Independent Review of Hate Crime Legislation in Scotland

Consultation Paper

Foreword

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

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

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

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

Alastair P. Campbell
(Lord Bracadale)

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Introductory Chapter

Background

On 26 January 2017, Annabelle Ewing, the Minister for Community Safety and Legal Affairs, announced the appointment of an independent review into hate crime legislation in Scotland to be conducted by Lord Bracadale. The review was established following the publication in September 2016 of the report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, chaired by Dr Duncan Morrow, which recommended that the Scottish Government should (a) lead discussion on the development of clearer terminology and definitions around hate crime, prejudice and community cohesion; and (b) consider whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime, for example based on gender, age or membership of other groups such as refugees and asylum seekers. On 9 November 2016 the Report of the Independent Advisory Group was the subject of a debate in the Scottish Parliament.

Separately, opposition parties had indicated an intention to support repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. James Kelly MSP had consulted on a Member's Bill to repeal the Act (his Bill was introduced in June 2017).

Further, a recent case had raised an issue in relation to a crime committed with a religious motivation. On 7 July 2016, at the High Court in Glasgow, Tanveer Ahmed pled guilty to the murder of Asad Shah, a shopkeeper in Glasgow. Although Ahmed admitted that he had committed the murder because he felt Mr Shah had disrespected the Prophet Muhammad and had claimed to be a prophet himself, prosecutors considered that the offence did not fall within the statutory provision of hate crime relating to religious prejudice and could not therefore be subject to a statutory aggravation.

Finally, hate crime legislation had been developed in a piecemeal manner and the question arose as to whether harmonisation and consolidation was needed.

Remit

Against that background, the remit of the Review is in the following terms:

> To consider whether existing hate crime law represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.
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> In particular, to consider and provide recommendations on:
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> - Whether the current mix of statutory aggravations, common law powers and specific hate crime offences is the most appropriate criminal law approach to take.

- Whether the scope of existing hate crime law should be adjusted, including whether the existing religious statutory aggravation should be adjusted to reflect further aspects of religiously motivated offending.
- Whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered).
- Whether existing legislation can be simplified, rationalised and harmonised in any way such as through the introduction of a single consolidated hate crime act.
- How any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework, ensuring this interacts effectively with other legislation guaranteeing human rights and equality.

Reference Group

Lord Bracadale is supported by a secretariat comprising Victoria MacDonald, legal secretary to the review, and Carole Robinson, project manager. Lord Bracadale invited a number of individuals to form a reference group, and their details may be found on the review's website.

The reference group has met on two occasions and members have engaged in extensive email communication in relation to the preparation of this consultation paper. Lord Bracadale is very grateful for their invaluable assistance.

Academic research

Lord Bracadale commissioned Professors James Chalmers and Fiona Leverick, both of the University of Glasgow, to prepare an academic report. Their report, which analyses the current law in Scotland and carries out a comparative exercise with other jurisdictions, is found at Appendix 1.

Website

The Secretariat established a website (http://www.hatecrimelegislationreview.scot). This forms the hub for communications with all interested parties.

Questionnaire

At the outset of the review process, Lord Bracadale sent out a letter to a large number of interested organisations explaining the purpose of the review and encouraging them and their members to participate in the consultation exercise in due course, and to complete a short questionnaire about their understanding and experience of the impact of hate crime. The review received 180 responses to the questionnaire. The responses were analysed by Dr Rachel McPherson. Her report is found at Appendix 2.

Meetings

Lord Bracadale and the secretariat have already participated in a series of fact-finding meetings. These have included meetings with police officers, representatives of the Crown Office and Procurator Fiscal Service (COPFS) and sheriffs. Lord Bracadale has also met with a wide range of interested parties in the community. These included representatives of groups with an interest in the currently protected characteristics and a number of potential additional characteristics, as well as those with particular interest in the 2012 Act and its possible repeal. A list of the organisations that Lord Bracadale and his secretariat have met or had discussions with is set out in the annex to this document.

Lord Bracadale is very grateful to all those who have contributed to the preliminary fact-finding work.

Other material

Many of the groups provided helpful material. In addition, Lord Bracadale and the Secretariat have engaged in desktop research into a significant body of material relating to hate crime which is available online. They have liaised with officials in other administrations within the UK to ensure the review takes into account relevant developments.

Statistics

COPFS and the Scottish Government publish annual statistics in relation to hate crime in Scotland. The most up-to-date statistics, relating to the financial year from April 2016 to March 2017, were published on 9 June 2017 and have been taken into account in this consultation paper.

Consultation paper

The consultation exercise will run from 31 August to 23 November 2017.

Purpose of the consultation

The questions set out in the various sections of the consultation paper are deliberately of a relatively open nature and invite the expression of views. Provisional proposals are not advanced at this stage. The responses, which will be analysed by professional analysts, will inform Lord Bracadale's Report to the Scottish Ministers based on the remit of the review.

It is recognised that not all consultees will wish, or feel able, to answer all of the questions. Consultees are encouraged to answer questions where they feel it appropriate to do so. If consultees wish to raise any relevant points that are not the focus of questions within this paper please contact Lord Bracadale's secretariat at secretariat@hatecrimelegislationreview.scot

Structure

Chapter 1 addresses what is meant by the term "hate crime" in Scotland and the justification for having hate crime legislation.

Chapter 2 then sets out the wider human rights context.

Chapter 3 considers the history and development of the current Scots law in relation to hate crime and the salient features of the provisions.

Chapter 4 explores certain issues in relation to the statutory aggravation provisions.

Chapter 5 addresses issues arising in relation to racially aggravated harassment and conduct under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

Chapter 6 examines the provisions relating to stirring up of hatred and offences committed online.

Chapter 7 examines the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and consequences of its possible repeal.

Chapter 8 considers the question of whether additional protected characteristics should be added.

Chapter 9 addresses a number of specific issues, including whether hate crime legislation has a role to play in relation to under-reporting and appropriate sentencing.

Consultees should read the chapters of the consultation paper along with the relevant parts of the Academic Report.

Versions

We have produced three versions of the consultation paper:

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

Events

During the period of the consultation, Lord Bracadale, members of the secretariat and members of the Reference Group intend to participate in a number of events run by interested parties, with a view to explaining the purpose of the review and encouraging participation in the consultation process. A list of the events which are open to members of the public to attend is included on the review website.

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

CHAPTER 1: Hate crime: definition and justification

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

Part 1: What is meant by hate crime

The term "hate crime" is well established in Scotland, the rest of the United Kingdom and other jurisdictions. It is clear from chapter 1 of the Academic Report that there is no single accepted definition of what constitutes a "hate crime". This was also reflected in some of the responses to the questionnaire. Different definitions may reflect different purposes.

This consultation paper is concerned with hate crime in the context of Scottish criminal law. In Scotland the term is commonly used by the police, prosecutors, the Scottish Government and many organisations in the community representing currently protected characteristics and potential additional characteristics. It is reflected in the annual statistics published by the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Government.

A working definition

It may be convenient for the purposes of this consultation paper to use as a working definition that identified in the Academic Report, quoting from N Chakraborti and J Garland *Hate Crime: Impact, Causes and Responses*, 2nd edn (2015) 13:

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

Using this definition a number of features of hate crime may be identified.

What is covered by hate crime

It is important to understand that this definition does not cover every crime driven by hatred. It would not, for example, include a crime committed simply out of personal hatred of an individual. So, for example, an assault on a neighbour motivated by hatred due to a long-running feud would not necessarily fall within the recognised category of hate crime. What lies at its core is the phrase "towards particular features of the victim's identity". In the context of Scottish criminal law this is reflected in statutory provisions in relation to a number of specific protected characteristics. Those currently protected are: race; religion; disability; sexual orientation and transgender identity. A similar approach is adopted in

many other jurisdictions. Some jurisdictions have additional protected characteristics such as age or gender. Whether any additional characteristics should be included in the Scottish provisions will be explored in chapter 8 of the consultation paper.

Motivation

Another feature which emerges from the working definition relates to motivation. Although the starting point is that the crime is motivated by hatred, it may not be necessary to prove either motivation or hatred. As explained in chapter 4 of the Academic Report, existing provisions in Scotland are "animus" based. ("Animus" is defined in the Concise Oxford Dictionary as "animosity shown in speech or action".) At its highest, the animus model might require proof that "the offence was motivated by hate against a group of people". This requires proof of motive and of hate. That high threshold may be reduced in two ways. First, by requiring no more than a "demonstration" of the feeling and, second, by substituting the concept of "hate" with the less demanding concept of "prejudice". Typically, this is achieved by a provision that an offence may be aggravated by a demonstration of hostility in relation to a protected characteristic. In Scotland this is reflected by the use of the phrase "evincing malice and ill-will".

Thus, if, for example, a person commits a breach of the peace by shouting and swearing in the street at someone of a different ethnic background and in the course of that makes remarks of a racist nature about that person, the offence would be aggravated by evincing of malice and ill-will towards the person on the basis of the protected characteristic of race.

Although the word "hatred" appears in certain stirring up provisions, in other provisions the words "hate" or "hatred" do not appear at all. Thus, a hate crime may be committed on the basis of something less than hatred. It is important to understand this because, as the Independent Advisory Group noted, sometimes neither the victim nor the perpetrator recognises their experience or actions to be based on, or driven by, hate.

The Academic Report quotes a source as observing that "most hate crimes tend to be committed by relatively ordinary people in the context of their everyday lives". A similar observation was made in a report published in 2004, commissioned by Stonewall, which noted: "Many perpetrators would not necessarily think themselves capable of committing a 'hate crime'".

Whether certain terms of abuse constitute a hate crime offence

In the course of gathering evidence our attention was drawn to examples of cases in which a term of abuse was used but there was doubt about whether the offender intended the term to indicate malice and ill-will related to the victim's membership of a protected group. Examples included the use of words such as 'dyke' or 'poof' as general terms of abuse, regardless of an individual's sexual orientation. Such abuse would not fall within the working definition of hate crime. It has been suggested by some that a prosecution as a hate crime of the use of such expressions in circumstances which do not truly reflect the evincing of malice and ill-will in relation to a protected group may undermine the arguments in favour of justification of hate crime legislation, and is in danger of artificially increasing the hate crime statistics giving rise to a perception that levels of prejudice are in fact higher than they are. However, it is also generally accepted that there is considerable under-reporting of hate crime, as we explore in chapter 9.

The statutory requirements

As will be explored in more detail later in the consultation paper, the bundle of offences which currently comprise hate crime in Scotland include statutory sentencing aggravations of existing crimes in relation to all the currently protected characteristics; a stand-alone offence of racial harassment or conduct; and stirring up of hatred offences in relation to race. Stirring up offences are sometimes referred to as "hate speech". In addition, certain offences under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 would fall under the umbrella of hate crime.

The statutory offences and aggravations require evidence to prove that (a) the conduct was motivated by malice and ill-will towards members of a group; or (b) the perpetrator evinced malice and ill-will towards the victim based on membership of the group. In other words the prosecutor must prove that one or other of these thresholds has been crossed.

Question:

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

A victim oriented approach

The recommendations in the Macpherson report into the murder of Stephen Lawrence led to a change in the approach adopted by police forces across the United Kingdom in relation to the investigation and recording of hate crime. The report reflected concern that the police and wider criminal justice system made decisions about what had happened, and why, without listening effectively to victims' and families' fears that this was a hate crime. Sir William Macpherson therefore recommended that any incident which is perceived as racist by the victim or any other person should be recorded as a

racist incident. He also recommended that the term "racist incident" should be used for all incidents reported as such by the public, whether or not the police initially considered them to be crimes, and that all should be reported, recorded and investigated with equal commitment.

