious belief. This would include Christians, Muslims, Hindus, Sikhs and different sects within a religion. It also includes people who hold no religious belief at all.

8.33. There is no statutory aggravation in relation to sectarianism in Northern Ireland. The Public Prosecution Service (PPS) take the approach that, where applicable, offences motivated by sectarianism may be considered to be aggravated on the basis of either race or religion, depending on the circumstances of the case. Some offences, which are considered in broad terms to be sectarian, do not fall within either statutory category of race or religion. In such situations the offence can still be prosecuted, but the legislation relating to the aggravation element will not apply.

Discussion

8.34. From the material examined above a number of points may be noted. First, it is clear that the concept of sectarianism extends beyond hate crime. The references to 'exclusion' and 'discrimination' in one of the definitions emphasise that sectarianism is not restricted to crime at all. It is a broader societal issue. In addition to criminal offences, it may feature in non-legislative contexts and in circumstances governed by the civil law. Thus, many aspects of sectarianism are beyond the remit of this review.

8.35. Secondly, there is a range of strongly held views as to what is meant by the term. There are sharp divisions of opinion as to whether it is a religious concept, a political and cultural concept or involves a mixture of religion, politics and culture.

8.36. Thirdly, the Justice Committee, by referring to 'future parliaments and governments' clearly contemplated a developing long-term debate in relation to laws to tackle sectarianism.

8.37. Fourthly, the working group has been established to work on a definition of sectarianism and they are best suited to take that forward.

8.38. It may be that as a result of the labours of the working group and future discussion and debate a specific bespoke means of dealing with offences of a sectarian nature may emerge. In the meantime, I am satisfied that criminal conduct in the context of a football match, which gave rise to prosecutions under section 1 when it was in force, can be prosecuted under the existing law. In relation to an offence characterised by religious prejudice a statutory aggravation may be applied. In relation to an offence with a political aspect, while, as I have explained above, I have concluded that hate crime should not extend to political identity, where the offence involves glorifying a proscribed organisation, a common law aggravation may be applied. The same approach can be adopted in relation to offences of a sectarian nature outwith the context of football. The majority of respondents to the consultation paper considered that it was appropriate to deal with sectarian singing, chanting etc in the same way wherever it occurred.

8.39. In these circumstances, I am satisfied that there is no gap in the law and am content to leave the issue of sectarianism to be taken forward in the manner suggested by the Justice Committee and currently being implemented by the Scottish Ministers.

Extraterritorial jurisdiction

8.40. The one feature of section 1 which does not exist in relation to breach of the peace or section 38 is the extraterritorial jurisdiction provided in section 10(1) OBFTCA which permitted prosecution in Scotland of an offence under section 1 committed outside Scotland by a person who is habitually resident in Scotland. It appears that the Scottish Parliament, by repealing section 1 in the knowledge that the existing offences did not have extraterritorial jurisdiction, was prepared to accept the loss of that power. In any event, the evidence available to the review did not indicate that the extraterritorial provision was much used.

Football banning orders

8.41. Sections 51 to 56 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 provide for the making of football banning orders. Subsection 51 makes provision for the making of such an order where a person aged over 16 years is convicted of an offence related to a football match and the offence involved violence or disorder. ‘Related to a football match’ is defined as including: an offence committed at a football match or while the person is entering or leaving, or trying to enter or leave, the ground; an offence committed on a journey to or from a football match or “otherwise, where it appears to the court from all the circumstances that the offence is motivated (wholly or partly) by a football match”.

8.42. Football banning orders may be imposed following convictions for any offence provided that the offence relates to a football match and involves violence and disorder. The definition of ‘disorder’ in section 56 specifically includes stirring up hatred against groups of persons or individuals based on their membership of protected groups.

8.43. A football banning order prohibits the person from entering any premises for the purposes of attending any regulated football matches in the United Kingdom. It also has provisions in relation to regulated football matches outside the United Kingdom. It may extend to maximum periods of 3, 5 or 10 years, depending on the circumstances. The evidence in the fact-finding stage of the review indicated that football banning orders were an effective deterrent as persons did not wish to be prevented from attending a match.

8.44. Under section 52 of the 2006 Act there is provision which allows the police to apply to the sheriff by summary application for a football banning order on a person who has not committed an offence. As some football clubs had expressed the view that a similar provision which would allow a football club itself to apply for a football banning order would be a useful tool in maintaining discipline, the consultation paper sought views on that suggestion. Although there was considerable support in principle from those who responded to this question, I am not inclined to recommend this approach. In the next section I consider the Unacceptable Conduct Rules developed by the SPFL and the SFA.

These have recently been revised. The range of sanctions available against a supporter who has engaged in unacceptable behaviour includes: exclusion from the home ground of the Club concerned; exclusion from all forms of club organised and/or supported travel; confiscation, without compensation, of any season tickets held by the person for a period, or periods, of time, or indefinitely and/or exclusion from being able to purchase tickets for away matches.

8.45. As explained in the next section, the implementation of the Rules is being monitored. I consider that a better approach would be to allow the effectiveness of these non-legislative Rules to be monitored and tested rather than to introduce an additional sanction at this stage. I also note that over the years very few summary applications for a football banning order have been made by the police in respect of a person who has not committed an offence. I think it unlikely that there would be many such applications made by football clubs. In any event, if in a particular case a football club considered that it was unable to achieve the desired result through the Unacceptable Conduct Rules, it could raise the matter with the police and invite them to seek a football banning order.

Non-legislative interventions

The Scottish Premier Football League Limited (SPFL) and the Scottish Football Association (SFA): Unacceptable Conduct Rules

8.46. I note certain steps taken by the governing bodies of Scottish football. Each has developed Unacceptable Conduct Rules which were revised for the current football season. The bodies have identical codes and similar structures for dealing with unacceptable conduct in relation to the football matches falling within their jurisdictions. In the consultation paper I described the Rules in some detail.

8.47. Unacceptable conduct is defined as that which is violent and/or disorderly. Disorderly conduct includes that which stirs up hatred against listed groups or against individuals based on their perceived membership of such groups. The listed groups are: 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.

8.48. 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 such as examining CCTV footage to identify persons engaging in unacceptable conduct such as singing sectarian songs. It is expected that such persons will be disciplined, for example, by being deprived of their season ticket. Clubs require to report incidents to the governing bodies.

8.49. I note that these rules appear to be comprehensive and well-structured. A wide range of groups is covered by the rule against stirring up of hatred. Significant sanctions are available in relation both to individual supporters and the clubs. Much will turn on successful implementation.

