

## Sectarianism Definition Group Legal Discussion Paper

This discussion paper sets out:

- A brief overview of the existing framework of hate crime legislation within which Scots law currently operates;
- The proposed legal framework for hate crimes in Scotland which seems likely to emerge from the Bracadale Review; and
- Alternative approaches which might be adopted, if the Group determine that it would be advantageous to introduce explicit sentencing aggravators based on sectarian prejudice or incitement to sectarian hatred offences in Scots law.

In terms of introducing the language of sectarianism into the criminal law, broadly, there are **three alternative approaches** available to the group:

- Recommend **no change**, on the basis that religious and racial aggravators and incitement offences adequately proscribe sectarian offending in Scots law
- Recommend that a new, named **sectarian prejudice aggravator** should be introduced only
- Recommend that a new **sectarian prejudice aggravator** and **incitement offence** should be introduced

If either the second or the third option is preferred, from a legal perspective, the critical question becomes: what factors should be included in a legal definition of sectarianism for these purposes? This paper sets out **three alternative approaches** – but these are non-exhaustive and are merely intended to stimulate discussion. These are:

- **Option 1:** a narrowly-framed aggravator, limited to Christian denominational prejudice; or
- **Option 2:** a more broadly-framed aggravator, extending not only to prejudice on a Christian denominational basis, but also British or Irish citizenship, nationality or national origins, or a mixture of both; or
- **Option 3:** a still more broadly-framed aggravator, including denominational prejudice, or prejudice based on British or Irish national origins, or glorifying proscribed terrorist organisations under Schedule 2 of the Terrorism Act 2000.

## 1. Hate Crime | The current law

Scotland's patchwork body of "hate crime" legislation is built up of a scattered and non-comprehensive body of legal rules. These have evolved in a piecemeal fashion since 1965 and the provisions are distributed across a disjointed series of legislative interventions. Considerable differences now categorise the law in Scotland and in England and Wales.

Broadly speaking, the criminal law engages with hate crime in two distinct ways: (a) **statutory sentencing aggravations** based on the **prejudiced motivations** of the offender and (b) **stand-alone offences** which directly criminalise behaviour based on its hateful character towards a protected group. The list of sentencing aggravations now available to the Scottish prosecutor is now fairly long, but is not comprehensive and does not exactly mirror the protected characteristics set out by the Equality Act 2010. By contrast, there are currently only a handful of stand-alone hate crime offences which currently apply in Scotland. These limited statutory crimes apply to racial prejudice only, excluding considerations of religion, sexuality, gender or other social or cultural identities.

## 2. Sentencing aggravators

Statutory aggravators are intended to enhance the severity of the charge and must be taken into account by the court in determining the appropriate sentence if the accused is convicted. Aggravators create no new criminal offences, but only ordain that offences motivated by animus towards specified groups may merit higher sentences. If the aggravator cannot be proven beyond a reasonable doubt, the court can nevertheless convict the accused of the underlying offence, under deletion of the aggravation. If the accused is acquitted of the principle charge, the accused cannot be convicted on the basis of the aggravator alone, even if proven.

The first statutory aggravator based on evincing malice and ill-will was introduced to Scots law in 1998.<sup>1</sup> Scots law currently adopts an "animus" based model in terms of aggravators based on hatred, which can be established by proving on the basis of a single source of evidence that:

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<sup>1</sup> Crime and Disorder Act 1998, section 33.

1. at **the time** of committing the offence or **immediately before** or **after** doing so, the offender evinced towards the victim of the offence (if any) “**malice and ill-will**” relating to a protected characteristic (or presumed protected characteristic) of the victim; or alternatively –
2. that the offence was **motivated (wholly or partly) by malice and ill-will** towards persons based on their perceived racial, religious or transgender identities, of their sexual orientation or disability.

Implicit in this logical structure is that aggravators are based on the perceptions of the accused, as demonstrated by their words and behaviour. If, for example, a bigot assaulted a Christian while shouting anti-Islamic epithets, the religious prejudice aggravator could still be attached to the charge and the incident would be recorded as religiously-motivated offending, irrespective of the victim’s religious beliefs, if any. As a result, aggravators are generally proven in court with reference to the words used or statements made by the accused in the course of the alleged offence.

Scots criminal law currently recognises five main aggravators based on prejudice: (1) **racial prejudice**, (2) **religious prejudice** on (3) prejudice relation to **disability** or (4) **sexual orientation** or (5) **transgender identity**.

