

One Scotland: Hate Has No Home Here

Response from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities (SCoJeC) is the 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 other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community.

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 **No** **Unsure**

The statutory aggravation is an effective means by which to indicate the increased gravity of an offence motivated by hatred. This sends a strong message that society at large will not tolerate certain kinds of behaviour, provides reassurance to victims and those who share relevant protected characteristics, and sends a strong message to perpetrators that hate crime will be severely dealt with.

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 **No** **Unsure**

For legal purposes, the terminology needs to be precise, accurate, and not open to misinterpretation. 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. Furthermore, the terms are not equivalent. “Malice” is much stronger than “hostility”, and implies an active intention to cause harm rather than only a negative attitude, so, as implied by the next question, changing the terminology would also change the threshold.

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 legislation itself, then by appropriate public information campaigns.

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?

Yes No Unsure

It is difficult entirely to divorce the everyday use of words from a different and specific meaning in a particular context, and we do not feel confident that the public, police, and courts would be able entirely to set aside the common meaning of “demonstrating hostility” in favour of a new legal definition. If the threshold is to change – and we do not believe that it should – that should be done by other means than the casual ‘updating’ of language.

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

Yes No Unsure

We do not wish to comment on this question.

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

Yes No Unsure

We do not wish to comment on the substantive question. However, as we have already stated, there should be clarity as to whether any change is simply to employ more up-to-date terminology or whether it would also result in a change to the threshold. If the threshold is to change, that should be done by other means than the casual updating of language.

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 do not wish to comment on this question.

Part Two: New Statutory Aggravations

It is important that all groups in society are able to feel safe as they go about their daily business, and we therefore recommend that, in order to prevent a hierarchy of (in)equality, all protected characteristics should be equally protected by the use of statutory aggravations. Since, however, changes in societal attitudes will affect those characteristics regarded as deserving of protection, we recommend that these should not be named in primary legislation but should be separately listed, and therefore able

to be amended by statutory instrument. Alternatively, there may be no need for a list at all since the legislation could identify the aggravation in completely general terms as malice against any identifiable group.

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

Yes No Unsure

As stated above, we believe that all protected characteristics, including gender, should be covered by a statutory aggravation.

Q8. Do you agree with Option B to develop a standalone offence for misogynistic harassment? (If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.)

Yes No Unsure

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

Yes No Unsure

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)? (If you agree, please tell us why.) (Please provide examples of the types of behaviour that could be captured by the standalone offence.)

Yes No Unsure

We support a combination of Options A and C, the development of a statutory aggravation together with a range of non-legislative, primarily educational, initiatives.

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

Yes No Unsure

As stated above, we believe that all protected characteristics, including age, should be covered by a statutory aggravation.

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

Yes No Unsure

Sectarianism should indeed be specifically addressed, and a clear and accepted definition would be helpful in terms of education, and understanding the issues involved.

Sectarianism should not, however, be differently addressed from other hate crimes as this would create an unreasonable and unfair hierarchy of protection. Sectarianism is

one form of hate crime, and should be dealt with in the same way as other hate crimes by a statutory aggravation.

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?

Yes No Unsure

As stated above, we believe that all protected characteristics, including religious hatred, of which sectarianism is one manifestation, should be covered by a statutory aggravation.

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?

Yes No Unsure

As stated above, we believe that the proposed new legislation is an opportunity to ensure that all protected characteristics, including sectarianism, receive equal protection.

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?

Yes No Unsure

We do not agree with the Working Group definition since this is both narrow and restrictive. In particular we do not agree that sectarianism is only “religious antipathy based on perceived Christian denominational affiliation” or that “sectarianism should be limited to sectarianism rooted in religious hostilities and rivalries within Christianity”. Sectarianism relates to intra-religious hostility, and while its main manifestation in Scotland undoubtedly relates to Christianity, we would highlight the 2016 murder in Glasgow of Asad Shah, an Ahmadi Muslim, by Tanveer Ahmed, a Sunni Muslim, who avowedly carried out the crime on sectarian grounds. To define sectarianism only in terms of Christianity would leave members of particular branches of other religions excluded and vulnerable.