8.50. In relation to implementation, in the consultation paper I noted the report and subsequent review conducted by the Advisory Group on Tackling Sectarianism in Scotland, chaired by Professor Duncan Morrow, to which I have already referred. The Group published a report in 2015 and a review in 2017. In relation to the Unacceptable Conduct Rules, in the 2017 review Professor Morrow observed that evaluation and monitoring of unacceptable conduct should begin by the start of the new 2017-2018 football season. While expressing a degree of scepticism as to whether these proposals would be sufficient to change what he described as “the evident sectarian behaviour in Scottish football”, he went on to state that in keeping with the spirit of the Advisory Group’s Report that changes should be evidence-based and collaborative, the sincerity and effectiveness of the proposals must now be explicitly and fully tested. He identified a number of outcomes which he considered would require to be supported by evidence. These included measurable evidence that sectarian singing at football matches had reduced and been replaced by other forms of identification.

8.51. For the purposes of this report, I simply draw attention to these ongoing developments which will, no doubt, be the subject of further monitoring.

Views expressed in the Scottish Parliament

8.52. In the debates on the repeal of section 1 of the 2012 Act calls were made for a collaborative approach. The police, football clubs and football fans needed to work together to promote good behaviour at football. It was particularly important that the issue of sectarianism should be tackled through education, particularly of young people. Cultural change was required in homes, classrooms and communities.

Conclusion

8.53. The will of the Scottish Parliament was clear that in repealing section 1 of the 2012 Act, it considered that pre-existing law was adequate to deal with criminal behaviour at regulated football matches in Scotland. From a review of the cases, I consider that, in relation to the hate crime aspects of section 1, that contention is well founded, with the exception of the extraterritorial jurisdiction. The statutory aggravations in relation to each of the current protected characteristics may attach to an existing offence. In addition, in chapter 5 I recommend that more general stirring up offences should be introduced. I have noted the non-legislative interventions such as the regulations introduced by the governing bodies in football. It seems to me that taking all these considerations into account it is unnecessary to recommend any statutory replacement for section 1 of the 2012 Act.

Recommendation 19

No statutory replacement for section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 is required.

I do not consider it necessary to create any new offence or statutory aggravation to tackle hostility towards a sectarian identity (insofar as that is different from hostility towards a religious or racial group) at this stage. The conclusions of the working group which has been appointed to consider whether and how sectarianism can be defined in law will provide Scottish Ministers and Parliament with the basis to debate how best to deal with offences of a sectarian nature in due course. That debate might include consideration of whether any such offences should be classed as a form of hate crime or treated as something distinct.

Chapter 9

Consolidation of Legislation

9.1. The previous chapters of my report consider the substantive effect of the law. I have identified those parts of the existing legislative structure which are working well and those where I am recommending change. The legislation has developed in a piecemeal fashion over time and is found in a number of separate legal provisions. In this chapter, I consider whether there would be benefit in bringing all of those provisions of legislation together in one, consolidated piece of legislation.

Consultation responses

9.2. As I mentioned in chapter 1 (process and methodology), I produced three versions of the consultation paper. In the full consultation paper (which was aimed mainly at the technical or legal audience), I asked a specific question about whether there is a need to bring all the statutory sentencing provisions and other hate crime offences together in a single piece of legislation. I considered this to be a technical issue, because it is not about the effect that the legislation and the offences have in practice, but about how it is set out on the statute book.

9.3. The responses to the consultation were mixed and are summarised in the analysis report. A majority of organisations favoured consolidation, compared with a minority of individuals.

9.4. Those who favoured consolidation did so for a number of reasons. They felt that consolidated legislation (along with appropriate guidance) would bring clarity, transparency and consistency of approach to the law. A unified approach was thought to be appropriate, given the similar issues encountered in most cases. Many considered that having all hate crime provisions in one place would avoid the perception that there is a ‘hierarchy’ of characteristics, and would make it easier to deal with cases involving more than one protected characteristic. Consolidation was also seen as an opportunity to modernise and rationalise, and would allow overlaps, gaps and inconsistencies to be addressed and confusion and uncertainty to be dealt with. Some considered that creating one new piece of legislation would be helpful in raising awareness and understanding of hate crime, would allow for greater alignment with other equality policies and would be helpful for data collection.

9.5. Amongst those who disagreed with the idea, it was argued that consolidation might result in an over-simplified generic approach. In particular, respondents felt there might be a potential risk to freedom of speech. It was argued that a single piece of legislation might become unwieldy or overly prescriptive. Some felt that the time and effort involved in consolidation is not merited. This view was generally expressed by those who had principled objections to the concept of hate crime legislation.

9.6. Two organisations (Engender and CRER) expressed particular concern that consolidation could lead to particular types of hate crime being given less focus than they would have if dealt with in separate pieces of legislation. Engender referred to the consolidation of equality provisions (in particular, public sector equality duties) in the Equality Act 2010. They felt that this had led to equality issues being dealt with in an undifferentiated way, glossing over or ignoring the specific disadvantage and discrimination faced by specific groups of people. They said: “Consolidation and simplification has resulted in the experience of women and girls becoming lost inside a list of nine protected characteristics, as public authorities attempt to develop one set of policies, practices, and interventions that will bring about equality for all. The laudable aim of consistency has had the unintended consequence of undermining the very purpose of the law.”

Discussion

9.7. I have considered the arguments and concluded that all provisions relating to hate crime and hate speech should be consolidated into one piece of legislation. This would cover all statutory aggravations and provisions relating to incitement/stirring up of hatred, including the subject-matter currently covered by Part 3 Public Order Act 1986, section 96 Crime and Disorder Act 1998, section 74 Criminal Justice (Scotland) Act 2003, and the Offences (Aggravation by Prejudice) (Scotland) Act 2009, as well as the new provisions recommended in the preceding chapters.

9.8. The review is recommending substantive amendments to some of these pieces of legislation and creating some new provisions in related subject areas in any event. If those recommendations are accepted, the Parliament and other relevant organisations and individuals would be devoting time to considering a Bill on the topic of hate crime and hate speech. Although some additional time and resource would be required to consolidate all relevant legislation in one place, that would in my view be worthwhile in view of the advantages of consolidation set out above.

9.9. I do not agree that consolidation risks over-simplification and generalisation. The principles behind statutory aggravations and incitement to hatred are relatively simple and consistent across the different characteristics. Insofar as specific provisions are required to deal with how freedom of expression is to be safeguarded in relation to a particular characteristic, that can be done within the framework of a single piece of legislation without making the legislation itself unwieldy.

9.10. I recognise the concerns expressed by some that consolidation might risk authorities losing focus on a particular characteristic. Engender have made this point forcefully in the context of the change from the gender equality duty under section 76A of the Sex Discrimination Act 1975 to the wider public sector equality duty under Part 11 of the Equality Act 2010. However, I think the risk of ‘losing focus’ arises much more in relation to provisions that require proactive policy making (where the detail of a particular

strand might be lost if the obligation is too wide ranging) than in relation to provisions which apply in individual cases and result in individual complaints or prosecutions. There does not appear to be any evidence that the number of sex discrimination or equal pay claims has reduced as a result of those rights being contained in the Equality Act rather than gender specific legislation. I therefore do not consider that such a loss of focus necessarily follows from consolidation; it is instead a question of how any consolidated provisions are given effect to in practice.

