

# **Final Report of the Working Group on Defining Sectarianism in Scots Law**

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**Scottish Government**  
Riaghaltas na h-Alba  
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# **FINAL REPORT OF THE WORKING GROUP ON DEFINING SECTARIANISM IN SCOTS LAW**

This report was presented to Scottish Ministers by the independent Working Group on Defining Sectarianism in Scots Law on 29 August 2018.

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## Executive Summary

Although the language of sectarianism is commonly used in day-to-day life, it has never been used or defined in Scots Law. This report is advisory and a first step in considering whether sectarianism should have a legal definition and, if so, what that definition could look like.

The Scottish Parliament's legislative competence is subject to important legal limitations. In terms of the civil law, the constitutional framework of the Scotland Act does not allow the Scottish Parliament to introduce a civil definition of sectarianism or discrimination, victimisation or harassment on a sectarian basis. Holyrood does not currently have the legislative competence to amend the Human Rights Act, the Equality Act, or to alter employment law.

However, the Scottish Parliament already enjoys a broad general competence to introduce and define the language of sectarianism in terms of the criminal law, subject to the European Convention on Human Rights, and we have recommended that the Scottish Government should introduce a legal definition of sectarian prejudice as part of the work they are currently taking forward to develop consolidated hate crime legislation. This would form an aggravation by sectarian prejudice alongside the existing aggravators based on religious and racial prejudice.

We believe that there are advantages to setting out the language of sectarianism explicitly in statute, rather than allowing sectarian offending to be subsumed into the broad general categories of religious and racial hatred. We also recognise the potential for creating a new offence of stirring up sectarian hatred, if adequate legal safeguards are introduced to protect free expression.

We recognise that there is need for a wide-ranging public debate on this issue and strongly recommend that the Scottish Government should take this opportunity to engage with all faith communities in Scotland, and all those with an interest in this issue, to gather the evidence which will ensure that the decisions of Scottish Ministers on the establishment of a legal definition of sectarianism are informed by the views of communities and those who have been targeted by sectarian prejudice.

In summary, the Working Group has reached the following conclusions:

- That the principle of 'fair labelling' should apply so that criminal acts of prejudice can be named for what they are whether that be anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor. In this respect, the Working Group seeks to open up options which will allow the criminal justice system to fairly label sectarian crime rather than allowing it to fall through the cracks if it does not, for example, fit neatly into a descriptor such as religious or racial hatred.
- In taking forward the principle of fair labelling we recognise that the language of sectarianism is widely used in society even if it has not been previously defined in law. Therefore we have recommended that a legal definition of sectarianism is established to reflect the fact that such language is used in day-to-day life.

- We believe that sectarianism in Scotland should be specifically defined as an issue that exists between Christian communities in Scotland at this time. We do not believe that enough is understood about sectarianism in relation to other communities in Scotland to make the application of “sectarianism” to these communities meaningful in a legal or social sense.
- We do not believe that the legal concept of sectarianism is any more abstract than the legal concepts of religion or race which are already specified in law. Therefore, while recognising the complex nature of sectarianism, we do not believe that this is a sufficient reason not to establish a legal definition.
- Sectarianism is undoubtedly an intersectional issue, that is to say that it does not fall easily into a single categorisation, but has evolved over time to be present within the religious, racial, cultural and political spheres. Additionally, 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.
- We are very conscious of the conclusions of Lord Bracadale’s review of hate crime legislation in Scotland and his proposal to establish a comprehensive set of statutory aggravators relating to all of the protected characteristics covered by equality law. We believe that as part of this work a new intersectional statutory aggravation of ‘sectarian prejudice’, should be incorporated into future consolidated hate crime legislation.

As we have already noted, all of the above is advisory. As previous discussions have not led to a conclusion on the merit or otherwise of establishing a legal definition of sectarianism in Scots Law, we believe that, regardless of the final conclusion, it is healthy for Scotland to have that discussion and hope that our report provides a good starting point for that discussion to be built upon.

Working Group on Defining Sectarianism in Scots Law  
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## **Section 1: Introduction**

Sectarianism can best be described as ‘a persistent intersectional issue’ in Scotland. By this we mean that it is a phenomenon originating in religious divisions which also draws in other identities, especially those of a racial and ethnic nature. In everyday speech, the term has come to be used to describe or allege specific discrimination and threat as well as being used in more imprecise ways in many informal settings to describe behaviours such as name-calling, humour and throwaway remarks which may or may not be intended to be disrespectful.

Until now, sectarianism has not been given formal definition in Scots Law. As a result, sectarianism can be alleged but never proven in law. It can be experienced as threatening and yet not taken properly into account through police and court proceedings.

This Working Group was established for a short and defined period to explore the potential for establishing a legal definition which might function as a useful mechanism for providing clarity. We fully recognised that legislation on its own is an inadequate means to address any deeply rooted social issues. However, we also recognise that legislation can play a vital role in establishing the boundaries between acceptable and unacceptable behaviour in society. Beyond its application by police and court services, the establishment of a legal definition also has the potential to support those working in communities to identify and name sectarian behaviour in those communities as the first step to tailoring effective interventions.

Our purpose was to advise on a potential definition of sectarianism that the Scottish Government could use as the basis for wider consultation with communities and interest groups across Scotland. The findings in this report were reached after discussions with a range of interest groups.

The members of the group were Duncan Morrow (Chair); Alison Logan; Andrew Tickell; Margaret Lynch; Ian Galloway; and Michael Rosie. All of the members were invited to participate on a purely personal basis, drawing on their broad experience of tackling community tensions or understanding of the law. The views expressed in this report are those of the group members and do not represent the official views of any organisation that the group members are currently, or have previously been, affiliated to. While we are very grateful for the willingness of everyone with whom we met to contribute to our work, the conclusions of this report are the views of the group members alone.

We hope this report will stimulate wider debate on the merits of our proposals from many quarters.

## Section 2: Background to the Advisory Group on Tackling Sectarianism

The Scottish Government has been actively committed to tackling sectarianism for over a decade. Although the advantages and disadvantages of defining such a complex and contested issue as sectarianism in law have been debated on a number of occasions, no clear conclusion on establishing a legal definition has ever been reached.

The most recent work of the independent Advisory Group on Tackling Sectarianism in Scotland came up with a descriptive working definition, and engaged on consultation on this issue, but it is important to note that this was not focussed on legal application. In their final report of April 2015 – “Tackling Sectarianism and its Consequences in Scotland” – the Advisory Group included the following working definition designed as an attempt to capture the full scope of sectarianism as it now exists:

*Sectarianism in Scotland is a mixture of perceptions, attitudes, actions, and structures that involves overlooking, excluding, discriminating against or being abusive or violent towards others on the basis of their perceived Christian denominational background. This perception is always mixed with other factors such as, but not confined to, politics, football allegiance and national identity.<sup>1</sup>*

It was always recognised that this was a social definition to be tested through a range of grass-roots projects aimed at tackling sectarianism in different communities. Over the last three years, YouthLink Scotland has been consulting on this definition through the Action on Sectarianism (AoS) website and their various social media accounts. AoS asked partners, other funded projects and users of their website to provide them with feedback on what they liked and didn't like about the definition and to advise on improvements which could be made.

There were many positive responses. However, some of the most helpful came from those who thought that the definition could be improved, including comments on both complexity and content, and on what was missing from the definition. These responses are summarised below:

### Complexity

- It is far too wide-reaching for practical application.
- The definition is significantly over-complicated, and convoluted.
- It is too long.
- It has too much jargon.
- It is a mixture of elements that are unhelpful.
- Academics or sociologists may understand this, but most people in communities will not.
- Sectarianism can also exist without reference to politics, football or nationality and this is not clear from the definition

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<sup>1</sup> (2015) *Tackling Sectarianism and its Consequences in Scotland: Final Report of The Advisory Group on Tackling Sectarianism in Scotland*, para 5. Accessible in full here: <https://www.gov.scot/Publications/2015/05/4296>.