The legal definition of “**race**” is wider than might intuitively be assumed. Under section 96 of the Crime and Disorder Act 1998, a “racially aggravated” offence is one which is committed in respect of a “racial group”, defined as a “group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.”<sup>2</sup>

The **religious prejudice** aggravator<sup>3</sup> is predicated on either (a) the victim’s membership (or presumed membership) of a religious group, or of “a social or cultural group with a perceived religious affiliation.”<sup>4</sup> The 2003 Act defines a “religious group” as a group of persons defined by reference to their:

- religious belief or lack of religious belief;
- membership of or adherence to a church or religious organisation;

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<sup>2</sup> Crime and Disorder Act 1998, section 96(6).

<sup>3</sup> Criminal Justice (Scotland) Act 2003, section 74.

<sup>4</sup> Criminal Justice (Scotland) Act 2003, section 74(2)(b).

- support for the culture and traditions of a church or religious organisation; or
- participation in activities associated with such a culture or such traditions.<sup>5</sup>

**Disability** is defined as “physical or mental impairment of any kind,”<sup>6</sup> and includes medical conditions which have, or may have, a substantial or long-term effect, or is of a progressive nature.<sup>7</sup>

An additional **domestic abuse** aggravator was introduced by the Scottish Parliament in 2016 where an offence involves “abuse of the partner or ex-partner of the person committing it.”<sup>8</sup> The aggravator will be made out if the prosecutor establishes, on uncorroborated evidence:

- that the accused intended to cause their partner or ex-partner to suffer physical or psychological harm; or
- where the offence is committed against the partner or ex-partner, that the accused was reckless as to causing the partner or ex-partner to suffer physical or psychological harm.<sup>9</sup>

A separate series of aggravations, based on the severity of the injuries inflicted on the victim, or the weapon used, can be attached to common law charges of assault. In terms of the aggravations prejudice on malice and ill-will, the current law does not cover crimes motivated by the gender, age, or socio-economic or political group of the victim, or explicitly use the language of sectarianism – though sectarian offences might be prosecuted with reference to religious aggravators where malice and ill-will is expressed on a Christian denominational basis, or as racially aggravated, where they are motivated by the victim’s perceived national origins.

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<sup>5</sup> Criminal Justice (Scotland) Act 2003, section 74(7).

<sup>6</sup> Offences (Aggravation by Prejudice)(Scotland) Act 2009, section 1(7).

<sup>7</sup> Offences (Aggravation by Prejudice)(Scotland) Act 2009, section 1(8).

<sup>8</sup> Section 1(1) Abusive Behaviour and Sexual Harm (Scotland) Act 2016 accessible here:

<http://www.legislation.gov.uk/asp/2016/22/section/1/enacted>

<sup>9</sup> Section 1(2), 2016 Act.

### 3.(a) Substantive hate crime offences | Stirring up racial hatred

The second body of relevant norms are the stand-alone “hate crime” offences. In Scotland, these are limited to **racial hatred** only. Section 18 of the Public Order Act 1986 criminalises “threatening, abusive or insulting words or behaviour” which is “intended or likely to stir up racial hatred” or words or behaviour which, in the circumstances, “is likely to stir up” racial hatred. In England and Wales, these provisions were supplemented by the provisions of the Racial and Religious Hatred Act in 2006 and the Criminal Justice and Immigration Act 2008, which introduced additional “stirring up” offences in England and Wales, on the basis of **religious hatred** and hatred on the grounds of **sexual orientation**.

There are minor but important differences which distinguish the charge of racial hatred from the more modern charges of stirring up hatred based on religion or sexual orientation south of the border. To be convicted of an offence on these grounds, the accused’s words or behaviour must amount to “**threats**” rather than “abusive or insulting” behaviour, and the prosecutor must also establish that the accused **intended** to stir up hatred.<sup>10</sup> While section 6 of the Offensive Behaviour and Threatening Communications (Scotland) Act introduced a broadly parallel offence of threats which stir up *religious* hatred in Scotland – these provisions have now been repealed.

### 3. (b) Substantive hate crime offences | Racially-aggravated harassment

The second and final substantive hate crime currently recognised in Scotland is the offence of **racially-motivated harassment**, set out in the Criminal Law (Consolidation) (Scotland) Act 1995.<sup>11</sup> The section 50A offence can be committed in two distinct ways. Firstly, it can be committed where an individual:

- pursues a **racially-aggravated course of conduct which amounts to harassment** of a person

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<sup>10</sup> Public Order Act 1998, Section 29B(1).

