

SIAA Response

Independent Review of Hate Crime Legislation in Scotland

November 2017

What do we mean by hate crime legislation and why does it exist?

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 definition provided by Chakraborti and Garland highlights the importance of motivation and demonstration of hostility that constitute hate crimes. However, this could be made clearer, which is particularly important for people who have no legal knowledge. We need to encourage consistency and clarity when defining hate crime, so that the public can distinguish between crime that is motivated by a hate of an individual as a person, and between prejudice against a victim on account of their protected characteristics.

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.

There needs to be concerted public awareness raising campaigns about what constitutes a hate crime, particularly targeting children and young people at schools.

Should we have specific hate crime legislation?

Yes.

Please give reasons for your answer.

Hate crimes are not crimes that only target individuals. As they relate to the features of a victim's identity, they are by extension an attack against other members of the group that an individual identifies with, affecting both individuals and communities. A hate crime is a 'message crime'; an offence that is aggravated by reason of a person's protected characteristic. It is therefore fundamental that a message is sent, highlighting wider civil society's intolerance of crimes that are motivated by animosity towards a person's protected characteristics.

Also, the emotional and psychological harm endured by victims of hate crime are more severe than those endured by victims of comparable crime which are not aggravated by prejudice. It is important that primary legislation reflects this.

Statutory aggravations: some issues

Do you consider that the current Scottish thresholds are appropriate?

Yes.

Please give reasons for your answer.

The current thresholds appear to be broad enough in scope to ensure that victims of hate crimes are able to prove the prejudicial context in which an instance of aggravated conduct or harassment took place.

Current guidance does however need to be further clarified on how these thresholds are articulated, particularly to the public and victims of hate crime. The use of case studies to clearly explain these thresholds would ensure that they are clear and accessible to victims of hate crime.

Should “evincing malice and ill-will” be replaced by a more accessible form of words?

Yes.

If so, please give examples of what might be appropriate.

‘Demonstrating hostility’; ‘evidencing hostility’; ‘demonstrating malice’; ‘evidencing malice’.

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?

Yes.

Please give reasons for your answer.

As there are currently provisions in Scottish legislation that allow for the prosecution for religious aggravations which cover ‘a social or cultural group with a perceived religious affiliation’, then it would be consistent for aggravations to apply towards perpetrators who ascribe a perceived political affiliation to individuals of a particular social and cultural group. Individual members of a particular social or cultural group may not identify with the political views that a perpetrator ascribes them to hold, yet be targeted precisely for these ascribed views.

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?

Yes.

Please give reasons for your answer.

It is not always the case that the religious beliefs of an individual are entirely congruous with the views of the wider religious group that they identify with. Similarly, the perpetrator of a hate crime may have a perception of an individual and the way in which they practice their religion, which may differ from how they perceive other individuals who are members of the same religious group. If an aggravation is only applied to an offence when it is clear that the beliefs of the victim are held by the wider group, the malice and ill-will which is ultimately directed towards the religion of one individual will fail to be recorded as a hate crime. An aggravation should therefore apply where an offence is motivated by malice towards the beliefs held by individual, otherwise the conviction of a perpetrator may not be recorded as religiously aggravated, and would therefore have the capacity to understate the instances of hate crime which takes place in Scotland.

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

It is important that police forces run training for their staff around non-binary identities. This will ensure that non-binary victims of hate crime feel comfortable sharing their identity with the police, and that these crimes are recording as being aggravated by reason of their non-binary identity. We would also add that it is very important that 'intersex' and 'transgender' are not used interchangeably within the Offences (Aggravation by Prejudice) (Scotland) Act 2009. 'Intersex' refers to physical bodies, whereas 'transgender' relates to gender identity.

Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic?

No.

Please give reasons for your answer.

Presently, statutory aggravations can apply in the form of a partial motivation – there can be more than one motivation. Hate crime statistics will therefore reflect the various ways in which hate crime is carried out, where aggravated by different forms of prejudice. However, although the primary legislation seems to suggest that aggravated conduct based on more than one protected characteristic is taken into account, there are issues about how legislation operates in practice. Police forces in particular need to develop a clearer understanding of intersectionality, and the multiple and overlapping identities amongst hate crime victims, which can be achieved through sophisticated training of police forces.