## What should be included and what is missing?

- More emphasis needs to be placed on the role of identity.
- Support for terrorist groups should be included.
- Anti-Irish racism should be included.
- It should focus on discrimination and violence.
- Organised segregation of groups based on religion (practicing or perceived) should be included.
- The issue stems from racism/xenophobia as a result of Irish immigration and this should be clearer.
- It should not single out any specific denomination (i.e. Christianity).

While there was a particular welcome for the fact that sectarianism had been acknowledged as an issue for legitimate public discussion and consideration, it was clear that the definition provided as the basis for general debate by the Advisory Group could not simply be passed into law.

The issue was most recently raised through the evidence-gathering sessions held by the Scottish Parliament's Justice Committee while considering the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, which was subsequently passed by parliament and came into effect in April 2018. The Committee heard from a range of sources of a need to establish a legal definition of the term sectarianism to aid application of the law by police and prosecutors, and 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 Act<sup>2</sup> is repealed – would help any future parliaments and governments in taking forward laws to tackle sectarianism<sup>3</sup>.*

In response, the Scottish Government established this Working Group to provide some evidence which could be used as the basis for finding an answer to the Justice Committee's recommendation with the remit:

*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.*

The content of this report is the summary of this work. The central task of this Working Group was to provide non-binding advice to the Scottish Government as a basis for undertaking a wider consultation on the question of whether a legal definition of sectarianism can and should be established in Scots Law. We look forward to seeing how the consultation develops.

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<sup>2</sup> The 2012 Act referred to by the Committee, and subsequently repealed, was the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

<sup>3</sup> (2018) *Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill*, Definition of Sectarianism, Pg. 57-59. Accessible in full here: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/1/18/Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications--Repeal---Scotland--Bill/JS052018R2.pdf>.

## **Section 3: Scope of the definition**

### **Sectarianism in Scotland**

Historically, sectarianism has been used in Scottish society to describe discord and tensions relating to internal divisions between Christian denominations. The roots of this complexity lie in the political, economic and religious history of Scotland after the Reformation (when anti-Catholicism was integral to many aspects of public life), the impact of, and reaction to, large scale Irish immigration to Scotland in the 19<sup>th</sup> and 20<sup>th</sup> Centuries, and the history of opposition to/support for British sovereignty in Ireland and then later Northern Ireland.

These divisions, with their religious, economic, national, cultural and political associations, spawned identity around what are sometimes called 'cultural signifiers' in many parts of Scotland, and were exploited in a variety of ways in social, political and economic life. These identity markers extended beyond the religious and into associated cultural expression.

In an age where identity politics appears to be on the rise again, these cultural signifiers have, to a large degree, supplanted Church affiliation as a means of identifying belonging, or perceived belonging, to one group or another. For example, affiliation to particular sports or sporting teams; vociferous support for a united Ireland or the United Kingdom of Great Britain and Northern Ireland; celebrations and commemorations around cultural events like St Patrick's Day (17<sup>th</sup> March) or the Battle of the Boyne (12<sup>th</sup> July); the simple colours that are worn by individuals (such as green and orange); the flags and emblems of nation, community or group; and musical heritage can all be played out at community and family gatherings across Scotland.

The Working Group was very clear that belonging to and embracing these cultural signifiers is not in and of itself evidence of sectarian sentiment towards others. Additionally, we need to be watchful that our own assertion of our rights to expression of our culture does not descend into dogmatic intolerance which allows us to claim protection for our own views while using that protection as a tool to silence others. For example, those who do not support issues like same sex marriage or abortion have a right to express those opinions, but those who do support the right to same-sex marriage or abortion also have a right to be critical of beliefs which oppose them.

Claiming a cultural basis for holding such a view does not exempt you from criticism or mean that the critic is being bigoted simply for taking a stance in opposition to your view. However, sectarianism becomes, and has become, 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.

## **Restricting the definition of sectarianism to Christian denominations – or extending it to include all faiths?**

Scotland is an increasingly multi-faith and multicultural country with adherents to faiths and beliefs such as Hinduism, Buddhism and Sikhism all forming small, important and visible communities. Furthermore, religious and racial prejudice is a real issue that is not confined to any single religion or group. For example, often higher profile acts of anti-Semitism and Islamophobia – with associated political and cultural signifiers – exist alongside much lower profile evidence of hate-based incidents and discrimination against people from minority backgrounds. All of these may also have an intersectional quality based on perceptions around both religion and race.

The level of sectarianism that exist outside of Christian communities in Scotland is not quantitatively clear. Anecdotally, we are aware that there may be tensions between different sections of the Jewish communities in Scotland, possibly between the more orthodox and liberal elements, but it is very unclear whether this could be described as sectarian. It is also plausible that within Muslim communities in Scotland there could be tensions between Sunni and Shia sects which reflect the tensions that exist between these communities in other parts of the world, but it was unclear to the Working Group how such tensions may play out in communities on a day-to-day basis. However, there is no escaping the fact that international affairs will have an impact on relationships between people of different faiths, and those of no faith, in Scotland to a greater or lesser degree. It would be naive to believe that we are immune from what happens beyond our national borders.

The Working Group noted that Lord Bracadale delivered his ‘Independent Review of Hate Crime Legislation in Scotland: Final Report’ in May 2018<sup>4</sup> while we were taking forward our work. Without a more robust evidence base, the group considers that hostility towards people of non-Christian faiths is best covered by the recommendations in Lord Bracadale’s report and can be addressed through ensuring that racial and/or religious aggravations can continue to be added to offence.

The Working Group therefore recommends that, until further evidence becomes available, any legal definition of sectarianism should be limited to sectarianism rooted in religious hostilities and rivalries within Christianity. However, the Working Group also recognises that the consultation which will follow the publication of this report provides an opportunity to engage with all faith communities in Scotland to seek their views on the benefits of extending any legal definition of sectarianism to include them and we recommend that the Scottish Government should take this opportunity to do so. We also recommend that the Scottish Government should consider commissioning research to identify the extent to which sectarianism is a problem within non-Christian religious communities in Scotland.

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<sup>4</sup> Accessible in full here: <https://www.gov.scot/Publications/2018/05/2988>.

## **Sectarianism and its relation to other discrimination such as anti-Catholicism and anti-Irish Racism.**

Sectarianism has evolved in Scotland to become a widely used term used in everyday speech to describe a family of related but different experiences which conform to a wider pattern of hostility and exclusion which bring together elements of religious and racial division in a specific, almost normalised, manner. Some of the representations to the Working Group have suggested that the term 'sectarianism' is misleading and that it is important not to allow the term to obscure its more specific underlying roots in religious discrimination, such as anti-Catholicism or anti-Protestantism, or in racism, such as anti-Irish or anti-British racism.

The Working Group was aware of the importance of language used, especially as the definition of any issue can also determine the scope and focus of action which results. Above all, the Working Group in no way wishes to diminish the legacy of structural or institutionalised bias against vulnerable minorities. The issue of who or what is sectarian is widely contested in public and the untested claims are often themselves used as evidence of the sectarianism of the claimant. However, we do acknowledge that while statistics on hate crime and religiously aggravated offending offer a limited picture of sectarian abuse in Scotland, the figures have highlighted Roman Catholicism as the religion that was most often the subject of offending. In addition we have noted from these statistics that the police are the most likely victim of religiously aggravated offending and that these charges often relate to incidents where the police arrested the accused for a separate charge (which may not have involved religious prejudice) and were then abused in religiously offensive terms afterwards.

However, having considered all of the issues in front of us, we believe that two overriding factors justify a generic legal definition which encompasses, and does not diminish, any religious or racist discrimination, such as anti-Catholic, anti-Protestant, anti-Irish or anti-British dimensions.

1. By using the term sectarianism, on the grounds of 'fair labelling', activities that are widely acknowledged as belonging together would be brought into sharper focus and would ensure that those behaving in a sectarian way do not 'fall between the cracks' of protections designed more specifically to address issues of religion, race and political opinion. This reflects our view that the word 'sectarian' has evolved as a distinct cultural pattern, and can no longer be defined in purely religious terms.
2. By using a simple single definition, anecdotal and rhetorical allegations of sectarianism could be properly tested in law, and the real underlying patterns – rather than allegation or presumption – identified over time. Far from obscuring the true nature of sectarianism, creating a legal definition could allow for the true nature of sectarianism to be recognised and affirmed more widely, to the benefit of victims. This approach is similar to that taken in relation to domestic violence legislation. While law is framed to ensure that all acts of violence are fairly addressed in law, the facts and evidence emerging as a result have demonstrated that domestic abuse disproportionately affects women and we rightly acknowledge this.