<sup>11</sup> Accessible here : <https://www.legislation.gov.uk/ukpga/1995/39/section/50A>

- which is **intended** to amount to harassment of that person or which occurs in circumstances where it **would appear to a reasonable person that it would amount to harassment of that person** <sup>12</sup>

Alternatively, an offence can also be committed under s.50A if the accused “acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.”<sup>13</sup>

Like the aggravators discussed in the preceding section, to make out the section 50A offence, the prosecutor must establish the harassment is motivated by “malice and ill-will” based on the victim’s presumed membership of a racial group, or hatred of a racial group more generally.

Like the statutory aggravator, the concept of a racial group extends to any “group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.”<sup>14</sup> Applying these provisions, the courts have held, for example, that the phrase “bastard Geordie” amounted to racially-aggravated harassment, as the concept of “Geordie” referred to the victim’s English national origins.<sup>15</sup> By contrast, the courts have held that disrupting a Jerusalem String Quartet performance by shouting “These are Israeli army musicians”, “Genocide in Gaza” and “End the siege in Gaza” was not covered by section 50A, as these remarks were not directed at a “racial group”, but towards the Israeli military and the activities of the State of Israel more generally.<sup>16</sup>

As a result, as Scots law stands, there are no explicit offence of harassment based on any of the other protected characteristics, though harassment motivated by LGBT hatred, for example, may well amount to an offence under s.38 of the Criminal Justice and Licensing (Scotland) Act 2010 and an sexual orientation or transgender aggravator could be attached to such a charge.<sup>17</sup>

<sup>12</sup> Criminal Law (Consolidation)(Scotland) Act 1995, s.50A(1)(a).

<sup>13</sup> Criminal Law (Consolidation)(Scotland) Act 1995, s.50A(1)(b).

<sup>14</sup> Criminal Law (Consolidation)(Scotland) Act 1995, s.50A(6).

<sup>15</sup> *Moscrop v McLintock* 2011 SCCR 621.

<sup>16</sup> *Procurator Fiscal, Edinburgh v Napier*, 8 April 2010, Edinburgh Sheriff Court, unreported. See K Goodall, “Conceptualising ‘racism’ in criminal law” (2013) 33 LS 215 at 231 quoted in J Chalmers and F Leverick (2017) *A Comparative Analysis of Hate Crime Legislation | A Report to the Hate Crime Legislation Review*.

<sup>17</sup> Full text accessible here: <https://www.legislation.gov.uk/asp/2010/13/section/38>.

Section 38 – “threatening or abusive behaviour” – is often characterised as a “statutory breach of the peace,” and was introduced by the Scottish Government after the courts considerably narrowed the common law crime after a series of challenges rooted in the European Convention on Human Rights.<sup>18</sup> Section 38 provides that an offence is committed where an individual (a) behaves in a “threatening or abusive manner”, which (b) “would be likely to cause the reasonable person fear or alarm,” and (c) the prosecutor can establish the accused either intended to cause fear or alarm, or was reckless about causing them. While this provision of the 2010 Act is not explicitly “hate crime” legislation, the expansive concept of “abusive behaviour” is capable of capturing a broad scope of objectionable behaviour expressed in prejudiced terms.

#### 4. Attempts to define “sectarianism” elsewhere

The only criminal statute which uses the explicit language of sectarianism in the UK is the Justice Act (Northern Ireland) 2011, which makes specific provision for prohibited conduct at “regulated matches” of football, including “throwing of articles capable of causing injury”, “going onto the playing area” and possession of fireworks or flares.<sup>19</sup> Section 37 of the 2011 Act prohibits “chanting” at any time during the period of a regulated match which is:

- of an indecent nature;
- is of a sectarian or indecent nature; or which
- consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability.<sup>20</sup>

The offence is punishable by a fine of up to £1,000 only.<sup>21</sup>

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<sup>18</sup> *Harris v HM Advocate* 2010 SCCR 15.

<sup>19</sup> The relevant sections of the legislation are accessible here: <https://www.legislation.gov.uk/nia/2011/24/part/4>

<sup>20</sup> Justice Act (Northern Ireland) 2011, section 37(3)(a) – (c).