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

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

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

Question:

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

Part 2: Justification for hate crime law

What is the justification for having hate crime legislation? This is explored in detail in chapter 3 of the Academic Report. What emerges from that chapter is that there is near universal agreement among scholars that hate crime should be punished more severely than non-hate crime. The Academic Report refers to a series of robust studies which demonstrate that hate crimes are more likely to cause harm both to the direct victim and to members of the group to which the victim belongs, or was perceived to belong, than non-hate crimes. Under reference to a number of studies, the Academic Report concludes that this argument is particularly compelling. It also describes as "persuasive" the argument that it is important to send a message to victims of hate crime that bias and inequality of treatment is roundly condemned by the State. Such a message may also be viewed as positively encouraging community cohesion, where people have a common vision and sense of belonging, regardless of any differences between them. The Academic Report concludes that the harm argument and the "message" argument taken together provide a compelling justification for punishing hate crime more severely. In addition, it is clear from the Academic Report that many jurisdictions share the view that legislating against hate crime is justified.

Question 3 of the Questionnaire asked about the impact that the experience of hate crime had on people. In the Analysis of Questionnaire Responses, Dr McPherson identified a number of themes into which the responses to question 3 could be organised. These included: emotional effects; mental health impact; social and practical impacts. The emotional effects included: feeling scared and fearful, hurt or upset; feeling powerless and helpless; feeling intimidated; feeling panicked; being shocked or horrified; feeling ashamed or guilty; experiencing anger and annoyance; being offended/disgusted; feeling vulnerable, frustrated, resentful, unsettled and uncomfortable. The mental health impacts included stress, depression and anxiety. The social and practical impacts included: social isolation; feeling disengaged from society; losing trust; having to move house to a different area; moving job; altering behaviour. These responses broadly reflect the findings of much larger studies referred to in the Academic Report.

On the other hand arguments are advanced against distinguishing hate crimes from other crimes. Some of these were advanced to the Working Group on Hate Crime which reported in 2004. Critics of hate crime legislation argued that it amounted to punishment of opinions and created a "slippery slope" whereby particular groups were singled out for special treatment under the law. Some argued that the fact that hate crime legislation punished the motivation as well as the crime meant that a person convicted of hate crime can receive a more severe punishment than someone who has been convicted of the same offence but without the additional motivation. Others submitted that it represented an extreme form of political correctness.

Again, some of the responses to the questionnaire voiced concern over the very idea of hate crime.

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

CHAPTER 2: Human rights context

There are a number of international human rights agreements which are relevant to the criminalisation of conduct motivated by group hatred, malice, ill-will or prejudice.

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

Only the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') is directly enforceable in domestic law by virtue of the Human Rights Act 1998 and the requirements on Scottish Ministers under the Scotland Act 1998. Other instruments are not directly enforceable. Indeed, the Istanbul Convention has been signed but not yet ratified by the United Kingdom. However, both the Scottish Government and wider civil society are committed to exploring how Scotland can go beyond rights already enshrined in domestic law. There is agreement that the principles set out in wider human rights instruments should be used to deliver the shared vision of a Scotland where everyone can live with human dignity. That includes tackling injustice and exclusion in order to improve lives. The need for priority action to 'enhance respect, protection and fulfilment of human rights to achieve justice and safety for all' was identified by work done under Scotland's National Action Plan for Human Rights (2013-17). This includes recognising the importance of raising awareness of hate crime and ensuring that it can be tackled effectively.

At the international and Council of Europe levels, protection from bias-motivated crimes emanates from general anti-discrimination standards found in the International Covenant on Civil and Political Rights ('ICCPR'), the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the ECHR. These instruments prohibit discrimination in conjunction with the enjoyment of other protected rights, including the right to life and security of persons.

In relation to bias-motivated crimes, the European Court of Human Rights has ruled that "[w]hen investigating violent incidents, such as ill treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights"[1].

Article 20.2 ICCPR states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Article 4(a) of CERD states that "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin" shall be considered offences punishable by law.

Article 16(5) of the UN Convention on the Rights of Persons with Disabilities requires State Parties to "put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted".

Article 3(d) of the Istanbul Convention requires State Parties to take the necessary legislative and other measures to prevent all forms of violence covered by the scope of the Convention, including gender-based violence against women (i.e., violence directed against a woman because she is a woman or that affects women disproportionately).

Article 6.2 of the Framework Convention on the Protection of National Minorities requires State Parties to undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Within the ECHR, articles 9 and 10 warrant particular consideration.

Freedom of thought, conscience and religion

Article 9 ECHR protects freedom of thought, conscience and religion:

> 9.1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 9.2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

1 *Identoba and Others v. Georgia*, ECtHR judgment of 12 May 2015 (Application no. 73235/12), para 67.

The rights in article 9 may be relevant in the context of hate crime for two reasons. First, conduct which is motivated by antipathy towards religious groups might interfere with the rights of persons in those groups to hold and manifest their religion or belief. The state may therefore have a positive obligation to take action to secure such rights – for example by prohibiting the offensive conduct. Second, a question could arise whether the expression of certain views related to religion or belief (for example, the criticism of other people or their actions as being incompatible with religious doctrine) should be permitted.

The right to hold particular beliefs is absolute. However, the right to manifest those beliefs may be qualified in accordance with article 9.2. It should be noted that the courts have drawn a distinction between action which is 'intimately linked' to the religion or belief, which can amount to a manifestation protected by article 9, and action which is merely motivated by a religious or other belief, which is not so protected.

It is possible to interfere with the manifestation of religion or beliefs if the limitation in question:

1. is prescribed by law
2. meets one of the legitimate aims set out in article 9.2
3. is necessary in a democratic society: does it correspond to a pressing social need; is it proportionate to the legitimate aim pursued; are the reasons given by the national authority to justify it relevant and sufficient?
4. is within the state's margin of appreciation.

It is therefore important to recognise that the freedom to practise or observe one's religion or belief does not provide protection for conduct (including speech) which is contrary to the fundamental tenets and values of the Convention.

Freedom of expression

Article 10 protects freedom of expression:

> 10.1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 10.2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The article may be relevant to hate crime and hate speech, particularly to conduct which stirs up hatred against members of particular groups. In principle, article 10 protects a wide range of expression, including spoken and written words, internet content, acts of protest and artistic performances. It covers the expression of both facts and opinions, and can apply both to the substance of the ideas and information expressed, but also to the tone and manner in which they are expressed. The courts have expressly noted that the right covers expression which shocks, offends and disturbs other people, as well as expression which is favourably received.

In some instances, the court has been prepared to find that expressions are so hateful that they do not fall within the protection of article 10 at all (and therefore can be restricted even in circumstances not falling within article 10.2). It has done this on the basis of article 17, which provides:

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

Recent cases suggest that the court is unwilling to ascribe article 10 protection to conduct or speech that incites violence against the "general" population based on extremist religious or racial views (e.g. if you advocate for the violent overthrow of secular government and the instigation of a caliphate, or you promote the re-instatement of Nazi policies in relation to the destruction of the Jewish people, that will not attract article 10 protection). In cases where speech is intended to stir up hatred and violence, an applicant will not be permitted to rely on article 10 in order to destroy the rights and freedoms contained within it: *Belkacem v Belgium, 34367/14, 27 June 2017; Garaudy v France, 65631/01, 24 June 2003; Norwood v UK, 23131/03, 16 November 2004.*

In less extreme cases, the expression will fall within the scope of article 10. However, the right is still not absolute. In terms of article 10.2, restrictions (including penalties) may be imposed in certain circumstances to achieve listed aims. As with the restrictions on manifestation of religion and belief in article 9.2, a restriction may be imposed if it:

1. is prescribed by law
2. meets one of the legitimate aims set out in article 10.2
3. is necessary in a democratic society: does it correspond to a pressing social need; is it proportionate to the legitimate aim pursued; are the reasons given by the national authority to justify it relevant and sufficient?
4. is within the state's margin of appreciation.

A state may therefore choose to prohibit certain types of expression (including expression amounting to hate crime) where it is necessary to prevent disorder or to protect the rights of others. Whether the interference meets the third and fourth tests above will depend very much on the circumstances. The European Court of Human Rights places particular importance on the discussion of matters in the public interest, and so the state's margin of appreciation in relation to such matters will be narrower than in cases involving less worthy expressions such as obscenity or blasphemy.

The court has found interference with article 10 rights permissible in relation to the publication of a book with extreme comments about Islam (*Soulas v France, 15948/03, 10 July 2008*), electoral leaflets exhorting foreigners to be sent home (*Feret v Belgium, 15615/07, 16 July 2009*) and the distribution of leaflets outside schools stating that homosexuality is morally destructive and responsible for the spread of HIV/AIDS (*Vejdeland and others v Sweden, 1813/07, 9 February 2012*).

CHAPTER 3: Current Scots law: history and development

Introduction

The current provisions of Scottish statutory criminal law in relation to hate crime are set out and analysed in chapters 2, 6 and 8 of the Academic Report to which the reader is referred for a comprehensive, detailed study.

In this chapter, which should be read in conjunction with the relevant chapters of the Academic Report, we shall examine the history of the development of the current legislation on hate crime in Scotland and outline the salient features of the provisions. In later chapters we shall explore certain aspects of the provisions which may give rise to issues to be addressed in the review.

Race: Public Order Act 1986

The earliest provisions in relation to hate crime are those which provide for offences involving the stirring up of racial hatred. As explained in the Academic Report at paragraph 2.2.1 these date back to 1965. The current offences are provided in the Public Order Act 1986 sections 18, 19 and 23, which contain various offences related to stirring up racial hatred extending to Scotland as well as England and Wales. Much of the rest of the Act extends to England and Wales only. The provisions specifically refer to “hatred”.

Race: Crime and Disorder Act 1998

The next development came in the Crime and Disorder Act 1998, which introduced two significant provisions extending to Scotland. The first of these, section 96, introduced a sentencing aggravation in respect of any offence which was racially aggravated. This was the first time that a statutory aggravation on grounds of the status of a victim had been created. Similar, but more extensive, provisions were introduced for England and Wales. It was recognised that Scottish criminal common law had more flexibility in dealing with such behaviour than was possible in England and Wales. As will be examined in more detail later, the aggravation is underpinned by the concept of “malice and ill-will” rather than “hatred”.

The second hate crime provision extending to Scotland created by the 1998 Act introduced a new section 50A to the Criminal Law (Consolidation) (Scotland) Act 1995. As is explained in paragraph 2.2.2 of the Academic Report, this section created two separate offences: racially aggravated harassment and racially aggravated conduct or behaviour. The concept of racial aggravation is defined in similar terms to section 96 of the 1998 Act.

Religion: Criminal Justice (Scotland) Act 2003

The next development of the law in relation to hate crime came with the introduction of Section 74 of the Criminal Justice (Scotland) Act 2003. This section applies where an offence is aggravated by religious prejudice and follows a very similar pattern to that in section 96 of the 1998 Act in respect of race.

The history of the introduction of section 74 of the 2003 Act is as follows. A Cross-party Working Group on Religious Hatred was set up in response to various events in 2001. These included: action by the Cross-Party Sports Group on sectarianism; a proposal for a Member's Bill by Donald Gorrie MSP which would have made sectarian behaviour an aggravation of a criminal offence; the Scottish Parliament's consideration of proposals in the UK Anti-Terrorism, Crime and Security Bill to create new offences of incitement to religious hatred and new religiously-aggravated offences. The Scottish Executive announced that it considered the existing law in Scotland was sufficiently able to deal firmly with religious hatred, but that they would convene the Cross-party Working Group to consider whether there was a need for any new legislation on the issue in Scotland.

The Cross-party Working Group reported in 2002. While it recognised the arguments that the current common law allowed for religious or sectarian factors to be taken into account, it felt that there was a serious lack of evidence that was happening in practice. The Cross-party Working Group therefore concluded that legislation would provide much needed clarity about the seriousness with which the law views offences motivated by religious hatred and would also facilitate the keeping of the records and statistics required to monitor the effectiveness of the law. The new provision was added by amendment to the Bill by Donald Gorrie MSP following publication of the report.

The Cross-party Working Group also considered, but rejected, arguments in favour of legislation covering incitement to religious hatred. It was concerned with the potential implications for freedom of speech:

> "A law against incitement to religious hatred could conceivably be used to prevent public preaching that the adherents of other faiths were in error. A law against incitement to religious hatred might also hinder people from discussing openly their concerns about particular religious practices that they might regard as harmful, whether within their own or another faith … Where an individual believes that any other particular set of beliefs is flawed and the adherents of that religion are in error, we are of the view that such an individual should be able to say so without fear of a law on incitement to religious hatred." [paras 5.06, 5.07]

Disability, sexual orientation and transgender identity: Offences (Aggravation by Prejudice) (Scotland) Act 2009

After the lengthy history outlined below, the next development came with the passing of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. This Act introduced statutory aggravations for offences aggravated by prejudice relating to disability, sexual orientation and transgender identity which are similar to those already created for race and religion.

