

Scottish Government Hate Crime consultation

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EIS response

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Part One: Consolidating Hate Crime Legislation

Q1. Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?

Yes; this has been the model for some years now and appears to us to be reasonably well embedded and understood; whereas an entirely new model would need considerable investment in training, implementation etc. We believe that the current model is reasonably well used, despite general under-reporting of hate crimes. The model is a sound idea which communicates that prejudice towards certain oppressed groups can make some crimes worse because of the impact on whole communities, e.g. an attack motivated by racism on one BME individual making their wider community fearful.

Q2. 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 and ill will' to 'demonstrating hostility'?

Yes. This is easier to understand; it is plainer and more accessible language. Given that 10% of respondents to an STUC survey on Hate Crime were 'not sure' if they had experienced a hate crime at work it must be made easier for people to understand this legal framework.

Q3. Do you think changing the language of the thresholds for the statutory aggravations from 'evincing malice and ill will' to 'demonstrating hostility' would change how the thresholds are applied?

No comment

Q4. Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?

Yes. People with variations of sex characteristics (VSC) are not necessarily part of the trans umbrella and we understand that groups representing people with VSC would like their concerns to be articulated and addressed separately. We are not sure if there is demonstrable evidence of hateful attitudes towards VSC people, but for clarity they should be treated separately.

Q5. Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?

Yes. We would share the views of expert LGBT organisations on this matter.

Q6. 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 share the views of expert LGBT organisations on this matter.

Part Two: New Statutory Aggravations

Q7. Do you agree with Option A to develop a statutory aggravation for gender hostility?

No. International evidence suggests this would be poorly used and could create complacency. In legislatures where it has been introduced it has been barely used e.g. in New Jersey in the US where only four gender-bias crimes were recorded compared with over 3,500 race bias incidents, and over 2,500 religion bias incidents (Hodge, Gendered Hate, Northeastern University Press, 2011). In New Jersey, after gender had been part of the Hate Crime infrastructure for over ten years "investigators and prosecutor were reluctant to conceptualize gender-based offences as hate crimes, much less enforce the gender category within the bias crime statute". (Hodge). The Council of Europe also reports that there are few legal cases which deal with sexist hate speech. (CoE, Background note on sexist hate speech, 2016).

Pilot initiatives to record 'misogynistic hate crime' by police forces in England and Wales have had mixed results but early indications are that some of the developing practices risk women's safety. (Engender, Submission to Independent Review of Hate Crime Legislation).

A statutory aggravation for gender could undermine the understanding of violence against women that has been in use in Scotland over many years. Leading Scottish women's equality organisations such as Engender, Rape Crisis Scotland and Scottish Women's Aid do not support this model and we are minded to agree with their position. An aggravation model would suggest that crimes overwhelmingly experienced by women, perpetrated overwhelmingly by men, e.g. rape or domestic abuse may sometimes be motivated by hostility to women as a group but may sometimes not, which differs fundamentally from

the understanding of violence against women and girls that has developed in Scotland, that it is a product of women's inequality and of misogyny.

To develop such an aggravator would require the construction of a concept of 'gender hostility' that doesn't currently exist in Scotland and would not sit well alongside existing laws, initiatives and programmes.

In general, we dislike the use of the word gender where we assume that sex is actually meant, and note that sex is a protected characteristic in the Equality Act, not gender.

Q8. Do you agree with Option B to develop a standalone offence for misogynistic harassment?

Yes. This would be helpful. Misogyny is widespread in Scottish society but seldom tackled. Developing a standalone offence of this nature could be done in collaboration with gender bias experts in Scotland and could lead to a piece of very effective legislation being enacted (a similar process to the development of the Domestic Abuse (Scotland) Act 2018).

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

Increased efforts to tackle misogyny via non-legislative work should absolutely continue, at pace. The many workstreams under 'Equally Safe' can all play a part in changing cultures in workplaces, schools and wider society. However, this work, while necessary, will not be sufficient.

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. We would support options B and C.

Q11. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?

While we instinctively see the appeal of creating an age aggravator to mirror age being a protected characteristic in the Equality Act 2010, we do not necessarily believe that there is strong evidence that age discrimination, which is not uncommon in employment, translates into age-motivated hate crimes.