<sup>21</sup> Justice Act (Northern Ireland) 2011, section 37(4).

The word “sectarian” is not further defined in the 2011 Act, though attempts were made to do so during the legislative process. The Minister responsible for the Bill proposed the following legal definition:

“For the purposes of this section chanting is of a sectarian nature if it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s religious belief or political opinion or to an individual as a member of such a group.”

This definition was not acceptable to a majority of MLAs.

## **5. Lord Bracadale’s Hate Crime Review**

Lord Bracadale’s review of Hate Crimes in Scotland has deliberated against this wider context of (a) legal fragmentation and (b) inconsistency in approach between different protected characteristics. At this stage, it is unclear what Bracadale’s review will recommend, but some permutation of the following seems highly likely:

- a general consolidation of the fragmented field of Scottish hate crime legislation into a single statute
- a consolidation of aggravators based on the accused’s malice and ill-will towards particular groups, with potential for additional aggravators – based on gender, or socio-economic grouping for example – to be enshrined in law.
- a consolidation of “stirring up hatred” offences to extend the law beyond the current narrow focus on incitement to racial hatred only to include other protected characteristics.

If a comprehensive consolidation of hate crime is recommended, Lord Bracadale is likely to provide a general conceptual and legal framework within which any legal definition of sectarianism could be located, both in terms of (a) introducing a new “sectarian prejudice” aggravator and potentially (b) a new criminal offence of “incitement to sectarian hatred” if the Definition Group determines that there is any merit in explicitly recognising the concept of sectarianism in Scots law. Three key questions arise:

1. Should a sentencing aggravator based on sectarian prejudice be introduced?

2. Should a stand-alone offence of incitement to sectarian hatred be introduced?
3. How should the concept of “sectarian prejudice” be defined for the purposes of  
(a) an aggravator and (b) an incitement offence?

## **6. Options for the Definition Group within the Bracadale context**

There may be considerable advantages to situating any potential legal definition of sectarianism within the wider context of the findings of Lord Bracadale’s Review. Firstly, this would be consistent with a consolidated approach to hate crime, within which sectarian hatred is one strand amongst many. Secondly, this approach has the advantage of narrowing down the Definition Group’s broad terms of reference to a far narrower series of practical questions, building on the Bracadale Review’s more expansive scrutiny of this area of law. Given the limited time available to the Group, this approach also has the benefit of being compatible with our timetable.

The 2015 *Advisory Group* definition described sectarianism in Scotland as:

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

For the purposes of the criminal law, whether in defining a sentencing aggravator or a hypothetical stand alone offence of inciting sectarian hatred, this sociological account of the character and range of manifestations of sectarian attitudes, actions and structures – will not serve. However, this definition provides a useful starting point for the Group’s deliberations, as it recognises the intersectional character of sectarianism which combines Christian denominational animus with other factors.

## **7. Some relevant considerations**

### **a. Redundancy**

Any definition of sectarianism is likely to overlap, to some extent, with aggravators based on religious and racial prejudice (the concept of race, in this area of law, including “citizenship and national origins”) and/or any potential incitement to religious

or racial hatred offence. It could be argued that an additional sectarian aggravator is unnecessary, as the existing aggravators and offences adequately capture “sectarian” offending, broadly defined.

**b. Potential impact on use by prosecutors if drafted in a complex way**

If a sectarian aggravator required the prosecutor to prove that the underlying offending was motivated by a complex combination of factors which together could be characterised as “sectarian”, in practice prosecutors may be inclined to rely on racial or religious aggravators instead – as proving these may be less onerous or readily contested than a complex sectarian aggravator. As set out in Appendix 1, this concern could be addressed by careful drafting of any aggravator and limiting the scope of any definition.

**c. Law’s declaratory function**

The social data confirms that sectarianism – and the language of sectarianism – is understood to be a social problem by a majority of Scots. Using the language of sectarianism to specify offending based on the Christian religious denomination or national origins of the victim arguably better chimes with the social vocabulary than an aggravator narrowly framed in terms of religious or racially motivated offending.

