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“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.”

Dr Martin Luther King

Ministerial Foreword



Hate crime and prejudice are completely unacceptable and we are absolutely committed to tackling them. Hate crime has a hugely damaging effect on victims, their families and communities and everyone needs to play their part to challenge it.

Lord Bracadale published his review into hate crime legislation in Scotland in May 2018 and we want to thank him for his insightful report and recommendations. We now want to hear from you and from communities across the country about what our hate crime law should look like, so we hope you take the time to respond to this consultation.

We are committed to taking this opportunity to shape our legislation so that it is fit for 21st century Scotland and, most importantly, affords sufficient protection for those that need it.

We recognise that legislation in and of itself is not enough to build the inclusive and equal society that we aspire to, however having clear legislation about hate crime sends a strong message. It makes it clear to victims, to communities and to wider society that certain criminal behaviour is not acceptable in society.

Scotland's diversity is our strength and we are proud that Scotland is becoming an increasingly open and inclusive nation. However, we also recognise that intolerance and prejudice remain and that more needs to be done.

We are committed to working across government in order to build a Scotland - One Scotland - where there is simply no place for hatred and prejudice and where everyone feels connected, has a sense of belonging and feels valued.

We are confident that together we can build a stronger, more connected Scotland.

We look forward to hearing your views.

Handwritten signature of Aileen Campbell in black ink.

Aileen Campbell MSP
Cabinet Secretary for Communities
and Local Government

Handwritten signature of Humza Yousaf in black ink.

Humza Yousaf MSP
Cabinet Secretary for Justice

Introduction



What type of Scotland do you want to live in?

Hate crime and prejudice threaten community cohesion and have a corrosive impact on Scotland's communities as well as broader society. It is never acceptable and we are committed to tackling it.

A cohesive society is one with a common vision and a sense of belonging for all communities; a society in which the diversity of people's backgrounds, beliefs and circumstances are appreciated and valued, and where similar life opportunities are available to all.

It is through this lens that we are considering the recommendations from Lord Bracadale's 'Independent Review of Hate Crime Legislation in Scotland'¹ in order to inform the modernisation and reform of hate crime legislation in Scotland.

¹ <https://www.gov.scot/Resource/0053/00535892.pdf>

What is hate crime?

Hate crime can be verbal or physical and has hugely damaging effects on the victims, their families and communities, and we all must play our part to challenge it.

In the summary report² accompanying his full report, Lord Bracadale defined hate crime as:

Hate crime is the term used to describe behaviour which is both criminal and rooted in prejudice.

Some examples of behaviour that could be taken to court as a hate crime

- Abusive shouting by a person who is annoyed that their neighbour creates a noise when putting their bins out early in the morning. In the heat of the moment the offender makes comments about their neighbour's sexuality and says he hopes 'people like you die of Aids'
- Tipping a disabled person out of their wheelchair in the street.
- A murder committed because of someone's skin colour
- Vandalism/graffiti on a mosque which says 'terrorists go home'.

Current hate crime legislation 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 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. These provisions are known as **statutory aggravations**. The court is currently required to record the statutory aggravation and take it into account when determining an appropriate sentence.

This ensures that levels of hate crime are recorded and it sends a signal that society does not accept this form of conduct. It also reassures victims and their families that the fact an offence was motivated by prejudice has been formally acknowledged and taken into account in sentencing.

In Scotland, the law currently recognises hate crimes as motivated by prejudice for statutory aggravations based on:

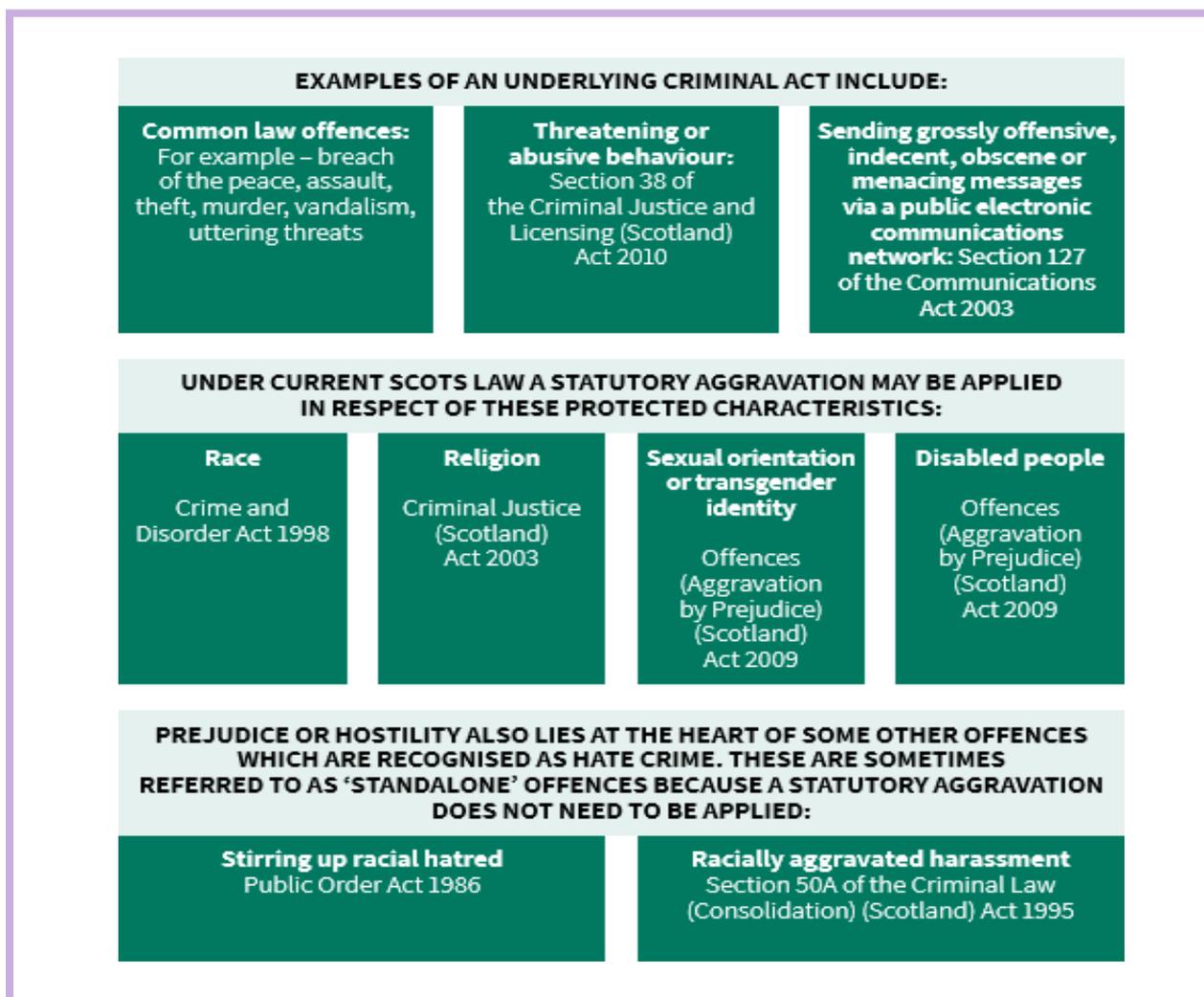
- **race**: section 96 of the Crime and Disorder Act 1998,
- **religion**: section 74 of the Criminal Justice (Scotland) Act 2003,
- **disability**: section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009,
- **sexual orientation** and **transgender identity**: section 2 of the Offences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

² [Independent Review of the Hate Crime Legislation in Scotland: Summary Document](#)

Prejudice or hostility also lies at the heart of some other offences which are recognised as hate crimes. These are sometimes referred to as **standalone** hate crime offences and they criminalise behaviour specifically because it is motivated by racial prejudice. Currently, these standalone offences include:

- **racially aggravated harassment:** section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995,
- **stirring up of racial hatred:** sections 18 to 22 of the Public Order Act 1986

In the summary report³ Lord Bracadale detailed the relevant laws used in the context of hate crime.



³ [Independent Review of the Hate Crime Legislation in Scotland: Summary Document](#)

Why have hate crime laws?

Lord Bracadale explained in his summary⁴ report that:

Legislation helps recognise the particular impact and harm caused by hate crime

Harm to the victim

- Harm can cause mental distress such as depression, anger, anxiety, trauma
- Harm has a social impact as victims or groups change their behaviour to avoid further victimisation
- May move home or job, avoid public spaces and become socially isolated

Harm to the group the victim belongs to

- Hate crimes remind members that they are potential targets
- Members can be fearful of those with the same identity as the perpetrator

Harm to wider society

- Undermines society's moral values
- Less tolerant society
- Hatred not recognised or challenged because it becomes the 'norm'
- May increase social unrest

Lord Bracadale's explained that:

Hate crime laws make it clear that such behaviour is not acceptable. It sends a message to victims, offenders and wider society that hate crime behaviour is unacceptable and will not be tolerated.

Background on this consultation

In September 2016, a review by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion⁵ was published which included a number of recommendations for the Scottish Government and its partners. These recommendations included:

- the Scottish Government should consider whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime,
- the Scottish Government should lead discussion on the development of clearer terminology and definitions around hate crime, prejudice and community cohesion

This led to the appointment of Lord Bracadale to conduct an Independent Review of Hate Crime Legislation in Scotland. The remit for Lord Bracadale's review was 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.