9.11. In this regard, the process of consolidating existing legislation will give relevant authorities (including the police and the COPFS) an opportunity to renew and revise existing procedures and consider how they interact with other relevant parties. With appropriate resourcing and leadership, I therefore view this as an opportunity to improve the experience of those who are involved in the criminal justice system in relation to hate incidents.

Legislative competence of the Scottish Parliament

9.12. Some of the existing hate crime offences are contained in legislation which was originally passed by the Westminster Parliament. This raises questions about whether the Scottish Parliament has the legislative competence to amend or consolidate them. I do not intend to go into the technical detail here, but simply note that it is in principle possible for an Act of the Scottish Parliament (ASP) to amend legislation passed at Westminster. Any analysis of legislative competence would have to be based on an actual draft provision, and so it is not appropriate to go into the matter any further at this stage. I think it very likely that any new ASP which consolidates existing hate crime legislation and creates new provisions will be within the legislative competence of the Scottish Parliament, even if it repeals pre-devolution Westminster legislation.

9.13. If there are any minor areas where there were legislative competence difficulties, section 104 of the Scotland Act 1998 provides a mechanism which can allow these to be resolved. It confers a power on UK Ministers to make subordinate legislation to make any provision which is ‘necessary or expedient’ in consequence of any provision made by or under any Act of the Scottish Parliament. Such subordination legislation can amend primary legislation.

Recommendation 20

All Scottish hate crime legislation should be consolidated into one new hate crime statute.

Chapter 10

Procedural Issues

10.1. This chapter looks at various procedural issues which have been raised during the course of the review. The first set of issues deal with support for victims and those affected by hate crime: tackling under-reporting, the effectiveness of third party reporting centres and how key parts of the criminal justice system communicate with victims of hate crime. The second set of issues are concerned with the how the criminal justice system deals most effectively with perpetrators of hate crime. In particular, I consider the potential application of restorative justice techniques.

Support for Victims

10.2. Reporting hate crime and the criminal justice response are integral parts of the implementation of hate crime legislation. An effective suite of hate crime laws must be underpinned and supported by:

- a willingness on the part of victims of hate crime to report it; unless it is reported no prosecution is possible and victims will not receive justice; and
- a criminal justice system that is effective and co-ordinated.

10.3. In the information gathering stage of the review, issues relating to reporting hate crime and the way in which victims were dealt with in the criminal justice system were repeatedly raised. Because of that I included questions on these issues in the consultation paper. I recognise that much of what I have learned from the responses in these areas concerns operational and procedural matters rather than the direct application of legislation and is therefore beyond the remit of this review. It will clearly be for others, namely policy makers and a range of partners in the criminal justice system, to consider how such work is driven forward. I have been advised that there are currently a number of initiatives and programmes in place. By noting these and setting out the key responses to my consultation paper, I hope to stimulate debate and encourage the creation of a strategic approach in the implementation of hate crime legislation.

Under-reporting

The issues

10.4. It became clear at an early stage of the review that there was a serious problem with under-reporting of hate crime. In chapter 9 of the consultation paper I listed the concerns that had been expressed and sought views as to how levels of under-reporting might be improved. The concerns included a lack of awareness of what hate crime is; an acceptance by people that certain types of abusive conduct was part of daily life and ‘just happened to people like us’; not knowing to whom to speak to report the crime or whether anything would come of doing so; a general lack of confidence in the police and a concern that no action would be taken by the criminal justice authorities; and the negative experience of others of criminal proceedings.

Responses to consultation paper

10.5. The analysis report to my consultation paper gives a comprehensive summary of how respondents thought that people could be encouraged to report hate crime. Many respondents told me that it was often unclear to them what hate crime is and how serious the conduct needed to be before it should be reported. Some respondents suggested that clear laws, explained in easily understood language brought together in one place, would enhance understanding of the type of conduct that falls within the meaning of hate crime. If the recommendations of my review are accepted that might go some way to meeting these concerns. Some respondents pointed out the need for education and awareness among the general public, and in specific communities, about what constituted hate crime, how it might be reported and the processes for prosecuting it. It was important to discourage people from accepting hostile or abusive behaviour as the norm.

10.6. There was a general view that a change of culture was needed within the police and criminal justice system in order to improve reporting. There needed to be a clear message conveyed to the public that complaints would be taken seriously and that there would be no negative consequences for individuals who reported hate crimes. Positive experiences and outcomes for those who made complaints would, over time, build trust and confidence in the criminal justice system. The COPFS response to my consultation highlighted that it would be beneficial to: “focus on ways to improve community cohesion and to encourage citizens to recognise and challenge prejudice when it happens in an appropriate manner. Education on rights and responsibilities, for all ages, would be valuable.”

Action underway

10.7. The Cabinet Secretary for Communities, Social Security and Equalities has established a Tackling Prejudice and Building Connected Communities Action Group to take forward a programme of work¹ in response to the recommendations made by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion². This group will consider a range of issues including: definitions and terminology; underreporting; third party reporting; hate crime in the workplace; online hate crime; and data and evidence.

10.8. I am pleased to note that the action group is specifically addressing the issue of under-reporting. This work will help to raise awareness and provoke further debate, not only on what constitutes hate crime, but also on the steps that can be taken to prevent incidents.

1 <http://www.gov.scot/Resource/0052/00520818.pdf>

2 <http://www.gov.scot/Resource/0050/00506074.pdf>

10.9. I also noted a number of marketing campaigns designed to help to spread key messages. The Scottish Government, in collaboration with Police Scotland and COPFS, sought to increase public understanding and increase reporting through the *Hate Has No Home* campaign in October 2017. In March 2018 Police Scotland delivered a social media hate crime campaign with the message 'Be Greater than a Hater'. This campaign was aimed primarily at 11-15 year olds, with education as the main focus. Student participation was encouraged through involvement of School link/Campus officers delivering hate crime awareness presentations. The multi-partner National Hate Crime Awareness Week in October 2018 will also offer opportunities to raise public awareness further. I am aware that the Tackling Prejudice and Building Connected Communities Action Group will be considering the impact of such marketing activity as part of its programme of work.

Third Party Reporting Centres (TPRCs)

Responses to the consultation paper

10.10. In relation to Third Party Reporting Centres respondents were largely supportive of their value, stating that they fulfilled an important role in encouraging reporting by those who might otherwise be deterred from contacting the police because of lack of confidence, mistrust of the authorities, poor previous experience, or difficulty in accessing the police. There was, however, a significant concern expressed by respondents that the current scheme was not working as well as it should be: there was low awareness of it, low usage and variable quality in the service provided.

