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**To:** COMMUNITIES, HOUSING AND PLANNING POLICY BOARD

**On:** 16 JANUARY 2018

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**Report by:** DIRECTOR OF ENVIRONMENT & COMMUNITIES

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**Heading:** INDEPENDENT REVIEW OF HATE CRIME LEGISLATION IN SCOTLAND –  
CONSULTATION PAPER

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## **1. Summary**

- 1.1 In January 2017 the Scottish Government announced the appointment of an independent review into hate crime legislation in Scotland with the review being led by Lord Bracadale. The review was established following an Independent Advisory Group report which recommended that the Scottish Government should:
- Lead discussion on the terminology and definitions around hate crime, prejudice and community cohesion, and
  - Consider whether existing criminal law provides sufficient protection for those who may be at risk of hate crime.
- 1.2 In addition to this, a recent case raised issues in relation to crimes committed with a religious motivation and was the subject of much debate as to whether the offence fell within the statutory provisions of hate crime. This case has highlighted the need to consolidate hate crime to recognise recent factors that have changed the landscape around hate crime offences.
- 1.3 Hate crime is defined as behaviour which is motivated by hatred, malice, ill-will or prejudice towards people because they form part of a specific group, such as people of a particular race or sexual orientation. A lot of common hate crime behaviour would be criminal even if there was no specific hate crime legislation to deal with it. For example, it is a criminal offence to assault another person.

- 1.4 To reinforce the importance placed in the motivation behind hate crimes, Parliament has passed legislation which means that where an offender has been convicted of another offence (e.g. assault, breach of the peace) and it is proved that the offence was aggravated by a particular form of prejudice, the court must record this and take the aggravation into account when determining sentence. These provisions are known as statutory aggravations. They ensure that levels of hate crime are recorded and send a strong signal that society does not accept this form of conduct. Statutory aggravations include grounds of race, religion, disability, sexual orientation and transgender identity.
- 1.5 Parliament has also enacted a number of standalone hate crime offences. These offences target different forms of unacceptable behaviour specifically because that behaviour is motivated by hatred, malice, ill-will or prejudice towards people because of the group they belong to. At present, these offences are:
- racially aggravated harassment,
  - offensive behaviour in relation to a regulated football match which is likely or would be likely to incite public disorder,
  - threatening communications,
  - offences under sections 18, 19 and 23 of the Public Order Act 1986 which prohibit the use of threatening, abusive or insulting words, behaviour or written material which will stir up racial hatred.
- 1.6 Lord Bracadale is considering the full range of existing legislation in order to reach a view on whether it is the most effective way for the justice system to deal with conduct motivated by hatred, malice, ill-will or prejudice.
- 1.7 The remit of the Lord Bracadale review is to:
- Consider whether existing hate crime law represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill will or prejudice,
  - Consider and provide recommendations on:
    - Whether the current mix of powers and hate crime offences are the most appropriate,
    - Whether the scope of hate crime law should be amended to reflect religiously motivated offending,
    - Whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered),
    - If existing legislation can be simplified and harmonised through the introduction of a single hate crime act,
    - How any gaps and inconsistencies can be addressed in any legislative framework ensuring it interacts with any other legislation.
- 1.8 The formal consultation period ran from 31 August 2017 to 23 November 2017, however the Scottish Government have extended this deadline to allow a response to be considered and submitted following this Board meeting. The proposed responses to the consultation questions were drafted in consultation with the “I Am Me Charity” and reflect the responses

made on behalf of that charity to the review. The Council's proposed response is detailed in section 4 of this report.

- 1.9 Lord Bracadale is scheduled to publish his report in 2018 and it will then be for the Scottish Government to decide how best to take forward the recommendations contained within his final report.
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## **2. Recommendations**

It is recommended that the Community, Housing and Planning Policy Board:

- 2.1 Notes the consultation on Independent Review of Hate Crime Legislation in Scotland
  - 2.2 Agrees the Council's consultation response as detailed in section 4 of this report.
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## **3. Background**

