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Hate Crime and Public Order (Scotland) Bill

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This Scottish Government bill seeks to modernise, consolidate and extend hate crime legislation in Scotland. It deals with the aggravation of more general offences by prejudice as well as specific hate crime offences.



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Executive Summary

The Hate Crime and Public Order (Scotland) Bill seeks to modernise, consolidate and extend hate crime legislation.

Existing legislation in this area covers:

- statutory aggravations in relation to the hate crime characteristics of race, religion, disability, sexual orientation and transgender identity - proof of an aggravation can make an offence (e.g. assault or breach of the peace) more serious
- offences relating to stirring up racial hatred
- offences of racially aggravated harassment

In 2017, the Scottish Government appointed Lord Bracadale (a retired judge) to carry out an independent review of hate crime legislation. His report was published in 2018. Following this, the Scottish Government consulted on proposed legislative changes.

Proposed changes in the Bill include the following concerning hate crime characteristics (simply referred to as characteristics in the Bill):

- updating the definition of transgender identity, including the removal of intersexuality which would instead be covered under variations in sex characteristics
- adding age
- allowing sex to be added at a later date by secondary legislation

The Bill provides for new offences relating to stirring up hatred that would apply to all the hate crime characteristics in the Bill - race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. Existing offences in this area apply to race only.

The Bill includes specific provisions seeking to protect freedom of expression in relation to religion and sexual conduct or practices.

The Bill also seeks to abolish the no longer used common law offence of blasphemy.

Introduction

The Scottish Government introduced the [Hate Crime and Public Order \(Scotland\) Bill](#) in the Parliament on 23 April 2020. ¹

Hate crime legislation in Scotland currently comprises:

- statutory aggravations in relation to the hate crime characteristics of race, religion, disability, sexual orientation and transgender identity
- offences relating to stirring up racial hatred
- offences of racially aggravated harassment

The statutory aggravations are not offences in themselves. Rather, they can make an offence (e.g. assault) more serious. They apply where the offender demonstrates, or is motivated by, malice and ill-will in respect of a hate crime characteristic (e.g. where an assault is motivated by prejudice towards the race of the victim).

The Bill's [policy memorandum](#) (para 4) states that: ²

“ This Bill provides for the modernising, consolidating and extending of hate crime legislation in Scotland. Legislation in this area has evolved over time in a fragmented manner with the result that different elements of hate crime law are located in different statutes, there is a lack of consistency, and the relevant legislation is not as user-friendly as it could be. The new hate crime legislation will provide greater clarity, transparency and consistency.”

Proposed changes include the following in relation to hate crime characteristics (simply referred to as characteristics in the Bill):

- updating the definition of transgender identity, including the removal of intersexuality which would instead be covered under variations in sex characteristics
- adding age
- allowing sex to be added at a later date by secondary legislation

The Bill also provides for new offences relating to stirring up hatred that would apply to all the hate crime characteristics in the Bill - race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. Existing offences in this area apply to race only.

The existing offences of racially aggravated harassment are unaffected by the Bill. Nor does it seek to add similar offences in relation to the other hate crime characteristics.

The Bill seeks to abolish the no longer used common law offence of blasphemy.

The Scottish Parliament's [Justice Committee](#) ³ will be carrying out detailed scrutiny of the Bill and has received a large number of responses to its call for views on the proposals. Given the scale of the response, they are not analysed in this briefing. Additional analysis

for the Committee will seek to ensure that the views expressed within the responses are highlighted as part of the scrutiny of the Bill.

Review and Consultation

Independent review of hate crime legislation

In January 2017, the Scottish Government appointed Lord Bracadale to carry out an independent review of hate crime legislation in Scotland.ⁱ This included consideration of:

- the scope of current statutory aggravations and specific hate crime offences
- whether new categories of hate crime should be created for characteristics such as age and sex
- whether existing laws could be simplified and rationalised (e.g. through the introduction of a single consolidated hate crime act)

[Lord Bracadale's report](#) was published in May 2018.⁵ In it, he adopts a definition of hate crime following the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from other crimes.

The hate crime legislation currently applying in Scotland is set out in annex 3 of the report.

The report highlights three reasons for having hate crime legislation:

- the harm which hate crime causes - the effect on the victim and the community group to which the victim belongs
- the symbolic function of legislation - sending a message to the victim, the group of which the victim is a member and wider society, that criminal behaviour based on bias and inequality is not tolerated
- the practical benefits of a clear set of rules and procedures for dealing with hate crime (e.g. in terms of consistency in sentencing and recording of hate crime)

It sets out 22 recommendations, including:ⁱⁱ

“ Recommendation 1 - Statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland.”

“ Recommendation 13 - Stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.”

“ Recommendation 20 - All Scottish hate crime legislation should be consolidated.”

A number of the report's recommendations are referred to later in this briefing in discussion of the proposals in the Bill.

The Bill's policy memorandum (para 32) notes that:

i Lord Bracadale is a retired judge and was, in January of this year, appointed to chair the [public inquiry](#) into the circumstances surrounding the death of Sheku Bayoh.⁴

ii Lord Bracadale's report uses the term 'protected characteristics' to refer to the characteristics described in this briefing as 'hate crime characteristics'. The latter is used in this briefing to avoid confusion with the protected characteristics covered by the Equality Act 2010.