⁴ [Independent Review of the Hate Crime Legislation in Scotland: Summary Document](#)

⁵ <https://www2.gov.scot/Resource/0050/00506074.pdf>

Lord Bracadale was asked by the Scottish Ministers to consider:

- the current law and consider how well it deals with hate crime behaviour,
- Whether new statutory aggravations should be created for example in relation to age and gender,
- whether the religious statutory aggravation is fit for purpose or should be expanded,
- whether we should make hate crime laws simpler by bringing them all together in one place,
- any issues or gaps in the framework for hate crime laws and to make sure that hate crime laws are compatible with laws that protect human rights and equality

Lord Bracadale published his 'Independent Review of Hate Crime Legislation'⁶ on 31 May 2018. In responding to publication of the report, **we accepted his recommendation⁷ to consolidate all Scottish hate crime legislation into one new hate crime statute and committed to consult on the detail of what will be included in the new hate crime bill.**

We recognise that on its own, legislation cannot build the inclusive and equal society that we aspire to. This consultation therefore includes questions in relation to the broader topics commented upon by Lord Bracadale such as victim support and restorative justice.

In parallel to Lord Bracadale's work, the Working Group on Defining Sectarianism in Scots Law has been developing its report 'Final Report of the Working Group on Defining Sectarianism in Scots Law'⁸, published in November 2018.

This group was established following a recommendation made by the Scottish Parliament's Justice Committee. During their Stage 1⁹ considerations of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, the Committee heard evidence from a number of sources which suggested that the lack of a legal definition of the term 'sectarianism' was a hindrance to police and prosecutors in pursuing cases of abusive sectarian behaviour.

The Working Group considered whether this could be achieved; the technical obstacles to achieving it; and what a legal definition could look like. The Group has recommended the development of a statutory aggravation for sectarian hate crime.

This consultation provides you with an opportunity to share your views and inform what is included in the new hate crime legislation.

A summary of Lord Bracadale's recommendations is attached at Annex A.

⁶ <https://www.gov.scot/Resource/0053/00535892.pdf>

⁷ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11583>

⁸ <http://www.gov.scot/ISBN/9781787812987>

⁹ [Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications--Repeal-Scotland--Bill](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11583)

Part One – Consolidating and Modernising Hate Crime Legislation

This chapter looks at the recommendations made by Lord Bracadale on the underpinning principles of hate crime legislation and how our legislation might best be modernised to provide a clear and consistent basis for prosecuting hate crime behaviour.

As already announced by the Scottish Government following publication of Lord Bracadale’s report, we agree that all relevant hate crime provisions including the statutory aggravations should be contained in one place. Therefore we intend to consolidate all Scottish hate crime legislation into a single statute to provide clarity, transparency and consistency.

The discussion that follows in this consultation explores issues relating to how one set of consolidated hate crime legislation might be modernised and reformed.

Section 1: Rationale

Lord Bracadale’s report¹⁰ explained that:

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... 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.

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.

Lord Bracadale’s Recommendation 1

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

Lord Bracadale’s Recommendation 20

All Scottish hate crime legislation should be consolidated.

For further reading, the relevant material discussing these issues in Lord Bracadale’s report is at paragraphs 3.2 to 3.4¹¹ and paragraphs 9.1 to 9.13¹² of his report.

¹⁰ At paragraphs 3.2 and 3.3 of Lord Bracadale’s report.

¹¹ <https://www.gov.scot/Publications/2018/05/2988/4>

¹² <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/10>

Subject to discussion later on in this consultation relating to a small number of standalone offences, the Scottish Government agrees that maintaining statutory aggravations as the core method for dealing with hate crime is appropriate. We think that this approach is effective and that it allows for clear records and statistics to be kept in respect of hate crime. We therefore propose to accept this recommendation.

Question 1:

**Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?
(Please tell us why in the comments box.)**

Section 2: Modernisation and Language

Thresholds

As has been explained above, the existing core method of prosecuting hate crimes in Scotland is via the attachment of a statutory aggravation when a person has committed an offence. A statutory aggravation 'attaches' to an offence in certain circumstances based on the conduct or motivation of the offender. In order for an aggravation to attach, there needs to be an underlying piece of criminal conduct i.e. a baseline offence committed. The circumstances that require to be met are sometimes referred as the 'threshold', or test for proving the aggravation.

At present, the various statutory aggravations in relation to different protected characteristics share a common framework as to when the aggravation will apply, and a similar 'threshold' for proving an aggravation applies in each case.

Lord Bracadale's report¹³ explained that:

- 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.

¹³ At paragraph 3.5 of Lord Bracadale's report.

Lord Bracadale considered¹⁴ whether the current thresholds were appropriate and concluded that they should remain the same, but with updated language:

The consultation responses indicated a need for simpler, 'user-friendly' language in the legislation. ...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 'evincing 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.

The Scottish Government agrees with Lord Bracadale that the two existing thresholds (or tests) for the statutory aggravations are effective and should be retained but that the language should be updated.

We want to ensure that the language of the tests is easier to understand and therefore propose, as recommended by Lord Bracadale, that the wording should be changed from 'evincing malice and ill-will' to 'demonstrating hostility'.

However, the intent of this change of wording is not to change the scope of the thresholds or tests themselves. While we agree with Lord Bracadale that updating the language as suggested does not mean that there will be any change in how the test operate, this is a specific area where we have sought views in a consultation question below.

Lord Bracadale's 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.

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 3.5 to 3.13¹⁵ of his report.

Question 2:

Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from 'evincing malice and ill will' to 'demonstrating hostility'?
(Please tell us why in the comments box.)

¹⁴ At paragraph 3.10 of Lord Bracadale's report.

¹⁵ <https://www.gov.scot/Publications/2018/05/2988/4>

Question 3:

Do you think changing the language of the thresholds for the statutory aggravations from ‘evincing malice and ill will’ to ‘demonstrating hostility’ would change how the thresholds are applied? (Please tell us why in the comments box.)

Intersex and transgender

Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (‘the 2009 Act’) created a statutory aggravation in respect of the protected characteristic of sexual orientation and the protected characteristic of transgender identity. Section 2(8) of that Act defined ‘transgender identity’ as being a reference to, among other things, intersexuality. However, in the time since the 2009 Act was enacted the Scottish Government now understands that there are concerns with a person’s intersex status being presented as an aspect of transgender identity, rather than as a separate identity characteristic.

Lord Bracadale’s report¹⁶ explained that:

...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...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.

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.

Lord Bracadale’s report¹⁷ described the responses to his consultation questions on the use of language in this area:

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. 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.

¹⁶ At paragraphs 3.28 and 3.29 of Lord Bracadale’s report.

¹⁷ At paragraphs 3.31 to 3.36 of Lord Bracadale’s report.

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.

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.

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.

Lord Bracadale identified that there is therefore a difference between 'transgender' and 'intersex' and that these are two separate identity characteristics, as opposed to intersex status being a sub-category of transgender identity. Lord Bracadale recommends that this should be reflected in hate crime legislation in respect of the protected characteristics to which hate crime legislation applies. We therefore propose to establish a separate category of 'intersex' to ensure legislation reflects current understanding and best practice.

We are aware of the importance of language and that a range of terms can be used to describe variations of sex characteristics, including 'intersex variations' and 'differences of sex development' (sometimes called DSD). In addition, some people born with variations in sex characteristics prefer not to use any of the collective terms to describe themselves or their variation, but instead may only talk specifically about their variation. Consultation questions below seek views on terminology in this area.

We are also aware, as regards the language used to describe transgender identity, that terms such as 'transvestism' and 'transsexualism' are widely viewed as outdated. The definition of 'transgender identity' in the 2009 Act currently uses these terms. Consultation questions below seek views on the terminology in this area.

As well as seeking views through this consultation exercise to update the language on transgender identity and intersex, we also propose to draw on the findings from our forthcoming consultation on improving the experiences of people with variations of sex characteristics (intersex) in Scotland.

Lord Bracadale's 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).

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 3.28 to 3.36¹⁸ of his report.

¹⁸ <https://www.gov.scot/Publications/2018/05/2988/4>

Question 4:

Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?

(Please tell us why in the comments box.)

Question 5:

Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?

(Please tell us why in the comments box.)

Question 6:

If you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?

Part Two – New Statutory Aggravations

This part of the consultation considers the recommendations made by Lord Bracadale and by the Working Group on Defining Sectarianism in Scots Law on whether there should be additional statutory aggravations added to the suite of hate crime legislation to cover new groups and characteristics. As noted above, the existing statutory aggravations apply in respect of the identity characteristics of: race, religion, disability, sexual orientation and transgender identity.

The new groups and characteristics considered include the two characteristics proposed by Lord Bracadale: gender and age. It is also proposed that a consistent approach is taken to protecting those who associate with a person with a protected characteristic (see section 7 of this Consultation).

Lord Bracadale's report explained¹⁹ the approach that he took to considering whether additional statutory aggravations should be created as follows:

...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.

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.

Section 3: Gender

Lord Bracadale²⁰ considered whether offending relating to hostility (or malice and ill-will) based on 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.

It is important to understand that... the practical impact of gender-based offending falls almost exclusively on women.

¹⁹ At paragraph 4.2 and 4.3 of Lord Bracadale's report.

²⁰ At paragraphs 4.9 and 4.10 of Lord Bracadale's report.

For ease of consistency of references with Lord Bracadale's report, this consultation paper takes the same approach to the use of the term 'gender' as opposed to 'sex' as is taken in the report.²¹

Lord Bracadale noted that in the context of the debate on gender based hate crime, the term 'misogyny' is commonly used. This is relevant as to whether any new provision is framed in terms of 'gender' or is framed in terms of 'misogyny'. Lord Bracadale concludes that a new statutory aggravation should be based in terms of gender rather than misogyny (please see further below for discussion on this point). Lord Bracadale also considered what is meant by the term 'misogyny'²²:

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.

In his report, Lord Bracadale²³ summarises the responses received in relation to gender.

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.

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.

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

²¹ At paragraph 4.11 of Lord Bracadale's report.

²² At paragraph 4.12 of Lord Bracadale's report.

²³ At paragraphs 4.13, 4.14 and 4.17 of Lord Bracadale's report.