The history leading to the introduction of these provisions in the 2009 Act is as follows. Robin Harper MSP initially lodged amendments to the Criminal Justice (Scotland) Bill 2003 which sought to create statutory aggravations where offences were aggravated by prejudice on grounds of disability, sexual orientation, gender and age. Those amendments were rejected in the Scottish Parliament. In arguing for the rejection of the amendments, the Justice Minister, Jim Wallace MSP, submitted that the groups covered by the amendment might not all be in need of the protection of the criminal law in the way that they required protection from discrimination as a matter of civil law. It might be difficult to distinguish between whether a victim had been subject to an offence simply because they were vulnerable rather than because of some provable motive of ill-will or malice against them as a result of their status.

In June 2003 the Scottish Executive did, however, set up a Working Group on Hate Crime to consider the most appropriate measures needed to combat crime based on hatred towards social groups. The Working Group reported in 2004.[2]

The Working Group on Hate Crime concluded that some social groups were proportionately more often victims of harassment and crime largely motivated by prejudice against those groups. The Working Group considered that statutory aggravations should be created as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. The Working Group considered that more work was required in consideration of offences aggravated by prejudice on grounds of age or sex, but that the statutory aggravation which it recommended should be drafted in such a way that it could be extended to other groups by statutory instrument over time if appropriate evidence emerged that such other groups were subject to a significant level of hate crime.

2 http://www.gov.scot/Resource/Doc/26350/0025008.pdf.

The Working Group also recommended that consideration should be given to whether a general statutory offence of harassment and alarming or distressing behaviour would be an effective tool to combat 'lower-level' harassment which they had been told about when carrying out their work. It considered that such an offence could be applied with a statutory aggravation.

The Scottish Executive initially rejected the Working Group's recommendation to create new statutory aggravations. Subsequently, however, in January 2008, the Cabinet Secretary for Justice indicated that the Scottish Ministers were in agreement with the recommendation of the Working Group on Hate Crime and would support legislation to give effect to it. Patrick Harvie MSP lodged a proposal for a Member's Bill which the Scottish Government decided to support, leading to the passing of the 2009 Act.

Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

The next development in relation to hate crime in Scotland came in the wake of certain events in 2011 associated with football. A number of serious incidents occurred which led to calls for an examination of, and response to, sectarian attitudes in some sections of Scottish society. Concerns about incidents during football matches (particularly, but not exclusively, Old Firm matches between Celtic FC and Rangers FC) led to a Scottish Government organised summit in March 2011 involving Ministers, the police, football clubs and football associations. Viable parcel bombs and bullets had been sent to Celtic FC manager, Neil Lennon, former MSP Trish Godman, Paul McBride QC and two Celtic FC players. The police had also made arrests in connections with sectarian comments posted online which were directed at Mr Lennon and a footballer on loan to Rangers FC.

This led to the introduction of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. The Bill was introduced on 16 June 2011, with Scottish Ministers initially seeking to have it subject to the emergency legislation procedure so that its passage could be completed before summer recess and the start of the 2011-12 Scottish football season. The Policy Memorandum indicated this timescale was necessary in order to begin to repair the damage done to the reputation of Scottish football and Scotland more generally by the events mentioned above. Significant concern was expressed within Parliament and by interested parties about the implications of such a short timetable for proper scrutiny of the Bill. Following the stage 1 debate, the Scottish Ministers agreed to extend the timetable for stages 2 and 3 with the aim of allowing the Bill to complete its passage by the end of 2011. The Act received Royal Assent on 19 January 2012 and was brought into force on 1 March 2012.

In June 2017 James Kelly MSP introduced a Member's Bill to repeal the 2012 Act. This is more fully discussed in chapter 7 of the Consultation Paper.

Conclusion

What emerges from an analysis of the chronological development of hate crime in Scotland is something of an evolving regime comprising a patchwork of provisions. There are a number of sentencing aggravation provisions covering race, religion, disability, sexual orientation and transgender identity. There are a number of provisions in relation to the stirring up of racial hatred. There is a provision of a somewhat different character in relation to the stirring up of religious hatred. There is the provision in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 which creates two offences in relation to racial harassment.

Salient features of the types of hate crime

Specific issues in relation to various types of hate crime will be explored in later chapters. For the purposes of this chapter we outline some of the salient features of the different types of offence.

Sentencing aggravations

The provisions for sentence aggravations of offences cover each of the currently protected characteristics of race, religion, disability, sexual orientation and transgender identity. As noted above, section 96 of the Crime and Disorder Act 1998 applies where an offence has been racially aggravated. Section 74 of the Criminal Justice (Scotland) Act 2003 applies where an offence has been aggravated by religious prejudice. The Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides equivalent statutory aggravations for offences aggravated by prejudice relating to disability, sexual orientation and transgender identity.

These statutory aggravation provisions do not create new offences. Instead, they require the court, in passing sentence on a person convicted of an offence along with a statutory aggravation, to take into account the prejudicial context of an offence when that prejudicial context relates to persons within certain groups. The statutory aggravation may apply to any offence.

The various statutory aggravation provisions follow a similar pattern. In each case the provision contemplates an offence libelled on an indictment or specified in a summary complaint. The offence is aggravated by prejudice relating to the relevant characteristic if one of two alternative thresholds is met. The first threshold is that at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to the characteristic or presumed (by the offender) characteristic of the victim. The second threshold is that the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a particular characteristic.

The statutory aggravation does not require to be corroborated. The base offence charged, which might, for example, be assault or breach of the peace or a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour), will require to be corroborated but the aggravation may be proved on the basis of evidence coming from one source. This reflects the position in respect of common law aggravations.

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

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

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 creates a free-standing offence of racially-aggravated harassment and conduct. There are two ways in which this offence may be committed. The first involves the pursuit of a racially-aggravated course of conduct which amounts to harassment of a person and is either intended to amount to harassment of that person, or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person. Harassment is defined as follows: "'harassment' of a person includes causing the person alarm or distress". Conduct is defined as including speech and a course of conduct must involve conduct on at least two occasions. The course of conduct is racially aggravated if one of the same two thresholds which feature in the statutory aggravation provisions is met. The second way in which the offence may be committed is by acting in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress. An action is racially aggravated in one or other of the same ways already noted in relation to conduct, namely, if one or other of the two thresholds is met.

In order to prove a section 50A offence the racially aggravated element requires to be corroborated; where another aggravated offence is charged, the racially aggravated element need not be corroborated. The Lord Advocate's Guidelines state that where there is corroboration the case should be prosecuted under section 50A.

Stirring up offences

The final category of hate crime offence in Scotland at present covers offences relating to the stirring up of hatred against particular groups. The conduct involved in such offences may be directed at society at large, rather than at a specific individual with a particular 'protected' characteristic. Such conduct is often given the shorthand title of hate speech. However, this is a misnomer, as the conduct in question can include other forms of communication and (at least in theory) conduct which stirs up hatred other than through communicating a particular message.

These offences are discussed at chapter 6 of the Academic Report. The Academic Report distinguishes between hate speech and other forms of hate crime. In relation to hate speech/stirring up offences, hate is primarily relevant not as the motive for the crime, but as a possible effect of the perpetrator's conduct.

Part 3 of the Public Order Act 1986 creates offences where an individual engages in certain types of behaviour and thereby intends to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up. Section 18 applies to the use of threatening, abusive or insulting words or behaviour or the display of threatening, abusive or insulting written material. Section 19 relates to the publication or distribution of threatening, abusive or insulting written material. Section 23 relates to possession of written or recorded material which is threatening, abusive or insulting, with a view to displaying, distributing etc. such material.

Offensive Behaviour at Football and Threatening Communications (S) Act 2012

The 2012 Act contains various offences where the stirring up of hatred against certain groups or individuals based on their membership of such groups forms an element of the offence. However, these offences are not direct equivalents to the racial hatred offences in the Public Order Act 1986. Section 1 created an offence which is committed when an individual engages in behaviour in relation to a regulated football match which is likely, or would be likely, to incite public disorder. The section identifies five categories of behaviour, some of which relate to hatred based on proteted characteristics:

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

Section 6 of the 2012 Act created an offence of threatening communications which also includes an element related to religious hatred. The offence applies where a person communicates material to another person whether either condition A or condition B is satisfied:

- Condition A is that:
  - the material consists of, contains or implies a threat or incitement to carry out a seriously violent act against a person or against persons of a particular description (which could include membership of a particular group);
  - the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm and
  - the person communicating the material intends by doing so to cause fear or alarm, or is reckless as to whether the communication of the material would cause fear or alarm;
- Condition B is that:
  - the material is threatening, and
  - the person communicating it intends by doing so to stir up hatred on religious grounds.

CHAPTER 4: Statutory aggravations: some issues

Introduction

In this chapter we raise a number of issues in relation to the statutory aggravation provisions which arose in the course of gathering evidence and in respect of which we would welcome the views of consultees.

The scattered nature of the provisions

In chapter 3 we noted the piecemeal development of the law in relation to hate crime generally and sentence aggravation provisions in particular. A specific element of the review is to consider and provide recommendations on whether existing legislation can be simplified, rationalised and harmonised in any way such as through the introduction of a single consolidated hate crime Act.

Question:

Do you believe there is a need to bring all the statutory sentencing provisions, and other hate crime offences, together in a single piece of legislation? Please give your reasons for your answer.

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

In chapter 3 we noted that in respect of each of the currently protected characteristics an offence is aggravated by prejudice relating to the relevant characteristic if one of two alternative thresholds is met. The first threshold is that at the time of committing the offence or immediately before or after doing so, the offender "evinces" towards the victim (if any) of the offence "malice and ill-will" relating to the characteristic or presumed (by the offender) characteristic of the victim. The second threshold is that the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a particular characteristic.

In England and Wales the sentence aggravation and penalty enhancement provisions require the offender to have demonstrated or have been motivated by "hostility". Certain specified offences may be aggravated by hostility under the Crime and Disorder Act 1998. The Law Commission *Consultation Paper number 213: Hate Crime: the Case for Extending the Existing Offences* notes that "hostility" is not defined in the 1998 Act and there is no standard legal definition. The ordinary dictionary definition of "hostile" includes being "unfriendly", "adverse" or "antagonistic".

In Canada the sentence aggravation requires that the offence must have been motivated by bias, prejudice or hate. In New Zealand the sentence aggravation applies when the offence was committed "partly or wholly because of hostility" towards the protected group. In Western Australia the penalty enhancement provisions require the offender to have demonstrated hostility based on the victim's membership of a racial group or have been motivated by hostility. Thus, it is clear that a similar approach is taken to that in Scotland in a number of other jurisdictions.

This approach is not, however, universal. In New South Wales and the Northern Territory reference is made to the offence having been motivated by hatred or hate against a group of people. As noted in the Academic Report, this is the most demanding of the animus model's thresholds. In Victoria the requirement is for the offence in the sentence aggravation to have been motivated wholly or partly by prejudice.

The phrase "evincing malice and ill-will" is well known to Scottish criminal lawyers. For generations it has been used as an aggravation of murder that the perpetrator "previously evinced malice and ill-will" against the victim. This aggravation would be libelled in a case where, for example, the accused has made threats to the deceased prior to committing the murder. The language may, however, not be particularly accessible. A question arises as to whether the use of the phrase should be revisited and more easily understood alternatives, such as "demonstrating hostility" considered.

Question:
Do you consider that the current Scottish thresholds are appropriate? Please give your reasons for your answer.
Should "evincing malice and ill-will" be replaced by a more accessible form of words? If so, please give examples of what might be appropriate.

Perceived associations of certain groups

In our initial evidence gathering, we have heard of cases where individuals feel that they have been subject to criminal conduct because of the perceived affiliations between a group that they belong to and another group. Where the first group is protected under existing hate crime legislation and the second group is not, it is not necessarily clear whether the conduct in question would or should be covered by the existing aggravations.