- 3.1 Hate Crime is a commonly used term in Scotland and elsewhere, but the term can mean different things to different people for different purposes. Not every crime committed by a person who hated the victim can be called a hate crime. Assaulting someone just because you hate them as a person does not make it a hate crime. What makes it a hate crime is if you committed the crime due to your hate or prejudice against the victim because of their race, religion, disability, sexual orientation or transgender identity. These groups are described as "protected characteristics".
  - 3.2 In addition, a hate crime does not have to be motivated by hate, it can be enough to be a hate crime if the person shows prejudice or hostility towards the victim because of the victim's membership of a group.
  - 3.3 For the purposes of this consultation the following definition is used as the working definition for hate crime "...the creation of offences, or sentencing provisions, 'which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from 'ordinary' crimes' although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim's identity, or the selection of the victim on the basis of a particular feature."
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## **4. Consultation Questions & Responses**

- 4.1 **Question 1 : Do you consider that the working definition outlined at 3.3 above adequately covers what should be regarded as hate crime by the law of Scotland?**
  - Current legislation appears difficult to enforce due to the complexity of the definition and terminology and this may prevent many victims from receiving access to justice.

- The definition is difficult to disaggregate, this may in-itself create a barrier to recognising and reporting an incident as hate crime related. The overall terminology 'Hate Crime' can be misleading as many incidents and crimes can be the result of prejudice based behaviour, rather than 'hate'. In addition, 'hate' is an emotion which can be difficult to evidence, possibly resulting in many charges not being brought through lack of evidence of 'hate'.
- At present, under the UK legislation, women as a group are not recognised as a hate crime category. However, on July 13<sup>th</sup> 2016, Nottinghamshire Police announced it would now record the harassment of women as a hate crime in an effort to tackle sexist abuse defining hate crime as: "Incidents against women that are motivated by an attitude of a man simply because they are a woman". Therefore it could be considered that gender should be included within the working definition and added to the protected characteristics

#### 4.2 **Question 2: How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be a hate crime, and what can be proved as hate crime?**

- Tensions and misunderstanding may be prevented by ensuring that legislation is clear, concise, and, removes the potential for personal opinions to be the deciding factor on whether the incident will be recorded as a 'hate crime'. For example, an experienced officer may recognise the possibility that the victim has been targeted due to the actual or perceived belonging to a particular social group (race, religion, disability, sexual orientation and/or transgender identity) and record the incident as such. If the victim, witness or any other person believes the incident to be motivated by malice or will because of the group they identify with this may cause tension. In addition, an individual may be targeted because of their perceived or actual vulnerability, for example, if they have a disability. The offender(s) may not evidence disablist language or display 'hate', but the victim is still being targeted because of their disability with a likelihood that the offender is displaying prejudice based behaviour (preconceived opinion that the person is more vulnerable due to disability).
- Awareness raising is required with practitioners across the wider Public Protection Agenda about what hate crime is and how to identify it.

#### 4.3 **Question 3: Should we have specific hate crime legislation?**

- Yes - we should have specific legislation that protects potentially more vulnerable members of society. This legislation should not be based on a hierarchy of protection and should be available to any person who is being 'targeted' because of an actual or perceived inequality. This may be an older person who is being targeted for financial exploitative benefit, simply because they are perceived as more vulnerable, or, the neighbour who is being targeted because of their sexual orientation.

4.4 **Question 4: 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 your reasons for your answer.**

Yes – This might assist the prosecution advocate to represent the public interest, and assist the court to reach its decision as to the appropriate sentence. This will include drawing the court's attention to:

- any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim;
- where appropriate, to any evidence of the impact of the offending on a community;
- any statutory provisions relevant to the offender and the offences under consideration;
- any relevant sentencing guidelines and guideline cases; and
- the aggravating and mitigating factors of the offence under consideration.

4.5 **Question 5: Do you consider that the current Scottish thresholds are appropriate? Should “evincing malice and ill-will” be replaced by a more accessible form of words? If so, give examples of what might be appropriate.**

- The current thresholds can be difficult to evidence/prove. This can affect the victims access to justice, particularly in relation to an ongoing campaign of harassment that may not as ‘standalone incidents’ reach the threshold of an actual ‘general’ crime. Race Hate Crime has additional legislative protection which can be more appropriate in certain circumstances (Racially Aggravated Harassment – s50A), but this is not extended to the remaining 4 strands of hate crime. Evincing malice and ill will” might be more accessible if re-worded as “targeted behaviour which causes harm or distress”
- Alarm and distress and changing cultural behaviours and crimes motivated by an attitude are also relevant. i.e. Wolf whistles may apply.

