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# Expert Response to One Scotland Consultation on Amending Scottish Hate Crime Legislation

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## Questionnaire

Respondents should take into consideration the information provided in this document alongside any other knowledge or personal experiences that could be relevant. All opinions are welcome.

We ask that you try to answer all the questions in each section, however, if you are unable to answer any question then please feel free to move on to the next.

There is a comments box below each question to allow you to set out your reasoning and provide general comments

### 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?  
(Please tell us why in the comments box.)**

- Yes
- No
- No Opinion

Comments

**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'?  
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**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?  
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q4. Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?  
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q5. Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?  
(Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Comments

**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?**

Comments

## Part Two: New Statutory Aggravations

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

**(Please provide details in the comments box below.)**

- Yes
- No
- Unsure

### Comments

A statutory aggravation based on gender hostility should be introduced. However, it must be recognised that a standalone aggravation is unlikely to 'fit' within the current hate crime statutory framework because there must be a protected characteristic enshrined in the law first. Therefore, we advocate for the introduction of gender as a protected characteristic in order to allow for a statutory aggravation to also be developed. This could follow the model introduced for disability, sexual orientation or transgender identity in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. The suggestion that a statutory aggravation be introduced is one we support but in its present form we find it to be likely to be unworkable as a prosecutable offence for the reason outlined above.

**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

**Comments**

We are supportive of the notion that misogynistic behaviour reaching the criminal threshold for prosecution *could* form the basis of a standalone offence, but in the current proposed form is problematic. There is no current legal definition of what can be defined as misogyny / misogynistic behaviour. Outside of the legal context, different groups regard different behaviours as amounting to misogyny. As such, Option B needs to be further thought through. We would prefer to see Option A in a revised form so that a statutory aggravation can be recorded on the basis of gender hostility where gender is embedded as a protected characteristic. It ought to be emphasised that Option B alone is not a viable alternative to Option A. Option A possibly captures a much broader spread of behaviours and can be applied to a much wider range of underlying offences. In the long-term Option B - if given due scrutiny - can be seen as a complimentary legislative step to Option A which should be a priority in the context of hate crime law reform. The offence of misogynistic harassment may – or may not – capture manifestations of online misogyny or online misogynistic harassment as it would then be called (see below at Question 27 – Online Conduct).

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

**(If you agree please tell us why.)**

- Yes
- No
- Unsure

**Comments**

The Equally Safe strategy draws on more general points and wider social strategies regarding combatting violence against women. As such, it is difficult to view Equally Safe as having any direct, tangible impact on the legislative options presented in the current consultation. However, we do see contributions building on Equally Safe if certain forms of violence against women are addressed within the hate crime framework. It is a significant non-legislative strategy and undoubtedly could have a role to play in developing a multi-faceted, holistic approach to pernicious harms caused by hate crime where that hate is a manifestation of violence against women.

**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

Comments

As noted in our answer to Question 8, we perceive a revised – as suggested in our answer to Question 7 – Option A as the best way forward.

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

**(Please provide details in the comments box below.)**

- Yes
- No
- Unsure

Comments

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

**(Please give your reasons for your response.)**

- Yes
- No (you may wish to go to question 15)
- Unsure

Comments

**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?**

**(Please give your reasons for your response.)**

- Yes
- No (you may wish to go to question 16)
- Unsure

Comments

**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?  
(Please give your reason for this.)**

- Yes
- No
- Unsure

Comments

**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?  
(Please give your reason for this.)**

- Yes
- No
- Unsure

Comments

**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?  
(Please give your reason for this.)**

Comments

**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?**

Comments

**Q18. Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?  
(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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)?  
(Please provide details in the comments box.)**

- Yes
- No
- No Opinion

Comments

**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?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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).**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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)?**

**(Please tell us why?)**

- Yes
- No
- Unsure

Comments

## 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?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

### Comments

We are of the view that there should be no hierarchy within the protected characteristics. The stirring up offences ought to be applied equally to *all* protected characteristics. The categories of protected characteristics operate in recognition of the fact that there are particular vulnerabilities attached to groups of people with certain features. Whilst there are historical and social reasons for the existing hierarchy, the only way to equalise this is to ensure that the stirring up offences are extended to cover all protected characteristics.

**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

### Comments

**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’.)**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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?)**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

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

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

## Comments

We are of the view that legislative change is essential in respect of online conduct, particularly where it concerns instances of gender-based online abuse, and / or gender-based hostility online.

“Discussions of provisions designed to tackle threats, abusive behaviour, harassment, and stalking have shown that much of the existing legislation is not suited to dealing with social media abuse. In addition, where some provisions could be suited to doing so, barriers are in place to prevent this being effective. Having only two provisions – both of which have very high evidential thresholds and both of which frequently see cases fail to meet the public interest test for prosecution – is an indicator that social media abuse gets only scant attention from the justice system. The attitude towards prosecutions, in particular from the CPS, is suggestive of social media problems being dismissed – even in 2018 – as trivial or frivolous. Finally, all of this leads to a lack of cohesion – and ultimately, something of a dismissive attitude towards pernicious harms disregarded by evidential and prosecutorial thresholds that are too high to satisfy.” (K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge 2019) pp74-75).

Gender-based hostility can occur both online and offline. Both of these forms should be recognised within the legislative sphere. Considerations of legislative reform of hateful conduct online should include misogyny (despite its definitional difficulties) but on the basis of additions to the categories of protected characteristics (see comment to Question 7 above).

In addition, the following points need to be considered:

- Existing legislation (both UK-wide and Scotland-specific) does not define the term ‘online hate’ nor it is clarified in common law.
- The dichotomy between offline and online violence needs to be challenged, especially in the context of online hate. Very often hate starts online, and translates into acts of violence committed offline, resulting not only in multiple harms suffered by victims but also an identifiable transference of harm between what is perceived to be the ‘online’ and ‘offline’ contexts.
- Whilst existing communications provisions can be potentially applicable, they do miss the nuanced aspect of online abuse, and the manner in which it is perpetrated.
- The communications offences focus on the sending of criminal communications and are therefore perpetrator focussed rather than victim focussed.
- To that end, the focus should always remain on the person affected – irrespective of their gender – rather than their public status and should be given equal importance and consideration.
- Statutory provisions including s38 Criminal Justice & Licensing Act (Scotland) 2010 address other elements of potential communications offences but focus on the offline commission of threatening behaviour.

## 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?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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?**

Comments

## Part Five: Other Issues

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

- Yes
- No
- No Opinion

Comments

**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?**

Comments

**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.) (Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**Q33. Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?  
(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

**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?  
(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Comments

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

Comments