As extracted above, and set out more fully in paragraphs 4.9 to 4.50 of his report, Lord Bracadale considers that there are various reasons why recognition of gender based hostility as a hate crime is necessary. This includes the increasing prevalence of online gender hostility (see Part 3 Section 9 for further discussion about online hate crime) and because of the risk of normalisation of hostility based on gender and the damaging effect this can have on society. Lord Bracadale²⁴ sets out what he thinks could be achieved by gender hostility being considered a hate crime:

- '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.'

After concluding that gender based hostility should be categorised as a hate crime, Lord Bracadale considered what form that should take, first considering whether or not there should be a statutory aggravation based on gender hostility and then considering whether or not a standalone offence is warranted.

Aggravation building on existing baseline offences

Lord Bracadale considered whether or not an aggravation based on gender hostility, in the same model as existing statutory aggravations based on other identity characteristics, should be introduced²⁵:

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.

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.

... 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.

²⁴ At paragraph 4.35 of Lord Bracadale's report.

²⁵ At paragraphs 4.39 to 4.41 of Lord Bracadale's report.

Lord Bracadale recommends a statutory aggravation based on gender hostility rather than specifically misogyny. Throughout the discussion on gender, Lord Bracadale notes that there is no consistent understanding of what is encompassed by the term 'misogyny'²⁶ and that this can 'unintentionally mask what is meant, as similar language is used by different people to mean different things'.²⁷ He also notes that as part of the preparation of his report, an academic report was prepared which undertook comparative research of the hate crime laws in place in other countries. While several countries had in place legislation concerning offences based on gender prejudice, none of these were in terms of misogyny and were instead in terms of 'gender' or 'sex'.²⁸ Lord Bracadale's conclusions on whether the aggravation should be based on gender or on misogyny are set out in paragraph 4.43²⁹ of his report:

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.

In regards to a new statutory aggravation based on gender, Lord Bracadale³⁰ concluded that:

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.

²⁶ At paragraphs 4.12 and 4.19 of Lord Bracadale's report.

²⁷ Paragraph 4.29 of Lord Bracadale's report.

²⁸ At paragraph 1.10 of Lord Bracadale's report for background on the academic report, and paragraphs 4.24 to 4.27 for commentary on the findings of that report in this context.

²⁹ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

³⁰ At paragraph 4.50 of Lord Bracadale's report.

Standalone offence – misogynistic harassment

Lord Bracadale³¹ also considered whether or not there should be a new standalone offence to tackle misogynistic harassment and abuse:

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 could take a number of years.

In regards to a standalone offence, Lord Bracadale³² concluded that:

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.

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.

Lord Bracadale's 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.

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 4.9 to 4.50³³ of his report.

³¹ At paragraph 4.45 of Lord Bracadale's report.

³² At paragraphs 4.47 and 4.48 of Lord Bracadale's report.

³³ <https://www.gov.scot/Publications/2018/05/2988/5>

Gender-based offending is a complex issue and there are different views on the action needed to tackle this. Since the publication of Lord Bracadale's report, there have been a number of developments in this area which have further emphasised the need for action to be taken, whilst recognising the complexity of this issue:

- on 9 July 2018, the 'Misogyny as a Hate Crime Evaluation Report' was published. The report details the findings of an evaluation commissioned by the Office of the Nottinghamshire Police and Crime Commissioner and the Nottingham Women's Centre to assess the impact of the 'Misogyny Hate Crime' policy, introduced by Nottinghamshire Police in April 2016'. The report findings reiterated that 'there is a high level of complexity in tackling misogyny, and that a significant part of the challenge is due to the 'normalisation' of these incidents',
- on 5 September 2018, UK Government Ministers announced that they will be asking the UK Law Commission to undertake a review of English and Welsh hate crime legislation. The terms of reference of this review were published on 18 October 2018³⁴, and include consideration as to how additional protected characteristics, in particular sex and gender, should be considered by new or existing hate crime law in England and Wales

We believe that there is a clear need for action to be taken to tackle gender based prejudice and misogyny and have identified **four main options** for progressing this work. These options are set out below.

Option A: Implement Lord Bracadale's recommendation to establish a statutory aggravation based on gender hostility.

Lord Bracadale stated that 'there are patterns of offending which relate particularly to the victim's gender and should be addressed through [hate crime] legislation³⁵'. Although this option focuses on gender based hostility, Lord Bracadale stated 'that the practical impact of gender-based offending falls almost exclusively on women.³⁶

This option would establish a new statutory aggravation based on gender hostility. This would mean that 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, 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. This option follows the current approach taken in the existing statutory aggravations for race, religion, disability, sexual orientation and transgender identity.

Lord Bracadale felt that this approach would be easiest to understand by both practitioners and the public as it will remain consistent with other hostility based aggravations. For further information, Lord Bracadale's discussion of why he made this recommendation can be found above and at paragraphs 4.9-4.50³⁷ of his report.

³⁴ <https://www.lawcom.gov.uk/law-commission-review-into-hate-crime-announced/>

³⁵ At paragraph 4.28 of Lord Bracadale's report.

³⁶ At paragraph 4.10 of Lord Bracadale's report.

³⁷ <https://www.gov.scot/Publications/2018/05/2988/5>

This approach would provide consistency with section 2 in terms of using aggravations as the core method of tackling hate crime (as set out on page 8). By way of example, sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010 create the offences of threatening and abusive behaviour and stalking respectively. These can cover a range of conduct, and the creation of an aggravation based on gender would enable such conduct to be recorded and dealt with as aggravated by gender hostility.

Lord Bracadale mentions that one advantage of statutory aggravations compared to standalone offences is the evidentiary burden.³⁸ Existing statutory aggravations can be proved by a single source of evidence at trial whereas standalone offences require two sources of evidence (known as corroboration). Applying this here, it may be easier to prove a statutory aggravation based on gender hostility compared to a standalone offence of misogynistic harassment.

Option B: Develop a standalone offence relating to misogynistic harassment.

Organisations such as Engender, Rape Crisis Scotland, Scottish Women's Aid and Zero Tolerance have called for the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women. These organisations take the view that adding an aggravation for gender hostility will not be helpful in tackling misogynistic harassment and/or abuse. They believe that the development of a specific offence to deal with this would recognise that the reality of violence against women is a complex issue and requires a considered approach.

The Scottish Government's Equally Safe strategy³⁹ states that violence against women and girls is a gendered issue and that it occurs in a societal context where gender stereotypes and inequality continues to persist. Women and girls therefore experience gender based violence because they are women and girls.

A number of women's organisations have stated that in order to tackle misogynistic harassment and abuse, an approach that focuses specifically on the experience of women needs to be taken.

At this stage it is not clear what specific conduct a potential standalone offence for misogyny might cover, therefore if consultees consider that a standalone offence is necessary we would welcome views on the types of behaviour that could be captured by an offence of this nature.

To inform the development of a potential standalone offence, we could draw on our experience of the approach taken to develop the Domestic Abuse (Scotland) Act 2018. The approach to developing domestic abuse legislation was to work closely with stakeholders with a role in tackling violence against women and girls, although the legislation itself is gender neutral. A potential first step could be to consider the types of conduct experienced by women which could be described as misogynistic behaviour. This would include considering the impact of such conduct on those who experience it and whether such conduct is or is not captured within existing criminal offences.

³⁸ At paragraphs 7.19 and 7.20 of Lord Bracadale's report. In the context of the existing standalone offence in relation to racial harassment under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (which Lord Bracadale recommends is repealed, and which is discussed below).

³⁹ <https://beta.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/>

As noted by Lord Bracadale, development of a standalone offence in this way is likely to take a significant amount of time. This approach would likely therefore be a longer term piece of work out with the development of this hate crime legislation.

Option C: Build on Equally Safe to tackle misogyny (a non-legislative approach)

The Equally Safe Strategy⁴⁰, the Scottish Government and COSLA's joint strategy for preventing and eradicating violence against women and girls, recognises that violence against women and girls can have both an immediate and long-lasting impact on the individuals and families directly involved. It impacts on the wider health, wellbeing and safety of our communities breeding a culture where this type of harm is tolerated – sometimes even condoned – and as a result is allowed to continue.

The Scottish Government is clear that this is unacceptable for modern day Scotland and does not reflect the country of equality we aspire to become. Equally Safe sets out a shared understanding of the causes, risk factors and scale of gender based violence and highlights the need to prioritise prevention in order to challenge the notion that violence and abuse is inevitable or acceptable. It recognises that this is a systemic issue that requires change in practice and, fundamentally, a change in culture.

On this basis, legislation is not always the sole or indeed the correct vehicle to drive this change forward. This option would focus on the use of education and wider activity to drive societal change, focusing on the implementation of Equally Safe alongside more gendered based policy and practice to end violence against women.

This would build on current work to deliver Equally Safe, including a suite of interventions that focus on primary prevention and aim to educate children and young people about gender based violence, 'consent' and healthy relationships. Current and relevant interventions include Rape Crisis' Sexual Violence Prevention Programme and the piloting of a 'Whole School' approach to tackling gender based violence.

This option could be taken forward in its own right, or in tandem with one or both of the legislative options set out above.

Option D: Take forward all of the above Options.

This would include both Options A (establish a statutory aggravation based on gender hostility) and B (standalone offence relating to misogynistic harassment), as well as Option C (building on Equally Safe).

This option would involve taking forward proposals to include a statutory aggravation for gender in the hate crime bill as well as exploring the development of a standalone offence for misogyny. This would mean that we would develop a gender aggravation to be included within the new hate crime bill alongside work on a standalone misogyny offence which would be a longer term piece of work. In the short term this would send a clear message to society that the type of behaviour set out in Option A is unacceptable and is being taken more seriously by the justice system, however would also recognise the complexity associated with tackling misogynistic harassment or abuse.