The motivation behind many sectarian incidents cannot always be easily attributed. Terms originating from sectarian antipathy have degenerated into common terms of abuse, and have been associated with violence and threat. Calling someone a “Fenian” or “Hun” can, in some contexts, denote a perception around political affiliation, national and/or religious identity. We believe that it is important that any legal definition of sectarianism extends to cover this complexity and inter-sectional challenge. But it should do so without diminishing the importance of anti-Catholicism, anti-Protestantism, anti-Irish racism or anti-British racism, as well as the use of cultural and social signifiers commonly used to identify membership or perceived membership of these groups.

In many incidents, the motivation behind the crime can be very easily identified as both being directed at one group and as generating a dynamic of fear between people which is profoundly sectarian. At the time of writing, the case of the alleged attack on Canon White outside St Alphonsus’ Church following the celebration of Mass is being prosecuted, but is widely believed to have been an unprovoked hate crime which was both anti-Catholic and sectarian in nature. Discrimination or threat on the basis of national identity or ethnic origin is also evident in some cases. At the same time, there is evidence of actions against people perceived to be hostile to Irishness/Britishness, or the signifiers associated with sectarian divisions, which have been violent or threatening. An attack on someone carrying an Irish/British flag could be identified as anti-Irish/British racism motivated by sectarianism rather than political bias. It is also possible for people carrying symbols relating to different expressions of Irish/British identity to act in a deliberate and hostile sectarian way against others.

Affiliation in sport is a clear example of where sectarianism has moved beyond simply being religious and into the cultural arena. It would be very difficult for perpetrators of sectarianism at, and around, football to identify whether the victim was a practising member of any religion, or indeed, whether they held any religious views at all. Additionally, it would be very difficult for perpetrators of sectarianism to identify whether the victim’s racial identity was Irish, British or something else, as it is very unlikely that these would be evident from an individual’s appearance. In such situations, defining sectarianism narrowly as either anti-Catholic/Protestant or anti-Irish/British racism may perversely reduce the chances of obtaining an aggravation to the offence.

The Working Group believes that any legal definition of sectarianism should be formally neutral. We acknowledge that the limits of establishing a legal definition which is workable in the context of Scots Law is unlikely to end rhetorical disputes about responsibility for, and consequences of, sectarianism, but that the principle of neutrality as central to the establishment of any definition.

## Section 4: Definition of Sectarianism: Legal Scope for A Definition

The 2015 Advisory Group on Tackling Sectarianism in Scotland defined 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.<sup>5</sup>*

Taking all the elements of this definition, there are a range of areas of law which regulate or interact, to a greater or lesser extent, with sectarian attitudes and actions which discriminate against, exclude or visit violence and abuse on others motivated by sectarian prejudice. Specifically, these exist in the field of civil law, including human rights legislation, employment law and equalities law, and include discrimination in the provision of housing, education, goods or services, and victimisation or harassment based on sectarian prejudice in the workplace. In terms of violence and abusive behaviour, the principal areas of devolved Scots law which arise are the criminal law, and the sub-category of hate crime, here understood as crimes motivated by, or which demonstrate hostility towards, an individual based on their perceived Christian denominational background or national origins or identity.

As Lord Bracadale's report helpfully summarises:

*The civil law is essentially concerned with regulating the relationship between individuals. In the context of prejudice, the civil law has a key role in addressing discrimination, for example, in the employee/employer relationship, in the provision of goods or services or on public transport. The remedy in a civil law dispute will usually be a requirement for one person to pay compensation to another or to take, or to stop taking, a particular course of action.<sup>6</sup>*

In addition to this, we may also consider civil remedies available in public law including civil actions to be taken against public authorities by individuals or affected groups on human rights grounds. In contrast with civil remedies – where the wronged party must generally vindicate their own rights in court, and the principal remedies are compensation for losses – criminal law interventions are driven by the state through police and prosecution decision-making, and the outcome of criminal procedure may involve a range of penalties and restrictions being imposed upon a convicted person's liberty, from fines and football banning orders, to community sentences and periods of incarceration.

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<sup>5</sup> (2015) *Tackling Sectarianism and its Consequences in Scotland: Final Report of The Advisory Group on Tackling Sectarianism in Scotland*, para 5. Accessible in full here: <https://www.gov.scot/Publications/2015/05/4296>.

<sup>6</sup> (2018) *Independent Review of Hate Crime Legislation in Scotland: Final Report*, para 2.6. Accessible in full here: <https://www.gov.scot/Publications/2018/05/2988>.

This section considers whether there is scope to introduce the language of sectarianism across these different branches of civil and criminal law in Scotland, dealing first with civil law before turning to the criminal law. To address this question, the constitutional framework within which Holyrood operates first must be considered.

## Summary of findings

Our analysis suggests that it is not practical to establish a civil law definition of sectarianism, as key areas of civil law which regulate racial and religious discrimination and prejudice are reserved matters under the Scotland Act 1998. We find there is, however, scope to reconsider whether it would be beneficial for the language of sectarianism to be explicitly incorporated in the criminal law of Scotland. Subsequent sections of this report consider different ways in which this might be done, and discuss the advantages and disadvantages of each approach.

## The Constitutional Framework

The Scotland Act 1998 delineates the devolved powers of the Scottish Parliament and Scottish Ministers.<sup>7</sup> Scottish devolution is structured around a “reserved powers” model. In practice, this means the 1998 Act identifies only those powers which the Scottish Parliament and Ministers *cannot* exercise. Matters which are not reserved are devolved.

However, the legislative competence of the Scottish Parliament is limited in several respects.<sup>8</sup> Acts of the Scottish Parliament cannot “relate to reserved matters” set out in Schedule 5<sup>9</sup>. Whether a provision of an Act of the Parliament relates to a reserved matter is to be determined with reference to the “purpose” of the provision, “having regard (among other things) to its effect in all the circumstances.”<sup>10</sup> Secondly, Acts of the Scottish Parliament cannot repeal or modify statutes which are specifically protected by Schedule 4 of the 1998 Act. Thirdly, provisions which are incompatible with the European Convention on Human Rights (ECHR) or “retained EU law”<sup>11</sup> are also outside Holyrood’s legislative competence. Similar restrictions apply to the executive competence of Scottish Ministers.<sup>12</sup>

Legislation – or specific provisions – which fall outwith the parliament’s legislative competence may be challenged by UK or Scottish law officers before royal assent is granted,<sup>13</sup> or afterwards by any individual or group able to establish they have the legal standing to bring judicial review proceedings.<sup>14</sup> If the court finds that the

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<sup>7</sup> Accessible in full here: <https://www.legislation.gov.uk/ukpga/1998/46/contents>.

<sup>8</sup> Scotland Act 1998, section 29.

<sup>9</sup> Scotland Act 1998, section 29(2).

<sup>10</sup> Scotland Act 1998, section 29(3). Discussed by the UK Supreme Court in *Martin and Miller v Lord Advocate* [2010] UKSC 10.

<sup>11</sup> European Union (Withdrawal) Act 2018, section 12.

<sup>12</sup> Scotland Act 1998, section 54 ad 57.

<sup>13</sup> Scotland Act 1998, section 33.

<sup>14</sup> *AXA General Insurance v Lord Advocate* [2011] UKSC 46.

impugned provisions “relate to reserved matters”, or are incompatible with ECHR rights or EU law, they will be struck down as *ultra vires* by the court.<sup>15</sup>

Although the Scotland Act “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland,” this report has focused on the powers which can be exercised by the Edinburgh institutions within their currently devolved powers.<sup>16</sup> Reviewing those powers, we find that the Scottish Parliament has restricted competence to introduce the language of sectarianism to the main areas of civil law engaged by the understanding of sectarianism set out by the Advisory Group in their 2015 report.