“ In responding to publication of the report, the Scottish Government accepted [Lord Bracadale's] recommendation to consolidate all Scottish hate crime legislation into one new hate crime statute and committed to consult on the detail of what will be included in what has become this Bill. ”

Scottish Government consultation

In November 2018, the Scottish Government launched a [consultation on amending hate crime legislation](#).⁶

An [analysis of responses](#) was published in June 2019, with the executive summary noting:⁷

“ A total of 1,159 responses were received: 108 from organisations (third sector bodies, public sector and partnership bodies, faith groups and other organisations) and 1,051 from individuals. The analysis of responses showed that organisations and individuals often had differing perspectives and views on the issues under consideration.”

The executive summary goes on to highlight what it describes as two key perspectives within the responses:

“ A substantial proportion of respondents (including most individuals) had concerns about the impact of hate crime laws on freedom of speech and religious expression, and about laws designed to protect specific groups. Many called for the repeal of hate crime laws or, at least, did not want such laws to be extended. These views shaped their responses to the consultation. ”

“ Other respondents (including most organisations) saw hate crime laws as important in protecting vulnerable groups, and sending out a message about the unacceptability of prejudice-based conduct. Within this group there was a range of perspectives on how to ensure the protection of particular groups. ”

Aggravation of Offences by Prejudice

Overview

Under section 1 of the Bill, an offence is aggravated by prejudice if either of the following apply:

- where there is a specific victim - at the time of committing the offence or immediately before or after doing so, the offender evinces (demonstrates or expresses) malice and ill-will towards the victim based on the victim's membership, or presumed membership, of a group defined by reference to a hate crime characteristic
- whether or not there is a specific victim - the offence is motivated wholly or partly by malice and ill-will towards members of a group defined by reference to a hate crime characteristic

Proof of the aggravation can make an offence more serious.

The hate crime characteristics set out in section 1 are:ⁱⁱⁱ

- race (race, colour, nationality (including citizenship), or ethnic or national origins)
- religion (religion or, in the case of a social or cultural group, perceived religious affiliation)
- disability
- sexual orientation
- transgender identity
- variations in sex characteristics
- age

They are further defined in section 14 of the Bill (e.g. religion includes a group defined by a lack of religious belief).

Statutory hate crime aggravations currently exist in relation to:

- race - Crime and Disorder Act 1998
- religion - Criminal Justice (Scotland) Act 2003
- disability, sexual orientation and transgender identity - Offences (Aggravation by Prejudice) (Scotland) Act 2009

The provisions of the Bill would replace these with provisions which are broadly similar in the way they seek to protect people from hate crime based on those hate crime characteristics.

ⁱⁱⁱ Simply referred to as characteristics in the Bill.

However, some important changes to the hate crime characteristics are proposed in the Bill:

- it seeks to update and improve the definition of transgender identity, including the removal of intersexuality which would instead be covered separately under variations in sex characteristics
- it seeks to add age as a hate crime characteristic

The Bill would retain the current situation under which evidence from a single source is sufficient to establish an aggravation.^{iv}

Changes to hate crime characteristics

As already noted, legislation currently provides for hate crime aggravations based on race, religion, disability, sexual orientation and transgender identity.

[Lord Bracadale's report](#) on hate crime includes the following recommendations on hate crime characteristics:⁵

“ Recommendation 4 - The drafting of any replacement for section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 should include 'intersex' as a separate category rather than a sub-category of transgender identity. Consideration should be given to removing outdated terms such as 'transvestism' and 'transsexualism' from any definition of transgender identity (without restricting the scope of the definition).”

“ Recommendation 10 - There should be a new statutory aggravation based on age hostility. Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.”

Both of these recommendations are taken forward in the Bill.

In addition, the report recommends that there should be a new statutory aggravation based on what it refers to as gender hostility. The Bill does not add this to the range of hate crime characteristics. It would, however, allow sex to be added at a later date by secondary legislation. The issues in this area are discussed later in this briefing under the heading of [Power to add Sex to Hate Crime Characteristics](#).

The Bill also seeks to strengthen protection for people who may be a victim of hate crime because they associate with others who are part of a group defined by reference to a hate crime characteristic (e.g. if a person is subject to abuse for having a partner with a disability). Existing laws in relation to race and religion include specific provision on this. The Bill would extend this to all of the hate crime characteristics by defining membership of a group as including association with members of that group.^v

iv The general requirement for corroboration applies to proof of the actual offence.

v Lord Bracadale's report recommends that statutory aggravations should apply where there is hostility based on association (recommendation 5).

Transgender identity and variations in sex characteristics

For the purposes of the current hate crime aggravations set out in section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, transgender identity is defined as:

“ (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or (b) any other gender identity that is not standard male or female gender identity.”

Under section 14 of the Bill, this would change to:

“ (a) a female-to-male transgender person, (b) a male-to-female transgender person, (c) a non-binary person, (d) a person who cross-dresses.”

In addition, the Bill would replace the previous inclusion of intersexuality as part of transgender identity, with separate protection for variations in sex characteristics. Under section 14, this would apply where:

“ the person is born with physical and biological sex characteristics which, taken as a whole, are neither - (a) those typically associated with males, nor (b) those typically associated with females.”

In explaining the reasoning for these changes, the Bill's policy memorandum (para 204) notes that:

“ Since the enactment of the 2009 Act, it has become clear that there are concerns with listing 'intersexuality' as an aspect of transgender identity. Intersex and transgender identity are now widely understood to be two separate and distinct characteristics (intersex being a physical condition, or range of conditions, relating to biological characteristics, and transgender identity relating to a person's gender identity).”

