



Law Society  
of Scotland

# Consultation Response

One Scotland: Hate Has No Home Here

Consultation on amending Scottish hate crime  
legislation

24 February 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: *One Scotland: Hate Has No Home Here* (the consultation).

This is a very important consultation with the opportunity it presents to tackle hate crime and prejudice for Scotland in the 21<sup>st</sup> century. We welcome the Scottish Government's commitment to the modernisation and consolidation of the legislation in relation to hate crime. The existing legislation has developed in a piecemeal fashion over many years. Clarification of the law in this area for everyone is vital. For solicitors, it is about advising their clients. For the public, it sets out what amounts to criminal conduct and protects those in the society most vulnerable to prejudice.

Legislative change will send out a message about the seriousness of tackling that type of crime. Legislation is not enough on its own: it needs to be supported by public awareness and education campaigns.

Introducing new statutory aggravators will do much to secure equality, certainly as proposed in relation to the various "protected characteristics" as defined under the Equality Act 2010.

There should be no hierarchy of aggravators. All aggravators should be treated equally. The creation of new statutory aggravators along with existing aggravators will ensure those in affected groups can understand the nature of the crime, understand the sentence that is imposed and how it has been increased on account of the statutory aggravator.

## General

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We agree that “hate crime and prejudices are completely unacceptable.”<sup>1</sup>

We support the consultation’s commitment to tackle these issues by bringing forward the proposed consolidation and modernisation of all Scottish hate crime legislation.<sup>2</sup> When Lord Bracadale’s Independent Review of Hate Crime<sup>3</sup> reported, we welcomed his recommendations regarding the proposed consolidation of legislation. We are pleased to see the Scottish Government’s commitment to tackling these issues by means of consolidating the legislation and said in our response to the report:

“there are enormous benefits to be gained from having a clear set of rules and procedures. It will bring increased clarity alongside a better understanding and application of the law.”<sup>4</sup>

Modernising the law and the use of language will do much to address the needs of 21<sup>st</sup> century Scotland. It will promote transparency and a fairer society. By creating one-stop legislation similar to that of the Sexual Offences (Scotland) Act 2009<sup>5</sup>, it will make it much easier to identify and understand what criminal conduct comprises. That will make it easier to initiate prosecutions in the public interest and for juries to understand what the elements of criminal conduct that must be proven are. It will benefit everyone and allow for more accurate information to be obtained as to the extent of the criminal conduct directed towards the relevant groups. In due course, this will allow monitoring and evaluation as to how successful the proposed legislation on hate crime and any subsequent initiatives.

Legislation alone cannot eradicate hate crime: this will need to be combined with changes to attitudes if the overall objective is to be achieved. Legislation will increase an awareness of the issues of hate and prejudice. That may be combined with education including its role within the national curriculum and the Scottish Government’s commitment to Getting it right for every Child.<sup>6</sup> We have emphasised the importance of that supporting role in relation to a number of our responses<sup>7</sup> to the various questions that underpin this consultation.

The committee has the following comments to put forward for consideration:

<sup>1</sup> Ministerial foreword to the consultation Aileen Campbell MSP Cabinet Secretary for Communities and Local Government and Humza Yousaf MSP Cabinet Secretary for Justice

<sup>2</sup> As set out in Recommendation 20 of the Lord Bracadale’s Independent Review of Hate Crime Legislation (Lord Bracadale’s Report) <http://www.gov.scot/Resource/0053/00535892.pdf>

<sup>3</sup> <https://www2.gov.scot/Resource/0053/00535892.pdf>

<sup>4</sup> <https://www.scottishlegal.com/article/law-society-of-scotland-lord-bracadale-recommendations-will-bring-clarity-to-the-law>

<sup>5</sup> <http://www.legislation.gov.uk/asp/2009/9/contents>

<sup>6</sup> <https://www.gov.scot/policies/girfec/>

<sup>7</sup> See response to Question 9

## Part One: Consolidating Hate Crime Legislation

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### **Question 1: Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?**

Yes. The public understands what is involved in crimes such as murder, assault and breach of the peace. They understand that the facts and circumstances of such crimes and offences, which can be aggravated by reason of their motivation, whether through malice or prejudice. These may involve the targeting of someone because of their race, gender or another “protected characteristic”.<sup>8</sup> There may be no need to create any new stand-alone crimes to deal with these kinds of aggravation, which is what Lord Bracadale’s report has indicated.<sup>9</sup> The current statutory aggravation model allows the courts meantime to consider existing aggravations, as and when they arise. We agree there may be a need for new aggravations to be created as specifically addressed in this consultation.

