

This document relates to the Hate Crime and Public Order (Scotland) Bill (SP Bill 67) as introduced in the Scottish Parliament on 23 April 2020

Hate Crime and Public Order (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Hate Crime and Public Order (Scotland) Bill introduced in the Scottish Parliament on 23 April 2020.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 67–EN);
 - a Financial Memorandum (SP Bill 67–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 67–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. This Bill provides for the modernising, consolidating and extending of hate crime legislation in Scotland. Legislation in this area has evolved over time in a fragmented manner with the result that different elements of hate crime law are located in different statutes, there is a lack of consistency, and the relevant legislation is not as user-friendly as it could be. The new

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hate crime legislation will provide greater clarity, transparency and consistency.

5. In addition to consolidation, the Bill seeks to modernise and extend existing hate crime legislation by:

- including age as an additional characteristic in new provisions for the aggravation of offences by prejudice under Part 1 of the Bill (existing aggravations, which the new provisions will replace, apply only in relation to disability, race, religion, sexual orientation and transgender identity);
- creating new offences relating to stirring up hatred in Part 2 of the Bill that will apply in relation to all listed characteristics, including age, disability, race, religion, sexual orientation, transgender identity and variations in sex characteristics (existing offences, which these new offences largely replace, apply only in relation to race);
- updating the definition of transgender identity in Parts 1 and 2 of the Bill, including removing the term 'intersexuality' and creating a separate category for variations in sex characteristics; and
- including a power to enable the characteristic of sex to be added to the lists of characteristics referred to in Parts 1 and 2 of the Bill by regulations at a later date, once the Bill has passed.

6. The Bill will also abolish the common law offence of blasphemy. The offence has not been prosecuted in Scotland for more than 175 years and is no longer considered necessary or appropriate.

7. The Scottish Government is committed to taking this opportunity to shape hate crime legislation so that it is fit for 21st century Scotland and, most importantly, affords sufficient protection for those that need it.

8. The Scottish Government recognises that legislation in and of itself is not enough to build the inclusive and equal society that Scotland aspires to, however having clear legislation about hate crime sends a strong message. In particular, it makes it clear to victims, perpetrators, and communities and to wider society that offences motivated by prejudice will be treated more seriously and will not be tolerated by society.

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Policy context

9. Scotland's diversity is its strength; and all communities are valued and their contribution welcomed. Hate crime and prejudice threaten community cohesion and have a corrosive impact on Scotland's communities as well as broader society. Hate crime and prejudice is never acceptable and the Scottish Government is committed to tackling it.

10. This legislation provides an essential element of the Scottish Government's ambitious programme of work to tackle hate crime and build community cohesion. Anyone who has experienced or witnessed a hate crime is encouraged to report it to the police or to one of the third-party reporting centres that are in place across Scotland.

11. A cohesive society is one with a common vision and a sense of belonging for all communities; a society in which the diversity of people's backgrounds, beliefs and circumstances are appreciated and valued, and similar life opportunities are available to all. It is through this lens that the Scottish Government has considered the recommendations from Lord Bracadale's 'Independent Review of Hate Crime Legislation in Scotland'¹ in order to inform the modernisation and reform of hate crime legislation in Scotland.

12. To ensure a consistent overarching approach, the Scottish Government identified a set of three principles to inform and guide policy decision making and development of hate crime legislation. These principles are:

- Standardisation and consistency of approach: across the characteristics, apart from where there is good reason to justify an exception. For example, in principle the Scottish Government has sought to ensure a consistent approach across the characteristics, including any new characteristics. This would involve a standard approach to how, for example, the statutory aggravations are applied, and would also help ensure there is not a perceived (or real) hierarchy between the characteristics.

¹ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

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- Future proofing of legislation: to reflect society in Scotland within the 21st Century whilst ensuring as far as possible that the law remains fit for purpose for the future. It is essential that the form and structure of the legislation is correct for current policy, but it would also be useful to ensure as appropriate that the legislation is set up so that it can be amended in the future. In particular, while the focus of the legislation is on addressing hate crime in today's society, such as racial and religious hatred, provision is also included to enable the characteristic of sex to be added into the new legislative framework established by the Bill, at a later date by means of regulations. It is also crucial that the legislation is robust and deliverable, ensuring that barriers and ambiguity are not created that will impede its application in order to help ensure the legislation can stand the test of time.
- Contribution to a modern Scotland: to build a more equal and inclusive Scotland. For example, hate crime legislation plays its role as part of wider efforts to ensure people feel safe and can live free from discrimination, through ensuring hate crime is enforceable with clear consequences, and where people have a greater and clearer understanding of hate crime and its consequences.