⁴⁰ <https://beta.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/>

Question 7:

Do you agree with Option A to develop a statutory aggravation for gender hostility?

(Please provide details in the comments box below.)

Question 8:

Do you agree with Option B to develop a standalone offence for misogynistic harassment?

(If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.)

Question 9:

Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)?

(If you agree please tell us why.)

Question 10:

Do you agree with Option D of taking forward all of the identified options? (This would include development of a statutory aggravation based on gender hostility (Option A); development of a standalone offence relating to misogynistic harassment (Option B); and work to build on Equally Safe (Option C)?

(If you agree, please tell us why.)

(Please provide examples of the types of behaviour that could be captured by the standalone offence.)

Section 4: Age

In some cases where a crime is committed against an older person, it may be that the victim is not targeted because of the offender's hostility against older people but rather because the offender perceives the victim as being more vulnerable than other people in society. The reason for the offence in those circumstances is exploitation of a perceived vulnerability – for instance if the victim is physically frail. Lord Bracadale draws a distinction between crimes motivated by the exploitation of a perceived vulnerability and crimes committed because of hostility based on the victim's perceived age i.e. hostility against a person because they are old, or because of their age.

This section of the consultation focuses on hostility based on age. Section 11 of this consultation considers the separate issue of crimes motivated by exploitation of vulnerability.

Lord Bracadale considered whether age should be included as a protected characteristic in the suite of hate crimes. He noted stakeholders reported that while it may be that many crimes against the elderly are motivated by a desire to exploit a perceived vulnerability, some crimes are motivated by hostility based on the perceived age of the victim.

Lord Bracadale ⁴¹ found that:

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...The difficulty which emerges... 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.

...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.

...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.

A statutory aggravation on 'age' hostility would cover people of any age. It does not refer to a particular age group such as elderly people or children and young people. Lord Bracadale considered the application of this to children and young people. He noted in his report⁴² that:

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.

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.

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.

In summary, Lord Bracadale found that, although there might only be a relatively small proportion of crimes relating to hostility against a person because of their age, introducing a new statutory aggravation based on age hostility would send a clear message to society that these offences would be treated seriously and would not be tolerated.

⁴¹ At paragraphs 4.52, 4.64 and 4.66 of Lord Bracadale's report.

⁴² At paragraphs 4.67 to 4.69 of Lord Bracadale's report.

His view was that where crimes motivated by hostility based on age do occur, it is important that these crimes should be treated in the same way as other hate crimes.

This proposal focuses on an aggravation concerning hostility based on age, rather than a proposal for additional protection of a vulnerable person. Please see Part Four which considers Lord Bracadale's recommendation on exploitation and vulnerability.

Lord Bracadale's 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.

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 4.51 and 4.70⁴³ of his report.

Question 11:

Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?

(Please provide details in the comments box.)

Section 5: Sectarianism

This section considers the issue of sectarianism. Specifically, whether sectarianism should be included within new hate crime legislation and, if so, how sectarianism would be defined within that legislation.

In his review of hate crime legislation, Lord Bracadale noted that the issue of sectarianism goes beyond hate crime and considered the issue in the context of the recent repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the 2012 Act) and the creation of the Working Group on Defining Sectarianism in Scots Law (the Working Group) which is discussed below.

Lord Bracadale noted that there was no consensus among those consulted during his review on what is meant by sectarianism, and noted that there were 'sharp divisions of opinion on whether it is a religious concept, a political and cultural concept or involves a mixture of religion, politics and culture.' Given the Working Group was specifically tasked with considering the merits of a legal definition of sectarianism, and the Working Group had not reported at the time he delivered his review, Lord Bracadale stated that the Working Group was 'best suited to take [this] forward'.

Sectarianism is often described as an intersectional issue – meaning that expressions of sectarianism can combine prejudice toward different characteristics, some of which are already protected in law, such as religion and race, and some which are not, such as the more difficult to define concept of culture. Lord Bracadale concluded that the absence of a statutory aggravation based on sectarianism would not leave a gap in the law because both the race and religion statutory aggravations can be attached to any specific offence once proven.

⁴³ <https://www.gov.scot/Publications/2018/05/2988/5>

Lord Bracadale explained in his report⁴⁴:

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.

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.

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.

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

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 [of the 2012 Act] 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.....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.

In its report at Stage 1, the Scottish Parliament's Justice Committee noted that scrutiny of the Repeal Bill (now the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018) had sparked a new debate on sectarian behaviour. 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.

⁴⁴ At paragraphs 8.34 to 8.38 and 8.23 of Lord Bracadale's report.

Lord Bracadale’s 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.

For more information on Lord Bracadale’s recommendation please see Chapter 8⁴⁵ of his report.

We agree with Lord Bracadale that the will of the Scottish Parliament should be respected in relation to the repeal of section 1 of the 2012 Act (covering offensive or threatening behaviour at football matches which was likely to incite public disorder) and that the focus of our considerations on this issue should be on the conclusions and proposals made by the Working Group which was established by the Scottish Government to provide a basis for considering whether or not sectarianism should be defined in Scots Law.

The Working Group has now reported to Scottish Ministers who are committed to using the group’s report as the basis for further consultation. This section takes forward that commitment and we have included questions on defining sectarianism in Scots Law below as part of this broader consultation on hate crime legislation.

Background to the working group

During their consideration of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (the Repeal Bill), the Justice Committee of the Scottish Parliament heard from a range of sources that there was a need to establish a legal definition of the term ‘sectarianism’ to aid application of the law by police and prosecutors. The Justice Committee Stage 1 report on the Repeal Bill, published on 18 January 2018 recommended that:

The Committee considers it important that the Scottish Government gives consideration to introducing a definition of sectarianism in Scots Law, which – whether or not the 2012 Act⁴⁶ is repealed – would help any future parliaments and governments in taking forward laws to tackle sectarianism.

The Working Group was established to provide evidence on the benefits and drawbacks of establishing a legal definition of sectarianism, and Scottish Ministers further committed to consulting on the findings of the Working Group to allow considerations of this issue to be informed by a wide range of views.

The working group’s remit was:

To consider and weigh up the pros and cons of establishing a legal definition of ‘sectarianism’ in Scots Law. Report the findings of these considerations to Scottish Ministers making clear recommendations on whether such a definition should be introduced and, if so, propose the text of such a definition.

⁴⁵

<https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/9/>

⁴⁶ [Offensive Behaviour at Football and Threatening Communications \(Scotland\) Act 2012](#)

The 'Final Report of the Working Group on Defining Sectarianism in Scots Law'⁴⁷ was published at the same time as this consultation document. The Working Group proposed that:

Definition: Sectarianism should be defined in law and that the definition should reflect the common understanding of sectarianism in modern Scotland. The Group's view is that sectarianism as it is commonly understood in Scotland is rooted in religious antipathy based on perceived Christian denominational affiliation, and hostility expressed in terms of perceived British or Irish national origins and citizenship. In other words, for the purpose of naming sectarianism in Scots Law, sectarianism should be defined as hostility based on perceived (a) Roman Catholic or Protestant denominational affiliation, (b) British or Irish citizenship, nationality or national origins or (c) a combination of (a) and (b).

The Working Group noted that sectarianism becomes a reality when antagonism, hostility, abuse or violence is directed at people because they are perceived to belong to the other group, or when perceived identity with a group is used to give permission to or justify violent and/or discriminatory behaviour which would otherwise be condemned.

Fair naming: The principle of 'fair naming' or 'fair labelling' (that is, naming something for what it is) should apply so that criminal acts of prejudice can be named more accurately whether that be anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor. The Working Group noted that sectarianism is an issue which does not fall easily into a single categorisation, but has evolved over time to be present within the religious, racial, cultural and political spheres.

The original link to religion is often completely obscured as the language of sectarianism is applied in cultural areas where the links to religion are no longer obvious. However, the context for this work was seeking to explore the options for defining sectarianism in law, and not simply to define it in a general sense.

Political views: In line with Lord Bracadale's findings, political views should not be included in any legal definition of sectarianism.

Breadth of the definition: Without a more robust evidence base, any legal definition of sectarianism should be limited to sectarianism rooted in religious hostilities and rivalries within Christianity at present.

Levels of sectarianism that exist outside of Christian communities in Scotland were not clear but that the views of all faiths should be sought through this consultation to allow evidence of non-Christian sectarianism to be identified and better understood.

Statutory aggravation: Lord Bracadale recommended the introduction of two new statutory aggravations for hate crime based on the protected characteristics of age and gender, and the Working Group believes that a new statutory aggravation of 'sectarian prejudice' should be incorporated into future consolidated hate crime legislation. This would introduce the language of sectarianism into Scots Law and be symbolically important, allowing sectarian crimes to be fairly named as such. The Working Group concluded that legal recognition of sectarianism could assist those struggling to tackle the issue out with the legal sphere and add a strong driver to support their work.

⁴⁷ <http://www.gov.scot/ISBN/9781787812987>

The Working Group concludes that a statutory aggravation of sectarian prejudice/ hostility should be introduced. Throughout the report the Working Group mentions the complex, intersectional nature of sectarianism. They set out a draft definition of what 'sectarian prejudice' would mean at pages 30 and 31 of their report.

The Working Group also concludes that there is no need for a standalone offence of sectarian prejudice. Lord Bracadale also looked at stirring up hatred offences (discussed below), which are a category of standalone hate crime offences. The Working Group did not support a stirring up of hatred offence in connection with sectarianism.

The full rationale for the draft legal definition outlined by the Working Group can be found on pages 31-32⁴⁸ of their report.

The Scottish Government believes that further exploration of the findings and proposals made by the Working Group are required. Specifically, the Scottish Government recognises that the argument for fair naming is an important one as understanding the different forms of hate crime in Scotland more accurately is essential for the development of future government policy. The Scottish Government already recognises that anti-Catholicism; anti-Protestantism; anti-Irish racism; and anti-British racism all exist to varying degrees. However, the intersectional nature of sectarianism, as described by the Working Group, raises the question of whether there is value in being able to specifically identify and name sectarianism as something which differs from these categories.