## Human rights

The Human Rights Act 1998 is distinct from the ECHR provisions written into the Scotland Act which limit the legislative and executive competence of Scottish legislators and Ministers.<sup>17</sup> The Human Rights Act has a more general application, binding over all “public authorities” in the United Kingdom to observe the minimum rights set out in the European Convention.<sup>18</sup> Section 7(1) of the Human Rights Act provides that “victims” of unlawful acts may bring judicial proceedings against public authorities which have unlawfully violated their Convention rights. Article 14 of the European Convention is particularly relevant to the issue of discrimination based on sectarian prejudice. It provides that:

*The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

Sectarian prejudice and discrimination by public officials in the recognition of the other substantive Convention rights would be caught by this provision. However, the language of sectarianism is not explicitly used in the European human rights framework, or the Human Rights Act which gives domestic effect to it and there is no scope for Holyrood to amend the 1998 Act. Although human rights are not a reserved matter,<sup>19</sup> the Human Rights Act is a statute protected from modification under Schedule 4 of the Scotland Act.<sup>20</sup> Accordingly, the Scottish Parliament does not have the power to amend its provisions to incorporate any conception of sectarianism.

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<sup>15</sup> For examples of which, see: *Christian Institute & Ors v Lord Advocate* [2016] UKSC 51 and *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales* [2015] UKSC 3.

<sup>16</sup> Scotland Act 1998, section 28(7).

<sup>17</sup> The full Act is accessible here: <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>18</sup> Human Rights Act 1998, section 6.

<sup>19</sup> A fact which, for example, allowed Holyrood to legislate to establish the Scottish Human Rights Commission under the Scottish Commission for Human Rights Act 2006. Accessible here:

<https://www.legislation.gov.uk/asp/2006/16/contents>.

<sup>20</sup> Scotland Act, Schedule 4, paragraph (1)(2)(f).

## Equal opportunities

The Equality Act 2010 is the key piece of legislation in the field of equal opportunities in England, Scotland and Wales. The 2010 Act (a) identifies protected characteristics and prohibited conduct, including (b) direct discrimination (c) indirect discrimination (d) harassment and (e) victimisation. The 2010 Act also provides for public sector equality duties. The language of sectarianism is not used in the Equality Act, although discrimination in the provision of goods and services, housing or employment on a sectarian basis could be caught by the protected characteristics of religion and belief or race, which includes the concept of nationality and ethnic or national origins.<sup>21</sup>

The legal position on Holyrood's competence to legislate concerning equal opportunities has been complicated by the Scotland Act 2016. The starting point is that "equal opportunities" is a reserved matter, and the Scottish Parliament has no legislative competence to (a) modify, amend or repeal the Equality Act 2010 or (b) introduce statutes the object and purpose of which are primarily concerned with equal opportunities.<sup>22</sup> For the purposes of the Scotland Act reservation, "equal opportunities" are defined as:

*the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.*<sup>23</sup>

Although some changes to these provisions of the Scotland Act were introduced in 2016, the overall effect of these changes have the following implications:

1. While the Scottish Parliament is authorised to legislate to "encourage" equal opportunities, it cannot do so "by prohibition or regulation."<sup>24</sup>
2. While the Equality Act extends some powers to Scottish Ministers to make subordinate legislation, Holyrood does not have the power to modify the Equality Act 2010 to incorporate the language of sectarian prejudice.<sup>25</sup>
3. While it would be possible for the Scottish Parliament to introduce additional supplementary provisions concerning sectarianism in respect of some public authorities operating in Scotland, the Scottish Parliament does not have the legislative competence to extend any of these provisions to the public at large, including providers of goods or services, landlords and employers.

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<sup>21</sup> Equality Act 2010, section 9(1).

<sup>22</sup> Scotland Act 1998, Schedule 5, L2.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> The relevant legal provisions are accessible here:  
<https://www.legislation.gov.uk/ukpga/2010/15/section/210>.

4. More generally, employment rights, duties and industrial relations are also reserved matters.<sup>26</sup>

### **Conclusions: Scope for defining sectarianism in civil law**

In conclusion, we find that there is currently no meaningful scope for the Scottish Parliament to amend the civil law to incorporate the language of sectarianism, however defined. Having examined the constitutional status of the areas of civil law already highlighted – human rights, employment law, and equality law – all these critical areas are either matters reserved to the Westminster Parliament, or protected statutes under Schedule 4 of the Scotland Act. However, devolution is – classically – a process, not an event. The Scotland Act has been amended on several occasions since it was first passed in 1998, with Holyrood accruing additional legislative competence. These competencies can be altered in two ways:

1. The Scotland Act may be amended by Westminster using primary legislation<sup>27</sup> or
2. The list of reserved matters appended to the Scotland Act may be altered by an Order in Council<sup>28</sup> under section 30 of the 1998 Act.<sup>29</sup>

If equal opportunities ceased to be a reserved matter – or Schedule 5 of the Scotland Act was amended to give the Scottish Parliament additional competence over equal opportunities – incorporating a civil definition of sectarian discrimination, victimisation and harassment into Scots Law would become feasible and we recommend that in such circumstances the Scottish Government should revisit this issue.

### **Criminal Law and Hate Crime**

One area in which the Scottish Parliament enjoys extensive legislative competence to regulate the issue of sectarian prejudice is the criminal law, which is generally a devolved matter, subject to the restrictions of the European Convention on Human Rights (ECHR). A range of different criminal offences are applicable to behaviour which is – in the language of the Advisory Group’s 2015 definition – “abusive or violent towards others on the basis of their perceived Christian denominational background.”

As the Bracadale Review summarised, Scotland’s patchwork “hate crime” legislation is currently 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 characterise the law in Scotland and in England and Wales. Broadly speaking, Scots criminal law engages with hate crime in three ways:

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<sup>26</sup> Scotland Act 1998, Schedule 5, H1.

<sup>27</sup> As happened, for example, with the passage of the Scotland Act 2016.

<sup>28</sup> Essentially, a form of subordinate legislation. A summary is available here: <https://www.parliament.uk/site-information/glossary/orders-in-council/>.

<sup>29</sup> Accessible here: <https://www.legislation.gov.uk/ukpga/1998/46/section/30>.

- (i) substantive general criminal offences;
- (ii) statutory sentencing aggravations based on the prejudiced motivations of the offender; and
- (iii) stand-alone offences which directly criminalise behaviour based on its hateful character towards a protected group.

From the perspective of sectarian prejudice, several points arise. Firstly, the language of “sectarianism” has not been used and has not been defined in any statute passed by the Westminster or Scottish Parliaments. 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>30</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>31</sup>

The offence is punishable by a fine of up to £1,000 only.<sup>32</sup> However, although the language of sectarianism is *used* by the Northern Irish legislation, 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.*<sup>33</sup>

This definition was not acceptable to a majority of Members of the Legislative Assembly (MLAs), and although the language of sectarianism was incorporated into the Act, the term was left undefined in Northern Irish law.

That said, a series of legislative interventions in the sphere of criminal law and hate crime in Scotland are, and have been, relevant for the prosecution of sectarian behaviour, including (a) statutory aggravators and (b) stand-alone offences which could – at least theoretically – apply to some manifestations of sectarian prejudice.

<sup>30</sup> The relevant sections of the legislation are accessible here: <https://www.legislation.gov.uk/nia/2011/24/part/4>.

<sup>31</sup> Justice Act (Northern Ireland) 2011, section 37(3)(a) – (c).

<sup>32</sup> Justice Act (Northern Ireland) 2011, section 37(4).

<sup>33</sup> Further discussed by N Jarman (2012) *Defining Sectarianism and Sectarian Hate Crime*, accessible at <http://conflictresearch.org.uk/wp-content/uploads/NIACRO-Report-02-Complete-Low-Res.pdf>.