It goes on to say that the separation into two distinct categories does not alter the level of legal protection provided.

Age

In outlining the case for a new statutory aggravation based on age hostility, [Lord Bracadale's report](#) considers both old-age and youth.⁵ Although recommending that age should be added to the hate crime characteristics, it acknowledges limitations in what this might deliver.

In relation to old-age, the report (para 4.52) notes:

“ considerable support for some form of recognition that offences against the elderly do constitute a type of offence which the criminal law should mark in a particular way.”

However, it highlights evidence indicating that most offending specifically targeted at older people is driven by a perception of the victim's vulnerability due to age, rather than hostility towards older people.

In light of this, the report also recommends that the Scottish Government should consider the creation of an aggravation covering exploitation and vulnerability. Lord Bracadale's view was that this would not fit within the scope of hate crime and should, therefore, be looked at separately from hate crime legislation.

In relation to youth, the report (para 4.68) says that "there is little evidence that there is a problem of hostility against youth in and of itself" but that "it is conceivable that such behaviour could occur".

Lord Bracadale concludes (para 4.69) that:

“ While I would expect, therefore, that most hostility-based offences based on age would be committed against elderly persons, I consider that it is appropriate to adopt an approach where a protected characteristic of age generally is introduced. Whether a particular offence is motivated by hostility in relation to age, or in the course of an offence hostility to age is demonstrated, would be a matter for consideration on a case-by-case basis.”

In explaining its reasons for including age as a hate crime characteristic in the Bill, the policy memorandum (para 221) states that:

“ Although there might only be a relatively small proportion of crimes relating to malice and ill-will towards a person because of their age, the Scottish Government wants to ensure that these crimes are treated in the same way as other hate crimes through the use of the statutory aggravation model. ”

In relation to the possibility of having an aggravation (outwith hate crime legislation) covering exploitation and vulnerability, the policy memorandum (para 232) indicates that:

“ In the longer term, the Scottish Government will consider whether there should be reforms to the criminal law to improve the protection available to people who may be at increased risk of becoming victims of crime because of their vulnerability, taking account of the responses received to the consultation. This will include consideration of whether a statutory aggravation would make a practical difference which would improve how the justice system responds to crimes committed against those who are especially vulnerable. ”

Consequences of aggravation

Where an offence is proven to have been aggravated by prejudice based on any of the hate crime characteristics, section 2 of the Bill provides that the court must:

- state the the offence is aggravated by prejudice with reference to the hate crime characteristics involved in the case (e.g. that the offence is aggravated by prejudice based on race)
- record the offence as aggravated by prejudice, including identification of the hate crime characteristics involved
- take the aggravation into account in sentencing

The court must also make clear what (if any) difference the aggravation has made to the sentence imposed and give its reasons. The approach taken by the Bill in this area follows that taken in legislation for existing hate crime aggravations. The policy memorandum (para 94) states that:

“ Retaining the current condition whereby a court is required to state in open court the extent, if any, that a sentence has been increased due to the operation of a statutory aggravation, will aid transparency in sentencing and help victims and others to better understand sentencing decisions.”

In retaining a requirement for the court to indicate the extent to which the sentence is changed by proof of an aggravation, the Bill departs (in part) from recommendation 8 of [Lord Bracadale's report](#) .⁵ The arguments are outlined in the Bill's policy memorandum (paras 97-113).

More information on the role aggravating factors may play in [sentencing](#) is set out below.

Sentencing

The Scottish Sentencing Council's website notes, under the heading of [Introduction to Sentencing](#), that judges take decisions on sentencing "based on what the law says and the unique circumstances of each case".⁸ As it explains, the judge:

- must first see whether the law sets out minimum or maximum sentences for the offence
- will then decide which factors are relevant and should be taken into account in the case, and consider how much weight to give to each one

It gives the following examples of factors which might be relevant in determining the appropriate sentence in a particular case:

- type of crime / seriousness of crime
- whether the person has admitted guilt
- how the crime affected a victim
- other convictions for crimes the person has committed in the past
- the offender's age and circumstances (including health issues)
- relevant sentencing guidelines

Factors that are likely to make a sentence more severe are called 'aggravating'. Those that are likely to make it less severe are called 'mitigating'.

Although they do not have to be set out in legislation, this is an approach which has been taken for aggravating factors in a number of areas. In addition to hate crime, examples of statutory aggravations include ones relating to domestic abuse and serious organised crime.

As well as allowing a parliament to explicitly highlight a particular aggravation, the statutory approach also allows it to be more prescriptive in terms of the action the court must take (e.g. in stating what difference it has made to the sentence imposed).

Offences Relating to Stirring up Hatred

Overview

Sections 3 to 5 of the Bill provide for offences of stirring up hatred and possessing inflammatory material.

The proposed offences would cover all of the hate crime characteristics in the Bill - race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. Existing offences in this area apply to race only (set out sections 18 to 23 of the Public Order Act 1986).

In relation to race, the offences would cover behaviour or material which is threatening, abusive or insulting. This is in line with existing offences. For the other hate crime characteristics, the offences are restricted to behaviour or material which is threatening or abusive (i.e. it would not be enough that behaviour or material is insulting).

It would be a defence to show that the behaviour or possession of material was reasonable. In addition, the Bill contains further provisions seeking to protect freedom of expression in relation to religion (section 11) and sexual conduct or practices (section 12).