Hate crime definition

13. There is no single accepted definition of hate crime with different definitions produced for different purposes, however Lord Bracadale stated in his review²: "Hate crime is the term used to describe behaviour which is both criminal and rooted in prejudice".

14. Within his independent review of hate crime legislation in Scotland, Lord Bracadale used the following definition of hate crime:

² <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-summary-document/pages/5/>

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“offences 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”.³

15. Hate crime can take many different forms and has hugely damaging effects on the victims, their families and communities. Lord Bracadale provides an example of what would currently constitute hate crime in Scotland:

“A man who was annoyed at the noise his gay neighbour made putting out the bins in the early morning engaged in abusive shouting, in the course of which he made comments about the neighbour's sexual orientation including hoping that "people like you die of AIDS". This would amount to a breach of the peace aggravated by prejudice in relation to sexual orientation in terms of section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009”.⁴

16. A further example of a hate crime might be where a man shouts at a disabled person in a wheelchair on a street saying ‘get out of my way you cripple’ and proceeds to tip them out of their wheelchair. This might amount to an assault aggravated by prejudice relating to the victim’s disability in terms of section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (“the 2009 Act”).

Rationale for hate crime legislation

17. Hate crime legislation helps recognise the particular impact and harm caused by hate crime. Harm can be caused to the victim, the group the victim belongs to by reference to one of the listed characteristics (for example, disabled people or a minority ethnic group) and to wider society. Hate crime legislation makes it clear that such behaviour is not acceptable and sends a message to victims, perpetrators and wider society that hate crime is not acceptable and will not be tolerated.

³ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

⁴ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/3/>

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18. The courts take it into consideration when offences are motivated by prejudice when determining sentences. Recording of convictions for hate crimes (whether the aggravation of offences by prejudice or offences relating to stirring up hatred) ensures that levels of hate crime are recorded and trends can be identified and monitored.

Current hate crime legislation in Scotland

19. Current hate crime legislation in Scotland specifies when an existing offence may be aggravated by prejudice in respect of one or more of the characteristics of race, religion, disability, sexual orientation and transgender identity (which includes 'intersexuality'). This approach does not involve the creation of new offences; rather it involves an existing offence (e.g. murder, assault, breach of the peace) being 'aggravated' where the perpetrator evinces, or is motivated by, malice and ill-will towards a group of persons defined by reference to one or more of the above characteristics.

20. In Scotland, the existing 'hate crime' statutory aggravations are:

- race: section 96 of the Crime and Disorder Act 1998 ('the 1998 Act');
- religion: section 74 of the Criminal Justice (Scotland) Act 2003 ('the 2003 Act');
- disability: section 1 of the 2009 Act;
- sexual orientation: section 2 of the 2009 Act;
- transgender identity: section 2 of the 2009 Act.

21. The above legislation makes provision for the aggravation of offences, requiring courts to take the aggravation into account when determining sentence.

22. Section 96 of the 1998 Act provides that an offence is racially aggravated if it is proved that either:

- (a) at the time of committing the offence, or immediately before or after doing so, the perpetrator evinces malice and ill-will based on the victim's membership (or presumed membership) of a racial group, or

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(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

23. 'Membership' in relation to a racial group, includes association with members of that group and 'presumed' means presumed by the offender.

24. Section 74 of 2003 Act makes similar provision in respect of membership of a religious group or membership of a social or cultural group with a perceived religious affiliation. In both cases this includes presumed membership.

25. The 2009 Act provides for statutory aggravations for offences where the perpetrator evinces, or is motivated by, malice and ill-will towards persons based on their disability (section 1), sexual orientation (section 2) or transgender identity (section 2).

26. Where there is a specific victim of the offence, the malice and ill-will may also be based on an incorrect presumption by the offender that the victim of the offence is a member of a group defined by reference to disability, sexual orientation or, as the case may be, transgender identity. But, unlike the 1998 Act and the 2003 Act, this aggravation does not include those associated with an individual who is a member of a group defined by reference to any such characteristic. For example, an assault would not be aggravated by prejudice under the 2009 Act if the attack was motivated by malice and ill-will only because the victim was associating with a transgender person.