This approach has precedents in other jurisdictions, where offending directed against specific groups has been specifically accommodated in national legislation, despite potential overlap with existing categories. For example, in the Republic of Ireland, the 1989 Prohibition of Incitement to Hatred Act<sup>22</sup> defines hatred as “hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.”<sup>23</sup> This provision can be explained, to some extent, by the failure to recognise the travelling community as an ethnic minority in Ireland until 2017 - but given public perceptions of sectarianism as particularly problematic, there is a policy

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<sup>22</sup> <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>

<sup>23</sup> Section 1(1).

justification in explicitly singling out sectarian prejudice as a condemnable motivation for offending.<sup>24</sup>

#### **d. Intersectionality**

As the 2015 Advisory Group report recognised, sectarianism is a complex phenomenon, rooted in inter-denominational Christian prejudices, but also often encompassing national origin, football allegiance and politics. Lord Bracadale’s consultation considered the issue of intersectionality in hate crimes more generally – although it is not yet clear how this issue will be handled in his final recommendations. Where, for example, an assault is motivated by malice and ill-will which combines racist and homophobic elements – as things stand, there is not a straightforward legislative mechanism to combine different aggravators in a single charge. If Bracadale recommends such an approach, the argument for a distinctive intersectional definition of sectarianism may be undermined.

#### **e. Incitement offences**

If the Definition Group determines that it may be useful to define sectarianism in law, and Lord Bracadale proposes that incitement to hatred offences should be consolidated into a single statutory source and conceptual framework of thresholds and safeguards, one obvious question arises: alongside a potential “sectarian prejudice” aggravator, should Scots law recognise a distinct offence of “incitement to sectarian hatred”? If so, should there be an exact alignment between (a) a potential sectarian prejudice aggravator and (b) a stand-alone offence of “incitement to sectarian hatred”? If the Definition Group determines that such an alignment between aggravators and incitement offences would be beneficial, only Option A or Option B approaches set out in Appendix 1 represent an easy fit.

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<sup>24</sup> <https://www.irishtimes.com/news/politics/oireachtas/travellers-formally-recognised-as-an-ethnic-minority-1.2994309>. In the United Kingdom, the courts have recognised that travellers are protected ethnic characteristics under the 2010 Equality Act.

## APPENDIX 1 | Sectarian Prejudice Aggravators

For the purposes of stimulating discussion about alternative approaches which might be adopted to introducing legal definition of sectarianism within the wider framework of hate crime, this appendix sets out three alternative approaches to drafting a sentence aggravator of “sectarian prejudice,” based to a significant extent on the (a) the existing stator provisions and (b) the *Advisory Group on Tackling Sectarianism’s* 2015 definition of sectarianism in modern Scotland as:

a complex of perceptions, attitudes, beliefs, actions and structures, at personal and communal levels, which originate in religious difference and can involve a negative mixing of religion with politics, sporting allegiance and national identifications. It arises from a distorted expression of identity and belonging. It is expressed in destructive patterns of relating, which segregate, exclude, discriminate against or are violent towards a specified religious other, with significant personal and social consequences.<sup>25</sup>

Three models for discussion are proposed, but it should be stressed these are only for the purpose of debate. These models are:

1. A Christian denominational prejudice model
2. A Christian denominational + national origin model
3. A Christian denominational + national origin + proscribed organisation model

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<sup>25</sup> <http://www.gov.scot/Publications/2015/05/4296>

## Option A: Christian denominational prejudice

**Summary:** *This simple aggravator applies exclusively to behaviour rooted in prejudice based on animus expressed towards particular Christian denominational groups and social or cultural groups with a perceived Christian denominational affiliation. It could be construed as a narrow understanding of how sectarian attitudes and behaviours manifest and can motivate offending. The principal objection to such an aggravation is redundancy, as an identical aggravator based on religious prejudice already applies in Scots law. On the other hand, using the language of sectarianism arguably (a) better reflects public understanding of the nature of the wrong committed, (b) would reflect the declaratory function of law in a legitimate way and (c) might assist officials in discriminating between different forms of religiously-motivated offending against, for example, Jewish and Muslim minorities.*

### 1. Aggravation by sectarian prejudice

(1) This subsection applies where it is—

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

(2) For the purposes of this section, an offence is aggravated by sectarian prejudice if

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

(3) For the purpose of this section is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4) The court must—

- (a) state on conviction that the offence was aggravated by sectarian prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

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

(6) In subsections (2)(a) —

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

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

(a) Christian denominational religious belief or lack of religious belief;

(b) membership of or adherence to a Christian denominational church or religious organisation;

(c) support for the culture and traditions of a Christian denominational church or religious organisation; or

(d) participation in activities associated with such a culture or such traditions.