The proposed offences could lead to maximum prison sentences of 12 months under summary procedure and seven years under solemn procedure. The seven year limit also applies to the existing offences dealing with racial hatred.

As noted later, when looking at [hate crime statistics](#), relatively few offences of stirring up hatred or possessing inflammatory material related to race are currently reported to the prosecution service (Crown Office & Procurator Fiscal Service). For example, in 2019-20 it received the following number of reports involving racial prejudice:

- 1,830 charges of more general offences with a race aggravator (Crime and Disorder Act 1998)
- 1,203 charges of racially aggravated harassment (Criminal Law (Consolidation) (Scotland) Act 1995)
- 5 charges of stirring up hatred or possessing inflammatory material (Public Order Act 1986)

Commenting on statistics in this area, [Lord Bracadale's report](#) (para 5.14) notes that: ⁵

“Stirring up of hatred offences directed against the group are likely to be much less common than aggravated offences directed against one or more individual member(s) of the group.”

It goes on to argue that:

“ The limited number of prosecutions does not, however, necessarily mean that there is under-prosecution of these offences, or that they do not have a useful function. It may simply reflect the reality that the type of conduct that merits prosecution as stirring up of hatred is less common than the sort of communication which might be more appropriately prosecuted using a baseline offence and a relevant aggravation. I do not consider that the argument that there might not be many prosecutions is persuasive against having a regime of stirring up hatred offences. Indeed, their relative rarity may only enhance their symbolic value.”

Stirring up hatred

Existing offences of stirring up hatred apply to race only and are set out in sections 18 to 22 of the Public Order Act 1986. They cover a range of circumstances including the spoken word, written material, sound and visual recordings. The Bill seeks to replace most of those existing offences with a single offence set out in section 3(1) of the Bill.^{vi} Under this it would be a crime if:

- a person - (i) behaves in a threatening, abusive or insulting manner, or (ii) communicates threatening, abusive or insulting material to another person; and
- either - (i) the person intends to stir up hatred against a group of persons defined by reference to race, or (ii) it is likely that hatred will be stirred up against such a group.

Although a range of more specific offences in the Public Order Act 1986 are being replaced by one offence dealing with racial hatred in the Bill, the policy memorandum suggests that the intention is to cover a similar range of behaviour with the same legal threshold for criminal liability. This is discussed further below when looking at the [protection of freedom of expression](#).

As noted earlier, the recommendations in [Lord Bracadale's report](#) include:⁵

“ Recommendation 13 - Stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.”

This is provided for in section 3(2) and (3) of the Bill, creating a single offence which could be used in relation to any of the hate crime characteristics other than race. The proposed offence generally follows the same approach used in section 3(1) for race. However, it does not include reference to insulting behaviour/material.

Lord Bracadale's report recommends that all of the stirring up hatred offences, including ones dealing with racial hatred, should be restricted to threatening or abusive behaviour/material. In doing so, it highlights evidence given in relation to the removal of insulting from an offence applying in England and Wales (para 5.41);

“ The Director of Public Prosecutions advised that the Crown Prosecution Service (CPS) had been unable to find any case that could not be characterised as 'abusive' as well as 'insulting' and took the view that from the perspective of the prosecution the word 'insulting' could safely be removed without undermining the ability of the CPS to bring prosecutions.”

^{vi} The Bill does not seek to repeal the offence set out in section 22 of the Public Order Act 1986. This is on the basis that it deals with an issue reserved to the UK Parliament - the regulation of broadcasting.

In explaining the Scottish Government's reasons for departing from this recommendation, the policy memorandum (para 151) says that:

“ the Scottish Government considered the potential impact that removal of ‘insulting’ may have on the ethnic minority communities in particular. Removal of insulting could be perceived as suggesting it was in some way acceptable to insult on the basis of race in a manner that previously it would not have been. Such a perception, even if based on an incomplete understanding of the operation of criminal law, is not a perception that the Scottish Government is willing to risk arising. ”

The policy memorandum also notes that the inclusion of insulting within existing racial hatred offences has not caused any difficulties.

In relation to both of the offences set out in section 3 of the Bill, section 3(4) provides for the following defence:

“ It is a defence for a person charged with an offence under this section to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable. ”

By way of example, the Bill's [explanatory notes](#) (para 35) suggest that the defence could apply where:⁹

“ a person communicates a threat of serious violence made by someone else for the purpose of alerting a journalist or a journalist reporting a threat of serious violence made by another person. ”

Possessing inflammatory material

An existing offence of possessing racially inflammatory material is set out in section 23 of the Public Order Act 1986. The Bill seeks to partly replace this with a similar offence on racial hatred set out in section 5(1) of the Bill.^{vii} Under this it would be a crime if:

- a person has possession of threatening, abusive or insulting material with a view to communicating the material to another person; and
- either - (i) the person intends to stir up hatred against a group of persons defined by reference to race, or (ii) it is likely that hatred will be stirred up against such a group.

The Bill also seeks to extend protection to the other hate crime characteristics - religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. This is provided for in section 5(2) and (3) of the Bill, creating an offence which generally follows the same approach used in section 5(1) for race but does not include reference to insulting material. This difference in approach replicates that in section 3 of the Bill in relation to [stirring up hatred](#).

In relation to both of the offences set out in section 5 of the Bill, section 5(4) provides for the following defence:

vii The Bill would amend but not repeal section 23 of the Public Order Act 1986. It would leave an offence dealing with matters covered by the reservation of broadcasting to the UK Parliament.