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?

Sectarianism should be defined to include all intra-religious hatreds. While a definition will be helpful in terms of educating about particular religious hatreds, it should be unnecessary in legislative terms since the legislation should be drawn up in a way that encompasses all crimes motivated by malice and ill-will to any recognisable group in society, including separate branches of individual religions.

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?

We agree that legislation cannot provide the whole solution to sectarianism or any other form of hate crime, and we emphasise the importance of educational initiatives, and interfaith and inter-communal activities in demystifying ‘the other’, promoting the development of good relations between communities, and enabling people to appreciate the lives and fears of people throughout Scotland’s diverse communities.

However, in order to be effective, It is essential that all information is accurate and appropriate, and we would therefore emphasise that all teaching materials must be referred to the relevant community for checking. This is simply a matter of respect, but also when it is not done, as we know from experience, errors can often be incorporated which may result in an inaccurate, and possibly even a negative impression of the community concerned.

When this does not take place errors may frequently be incorporated which may result in an inaccurate, and possibly even a negative impression of the community concerned.

On occasion, there may also be a value in restorative justice measures. However, while a laudable concept in theory, in the arena of hate crime it may not always yield the positive outcomes desired. This would be very much dependent upon circumstances. It may, for example, be worth considering whether conditions could be attached to penalties 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.

However just as 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. Furthermore, it is important to avoid undermining the victim’s faith in the justice system – as well as the faith of all those who share relevant characteristics with the victim – or denying them an impression that their case has been dealt with appropriately and justice served.

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

Yes No Unsure

Hostility towards “political entities” should not be regarded as a hate crime. Attacks on individuals on account of their association or perceived association with such groups should be covered by a statutory aggravation.

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)?

Yes No Unsure

Malice and ill-will against any person or group of people on account of their association or perceived association with a group should be covered by a statutory aggravation. As we have already stated, if the legislation is framed in general terms, there may be no need for any list of protected groups. Alternatively a list could be specified by

statutory instrument so as to be easily amendable according to the emergence of new vulnerable groups and changes in societal attitudes. We urge that no list should be included in the primary legislation since this would set in stone those groups benefitting from protection while leaving the members of other groups permanently – or at least in the long term – vulnerable to attack, possibly even regarded as a ‘safe target’ since no statutory aggravation would apply.

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?

Yes No Unsure

By definition, hate crime is motivated by malice or ill-will towards a particular group, not an individual.

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 No Unsure

We strongly support the application of statutory aggravations where people are presumed to have multiple protected characteristics. If this were not to be the case, there would be irrational loopholes in the legislation; for example, an attack accompanied by abuse of a person’s actual or perceived disability would be covered, as would an attack accompanied by abuse of a person’s actual or perceived faith. But an attack accompanied by abuse of the victim as a disabled member of a particular faith community would not be covered. This is clearly illogical and unacceptable.

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 No Unsure

There is ample evidence that people may be targeted for their association, or perceived association with people who have or are perceived to have protected characteristics. We therefore strongly agree that the statutory aggravations should apply not only when the victim is a member of the targeted group, but also when he or she is in any way associated with the relevant group.

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 No Unsure

We agree with the recommendation that stirring up or inciting hatred should be an offence. In particular this would be likely to limit incitement that masquerades as political discourse, for example, comments that incite hatred against Muslims while claiming only to criticise Islamist terrorism, or that incite hatred against Jewish people under the pretence of only criticising the actions of the Israeli government. If a new offence is introduced it should apply equally to all protected groups in order not to cause a hierarchy of protection.

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 No Unsure

As we have stated above, some incitement may be careful to avoid overt threats or abuse, stirring up hatred of the relevant group by more sophisticated and pernicious means. We do not, therefore, believe that the threat or abuse should require to be overt in order to meet the threshold. We suggest, rather, that the test should be whether a reasonable person would regard the speech or conduct as intended or likely to incite hatred.