From the perspective too of the solicitor, it can be useful to have separated out the actions that amount to criminal conduct and the relevant aggravator. It makes it easier to understand the “core” criminal offence<sup>10</sup> as distinct from and additional to the aggravation. This is also relevant in relation to what aspects need to be corroborated.

We question whether the records of convictions and statistics as to aggravations in relation to hate crimes are as accurate or joined up as they might be. This may be relevant when considering some of the questions in the consultation as there is, in our view, a need to show evidence as to the incidence of certain kinds of aggravators to justify their specific inclusion within future legislation.

Accurate statistical information should be maintained in relation to the various groups of protected characteristics, in order to assess the effectiveness of such legislation. This should demonstrate where prosecutions have been instituted in relation to that aggravation and thereafter have resulted in a conviction.

### **Question 2: Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from ‘evincing malice**

<sup>8</sup> As defined in the Equality Act 2010

<sup>9</sup> Paragraphs 3.2 and 3.3 of Lord Bracadale’s Report

<sup>10</sup> Comprising the actus reus and mens rea

## and ill will' to 'demonstrating hostility'?

Yes. In our response to Lord Bracadale's consultation<sup>11</sup>, we supported the need for consolidation of hate crime legislation. The relevant law has progressed in a piecemeal fashion which has created confusion and uncertainty. The archaic language tends to play a role in promoting that confusion as well. As we highlighted in relation to the Sexual Offences (Scotland) Act 2009 which defined and modernised the language round sexual offences, there is a need for clarity. The 2009 Act provides a potential model for new consolidated legislation to follow.

"Evinced malice and ill will" are terms probably only understandable by those practising in courts and are not clear to the wider public. Ordinary people need to be able to understand the meaning of criminal laws, not least when serving on juries.

We support the changes being proposed, although we question whether "hostility" and "malice" are necessarily equivalent. Hostility<sup>12</sup> is not necessarily equivalent to malice<sup>13</sup> and ill will<sup>14</sup> when considering their respective dictionary definitions. There may be a perception that the threshold could have been lowered. If this is the policy intention, that should be specifically stated.

In supporting modernisation of legislation, existing crimes and offences should be reviewed to ensure that they are defined in up to date 'plain English' language representative of the groups to be afforded these protections (see Questions 4 and 21). These too need to reflect the different and modern 21<sup>st</sup> century perspective. Any legislation should be future-proofed so far as possible

There may be an opportunity as indicated in Recommendation 2 of Lord Bracadale's Report<sup>15</sup> to re-emphasise that evidence from a single source is sufficient evidence to establish the aggravation. This relates to the question of corroboration which remains separately under review.

### **Question 3: Do you think changing the language of the thresholds for the statutory aggravations from 'evinced malice and ill will' to 'demonstrating hostility' would change how the thresholds are applied?**

We refer to our answer to Question 2.

11 Independent Review of Hate Crime Legislation in Scotland Consultation Paper dated 22 November 2017

12 Hostile behaviour; unfriendliness or opposition. <https://en.oxforddictionaries.com/definition/hostility>

13 the desire to harm someone; ill will <https://en.oxforddictionaries.com/definition/malice>

14 bad and unkind feelings towards somebody <https://www.oxfordlearnersdictionaries.com/definition/english/ill-will>

15 <http://www.gov.scot/Resource/0053/00535892.pdf>

If the words are not defined in any statute, then the common dictionary meaning will be applied.

It is important that the policy intention with regard to any threshold is made clear at the time of bringing forward legislation.

**Question 4: Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?**

Yes. We understand that these deal with two different issues. Historically, intersex was a term used within the transgender umbrella which include a range of gender identities and expressions. This term was identified which allowed for the promotion of discussions around intersex people and the issues that impacted on them. As time has moved on, we understand that intersex may no longer be included within the transgender definition. The law needs to take account of the correct terminology so that specific protections are provided.

We are content to follow the relevant expert group recommendations on this topic. We understand that the forthcoming consultation on improving the experiences of people with variations of sex characteristics (intersex) in Scotland should also be helpful in this regard.

