



One Scotland: Hate Has No Home Here  
Consultation on amending Scottish hate crime legislation

SCRA Practice & Policy Team 2019

22/02/2019



**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

The statutory aggravation model is established and widely understood. It also has the range and strength of approach to apply across all criminal behaviour and as such is the most flexible approach we can take to recognising and responding to the effects of hate crimes.





**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**

SCRA agrees that a change in language is necessary but we question why the new phrasing is not demonstrating hate and / or hostility. Hostility implies a behaviour, whereas hate is about belief(s); and the word hate is, we think, a more accurate development of the concept of malice.

**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.)

**Unsure**

SCRA thinks that including the word hate would mean that the same threshold would still apply; but it may not if hate is not included. If the new threshold is about 'demonstrating hostility' then it may be that assessment of the level of hostility also becomes necessary and this may or may not be desirable.

SCRA thinks that this use of language should be considered throughout these proposals – whenever 'hostility' is referenced.

**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**

**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**

Intersex is distinct from and different to transgender identity and should be recognised as such.

**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?

SCRA thinks that those with expertise should be asked specifically about language use (and its effects). Stonewall Scotland, the Scottish Trans Alliance and the Scottish Equality Network, for example. The language used should also align with the use of language in the proposed review of the Gender Recognition Act 2004.





## 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**

SCRA thinks this approach to gender hate / hostility is the most equitable and will capture the greatest range of behaviours.

**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.)

**Unsure**

In theory SCRA supports this approach – in line with equalities legislation. However, we are of the view that it is probably not necessary if the aggravation in respect of gender hate / hostility is strong enough. Indeed, an additional aggravator focused specifically on misogyny may add an element of confusion – if the gender hate / hostility aggravator would capture misogynistic as well as other gender based hate crime.

**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**

SCRA absolutely supports the approach of building on established programmes to provide a robust response, and Equally Safe would be an ideal vehicle for this work to occur and to make a difference.

**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.)

**Unsure**

As outlined above we have some misgivings so are unable to support the option of taking forward all these approaches.

**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**





SCRA thinks that an age hate / hostility aggravator is important given the aging profile of our population. Age as an aggravator has the benefit of protecting all ages as well, so has wide ranging applicability.

**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.)

**Unsure**

In principal we support the idea of an aggravator linked to hate / hostility because an individual is, or is believed to be a member of a certain identifiable group, however we think that the stirring up of hatred proposals may have an effect here. We think that further work on the specific area of sectarianism would be helpful, particularly given the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018.

**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.)

**Unsure**

**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.)

**Unsure**

**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.)

**Unsure**

**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.)

Further work may be required on this.

**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 on its own will never be enough to address this entrenched societal issue in Scotland. A clear and focussed plan in relation to sectarianism would be helpful and could be one of the strands which would emerge from further expert consideration of this issue.





**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.)

**No**

**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.)

**No**

Although we would restate our position as above in regard to the need for further work in relation to the issue of sectarianism.

**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.)

**No**

**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**

**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**

### **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**

**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**





**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**

**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**

**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**

SCRA thinks that the existing aggravators, in combination with the proposed new aggravators in respect of protected characteristics, would be applicable across the existing offences in relation to online / digital communications and behaviours.

#### **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.)

**Unsure**

SCRA agrees with Lord Bracadale that offending behaviour which involves the exploitation of perceived vulnerability should not be treated as a hate crime.

We would also ask that more work is done in assessing the impact of this approach. This aggravator would potentially apply to all children who are victims of adult offenders or youth offenders; and it would also potentially apply to all victims who have a protected characteristic. The approach may not be workable and may be confusing.

**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?

We do not know enough to comment – and would ask that more work is done in this area.





## 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.)

### Unsure

We would ask that clear procedural guidance in the event of repeal is developed – so that Police Scotland have an unequivocal approach to racial harassment which is widely understood by the Scottish public.

Our statistical returns echo the Scottish Government Criminal Proceedings Database statistics in that offences under section 38 of the Criminal Justice and Licensing Act 2010 are much more prevalent in terms of both referral to the reporter and in terms of referral to a children’s hearing with a subsequent Compulsory Supervision Order being made than referrals under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

**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?

### Unsure

However, the repeal could have a really positive effect – in that it would re-focus professionals on an assessment of the statutory aggravator in relation to race across all offending.

**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.)

### Unsure

This is not relevant in relation to the children’s hearing decision to make a Compulsory Supervision Order.

**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.)

### Unsure

Victim Support Scotland are best placed to provide expert advice in relation to this. The children’s hearings system focus is always on the child referred to the children’s hearing and decision making within the children’s hearings system is in the child’s best interest. As a result the communication we have with the victims of an offence committed by a child and dealt with through referral to a reporter or referral to a children’s hearing is limited, specific and determined by statute.





However, we recognise that the pervasive and negative effects of hate crime can have a really corrosive, long term effect on victims; and that victims may be subject to repeat or prolonged victimisation. More work may be required in order to determine the nature of the supports which should be available to address victims experience of all hate crime.

**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.)

**Unsure**

Community Justice Scotland may be able to give a detailed mapping of the provision of restorative justice provision and diversion from prosecution. Our view is that it may be that the availability and provision of restorative and reparative justice services across Scotland's local authorities may have been a casualty of austerity.

It may be that a stated commitment to restorative / reparative justice practices and clear guidelines in relation to the practices is sufficient – but it may be that legislative change is required, if the availability of the practices is scarce, sparse or non-existent.

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

We have nothing else to add.

**Melissa Hunt**

**Policy & Public Affairs Manager, SCRA**