The Scottish Government also believes that the idea of a statutory aggravation for sectarianism is worth exploring further as this may be an effective way to ensure that sectarian behaviour which crosses the criminal threshold is seen to be punished without the need to create a new standalone offence. As with all statutory aggravations, a sectarian aggravation could only be added if an initial charge for criminal behaviour was proven. On conviction, the fact that the offence was motivated by, or demonstrated, sectarian prejudice would be taken into account in passing sentence. However, the Scottish Government also acknowledges that if such an aggravation was to be taken forward, the scope of this would need to be carefully considered.

The following questions have therefore been designed to explore the findings of the Working Group:

Question 12:

Do you think there is a need for sectarianism to be specifically addressed and criminalised in hate crime legislation.

(Please give your reasons for your response.)

Question 13:

If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation?

(Please give your reasons for your response.)

⁴⁸ <http://www.gov.scot/ISBN/9781787812987>

Question 14:

If your response to question 12 was yes, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation? (Please give your reason for this.)

Question 15:

If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and/or perceived British or Irish citizenship, nationality or national origins of the victim?

(Please give your reason for this.)

Question 16:

If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism?

(Please give your reason for this.)

Question 17:

The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?

If you have answered the questions in this section, you may also wish to refer to the following section (6) on Other Groups or Characteristics and questions 18 to 20.

Section 6: Other Groups or Characteristics

Sections 3 and 4 outlined Lord Bracadale's recommendations on the creation of statutory aggravations based on the characteristics of gender and age. Section 5 then considered recommendations made by both Lord Bracadale and the Working Group on Defining Sectarianism in Scots Law in regards to whether sectarianism should be included within hate crime law. Lord Bracadale concluded that, other than gender and age, it is not necessary to create any further statutory aggravations within hate crime law.

This section considers political/religious/racial cross-over; other new groups and characteristics; and whether it is necessary to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group. Each of these aspects will be considered in turn.

Political/religious/racial cross-over

As part of his review, Lord Bracadale considered whether a statutory aggravation should apply where an offence is motivated by malice and ill-will (or hostility) towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group. His report found that⁴⁹:

⁴⁹ At paragraphs 3.40 to 3.44 of Lord Bracadale's report.

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.

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.

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.

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.

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.

Lord Bracadale⁵⁰ concluded:

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.

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.

⁵⁰ At paragraphs 3.48 and 3.49 of Lord Bracadale's report.

Lord Bracadale recommended that it was not necessary to create a statutory aggravation to cover hostility towards a political entity. We propose to accept his recommendation.

Lord Bracadale's Recommendation 6

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

For further information, Lord Bracadale's reasons for these recommendations can be found at paragraphs 3.40 to 3.49⁵¹ of his report:

Question 18:

Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?

(Please provide details in the comments box.)

Other specific new groups or characteristics

Lord Bracadale considered whether it would be necessary to create statutory aggravations to cover hostility towards any other specific new groups or characteristics (other than gender or age, which are discussed above).

He considered immigration status and concluded⁵²:

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.'

Lord Bracadale considered membership of the Gypsy/Traveller community and concluded⁵³:

Romany gypsies have long been recognised as an ethnic racial group, and other more recent court decisions have treated Irish travellers and Scottish Gypsy/Travellers as ethnic groups too. 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.

⁵¹ <https://www.gov.scot/Publications/2018/05/2988/4>

⁵² At paragraph 4.74 of Lord Bracadale's report.

⁵³ At paragraph 4.79 of Lord Bracadale's report.

Lord Bracadale considered Gaelic speakers and concluded⁵⁴:

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.

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.

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

Accordingly, Lord Bracadale did not consider it necessary for there to be new statutory aggravations in connection with hostility toward immigrants/ immigration status, the Gypsy/ Traveller community or Gaelic speakers. That is because the existing statutory aggravation in connection with hostility based on race is defined widely enough in the existing legislation to capture these other areas in so far as they are examples of nationality (including citizenship and ethnicity).

Lord Bracadale also considered socioeconomic status, and concluded⁵⁵:

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.

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.

⁵⁴ At paragraph 4.81, 4.83 and 4.84 of Lord Bracadale's report.

⁵⁵ At paragraph 4.87 and 4.89 of Lord Bracadale's report.

Lord Bracadale set out his conclusion in relation to other groups⁵⁶:

...a number of further groups were suggested by consultation respondents to be covered by 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 2007, 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.

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.

Lord Bracadale recommended that it was not necessary to create a statutory aggravation to cover hostility towards any specific new groups or characteristics, (other than gender or age). We propose to accept his recommendation.

Lord Bracadale's Recommendation 12

I do not consider it necessary to create a statutory aggravation to cover hostility towards any other (meaning other than gender or age) specific new groups or characteristics.

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 4.71 to 4.95⁵⁷ of his report.

Question 19:

Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)?
(Please provide details in the comments box.)

Religiously aggravated offending: consideration of extending the religious aggravation provision to capture beliefs held by an individual

The remit of Lord Bracadale's review included considering whether the existing religious statutory aggravation (section 74 of the Criminal Justice (Scotland) Act 2003) should be adjusted to reflect further aspects of religiously motivated offending.

⁵⁶ At paragraphs 4.91, 4.93 and 4.95 of Lord Bracadale's report.

⁵⁷ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

Lord Bracadale's report explained the background⁵⁸:

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.

Lord Bracadale concluded⁵⁹:

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.

Lord Bracadale also considered whether the provision should extend to those targeted for being a humanist or an atheist⁶⁰:

... 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.

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.

⁵⁸ At paragraph 3.50 of Lord Bracadale's report.

⁵⁹ At paragraph 3.54 of Lord Bracadale's report.

⁶⁰ At paragraphs 3.55 and 3.56 of Lord Bracadale's report,

I note that the background to the introduction of section 74 was the Report of the CrossParty Working Group on Religious Hatred which reported in 2002. The work of the group arose out of concerns about religious intolerance in Scotland. While in principle I consider 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.

Lord Bracadale recommended that it was not necessary to create a statutory aggravation to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group. We propose to accept his recommendation.

Lord Bracadale's 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.

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 3.50-3.56⁶¹ of his report.

Question 20:

Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual?

(Please provide details in the comments box.)

Section 7: Association with Members of a Protected Group

At the moment, the existing statutory aggravations in relation to the protected characteristics of race, religion, disability, sexual orientation and transgender identity each apply where the offence is motivated by, or demonstrates, hostility based on one of those grounds even where the victim does not have the identity characteristic in question. For instance, someone is assaulted because of the perpetrator's prejudice against Muslims but the victim is not Muslim. In such cases, a statutory aggravation would apply even though the perpetrator was mistaken as to the fact that the victim had the identity. This is because the statutory aggravations apply where the perpetrator presumes that the victim has the identity characteristic.

Lord Bracadale recommends that it continues to be the case that the statutory aggravations (including any new statutory aggravations) continue to apply where an offence is motivated by, or demonstrates, hostility in relation to people who are presumed to have the identity characteristic. The Scottish Government agrees with this approach.

Currently the race and religion statutory aggravations also apply in relation to persons who have an association with someone with the protected characteristic.

⁶¹ <https://www.gov.scot/Publications/2018/05/2988/4>

This is because section 96 of the Crime and Disorder Act 1998 (race statutory aggravation) defines membership of a racial group as including association with members of the group. Likewise, section 74 of the Criminal Justice (Scotland) Act 2003 (religion statutory aggravation) defines membership of a religious group as including association with members of the group. This is different to the perpetrator being mistaken as to the victim being a member of a particular racial group or religious group. Rather, the application of the aggravations in relation to people who have an association applies where, for example, a white person is assaulted because they socialise with a person of a different race.

While the race and religion aggravations apply in relation to people associating with members of a racial or religious group, this is not the same in relation to the statutory aggravations applying in relation to disability, sexual orientation and transgender identity. Lord Bracadale recommends that the association principle should apply in relation to all of the statutory aggravations.

Lord Bracadale considered association and presumed membership. His report⁶² explained that:

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.

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.

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.

⁶² <https://www.gov.scot/Publications/2018/05/2988/4>

The Scottish Government recognises the merits of modernising legislation to ensure that all of the hate crime statutory aggravations apply in relation to people who are presumed to have the characteristic or who have an association with the protected characteristic.

For example, if a person is targeted because the perpetrator presumed they were gay (i.e. this is an example of the aggravation applying where there is a presumption that a person has a protected characteristic), or a parent is targeted because they are with their disabled child (i.e. this is an example of the aggravation applying where there is an association with the protected characteristic).

We propose to accept Lord Bracadale's recommendation.

Lord Bracadale's 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.

For further reading, the relevant material discussing these issues in Lord Bracadale's report is at paragraphs 3.37 to 3.39⁶³ of his report.

Question 21:

Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristic(s)?

(Examples of protected characteristics are religion, sexual orientation, age, gender, race, disability, transgender identity and intersex).

(Please provide details in the comments box.)

Question 22:

Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)?

(Please tell us why?)

⁶³ <https://www.gov.scot/Publications/2018/05/2988/4>

Part Three – New Stirring Up of Hatred Offences

Section 8: Current Position and Proposed Changes

As mentioned above, in the context of hate crime, there are both statutory aggravations and standalone offences. So far, this consultation has focused on statutory aggravations, but this section considers a category of standalone offences referred to as stirring up hatred offences.

Lord Bracadale noted that statutory offences of stirring up hatred only exist in relation to race. These are contained in sections 18 to 22 of the Public Order Act 1986. These existing offences would capture actions that are threatening, abusive or insulting, with the intention of stirring up racial hatred, or which, having regard to all the circumstances, are likely to stir up racial hatred.