A specific example relates to the perceived links between the Jewish community and Israel. Some within the Jewish community report that the level of threatening behaviour which they experience in relation to political discourse about the state of Israel is much greater than would have been the case if they were not Jewish. They report a sense of feeling 'held to account' for the actions of a political state for which they have no responsibility. Under existing hate crime law, an offence is aggravated if it is motivated

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

The International Holocaust Remembrance Alliance has adopted the following definition of antisemitism:

> "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

The Alliance recognises that some anti-Zionist activity will also be antisemitic, but other activity will not. In essence, it is argued that criticism of Israel that would not have been levelled at any other country is a manifestation of hostility against Jews[3]:

> "Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic.
>
> Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:
>
> - Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
> - Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
> - Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
> - Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
> - Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
> - Drawing comparisons of contemporary Israeli policy to that of the Nazis.
> - Holding Jews collectively responsible for actions of the state of Israel.

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

3 https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf

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

Religiously motivated offending

There is a specific issue arising from the application of section 74 of the Criminal Justice (Scotland) Act 2003 in relation to offences aggravated by religious prejudice. This is specifically raised in the remit.

On 7 July 2016, at the High Court in Glasgow, Tanveer Ahmed pled guilty to the murder of Asad Shah, a shopkeeper in Glasgow. Mr Shah was a member of the Ahmadi sect of Islam. Most Muslims believe that Muhammad was the final Prophet and many consider that any statement to the contrary is blasphemous, but Ahmadis believe that Muhammad was not the final Prophet. Mr Shah had used social media to publish messages which were capable of being interpreted as meaning that he himself claimed to be a prophet. When Tanveer Ahmed pled guilty to the murder, he issued a statement explaining that he had committed the murder because he felt Mr Shah had disrespected the Prophet Muhammad and had claimed to be a prophet himself. There was no suggestion that other members of the Ahmadi sect considered Mr Shah to be a prophet. Therefore, Tanveer Ahmed's statement could be interpreted in terms of his attitude of malice and ill-will against the *individual* religious beliefs of his victim and the way in which the victim had expressed those beliefs. Accordingly, the Crown took the view that the case did not fall within the terms of the religious aggravation in section 74 of the 2003 Act.

In an article entitled "The Lord Advocate's Lacuna", published in the Juridical Review in November 2016, Dr Phil Glover of Aberdeen University argues that section 74 was drafted too narrowly and on the assumption that individual religious practitioners inevitably form part of a wider religious, social or cultural group. Dr Glover notes that religious expression is an individual act of expression. The freedom of thought, conscience or religion enshrined in Article 9(1) ECHR (discussed at chapter 2 above) may be exercised "either alone or in community with others". Accordingly, Dr Glover argues that section 74 should also be capable of applying in relation to offences motivated by intolerance of the expression an *individual's* beliefs as well as malice and ill-will based on membership of a religious group.

The counter argument is that it does not matter whether the religious aggravation provision in section 74 of the 2003 Act applies to this kind of offence because the judge was able to deal with the matter as being a crime aggravated at common law. In passing sentence, Lady Rae specifically commented:

> This was a brutal, barbaric and horrific crime, resulting from intolerance and which led to the death of a wholly innocent man - who openly expressed beliefs which differed from yours - but - who also exercised an understanding and tolerance of others whose religious beliefs might be different from his own.
>
> It is accepted by you in the agreed narrative that this was a religiously motivated crime, although it was not directed towards the Ahmadi community.

Ahmed was sentenced to life imprisonment, with a punishment part set at 27 years. Lady Rae did not set out in detail how she arrived at the punishment part (save in relation to a limited reduction by reference to Ahmed's guilty plea), but it seems clear from the wider comments that she took the religious motivation into account. However, reliance on the common law rather than the statutory aggravation does, of course, mean that the conviction would not be recorded as religiously aggravated. Neither would the impact on sentence be recorded in terms as required by section 74(4A) of the 2003 Act. The conviction would not appear as a hate crime on the offender's criminal record and would not be included in the hate crime statistics, so the overall picture of hate offending may not be clear.

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

Transgender and intersex

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

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

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

The definition also suggests that intersexuality is a form of transgender identity. Intersex variations, also known as differences or disorders of sex development (DSD), are when the physical sex characteristics a person is born with do not fit typical binary notions of male or female bodies. It is important to be clear that intersex issues are different and distinct to those of gender identity and sexual orientation. Some intersex people and organisations work together with LGB and trans people in a broad LGBTI movement, but others choose not to.

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

Intersectionality

'Intersectionality' is a term coined by the American academic Kimberlé Williams Crenshaw. It refers to the idea that an individual's experience is not governed solely by one facet of their identity, but by a number of intersecting facets. So, for example, a Muslim woman's experience of discrimination or hate crime might be very different from the experience of a Muslim man or a non-Muslim woman. The theory proposes that individuals think of each element or trait of a person as inextricably linked with all of the other elements in order to fully understand that person's identity[4].

As described in chapter 3, hate crime legislation in Scotland has been developed over time through the creation of a series of provisions which each 'protect' a specific group. Many of the campaigning organisations which operate in the field of hate crime have a focus on one particular group, and some have argued that the 'silo' approach to identity in existing legislation can lead to competition between groups for resources or recognition and confusion for victims[5].

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

4 *DeFrancisco, Victoria P.; Palczewski, Catherine H. (2014). Gender in Communication. Thousand Oaks, California: Sage. p. 9.*

5 Hannah Mason-Bish; 'Beyond the Silo: Rethinking hate crime and intersectionality', Routledge International Handbook on Hate Crime

The Academic Report notes that it is important that provisions based on the motivation of the offender apply whether the motivation in question is the sole or partial motivation for the act. This is because of the intersectional nature of identity: the commission of hate crimes may often be related to a range of different characteristics on the part of a victim (only some of which might be protected by the relevant legislation). The fact that a person may be a victim of hate crime based on both their gender and their disability (for example) is an argument for drafting hate crime law in a way that does not require the offender to have been motivated by prejudice against a single protected group.

We have heard from members of the Crown Office and Procurator Fiscal Service that charges can proceed with more than one statutory aggravation – for example, in cases where the conduct in question is motivated by malice and ill-will relating to both religion and disability. The annual COPFS hate crime statistics also recognise this. Where a charge has more than one hate crime aggravation, it is included in the overall figures for each type of hate crime into which it falls.

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

Sentencing and recording

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

The history of this requirement is as follows. The original racial aggravation provisions simply required the court to take the aggravation into account in determining the appropriate sentence. The original religious aggravation provisions required the court to take the aggravation into account and, if the sentence was different, state the extent of and reasons for the difference. The current formulation was used for the first time in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Racial and religious aggravation provisions were subsequently amended in the Criminal Justice and Licensing (Scotland) Act 2010 in order to bring them into line with formulation used in the 2009 Act.

In the course of compiling this paper we received anecdotal evidence that there is, at best inconsistent practice in complying with these obligations. We also note that in *RR v Procurator Fiscal Aberdeen* [2015] HCJAC 34 the court commented on the failure of the sheriff to comply with the requirement of section 96(5)(d) the Crime and Disorder Act 1998 and the failure of the minute to comply with the requirement of section 96(5)(b). While the requirement to take into account the aggravation appears to be generally complied with, anecdotal evidence would suggest that the requirement to specify the difference in sentence because of the aggravation is less well complied with. Disquiet about this requirement has been expressed by some sheriffs. Where the aggravation is at a relatively low level it may be counterproductive to state the difference. Some sheriffs have indicated that there is an absence of guidance on the appropriate amount by which to increase the sentence; the sentence is often being adjusted in a number of different directions take account of, for example, a guilty plea or backdating; there is a limited amount of time to deal with each sentence; determining a sentence is ultimately a matter of judgement and an overly mathematical approach is not helpful.

As to recording, the requirement is limited to recording the aggravation. It is not clear how well this requirement is complied with. It is important that the sentencing judge takes the aggravation into account in determining the appropriate sentence. It may be thought highly desirable that there is consistent compliance with the requirement to record the conviction in a way that shows that the offence is aggravated so that it will appear on the schedule of previous convictions in any future case. In light of the observations of some sheriffs in relation to the requirement to state the difference in sentence to that which the sentence would have been in the absence of the aggravation, a question arises as to whether it is necessary for the sentencing judge to state the different sentence which would have been imposed if the offence had not been aggravated or the reasons for making no difference and whether it is necessary for that to be recorded.

Question:

Should the aggravation consistently be recorded? Please give your reasons for your answer.

Is it necessary to have a rule that the sentencing judge states the difference between what the sentence Is and what it would have been but for the aggravation? Please give your reasons for your answer.

CHAPTER 5: Standalone offence: racially-aggravated harassment and conduct

The salient features of section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (racially-aggravated harassment and conduct) were examined in chapter 1. The provision is set out and analysed in paragraph 2.2.2 of the Academic Report.

Racial crime remains the most commonly reported hate crime, although the most recent figures from the Crown Office show the number of racial charges at its lowest level since 2003-04. In 2016-17, 3,349 charges were reported: this includes both charges under section 50A and charges to which the section 96 racial aggravation has been added. It is of note that there has been a shift over a period in the balance between the reporting of charges under section 50A and other charges with a section 96 aggravation. In 2010-11, 62% of the charges were under section 50A and 38% related to another offence with a racial aggravation. The proportion of section 50A charges has fallen steadily year-on-year, such that in 2016-17, 44% were under section 50A and 56% involved a section 96 aggravation.

There are two ways in which the section 50A offence may be committed:

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

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

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

In many situations the conduct caught by section 50A could also be prosecuted as another offence aggravated in terms of section 96. In certain circumstances the conduct might amount to a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act

2010 (threatening or abusive behaviour) together with the section 96 aggravation. Or the circumstances might amount to a breach of the peace aggravated in terms of section 96. In relation to maximum sentence, section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 carries a maximum prison sentence on summary conviction of 12 months[6] and on indictment 7 years. The section 38 offence has a maximum sentence on indictment of five years and on summary conviction of 12 months. Breach of the peace at common law has no maximum on indictment and the normal 12 months on summary complaint.

In order to prove the section 50A offence, all parts of the offence including the racially aggravated element must be corroborated. This means there must be evidence coming from more than one source pointing to the racial element. By contrast, where a prosecution is brought under a different general offence (e.g. assault) with a statutory aggravation, there must be more than one source of evidence for the assault, but there needs only be one source of evidence for the aggravation.

We would welcome the views of consultees as to whether there are any circumstances in which conduct presently prosecuted under section 50A could not also be prosecuted as some other offence with a statutory aggravation.

Depending on what the ultimate answer to that question is, two further questions may arise. First, if the section does cover any different conduct, then the question arises whether there is a need for equivalent provision in respect of other protected characteristics. Secondly, if it does not, then the question arises as to whether there is any benefit in having a contravention of section 50A as a separate offence.

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

6 The original provision set out a maximum prison sentence on summary conviction of 6 months, but this was increased to 12 months by virtue of the Criminal Proceedings etc. Reform (Scotland) Act 2007, s. 45.

CHAPTER 6: Stirring up hatred and online hate

This chapter brings together discussion on issues which relate to the way in which ideas, views or comments are expressed: offences relating to stirring up of hatred, including threatening communications under section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, and online hate.

Part 1: Stirring up offences (including section 6 of the 2012 Act)

The existing offences relating to the stirring up of hatred have been described in chapter 3. The first hate crime provisions in Scotland and the rest of the United Kingdom related to the stirring up of hatred on grounds of race. However, those offences have not been replicated in identical terms for other groups.

The 2004 Working Group considered, but rejected, the idea of creating new stirring up offences in Scotland. Likewise, the 2002 Cross-Party Working Group had rejected the idea in relation to stirring up religious hatred. This was mainly due to concerns about the potential impact of such offences on freedom of expression. Further offences were subsequently created in relation to threatening communications which stir up religious hatred (section 6 of the 2012 Act) and behaviour at regulated football matches which stirs up hatred against individuals or groups based on certain characteristics and is, or would be likely to incite public disorder (section 1 of the 2012 Act). However, James Kelly MSP has introduced a Bill with the aim of repealing these last two provisions: the main arguments supporting the proposed repeal in the Policy Memorandum accompanying the Bill are that the offences are unnecessary and illiberal.