Should the aggravation consistently be recorded?

Yes.

It is important, particularly where there are aggravations on grounds of more than one protected characteristic that prejudicial crimes are highlighted as such. Compliance with this requirement is particularly important where there are various partial aggravations, so that Police Scotland, politicians, voluntary organisations, and members of the public are provided with an accurate picture of hate crimes across Scotland. It is also important that if a perpetrator repeatedly commits a hate crime, that the sentencing judge is aware of previous aggravations by reason of protected characteristics.

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?

Yes.

It is important the sentencing judges state the difference in the length of a sentence had it not been aggravated. This rule would ensure that it is clear to perpetrators and wider civil society how the justice system appropriately sentences hate crime offences. Furthermore, if separate, free-standing legislation is not established to prosecute hate crimes against individuals with protected characteristics other than race, then it is crucial that the justice system is able to highlight -through aggravations - civil society's intolerance of prejudice in all forms.

Standalone offence: section 50A Criminal Law (Consolidation) (Scotland) Act 1995: racially-aggravated harassment and conduct

Is this provision necessary?

Yes.

Please give reasons for your answer.

As racial crime remains the most commonly reported hate crime, it is important that victims are able to pursue justice through legislation that specifically highlights racially aggravated harassment and conduct. Standalone offences are important to highlight the occurrence of hate crimes.

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

The SIAA would like to see legislation amended and developed, so that other protected characteristics – which would otherwise be taken into account through statutory aggravations - are include as part of the criteria for sentencing under Section 50. There should be primary legislation which recognises hate crime as a standalone charge, but which ultimately takes into account multiple protected characteristics. This is important in ensuring that standalone offences of ill-will and malice on account of protected characteristics are dealt within

the same way that various partial aggravations are ascribed to particular cases. The difference would be that this piece of legislation would target hate crime in all forms.

Stirring up hatred and online hate crime

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

No.

While the current law appropriately treats online hate with equal weight as hate crimes carried out in person, online hate is presently not tackled adequately in practice.

Currently, victims of online hate crime feel less inclined to make a report to the police due to a lack of confidence in the police's understanding of online hate crime. There are examples of individuals ringing up the police who felt that their allegations were ultimately ignored. There are also evidential issues which lead to lack of technical information being made available to police who may choose to investigate hate crimes. For example, if data is hosted on servers outwith the UK, there is an issue when attempting to source the authorship of online content.

Police Scotland should receive training on how to support victims of online hate crime, and to learn about effective methods of investigating these alleged crimes. There also needs to be a comprehensive review of third party reporting, so that individuals who want to report a case of online hate crime are able to do so, with the confidence that the police are taking these instances as seriously as hate crimes carried out in person.

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.

Unsure.

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?

The 2012 Act is not clear about what constitutes a criminal offence, and the Act is ambiguous over what constitutes a deliberate intention to stir up hatred on religious grounds.. There is also no legal definition of 'sectarianism' under Scots law.

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?

Yes.

If so, what kind of behaviour should be criminalised?

It is appropriate that if a person intentionally stirs up hatred, and this is considered to be a threatening act, their behaviour should be criminalised. Even if acts of hate speech are not targeted at a specific individual with a protected characteristic, a breach of the peace or threatening behaviour may follow directly from their hate speech.

As there are statutory aggravations relating to the evincing of ill-will and malice on account of protected characteristics, behaviour at football matches which incite hatred based on protected characteristics should be criminalised. If an individual's behaviour expressed hatred or stirred up hatred against a group of persons based on their membership – or perceived membership - of a religious, or social and cultural group with a religious affiliation, then this form of harassment and conduct bears an equivalence to acts of ill-will and malice that occur out with a regulated football match.

Football clubs already have disciplinary procedures which are undertaken when football fans stir up hatred against listed groups or individuals based on their protected characteristics. However, these acts cannot be considered internal matters for clubs within the confined parameters of a football stadium. A lack of consistency cannot occur merely on account of where an offence occurs.

Does equivalent behaviour exist in a non-football context?

Yes.

Equivalent behaviour can occur in any public or private space. For example, a person may receive a prison sentence for employing sectarian language on a train.

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

Yes.

Please give reasons for your answer.