Lord Bracadale's report⁶⁴ explained that:

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.

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... 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.

The Scottish Government agrees that these are the key issues to consider in assessing the merits of an expansion of stirring up hatred offences.

⁶⁴ At paragraphs 5.3 and 5.4 of Lord Bracadale's report.

In considering the merits of having stirring up hatred offences, Lord Bracadale⁶⁵ explained his views on these key issues as follows:

Wrongfulness

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

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. ...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 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.

Seriousness

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* in which points were offered for carrying out a variety of acts against Muslim persons on a particular day of action.
- In the one case of stirring up religious hatred prosecuted on indictment under section 6 [of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ('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'.
- 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

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... 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

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 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... 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.

⁶⁵ At paragraphs 5.9 to 5.16 of Lord Bracadale's report.

Is there a gap in the law?

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.

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

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

Lord Bracadale⁶⁶ also identified that these are concerns arise that any expansion of stirring up hatred offences could adversely affect freedom of speech and freedom of expression.

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 includes 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 hatred.

⁶⁶ At paragraph 5.17 of Lord Bracadale's report.

Having considered Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) Lord Bracadale⁶⁷ concluded that:

A protection of freedom of expression provision, similar to those described 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.

The Scottish Government considers that issues relating to freedom of speech and freedom of expression must be considered carefully.

Article 10 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.

The European Court of Human Rights has consistently treated freedom of expression as a fundamental human right, emphasising its importance not only directly, but also as a core underpinning of democracy and other human rights.

Protection for freedom of expression is built into the operation of the legal system. All laws made by the Scottish Parliament have to be interpreted in a way that is compatible with the ECHR. If they cannot be interpreted as compatible, they have no effect.

However, even with these protections, the Scottish Government believes there can be merit in clearly and explicitly signally respect for human rights in legislation. There are examples on the statute book of provisions that offer direct protection of ECHR rights. For example, section 16 of the Marriage and Civil Partnership (Scotland) Act 2014⁶⁸ explicitly provides that nothing in the Act affects the ECHR rights to freedom of thought, conscience and religion or to freedom of expression. A similar approach could be adopted for the purposes of any new legislation relating to offences concerning stirring up of hatred.

English and Welsh law contains stirring up hatred offences in relation to religion and sexual orientation (under sections 29A to 29N of the Public Order Act 1986). Sections 29J and 29JA of that Act contain protections for freedom of expression in relation to those offences. Section 6 of the now-repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 created an offence of stirring up religious hatred and section 7 contained protections for freedom of expression in relation to that offence. Lord Bracadale recommended that similar protections for freedom of expression should be included in any new legislation relating to stirring up of hatred.

⁶⁷ At paragraph 5.29 of Lord Bracadale's report.

⁶⁸ <http://www.legislation.gov.uk/asp/2014/5/section/16>

Protected characteristics to be included

Lord Bracadale's report also considered whether stirring up hatred offences should be expanded to other protected characteristics⁶⁹:

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.

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

...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.

The Scottish Government considers there is merit in considering whether stirring up hatred offences should be extended to other protected characteristics and is interested in hearing views on whether there should be an expansion.

Thresholds

Lord Bracadale's report also considered the different approaches taken to the scope and thresholds (or tests) that apply for an offence to be committed in existing 'stirring up hatred' offences in the different UK jurisdictions and considered how they might need to be adjusted⁷⁰:

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').

...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 of the [Criminal Justice and Licensing (Scotland) Act 2010]. 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'.

⁶⁹ At paragraphs 5.30 and 5.33 of Lord Bracadale's report.

⁷⁰ At paragraphs 5.34 & 5.37 of Lord Bracadale's report.

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.

...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.

The existing offences concerning stirring up racial hatred (contained in sections 18 to 22 the Public Order Act 1986) requires that, for the offence to be committed the conduct or material must be 'threatening, abusive or insulting'. Lord Bracadale recommended that consistency with other protected characteristics required that the reference to 'insulting' should be deleted.

Lord Bracadale noted in his report that the word 'insulting' was deleted from the English and Welsh harassment offence under section 5 of the Public Order Act 1986 in 2014 without any material impact. He observed that there did not appear to be any adverse effect on the ability of the Crown Prosecution Service (the English and Welsh equivalent of the COPFS) to prosecute such conduct, as any 'stirring up hatred' conduct that had actually been prosecuted involved behaviour that could be characterised as 'abusive' as well as 'insulting'.

Lord Bracadale's Recommendation 13

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

Lord Bracadale's 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.

Lord Bracadale's 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.

Lord Bracadale's 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 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 should be included in any new legislation relating to stirring up offences.

Further information on Lord Bracadale's recommendations can be found at paragraphs 5.1 to 5.42⁷¹ of his report.

Question 23

Do you agree with Lord Bracadale's recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics?

(Please provide details in the comments box.)

Question 24:

Do you agree with Lord Bracadale's recommendation that any new stirring up hatred offences should require that the conduct is 'threatening or abusive'?

(If not, what do you think the threshold should be for the offence to be committed?)

Question 25:

Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences?

(This would mean that the offence would apply where the behaviour is 'threatening or abusive', but not where it is only 'insulting'.)

(Please provide details in the comments box.)

Question 26:

Do you agree with Lord Bracadale's recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?

(If you answered yes to this question, do you have any comments on what should be covered by any such 'protection of freedom of expression' provision?)

(Please provide details in the comments box.)

Section 9: Online Hate

In the modern era, online communication is a core part of many people's everyday lives and interactions with others. The Scottish Government notes that the starting point in considering what changes may be necessary as regards online hate crime is that what is criminal off-line is criminal on-line, and that an existing offence committed online can be aggravated in the same way as any other offence can be aggravated.

⁷¹ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

For instance, the offence of threatening or abusive behaviour at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 can be prosecuted in relation to conduct occurring online or in person and, in both cases, statutory aggravations can be attached if the offence is motivated by, or the perpetrator demonstrates, hostility toward the victim on the basis of a protected characteristic. Similarly, the offences of stirring up racial hatred under sections 18- 22 of the Public Order Act 1986 can be prosecuted in relation to online conduct.

This consultation asks whether stirring up of hatred offences should be extended to cover other identity characteristics.

With this in mind, the focus of this section is on whether any additional criminal law measures are needed to combat online hate crime that the criminal law does not already provide.

Lord Bracadale⁷² considered how well the current law operates in relation to hate crime and hate speech online, and whether any changes are needed. Lord Bracadale's report found that:

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.

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 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.

It should be noted that there are a range of criminal offences which can be used to prosecute abuse and harassment, whether it occurs online or face-to-face. These include the offences of threatening or abusive behaviour, stalking, indecent communication and offences concerning the stirring up of racial hatred.

- the offence of 'threatening or abusive behaviour' at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ('the 2010 Act') makes it an offence to behave in a threatening or abusive manner, where that behaviour is such that it would be likely to cause a reasonable person to feel fear or alarm.

⁷² At paragraphs 6.5 and 6.6 of Lord Bracadale's report.

- where a person undertakes a course of conduct which is intended to cause the victim to suffer fear or alarm (or where the person knows or ought to have known that engaging in the course of conduct would be likely to cause the victim to suffer fear or alarm), it may amount to an offence of stalking under section 39 of the 2010 Act.
- where the abusive or threatening communications are of a sexual nature, depending on the circumstances, it may be prosecuted using offences concerning 'communicating indecently' or 'coercing a person into looking at a sexual image' contained in the Sexual Offences (Scotland) Act 2009.
- section 127 of the Communications Act 2003 contains two offences:
 - a) it is an offence to send by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character or to cause such a message or matter to be sent
 - b) it is an offence, for the purpose of causing annoyance, inconvenience or needless anxiety to another:
 - i) to send by means of a public electronic communications network, a message that the sender knows to be false
 - ii) to cause such a message to be sent, or
 - iii) to persistently make use of a public electronic communications network

Lord Bracadale⁷³ considers that all forms of hate crime – whether committed face-to-face or online - will be able to be better addressed through implementing his proposals for modernising hate crime legislation. He concluded:

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.

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.

However, stakeholders have expressed concern that 'lower level' online abuse is not covered by legislation and that further consideration is needed due to the often damaging impact it can have on people's lives.

⁷³ At paragraphs 6.51 to 6.52 of Lord Bracadale's report.

Lord Bracadale's 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.

Further information on Lord Bracadale's recommendation can be at paragraphs 6.1 to 6.53 ⁷⁴ of his report.

Question 27:

Do you agree with Lord Bracadale's recommendation that no specific legislative change is necessary with respect to online conduct?

(Please provide details in the comments box.)

⁷⁴ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/7/>

Part Four - Exploitation and Vulnerability

Section 10 New Statutory Aggravation – Exploitation and Vulnerability

As discussed above, the thresholds used in the statutory aggravation approach in hate crime legislation are based on **hostility** by the perpetrator towards a person or persons due to their perceived membership of a particular group. For example, an offence committed against a person where the perpetrator demonstrated hostility towards that person because they were elderly would be addressed through the inclusion of age as a protected characteristic, as discussed in section 4 of Part 2 of this consultation paper.

However, Lord Bracadale draws a distinction between crimes based on hostility towards a particular group, and crimes where the perpetrator targets a potential victim because the perpetrator believes them to be in some way vulnerable. Lord Bracadale defined hate crime as ‘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’⁷⁵ from other crimes. Where a perpetrator targets a victim in order to exploit a vulnerability (perceived or otherwise) the perpetrator does not necessarily hate the person because of that vulnerability, but is motivated to exploit the vulnerability for the purposes of the offence.

Accordingly, this chapter considers Lord Bracadale’s further recommendations in this area regarding introducing a general aggravation covering exploitation and vulnerability Lord Bracadale discussed the issue as follows⁷⁶:

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... I am not convinced that this will always be the case.