Wherever the threshold is, however, set, it should be the same for all protected groups in order not to result in a hierarchy of protection.

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 No Unsure

As we have stated above, the threshold should be the same for all protected characteristics.

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?)

Yes No Unsure

Yes, but limited.

As recognised by the European Convention of Human Rights, freedom of expression is not an absolute right but must be qualified “as necessary in a democratic society” for, amongst other things, “for the protection of the reputation or rights 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" or incitement, without also criminalising rational discussion or even humour.

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

Yes No Unsure

Successive Ministers, including the Lord Advocate, have stated categorically that conduct that is not to be tolerated on the street should not be tolerated online. Whether or not legislative change is needed, a change in attitude by police and prosecutors definitely is in order to bring this about.

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?

Yes No Unsure

As we have already stated, hate crime is targeted against an individual on account of their belonging, or perceived belonging to or association with, a particular group. The introduction of a statutory aggravation relating to personal vulnerability is a completely separate issue, and should be considered separately from hate crime legislation.

The definition of personal vulnerability has proved difficult in relation to previous legislation. For example, the Protection of Vulnerable Groups (Scotland) Act 2007 refers to "protected" rather than "vulnerable" individuals as a result of representations made by people who might otherwise have been regarded as being vulnerable to exploitation or abuse, and similarly defines relevant situations and contexts rather than personal attributes that might result in increased vulnerability.

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?

Exploitation or abuse by someone in a position of trust and/or power in relation to the victim.

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?

Yes No Unsure

We agree that this legislation should be repealed in order to bring all provisions relating to hate crime together in a single piece of legislation, thereby making it clearer and more accessible to victims, perpetrators, and all those engaged in law enforcement, and also to ensure equal protection for all protected characteristics. However, the threshold should be set at least at the highest existing point in order to level up rather than down. In particular, the retention of "course of conduct" is important in order to

ensure that the perpetrator of a series of individual incidents that individually do not reach the threshold of criminality is not able to evade justice.

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?

In positive terms, this would facilitate a level playing field in which the same thresholds and sentencing implications apply to all types of hate crime.

We would be concerned were the test of “alarm or distress” to be replaced by “fear and alarm”, but, as we have already said, the new legislation should level up, giving the greatest possible protection to victims, and we would, therefore, recommend that “alarm or distress” should be the relevant test for all types of hate crime.

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 No Unsure

The fact that a statutory aggravation had been taken into account in sentencing should be stated in open court since this emphasises the gravity of the offence, and thereby provides additional reassurance for the victim and those who share the relevant characteristics. We do not believe it is necessary for the statement to include precise details of what the sentence would otherwise have been, and by how much it has been increased.

We strongly recommend that protocols should be developed to facilitate accurate and consistent recording of the statutory aggravation. We are, for example, 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.

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

Yes No Unsure

Victim support is a very important issue, particularly in relation to hate crime since the fear engendered by the crime will, by definition, extend to the wider group that shares relevant characteristics with the victim. It therefore requires detailed and separate consideration rather than being only an afterthought to hate crime legislation.

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?

Yes No Unsure

Restorative justice measures may be very valuable especially when these challenge the perpetrator's prejudices against particular groups. However, as we have already stated, we are concerned that it may sometimes revive and exacerbate the trauma already suffered by the victim, and it therefore requires detailed and separate consideration.

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

Hate crime legislation is important for society to signal its abhorrence of prejudice and hatred against identifiable groups. There is, however, 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".

If, as we have suggested above, the legislation is framed in general terms, it will not be necessary to include all applications on the face of the Bill. Listing protected groups separately in secondary legislation would facilitate the addition of groups that may not have been considered at the outset. Even more simply, the legislation could simply be framed so as to apply to any recognisable group as this would take account of future changes in society without the need for explicit amending even secondary legislation.

Similarly, if, as we strongly recommend, all measures are equally applicable to all groups, thus providing them all with equal protection before the law, it will not be necessary to complicate the legislation with exceptions or special provisions.