We believe that some crimes committed against older people may be motivated more by their vulnerability than by hatred of old people, and so would be covered by new provisions as discussed in relation to question 28. We are not aware of any crimes being targeted specifically at younger people because of hatred of young people as a group, or of evidence that young people are 'hated' in the same way as people from different racial backgrounds or LGBT people. However, it may be that organisations representing older or younger people have evidence of this and we would wish to review their evidence.

We are certainly aware of ageism as a phenomenon, which often affects our members, sometimes in combination with sexism, and would be interested in how this area develops.

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

No. We believe that the protections for race and religion are sufficient to tackle bigotry and unacceptable criminal behaviour. Defining sectarianism is extremely complex and would need to take account of the fact that sectarian attitudes are not only relevant to Christian communities but also to other faiths. We would not support the creation of new aspects of legislation if the driver was primarily to enable better recording of incidents.

Q13. 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?

N/A

Q14. If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation?

N/A

Q15. 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?

N/A

Q16. 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?

N/A

Q17. The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?

EIS policy on tackling sectarianism (Breaking Down the Barriers) states that we recognise the role education plays in combating sectarianism; and the opportunities available in the Curriculum for Excellence to tackle sectarianism and discrimination.

We continue to support a fully comprehensive non-denominational education system; and we believe that the Scottish Government could also challenge employment practices which can be perceived as discriminatory by all means possible; monitor closely the development of joint campus schools; and encourage churches and other faith communities to preach a strong anti-sectarian message and to work together in partnership across the diversity of faiths followed in Scotland. We would also encourage voluntary organisations, sports clubs, public bodies and businesses to include a commitment to non-sectarianism in their constitutions, mission statements and application forms.

We also seek continued efforts from both national and local government to eradicate poverty from Scottish society and to mitigate the effects of poverty on people's lives, and would suggest that such efforts would have a positive impact on reducing sectarianism, which although not confined to areas of deprivation, appears to be more prevalent in deprived communities. (For example, Scottish Social Attitudes data shows that those in deprived areas are more likely than those in affluent areas to think there is some anti-Protestant sentiment in Scotland).

Q18. Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?

No. As far as possible the Hate Crime legislation should mirror the Equality Act 2010 in terms of the groups who are offered protection, as these groups have historically experienced substantial disadvantage and discrimination, which is well evidenced.

Q19. 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.

Q20. 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?

No comment.

Q21. 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. This can be particularly relevant for people from BME backgrounds who are frequently 'misrecognised' e.g. Sikhs who are believed to be Muslim and who experience hate crime rooted in anti-Muslim prejudice. Similarly, assumptions can be made about e.g. patrons of LGBT friendly venues, or women or men who do not conform to rigid gender norms in terms of dress, hairstyle, etc. and are thus perceived by people with ideas about how men or women should behave to have a different sexual orientation than they do.

Q22. 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. This confers important protections on the family members, friends, colleagues etc. of people who are at risk of experiencing hate crime.

Part Three: New Stirring Up of Hatred Offences

Q23. 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. If one of the key purposes of Hate Crime legislation is to convey the message that hateful and prejudiced attitudes will not be tolerated in modern Scotland then it will be important for efforts to be made to quell these attitudes even where they do not result in a specific offence against an individual person and where they place communities in fear.

Q24. 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, this seems appropriate.

Q25. 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.

Q26. 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?)

Freedom of expression needs some protection, but this should never mean freedom to cause harm to people, and to express hateful views. This work will need to be carefully constructed and should be done in collaboration with people most affected by hate speech e.g. people from minority ethnic communities, disabled people and LGBT people. ‘Freedom of speech’ can too often be used by bigoted groups to promote speech which puts people at risk if real harms. We note that the Article 10 Convention right to freedom of expression is already limited by duties and responsibilities.

Q27. Do you agree with Lord Bracadale’s recommendation that no specific legislative change is necessary with respect to online conduct?

*No. Online spaces are particularly toxic and regulation has not kept pace with this. The targeted harassment of Black and Minority Ethnic (BME) women in public life, for example, is particularly significant. For example, a study by the Guardian newspaper of comments on their website articles found that of its ten regular writers who received the most abuse, eight were women (four white and four BME women) and two were BME men. The ten regular writers who received the least abuse were all men.
(<https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>).*

Also, we do not support the creation of a gender aggravator as per the discussion at Q7 above, which Lord Bracadale has argued would help to tackle this problem. Regulation of online spaces could however form part of the planning for a standalone offence on misogyny, which we would support, to

ensure that such offences could be prosecuted whether conducted offline or online.