The number of prosecutions which have been brought under the existing stirring up offences is small when compared with the other hate crime provisions. There have only been 9 cases involving charges under Part 3 of the Public Order Act 1986 (stirring up hatred on racial grounds) between 2006 and 2016. There have been a total of 32 cases involving charges under section 6 of the 2012 Act since that legislation came into force. Those figures include charges involving the threat of seriously violent acts (condition A) and stirring up of religious hatred (condition B). Official statistics do not distinguish between the two.

This chapter of the consultation document therefore asks questions to explore whether stirring up offences are needed and, if so, whether the current offences are drafted appropriately.

Issue: overlap between stirring up offences and other existing offences, such as breach of the peace, uttering threats or abusive and threatening behaviour?

The conduct involved in stirring up offences may be directed at society at large rather than at a specific individual with a particular 'protected' characteristic. For example, the offence in section 19 of the Public Order Act 1986 may be committed in relation to the publication of racist literature. However, in instances where hatred of a group is being stirred up, the same behaviour may also constitute a direct offence against individuals from that group.

The Academic Report notes the potential application of the offences under section 127 of the Communications Act (improper use of public electronic communications network) and section 38 of the Criminal Justice and Licensing (Scotland) Act (threatening or abusive behaviour) to conduct which would be covered by the existing or potential stirring up offences. The Scottish Government conducted an evaluation of section 6 of the 2012 Act, which noted that existing legislation (section 38 threatening or abusive behaviour and section 127 Communications Act) would remain appropriate for the majority of cases involving threatening communications.

The review has considered details of the summary complaints for the four religious cases charged under section 6 of the 2012 Act in 2016-17. Three of them had an alternative charge of section 127, and it appears from the limited material available as if the fourth could also have been so charged. Such offences could of course be charged in conjunction with one of the statutory aggravations, if the conduct in question was motivated by malice and ill-will towards a protected group.

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

The Academic Report notes that hate speech (and other stirring up offences) are to be distinguished from other forms of hate crime. In relation to hate speech and stirring up offences, hate is primarily relevant as a possible effect of the perpetrator's conduct, rather than as the motive for the crime. However, as a matter of practice, it seems likely that individuals who act in a way which is intended (or likely) to stir up hatred against a group will also evince or be motivated by malice and ill-will against that group.

The Law Commission of England and Wales considered whether stirring up offences should be extended to disability and gender identity in a report in May 2014.[7] It concluded that there is a justification in principle for an extension, but a practical need to do so had not been established. The Law Commission considered the examples of conduct which

7 Hate Crime: should the current offences be extended? Law Com no. 348: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348_hate_crime.pdf.

consultees felt might be prevented through the creation of a stirring up offence, and expressed a fear "that unrealistic expectations are held about what the stirring up offences would be capable of preventing or discouraging" (para 7.122).

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

Issue: potential impact of stirring up offences on ability to debate issues of public importance – freedom of speech/expression

As noted above, the main reason why the 2004 Working Group considered it inappropriate to create new provisions on the stirring up of hatred against groups in addition to race was because of concern about the impact of such offences on freedom of expression. There is a consensus of opinion in mainstream society that there are no acceptable grounds for expressing antipathy towards racial groups. By contrast, people hold a variety of opinions about the beliefs and practices of different religious groups, and it is considered important in a democratic society that such opinions are capable of expression and debate.

When provisions about incitement to religious hatred were included in section 6 of the 2012 Act, the Scottish Parliament sought to deal with these concerns in two ways. First, the conduct caught by section 6 is slightly narrower than that covered in the earlier race provisions. The race provisions apply to words and other conduct which is "threatening, abusive or insulting", whereas the provisions about religious hatred in section 6 only apply to "threatening" material. Material which is merely abusive or insulting is therefore excluded. Section 6 also requires an intent to stir up hatred, whereas the race provisions also apply where the accused does not specifically intend to stir up hatred but, having regard to all the circumstances, racial hatred is likely to be stirred up.

Second, the Scottish Parliament made specific provision to safeguard freedom of expression through the provisions in section 7. That section provides, for the avoidance of doubt, that section 6 does not prohibit or restrict discussion or criticism of religions or the beliefs or practices of adherents of religions; expressions of antipathy, dislike, ridicule, insult or abuse towards those matters; proselytising; or urging adherents of religions to cease practising their religions. The provisions about stirring up of hatred on grounds of religion in England and Wales are qualified in similar terms[8]. Likewise, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices and the discussion or criticism of the sex of the parties to a marriage are specifically excluded from the England and Wales provisions about stirring up hatred on grounds of sexual orientation[9].

8 See section 29J of the Public Order Act 1986.
9 Section 29JA of the Public Order Act 1986.

The requirements of articles 10 (freedom of expression) and 9 (freedom of thought, conscience and religion) ECHR are discussed at chapter 2 above. In terms of the Human Rights Act 1998, the courts are required to interpret legislation compatibly with Convention rights so far as it is possible to do so. It might therefore be argued that section 7 of the 2012 Act (and sections 29J and 29JA of the Public Order Act in England and Wales) merely reflect what the courts would be required to consider in any event. On the other hand, there may be benefit in spelling out these requirements expressly in order to avoid the mere existence of the provision having an unnecessarily 'chilling' effect on speech and debate. There is no equivalent provision applicable to the stirring up behaviour elements of the offence in section 1 of the 2012 Act.

The Policy Memorandum accompanying James Kelly's Bill to repeal the 2012 Act criticises section 6 as sharing "some of the illiberal character of the section 1 offence, including lack of clarity and freedom of speech issues."[10] It recognises the existence of section 7, but expresses concern that the boundary between stirring up hatred on religious grounds and expressing 'antipathy, dislike, ridicule, insult or abuse' towards religions or the practices of adherents of a religion seems very unclear and uncertain, making it difficult to distinguish between the two and identify what constitutes an offence.

Question:
If there are to be offences dealing with the stirring up of hatred against groups, do you consider that there needs to be any specific provision protecting freedom of expression? Please give your reasons for your answer.

Part 2: Online hate crime

This part of the chapter explores issues specific to hate crime and hate speech which is committed online. There have been a number of cases reported in the press involving racist tweets etc. Hate crimes which occur online are subject to the same laws that would apply if the crime occurred in person. In our initial information gathering phase, we have heard views that online activity is not taken as seriously as that which occurs 'in real life'. We have also heard that the speed and potential anonymity of activity online means that it can have an impact which is greater than similar offline activity. We have been told that young people are particularly affected. Some people have suggested to us that the existing legislative framework is not apt to cover technological developments.

10 Para 26 of the Policy Memorandum.

Online hate crime can take many forms. The Coalition for Racial Equality and Rights have published a guide to responding to online hate speech and hate crime[11] which states that online hate crime in particular can include:

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

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

COPFS has published guidance on cases involving communications sent via social media[12]. The guidance covers offences that are most likely to be committed by the sending of communications via social media. It sets out factors which prosecutors must take into account when dealing with such offences, in particular in relation to obtaining evidence and deciding whether it is in the public interest to prosecute. It sets out four categories of online communications which may give rise to criminal activity:

1. Communications which specifically target an individual or group of individuals in particular communications which are considered to be hate crime, domestic abuse or stalking.
2. Communications which may constitute threats of violence to the person, incite public disorder or constitute threats to damage property.
3. Communications which may amount to a breach of a court order or contravene legislation making it a criminal offence to release or publish information relating to court proceedings.
4. Communications which do not fall into categories 1, 2 or 3 but are nonetheless considered to be grossly offensive, indecent or obscene or involve the communication of false information about an individual or group of individuals which results in adverse consequences for that individual or group of individuals.

In the hate crime context, conduct which targets a specific individual is likely to fall within category 1 or 2; conduct which incites public disorder would fall within category 2; other behaviour which communicates grossly offensive information about a particular group may fall within category 4. Considering the distinction drawn between hate speech and other hate crime in the Academic Report, it can be seen that categories 1 and 2 are more likely to be considered hate crime (i.e. the underlying baseline conduct is criminal, and the motivation marks the conduct out as hate crime), whereas category 4 is more

11 Hate Online: a guide to responding to online hate speech and hate crime. Coalition for Racial Equality and Rights – February 2016.

12 COPFS guidance on cases involving communications sent by social media

likely to be hate speech. Part 1 of this chapter discusses the potential overlap between circumstances in which conduct is aimed at society at large and stirs up hatred against groups, and circumstances in which the same conduct also amounts to a hate crime against individuals. Category 4 of the Crown Office guidance may be intended to cover communications which have the former, but not also the latter, effect.

For category 1 and 2 cases, the guidance states there is a strong presumption that it is in the public interest to instigate court proceedings where there is sufficient evidence to do so, particularly in cases motivated by prejudice or hate, and all such cases should be prosecuted robustly. By contrast, category 4 cases do not involve a credible threat of violence or activity targeted at individuals. This might include offensive jokes about a particular group online. In such cases, the guidance states that a high threshold test applies before such conduct amounts to a criminal offence. It is not entirely clear from the guidance whether it is attempting to set out where the threshold exists before conduct becomes criminal (as a matter of law) or whether it is a reflection of a COPFS policy that prosecutors will only take action in relation to the worst cases, even though others might cross criminal threshold. Prosecutors are required to consider the context of the communication and whether the communication itself goes beyond being merely offensive, rude etc. As with all cases reported to COPFS, even where there is sufficient evidence, prosecutors must consider whether it is in the public interest to prosecute. In making that decision, they may also take into account any expression of genuine remorse, whether the person responsible for the communication had taken action to remove it and the effect on any identifiable victim.

There are a number of offences listed in the guidance which may be relevant, depending on the content and effect of the communications: common law offences of uttering threats or breach of the peace; threatening or abusive behaviour contrary to section 38; section 127 Communications Act 2003; Part 3 Public Order Act 1986 – incitement to racial hatred; section 6 of the 2012 Act, which covers threatening communications with an intent to incite religious hatred[13].

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

13 It may be noted here that the Malicious Communications Act 1988 may be used in England, Wales and Northern Ireland in relation to online communications. That Act was originally designed to deal with poison pen letters, and has since been amended to cover electronic communications. However, it does not extend to Scotland. When the Bill which became the Malicious Communications Act was before Parliament, the Government explained that it was not necessary for it to extend to Scotland because Scots common law offences already covered relevant conduct.

A contrary view has been expressed by some women's organisations and academics. In our initial information gathering, it has been suggested that online harassment and incitement to hatred online is a material problem which is not properly dealt with by the criminal justice system at present. Online forums allow people to coalesce around a particular idea or topic, particularly with the use of hashtags. This can result in a phenomenon described as 'crowdsourced harassment' or 'dogpiling', where a large number of people join in an outpouring of criticism or condemnation in a way which can be extremely intimidating for those subject to it. One recent example has been the 'gamergate' activity online in the USA, where various female journalists and video game developers were subject to a material degree of harassment. Some individual acts of harassment were very minor and others were much more significant (e.g. death threats, arranging for SWAT teams to attend the subject's house etc) but all were co-ordinated through the use of the 'gamergate' hashtag[14]. Gender equality campaigners Engender suggested that similar campaigns of 'crowdsourced harassment' are becoming more common in the UK – referring to Caroline Criado-Perez and Stella Creasy MP who were subject to online harassment after having campaigned to get more women depicted on banknotes[15]. The argument is that this kind of online harassment is much more common in relation to prominent women online than it is in relation to men, and that therefore indicates that the harassment is in part motivated by malice and ill-will based on the subject's gender.

The scale of the use of social media means that it may not be practicable to prosecute all serious cases. Every minute on the internet, there are approximately 500 new websites, 300,000 tweets, 40,000 Facebook updates and 600 hours of YouTube video posted.[16] This has prompted some policy makers to consider how internet service providers and social media platforms can be encouraged or required to take more action to address hate crime and illegal content online. Many complainers are primarily interested in ensuring that communications which they find offensive are removed from the internet (and not replaced) rather than whether the posters are prosecuted.