**Question 5: Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?**

Yes. We refer to our answer to Question 4.

**Question 6: If you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?**

We would defer to the expert advice being provided by the relevant support and interest groups. These groups will be best able to advise on the preferred and accepted terminology. The law will need to reflect terms that ensure a degree of future-proofing of the legislation.

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## **Part Two- New Statutory Aggravations**

### **Question 7: Do you agree with Option A to develop a statutory aggravation for gender hostility?**

Yes. This question deals with additional statutory aggravations, which would be added to the suite of hate crime legislation to cover the relevant new groups and characteristics.

Option A relates to implementing Lord Bracadale's Report's recommendation to establish a statutory aggravation based on gender hostility. We support this approach. It is the easiest for all to understand as it will follow the other existing styles of aggravations and will be familiar to those who practise. It can readily be understood and this will also allow for consistency in due course by the courts and in sentencing.

The consultation identified a need to create a crime involving gender hostility. Although the research is recognised as dealing mostly with women, men should not be excluded from the potential of these aggravations. That follows the modern drafting approach to using gender neutral terminology which allows the aggravator not to be gender specific.<sup>16</sup>

This option meets the requirements of equality by affording greater protection to women while still allowing it to apply to men.

### **Question 8: Do you agree with Option B to develop a standalone offence for misogynistic harassment?**

No. We prefer Option A for the reasons as outlined in our answer to Question 7.

### **Q9. Do you agree with Option C of building on Equally Safe to tackle misogyny? (this would be a non-legislative approach)?**

No. We prefer Option A for the reasons outlined in our answer to Question 7. Option C could be adopted at the same time as a non-legislative approach while adopting Option A. Option A addresses the legal shortfalls while Option C addresses concerns brought by the affected groups, especially in relation to the action groups and women's charities, which tend to support Option B.

We welcome a sensible approach to developing legislation which should not be stand on its own or be seen as one solution. Any legislation would have guidance and training involved in its implementation. There also needs to be a campaign of raising awareness of the forthcoming changes addressed to the public and aimed at improving the cycle of reporting, prosecuting and the sentencing outcomes, on conviction, appropriate for a fairer Scotland.

<sup>16</sup> Sexual Offences (Scotland) Act 2009 uses this approach.

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

No. A step-by-step approach which allows for proper evaluation of the introduction of Option A would seem the best approach to adopt.

We refer to our reasons supporting Option A as set out in our answers to questions 7-9 above.

**Question 11: Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?**

Yes. There is merit in having all “protected characteristics” in the Equality Act 2010 included as statutory aggravations. There seems to be no good reason to exclude this category. The message being sent by any legislation is important; it will demonstrate the seriousness of such crimes when they are motivated by age.

The consultation refers to the motivation for the offence as being hostility based on age during, immediately before or after the commission of the offence.

The most difficult aspect may be to demonstrate that it was the age rather than the overall vulnerability of the person which motivated the hostility. Practical examples as well as understanding how the aggravation will work once the offence has been drafted, will do much to promote an understanding of how this will operate in the future.

By including age hostility in the manner being proposed, this will allow age hostility to be addressed in the system of aggravations as at present.

Age would refer to the full range of ages from elder through middle age to youth. All need to be treated equally.

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

We recognise, as the consultation does, that this is a very challenging question.

Sectarianism is deeply negative aspect of Scottish culture. The term is widely used, though lacks any legal definition currently.

The issue of sectarianism needs to be addressed as the hate crime discussion is taken forward, whether directly within the drafting of future legislation or in other ways, by raising awareness of its existence, what it is and how challenging it is a fundamental role within the education curriculum.

Irrespective of the final policy decision about how best to deal with sectarianism, whether in legislation or not, there needs to be a clear understanding of what sectarianism means for all concerned. The expert views provided by the Working Group on Defining Sectarianism in Scots Law<sup>17</sup> should now be factored in. Its Report (which is only advisory) has been published which makes a number of recommendations including the requirement of “fair labelling” to apply in relation to sectarianism. Criminal acts of prejudice should be named for what they are whether anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor.

Providing a definition of sectarianism would enhance the discussion to reflect the language that is used in day-to-day life.