Part Four: Exploitation and Vulnerability

Q28. 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?

Disabled people in particular are often exploited when they are vulnerable. e.g. people with epilepsy or other neurological conditions who can be robbed when unconscious, people with learning disabilities or dementia who can be exploited financially, etc. However, they would be protected by a disability provision, so on balance we think that more efforts should be made to use existing aggravators to protect people with vulnerabilities. Also, we suggest that exploiting the vulnerability of a victim is not conceptually the same as perpetrating a crime against someone based on prejudice towards the victim because of their characteristics such as their race or sexual orientation. Other schemes which seek to protect vulnerable groups should be supported but hate crime is the wrong rubric for addressing exploitation of vulnerable people.

Q29. 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?

As above.

Part Five: Other Issues

Q30. Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed? (Please provide details in the comments box.)

No. We would view this as a misstep, which might be interpreted by members of Scotland's BME communities and by potential offenders as meaning that racist hate crime does not matter. Racist hate crime is the most commonly charged in Scotland, with racially aggravated crimes comprising 61% of all hate crimes. However, the overall number of charges remains similar to those pursued in 2003, which we find concerning in the current climate.

A significant minority of the Scottish population hold negative attitudes towards diversity: the Scottish Social Attitudes survey has found that a third of people in Scotland (33%) said that they would rather live in an area 'where most people are similar to you', and fewer than half (40%) agreed that 'people from outside Britain who come to live in Scotland make the country a better

place'. There has been increasingly hostile and Islamophobic media coverage of world events such as the refugee crisis: the European Commission against Racism and Intolerance (ECRI) has raised concerns about some British media outlets, particularly tabloid newspapers, using "offensive, discriminatory and provocative terminology" and says that it considers that "hate speech in some traditional [UK] media continues to be a serious problem"

Racist and extremist views have been more prominent in political discourse, associated with e.g. the Trump administration and the 'Brexit' referendum. The ECRI has highlighted this issue, saying, "There continues to be considerable intolerant political discourse" which it links to "an increase in xenophobic sentiments". It reports that "Muslims are similarly portrayed in a negative light by certain politicians and as a result of some government policies" and raises concern about the tenor of discourse on Traveller communities.

In this climate we would have expected reporting of racially aggravated crimes to have increased; the fact that the number of charges is broadly static is concerning and suggestive of under-reporting and under-utilisation by protected groups of the justice system.

If efforts to tackle racist hate crime are subsumed within a consolidated piece of legislation we believe that the focus on racism may be lost.

S50A is heavily relied on by prosecutors, and it resulted in more convictions in 2016/17 (626) than s38 with a racial aggravator (433).

We support the creation of a standalone offence on misogyny. We think therefore that it is important to preserve the existing standalone offence of racially aggravated harassment, to show that racism is considered by the justice system to be just as harmful as misogyny. In general, the experience of consolidating equality law has led to a less sharp focus on the needs and experiences of particular groups, and we would be concerned about consolidating hate crime law on that basis.

Q31. What do you think the impact of repealing section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?

As discussed above, we believe the impacts could be:

- the unintended consequence of signalling that tackling racism is less of a priority now than in the past*
- the unintended consequence of creating a hierarchy of oppression, if a standalone misogyny offence is created whilst this is repealed*
- capturing fewer expressions of racist behaviour within the criminal law and thus creating a gap in legal protection*
- repealing a provision which is widely used, to the detriment of BME people in Scotland*
- a less sharp focus on racism.*

Q32. 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? (This would mean that Lord Bracadale’s recommendation on sentencing would not be taken forward.)

Yes. This could have a deterrent effect. The additionality is likely to be reported in the media where it is significant. This will show communities who are targeted that the legal system recognises this is unacceptable; and will show potential offenders that prejudicial attitudes, where translated into harmful criminal behaviour, will be taken seriously by the justice system.

Q33. Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?

No comment.

Q34. 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?

No comment.

Q35. What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?

We would encourage the Scottish Government to continue with non-legislative programmes to bring about change to Scottish society, as legislation tends to be remote from people’s lives, with many people, including those who regularly experience hate crime, feeling that the legal system is not relevant to them or not accessible. Non-legislative efforts to tackle prejudice and discrimination and to celebrate diversity and inclusion are important and should be sustained.