4.6 **Question 6: 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?**

- This potentially could apply. Hate crime is a criminological and social issue at the forefront of today’s political unease. In the week prior to and the week following the EU referendum on 23<sup>rd</sup> June 2016, incidents of hate crime reported to police increased by 42%. (Dodd, The Guardian, 2016). They are abhorrent crimes that can have severe effects on victim and the collective sentiments of the wider social groups to which they belong. Violence against women is similarly relentless in its impact on victims.

4.7 **Question 7: 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.**

- On the basis of not tolerating bias and inequality of treatment, the aggravation should apply to all targeted behaviour against an individual for any perceived inequality. If the person has been targeted because of who they are, or are perceived to be, the legislation should apply.

**4.8 Question 8: Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?**

- No comment given

**4.9 Question 9: 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.**

- The current legislation would likely operate more effectively if the legislation offered each group the same protection, rather than operating under a hierarchical silo approach. The current legislation is more likely to be identified and applied in cases where conduct involves malice and ill-will based on more than one protected characteristic.

**4.10 Question 10: Should the aggravation consistently be recorded? Please give your reasons of your answer. 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 for the aggravation. Please give your reasons for your answer.**

- No comment given

**4.11 Question 11: Is this provision necessary? Should the concept of a standalone charge be extended to other groups? If so, which groups? Please give reasons for your answer.**

- This provision would not be necessary, if the hate crime legislation is amended to include the provision for aggravated harassment. However, as the law stands, Section 50A of the Criminal Law (Scotland) Act 1995 is more clearly defined and more recognisable as a legislative protection for this group. If this legislation is to remain, it could be extended to other groups, to create fair and equitable access to the justice system.

**4.12 Question 12: Should there be offences relating to the stirring up of hatred against groups? If so, which groups? Please give reasons for your answer.**

- If the offence is to remain, this should be extended to all groups.
- At the moment there is only a specific harassment offence for race and no separate offence for harassment aggravated by religion, disability, sexual orientation or transgender identity. Other groups such as gender based violence should have the same as this falls within a harassment offence.

4.13 **Question 13: If there are to be offences dealing with the stirring up of hatred against groups, do you consider that there need to be any specific provision protecting freedom of expression? Please give your reasons for your answer.**

- Specific provision protecting freedom of expression is essential. Freedom of expression guarantees the right of every person to exchange information, debate ideas and express opinions. This is especially important in the context of politics, in order that members of the public can decide how to vote and which policies to support. However, freedom of expression also underpins artistic, scientific and commercial development, and plays an essential role in holding public bodies to account and in uncovering wrongdoing.
- Because these objectives are considered so important, the law protects not only the expression of opinions which are uncontroversial but also those that 'offend, shock or disturb'. Limits on freedom of expression can only be justified where it is strictly necessary to do so.
- Although Article 10 protects many different kinds of expression, the particular level of protection can vary considerably depending on the *type* of expression involved. For example, political campaigning, journalism and commentary on matters of public interest are generally given a very high degree of protection and this should incorporate hatred to give the additional support to groups.

4.14 **Question 14: Does the current law deal effectively with online hate? Please give reasons for your answer. 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.**

- It is often highlighted that members of particular social groups are targeted online. This takes many different forms, from targeting whole groups to targeting individuals. The legislation is not clear, who can make reports and what incidents can be reported (and how can reports be made). The provision of an online platform used to harass or target individuals or groups without adequate and effective controls to monitor or respond to incidents could be considered for more effective legal control. There have been complaints about photo's being uploaded of individuals and then used to mock and demean this person. For example, a recent incident was highlighted where a disabled lady in a wheelchair was struggling to manage her shopping basket. This was posted onto social media by a member of the public and used to mock the lady whilst calling her offensive and disabilist names. The post was reported to the social media provider and no action was taken.