10.11. Community Safety Glasgow mentioned that they would like to see a Scottish Government initiated sharing of good practice and a knowledge exchange programme for TPRCs. They also suggested that Police Scotland should publish an evaluation of TPRCs as part of their quarterly performance report to the SPA.

10.12. CRER, in addition to expressing concerns about the effectiveness of TPRCs, made a more fundamental point. They cautioned that, in relation to black and minority ethnic groups using a TPRC, there was a risk that this might increase "the gap between police and communities, and leave some groups feeling as though the police simply do not have time for them".

Action underway

10.13. In addition to the work of the Tackling Prejudice and Building Connected Communities Action Group, noted above, Police Scotland have recently reviewed the effectiveness of the third party reporting scheme across Scotland and are currently implementing an improvement plan which includes measuring effectiveness. Their review has included consultation with several key partners through a 'short life' working group. They advise that there are some potentially helpful and progressive plans which will be put into place. Police Scotland have introduced an 'activity monitoring form' which is to be

completed every time a TPRC offers support in relation to hate crime. This information will be collated on a quarterly basis to provide management with statistics on usage and on which protected characteristics feature in the use of the service. The Police Scotland response to my consultation indicates that “the future may see better promotion of the scheme, using fewer centres with enhanced support and better advertising/signposting”. Police Scotland is undertaking training and providing guidance to TPRC staff. They recognise the need to build sustainability of this reporting mechanism through having officers as dedicated contact points for TPRCs. I commend these positive moves by Police Scotland which I hope will address calls to improve the consistency and quality of service offered. The data gathering proposals will also provide useful evaluation of the quality of the service provided.

Anonymity for witnesses

Responses to consultation paper

10.14. I have already listed a number of concerns in relation to reporting hate crime which emerged in the course of the information gathering stage of the review. A further concern, particularly expressed by some in the LGBTI community, related to potential publicity if the case was reported by the press and broadcasters. An actual example cited to me was of a transgender person who reported a hate crime to the police and as a result of the subsequent trial was ‘outed’ in a local newspaper. This had discouraged others in the community from reporting hate crime. In the consultation paper I asked whether respondents considered that in certain circumstances press reporting of the identity of the complainer in a hate crime should not be permitted.

10.15. A large majority of the organisations which responded to this question considered that in certain circumstances the identity of a complainer in a hate crime case should not be published. The views of the individuals who responded were evenly split.

10.16. The respondents who considered that preventing press reporting of the identity of the complainer thought that this would remove a potential barrier to reporting of hate crimes. They noted that complainers may be concerned about further victimisation and retaliation; being shunned by others in their own community; having personal information made public, for example, their LGBTI status; and sensationalised reporting that focused on the victim rather than the perpetrator. Some respondents argued that restrictions on press coverage would make the process of taking a case to court less traumatic for victims. Some also suggested that negative press reporting could have a wider adverse impact on community wellbeing and social cohesion.

10.17. While some favoured a standard approach of anonymity for all hate crime victims, others thought restrictions on press reporting should be judged on a case-by-case basis. They thought this might depend on an assessment of the vulnerability of the complainant, the risk to their safety and wellbeing, or the risk to an individual’s right to privacy.

10.18. Those respondents who were opposed to anonymity for victims of hate crime in press coverage considered that it was important that justice ‘was seen to be done’, that the press should be free to cover court proceedings, and that the public had a right to know the identity of those making complaints. Some did not think that hate crimes should be treated differently to any other crimes, while others thought that protecting the identity of complainants could encourage false accusations.

Discussion

10.19. The general principle is that justice is administered by the courts in public, is open to public scrutiny and the media are the conduit through which most members of the public receive information about court proceedings³. The ability to identify a person in a story is important. Stories about a particular individual are more attractive to readers than stories about unidentified people⁴.

10.20. The principle of open justice may, however, be departed from in certain circumstances. Section 11 of the Contempt of Court Act 1981 provides:

“In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.”

10.21. In a recent appeal, the High Court has affirmed that Scottish courts, including the sheriff summary court, have an inherent power to withhold the identity of a complainer where it is in the interests of justice to do so and make an order under section 11⁵. This is regularly done, for example, in cases of blackmail.

10.22. I consider that it is at least arguable that in certain circumstances the court could withhold the identity of the complainer in a hate crime case from the public and make an order under section 11 of the Contempt of Court Act 1981.

3 *A v British Broadcasting Corporation (Secretary of State or the Home Department intervening)* [2015] AC 588, Lord Reed JSC at paras 23 – 26

4 *In Re Guardian News and Media Limited and others* [2010] 2 AC 697 at para 26

5 *Petition to the Nobile Officium by Mr A* [2017] HCJAC 91

10.23. This issue is plainly outwith the remit of my review. It would not be appropriate to make a recommendation. I would, however, encourage the Scottish Ministers, perhaps through the Tackling Prejudice and Building Connected Communities Action Group, to carry out further research into it.

Communications with victims

Responses to consultation paper

10.24. Among the responses to the consultation paper in relation to the issue of under-reporting of hate crime, there were calls for improved communication between victims, the police and the criminal justice system. Respondents called for improved policies and procedures relating to the reporting, recording, investigating and prosecuting of hate crimes to ensure that relevant cases were correctly identified and progressed as hate crimes, and complainers benefited from regular communication and updates through the course of a case. Communication at all stages of a case was key so that victims were given updates and assurance. CRER called for greater clarity in relation to the point at which the role of the police ends and the prosecution process begins.

10.25. Respondents suggested that there should be guidance and training for those working in the criminal justice system to raise awareness of hate crime and to ensure that cases were dealt with appropriately and promptly, and those reporting crimes were dealt with sensitively, taking into account any special needs or vulnerability. Some respondents said that there should be appropriate and easily accessible support and assistance for those reporting hate crimes, for example, the use of appropriate adults to support young people making complaints and the use of independent advocates.

10.26. Some respondents made specific suggestions for improvements. Community Safety Glasgow (CSG) suggested “the provision of a dedicated 24 hour support service, backed with a comprehensive communications strategy and budget” which would “generate many more reports and make the demand for services more visible”. CSREC, which operates as a third party reporting centre, favoured a national free-phone helpline and a hate crime reporting app.

10.27. CSG also suggested that resources should be “segmented for the general population and for different communities affected by hate crime: this would take into account a range of support needs, for example communication needs for people with learning disabilities; LGBTI people who fear being outed”. To improve knowledge and consistency, national information resources (not just online) should be developed in partnership with stakeholders. CSG suggest that this would help to manage victim expectations about the criminal justice process and help to clarify the distinction between a hate incident and a hate crime, as well as clarifying the processes that Police Scotland follow when a hate incident or crime is reported.

