



Independent Review of Hate Crime Legislation in Scotland

Response to consultation from **Scottish Council of Jewish Communities (SCoJeC)** **jointly with Glasgow Jewish Representative Council**

The Scottish Council of Jewish Communities (SCoJeC) is the democratic representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families outwith any Jewish community, and works in partnership with other organisations and communities to promote equality, good relations, and understanding.

The Glasgow Jewish Representative Council speaks on behalf of the Jewish Community of Glasgow and the surrounding area, and provides a democratic forum for organisations within the community.

We have consulted among members of the Jewish community in preparing this response.

Questionnaire

Chapter 1 – hate crime: definition and justification

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

The "working definition" refers only to "hate or prejudice against the victim because of their" own characteristics. This should be broadened to include 3 other situations explicitly:

- (a) where the victim is perceived or believed by the perpetrator to have a protected characteristic, but in fact does not;
- (b) where the victim is associated with people with a protected characteristic (such as being a family member or carer);
- (c) where the victim has some other characteristic that correlates or is associated with a protected characteristic (as discussed in only one context in Chapter 4).

There could be merit in adopting some of the language of the Equality Act 2010, for example regarding indirect and secondary discrimination, not least because there is already well-developed case law.

An example that engages all of the above considerations is of someone who is not Jewish, but is coming out of a kosher food shop, and is attacked by someone shouting "This is for the Palestinians" – that is clearly a hate crime as it is motivated by the perpetrator's hatred of an identifiable group, albeit that some (if not all) of his or her beliefs are factually incorrect.

It may be also be preferable to refer, as the working definition does, to "selection of the victim on the basis of a particular feature", in general, rather than to have a closed list of "protected characteristics", as this would take account of future changes in society without the need for explicit amending legislation.

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

This question is clearly closely linked to the previous. Hate crimes may be motivated by prejudices which the perpetrator may not actively understand, and tensions and misunderstandings may arise through unperceived or institutional bias. It is very important to listen to communities and review research evidence about such crimes in order to avoid drawing the boundaries incorrectly – it is just as important to avoid including crimes not motivated by hate as it is to ensure that all hate crimes are brought into this category.

It is difficult to balance the concerns of victims of "hate incidents" that are not classified as crimes with the rights of those who might be wrongly accused. In some cases better explanation about the reason for not prosecuting, and information about recording etc, might suffice, but there is a danger that that may heighten the victim's

anxiety about being vulnerable to a repetition. Adopting different vocabulary might assist, but this is a difficult area and merits further separate study.

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

Separate hate crime legislation is important both to signal that society at large will not tolerate certain kinds of behaviour. Put briefly, whilst all crime can have serious consequences for the victim, hate crimes can be profoundly affecting on the victim and their whole community. This is especially relevant at times of tension against a community if it is perceived that crimes against that community are not being treated as seriously as they should be – it is divisive – and damaging to social cohesion as a whole. We have seen this, for example, with reported failures to act upon hate crimes committed in England.

Hate crime is different from other crime for a number of reasons:

- it is motivated by hostility to an aspect of the victim's identity, something over which the victim has no control;
- associated with that, it may involve generalising or stereotyping, by holding all members of the group responsible for the actions of a few;
- and because it has far wider destabilising effects on entire communities, since as the ACPOS Hate Crime Manual noted, "fear of hate crime escalates dramatically amongst those who share with the immediate victim the same group identity that made the victim a target".

The final paragraph on p.7 was disturbing. A crime motivated by a hate fuelled opinion ought to be punished as such. For it to be considered that such crime is part of free speech is itself worrying and divisive.

Chapter 4 – statutory aggravations

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

There is a strong case for simplifying and consolidating all relevant legislation, including regarding sentencing, because there is too often a feeling that although there is a consensus in society that some conduct is wrong, it is not clear under what label to prosecute. Consolidated legislation and general definitions would also help ensure uniformity across the protected characteristics – for example with regard to harassment – and help avoid any one group feeling either ignored or targeted or the creation of a "hierarchy of inequality".

Consequently, the appropriate way forward is not piecemeal repeal, but consolidation in the context of legislation resulting from this review.

Do you consider that the current Scottish thresholds are appropriate? Please give reasons for your answer.

The requirement for malice or ill-will to be manifested “immediately” before or after the offence may be too restrictive, for example if the perpetrator seeks to defend his or her conduct some time later in social media posts.

Should "evincing malice and ill-will" be replaced by a more accessible form of words? If so, please give examples of what might be appropriate.

For legal purposes, the terminology needs to be precise, accurate, and not open to misinterpretation. Research will show whether terminology used in other jurisdiction is less prone to challenge. However, although the language appears old fashioned, there is always a danger that redefining a well used legal terminology will bring fresh challenges which will create an unknown.