There is a risk that including sectarianism may merely replicate a number of the concerns that were part of the reasons for the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

Where potentially an aggravation of sectarianism arises and is libelled, the conduct may well overlap with what constitutes racial or religious prejudice. If it can be proved that a person’s conduct was sectarian, however it is defined, there would be no need to prove that it was not some other form of prejudice. This is like someone being charged with assault and the prosecution not having to prove that it was not the crime of a breach of the peace. The Crown has the discretion as to what crime to choose to prosecute according to the facts and circumstances of the case. What might be helpful is to consider different scenarios where the offence of being aggravated by sectarianism would be found proved. That would allow its practical application to ascertain where it would be distinguished from aggravations attributable to racial or religious prejudice.

In the case of *Orr v PF Paisley*,<sup>18</sup> the conviction for a contravention of section 38 of the Criminal Justice and Licensing (Scotland) 2010 was upheld for a crime aggravated by religious prejudice. The accused stood outside a cathedral holding a religious placard. His offending behaviour, while probably sectarian in origin, was adequately and effectively covered by the existing statutory offence. The test was whether:

“A hypothetical reasonable person would be alarmed by the behaviour, given its timing and location. It was insulting to followers of the Roman Catholic faith. It had the potential to give rise to a confrontation outside

<sup>17</sup> Its remit was ‘to consider the pros and cons of establishing a legal definition of ‘sectarianism’ in Scots Law’.

<sup>18</sup> <http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018sacrim116a9855a7898069d2b500ff0000d74aa7.pdf?sfvrsn=0>

a place of worship. To the extent that [he] may have had a genuine message which he wished to put across – that the Roman Catholic Church was not following God’s teaching – the placard in no way, shape or form conveyed that message.”<sup>19</sup>

Lord Bracadale’s Report concluded that the absence of a statutory aggravation based on sectarianism would not leave a gap in the law since race and religion can be attached as an aggravator to any specific offence. On the other hand, the Working Group considered that there is a case for introducing a sectarian prejudice aggravator. Such an aggravation would then lie alongside the current aggravations of racial prejudice and religion. They outline that there are advantages in setting out the language explicitly in a statute. We refer to our comments in Questions 1 and 2 above about clarification of the law and producing clear definitions as to what is to constitute criminal offences.

No matter which approach is adopted, the suggestion of considering specific scenarios is vital to see how such an offence would work out in practice.

We would also highlight the Working Group’s recommendation which we support that relates to the promotion of public debate. There is the opportunity for the Scottish Government to engage with all faith communities in Scotland and others on how best to decide on how to handle this issue with the communities in which sectarianism exists.

**There is a need for a “proactive wide-ranging” campaign to explain that the behaviour is unacceptable and will, when found proved, be subject to significant criminal sanctions. There will promote a much greater understanding of sectarianism. Question 13: If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation?**

Please see our answer to Question 12. If there is a decision to deal with sectarianism in legislation, for consistency purposes, we would suggest that it is included as a statutory aggravator.

We would emphasise our comments with the need to see how a statutory aggravator would work in practical scenarios.

**Question 14: If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation?**

<sup>19</sup> Paragraph [10]

No. Either the current law once consolidated is sufficient to cover the types of behaviour when they are offending or the offence is created as a statutory aggravator.

**Question 15: If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and/or perceived British or Irish citizenship, nationality or national origins of the victim?**

We defer to the views of the expertise of the Working Group; it seems broadly to capture the essence of the problem. However, the religious affiliation is already addressed by the religious prejudice aggravation. Would this example mean that sectarianism would include hostility towards British citizenship on its own? That does not tend to fit with the concept of sectarianism. How do nationality or national origins fit in with racial prejudice aggravations?

The Working Group recommended further research which would be advisable with the affected groups which will help inform any definition of sectarianism which may be adopted.

The case of *Moscrop v McLintock*<sup>20</sup> which involved a contravention of section 50A(1)(b) and (5) of the Criminal Law (Consolidation) (Scotland) Act 1995 where the accused had sworn and uttered remarks which had caused the complainer distress. This included the term "Geordie" that had been motivated in whole or in part by malice and ill-will toward the complainer based upon his membership of a racial group. That racial group was being persons of English national origin, as identified by the complainer's place of origin, namely Gateshead. The conviction was upheld.

**Question 16: If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism?**

We refer to our answer to Question 15.