“ It is a defence for a person charged with an offence under this section to show that the possession of the material was, in the particular circumstances, reasonable. ”

By way of example, the Bill's explanatory notes (para 50) suggest that the defence could apply where:

“ a person is in possession of inflammatory material made by someone else for the purpose of alerting a journalist or where a person does not know and could not reasonably have known that they were in possession of inflammatory material likely to stir up hatred, for example, postal distributors or couriers who handle sealed envelopes containing inflammatory material, who had no reason to suspect the content of the material inside. ”

Protection of freedom of expression

The discussion of stirring up hatred offences in [Lord Bracadale's report](#) includes consideration of:⁵

- the threshold for criminal liability (e.g. whether it should be limited to situations where there is an intention to stir up hatred)
- provisions aimed at protecting freedom of expression on specific issues - religion and sexual conduct or practices
- the protection of freedom of expression provided by article 10 of the European Convention on Human Rights

These three areas are considered below.

In addition, concerns have been expressed that the way in which the stirring up hatred offences are set out in the Bill may be unduly wide or lack clarity as to what conduct is criminal. Compared with existing racial hatred offences in the Public Order Act 1986, the Bill provides for a smaller number of less specific offences. Lord Bracadale's report (para 5.41) describes the current stirring up hatred offences as "somewhat complicated and cumbersome".

In seeking to strike the right balance in terms of what should be criminal, the approach taken in the Bill also places greater reliance on the general defence of reasonable behaviour outlined earlier (sections 3(4) and 5(4)). Existing racial hatred offences in the Public Order Act 1986 include a number of more specific defences/exceptions. For example, section 18 of that Act:

- includes an exception for behaviour in the home
- provides that where there is no intention to stir up racial hatred, the fact that the behaviour was likely to do so does not make it an offence if the person "was not aware that it might be, threatening, abusive or insulting"

Of course, there may be different views on whether the existing defences/exceptions are appropriate.

Threshold for criminal liability

For England and Wales (not covering Scotland), Part IIIA of the Public Order Act 1986 sets out stirring up hatred offences relating to religion and sexual orientation. Lord Bracadale's report notes that they are more restricted than those dealing with racial hatred, including the fact that:

- the behaviour or material must be threatening (not just abusive or insulting)
- there must be an intention to stir up hatred (it being likely that hatred will be stirred up is not sufficient)

His report argues against similar restrictions for offences in Scotland. In relation to the first point it states that (para 5.37):

“ I consider that the requirement for threatening behaviour sets the threshold too high. Abusive conduct which was not necessarily threatening could still be intended to stir up hatred in relation to a protected characteristic or could give rise to the likelihood that hatred could be stirred up. The use of the phrase 'threatening or abusive' would be consistent with the approach in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.”

The Criminal Justice and Licensing (Scotland) Act 2010 sets out a general offence of threatening or abusive behaviour which is not limited to particular issues. It is, however, more restricted in requiring that:

- the behaviour would be likely to cause a reasonable person to suffer fear or alarm;
and
- the person intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm

So, although not restricted to a crime of intention, a likelihood of causing fear or alarm is not enough in itself.

Returning to the proposed offences of stirring up hatred and intention, Lord Bracadale's report states (para 5.38):

“ As to whether the offences should be restricted to an intention to stir up hatred, or should also include the likelihood formula used in the stirring up of racial hatred offences, I consider that the wider test including both of these would give more flexibility. It is relevant to note why the alternative likelihood threshold of 'having regard to all the circumstances racial hatred is likely to be stirred up thereby' appears in the Public Order Act 1986. It was inserted in 1976 into the Race Relations Act 1965 following criticism by Lord Scarman in his report into the disorder in Red Lion Square in 1974 that the requirement for proof of intent in the Race Relations Act 1965 was too onerous and rendered the offence 'useless to a policeman on the street'.”

The Bill's policy memorandum notes that the Scottish Government accepted Lord Bracadale's arguments on these points, stating that (paras 138 and 141):

“ The Scottish Government agrees with Lord Bracadale that adopting a threshold of threatening or abusive behaviour for stirring up hatred offences covering new characteristics strikes the right balance between conduct which ought to be criminalised and one's right to freedom of expression, and represents a measure familiar to Scots law, which works well currently in practice.”

“ The Scottish Government accepts that to confine a stirring up offence to an intention to stir up hatred would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused's intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.”

Freedom of expression on specific issues

The Bill includes specific provisions seeking to protect freedom of expression in relation to religion and sexual conduct or practices.

Section 11(2) provides that behaviour or material is not to be treated as threatening or abusive solely on the basis that it includes:

- discussion or criticism of religion, religious beliefs or practices
- proselytising (trying to convert a person from one faith to another)
- urging of persons to cease practising their religions

Section 12(2) provides that behaviour or material is not to be treated as threatening or abusive solely on the basis that it includes:

- discussion or criticism of sexual conduct or practices
- urging of persons to refrain from or modify sexual conduct or practices

In relation to section 12, the Bill's explanatory notes (para 73) state that:

“ As such, the act of, for example, writing a newspaper article or blog post which claimed that same-sex sexual activity was wrongful could not be regarded, of itself, as behaviour which is abusive towards people who are lesbian, gay or bisexual. However, if, for example, the article or blog-post made abusive comments about people who are lesbian, gay or bisexual, or threatened them with violence, it could still amount to behaviour that is threatening or abusive. ”

The inclusion of provisions along the lines described above is recommended in Lord Bracadale's report:

“ Recommendation 16 - A protection of freedom of expression provision similar to that in sections 29J and 29JA of the Public Order Act 1986 and section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 should be included in any new legislation.”