**Option B: Christian denominational prejudice  
+ national origins and citizenship**

**Summary:** *This specimen aggravator incorporates not only animus towards particular Christian denominations covered by Option A, but extends to animus based on the victim's perceived British or Irish national origin, citizenship – or association with a social or cultural group with a perceived British or Irish affiliation. Like option A, this sectarian prejudice aggravator could be argued to be legally redundant, as (most) offending motivated by animus based on national origins or citizenship could already be indicted with a racial prejudice aggravator. The arguments in favour of using the language of sectarianism, summarised above, apply here too. As drafted, this sentencing aggravator could be applied if animus based on either Condition A (Christian denominational) or Condition B (national origin and citizenship), or a combination of Condition A and B applies.*

**1. Aggravation by sectarian prejudice**

(1) This subsection applies where it is—

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

(2) For the purposes of this section, an offence is aggravated by sectarian prejudice if either Condition A or Condition B are met, or if Condition A and Condition B are both met.

(3) Condition A is that —

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

(4) Condition B is that –

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins; or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.

(5) For the purpose of this section is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(6) The court must—

(a) state on conviction that the offence was aggravated by sectarian prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

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

(8) In subsections (3)(a) and (4)(a)—

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

(9) In this section, “Christian denomination group” means a group of persons defined by reference to their—

(a) Christian denominational religious belief or lack of religious belief;

(b) membership of or adherence to a Christian denominational church or religious organisation;

(c) support for the culture and traditions of a Christian denominational church or religious organisation; or

(d) participation in activities associated with such a culture or such traditions.

**Option C: Christian denominational prejudice + national origins and  
citizenship + glorifying proscribed organisations**

**Summary:** *This specimen aggravator incorporates not only animus towards particular Christian denominations and animus based on the victim's perceived British or Irish national origin, nationality or citizenship – or a combination of the two – but also extends to offending accompanied by glorifying of proscribed organisations under the Terrorism Act 2000. There are some potential technical challenges here. "Terrorism" is a reserved matter under Schedule 5 of the Scotland Act, and as a result, terrorism legislation is beyond Holyrood's legislative competence. That said, there is a compelling argument that this draft aggravator would be within Holyrood's legislative competence, as it does not make "special provision" about terrorism – but provision about the factors to be taken into account in sentencing a person otherwise convicted under the criminal law – which is undoubtedly a devolved matter.*

**1. Aggravation by sectarian prejudice**

(1) This subsection applies where it is—

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

(2) For the purposes of this section, an offence is aggravated by sectarian prejudice if Condition A, B or C, or a combination of A, B or C are met.

(3) Condition A is that —

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

(4) Condition B is that –

- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins; or
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.

(5) Condition C is that –

- (a) at the time of committing the offence or immediately before or after doing so, the offender glorifies one or more Proscribed Organisations, as defined by Schedule 2 of the Terrorism Act 2000;<sup>26</sup>

(6) For the purpose of sub-sections (3) and (4) is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(6) The court must—

- (a) state on conviction that the offence was aggravated by sectarian prejudice,
- (b) record the conviction in a way that shows that the offence was so aggravated,
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
  - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
  - (ii) otherwise, the reasons for there being no such difference.

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

(8) In subsections (3)(a) and (4)(a)—

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

(9) In this section, “Christian denomination group” means a group of persons defined by reference to their—

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<sup>26</sup> Accessible here : <https://www.legislation.gov.uk/ukpga/2000/11/schedule/2>

- (a) Christian denominational religious belief or lack of religious belief;
  - (b) membership of or adherence to a Christian denominational church or religious organisation;
  - (c) support for the culture and traditions of a Christian denominational church or religious organisation; or
  - (d) participation in activities associated with such a culture or such traditions.
- (10) In sub-section (5)(a), “glorifies” has the same meaning as section 6 of the Terrorism Act 2006.<sup>27</sup>

## References

- F Leverick and J Chalmers (2017) *A Comparative Analysis of Hate Crime Legislation | A Report to the Hate Crime Legislation Review*  
[https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting\\_documents/495517\\_APPENDIX%20%20ACADEMIC%20REPORT.pdf](https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf)

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<sup>27</sup> Including “any form of praise or celebration”, accessible here:  
<https://www.legislation.gov.uk/ukpga/2006/11/section/20>.