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.

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.

⁷⁵ At paragraph 2.10 of Lord Bracadale’s report.

⁷⁶ At paragraphs 3.22 to 3.27 of Lord Bracadale’s report.

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

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.

As part of his consideration of a new statutory aggravation based on age hostility within the existing suite of hate crime legislation, Lord Bracadale concludes that⁷⁷:

...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.

Lord Bracadale noted the strong support for the introduction of a statutory aggravation covering offences committed against older people because of perceived vulnerability. Often, older people are targeted by perpetrators of particular forms of crime not because the perpetrator is motivated by hatred of older people, but because the perpetrator perceives them as being more vulnerable to such crime.

However, not all crime involving exploitation of vulnerability is 'opportunistic'. There have been high profile cases where someone responsible for caring for a person has taken advantage of their position of trust to financially exploit the person they are meant to be caring for.

⁷⁷ At paragraph 4.70 of Lord Bracadale's report.

Equally, we are aware of cases where people who rely on carers or family have been abused or neglected by those who are supposed to be looking after them and that this may or may not be accompanied by financial exploitation.

As Lord Bracadale notes, these issues do not only affect older people. His view is that people may be vulnerable, or perceived as being vulnerable, because of, for example, a physical disability, illness or a learning disability.

Lord Bracadale explicitly recognised that a proportion of offences committed against disabled people are based not on hostility, but on perceived vulnerability.

Lord Bracadale therefore recommended that the exploitation of vulnerability should not fall within the definition of 'hate crime', and that the Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation concerning exploitation of vulnerability.

Statutory aggravations in contexts other than hate crime already exist on the statute book. For instance:

- aggravation of an offence which involves abuse of a partner or ex-partner (section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016)
- aggravations of offences in connection with human trafficking (sections 5 to 7 of the Human Trafficking and Exploitation (Scotland) Act 2015)
- aggravation of the offence of domestic abuse by reason of involving a child (section 5 of the Domestic Abuse (Scotland) Act 2018)

This is a complex subject and we want to use this consultation to explore the impact of Lord Bracadale's recommendation in this area. We want to carefully consider how 'vulnerability' is defined in any such aggravation and what circumstances should be covered.

Vulnerability can take very different forms. As noted above, a person may be targeted because they are perceived as being more vulnerable because of factors such as their age, or because of a physical disability. Equally, a person may be perceived as being more vulnerable, for example, because they are under the influence of alcohol or drugs at the time an offence is committed against them, or even because they are identified by the perpetrator as being lost or in unfamiliar surroundings (for example a tourist visiting a city they do not know, late at night).

It is also important to consider that vulnerability can be relative. While people with mobility issues may be especially vulnerable to an opportunistic street robbery, and people with cognitive issues or learning disabilities could be especially vulnerable to opportunistic fraudsters, most of the population could be considered vulnerable relative to a person who threatens them with a weapon. Indeed, perpetrators may target victims for certain types of crime, such as street robbery because they perceive them as being vulnerable to that crime or unlikely to put up resistance.

It is not clear that all types of 'vulnerability' described in the above two paragraphs should necessarily be treated in the same way as the kind of crimes committed against people who are perceived as being especially vulnerable because of their age, disability or physical infirmity.

In addition to this, any aggravation will require the prosecution to prove beyond reasonable doubt that the offence is aggravated in the way specified.

It may, for example, be easier to prove that a person deliberately exploited the vulnerability of someone they were caring for over a significant period of time, than that an opportunist thief or doorstep scammer deliberately targeted their victim because they believed them to be especially vulnerable.

Given these issues a statutory aggravation covering exploitation and vulnerability may not be the best way to address this issue. The judiciary are able to take account of the full facts and circumstances of each case before them, including whether, and in what way, the perpetrator exploited the vulnerability of their victim, when determining an appropriate sentence for each offender. A statutory aggravation may risk unnecessarily complicating sentencing decisions in this area.

However, a statutory aggravation would provide reassurance that the justice system recognises the particular harm caused by perpetrators who target victims because they perceive them to be especially vulnerable.

We would welcome views on whether there should be a statutory aggravation, outwith the hate crime scheme, concerning exploitation of vulnerability and, if so, how that aggravation should be framed.

Lord Bracadale's Recommendation 3

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

Lord Bracadale's Recommendation 11

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

Further information on Lord Bracadale's recommendations can be at paragraphs 3.14 to 3.27⁷⁸ and paragraphs 4.1 to 4.70⁷⁹ of his report.

Question 28:

Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim?

(Please provide details in the comments box.)

Question 29:

If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you think such an aggravation should cover?

⁷⁸ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

⁷⁹ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

Part Five – Other Issues

Section 11: Repeal of Section 50A Racially Aggravated Harassment

Other **standalone offences** in the context of hate crime law are the offences relating to racially-aggravated harassment, contained in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995. These offences include the element of hostility as a core part of the offence. This is different from operating on the basis of a baseline offence with a separate statutory aggravation.

Lord Bracadale explains section 50A as follows

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.

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.

For these purposes, 'harassment' in section 50A(1)(a) includes causing the person alarm or distress and a 'course of conduct' must involve conduct on at least two occasions.

There are no equivalent offences in relation to other protected characteristics.

The Crime and Disorder Act 1998 simultaneously created:

- the standalone offence of racially aggravated harassment by way of inserting section 50A into the Criminal Law (Consolidation) (Scotland) Act 1995 (section 33 of the 1998 Act)
- the statutory racial aggravation (section 96 of the 1998 Act)

The offence was developed before the introduction of other statutory aggravations concerning e.g. religious hatred, now found elsewhere in the statute book. The development of this approach was informed by concerns that the problems of racial harassment and racially motivated violence were not treated seriously enough by the criminal justice system.

Lord Bracadale takes the view that, over time, other legislation has been introduced which captures the behaviour covered under section 50A. He goes on to discuss the offence of threatening or abusive behaviour which is contained in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010⁸⁰:

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.

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 2016/17

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.

⁸⁰ At paragraphs 7.12 to 7.13 of Lord Bracadale's report.

In comparing the tests of 'fear or alarm' (as per section 38 of the Criminal Justice and Licensing (Scotland) Act 2010) and 'alarm or distress' (per section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995), Lord Bracadale's report explains⁸¹:

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.

Sentencing differences

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 of note that the vast proportion of section 50A and section 38/section 96 offences 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

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.

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.

⁸¹ At paragraphs 7.15 and 7.17 to 7.20 of Lord Bracadale's report

Lord Bracadale⁸² concluded:

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.

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.

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.

Lord Bracadale's view is that the existence of section 38 of the Criminal Justice and Licencing (Scotland) Act 2010 and section 96 of the Crime and Disorder Act 1998 have resulted in section 50A no longer being needed to meet the aims which it was intended to achieve when it was created in 1998. The report recommends that Section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 should be repealed.

Some stakeholders have raised concern around the repeal of Section 50A and the potential message that this sends to victims, perpetrators and wider society. It has also been suggested that this would leave a gap in the level of protection provided to this group of people.

Lord Bracadale's Recommendation 18

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

⁸²At paragraphs 7.24 to 7.26 of Lord Bracadale's report

For further information, Lord Bracadale's reasons for this recommendation can be found at paragraphs 7.1 to 7.26⁸³ of his report.

Question 30:

Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed? (Please provide details in the comments box.)

Question 31:

What do you think the impact of repealing section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?

Section 12: Sentencing

Lord Bracadale's report⁸⁴ explained that certain requirements fall on the court when sentencing for a hate crime aggravation. His report explained that:

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.

Lord Bracadale's report⁸⁵ indicated that:

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.

⁸³ <https://www.gov.scot/Publications/2018/05/2988/8>

⁸⁴ At paragraph 3.57 of Lord Bracadale's report.

⁸⁵ At paragraphs 3.59 and 3.60 of Lord Bracadale's report.

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.

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.

Lord Bracadale considered 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 in the absence of an aggravation. His report⁸⁶ stated:

I consider that... 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.

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.

The Scottish Government agrees with Lord Bracadale's comments on the importance of the requirements to state and record that convictions have been aggravated, and that aggravations should be taken into account in determining the sentence. We propose to accept his recommendation in respect of these requirements.

⁸⁶ At paragraphs 3.63 and 3.64 of Lord Bracadale's report.

However, while the Scottish Government is broadly supportive of Lord Bracadale's views in this area, we would propose to reject his recommendation to remove the current requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation. If this was implemented, it would mean that the difference in the length of sentence would no longer be required to be stated in open court.

During initial engagement with stakeholders following publication of Lord Bracadale's report, we have heard a range of views about this recommendation, including a number of concerns with the potential removal of the requirement to state the extent to which the sentence imposed is different to what it would have been without the aggravation.

We heard that stating the difference in the sentence sends a message to both victims and perpetrators that these types of crimes are being taken seriously. In addition, it was thought that there was potential to make more use of this information in providing effective support to victims.

Lord Bracadale's 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.

Further information on Lord Bracadale's recommendation can be found at paragraphs 3.57 to 3.66 ⁸⁷ of his report.

Question 32:

**Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence? (This would mean that Lord Bracadale's recommendation on sentencing would not be taken forward.)
(Please provide details in the comments box.)**

Section 13: Wider context: Support for Victims of Hate Crime and Restorative Justice

Support for victims of hate crime

In 2017, in response to Duncan Morrow's Independent Advisory Group report on Hate Crime, Prejudice and Community Cohesion⁸⁸ the Scottish Government published its Tackling Prejudice and Building Connected Communities Action Plan⁸⁹, an ambitious programme of work to tackle hate crime and build community cohesion.