There is a separate concern about public understanding: the law needs to be clear both in order to deter potential perpetrators and to encourage victims to report their experiences, both of which are more difficult for people not used to legal terminology and especially those for whom English is not their first language. This needs to be addressed, if not by the legislation itself, then by appropriate public information campaigns.

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

Yes. As noted above, there is precedent in the Equality Act for indirect discrimination or harassment, and for discrimination or harassment by association. It would be absurd if discrimination were unlawful but not more serious offences such as assault or public disorder when motivated by the same prejudice.

The aggravation should of course apply, as at the end of the day the victim has been selected because of his or her racial or religious group – whether or not they themselves identify with the political reasoning assumed by the perpetrator. An interesting parallel is with discrimination, the test being what is in the mind of the perpetrator.

The full consultation paper refers to the internationally accepted definition of antisemitism, with which we agree – not all anti-Israel activity is inherently antisemitic, but much of it is: for example when subjecting Israel to criticism not applied to other nations it is a form of discrimination; and when targeting Jewish people or institutions without regard to their actual views about Israel, it is a form of stereotyping.

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

As stated above, hate crime legislation is important for society to signal its abhorrence of prejudice and hatred against identifiable groups. Thus, if the test is whether conduct is motivated by malice or ill-will against a group, then malice or ill-will against an individual does not meet that test, and ought not to be classed as a hate crime, or aggravated by hatred, although it may well be an offence under other legislation.

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

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

Since, as stated in the document, conduct only requires to be motivated in part by malice or ill-will, conduct motivated by hatred of more than one group manifested in the same individual should be regarded as doubly aggravated rather than less so.

We are aware of difficulties of classifying antisemitic hate crime as either racially or religiously aggravated (or both). That may depend upon the facts – e.g. what insults the perpetrator was shouting at the time – but it may also result from the presuppositions of the officer recording the crime. In either event, this impedes understanding of the nature and extent of antisemitism, and the same is likely to be true of hate crime against other protected characteristics.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

Absolutely! We are aware that antisemitic hate crime is sometimes recorded as racially aggravated and sometimes as religiously aggravated. Although there may sometimes be factors to justify this (e.g. what the perpetrator said at the time) this is unhelpful for collecting statistics and so identifying trends. All relevant detail should be recorded.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

Yes. This too is useful for statistical purposes, as well as, so to speak, quantifying society's disapproval, and it also prevents the accused from minimising or ignoring the hate-related motivation of the offence.

Chapter 5 – standalone offence: racially-aggravated harassment and conduct

Is this provision necessary? Please give reasons for your answer.

Yes. There may be conduct that by itself is merely unpleasant, but when repeated constitutes a "course of conduct" that evidence may show to be motivated by hatred, malice, or ill-will.

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

Yes. All 'Protected Characteristics' should be protected in the same way. It is hard to see why stand-alone evidence can be used for race crimes but not for religious or other hate crimes as the effect on the victim and the community may be equally serious.

Chapter 6 – stirring up hatred and online hate crime

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

If conduct motivated by hatred is illegal, then it follows that it should be illegal to incite such hatred.

Stirring up hatred online is an increasingly severe threat and a big worry to much of the community. It can lead to great harm, to exacerbating background prejudice, to actual physical threat or attack, and to increased hate crime. It leads to division and the marginalisation of targeted communities. When it appears – especially when it is anonymous – communities may be powerless against it, and it can spread quickly, which further exacerbates the harm.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

Most human rights are not absolute, and the right to free speech most certainly is not absolute when it is contrary to the rights and well-being of others. Proportionality as ever is the key, and legislation could give guidance on how to achieve a proportionate balance.

There is a clear distinction between rational argument and rabble-rousing. Context, demeanour, vocabulary, and previous conduct all contribute to making that judgement. It should be possible to frame legislation that captures deliberate "stirring up", without also criminalising rational discussion or even humour.

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

The question here may not be one of whether the current law is well enough equipped to deal with on-line hate (which it may be) but whether tackling it is well enough supported and resourced.

Many members of the Jewish Community have experienced antisemitism online specifically directed at us. For many of us, it was our first real experience of antisemitism. Much is hidden in Scotland in day to day 'real' life, but can be very easily found on the internet. That it is there is thoroughly dispiriting, and that is likely to be the same for many communities in Scotland.

The main concern is not with the law, but with the difficulty of gathering evidence that meets the required criminal standard of proof, in particular about the identity of the perpetrator. Consideration should therefore be given to ways of addressing this: for example people are not permitted to drive cars or buy guns anonymously, so if social media are being used as a weapon, they should be subject to similar controls to ensure owners and users can be identified. In addition, consideration should be given to requiring minors to have the approval of a parent, guardian, or other responsible adult when opening an account.