**Question 17: The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address**

<sup>20</sup> 2011 SCCR 621

## sectarianism?

We have already commented on the need for raising awareness and education in our answers to Question 1 and 2.

### **Question 18. Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?**

No. Lord Bracadale’s Report concluded that crimes should not extend to political entities as a “protected characteristic.”

There is a real danger by stepping beyond the “protected characteristics” and creating new statutory aggravations that this would diminish the impact of the other long recognised and more serious aggravations by prejudice. There may be issues to with the definitions.

The freedom of speech to engage in political protest is vitally important. Such an aggravation would have potentially an effect of closing legitimate political debate and impinging on freedom of speech.

### **Question 19. Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)?**

No. Lord Bracadale’s Report<sup>21</sup> concludes that there is no need to create a statutory aggravation to cover hostility towards any other specific new groups.

We agree that extending “hate crime to these characteristics would stretch the concept too far from what is readily understood by society and risk undermining confidence in the scheme”.

### **Question 20: Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual?**

<sup>21</sup> <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/> Para 49

No. We agree with Lord Bracadale's Report's observations that there needs to be a consistent approach across the "protected characteristics." What is being sought is a clear definition of hate crime: a shared understanding of the scope of the "protected characteristic" is central to that.

We can understand that it is important for the law to protect people from being targeted because of their beliefs, regardless of how widely those beliefs are held. Motivation is the same, regardless of whether the beliefs were held by an individual or a group.

To create a new statutory aggravation would be difficult if not challenging to set out individual religious and other beliefs for the purposes of the legislative definitions.

If necessary, further guidance could be provided to ensure that an individual's understanding or lack of understanding of a person's religion does not prevent it being classified as religiously motivated hate crime.

**Question 21: Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristic? (Examples of protected characteristics are religion, sexual orientation, age, gender, race, disability, transgender identity and intersex).**

Yes. Lord Bracadale Report's recommendation should be followed as this allows for a broader base for protection. There is no relevant difference between person who attacks someone because they mistakenly believe the victim to have a "protected characteristic" and a crime where someone actually does fall within the particular protected group.

Section 74 of the Criminal Justice (Scotland) Act 2003 makes a similar provision in respect of membership (or presumed membership) of a religious group or of a social or cultural group with a perceived religious affiliation. In each case, 'presumed' means presumed by the accused and 'membership' includes association with members of the group. Section 74 states:

A person who does not actually have the protected characteristic could come within these provisions if:

- (a) the perpetrator presumed that the person had the "protected characteristic" even if they did not or
- (b) the victim had an association with members of the group.

Replicating this approach seems appropriate for the application of legislation where hostility is demonstrated because of a "protected characteristic", even if the person to whom the hostility is expressed does not actually have that characteristic.

Hate crime needs to be challenged in all its forms.

**Question 22: Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)?**

Yes. We refer to our answer to Question 21.

This will allow for greater protection, for instance, of families of those with “protected characteristics”. It will also offer a greater protection for those who do not belong to a group carrying out their work. It can work to eliminate and change negative attitudes which leads to the isolation of groups representative of “protected characteristics”. It should therefore foster greater inclusivity and safety.

### **Part Three: New Stirring Up of Hatred Offences**

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**Question 23: Do you agree with Lord Bracadale’s recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics?’**

Yes. We agree with Lord Bracadale’s recommendation 13.

There is a gap in the law and the creation of stirring up offences in respect of each of the “protected characteristics” would bridge that gap. It would bring Scots law into line with the law in England and Wales where there is not a hierarchy of “protected characteristics.”

**Question 24. Do you agree with Lord Bracadale’s recommendation that any new stirring up hatred offences should require that the conduct is ‘threatening or abusive’? (If not, what do you think the threshold should be for the offence to be committed?)**

Yes. We agree with Lord Bracadale’s recommendation 14. There should be a consistency of approach. There has been a suggestion that this could be too limited. Would devaluing or depersonalising be added?

**Question 25: Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences? (This would mean that the offence would**

**apply where the behaviour is ‘threatening or abusive’, but not where it is only ‘insulting’.)**

Yes. We agree with Lord Bracadale’s Recommendation 15. Reference has already been made to the need for consolidation of the existing legislation. Please see our answer to Question 1.