The House of Commons Home Affairs Committee published a report in April 2017 which explored the extent to which it is possible to combat hate online[17]. It considered both the responsibilities of individual posters and action which might be taken by social media providers. It recognised the importance of freedom of expression and open public debate, but noted that protecting democracy also means ensuring that some voices are not drowned out by harassment and persecution, by the promotion of violence against

14 See http://www.bbc.co.uk/news/technology-29616197.

15 In 2014, three people were convicted in England of offences under section 127 Communications Act in relation to this harassment.

16 Chis Wolf, Viral Hate: Containing its spread on the internet

17 Hate crime: abuse, hate and extremism online. 14th report of session 2016-17: https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/609/609.pdf

particular groups or by terrorism and extremism. Some argue that the deference given to rights of freedom of expression therefore goes too far.

A recent report assessing the legal regulation of online hate speech in Nordic countries[18] reaches similar conclusions: *"Many studies also show that the hostile online environment keeps many individuals from participating in the public discourse… This could ultimately lead to the silencing of some voices and hence to an effect where freedom of speech is a reality for some but not others… There is an uncertainty in the Nordic countries regarding how the provisions criminalising hate crimes should be applied and where to draw the boundaries in relation to freedom of expression, and consequently the provisions are rarely used. This means that the practical protection is limited for all groups, and currently non-existent for victims of violations based on gender, age, social status and political affiliation."*

In relation to more systemic action that may be taken once hate has been expressed, the Home Affairs Committee contrasted the resources which social media providers put into dealing with copyright infringement (where they have potential financial liability) with that which they put into monitoring their sites for hate speech. The committee recommended that social media providers should be required to take more proactive action to identify and remove illegal content. There is also an EU Code of Conduct on Countering Illegal Hate Speech Online, entered into between the EU and various key social media providers, in which the social media providers undertake to monitor and remove offensive conduct. The Code of Conduct is linked to the e-commerce directive. There have been two private member's bills in recent sessions of the Westminster Parliament which have aimed (in different ways) to get social media companies to take action in relation to offensive content online[19].

It should be noted that the regulation of certain matters relating to telecommunciations and broadcasting is reserved to Westminster in terms of the Scotland Act 1998. If it were concluded that online hate should be tackled through imposing additional obligations on social media providers, that may well require action by the Westminster Parliament rather than the Scottish Parliament.

Question:

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

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

Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two? Please give reasons for your answer.

18 Hat och hot på nätet – en kartläggning av den rättsliga regleringen i Norden från ett jämställdhetsperspektiv, NIKK, Mao Bladini, 21 June 2017.

19 Anna Turley MP's Malicious Communications (Social Media) Bill in 2016-17 session of Parliament; Liz Saville Roberts MP's Criminal Offences (Misuse of Digital Technologies and Services) (Consolidation) Bill in 2015-16 session (which would have extended to England, Wales and Northern Ireland only).

CHAPTER 7: The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1

This chapter should be read along with chapter 8 of the Academic Report which sets out the background to the provision and an analysis of it as well as examining the approach taken in other jurisdictions, particularly in England and Wales and Northern Ireland. In addition, the Academic Report explores the terms of the Lord Advocate's Guidelines on the 2012 Act.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act") came into force on 1 March 2012. It was introduced against a background of certain events in 2011 which were football related, as more fully described in chapter 3 above and paragraph 8.1.1 of the Academic Report. Since its introduction there has been significant opposition to the Act. This includes disapproval by opposition parties in the Scottish Parliament. On 2 November 2016, a motion by Douglas Ross MSP urging the Scottish Government to repeal the Act was passed. On 21 June 2017 James Kelly MSP introduced a member's Bill to repeal the 2012 Act. The Justice Committee has issued a call for written evidence. Given the cross party support among opposition parties and the parliamentary arithmetic, there is a prospect that the Act will be repealed.

The 2011 Policy Memorandum

When the Bill was introduced in 2011 the Policy Memorandum noted at paragraph 12 that there was:

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

At paragraphs 20 and 21 the Policy Memorandum noted that disorderly and offensive behaviour at football matches could, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of "threatening or abusive behaviour" under 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there was a racist element to the behaviour, prosecution using the offences of incitement of racial hatred in the Public Order Act 1986 might also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986 which provided for statutory aggravations on grounds of religious or racial hatred, might also be relevant. However, there was concern that a substantial proportion of offensive behaviour related to football which led to public disorder was not explicitly caught by the pre-existing law. Such offensive behaviour might not satisfy the strict criteria for causing

"fear and alarm" required to prove breach of the peace or section 38 of the 2010 Act. The Policy Memorandum went on to explain that the Bill sought to put beyond doubt that behaviour related to football matches which was likely to incite public disorder and which would be offensive to any reasonable person was a criminal offence. The offence would serve to clarify rather than complicate the law and would provide reassurance to the public in relation to a collective abhorrence of that sort of behaviour. It would send a clear and powerful signal to football fans and the public more generally that such behaviour at football matches was simply unacceptable. It would also mean that the offender's criminal record would clearly show that he or she had engaged in offensive behaviour specifically related to football, rather than to any more general offence.

The Policy Memorandum went on to state that there was no evidence of a significant problem with disorder or sectarian or otherwise offensive behaviour associated with sports other than football and that accordingly the new offence should apply in respect of football matches only. It was also to apply to problems of disorder outside stadia and on the way to and from matches on public transport and in the city streets as well as in pubs and other venues where matches were being televised.

The 2017 Policy Memorandum (Member's Bill)

The Policy Memorandum accompanying the member's Bill in June 2017 makes reference to the criticism of the Act. Picking up on the 2011 Policy Memorandum's assertion that introducing the offence under section 1(2)(e) "will serve to clarify rather than complicate the law", the Policy Memorandum at paragraph 18 states:

> "However, there has been strong criticism that section 1(2)(e), in particular, which criminalises 'other behaviour that a reasonable person would be likely to consider offensive' (where it is or would be likely to incite public disorder) is confusing and unclear. The terms of this section do not differentiate between the specific behaviour it is targeted at (i.e. those involved in offensive behaviour at football) and a wider category of behaviour that people should be free to engage in (i.e. what may be considered to be offensive to some, would not be so to others). In this respect, the Act has been interpreted as being illiberal, and does not allow the public to understand what is and what is not allowed, and so is liable to be unfair and arbitrary in its application."

The second principal criticism of the operation of the Act is at paragraph 20 where, noting that section 1 relates to football only, it points to concerns that had been expressed as to why only football matches were covered by the legislation, and not other sports events, or events such as parades. There had been concern that the focus on the setting of a football match meant that exactly the same (sectarian) behaviour could be treated differently in law solely because of the context in which it occurred.

The Advisory Group on Tackling Sectarianism in Scotland

In May 2015 the Advisory Group on Tackling Sectarianism in Scotland, chaired by Dr Duncan Morrow, reported. The report, which was wide ranging, included recommendations in relation to football. Dr Morrow was invited by the Minister for Community Safety and Legal Affairs to review the progress that had been made across all of the sectors at which recommendations had been aimed and in March 2017 he published his *Review of Implementation of the Recommendations*.

The recommendations made in 2015 in relation to football included:

"5.7.10 The football authorities and clubs should proactively work to address the close association in public perception of football in Scotland with sectarianism through direct programmes of intervention, clear and anti-sectarian messaging and active and visible leadership in partnership with other agencies such as local government, youth work, schools, police.

5.7.11 Respond to our question 'if not strict liability then what?' It is clear that a strategic and measured response to Scotland's remnants of sectarian attitudes and behaviour cannot succeed without squarely addressing sectarian problems within and around football."

In his 2017 Review Dr Morrow noted that the supporting evidence for the association between football and sectarianism remained very strong (page 29). Dr Morrow noted that as an alternative to a strict liability approach the football authorities had proposed a revised and more robust approach to tackle unacceptable conduct including, but not restricted to, sectarian behaviour. He noted that the evaluation and monitoring of unacceptable conduct should begin by the start of the new 2017-18 football season. While expressing a degree of scepticism as to whether these proposals would be sufficient to change "the evident sectarian behaviour in Scottish football", he went on to state that in keeping with the spirit of the Advisory Group's Report that changes should be evidence-based and collaborative, the sincerity and effectiveness of the proposals must now be explicitly and fully tested. He identified a number of outcomes which he considered would require to be supported by evidence. These included measurable evidence that sectarian singing at football matches had reduced and been replaced by other forms of identification.

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

In response to the questionnaire issued by this review, the SPFL set out in some detail their revised Unacceptable Conduct rules. In the course of the fact-finding stage of the review we met with the Chief Executives of the SPFL and the SFA, together with other representatives of each body. Each of the bodies has an identical code and a similar structure for dealing with unacceptable conduct in relation to the football matches falling within their jurisdiction.

Unacceptable Conduct is defined as conduct which is violent and/or disorderly. Disorderly conduct includes conduct which stirs up hatred against listed groups or against individuals based on their perceived membership of such groups. The listed groups are: female or male gender; colour, race, nationality (including citizenship) or ethnic or national origin; membership of a religious group or of a social or cultural group with a perceived religious affiliation; sexual orientation; transgender identity; and disability.

Where unacceptable conduct is alleged to have occurred, the SPFL or the SFA investigates the allegations and may impose sanctions on clubs responsible for unacceptable conduct. A club requires to have taken certain reasonably practicable steps in terms of Rule H 33: the home club must ensure, so far as is reasonably practicable, good order and security; that policies and procedures have been adopted and are implemented to prevent incidents of unacceptable conduct; and that any incidents of unacceptable conduct are effectively dealt with, all at its stadium on the occasion of an official match. Every club must ensure, so far as is reasonably practicable, that: persons, including its supporters, do not engage in unacceptable conduct at the stadium on the occasion of an official match; it identifies any of its supporters who engage in unacceptable conduct; and it takes proportionate disciplinary measures in respect of such supporters. Any failure by a club to discharge these requirements constitute a breach of the rules

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

Where a club has breached the rules a range of sanctions is open. These include: a warning as to future conduct; a reprimand; a fine; the annulment of result; an order that a match be replayed; the imposition of a deduction of points; the award of the result of a match to another club; ordering that the playing of a match be behind closed doors; ordering the closure of all or part of a stadium for a period; ordering the playing of a match at a particular stadium; ordering the relegation of a club to a lower division; expelling the club from the League.

The SPFL maintain an independent commission and the SFA a judicial panel to deal with matters of this kind.

For the 2017-2018 football season particular stress has been placed on the responsibility of each club to maintain discipline among its supporters. Clubs will be expected to take steps such as examining CCTV footage to identify persons engaging in unacceptable

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

We were advised that some clubs considered that a useful tool in dealing with unacceptable conduct would be a provision which allowed a football club to make an application for a football banning order similar to section 52 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which allows the Chief Constable of the Police Service of Scotland to apply to the sheriff for such an order. We shall return to this issue later in the chapter.

Views of fans' groups

Some of the fans' groups to whom we spoke shared Dr Morrow's scepticism about how well the rules will operate in practice.

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

Approach of the review

It is clear that the progress of the member's Bill through the Parliament is likely to coincide with the consultation period of the review and perhaps extend beyond it. No doubt the parliamentary process will inform and assist the consultation exercise. While the issues which are likely to emerge in the arguments as to whether or not the 2012 Act should be repealed overlap with those raised in the review consultation in relation to section 1, they do not precisely coincide with them. It is important to understand that not all the behaviour struck at by section 1 falls into the category of hate crime motivated by prejudice. In addition, some of the broader arguments advanced in favour of repeal may be outwith the remit of the review.

For the purpose of the consultation paper we intend to examine the use to which the provisions of section 1 have been put in practice in the past five years and identify questions that arise from that analysis. In addition, we shall address certain other developments in relation to section 1.

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

Whether section 1 offences fall within the remit of the Review

Section 1 creates an offence in relation to a regulated football match of engaging in certain types of behaviour which is likely, or would be likely, to incite public disorder. As noted above, it should immediately be recognised that not all of the behaviour struck at by section 1 would fall within the current definition of hate crime.