Sections 29J and 29JA of the Public Order Act 1986 are concerned with the existing stirring up hatred offences relating to religion and sexual orientation which apply in England and Wales. As noted earlier, the [threshold for criminal liability](#) for those offences is

higher than that proposed in the Bill for Scotland. Sections 29J and 29JA are reproduced below for comparison:

- 29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

- Section 29JA - Protection of freedom of expression (sexual orientation)

(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 was repealed in 2018. Prior to this, it included provisions making it an offence to communicate threatening material to another person with the intention of stirring up hatred on religious grounds. Section 7 sought to provide reassurance that the offence would not unduly limit freedom of expression by stating that it did 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
- urging of adherents of religions to cease practising their religions

The Bill does not include any specific provisions seeking to protect freedom of expression in other areas. The policy memorandum (para 192) states that:

“ Consideration was also given to whether specific provision should be made in respect of the other characteristics covered by the offences relating to stirring up hatred, namely age, disability, race (and related characteristics), transgender identity and variations in sex characteristics. However, Lord Bracadale did not make any recommendation in his report on this matter, and consultation respondents' concerns about the impact of the offence on freedom of expression related specifically to religion and sexual orientation. ”

European Convention on Human Rights

Article 10 of the [European Convention on Human Rights](#),¹⁰ which protects freedom of expression, provides that:

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.
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.

Lord Bracadale's report (para 5.22) notes that:

“ 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 not only 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 it protects expression which shocks, offends and disturbs other people.”

The report goes on to discuss the extent to which limiting freedom of expression is allowed, commenting that (para 5.26):

“ In relation to whether and to what extent expression is protected by article 10, content and context are important. Freedom of expression carries with it duties and responsibilities. There is an obligation to avoid as far as possible expressions of opinion or belief that are gratuitously offensive to others and thus an infringement of their rights (for example freedom of religion), and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. The court has found interference with article 10 rights permissible in relation to the publication of a book with extreme comments about Islam, electoral leaflets exhorting foreigners to be sent home and the distribution of leaflets in students' lockers at a school stating that homosexuality is morally destructive and responsible for the spread of HIV/AIDS.”

Lord Bracadale concludes that "extending the stirring up offences in Scotland would not infringe the article 10 right to freedom of expression" (para 5.28).

The Bill's policy memorandum (paras 292-302) considers the provisions of the European Convention on Human Rights, noting that the Scottish Government believes the Bill to be compatible with its provisions.

Offences committed by organisations

Section 9 of the Bill deals with situations where an offence of stirring up hatred or possessing inflammatory material is committed by an organisation such as a company. It sets out the circumstances in which certain individuals (e.g. company directors), as well as the organisation itself, may be held guilty of the offence.

To be criminally liable, a relevant individual must have:

- consented to, or connived in, the organisation's commission of the offence; or
- been guilty of neglect resulting in the organisation committing the offence

Online Hate Crime

Chapter 6 of [Lord Bracadale's report](#) considers how current laws operate in relation to online hate crime.⁵ It concludes that existing offences, if supplemented as recommended elsewhere in the report (e.g. by adding sex to the hate crime characteristics covered by relevant legislation),^{viii} can be used to effectively prosecute online hate crime.

The report includes discussion of the jurisdiction of the Scottish courts - whether they can deal with an alleged offence where some aspects of the case take place in another country. The relevance of this issue is not limited to offending with an online element but may, given the global nature of the internet, be seen as a particular issue in this area. In his report, Lord Bracadale states (para 6.41):

“ In the case of a common law crime, the Scottish courts have jurisdiction if an act done outside Scotland has a practical effect in Scotland. This rule has been considered in relation to statutory offences, the key decision being *Clements v HM Advocate*, which related to the supply of drugs where the activities in question took place in both Scotland and England. (...) The High Court of Justiciary was satisfied that conduct which occurs in Scotland, or conduct abroad which has had its result in Scotland, should be treated as amounting to a crime committed in Scotland. The court was satisfied that this result followed from the application of the accepted rules governing questions of jurisdiction, and did not require the assertion of any extra-territorial jurisdiction.”

He goes on to say (para 6.42):

“ Applying an equivalent reasoning to online hate cases, I am satisfied that the Scottish courts would have jurisdiction where the harm arising from the act occurs in Scotland, even if acts leading to that harm in fact took place elsewhere. I do not therefore see any need to recommend a provision to confer extra-territorial jurisdiction in relation to hate crime or hate speech which is committed online.”

Section 10 and schedule 1 of the Bill deal with a different aspect of online hate crime - the potential criminal liability of 'information society services' in relation to the offences provided for in the Bill (i.e. stirring up hatred and possessing inflammatory material as set out in sections 3 to 5). The provisions seek to ensure that the Bill complies with EU law as set out in the [e-Commerce Directive](#) (2000/31/EC).

The definition of information society services includes most internet service providers and online platforms. They do not necessarily have the same degree of editorial control of the content they host as some publishers of information (e.g. newspapers).