**Question 15, 16, 17, 18, 19 & 20 relate to Football (no comment given)**

4.15 **Question 21: 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?**

Yes, bullying based behaviour is often targeted behaviour against an individual's actual or perceived 'difference'. Many possible hate crime reports are initially classed as 'bullying',

'anti-social behaviour' or a 'disagreement between individuals'. For young people, who are often the victim of behaviour categorised in this way, there can seem to be no legislative protection and no resolution. This can have an effect on a young person's mental health and a long lasting effect throughout adult life.

**4.16 Question 22: 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.**

- If Hate Crime legislation is to be reviewed and remodelled, there should be a fair and equitable balance of protection for all social groups. If a person/group are targeted specifically because how they identify, this should be recognised as an aggravating factor. This legislation should cover all targeted abuse, harassment and exploitation both online and in person.

**4.17 Question 23: Do you have any views as to how levels of under-reporting might be improved? Please give reasons for your answer.**

**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?**

- Hate Crime is vastly under reported, for many reasons, but mainly the complexity of the legislation, the 'Hate Crime' terminology and the understanding of the legislation within society (including Police). Protective legislation should be mainstreamed across all groups, should be accessible and must be taken seriously by the Police and the Justice System. If a person indicates that they believe they are a victim because of how they identify, this should be taken seriously and recorded as such, until the point that the claim can be disproven. Bias, personal judgement and opinion require to be removed from how an incident or crime should initially be recorded and this requires to be more transparent. These incidents and crimes should be recorded and reported as potential hate crimes.
- Victims require to be more clearly identified within the system, e.g. Police Scotland ask a complainant for name, age and place of birth. This creates the potential to identify whether a person has been targeted because of their race, however, other identifying questions are not asked, which may result in many hate crimes being mis-reported leading to under reporting of incidents/crimes.



- In addition, other Public Sector agencies may be recording incidents without recognising / recording the potential for an aggravating factor such as disability, race, religion, sexual orientation or transgender identity.
- Reporting requires to be more accessible e.g. large print, alternative languages and BSL accessible.
- Victims should be kept up to date with progress and ensured that reports will be taken seriously.
- The identity of a complainer/victim should not be publicised if this has the ability to put the individual at higher risk of additional targeted behaviour.

**4.18 Question 24: 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?**

- The third party reporting scheme is a valuable reporting mechanism for individuals who do not feel able to report directly to the Police, however, this scheme could be improved by working directly with community groups such as disability organisations, advocacy workers, mosques, LGBT groups etc to ensure that the most accessible and appropriate organisations are able to support members to take reports and ensure that incidents are passed to the Police. It may be unlikely that a victim of crime would report to an unfamiliar place such as a library to make a report, if it is not a place that they would regularly frequent.

**4.19 Question 25: Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime? Please give reasons for your answer.  
Should such schemes be placed on a statutory footing? Please give reasons for your answer.**

- More work is required in order to determine the success rate for diversionary and restorative justice in relation to hate crimes, but if these are successful, then yes they should be included. It is also key to include equality and diversity training within the education system to help build a generation of tolerant and accepting individuals who embrace diversity.

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**Implications of the Report**

1. **Financial** – None
2. **HR & Organisational Development** – None.
3. **Community Planning** –

**Our Renfrewshire is fair** - Renfrewshire is a place where everyone is treated fairly and equally. This paper and consultation response shows the commitment to reducing hate crime in Renfrewshire.

**Our Renfrewshire is safe** – Everyone that works, visits and lives in Renfrewshire deserves to feel safe. Hate crime has no place in Renfrewshire and Scotland and this is highlighted in the consultation response.

4. **Legal** – None.
5. **Property/Assets** – None
6. **Information Technology** – None.
7. **Equality & Human Rights** - The recommendations contained within this report have been assessed in relation to their impact on equalities and human rights. No negative impacts on equality groups or potential for infringement of individuals' human rights have been identified arising from the recommendations contained in the report because it is for noting only. If required following implementation, the actual impact of the recommendations and the mitigating actions will be reviewed and monitored, and the results of the assessment will be published on the Council's website.
8. **Health & Safety** – None.
9. **Procurement** – None.
10. **Risk** – None.
11. **Privacy Impact** – None.
12. **CoSLA Policy Position** – None.

**List of Background Papers:** None

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