**Question 26: Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred? (If you answered yes to this question, do you have any comments on what should be covered by any such ‘protection of freedom of expression’ provision?)**

Yes. Either it could be worded in line with sections 29J and 29JA of the Public Order Act 1996 or Section 7 of the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

**Question 27: Do you agree with Lord Bracadale’s recommendation that no specific legislative change is necessary with respect to online conduct? (Please provide details in the comments box.)**

Yes. There are a range of recently created statutory offences available to the Crown Office and Procurator Fiscal Office (COPFS) to address hate crime online. That does not mean that there will never be an incident which falls outwith the scope of the existing legislation. It seems at present that there does not need to be any specific change.

We are keen that the creation of new offences is minimal and is only in response to the absence of offences given the rapidly changing communication landscape. That would allow account to be taken of Law Commission<sup>22</sup> work on Abusive and Offensive Online Communications to ascertain if further reform was required. The issue of publication and republication will not doubt be covered in that work.

## **Part Four: Exploitation and Vulnerability**

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<sup>22</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6.5013\\_LC\\_Online-Summary-Report\\_FINAL\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6.5013_LC_Online-Summary-Report_FINAL_WEB.pdf)

**Question 28: Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim?**

Lord Bracadale's Report's Recommendation 11 suggests that the Scottish Government should consider the introduction of a general aggravation covering exploitation and vulnerability. There is an argument that to introduce further aggravations may create too many potential offences and could dilute the overall effect of the hate crime legislation.

Where this exploitation arises, the courts can deal with it when considering the facts and circumstances relating to the offences which they found proved though of course not as a formal aggravator.

There are certainly settings where exploitation of the vulnerable takes place, for example in care homes, although we suspect that might tend to be covered by an aggravator of age hostility referred to in Question 11. There are a range of other legislative measures which allow for prosecution under various statutes which include:

- Section 315(3) of the Mental Health (Care and Treatment) (Scotland) Act 2003<sup>23</sup> for ill-treatment and wilful neglect of mentally disordered person
- Section 83 of the Adults with Incapacity (Scotland) Act 2000<sup>24</sup>
- Part 3 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016<sup>25</sup>

We have also considered the creation of an aggravation for vulnerabilities related to people with learning disabilities (or other mental disorders) as a particular vulnerable group. It would send out a clear message about the importance of protecting this group. This would keep people with learning disabilities safer.

We refer to the possible consideration of replicating aspects of the Section 12 of the Children and Young Persons (Scotland) Act 1937<sup>26</sup> which is a widely drafted offence where there may be parallels with the type of conduct towards elderly persons, which should be subject to criminal sanctions. That offence which is widely used in our experience concerns cruelty to children under 16 where it involves a person "who has parental responsibilities or has charge or care of that person and they willfully ill-treats, neglects, abandons, or exposes them or causes or procures them to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause them unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)."

<sup>23</sup> <http://www.legislation.gov.uk/asp/2003/13/section/315>

<sup>24</sup> <http://www.legislation.gov.uk/asp/2000/4/section/83>

<sup>25</sup> <http://www.legislation.gov.uk/asp/2016/14/contents/enacted>

<sup>26</sup> <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/37/section/12>

If there is a specific offence, it may be easier to initiate a prosecution as the criminal threshold would be clearly set out. The offence would then be more significant and specific statistical information could be obtained to monitor its incidence and how it was dealt with in the criminal justice forum.

We also understand that there are issues with regard to the notion of vulnerability being based on the membership of a particular group as that may be felt to be discriminatory and perpetuate a message that the 'problem' is the weakness of that person, not discrimination, stigma and other societal barriers.

There may be difficulties too in its application as to what degree and nature of disability would achieve the necessary level for prosecution.

We are already aware of the difficulties in defining what vulnerable means.

There may well be issues here as well as to what medical or physical conditions are included. For instance, would an epileptic or person with ADHD with that diagnosis be sufficient in their own right. Not only are there gradations within any condition but some of these conditions at onset are not always specifically the subject of a formal diagnosis.

Arguing over any such "special capacity" (as to whether the victim qualifies or not) in court might well detract from the real issues in the case. Emphasising the victim's disability may even in some cases make it more likely that the defence could challenge their credibility as well as disclosure of personal sensitive information. Where details of a disability might require to be revealed could discourage those affected in coming forward- though there are of course special measures with the court process that could be deployed to protect the witness.