A House of Commons Library [briefing on social media regulation](#) (February 2020)¹¹ notes that the e-Commerce Directive provides, under certain circumstances, exemptions to criminal liability for online service which transmit (referred to as conduits), cache or host electronic information. In relation to social media, the briefing paper (p 5) notes that:

viii See discussion below on the [power to add sex to hate crime characteristics](#).

“ Social media companies are generally regarded as information society services that host material, rather than create it. Under Article 14 [of the e-Commerce Directive], they are not liable for content that they host, provided they do not have actual knowledge of illegal activity and act expeditiously to remove the information if they are informed that it is illegal. Only services that 'play a neutral, merely technical and passive role towards the hosted content are covered by the exemption'. This model of liability is commonly called the 'notice and take-down' model.”

“ Under Article 15, Member States must not impose a general obligation on internet intermediaries to monitor or actively to seek facts or circumstances indicating illegal activity.”

The House of Commons Library briefing paper goes on to outline criticisms of the approach in the e-Commerce Directive.

Power to add Sex to Hate Crime Characteristics

[Lord Bracadale's report](#) recommends that sex (referred to in the report as gender) should be added to the hate crime characteristics covered by hate crime legislation.⁵

The Bill does not seek to implement Lord Bracadale's recommendations in this area. However, section 15 of the Bill would allow the Scottish Government to add sex to the range of hate crime characteristics through the use of secondary legislation. This could be used to add sex to the characteristics covered by the statutory aggravation in section 1 and/or the offences relating to stirring up hatred in sections 3(2) and 5(2).

In outlining the Scottish Government's thinking, the policy memorandum highlights the opposition of some women's organisations to the approach recommended by Lord Bracadale. Those groups instead calling for a new offence of misogynistic harassment. The policy memorandum (para 240) states that:

“ Recognising that there is a clear need to tackle misogyny and gender based prejudice in Scotland, the Scottish Government is committed, in principle, to developing a standalone offence on misogynistic harassment and is establishing a Working Group to take this work forward. Provision is also included in this Bill for an enabling power to allow the characteristic of sex to be added to the hate crime legislative framework at a later date, after the Bill has passed if this is, for example, recommended by the Working Group.”

The possibility of creating a new offence dealing with misogynistic harassment is considered but rejected in Lord Bracadale's report (para 4.48):

“ In general terms, I think the clearest and most effective way to mark out hate crime is a scheme involving baseline offences and statutory aggravations which reflect identity hostility. That is the underlying philosophy which I have applied throughout the scheme which I am recommending. I would depart from that approach if I felt that it was necessary in order to achieve effective recognition of gender-based hate crime. However, based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against women which ought to be criminal but are not.”

The Scottish Government has yet to establish the proposed Working Group.

Racially Aggravated Harassment

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 sets out two offences which may be used to prosecute:

- a racially aggravated course of conduct - where this amounts to harassment of a person and is intended to amount to harassment or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment
- individual racially aggravated acts - which cause, or are intended to cause, a person alarm or distress

As noted in [Lord Bracadale's report](#),⁵ equivalent provisions do not exist in relation to other hate crime characteristics such as religion or sexual orientation. After considering the background to and use of the provisions, the report (para 7.23) states that:

“ At the time section 50A was introduced in 1998 it was a significant statutory development in that it was part of a suite of provisions intended to deal with racially aggravated offending. However, I have concluded that it is no longer needed to meet the aims which it was intended to achieve when it was created in 1998. In particular, the advent of the offence of threatening or abusive behaviour contrary to section 38 [of the Criminal Justice and Licensing (Scotland) Act 2010] means that there is an alternative route to target the behaviour, which is well understood by the criminal justice authorities and which is clear about the nature of the conduct in question. The statistics demonstrate that this route is being used in practice in conjunction with statutory aggravations to tackle hate-based prejudice on different grounds.”

The report goes on to recommend the repeal of section 50A.

The Bill does not seek to repeal it. Nor does it seek to add similar offences in relation to the other hate crime characteristics covered by the Bill.

In explaining why repeal of section 50A is not being sought, the Bill's policy memorandum highlights concerns that the offence set out in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 does not cover all of the same behaviour. It also refers to arguments about the nature of racism (para 274):

“ Many stakeholders have argued that race related hate crime requires a unique approach due to the prevalence and nature of racial harassment and racially motivated violence. It has been argued by some that the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion, justifies a separate approach. ”

Sectarianism

In January 2018, the Justice Committee's [stage 1 report](#) on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill was published.¹² It includes a recommendation (para 179) that:

“ the Scottish Government gives consideration to introducing a definition of sectarianism in Scots Law, which (...) would help any future parliaments and governments in taking forward laws to tackle sectarianism. ”

Following this, the Scottish Government set up a working group on defining sectarianism in Scots law. The [working group's report](#) was published in November 2018.¹³ It recommends that sectarian prejudice should be defined in criminal law as a specific hate crime aggravation and notes that (p 2):

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

The report suggests a definition of sectarianism covering prejudice towards membership of:

- a Roman Catholic or Protestant denominational group, or of a social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation; or
- a group based on their Irish or British nationality (including citizenship) or ethnic or national origins^{ix}

[Lord Bracadale's report](#), published earlier the same year, also considers the issue of sectarianism.⁵ It does not recommend the creation of any new offence or statutory aggravation to tackle sectarianism, but refers (para 8.53) to the role of the working group:

“ The conclusions of the working group which has been appointed to consider whether and how sectarianism can be defined in law will provide Scottish Ministers and Parliament with the basis to debate how best to deal with offences of a sectarian nature in due course. That debate might include consideration of whether any such offences should be classed as a form of hate crime or treated as something distinct.”