10.28. CRER also favoured greater coordination in this area. They suggested that there should be a “bespoke, independent victim support body who could provide victims with information on reporting hate crimes, and continue to provide support to victims through the process if needed”.

10.29. Police Scotland advised the review that as part of their strategic approach to tackling hate crime one of their areas of focus is on revised training for new recruits, existing officers and staff members. They are doing this in conjunction with external partners and communities to improve mutual understanding and to increase confidence.

Action underway

Legislative background

10.30. The Victims and Witnesses (Scotland) Act 2014 places on justice organisations a statutory duty to set clear standards of service and improve the support and information made available to victims. The Act is supported by the Victims Code, published in 2016⁶ and the Standards of Service for Victims and Witnesses⁷. The latter contains a flowchart or ‘Victims’ Map’ setting out what victims can expect from each organisation at each stage of the process. This flowchart highlights the complexity of the system and the fact that victims are likely to have to deal with numerous agencies at different stages of the process.

Thomson review

10.31. This complex landscape was highlighted in the report produced by Dr Lesley Thomson QC, *Review of Victim Care in the Justice Sector in Scotland*, published in January 2017⁸. Her report recommends ways in which the criminal justice system might provide a better service to victims of crime. Her recommendations include:

- the development of a coordinated, multi-disciplinary service (bringing together all of those involved in the criminal justice system and third sector agencies) and the operation of a ‘one front door’ model or ‘single point of contact’;
- various pieces of further research should be undertaken to support the design of this coordinated service and future policy making;

6 <https://www.mygov.scot/victims-code-for-scotland>

7 <http://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2018/04/30/standards-of-service-for-victims-and-witnesses>

8 http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Review%20of%20Victim%20Care%20in%20the%20Justice%20Sector%20in%20Scotland.pdf

- specific actions for COPFS, which should:
 - continue to explore increasing use of digital contact to provide system and case progress information to victims and witnesses;
 - deliver an updated programme of mandatory training for all staff and Crown Counsel on the impact of crime on victims;
 - further develop the role of its Victim Information and Advice service (VIA) in supporting victims and witnesses to give best evidence.

The Justice Board

10.32. In the *Justice Vision and Priorities. Delivery Plan 2017-18*⁹ the Justice Board¹⁰ has committed that justice partners will work with the third sector to create a single point of contact to provide support for victims.

Victim Support Scotland (VSS)

10.33. In April 2018, the Cabinet Secretary for Justice announced¹¹ a new, 3-year funding package for VSS totalling £13.8 million, to enable them to provide free practical and emotional support to victims of crime across the country. As part of this, VSS will lead the development of a new ‘victim centred’ approach, working with partners to streamline points of contact, improve information flow and ensure victims of crime feel supported through the criminal justice system. The intention is that this will reduce the need for victims to have to retell their story to several different organisations as they seek help.

Crown Office and Procurator Fiscal Service (COPFS)

10.34. Running in tandem with the Thomson review, COPFS has been focusing on a range of measures to support victims, largely through its VIA service and partnership working. In September 2017, COPFS, the Scottish Court Service (SCTS), Victim Support Scotland and Police Scotland updated the Joint Protocol titled *Working together for Victims and Witnesses* to ensure that there are clear methods of communication for COPFS to communicate to SCTS that a witness attending at court has additional needs.

10.35. In December 2017, a Feedback Agreement was signed between the Lord Advocate and the CEO of Rape Crisis Scotland. The latter will share anonymous feedback on victims’ experiences of the criminal justice system and their views on the service provided by COPFS: for instance how information was shared and the way the process was explained. The feedback will be used to identify ways COPFS can improve the service provided to victims of sexual crime.

9 <http://www.gov.scot/Publications/2017/07/8431>

10 <http://www.gov.scot/Topics/Justice/justicestrategy/justice-board>

11 <https://beta.gov.scot/news/support-for-bereaved-families/>

10.36. COPFS is in discussions with the Scottish Government and the Scottish Court Service with a view to identifying legislative provisions which could be amended in order to streamline administrative processes that VIA is required to adhere to. If those provisions are amended this will enable VIA's resources to be directed towards greater levels of engagement with victims and witnesses.

Conclusions

10.37. It is clear that a number of initiatives are underway in relation to the treatment of victims of crime generally and victims of hate crime should benefit from these developments. I suspect it will take some time to realise this approach. Cultural change across many organisational boundaries will be needed, along with practical considerations such as aligning operating procedures and systems. That said, these initiatives are warmly to be welcomed and, if effectively implemented, would help to meet many of the concerns raised by a large number of people in the course of my review. I recognise that these matters go beyond my remit. Nevertheless a coordinated approach to reporting, preventing and responding to hate crime would ensure that:

- victims have greater understanding about why hate crime is unacceptable, supported by a societal commitment to reduce incidents;
- victims receive clearer communication at the various stages of the process: expectations could be better managed, thus building trust and confidence;
- all parts of the criminal justice system develop clear and well implemented operational practice to support victims' needs.

Recommendation 21

No legislative change is required in relation to the support given to victims of hate crime offences. However, I note and commend the practical measures being taken to create a more coordinated response to reporting, preventing and responding to hate crime offences.

How the Criminal Justice System deals with Perpetrators of Hate Crime

10.38. Where a hate crime has been committed, the court must consider the most appropriate way to sentence the perpetrator. As explained in chapter 3, the existing statutory aggravations require the court to take the fact of the aggravation into account when sentencing. This may result in an increased sentence, but it does not necessarily do so. It could equally result in the court choosing to impose a sentence of a different nature from what would otherwise have been given.

10.39. The report of the Independent Advisory Group on Hate Crime, Prejudice, and Community Cohesion specifically recommended that “the Scottish Government and partners should explore the use of restorative justice methods with victims and perpetrators of hate crime”. Restorative justice is a process of independent, facilitated contact, which supports constructive dialogue between a victim and a person who has harmed arising from an offence or alleged offence. Restorative justice may take different forms, including direct or indirect communication between the parties. It is a fundamental feature of restorative justice that it is an entirely voluntary process for both parties and can be discontinued at any time.

10.40. Under section 5 of the Victims and Witnesses (Scotland) Act 2014, the Scottish Ministers have a power to issue guidance about restorative justice, which must be taken into account by relevant bodies who are prescribed by order. The Scottish Ministers issued such guidance in October 2017¹² (though section 5 is not yet in force, and so the guidance has no legal force at present).

10.41. The guidance explains why restorative justice is considered appropriate in some circumstances:

It gives victims the chance to meet, or communicate with, the relevant people who have harmed, to explain the impact the crime has had on their lives. This has the potential to help some victims by giving them a voice within a safe and supportive setting and giving them a sense of closure.