If a person stirs up and incites hatred through singing and speech in a public space, their actions can lead to threatening and abusive behaviour towards individuals with protected characteristics.

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.

Individuals who are prosecuted for hate speech are likely to commit the same offence when travelling abroad. Criminal behaviour should not be ignored if supporters of football clubs are not based within Scotland at the time of the offence, as these supporters will continue to live in Scotland once they return from football matches in other countries.

Should a football club be able to apply to the court for a football banning order?

Yes.

Please give a reason for your answer.

Banning orders have proven useful for football clubs, helping them to ensure supporters behave appropriately.

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?

Yes.

If so, what would you suggest?

Legislation should provide clear, accessible and substantive definitions of what constitutes bullying and antisocial behaviour. Case studies should be provided – such as highlighting examples of bullying and abuse towards young people – which highlight the difference between bullying behaviour and hate crime.

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.

In independent advocacy, we see aggravated conduct and harassment take place against all these groups on account of their protected characteristics. However, we do not think that separate legislation should be

established to account for offences involving all these groups – instead, the parameters by which standalone offences are prosecuted under should be broadened.

The SIAA believes that acts of harassment that are aggravated by misogyny should be constituted as a hate crime. If a perpetrator demonstrates malice or ill-will towards a person due to a sense of animosity towards a person for their gender, there should be primary legislation in place that can appropriately sentence gendered aggravations,

We do not think that specific legislation should be created to deal with offence involving malice against the gypsy/traveller community. Aggravations on account of racial prejudice will still apply to members of the gypsy/traveller community, therefore it is important that Police Scotland and the Crown Office and Procurator and Fiscal Service are able to support members of the gypsy/traveller community who are victims of racially aggravated offences. It would also be helpful to use case studies which demonstrate the prevalence of racially aggravated hate crimes against the gypsy/traveller community, and raise awareness around the lack of definition around race hate crime.

Similarly, we do not think that malice or ill-will towards a person's immigration status should be demarcated as a separate category. This is because otherwise there is a danger of racially aggravated hate crimes becoming redefined as immigration hate crimes.

Other specific issues

Do you have any views as to how levels of under-reporting might be improved?

Please give reasons for your answer.

Police forces across Scotland need to be provided training on how the multiple identities of victims of hate crime intersect, and ensure that hate crimes aggravated by prejudice against a variety of protected characteristics are reported. Victims must be comfortable in reporting hate crimes to the police, and this can only be achieved if there is a sense of trust in Police Scotland.

The work of independent advocates across a range of organisations should be promoted as widely as possible within communities, so that individuals who are victims of crime can seek support.

Much more work needs to be done to promote the work of Third Party Reporting Centres (TPRC) as many victims of hate crime do not feel comfortable reporting incidents to the Police. The provision and promotion of safe and secure spaces in TRPC, where people can report hate crimes anonymously with people they are familiar with, is fundamental in ensuring that hate crimes are reported. More resources need to be provided in localities across Scotland to signpost victims of hate crime to appropriate support networks and agencies in their communities.

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

Complainers who are victims of hate crimes should have the right to remain anonymous. Otherwise, the frequency with which hate crimes are reported may be reduced as other victims of hate crime are deterred from making complaints to the police.

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

Yes.

If so, how might the current scheme be improved?

There needs to be more regular interaction between staff from Third Party Reporting Centres (TPRC) with the various forces that comprise Police Scotland. Victims of hate crime who go to TPRs need to be confident that their reports will later be taken seriously by Police Scotland and acted upon.

A wider concerted effort must also be made by the Scottish Government to promote the work of third party reporting schemes. Members of local communities must feel assured they can trust staff and volunteers who work separately from the Police. Also, the role of these TPRC must be clarified, and the location of these spaces must be made clear to the public.

Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime?

Yes.

Please give reasons for your answer.

Restorative justice can be important in rehabilitating individuals who carry out hate crimes. However, it is important that restorative justice is victim focused. Appropriate support mechanisms need to be provided for victims of hate crime, to ensure that they are not re-traumatised through interaction with the perpetrators of hate crimes.

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

Unsure.

As current research on benefits of restorative justice is limited, and due to issues around the capacity for victims of hate crime to be re-traumatised, it is too early to establish restorative justice schemes through statutory legislation.