The Bill does not include any specific provisions dealing with sectarianism. The policy memorandum (para 233) states that:

“ The Scottish Government consultation exercise and wider engagement with stakeholders found that there was no clear consensus on the benefits, or otherwise, of including specific protections for sectarianism in the new hate crime legislation, therefore provisions for a sectarianism statutory aggravation have not been included in this legislation. ”

ix It may be noted that the hate crime characteristic of race, as defined in the Bill, covers nationality (including citizenship) and ethnic or national origins.

Abolition of Blasphemy

The Bill seeks to abolish the common law offence of blasphemy, with the policy memorandum noting that it has "not been prosecuted in Scotland for more than 175 years" (para 6).

The Stair Memorial Encyclopaedia (criminal law para 455) provides the following description of the offence: ¹⁴

“ It is a crime at common law to publish or expose for sale blasphemous works which are intended to asperse, vilify, ridicule and bring into contempt the Holy Scriptures or the Christian religion.”

It goes on to say that:

“ The reason that blasphemy was criminal at common law was that the Christian religion and the Bible were said to be part of the law of the land and that accordingly any vilification of them was an infringement of the law. It follows that blasphemy protects only the predominant religion in Scotland and is not available to shield the sensitivities of other non-Christian faiths. As such, in a pluralistic society, it is open to criticism. Whether it is necessary in modern society must now be a moot point. In any event, it seems tolerably plain that a prosecution for blasphemy, were one ever to be mounted, could contravene article 10 of the European Convention on Human Rights.^x”

The Bill's policy memorandum (para 263) argues that:

“ Abolition would be in line with international thinking, and many other countries, including England and Wales, have already repealed their blasphemy laws. The current blasphemy laws are not used and are arguably inappropriate in a modern society. In addition, the continued retention of blasphemy laws in Scotland might be relied on by some other countries to justify retaining their own blasphemy laws in circumstances where they are used inappropriately to persecute individuals. ”

x Article 10 of the [European Convention on Human Rights](#) is considered earlier in this briefing.

Hate Crime Statistics

A report on the main findings of the [Scottish Crime and Justice Survey 2018-19](#),¹⁵ published in June of this year, notes that respondents who had experienced violent crime or harassment were asked if they believed this may have been motivated by a range of personal characteristics - including race, religion, gender/gender identity, disability, sexual orientation and age.

It states that most respondents did not think such characteristics were a motivating factor - 89% in relation to violent crime (p 43) and 61% in relation to harassment (p 135). The personal characteristics most frequently highlighted as being possible motivating factors for harassment were gender/gender identity (14%), race (12%) and age (8%).

Other sources of hate crime statistics include a number of annual publications. For example, [Hate Crime in Scotland 2019-20](#), published by the Crown Office & Procurator Fiscal Service (COPFS) in June 2020,¹⁶ provides information on the prosecution of:

- general offences coupled with the current hate crime aggravators (race, religion, disability, sexual orientation and transgender identity)
- specific hate crime offences currently covering race only

In relation to the aggravation of more general offences, it includes the following figures for the total number of charges with a relevant aggravator reported to the prosecution service in 2019-20:

- race - 1,830 (this figure does not include charges relating to the specific hate crime offences currently covering race only)
- sexual orientation - 1,486
- religion - 660
- disability - 387
- transgender identity - 41

Not all of the reported charges resulted in court proceedings. Information on the action taken is included in the publication.

In relation to specific hate crime offences currently covering race, [Hate Crime in Scotland](#) states that 1,208 charges were reported in 2019-20. The vast majority of these involved the racially aggravated harassment offences set out in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

The COPFS has advised that only five of the 1,208 charges in 2019-20 were concerned with offences of stirring up hatred or possessing inflammatory material under sections 18 to 23 of the Public Order Act 1986.^{xi} The picture for previous years is similar, with fewer than ten charges under the 1986 Act being reported during each of the years 2013-14 to 2018-19.

xi SPICe contact with the COPFS, August 2020.

[Criminal Proceedings in Scotland, 2018-19](#), published by the Scottish Government in March 2020, includes figures for people convicted with a hate crime aggravator recorded against the main charge.¹⁷ Table 12 provides the following figures for 2018-19:

- race - 629
- sexual orientation - 356
- religion - 204
- disability - 89
- transgender identity - 7

Table 13 indicates that the main offences associated with these aggravators were assault and breach of the peace (including related offences such as threatening or abusive behaviour).

Care should be taken if comparing COPFS figures with criminal proceedings data. Hate Crime in Scotland 2019-20 (p 15) highlights that:

“ there are differences in the way the Criminal Proceedings statistics measure activity in comparison to the figures in this report. In particular, this publication is based on charges reported, while the Criminal Proceedings figures are based on persons prosecuted or convicted, by main charge. One person can be reported with one or more charges against them. Additionally this publication is based on the year the charge was reported to COPFS. The Criminal Proceedings figures are based on the year of disposal. ”

More information on statistics is set out in some of the documents published along with the Bill. The policy memorandum (para 52) notes that:

“ it is widely accepted that hate crime is often not reported to the police. Under reporting of hate crime is a key issue and tackling the issues surrounding that remains a key priority for the Scottish Government, Police Scotland and COPFS. ”

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