Common law charges of murder, culpable homicide, assault, reckless injury and reckless endangerment of the lieges may apply to acts of violence, based on the extent of the injuries caused to the victim and the *mens rea* of the accused. Abusive behaviour is criminalised by a range of statutory and common law offences. Under the common law, breach of the peace is defined as “conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community” and has been employed for some decades to prosecute sectarian abuse satisfying this legal threshold.<sup>34</sup>

Recent data suggests, however, that the overwhelming majority of cases being prosecuted as motivated by religious prejudice are now charged under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Scottish Government statistics found in the last year there were 642 charges aggravated by religious prejudice.<sup>35</sup> In 2017/18, 50% concerned offences demonstrating hostility towards, Roman Catholics and 27% Protestant denominations.<sup>36</sup> Of the total of 642 charges, 502 (78%) were charges of “threatening or abusive behaviour” under section 38 of the 2010 Act.<sup>37</sup>

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 ECHR.<sup>38</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 where (c) the prosecutor can establish the accused either intended to cause fear or alarm, or was reckless about causing them. The expansive concept of “abusive behaviour” can capture a broad scope of objectionable behaviour expressed in prejudiced terms.

In terms of online behaviour, under the Communications Act 2003, charges of improper use of a public electronic communications network may be brought against individuals who send “grossly offensive or of an indecent, obscene or menacing character” by means of the internet, including social media.<sup>39</sup>

Some dimensions of sectarian abuse are captured by the existing fractured body of hate crime laws in Scotland. 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.

The broad legal definition of “race” also captures some elements of sectarian prejudice. The concept of a “racial group” is defined in law as “group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or

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<sup>34</sup> *Smith v Donnelly* 2002 JC 65, para 17.

<sup>35</sup> Scottish Government (2018) *Religiously Aggravated Offending in Scotland 2017/18*, Table 7.

<sup>36</sup> Scottish Government (2018) *Religiously Aggravated Offending in Scotland 2017/18* accessible at <https://www.gov.scot/Publications/2018/06/2695/0>.

<sup>37</sup> The details of the offence are accessible here: <https://www.legislation.gov.uk/asp/2010/13/section/38>.

<sup>38</sup> *Harris v HM Advocate* 2010 SCCR 15.

<sup>39</sup> Communications Act 2003, section 127. Accessible here: <https://www.legislation.gov.uk/ukpga/2003/21/section/127>.

national origins.”<sup>40</sup> In the context of sectarianism, for example, the Appeal Court has held that the word “Fenian” can relevantly ground changes brought on the basis of racial prejudice, as:

*it is within judicial knowledge that the term "Fenian" is used by a certain section of the population to describe a person either of Irish ancestry or even a person of the Roman Catholic faith, whether of Irish ancestry or not. Coupled with the derogatory term "bastard", this is either an expression of religious prejudice or racial bigotry or both.*<sup>41</sup>

On the basis of the law’s broad understanding of the concept of race, some abusive sectarian behaviour can also be prosecuted as racially-motivated harassment, as set out in the Criminal Law (Consolidation) (Scotland) Act 1995.<sup>42</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;
- 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>43</sup>

Alternatively, an offence can also be committed under section 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>44</sup> To make out the offence of racially-motivated harassment, 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. 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>45</sup> These provisions will have application to some forms of sectarian harassment, based on the perceived national origins or citizenship of the victim.<sup>46</sup>

During the period of its application, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 also applied to sectarian abuse in two distinct ways. Firstly, in the limited context of regulated football matches, the Act criminalised behaviour which “expressed” or “stirred up hatred” against individuals or groups on the grounds of their membership or presumed membership of (i) a religious group (ii) a social or cultural group with a perceived religious affiliation, or

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<sup>40</sup> Crime and Disorder Act 1998, section 96(6).

<sup>41</sup> *William Walls v Procurator Fiscal, Kilmarnock* [2009] HCJAC 59, para 19. Accessible here: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=1c2e86a6-8980-69d2-b500-ff0000d74aa7>.

<sup>42</sup> Accessible here: <https://www.legislation.gov.uk/ukpga/1995/39/section/50A>.

<sup>43</sup> Criminal Law (Consolidation)(Scotland) Act 1995, s.50A(1)(a).

<sup>44</sup> Criminal Law (Consolidation) (Scotland) Act 1995, s.50A(1)(b).

<sup>45</sup> Criminal Law (Consolidation) (Scotland) Act 1995, s.50A(6).

<sup>46</sup> Applying these provisions, the courts have held, for example, that the use of the phrase “bastard Geordie” in the course of threatening and abusive behaviour amounted to racially-aggravated harassment, as the concept of “Geordie” referred to the victim’s English national origins. *Moscrop v McLintock* 2011 SCCR 621.

(ii) their nationality or ethnic or national origins where this behaviour was also “likely to incite public disorder.”<sup>47</sup> The Act’s provisions, controversially, also applied to “behaviour the reasonable person would consider to be offensive.”

The second element to the regulation of sectarian abuse contributed by the 2012 Act was the section 6 offence of “threatening communications”, which applied both to threats to carry out “seriously violent acts” and to threats which intended “to stir up hatred on religious grounds.”<sup>48</sup> The net effect of the repeal of section 6 is that stirring up religious hatred is not – in itself – now a criminal offence in Scotland, although threatening behaviour might well be prosecuted under another common law charge or enactment.

In England and Wales, by contrast, the racial hatred 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 on the basis of religious hatred and hatred on the grounds of sexual orientation.

While the 2012 Act was often characterised in popular comment and media as an “anti-sectarianism” measure, like the surrounding statutory framework, the 2012 Act also did not make explicit use of the language of sectarianism to frame its offences.

### **Sentencing aggravators**

Statutory aggravators are intended to enhance the severity of criminal charges 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 proved beyond a reasonable doubt, the court may 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>49</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:

- 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
- that the offence was **motivated (wholly or partly) by malice and ill-will** towards persons based on their perceived racial, religious or transgender identities, or their sexual orientation or disability.

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<sup>47</sup> Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1.

<sup>48</sup> The repealed text of section 6 is available here:

<https://www.legislation.gov.uk/asp/2012/1/section/6/enacted>.

<sup>49</sup> Crime and Disorder Act 1998, section 33.

Implicit in this logical structure is that aggravators are based on the perceptions of the accused, as demonstrated by their words and behaviour, and not the characteristics of the victim. If, for example, an individual 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 animus-based aggravators, of which racial and religious prejudice are relevant to the prosecution of crimes motivated by sectarian prejudice. Like the substantive offences of stirring up racial hatred and racially-motivated harassment, in aggravations by racial prejudice, the concept of race is given a wide legal definition.

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>50</sup> From the perspective of sectarianism, this aggravator would apply to criminal behaviour motivated by hatred of the victim's presumed national origins – or crimes where malice or ill-will is evinced towards the victim's presupposed national origins by the accused.

The religious prejudice aggravator was introduced to Scots law in 2003<sup>51</sup> and is predicated on either the victim's membership (or presumed membership) of (a) a religious group, or (b) of "a social or cultural group with a perceived religious affiliation."<sup>52</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;
- 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>53</sup>

Depending on the facts and circumstances of a particular case, and the behaviour of the accused during the commission of the underlying crime, either or both of these aggravators may currently be attached by prosecutors to charges motivated by sectarian prejudice.

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<sup>50</sup> Crime and Disorder Act 1998, section 96(6).

<sup>51</sup> Criminal Justice (Scotland) Act 2003, section 74.

<sup>52</sup> Criminal Justice (Scotland) Act 2003, section 74(2)(b).

<sup>53</sup> Criminal Justice (Scotland) Act 2003, section 74(7).

## Criminal law responses to sectarianism after Bracadale

If the Bracadale Review's proposals for the reform of hate crime in Scotland are enacted, arguably only superficial changes will apply to the prosecution of offences motivated by sectarian prejudice.<sup>54</sup> The aggravators will be consolidated in a single enactment. The language used in the statutory aggravators will be updated for comprehensibility, attaching to "demonstrations of hostility" rather than "evincing malice" against the victim's perceived religious or national origins. Additional aggravators may be added based on additional protected characteristics but, from the perspective of offending motivated by or evincing sectarian prejudices, the additional aggravators are irrelevant.