In addition, statute could create a legal presumption that messages were sent by the owner of the computer or other device, or by the registered owner of the e-mail or social media account, from which they were sent, unless he or she is able to prove otherwise.

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

Any conduct that would not be permitted face-to-face should not be permitted on-line.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

Both as appropriate. People are not permitted to drive cars or buy guns anonymously, so if social media are used as a weapon, they should be subject to similar controls.

Chapter 7 – offensive behaviour at football

How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?

We would refer you to our response to the consultation by the Scottish Parliament's Justice Committee on James Kelly's proposed repeal Bill:
http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR075-SCoJeC.pdf
(original at
https://www.scojec.org/consultations/2017/17viii_offensive_behaviour_etc_repeal_bill.pdf)

Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all? If so, what kind of behaviour should be criminalised?

Deliberately offensive or intimidating conduct should be illegal in any context.

Does equivalent behaviour exist in a non-football context?

If so, should it be subject to the same criminal law provisions? Please give reasons for your answer.

Yes. Similar conduct should be proscribed in other contexts, and with regard to other protected characteristics, and for exactly the same reasons – people deserve to be able to go about their ordinary lawful business without being intimidated.

Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? Please give reasons for your answer.

Yes; and not only in the context of football.

Should a similar provision apply to non-football related hate crime? Please give reasons for your answer.

Yes. See above, and in particular section 4 of our response at the above link.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

It is not merely the disorder but the effect on the victim's well-being, mental health, etc that is of concern. In general (and not only in the context of football), it is reasonable to seek to prevent offensive behaviour or public disorder, and not only to deal with the perpetrators after the event. The law should therefore provide a clear objective test for conduct likely to have such results in all contexts, in order to enable the police to act in a timely manner to prevent it.

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

[This question appears in the full consultation document only– please refer to that document if you wish to respond]

That appears to be the consensus of the legal community, and in particular the Crown Office (who must be regarded as the experts on what can be prosecuted) in their responses to the consultation on James Kelly's Bill to repeal the Act.

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

It seems not unreasonable that a club (or analogous body in other contexts), which is best placed to know its own members, should be able to take pre-emptive action to prevent harm.

Chapter 8 – should the law be extended to other groups?

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

Where bullying online related to prejudice occurs, there should be appropriate mechanisms to tackle it. Working with the Scottish Government to clarify when bullying behaviour is a hate crime – such as when it is related to prejudice – would

be valuable, especially as it would be an opportunity to set children on a better path.

Adoption of definitions analogous to that in the Prevention of Harassment Act (for England and Wales as well as Scotland) may assist.

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

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

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

As noted above, it may be preferable to refer, as the working definition does, to "selection of the victim on the basis of a particular feature", in general, rather than to list "protected characteristics", as this would take account of future changes in society without the need for explicit amending legislation.

Chapter 9 – other specific issues

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

Under reporting is historically an issue for the Jewish community, either because people do not wish to stand out or be seen to be making a fuss, or because they regard antisemitism as a fact of life, or they do not believe it will be taken seriously, or (as with online hate) they do not believe it will be possible to do anything about it.

There is clearly a need to encourage the victims of even co-called "low-level" hate crime to report it, since what may seem low-level on an absolute scale may be devastating, and potentially life-changing, for a vulnerable victim. How that can be assisted by legislation is not clear, but it is important that the issue is noted so that it can be addressed.

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

If so, in what circumstances should restriction be permissible?

It is not clear that the identification of the victim serves any purpose in terms of the openness and transparency of the legal system, and indeed it may result in the victim or any witness being subjected to further abuse, especially in social media.

Simply the fear of being further victimised is likely to discourage reporting, so anonymity should be the norm.

Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime?

If so, how might the current scheme be improved?

Yes, although the system is not working as well as intended, and there is anecdotal evidence that reporting can actually be discouraged in small communities because victims do not want other members of the community to know their business.

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

Yes, but consideration should be given to whether conditions could be attached to penalties etc when appropriate, for example either to require the perpetrator to undertake work with the group against whom the offence was committed, or to bar him or her from working with groups who might be persuaded by his or her ideology.

Restorative justice is a laudable concept in theory, but in the arena of hate crime may not yield the positive outcomes desired. This would be very much dependent upon circumstances – much hate crime is based upon misconceptions and misinformation about the targeted group, and exploration of diversion including education may overall be useful, but it would be important to avoid undermining the complainer's faith in the justice system or denying them an impression that their complaint has been dealt with appropriately and justice served.

However one would not normally expect a rape victim to face the rapist because of concerns about reviving and exacerbating the trauma; the same is true of the victim of a hate crime. We are aware of cases in which university authorities have attempted to do this instead of taking decisive and demonstrative disciplinary action, and have thereby caused so much distress that the victim abandoned her studies.

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

Yes – to ensure consistency and signal the seriousness of such crimes and the devastating effect they have on individuals and communities.