We have set out the five categories of behaviour which may be caught by the section 1 offence at chapter 3 above. The types of behaviour identified in section 1(2)(a) to (c) clearly fall within the remit of the Review. The behaviour identified in (a) is behaviour expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of (i) a religious group, (ii) a social or cultural group with a perceived religious affiliation, (iii) a group defined by reference to a thing mentioned in subsection (4). The things mentioned in subsection (4) are colour; race; nationality (including citizenship); ethnic or national origins; sexual orientation; transgender identities; and disability. The behaviour identified in section 1(2)(b) is behaviour expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of one of the groups mentioned above.

The behaviours in section 1(2)(a) and (b) would fall into the category of hate speech as explained in chapter 6 of the Academic Report. Section 1(2)(c) covers behaviour that is motivated (wholly or partly) by hatred of such a group. This would fall within the definition of hate crime. In each case the behaviour must be related to a regulated football match and be likely to incite public disorder.

Section 1(2)(d) identifies one of the types of behaviour struck at by the provision as "behaviour that is threatening". Thus, section 1(2)(d) contemplates an offence in relation to behaviour which is threatening, is likely, or would be likely, to incite public disorder and is committed in circumstances in relation to a regulated football match. There is in relation to this particular subsection no qualification of hatred or prejudice. We were told, for example, that most of the cases following the disruption after the 2016 Scottish Cup Final between Hibs and Rangers were brought under section 1(2)(d) or (e) and involved no

obvious prejudice. Another example given was an altercation within the crowd over seating arrangements: this could amount to threatening behaviour under 1(2)(d). We consider, therefore, that offences under section 1(2)(d) do not fall within the remit of the Review.

Section 1(2)(e) identifies "other behaviour that a reasonable person would be likely to consider offensive" as struck at by the provision. Although this subsection is very widely drafted and consequently could include behaviour which fell outside the remit of this review, we were advised by the football liaison prosecutors to whom we spoke that songs or speech which had a religious connotation would be prosecuted under one of section 1(2)(a) to (c), while songs, speech or gestures that glorify terrorist organisations such as the IRA or UVF would be brought under 1(2)(e). The vast majority of prosecutions under section 1(2)(e) involved that type of behaviour. While such action does not necessarily evince malice and ill-will towards others based on their membership of groups, it may be said to be driven by the same type of prejudice or sectarian culture. Accordingly, we are inclined to include offences under 1(2)(e) as falling within the remit of the review.

Evidence of conduct prosecuted under section 1

What emerged from the evidence from the football liaison prosecutors in COPFS and police officers in the Football Coordination Unit for Scotland (FoCUS) was that there are three broad categories of behaviour which have consistently given rise to offences under section 1 since its introduction. First, there were offences involving threatening behaviour (section 1(2)(d)). Secondly, there were offences involving behaviour expressing or stirring up hatred for, or motivated by, hatred based on religion, race or other characteristics, but very much focused on religion (section 1(2)(a)-(c)). Generally, this behaviour involved singing, speech, the waving of banners and making of gestures. Thirdly, there were offences characterised as "other offensive behaviour" (section 1(2)(e)). These generally involved singing, speech, the waving of banners and making of gestures all in support of proscribed terrorist organisations such as the IRA or the UVF. The use of pyrotechnics was generally dealt with as culpable and reckless conduct rather than section 1 offensive behaviour.

Statistics

This evidence as to the type of offences which have been brought under the Act is supported by the statistics. The Scottish Government publish an annual report analysing the statistics in relation to charges reported under the 2012 Act. The latest edition, *Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2016-17*, was published on 9 June 2017. In 2016-17 there was an unusually large number of charges of threatening behaviour. This is perhaps due to the fact that 45% of the charges of threatening behaviour in that year arose from the Scottish Cup Final between Rangers and Hibs. Of the offences under section 1(2)(a) to (c) the statistics indicate that the vast bulk of charges of this type were

in relation to religion (Table 7 of the report). A much smaller proportion was in relation to race. Over the five year period between 2012 and 2017 there were a total of 337 charges relating to religion. There were 64 in relation to race. There were eight in relation to sexual orientation and one in relation to disability.

Table 9 of the report sets out the type of behaviour engaged in. This is broken down into the following categories: singing; speech; use of a banner; gesture; and "generally offensive". The category of "generally offensive" refers to behaviour used by the accused that could not be categorised as singing, speech, banner, or gesture and any charges which involve the accused acting in a disorderly or aggressive manner, e.g. challenging others to fight or physically engaging in fighting. It is worthy of note that between 2012-13 and 2016-17 there has been a significant drop in the number of charges in relation to singing. In 2012-13 there were 112 charges relating to singing (42% of the total charges) while in 2016-17 there were 44 charges relating to singing (12% of the total charges).

Table 8 of the report provides a breakdown of the religions that were targeted. In 2016-17, 75% of the charges were directed against Roman Catholicism and 25% against Protestantism. There were no charges directed against Judaism and 2% (one charge) against Islam.

"In relation to a regulated football match"

In terms of section 2(2) behaviour is in relation to a regulated football match if it occurs not only in the ground where the match is being held but also while the person is entering or leaving or trying to enter or leave the ground, or on a journey to or from the match. A person may be regarded as having been on a journey to or from a regulated football match whether or not the person actually attended or intended to attend the match. A journey includes breaks, including overnight breaks. The behaviour also includes behaviour in premises, such as a pub, where the match is being televised.

We were advised by the football liaison prosecutors that the behaviour in the majority of the cases prosecuted had occurred within the stadium. A minority of cases involved behaviour outwith the stadium. Very few cases came from pubs in which the match was being televised. Some incidents occurred on trains on which fans were travelling to matches. This evidence is supported by the statistics. In each of the five years since the Act was introduced the majority of charges related to behaviour in a football stadium. In 2016-17 there was a significant increase in the proportion of charges relating to behaviour within the stadium but this, again, may be skewed by events at the Scottish Cup Final 2016. After charges occurring at football stadiums, the next most common are on the main street followed by public transport. The figures in relation to public transport in 2015-16 were particularly high compared to previous years; this was partly attributed to two incidents which accounted for 26 out of 66 charges.

The approach in other jurisdictions

This is explored in detail in paragraph 8.2 of the Academic Report to which the reader is referred. It is striking that, in comparison with the widely stated provision of section 1 of the 2012 Act, both the provisions in force in England and Wales and Northern Ireland specifically relate to chanting. Chanting is defined as meaning the repeated uttering of any words or sounds, whether alone or in concert with one or more others. In England and Wales the target is chanting of an indecent or racialist nature, while in Northern Ireland the chanting may be of an indecent nature, a sectarian or indecent nature, or consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability. We wish to consider whether anything is to be learned from these provisions for application in the Scottish context.

Conclusion on type of conduct prosecuted under section 1

When the threatening behaviour charges are left out of account, the history of the operation of section 1 of the 2012 Act makes it clear that the remaining charges have overwhelmingly been of a sectarian nature. The conduct giving rise to these charges comprised singing, speech, waving of banners and making of gestures. The charges which were brought involved either the expressing or stirring up of hatred of religion or offensive behaviour by glorifying proscribed organisations. A questions arises as to whether conduct of that sort in the context of a football match should in Scotland be the subject of criminal proceedings. If the answer to that is that such conduct should be subject to the criminal law, then, whether or not the Act is repealed, a question arises as to whether section 1 in its current form is the best vehicle for prosecuting, in a focused way, the kind of conduct it has been used for in the past.

Question:

How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?
Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all?
If so, what kind of behaviour should be criminalised?
Does equivalent behaviour exist in a non-football context?
If so, should it be subject to the same criminal law provisions? Please give reasons for your answer.

Application of section 1 to conduct outwith Scotland

Section 10(1) of the 2012 Act permits prosecution in Scotland of an offence under section 1 committed outside Scotland by a person who is habitually resident in Scotland. This provision was used in the case of *Procurator Fiscal, Glasgow v Jordan Robertson* in

2013. The accused was prosecuted in Glasgow Sheriff Court on a charge of contravening section 1 by singing offensive songs at a football match in Berwick between Berwick Rangers and Rangers.

Question:
Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? Please give reasons for your answer.
Should a similar provision apply to non-football related hate crime? Please give reasons for your answer.

The impact of the case of Cairns

Subsection 1(1)(b) requires that the behaviour (i) is likely to incite public disorder, or (ii) would be likely to incite public disorder. Subsection (5) provides that behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that measures are in place to prevent public disorder or persons likely to be incited to public disorder are not present or are not present in sufficient numbers. In *MacDonald (PF Dingwall) v Cairns* 2013 SCCR 422 this somewhat dense provision was considered in the context of its application to "other behaviour that a reasonable person would be likely to consider offensive" (subsection (2)(e)). The evidence disclosed that the accused was singing some of the words of The Roll of Honour, a song about the ten paramilitary prisoners who died during the hunger strikes in the early 1980s. He was also singing words from The Boys of the Old Brigade, which is a song from an earlier period in the history of the IRA. In addition, he was making a gesture which could be construed as firing a rifle into the air. The court held that the effect of subsection 1(5) was that, as it did not matter whether persons likely to be incited to public disorder were present in sufficient numbers, or were there at all, it could not matter whether or not the persons who were present (whether likely to be incited to public disorder or otherwise) actually became aware of the relevant behaviour.

The football liaison prosecutors to whom we spoke considered that, following the court's interpretation in *Cairns*, section 1 was easier for the prosecutor to prove than (a) was thought before *Cairns*; and (b) a charge of breach of the peace. The effect of the decision has been that if it is proved that the conduct would be considered offensive by the reasonable person, the likelihood of inciting public disorder follows almost naturally. While evidence of actual disorder or evidence that equivalent conduct has provoked disorder in the past was led in some cases, it is no longer necessary to lead such evidence. Prior to *Cairns* the Crown had led such evidence in a section 1 case. In earlier breach of the peace cases sheriffs had taken different approaches to the nature of conduct in football grounds and level of disorder which might cause alarm to a reasonable person.

One football liaison prosecutor told us that a consequence of the decision in *Cairns* is that the difficulty, which arose when sheriffs were reluctant to convict of breach of the peace because the stadium was noisy and a reaction from anyone was unlikely, was now removed. One sheriff expressed the view that the impact of the decision in *Cairns* was to render the application of the section "counter-intuitive". The offence amounted to a public disorder offence which could apply in circumstances where there was no real likelihood of anyone being caused upset or fear or alarm.

A question arises whether the decision in *Cairns* demonstrates that for practical purposes section 1(5) so emasculates the requirement in section 1(1)(b) as to make it virtually redundant. It may be argued that by its very nature sectarian singing, gesturing etc would not only be offensive to the reasonable person but would be likely to incite public disorder and that that is enough to satisfy the requirement of section 1(1)(b).

Question:
Is it appropriate to have a requirement that behaviour is or would be likely to incite public disorder in order for it to amount to a criminal offence? Please give reasons for your answer.

Is any conduct subject to prosecution under section 1 of the 2012 Act not covered by pre-existing common law or legislation?

The Policy Memorandum to the 2011 Bill stated at paragraph 48 that considerable thought had been given to whether it was necessary to create new criminal offences or whether the approach should involve what was described as "a further determination to use existing measures effectively". It went on to state:

> "While in relation to offensive and disorderly conduct at football matches there is coverage of existing law in relation to most of the behaviour we are seeking to eradicate, there are nevertheless areas where greater clarity and a strengthened response would be beneficial".

The Policy Memorandum to the member's 2017 Bill contends at paragraph 16 and 17 that an argument for the repeal of the Act is "that it is not needed as existing laws already make it possible for offenders to be brought to justice".

There is no doubt that some offences currently prosecuted under section 1 could be prosecuted as breach of the peace. One sheriff described a case taken under section 1 which involved a person on a train travelling from Glasgow to Central Scotland following a match singing a sectarian song known as "the Sash". The individual was convicted of an offence under section 1 and received a football banning order until the end of the season. One of the football liaison prosecutors described a similar case prosecuted before the introduction of the 2012 Act involving similar singing and remarks of a prejudicial nature

towards Roman Catholics. That case was successfully prosecuted as a breach of the peace with an aggravation in terms of section 74 of the Criminal Justice (Scotland) Act 2003. Such conduct could attract a football banning order as coming within the definition of "disorder" in section 56 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. It is important to bear in mind that football banning orders may be imposed on conviction for a variety of offences in addition to a contravention of section 1 of the 2012 Act.