The Bracadale review also proposes to abolish the offence of racially-motivated harassment as part of the consolidation, which would close one route through which sectarian behaviour might currently be criminalised. Critically, under these proposals, the language of sectarian prejudice will continue to go unused in the letter of Scottish criminal law, with sectarian offending – at least in a technical sense – being swept up in the broader and general categories of statutory aggravators based on the accused's perception of the victim's religious and racial characteristics, incorporating hatred based on supposed national origins or citizenship.

Although Lord Bracadale consulted on the issue of intersectionality – where the hostility motivating or expressed by the accused combines several different strands of hatred<sup>55</sup> – Bracadale's approach would continue to treat each of the protected characteristics as a discrete issue giving rise to a distinctive aggravation, rather than recognising that a messy social phenomenon like sectarian prejudice – which often incorporates hostility expressed in a range of religious and racialised terms simultaneously – does not always allow a clear demarcation to be drawn between behaviour motivated by the victim's membership (or presumed membership) of a religious group and behaviour based on perceived national origins or citizenship.

In terms of the consolidated and extended "stirring up hatred" offences Lord Bracadale has proposed, if enacted, prosecutions for incitement to hatred may be possible in future if the prosecutor could establish that the accused has engaged in threatening or abusive conduct, with either (i) an intention to stir up hatred on religious or racial grounds, or (ii) that "having regard to all the circumstances hatred in relation to the particular protected characteristic is likely to be stirred up."<sup>56</sup> In this respect, Bracadale's proposals largely replicate the existing offence of incitement to racial hatred for incitement to sectarian hatred based on perceived national origins or citizenship, but would substantively re-introduce the incitement to religious hatred offence, introduced by section 6 of the Offensive Behaviour at Football Act, repealed in May 2018.

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<sup>54</sup> (2018) *Independent Review of Hate Crime Legislation in Scotland: Final Report*. Accessible in full here: <https://www.gov.scot/Publications/2018/05/2988>.

<sup>55</sup> For example, in *William Walls v Procurator Fiscal, Kilmarnock*, the accused was convicted of common law breach of the peace charges, aggravated by both religious and racial prejudice, having been witnesses expressing a combination of the following sentiments "the famine is over", "fenian bastard" and "f\*\*\* the Pope" during a match at Rugby Park.

<sup>56</sup> (2018) *Independent Review of Hate Crime Legislation in Scotland: Final Report*. Recommendation 14. Accessible in full here: <https://www.gov.scot/Publications/2018/05/2988>.

## Conclusions: Scope for legal intervention

Against this backdrop, the following conclusions arise.

1. There is no current scope for the Scottish Parliament to amend equal opportunities legislation to incorporate the language of sectarianism on constitutional grounds.
2. While there is constitutional scope to introduce changes to the criminal law in Scotland explicitly to use the language of sectarianism, the question arises: is it right to do so? Broadly speaking, three potential responses to this question are available:
  - The first option is **not to reform the criminal law**, instead relying on the existing legal structures adequately to capture and to punish offending motivated by sectarian prejudice, without using the contested vocabulary of sectarianism or attempting to define the concept in law.
  - The second alternative approach would be to **introduce a new criminal statute**, alongside the existing structures of criminal offences and aggravators, which makes explicit use of the language of sectarian prejudice, alongside general offences such as “threatening or abusive behaviour”, summarised above.
  - The third approach would be **explicitly to incorporate the language of sectarianism in a more limited way into Scottish criminal law** – not by creating new offences, but by tailoring the familiar aggravators associated with religious and racially motivated offending to recognise and to name the social problem of sectarian prejudice. This third model would incorporate sectarianism into the language of hate crime in Scotland, but would not radically innovate in terms of the behaviour which is and is not criminalised.

The merits of each of these issues is considered in turn in the following section.

## Section 5: Options

Broadly speaking, the group has identified three approaches which could be adopted to defining sectarianism in Scots criminal law:

- **Option A:** do nothing – maintain the status quo, using aggravators and offences based on the more generic concepts of religious and racial prejudice to address offending motivated by sectarian bigotry.
- **Option B:** introduce new criminal legislation, alongside existing common law and statutory offences, to address offences motivated by sectarian prejudice.
- **Option C:** develop a new intersectional statutory aggravation of “sectarian prejudice”, which could be incorporated into the consolidated hate crime legislation proposed by Lord Bracadale.

We have identified the following key themes and considerations relevant to the assessment of whether Options A, B, or C should be our preferred recommendation.

### Legal redundancy

As the legal summary in Section 4 demonstrates, any definition of sectarianism is likely to overlap to a considerable extent with the criminal law’s existing responses to religious and racial prejudice. It could be argued that an additional sectarian aggravator or offence is unnecessary, as the existing aggravators and offences adequately capture sectarian offending, broadly defined, and allow them to be punished by the courts where proven. This argument of redundancy was deployed consistently by critics of the now-repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act, on the basis that, as a matter of law, the conduct prohibited by the Act was already prohibited by existing common law and statutory offences, and therefore any additional legal rules were surplus to requirements.

### Economy of legal language and effective enforcement

Because any new and supplementary definition of sectarianism in Scots law will apply alongside the pre-existing aggravators and offences based on religious and racial prejudice, the group were alive to concerns that any legal definition of sectarianism should not be so complex or onerous that Scottish prosecutors would have incentives to disapply any legal definition of sectarianism, in favour of simpler or more easily established religious and racial aggravators or substantive offences. On this basis, the group recognised it was important that any legal definition of sectarianism should have a reasonable economy of scope and application to allow it to be enforced effectively.

### 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.<sup>57</sup> Using the language of sectarianism to specify offending based on the Christian religious denomination or national origins of the victim arguably chimes better with the social vocabulary than an aggravator narrowly framed in terms of religious or racially motivated offending.

This can be understood as the principle of “fair labelling” in criminal law, defined by Professors Andrew Ashworth and Jeremy Horder as ensuring:

*that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.*<sup>58</sup>

Although there is always going to be a gap between popular and technical legal understandings of criminal offences, we believe it is desirable that the criminal law should – so far as is possible – employ a recognisable social vocabulary to describe the wrongs it punishes. As Section 4 has summarised.

This approach finds 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>59</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>60</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 justification in explicitly singling out sectarian prejudice as a condemnable motivation for offending.<sup>61</sup>

A further example of a State framing hate crime legislation in terms of their own prevailing social and cultural problems can be found in the South African Prevention and Combatting of Hate Crimes and Hate Speech Bill.<sup>62</sup> Responding to the prevailing features of modern South Africa, the Bill's list of protected characteristics ranges far more widely than Lord Bracadale's proposals, including albinism and HIV status, in response to the prevailing social context in South Africa.<sup>63</sup>

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<sup>57</sup> Scottish Government (2015) *An Examination of the Evidence on Sectarianism in Scotland: 2015 Update* accessible at <https://www.gov.scot/Publications/2015/05/5191>.

<sup>58</sup> A Ashworth and J Horder (2013) *Principles of Criminal Law* 7<sup>th</sup> edn (Oxford, Oxford University Press), 77 – 78. The concept is discussed further in P R Ferguson and C McDiarmid (2014) *Scots Criminal Law: A Critical Analysis* (Edinburgh, Edinburgh University Press), para 4.6 and J Chalmers and F Leverick (2008) “Fair labelling in criminal law” 71 *Modern Law Review* 217.

<sup>59</sup> Full text accessible here: <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>.

<sup>60</sup> Prohibition of Incitement to Hatred Act 1989, Section 1(1).

<sup>61</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.

<sup>62</sup> Full text, accessible here: <https://www.parliament.gov.za/storage/app/media/Docs/bill/9febb155-8582-4a15-bf12-5961db2828c2.pdf>.

<sup>63</sup> *Ibid.* Section 3

## The intersectional character of sectarianism

As the Advisory Group's report in 2015 recognised, sectarianism in modern Scotland is a complex phenomenon, rooted in inter-denominational Christian prejudices, but one which has mutated to encompass a combination of elements, including national origin, football allegiance and politics. One relevant consideration to determining whether there is merit in introducing a legal definition of sectarianism is its capacity to capture this intersectional character where, for example, the expressions of anti-Catholic antipathy accompanying a criminal offence may be spontaneously accompanied by anti-Irish hostility.