⁸⁷ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

⁸⁸ <https://www2.gov.scot/Resource/0050/00506074.pdf>

⁸⁹ <https://beta.gov.scot/publications/tackling-prejudice-building-connected-communities-scottish-government-response-report-independent/>

It looks to address under reporting of hate crime, including barriers to reporting and third party reporting; consider and address prejudice-based bullying; consider the gathering of data and evidence in relation to hate crime; and hate crime in the workplace.

An Action Group, chaired by the Cabinet Secretary for Communities and Local Government with key stakeholders, was established to take this work forward. The Action Group will publish a report on progress in 2020.

Lord Bracadale⁹⁰ stated in his report:

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.

Lord Bracadale addressed the issue of under reporting of hate crimes and the various ways that could remedy this, such as a through the use of third party reporting centres, anonymity for witnesses and a change of culture within the police and criminal justice system. In his report Lord Bracadale⁹¹ also highlights activity underway to support victims:

In April 2018, the Cabinet Secretary for Justice announced a new, 3-year funding package for Victim Support Scotland totalling £13.8 million, to enable them to provide free practical and emotional support to victims of crime across the country.

The Programme for Government⁹² contains a package of measures to improve the experience of victims of crime. This includes work being led by Victim Support Scotland to develop 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.

In addition, the Cabinet Secretary for Justice is chairing a new Victims Task Force, to provide leadership to guide and shape the development of this victim-centred approach. Beginning its work before the end of 2018, the Task Force will focus on delivery of the victims commitments in Programme for Government. This will provide the necessary oversight and momentum to ensure progress and achieve better outcomes for all victims of crime.

There are currently many initiatives being undertaken to ensure that victims of hate crime are supported throughout the reporting process. We therefore believe that no legislation change is required at this point to support victims of hate crime.

⁹⁰ At paragraph 10.2 of Lord Bracadale's report.

⁹¹ At paragraph 10.33 of Lord Bracadale's report.

⁹² <https://beta.gov.scot/programme-for-government/>

On this basis, we propose to accept Lord Bracadale’s recommendation that no legislative change is required in this area.

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.

Further information on Lord Bracadale’s recommendation can be found at paragraphs 10.1 to 10.37 and paragraphs 10.38 to 10.52⁹³ and of his report.

Question 33:

Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?

(Please provide details in the comments box.)

Restorative justice

Lord Bracadale encourages the use of restorative justice processes in dealing with hate crime, where appropriate. Lord Bracadale defines restorative justice as ‘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.’⁹⁴

Lord Bracadale also noted that⁹⁵

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.

Restorative justice is the concept that mediation may be helpful between victims of crime (either people or communities as a whole) and perpetrators where the perpetrator faces up to their offending behaviour and takes responsibility for it.

We do not believe there is a need for statutory change to facilitate restorative justice or diversion from prosecution as there are clear structures and Scottish Government guidance on restorative justice⁹⁶ that can be used to ensure the consistent governance, oversight and standards.

In addition, the Scottish Government has made a commitment in Programme for Government to have restorative justice services widely available across Scotland by 2023 with the interests of victims at their heart. We will publish a Restorative Justice Action Plan by spring 2019 that will set out how we deliver this aim.

⁹³ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/11/>

⁹⁴ At paragraph 10.39 of Lord Bracadale’s report.

⁹⁵ At paragraph 10.50 of Lord Bracadale’s report.

⁹⁶ <https://www.gov.scot/publications/guidance-delivery-restorative-justice-scotland/>

Accordingly we agree with Lord Bracadale that legislative change is not required in relation to restorative justice.

On this basis, we propose to accept Lord Bracadale's recommendation that no legislative change is required in this area.

Lord Bracadale's 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.

Further information on Lord Bracadale's recommendation can be found at paragraphs 10.38 to 10.52⁹⁷ of his report.

Question 34:

Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland?

(Please provide details in the comments box.)

Section 14: Any Gaps?

Lord Bracadale provided a comprehensive review of hate crime legislation and made a number of recommendations in his report. We would like to know if there are any other issues that we should consider for inclusion in our consolidated and modernised hate crime legislation for Scotland.

Question 35:

What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?

⁹⁷ <https://beta.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/11/>

Part Six - Responding to this Consultation

1. Please respond to this consultation by **24 February 2019**.
2. You can view and respond to this consultation online at:
<https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation>
3. You can save and return your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 24 February 2019.
4. If you are unable to respond online, please complete the Respondent Information Form at Annex B (see 'Handling your Response' below) and send with your completed questionnaire to:

Hate Crime Legislation Team
Scottish Government
Area 3H South
Victoria Quay
Edinburgh
EH6 6QQ

Or by email to connectedcommunities@gov.scot.

5. Questions are raised throughout the consultation but they can all be found and answered in the questionnaire at Annex B to this consultation paper.

Handling your Response

6. If you respond online using the Scottish Government's consultation platform, Citizen Space (<http://consult.scotland.gov.uk>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.
7. If you are unable to respond through Citizen Space, please complete and return the Respondent Information Form which is also included in Annex B to this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.
8. All respondents should be aware that the Scottish Government is subject to the provisions of the [Freedom of Information \(Scotland\) Act 2002](#) and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next Steps in the Process

9. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk>.

10. If you used Citizen Space to respond, you will receive a copy of your response via email.
11. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and Complaints

12. If you have any comments about how this consultation exercise has been conducted, please send them by email to connectedcommunities@gov.scot.

Scottish Government Consultation Process

13. Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work. You can find all our consultations online: <http://consult.scotland.gov.uk>.
14. Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis within three months of the closing date of the consultation.
15. The consultation is also available in Easy Read and BSL. Alternative versions can be obtained by emailing connectedcommunities@gov.scot or writing to Hate Crime Legislation Team at the address in paragraph 3 above.

LORD BRACADALE'S 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.



Annex B

Consultation on amending Scottish hate crime legislation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Questionnaire

Respondents should take into consideration the information provided in this document alongside any other knowledge or personal experiences that could be relevant. All opinions are welcome.

We ask that you try to answer all the questions in each section, however, if you are unable to answer any question then please feel free to move on to the next.

There is a comments box below each question to allow you to set out your reasoning and provide general comments

Part One: Consolidating Hate Crime Legislation

Q1. Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?

(Please tell us why in the comments box.)

- Yes
- No
- Unsure

Comments

Q2. Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from 'evincing malice and ill will' to 'demonstrating hostility'?

(Please tell us why in the comments box.)

- Yes
- No
- Unsure

Comments

**Q3. Do you think changing the language of the thresholds for the statutory aggravations from ‘evincing malice and ill will’ to ‘demonstrating hostility’ would change how the thresholds are applied?
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q4. Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q5. Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

Q6. If you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?

Comments

Part Two: New Statutory Aggravations

Q7. Do you agree with Option A to develop a statutory aggravation for gender hostility?

(Please provide details in the comments box below.)

- Yes
- No
- Unsure

Comments

Q8. Do you agree with Option B to develop a standalone offence for misogynistic harassment?

(If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.)

- Yes
- No
- Unsure

Comments

Q9. Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)? (If you agree please tell us why.)

- Yes
- No
- Unsure

Comments

Q10. Do you agree with Option D of taking forward all of the identified options? (This would include development of a statutory aggravation based on gender hostility (Option A); development of a standalone offence relating to misogynistic harassment (Option B); and work to build on Equally Safe (Option C)?

(If you agree, please tell us why.)

(Please provide examples of the types of behaviour that could be captured by the standalone offence.)

- Yes
- No
- Unsure

Comments

Q11. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?

(Please provide details in the comments box below.)

- Yes
- No
- Unsure

Comments

Q12. Do you think there is a need for sectarianism to be specifically addressed and defined in hate crime legislation?

(Please give your reasons for your response.)

- Yes
- No (you may wish to go to question 16)
- Unsure

Comments

Q13. If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation?

(Please give your reasons for your response.)

- Yes
- No (you may wish to go to question 16)
- Unsure

Comments

Q14. If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation? (Please give your reason for this.)

- Yes
- No
- Unsure

Q15. If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and/or perceived British or Irish citizenship, nationality or national origins of the victim? (Please give your reason for this.)

- Yes
- No
- Unsure

Comments

Q16. If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism? (Please give your reason for this.)

Comments

Q17. The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?

Comments

**Q18. Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?
(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q19. Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)?
(Please provide details in the comments box.)**

- Yes
- No
- No Opinion

Comments

Q20. Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual?

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q21. Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristic?

(Examples of protected characteristics are religion, sexual orientation, age, gender, race, disability, transgender identity and intersex).

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q22. Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)?

(Please tell us why?)

- Yes
- No
- Unsure

Part Three: New Stirring Up of Hatred Offences

Q23. Do you agree with Lord Bracadale’s recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics?’

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q24. Do you agree with Lord Bracadale’s recommendation that any new stirring up hatred offences should require that the conduct is ‘threatening or abusive’? (If not, what do you think the threshold should be for the offence to be committed?)

- Yes
- No
- Unsure

Comments

Q25. Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences?

(This would mean that the offence would apply where the behaviour is ‘threatening or abusive’, but not where it is only ‘insulting’.)

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q26. Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?

(If you answered yes to this question, do you have any comments on what should be covered by any such ‘protection of freedom of expression’ provision?)

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q27. Do you agree with Lord Bracadale’s recommendation that no specific legislative change is necessary with respect to online conduct?

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Part Four: Exploitation and Vulnerability

Q28. Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim?

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q29. If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you think such an aggravation should cover?

Comments

Part Five: Other Issues

Q30. Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed?
(Please provide details in the comments box.)

- Yes
- No
- No Opinion

Comments

Q31. What do you think the impact of repealing section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?

Comments

Q32. Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence?

(This would mean that Lord Bracadale’s recommendation on sentencing would not be taken forward.)

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q33. Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q34. Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland?

(Please provide details in the comments box.)

- Yes
- No
- Unsure

Comments

Q35. What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?

Comments



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