It also provides those who have harmed with an opportunity to consider the impact of their crime and take responsibility for it, with the aim of reducing the likelihood of re-offending. In some circumstances it can also allow them the opportunity to make amends for the harm caused. It can also be appropriate and helpful for children and young people who have harmed, where the need to safeguard and protect their interests is paramount.

12 <http://www.gov.scot/Resource/0052/00526079.pdf>

During a restorative justice process, the person who has harmed and the victim may sometimes agree on certain actions that the person who has harmed can undertake to acknowledge the harm they may have caused. Clearly the agreement of both parties on which actions are appropriate cannot be guaranteed. The restorative justice process can be initiated by either the victim or the person who has harmed.

10.42. Restorative justice processes have not been widely used in relation to hate crime offending. However, Professor Mark Walters, Rupert Brown and Susann Wiedlitzka have analysed its use in their research, *Preventing Hate Crime – emerging practices and recommendations for the improved management of criminal justice interventions*¹³, and concluded that it can be beneficial in appropriate cases. Giving evidence to the Westminster Home Affairs Select Committee, Professor Walters noted that restorative justice could have a much greater impact on the perpetrator than simply increasing the level of a fine: “If you’re talking about smarter penalties or smarter interventions, Restorative Justice has a lot of potential.” He referred to an antisemitism case in which the family affected did not want the offender to litter-pick as part of his community sentence, but instead wanted him to do a study on the effects of the Holocaust on the Jewish people. The offender was supervised to do this for two weeks and had to present his findings and his reflections to the family. Professor Walters summarised the offender’s reflections: “I had actually no idea that being antisemitic had this kind of impact. I had no idea that all these people died during the Second World War”.

10.43. An alternative way in which perpetrators may be encouraged to consider the impact of their actions is through schemes which allow diversion from prosecution. If the prosecutor considers such schemes are appropriate and likely to be effective in a particular case, they may offer this option. A diversion scheme generally involves activities to encourage the individual to consider the effect of their behaviour and avoid it happening again. If the individual engages with the programme effectively, they will not be prosecuted and the behaviour in question is not reflected on any criminal record. However, if they do not engage effectively, the COPFS can still decide to proceed with the prosecution. Generally, such schemes would only be considered appropriate where the individual accepts that they committed the offence and the nature of the offending behaviour was relatively low-level. Members of the Justice Committee considering the Bill to repeal the OBFTCA were particularly interested in such schemes in the context of how they could be used for individuals involved in sectarian chanting etc.

13 Walters, Mark, Brown, Rupert and Wiedlitzka, Susann (2016) *Preventing hate crime: emerging practices and recommendations for the effective management of criminal justice interventions*. Project Report. Sussex Crime Research Centre, Sussex, UK: http://sro.sussex.ac.uk/64925/1/Interventions%20for%20Hate%20Crime%20-%20FINAL%20REPORT_2.pdf

Consultation responses

10.44. The consultation paper described schemes for restorative justice or diversion from prosecution and asked for views on whether such options were useful in dealing with hate crimes and if legislative change would be required.

10.45. A small majority of respondents considered that diversion and restorative justice schemes should be considered (amongst other options) in dealing with the perpetrators of hate crime. This view was more strongly held by organisations than individuals. The main reasons given were based around an idea that perpetrators were less likely to re-offend if they really understood the context and impact of their offending. It was also thought that such schemes would give victims a stronger voice in the criminal justice system.

10.46. Amongst those who disagreed, the view was that such schemes were not effective or might be seen as a ‘soft option’. Some respondents expressed concern that there is an insufficient focus on the role of the victim, and that there had been instances in which victims felt pressured to take part in restorative justice conversations in a way which was not truly voluntary. This could lead to further harm to the victim, particularly if the scheme is administered by someone who does not have a full understanding of the power dynamics which may be at play.

10.47. There was a common theme amongst respondents (whether they agreed or disagreed with the principles of diversion and restorative justice) that their use is not straightforward and must be assessed on a case-by-case basis.

10.48. There was less certainty in response to the question about whether diversion or restorative justice schemes should be placed on a statutory footing, with more respondents answering ‘don’t know’ than either ‘yes’ or ‘no’. Amongst those who argued for a statutory provision, this was generally because they considered statutory recognition of the schemes would give them greater prominence, and ensure that they are used consistently.

Discussion

10.49. I explained in chapter 2 that hate crime legislation is one part of a much bigger picture of how to achieve a society in which people live together, respecting one another and treating each other fairly, regardless of differences. Hate crime offences involve identifying and condemning hostility based on personal characteristics. If it is possible to take action in relation to a perpetrator which will reduce or dispel that hostility, and which will give the victim confidence that the impact on them has been recognised, that is in my view a positive thing and consistent with the aims and justification of hate crime legislation.

10.50. From the evidence available to the review, I consider that there is strong potential for diversion and restorative justice techniques to be effective when used appropriately. However, it is also clear that they can have a negative effect (either through causing further harm to the victim or reducing confidence in the criminal justice system) if used without due care. The academic research mentioned in paragraph 10.42 highlighted one pilot scheme in which police officers had been trained to offer ‘restorative encounters’ following low-level offences. A number of the victims who took part in such encounters reported that they felt pressured to take part and that any apology received had not been genuine.

10.51. I learned about a project being undertaken by the Criminal Justice Social Work Department of City of Edinburgh Council to increase the awareness and availability of restorative justice. This has involved considerable liaison between agencies and the development of training programmes, clear structures and information sharing protocols. The Department has now carried out its first restorative justice conference with an individual subject to statutory supervision by the court. The approach taken by the Department shows that restorative justice is not an easy ‘sticking-plaster’, but requires considerable devotion of resources if it is to be made to work. An evaluation of this service will be undertaken at a future date.

10.52. I am satisfied that there is no need for statutory change to facilitate restorative justice or diversion from prosecution. The COPFS has clear structures which allow them to offer diversion from prosecution in appropriate cases but then retain the option of proceeding with the prosecution if the individual does not engage effectively with the programme. The guidance on restorative justice which has been published by the Scottish Government can be used to ensure the consistent governance, oversight and standards which consultation respondents considered important. I therefore do not propose to make a specific recommendation on this topic, but simply highlight the opportunities available in this nascent area and encourage practitioners to take note of, and learn from, developing practice.

Recommendation 22

No legislative change is required in relation to the provision of restorative justice and diversion from prosecution services. However, I encourage practitioners to take note of, and learn from, developing practice in this area.