## Controversy and social acceptance

Reflecting the complexity of sectarianism in modern Scotland, how the concept is defined is likely to generate considerable disagreement. The extent to which a broad social consensus may be reached on the scope of any legal definition is also a relevant factor in assessing whether there is substantive merit in defining the concept of sectarian prejudice in law.

Those key themes, issues, concerns and arguments having been identified, we now turn to consider the potential merits and demerits of each of the alternative approaches identified.

### Option 1: The Status Quo

The first approach considered here is – broadly – no change. No additional legislative intervention is required. Lord Bracadale's review supported this approach, reasoning that he did 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.*<sup>64</sup>

This approach can be justified by several arguments. As Lord Bracadale suggests, it might be thought that the concept of sectarianism in Scotland is so essentially contested that any attempt to define the phenomenon and to secure widespread social recognition of the definition would be impossible. An alternative perspective, short of this claim, would maintain that the very process of attempting to coin a generally socially acceptable definition of sectarianism would, in itself, be a dangerous and divisive process which could do more damage than good in the process. It could also be argued that using the language of sectarianism could serve to conceal rather than illuminate the social reality of sectarianism in modern Scottish society.

More technically, the case for not incorporating the language of sectarianism explicitly into Scots criminal law can be supported by the concept of legal redundancy, which largely informed Lord Bracadale's analysis of the topic. If an

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<sup>64</sup> (2018) *Independent Review of Hate Crime Legislation in Scotland: Final Report*. Recommendation 19. Accessible in full here: <https://www.gov.scot/Publications/2018/05/2988>.

assault motivated by anti-Catholic bigotry can be prosecuted as aggravated by religious-prejudice, the reasoning runs, what is the benefit of an additional, second aggravator using the language of sectarian prejudice to characterise this behaviour? Using this logic, general provisions which punish religious and racial motivations for criminal offending adequately capture and adequately penalise sectarian behaviour.

On the other hand, one of the key criticisms of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 was its failure to employ the language of sectarianism – although criticisms of the legislation were also couched in terms of its clarity and the risk that the rules it created might be illiberally applied by law enforcement authorities (although the 2012 Act itself did not make any provision for policing). Turning the argument on its head, is there a rational explanation for why the widespread, much-debated but understood social vocabulary of sectarianism is not used in Scottish criminal law, but the abstract and socially-unrooted vocabulary of religious or racial hatred is regarded as technically acceptable?

Also, against inactivity, it may be argued that the existing statutory regime – and the recommendations of Lord Bracadale – fail adequately to capture the intersectional character of contemporary sectarianism, which cannot be neatly divided into religious or racially motivated offending, but often incorporates expressions of hostility based on Christian denominational affiliation and national origins and citizenship simultaneously. The status quo arguably fails to reckon with this.

It may also be argued that, despite vigorous debates about what does and does not fall within its bounds, the nature of sectarian prejudice is not so essentially contested that a broadly socially acceptable definition could not be devised. Understanding of sectarianism – although debated – is well-established. The argument that the language of sectarian prejudice represents as a distorting lens through which to regard the social phenomenon sits uncomfortably along the pervasive use of the vocabulary of sectarianism to describe anti-Catholic and anti-Protestant antipathy, or to describe crimes accompanied by demonstrations of hostility based on the victim's presumed national origins or citizenship – British or Irish.

## **Option 2: A New Sectarianism (Scotland) Bill**

The second alternative approach would be to recommend that a new criminal offence – or series of criminal offences – might be created explicitly using the vocabulary of sectarian prejudice to supplement the existing common law and statutory offences outlined in Section 4. Although it did not use the explicit language of sectarianism, within the limited context of regulated football matches, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 can be understood as an attempt to do so. A designated statute, using the language of sectarianism to describe prejudiced behaviour, would arguably reflect the interests of “fair naming” of sectarian behaviour and the declaratory function of the criminal law. The creation of a distinctive sectarianism offence or body of criminal offences could also have statistical advantages for aiding the social understanding of the prevalence of sectarian offending in Scotland, distinguishing charges of a sectarian character from more general offending, or hate crimes motivated by, for example, antisemitism or islamophobia.

Depending on the complexity and comprehensibility of how such a Sectarianism Act was drafted, it could also serve the interests of an economy of legal language and represent an effective tool for prosecutors and a comprehensible guide to permissible conduct for the wider public. New offences could also be drafted in such a way as to recognise that offending motivated by sectarian prejudice is intersectional in character and cannot always neatly distinguish between its religious, social and cultural manifestations in the manner the current law enshrines and the Bracadale Review proposes.

However, the major objection to such an approach is legal redundancy. Why is it necessary to generate an additional tranche of tagged sectarianism offences? The leading contemporary charge used by the authorities in cases of religiously-motivated offending is “threatening or abusive behaviour.” Section 38 is framed in a broad and general way, with appropriate safeguards. To give distinctive social recognition and identity to the distinctive wrong of criminal offending motivated by sectarian prejudice, it is arguably unnecessary to add additional offences to the statute book. Instead, the dominant approach of using statutory aggravators allows hate crimes to be distinguished from other offending, without introducing additional layers of complexity and duplication to the substantive criminal law.

There are also relevant political considerations which weigh against the creation of a distinctive sectarianism statute, in view of the Scottish Parliament’s recent repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and the logical basis for this repeal. A key critique of the legislation was the limited compass of the section 1 offence of “offensive behaviour at football.” Critics argued that the law should have general application and not be limited to individuals associated with a particular sport. Moreover, during parliamentary scrutiny of the 2018 Repeal Act, significant emphasis was placed on the issue of legal redundancy.

Critics argued (a) that the legislation was illiberal and over-extended the criminal law in Scotland but also that (b) the main offences created by the 2012 Act were adequately captured by common law and statutory charges and aggravators, including breach of the peace, threatening or abusive behaviour, and religious or racial prejudice aggravators. These arguments would powerfully apply to any hypothetical Sectarianism (Scotland) Bill which attempted to introduce new, named sectarian offences.

Moreover, the boundaries around where any new offences should apply are likely to be hotly contested. This is reflected by the discussion of perhaps the most controversial section of the 2012 Act – the section which criminalised “behaviour the reasonable person would consider to be offensive” in relation to regulated football matches. Any proposals to create new named sectarian offences are particularly likely to generate considerable controversy about the appropriate language and drafting of the statute and the conduct included and not included within the scope of its definition.

### **Option 3: a sectarian prejudice aggravator**

The third option considered by the group would be to adapt the current law concerning religious and racial aggravators to create a new, intersectional aggravator for sectarian prejudice based on the accused's demonstration of hostility towards the victim's 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). In view of the Bracadale proposals, this might be accompanied by incorporating sectarian hatred into a new incitement offence in the consolidated hate crime Bill which the Scottish Government has already committed to taking forward.

This approach would have the benefit of "fair labelling" sectarian offending. Instead of employing the broader vocabulary of religious or racially motivated offences, the meaningful social vocabulary of sectarian prejudice could be attached to an offence which, for example, involved expressions of hostility motivated by anti-Catholic and anti-Irish bigotry. Moreover, the proposed structure of this new aggravator would arguably better reflect the intersectional character of modern sectarianism, allowing the aggravator to be established on evidence of the accused's racial, religious and/or cultural motivations.

For police and prosecutors, a single, intersectional sectarian aggravator could have two key advantages. Firstly, it streamlines decision-making where the accused's conduct immediately before, during or after the offence might arguably fall within racial or religious aggravations, where the hostility evinced is of a sectarian character.

A single compound aggravator avoids the need for duplication where, for example, the accused's behaviour could arguably ground both a religious and a racial aggravator. From the perspective of economy of legal language and effective enforcement, there is no reason in principle why a sectarian prejudice aggravator should be any more difficult to apply in practice than the existing aggravators based on religious and racial prejudice.