As noted above, section 10(1) of the 2012 Act permits prosecution in Scotland of an offence committed extra-territorially. Offences at common law and other statutory offences, such as contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, could not be prosecuted if committed outwith the jurisdiction.

As noted above, the football liaison prosecutors expressed the view that since the decision in *Cairns*, it was easier to prove that singing within the stadium constituted an offence under section 1 than proving an offence of breach of the peace. Both a football liaison prosecutor and a sheriff expressed the view in relation to a lot of singing within the stadium that it would be difficult to show that the behaviour amounted to a breach of the peace or was threatening or abusive in terms of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

These, and related issues will no doubt be the subject of scrutiny in the parliamentary process of the member's Bill. It is also an issue on which the review would wish to receive full and clear responses.

Question:
Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation? Please give reasons for your answer.

Diversion

There is available as an alternative to prosecution a diversion scheme in relation to a person charged with an offence such as offensive singing. The community justice organisation, Sacro, operates a nationwide scheme for young people (aged 12 and over) charged under the 2012 Act. Under the scheme, young people can be offered diversion from prosecution in the form of a structured programme based on behavioural and attitudinal change, using Cognitive Behavioural Intervention techniques. The sessions support the individual to understand why they behave in a specific way and take ownership of their attitude and behaviours to ensure positive changes so as not to repeat the offence.

It was suggested to us that this was the preferred course of action in relation to young offenders where violence was not involved and it was considered that a football banning

order was not necessary. The requirement of the scheme was that the person should attend and successfully complete it. If they did not do so they could still be prosecuted.

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

Football Banning Orders

For a more detailed analysis of the provisions in relation to the making of football banning orders, the reader should refer to the Academic Report at paragraph 8.2.

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

A football banning order prohibits the person from entering any premises for the purposes of attending any regulated football matches in the United Kingdom. It also has provisions in relation to regulated football matches outside the United Kingdom. It may extend to maximum periods of 3, 5 or 10 years, depending on the circumstances. Some of those to whom we spoke considered that football banning orders were an effective deterrent as persons did not wish to be prevented from attending a match.

We were advised that where a person is convicted under section 1 of the 2012 Act a football banning order was usually imposed. However, it is important to understand that football banning orders may also be imposed following convictions for offences other than those under the 2012 Act, provided that the offence related to football match and involved violence and disorder. The definition of 'disorder' in section 56 specifically includes stirring up hatred against groups of persons or individuals based on their membership of protected groups.

Under section 52 of the 2006 Act there is provision for the police to apply to the sheriff by summary application for a football banning order on a person who has not committed an offence if the court thinks that the person has been involved in violence or disorder in the past and that banning the person would help to prevent future violence or disorder at football matches. These are not common. There have been around twenty such applications in the past six years.

As noted earlier in this chapter, some football clubs have expressed the view that a similar provision which would allow a football club to apply for a football banning order would be a useful in maintaining discipline as required by the governing bodies of football.

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

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

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

Before going on to consider the individual characteristics, it is worth reviewing the general arguments for and against the existence and extension of hate crime legislation as set out in chapter 1. It has been argued that there should be a 'level playing field' between different groups who are protected in existing equality law, and that hate crime laws jeopardise the principle of equality by providing additional protection to some groups but not others. On the other hand, it has been suggested that extending legislation to a wide range of new characteristics means creating so many different priorities that nothing is truly a priority. This could make provisions difficult to apply in practice and risks undermining the purpose of having hate crime provisions. Chapter 5.2 of the Academic Report sets out a number of principled approaches that have been advocated for selecting which groups should be protected through hate crime legislation: the existence of a group identity; immutability of the characteristic; groups with a history of discrimination/ oppression; vulnerability and difference; groups which are unjustly marginalised as a result of perceived differences.

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

Action on Elder Abuse is a UK-wide charity which has campaigned for a new aggravated offence of elder abuse since June 2016. It considers elder abuse to include being targeted by scammers, neglect, abuse of Powers of Attorney, physical abuse and psychological intimidation.

In February 2017, it conducted a poll of 3,183 people across the UK to assess attitudes to making elder abuse a hate crime. Almost 95% of respondents considered that the abuse of older people should be an aggravated offence like hate crimes based on race, religion or disability. The survey also showed that 95% of respondents agreed (40%) or strongly agreed (55%) that older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.

Action on Elder Abuse argue that offences committed against older people are not treated as seriously as offences committed against other groups. Within care settings, they refer to anecdotal evidence that the social care system tries to 'manage' instances of abuse internally via adult protection referrals, without involving the police or criminal justice systems. They believe this is a key reason why so few cases of abuse reach the courts. They argue that having a specific aggravation provision relating to offences committed against the elderly would encourage criminal justice authorities and the courts to take the issue more seriously, and result in the imposition of more significant sentences.

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

The examples given of offending against the elderly may suggest that the offending is motivated by the perceived vulnerability of those offended against, rather than any particular hatred of or animosity towards them. This raises the question of whether such offending could be tackled through a statutory aggravation provision based on malice and ill-will towards the group, or whether a provision which focuses on the reason the victim has been 'selected' is more appropriate (see the discussion of models of hate crime in chapter 4 of the Academic Report). Alternatively, it might be argued that a free-standing offence of 'elder abuse' is more appropriate.

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

The review received a large number of responses from young people to the questionnaire (77), which indicates the strength of feeling from young people about this topic. Responses outlined experiences largely around prejudice or harassment relating to race, religion, disability and sexual orientation. Those surveyed also reported that they

had witnessed hate crime against others. Online hate crime was also a feature as noted in chapter 6, part 2 of this paper.

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

This is especially the case where the conduct is carried out by other children, where issues about the scope for criminal responsibility arise. The Scottish Parliament Equal Opportunity Committee published a report on bullying on 6 July 2017, which considers the relationship between bullying of children based on certain characteristics and hate crime[20]. Recommendations 6 and 14 specifically deal with the need for clarity about when bullying behaviour constitutes a crime (in particular a hate crime or sexual offence). The Scottish Government National Anti-Bullying Approach is currently under revision in light of the Equal Opportunities Committee's report.

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

Gender:
For some time, women's organisations have debated whether a statutory aggravation based on gender would be beneficial. In 2008, the collective view given in evidence to the Scottish Parliament Equal Opportunities Committee in the course of stage 1 evidence on the Offences (Aggravation by Prejudice) Bill was that there should not be an aggravation. A statutory aggravation was not thought to be the correct way to address the complexities of violence against women. In particular, women's organisations were concerned that an aggravation would create a two-tier system where some cases of violence against women were thought to be motivated by gender hatred but others were not. This would be incompatible with the view that all gender-based violence against women is due to the endemic misogyny in society. If some offences of violence against women were considered to be caused by misogyny and others not, it would be difficult to draw the distinction and obtain appropriate evidence. At the time of the 2008 Bill, Engender noted that some jurisdictions had adopted gender aggravations (in particular, Canada and 19 US states), but these had resulted in few gender-based crimes being reported.

20 http://www.parliament.scot/S5_Equal_Opps/Inquiries/EHRiC_5th_Report_2017_SP_Paper_185.pdf

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

We know that some police forces in England have started to record offences which are motivated by hostility on grounds of gender as hate crime. This does not alter the criminal offences or sentencing powers which are available in respect of those offences, but it has been suggested that classifying offences in this way means that they are taken more seriously by the relevant police force.[21]

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

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

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

A question arises whether cases where an offence is motivated by malice or ill-will towards a person as a result of their immigration status are capable of being prosecuted as being racially aggravated in any event. We were told of one case where the accused had shouted at Italian workers in a fish and chip shop in an abusive fashion, calling them 'immigrant bastards'. The sheriff accepted a plea of no case to answer on the basis that the abuse had not been targeted at a specific racial group, but been aimed at 'immigrants' at large. By contrast, there is English House of Lords authority in *R v Rogers [2007] 2 AC* 62 that it was wrong to argue that a racial group should be defined by what it is rather than

21 'Britain breaking barriers: strengthening human rights and tackling discrimination', Bright Blue, July 2017.

what it is not. In *Rogers*, the defendant was found to have acted in a racially aggravated fashion by calling three Spanish women 'bloody foreigners' and telling them to 'go back to your own country'.

Socioeconomic status:

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

Travelling community:

The term 'Gypsy/Travellers' is used by the Scottish Government and refers to distinct groups – such as Romany Gypsies, Scottish and Irish Travellers – who regard the travelling lifestyle as being part of their ethnic identity. There are also other types of Traveller, such as Occupational Travellers, Showpeople and New Age Travellers, distinct groups who do not necessarily regard themselves as Gypsy/Travellers.

The Scottish Government recognises Gypsy/Travellers as an ethnic group in its work and encourages others to do likewise. The Equality Act 2010 provides the legislative framework which protects people (such as Gypsy/Travellers) who are recognised as a distinct ethnic group from being discriminated against on the grounds of ethnicity. This follows an Employment Tribunal ruling in 2008 in the case of *MacLennan v Gypsy Traveller Education and Information Project*, which concluded that Scottish Gypsy/Travellers are a group which can be defined by reference to their ethnic origins and can therefore be afforded legal protection under race discrimination law[22].

The term 'racial group' in existing hate crime legislation means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins. It is expected that the criminal courts would interpret this definition in line with the approach taken by the civil courts, so as to treat those within the travelling community who travel as part of their ethnic identity as a racial group protected by the hate crime legislation. We would be interested to hear from any consultees with experience of this.

22 S/13271/07. Earlier English case law had recognised Romany Gypsies and Irish Travellers as racial groups. The initial Employment Tribunal in *MacLennan v Gypsy Traveller Education and Information Project* had accepted an argument that the Scottish Gypsy/Traveller community was not a distinct group. However, after hearing evidence from a selection of academics and travelling-community historians, the Tribunal concluded that Scottish gypsies were, in fact, a distinct ethnic community and must be treated as such under law.

The Scottish Government recognises that there are other travellers who would not regard themselves as Gypsy/Travellers. It is unlikely that these travellers would fall within the existing race provisions as a 'racial group'.

Other groups:

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

Question:

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

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

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

CHAPTER 9: Other specific issues

Under-reporting

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

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

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

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

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

Question:

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

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

If so, in what circumstances should restriction be permissible?

Third party reporting

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

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

While most of those to whom we spoke thought that the third party reporting centres were a good idea, many of them identified difficulties in practice. The ambition of Police Scotland for the scheme did not match the capacity of individual centres to deal properly with reports. The number of case workers was limited and the quality of training might be improved. A concern was voiced by the Coalition for Racial Equality and Rights (CRER) that if low-level incidents were reported and handled badly it was likely that people might be deterred from reporting more serious incidents. According to Stonewall, the reporting rates through third party reporting centres was relatively low. Others observed that it is unclear whether people knew that the centres were there or what their role was. Not all the centres which were listed were in fact operational. It was often the case that staff in the centres were unclear how to deal with victims who attended at third party reporting centres.

Question:
Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime?
If so, how might the current scheme be improved?

Diversion from prosecution and restorative justice

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

- Sacro also offer a scheme in Glasgow and Lanarkshire which deals with hate crime more generally[23]. The scheme (STOP: SACRO Tackling Offending Prejudices) was initially run as a pilot and focused specifically on sectarianism, but has been widened out and now accepts referrals for all forms of low-level hate crime.
- Sacro have an adult restorative justice programme which can operate as a diversion to prosecution in relation to any offence where the person responsible accepts that they committed the offence and the victim is willing to be involved[24].

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

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

23 http://www.sacro.org.uk/services/criminal-justice/stop-anti-sectarianism-hate-crime-services
24 http://www.sacro.org.uk/services/criminal-justice/adult-restorative-justice

Question:

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

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

Annex: Meetings and discussions

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

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

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

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