The problem is not so much the level of penalties which people face for victimising people with learning disabilities. There may be an absence of prosecutions, for example, of the offences of ill-treatment and wilful neglect of 'mentally disordered' persons as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003. That may be attributed to:

- Lack of clarity about what constitutes ill-treatment or wilful neglect
- Problems with the quality or admissibility of evidence from a person with a learning disability (which can be addressed to an extent of special measures)
- Where the abuse is not violent, but coercive (e.g. forced labour type cases, some financial exploitation, some sexual crimes) to the difficulty of proving that the person with the learning disability either did not consent or was not able to consent to these actions

**Question 29: If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you**

## think such an aggravation should cover?

We refer to our answer to Question 28.

## Part Five: Other Issues

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### **Question 30: Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed?**

We understand that section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 tends not to be used in practice. Where there have been prosecutions, the offence has been amended to a contravention of Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (breach of the peace).

There is an inconsistency of practice with regard to convictions under section 50A as they have been quashed as well as upheld. Clarity on the operation of this section would be merited.

Consolidation of hate crime means that there should be no hierarchy of “protected characteristics”. If there are challenges to the use of this offence, as part of the overall review, this seems a time to consider if it adds anything or could be best repealed.

### **Question 31: What do you think the impact of repealing section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?**

If the offence is not used effectively for prosecutions, then it should not be retained.

However, we would want to ensure that its repeal did not mean that the conduct went unpunished. Given the intention to produce specific hate-crime legislation, this seems not to be a problem as the legislation would ensure that the offending conduct was addressed.

There is also a need to address the public to ensure that they do not perceive that any repeal of this offence was seen as a weakening of the criminal law. That could presumably form part of the public campaign around any Bill.

### **Question 32: Do you think that courts should continue to be required to state in**

## **open court the extent to which the statutory aggravation altered the length of sentence?**

Yes. There are a number of reasons why this is important. The person who is being sentenced needs to be aware of how their sentence has been composed which includes the various elements of the offence. That is important from the perspective of transparency as well as fairness to all including the victim in court. What would the sentence have been if the aggravation had not arisen and had not been found proved?

It is substantially similar to the issue of sentencing discounting under sections 196 (1A) (a) and (b) of the Criminal Procedure (Scotland) Act 1995. The court requires to state how the sentence which is being imposed differs from the sentence that would have been imposed but for the early plea. The same point arises with bail aggravations under section 27 (3) (c) of the Criminal Procedure (Scotland) Act 1995.

Legislating for hate crimes will have two advantages.

- Drafting the legislation will allow a focus on what factors should be considered as important from a prosecution or sentencing perspective.
- It would also allow the question of sentencing for hate crimes to be considered anew. In that capacity, we note that the Scottish Sentencing Council is working on producing sentencing guidelines. Any sentencing guidelines being produced in respect of hate crime may be some time off.

In the meantime, clarity around the hate crimes would help to promote the consistency of sentencing which would lead to fewer appeals. Importantly, that would also assist in the management of the public's expectations of what is realistic sentencing for hate crime when they arise. Of course, guidance as to the likely sentences will also seek to inform those advising anyone accused of a hate crime.

## **Question 33: Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?**

Yes. We agree that there should be no legislative change in respect of support and measures being given to victims of such crimes.

However, we consider that there needs to be a campaign to raise public awareness of the aggravations and of the impact both in sentence in expressing society's disapproval as well as the outcomes to be expected where aggravations are proved.

Victims need to be informed too of the likely outcomes as well as their role in reporting and giving evidence. Enhanced support and the promotion of understanding is needed. There are a number of organisations well placed to provide this where they need to be given the information and support to allow them to undertake this role effectively. There are challenges for all concerned.

**Question 34: Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland?**

Yes. We refer to our answer to Question 33 above. There are adequate mechanisms of support for victims of hate crimes. There is work going forward on the Scottish Government's task force on victims<sup>27</sup> which may be a route for such improvements to be best directed.

**Question 35: What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?**

We have nothing further to add.

**For further information, please contact:**

Gillian Mawdsley  
Policy Executive  
The Law Society of Scotland  
DD: 0131 476 8206  
[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)

<sup>27</sup> <https://news.gov.scot/news/victims-task-force>