Creating a sectarian aggravator would be considerably simpler than proposals to create a distinctive sectarianism offence which extends more widely than the general criminal law. A sectarian prejudice aggravator – in and of itself – would create no additional criminal offences. It would only apply – if proven – where the accused had been convicted of an underlying offence, such as assault, homicide or threatening or abusive behaviour.

Against Option 3, it may be argued that an intersectional sectarian prejudice aggravator would be legally redundant. If it largely replicated existing religious and racial prejudice aggravators, a sectarian prejudice aggravator would be creating nothing new legally. It would not enhance the powers of the police or prosecutors. It would not give courts the power to impose stricter sentences than they are currently able to do so using racial and religious aggravators. In response, it can be argued that a sectarian prejudice aggravator – proceeding along these lines – will add something significant to Scots law and Scottish society. It would use the language of sectarianism for the first time in Scots law without dramatically extending the powers of the police or curbing the liberty of citizens, while recognising and naming the intersectional reality of sectarianism in modern Scotland.

## Section 6. Conclusions and Recommendations

**Having considered these arguments, the Advisory Group has concluded that Option 3, set out in Section 5 of this report, represents the best and most effective way to incorporate a legal definition of sectarianism into Scots law, within the limited powers of the Scottish Parliament.**

We conclude there is merit in properly labelling offences as being motivated by sectarian prejudice. We conclude that the status quo – and Lord Bracadale’s review proposals – both fail to capture the intersectional reality of sectarian prejudice in modern Scotland, which is characterised not only by religious antipathy based on perceived Christian denominational affiliation, but also hostility expressed in terms of perceived British or Irish national origins and citizenship, or a combination of the two. Not only would this intersectional aggravator name and better capture the reality of modern sectarian prejudice in the field of criminal law, we believe it may also have advantages for police and prosecutors in properly labelling, charging and prosecuting offending involving the demonstration of sectarian hostility.

Our draft legislative language (below) is based on the already applicable law on religious and racial prejudice aggravators, updated to reflect the modernised vocabulary recommended by Lord Bracadale’s report. If adopted, this aggravator would introduce the language of sectarian prejudice into Scots Law for the first time. It explicitly locates sectarian prejudice in the context of Roman Catholic and Protestant animus, but recognises the intersectional character of modern sectarianism by incorporating demonstrations of hostility, expressed in terms of perceived Irish or British national origins or citizenship. Alone, this aggravator creates no additional criminal offences, nor does it extend the scope of behaviour which is, or is not, criminal.

As this aggravator is intended to be incorporated into the consolidated Hate Crime Bill which the Scottish Government will be developing over the next few years, it focuses on the concept of demonstrating hostility based on the victim’s imagined characteristics. Like the existing law, this aggravator is based principally on the perceptions of the accused, not the characteristics of the victim.

To take one worked example of how the aggravator could operate in practice, consider the facts of the 2009 case of *William Walls v Procurator Fiscal Kilmarnock*.<sup>65</sup> Walls was charged with committing a breach of the peace. Walls had been observed shouting a combination of the following at a Kilmarnock v Rangers match at Rugby Park: “the famine is over,” “Fenian bastard” and “f\*\*\* the Pope.” Under the existing law, this breach of the peace was treated as aggravated by both religious and racial prejudice. Under the proposed sectarianism aggravator, it could be classified as being aggravated by sectarian prejudice, as it combines elements of both condition (a) – anti-Catholic – and condition (b) – anti-Irish – hostility. It could also apply to the facts and circumstances of the alleged attack against Canon Tom White in Glasgow on 07 July 2018.<sup>66</sup>

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<sup>65</sup> *William Walls v Procurator Fiscal, Kilmarnock* [2009] HCJAC 59, para 19. Accessible here: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=1c2e86a6-8980-69d2-b500-ff0000d74aa7>.

<sup>66</sup> BBC Scotland (2018) “Canon Tom White describes attack during Orange walk” <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-44762725>.

**We recommend that the following definition of sectarianism should be incorporated into a consolidated Hate Crime Bill, alongside the existing aggravators based on religious and racial hatred:**

**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 demonstrates hostility towards the victim (if any) of the offence based on the victim’s membership (or presumed membership) of a Roman Catholic or Protestant denominational group, or of a social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a Roman Catholic or Protestant denominational group, or of a social or cultural group with a perceived Roman Catholic or Protestant 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 demonstrates hostility towards the victim (if any) of the offence 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 hostility 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 it is immaterial whether or not the offender’s hostility 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, and

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

(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, “Roman Catholic or Protestant denomination group” means a group of persons defined by reference to their—

(a) Roman Catholic or Protestant denominational religious belief or lack of religious belief;

(b) membership of or adherence to a Roman Catholic or Protestant denominational church or religious organisation;

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

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

### **Stirring up hatred offences**

Lord Bracadale recommends that – alongside aggravators which can be attached to underlying criminal charges – Scots law should be reformed so there is a substantive incitement offence which applies in respect of each of the protected characteristics, where it can be shown that:

(i) The accused has behaved in a “threatening or abusive” manner, and either

(ii) intends to stir up hatred against one of the protected characteristics identified, or

(iii) hatred would be likely to be stirred up in those circumstances.

If a sectarian prejudice aggravator was, as we recommend, incorporated into a consolidated hate crime Bill, the logic of codification and consolidation – married with Lord Bracadale’s strong recommendation that there should be no internal hierarchy among protected characteristics – would weigh in favour of introducing a new offence of stirring up sectarian hatred alongside the proposed offences of stirring up hatred on grounds including race, gender and sexuality. This could be done straightforwardly by adapting the language of Conditions A and B in the draft aggravator.

To do so would not extend the criminal offence Lord Bracadale has recommended the Scottish Parliament should introduce. If the distinctive concept of stirring up sectarian hatred was not introduced, the stirring up of hatred based on British or Irish nationality, national origins and citizenship or Christian denominational affiliation would be caught by Lord Bracadale's protected characteristics of race and religion.

While we are convinced of the case for introducing a sectarian prejudice aggravator, introducing a new substantive criminal offence of stirring up hatred must be undertaken with extreme care, with particular regard to free expression and the need for appropriately high legal thresholds to justify criminal sanctions. In this respect, we welcome and support Lord Bracadale's recommendation that any new offences concerned with the stirring up of hatred must incorporate explicit recognition of the right to free expression under the European Convention on Human Rights and differentiate between behaviour which genuinely incites hatred from robust, critical, and perhaps challenging and difficult forms of expression concerning any of the protected characteristics. We also welcome his recommendation that any stirring up offence should be subject to a defence that it is reasonable in all the circumstances. These safeguards are essential if legislative overreach is to be avoided.

To establish the new stirring up offence, Lord Bracadale recommends that prosecutors need only demonstrate that either (a) the accused intended to incite hatred, or that (b) hatred was likely, in the circumstances, to be stirred up by the threatening or abusive behaviour.

We are not yet convinced that this approach represents an adequately high threshold for the application of the criminal law, which will apply to a number of areas of social life often characterised by strong emotions, contested ideas, and difficult conversations. It might be argued, for example, that any stirring up offence – whether applying to sectarian hatred or to homophobia or racial hatred – should be a crime of intention only.

The idea of recklessly stirring up hatred may cast the net of the criminal law too widely. As drafted, the incitement offence could also be committed even if there was no evidence that the threatening or abusive behaviour was likely, in the circumstances, to stir up hatred against the protected group. This approach may also be questionable. It could be argued that it would be more appropriate, in addition to having to prove the accused intended to stir up hatred, for prosecutors to also establish that the behaviour was actually likely, in all the circumstances of the case, to stir up hatred.

The legal detail of any new incitement to hatred offence must be carefully scrutinised and subject to a broad and searching consultation by the Scottish Government, including scrutiny by the Scottish Parliament and wider civic society. While Lord Bracadale rejected both approaches, we believe the merits of these elements of his hate crime report proposals should be carefully re-examined in public consultation, insofar as they might apply to any new offence of stirring up of sectarian hatred, or to incitements to antisemitism, transphobia or Islamophobia or any other protected characteristic.



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