Annexes

ANNEX 1

Meetings and discussions held by Lord Bracadale and his Secretariat

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

Tom Devine, Professor Emeritus in the University of Edinburgh

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

Patrick Harvie MSP, co-convenor of the Scottish Green Party

Daniel Johnson MSP, Justice Spokesperson, Scottish Labour Party

James Kelly MSP, Shadow Secretary for Finance and the Constitution, Scottish Labour Party

I am Me

Inclusion Scotland

Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion
Interfaith Scotland
LGBT Youth
Liam McArthur MSP, Scottish Liberal Democratic Party
Officials from UK Government departments and Northern Ireland Administration
Police Scotland's National Independent Strategic Advisory Group (NISAG)
People First (Scotland)
Police Scotland including the Football Coordination Unit Scotland (FoCUS)
Religious Leaders' Forum
Sacro
Safer for Women Project
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
Stop Hate UK
Stonewall Scotland
STUC
Supporters Direct Scotland
Victim Support Scotland
Young Scot
Youthlink Scotland

ANNEX 2

Consultation Events

| DATE | EVENT HOSTED BY | LOCATION |
|--|--|------------|
| 31/8/2017 Consultation paper launch | The Central Scotland Regional Equality Council (CSREC) | Stirling |
| 5/9/2017 | Shetland Interfaith AGM | Lerwick |
| 15/9/2017 | The Scottish Older People's Assembly AGM | Glasgow |
| 19/9/2017 | The Scottish Parliament's Cross Party Group on Disability AGM. | Edinburgh |
| 26/9/2017 | The Scottish Parliament's Cross Party Group on Racial Equality AGM | Edinburgh |
| 27/9/2017 | Fairness Race Awareness and Equality Fife | Kirkcaldy |
| 28/9/2017 | Victim Support Scotland: mini-conference | Glasgow |
| 7/10/2017 | Young Scot, Youthlink Scotland and the Scottish Youth Parliament: facilitated workshop | Edinburgh |
| 10/10/2017 | The Scottish Association for the Study of Offending (SASO) members' meeting. | Dundee |
| 17/10/2017 | Interfaith Scotland, Stonewall Scotland, Faith in Older People and Edinburgh University Chaplaincy: Conference on Identity and Belonging | Linlithgow |
| 19/10/2017 | Article 12 | Perth |
| 2/11/2017 | The Coalition for Racial Equality and Rights | Glasgow |
| 3/11/2017 | COSLA: Community Wellbeing Board | Edinburgh |
| 7/11/2017 | The Dumfries and Galloway Equalities Partnership: made up of D&G Multicultural Association, DG Voice, D&G LGBT Plus and LGBT Youth | Dumfries |
| 9/11/2017 | CSREC, the Crown Office and Procurator Fiscal Service and Police Scotland | Stirling |
| 16/11/2017 | West of Scotland Regional Equality Council | Glasgow |
| 18/11/2017 | The Scottish Trades Union Congress: conference for disabled workers | Clydebank |

ANNEX 3

Current Law

The current Scottish hate crime legislation comprises a mixture of:

- statutory aggravations in relation to each of the protected characteristics, which can attach to any offence, but do not themselves create any new offences;
- a standalone offence of harassment in respect of race; and
- offences of stirring up racial hatred.

A: Statutory aggravations

The statutory aggravations, which can apply to any baseline offence, cover each of the currently protected characteristics of race, religion, disability, sexual orientation and transgender identity. The full text of each statutory aggravation is given here:

Crime and Disorder Act 1998

Section 96: Offences racially aggravated.

(1) The provisions of this section shall apply where it is—

- (a) libelled in an indictment; or
- (b) specified in a complaint,

and, in either case, proved that an offence has been racially aggravated.

(2) An offence is racially aggravated for the purposes of this section if—

- (a) at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a racial group; or
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group,

and evidence from a single source shall be sufficient evidence to establish, for the purposes of this subsection, that an offence is racially aggravated.

(3) In subsection (2)(a) above—

- “membership”*, in relation to a racial group, includes association with members of that group;
- “presumed”* means presumed by the offender.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—

- (a) the fact or presumption that any person or group of persons belongs to any religious group; or
- (b) any other factor not mentioned in that paragraph.

- (5) The court must—
- (a) state on conviction that the offence was racially aggravated,
 - (b) record the conviction in a way that shows that the offence was so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) In this section “*racial group*” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

Criminal Justice (Scotland) Act 2003

Section 74: Offences aggravated by religious prejudice

- (1) This section applies where it is—
- (a) libelled in an indictment; or
 - (b) specified in a complaint,
- and, in either case, proved that an offence has been aggravated by religious prejudice.
- (2) For the purposes of this section, an offence is aggravated by religious prejudice if—
- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim’s membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.
- (2A) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.
- (4A) The court must—
- (a) state on conviction that the offence was aggravated by religious prejudice,
 - (b) record the conviction in a way that shows that the offence was so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

- (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
- (ii) otherwise, the reasons for there being no such difference.

(5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

(6) In subsection (2)(a)—

- “membership”* in relation to a group includes association with members of that group; and
- “presumed”* means presumed by the offender.

(7) In this section, *“religious group”* means a group of persons defined by reference to their—

- (a) religious belief or lack of religious belief;
- (b) membership of or adherence to a church or religious organisation;
- (c) support for the culture and traditions of a church or religious organisation; or
- (d) participation in activities associated with such a culture or such traditions.

Offences (Aggravation by Prejudice) (Scotland) Act 2009

Section 1: Prejudice relating to disability

(1) This subsection applies where it is—

- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to disability, and
- (b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to disability if—

- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to a disability (or presumed disability) of the victim, or
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or a particular disability.

(3) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability.

- (5) Where subsection (1) applies, the court must—
- (a) state on conviction that the offence is aggravated by prejudice relating to disability,
 - (b) record the conviction in a way that shows that the offence is so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) In subsection (2)(a), “*presumed*” means presumed by the offender.
- (7) In this section, reference to disability is reference to physical or mental impairment of any kind.
- (8) For the purpose of subsection (7) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.

Section 2: Prejudice relating to sexual orientation or transgender identity

- (1) This subsection applies where it is—
- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and
 - (b) proved that the offence is so aggravated.
- (2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—
- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—
 - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
 - (ii) the transgender identity (or presumed transgender identity) of the victim, or
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—
 - (i) a particular sexual orientation, or
 - (ii) a transgender identity or a particular transgender identity.
- (3) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.

- (4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to sexual orientation or transgender identity.
- (5) Where subsection (1) applies, the court must—
 - (a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,
 - (b) record the conviction in a way that shows that the offence is so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) In subsection (2)(a), “*presumed*” means presumed by the offender.
- (7) In this section, reference to sexual orientation is reference to sexual orientation towards persons of the same sex or of the opposite sex or towards both.
- (8) In this section, reference to transgender identity is reference to—
 - (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or
 - (b) any other gender identity that is not standard male or female gender identity.

Offences which commonly attract statutory aggravations

Although the statutory aggravations can attach to any offence, some offences are more commonly charged in conjunction with statutory aggravations than others. The following table sets out the detail of a number of such offences. This is intended to provide context and illustration.

| Offence | Conduct | Offender's state of mind | Outcome of the prohibited conduct | Sentence |
|--|--|--|---|--|
| Common law breach of the peace | <p>Conduct severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community.</p> <p>Conduct must be genuinely alarming and disturbing, in its context, to any reasonable person.</p> <p><i>Smith v Donnelly 2002 JC 65</i></p> | | <p>If no evidence of actual alarm, conduct had to be flagrant – i.e. severe enough to cause alarm to any reasonable person and to threaten serious disturbance to the community.</p> <p><i>Montgomery v Harvie 2015 JC 223</i></p> | Common law offence – sentence subject to limitations of sentencing court. |
| <p>Common law issuing threats</p> <p><i>[Largely superseded by section 38 offence, but common law offence was used in Smart v Donnelly [2012] HCJAC 113]</i></p> | Written or oral threats of violence | Offence committed even if person had no intention of carrying threats into effect | | Common law offence – sentence subject to limitations of sentencing court. |
| <p>Threatening or abusive behaviour</p> <p>Section 38 Criminal Justice and Licensing (Scotland) Act 2010</p> | <p>Behaves in a threatening or abusive manner</p> <p><i>[Note: defence if behaviour was, in all the circumstances, reasonable.]</i></p> | <p>Intention to cause fear or alarm</p> <p>OR reckless as to whether the behaviour would cause fear or alarm</p> | <p>Behaviour would be likely to cause a reasonable person to suffer fear or alarm</p> <p><i>Note: objective test – no requirement to show whether the complainer suffered fear or alarm:</i></p> <p><i>Patterson v Harvie 2015 JC 118 – Lord Justice General Gill</i></p> | <p>Indictment: max 5 years imprisonment or fine or both</p> <p>Summary conviction: max 12 months imprisonment or fine up to statutory maximum (currently £10,000) or both.</p> |

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| Offence | Conduct | Offender's state of mind | Outcome of the prohibited conduct | Sentence |
|---|---|--|--|--|
| <p>Stalking</p> <p>Section 39 Criminal Justice and Licensing (Scotland) Act 2010</p> | <p>Engages in a course of conduct (i.e. conduct on at least two occasions).</p> <p>Specific forms of conduct described, including following a person or acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm.</p> <p><i>[Note: defences for conduct authorised by rule of law; prevention and detection of crime; or conduct that was otherwise reasonable in the particular circumstances.]</i></p> | <p>Intention to cause B fear or alarm</p> <p>OR A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.</p> | <p>B does in fact suffer fear or alarm</p> | <p>Indictment: max 5 years imprisonment or fine or both</p> <p>Summary conviction: max 12 months imprisonment or fine up to statutory maximum or both.</p> |
| <p>Improper use of a public electronic communications network</p> <p>Section 127(1) Communications Act 2003</p> | <p>Sends a message or other matter by public electronic communications network that is grossly offensive or of an indecent, obscene or menacing character</p> <p>OR causes such a message or matter to be sent.</p> | | | <p>Summary only: Max imprisonment 6 months or fine up to level 5 (£5,000) or both.</p> |

| Offence | Conduct | Offender's state of mind | Outcome of the prohibited conduct | Sentence |
|---|--|--|---|---|
| <p>Improper use of a public electronic communications network</p> <p>Section 127(2) Communications Act 2003</p> | <p>Sends a message by public electronic communications network that he knows to be false,</p> <p>OR causes such a message or matter to be sent,</p> <p>OR persistently makes use of a public electronic communications network</p> | <p>For the purpose of causing annoyance, inconvenience or needless anxiety to another</p> | | <p>Summary only:</p> <p>Max imprisonment 6 months or fine up to level 5 (£5,000) or both.</p> |
| <p>Communicating indecently etc.</p> <p>Section 7 Sexual Offences (S) Act 2009</p> <p><i>[Note: separate offences re communicating indecently with younger and older children – sections 24 and 34]</i></p> | <p>Sends a written sexual communication or directs a verbal sexual communication at B</p> <p>WITHOUT B consenting to the communication or A having a reasonable belief that B consents</p> <p><i>[Note: a communication is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual: s. 60(2).]</i></p> | <p>Acts intentionally and for the purpose of (a) obtaining sexual gratification; OR (b) humiliating, distressing or alarming B</p> | <p><i>[Note: irrelevant whether or not B was in fact humiliated, distressed or alarmed by the thing done by A: s. 49(2).]</i></p> | <p>Indictment: max imprisonment 10 years or fine or both.</p> <p>Summary complaint: max 12 months imprisonment or fine up to statutory maximum or both.</p> |

B: Standalone offence

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995: racially-aggravated harassment and conduct

- (1) A person is guilty of an offence under this section if he—
- (a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and—
 - (i) is intended to amount to harassment of that person; or
 - (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or
 - (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.
- (2) For the purposes of this section a course of conduct or an action is racially aggravated if—
- (a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person's membership (or presumed membership) of a racial group; or
 - (b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.
- (3) In subsection (2)(a) above—
- "membership"*, in relation to a racial group, includes association with members of that group;
 - "presumed"* means presumed by the offender.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—
- (a) the fact or presumption that any person or group of persons belongs to any religious group; or
 - (b) any other factor not mentioned in that paragraph.
- (5) A person who is guilty of an offence under this section shall—
- (a) on summary conviction, be liable to a fine not exceeding the statutory maximum, or imprisonment for a period not exceeding [twelve] months, or both such fine and such imprisonment; and
 - (b) on conviction on indictment, be liable to a fine or to imprisonment for a period not exceeding seven years, or both such fine and such imprisonment.
- (6) In this section—
- "conduct"* includes speech;
 - "harassment"* of a person includes causing the person alarm or distress;
 - "racial group"* means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins,
- and a course of conduct must involve conduct on at least two occasions.

C: Stirring up hatred offences

Part 3 of the Public Order Act 1986 makes it an offence to stir up racial hatred in five situations:

- using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting (section 18);
- publishing or distributing written material which is threatening, abusive or insulting (section 19);
- presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour (section 20);
- distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting (section 21); and
- providing a programme service, or producing or directing a programme, where the programme involves threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein (section 22).

“Racial hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. In each case, the person commits the offence if he or she intends to stir up racial hatred by doing the specified act or if, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

The maximum sentence on summary conviction is 12 months imprisonment or a fine up to the statutory maximum or both. The maximum sentence if convicted on indictment is 7 years imprisonment or a fine or both.



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