27. For each of the statutory aggravations referred to above, evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to race, religion, disability, sexual orientation or transgender identity. Where any such statutory aggravation is proven, the court is required to state on conviction that the offence is aggravated by prejudice relating to the characteristic in question; record the conviction so that it shows the relevant aggravation and take the aggravation into account in sentencing, stating the extent of any difference, the reasons for the difference or, if there is no difference, the reason for this.

28. Prejudice or hostility also lies at the heart of some other offences which are recognised as hate crimes. These are sometimes referred to as

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standalone hate crime offences and they criminalise behaviour specifically because it involves racial prejudice. Currently, these standalone offences include:

- racially aggravated harassment: section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995; and
- stirring up of racial hatred: sections 18 to 23 of the Public Order Act 1986. These provisions deal with conduct which is threatening, abusive or insulting and is intended, or in all the circumstances is likely, to stir up racial hatred. The six different offences cover a very broad range of conduct ranging from, for example, the spoken word and written material, to recordings of visual images and sounds. The aim of this legislation at the time was to seek to capture all the different types of conduct that may, as its effect, stir up hatred against a racial group.

Independent Review of Hate Crime Legislation in Scotland

29. In September 2016, a review by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion⁵ was published which included a number of recommendations for the Scottish Government and its partners. These recommendations included that:

- the Scottish Government should consider whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime; and
- the Scottish Government should lead discussion on the development of clearer terminology and definitions around hate crime, prejudice and community cohesion.

30. In 2017, this led to the appointment of Lord Bracadale to conduct an Independent Review of Hate Crime Legislation in Scotland⁶. The remit for Lord Bracadale's review was to consider whether existing hate crime law

⁵ <https://www.gov.scot/publications/report-independent-advisory-group-hate-crime-prejudice-community-cohesion/>

⁶ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

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represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

31. Lord Bracadale was asked by the Scottish Ministers to consider:

- the current law and how well it deals with hate crime behaviour;
- whether new statutory aggravations should be created for example in relation to age and gender;
- whether the religious statutory aggravation is fit for purpose or should be expanded;
- whether hate crime laws should be made simpler by bringing them all together in one place; and
- any issues or gaps in the framework for hate crime laws and to make sure that hate crime laws interact effectively with laws that protect human rights and equality.

32. Lord Bracadale published his Independent Review of Hate Crime Legislation⁷ on 31 May 2018. In responding to publication of the report, the Scottish Government accepted his recommendation to consolidate all Scottish hate crime legislation into one new hate crime statute and committed to consult on the detail of what will be included in what has become this Bill.

The Working Group On Defining Sectarianism in Scots Law

33. In parallel to Lord Bracadale's work, the Working Group on Defining Sectarianism in Scots Law had been developing its report 'Final Report of the Working Group on Defining Sectarianism in Scots Law'⁸ published in November 2018.

34. The Working Group was established following a recommendation made by the Scottish Parliament's Justice Committee. During its Stage 1

⁷ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

⁸ <https://www.gov.scot/publications/final-report-working-group-defining-sectarianism-scots-law/>

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considerations of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, the Committee heard evidence from a number of sources which suggested that the lack of a legal definition of the term ‘sectarianism’ was a hindrance to police and prosecutors in pursuing cases of abusive sectarian behaviour.

35. The Working Group considered whether this could be achieved; the technical obstacles to achieving it; and what a legal definition could look like. The Group recommended the development of a statutory aggravation for sectarian hate crime.

A working group on misogynistic harassment

36. On 23 January 2019, the First Minister’s National Advisory Council on Women and Girls published its first report and recommendations⁹. It included a recommendation to ‘criminalise serious misogynistic harassment, filling gaps in existing laws’.

37. In response, the Scottish Government has made a commitment, in principle, to developing a standalone offence on misogyny. In order to progress this commitment, the Scottish Government in establishing a Working Group to consider how the criminal law deals with misogyny, including whether there are gaps in legislation that could be filled with a specific offence on misogynistic harassment.

38. It is intended that the Working Group will, in due course, also consider whether the characteristic of ‘sex’ ought to be added (by regulations) to the list of characteristics which apply in relation to the aggravation of offences by prejudice in Part 1 of the Bill and/or to the lists of characteristics which apply in relation to offences relating to stirring up hatred in Part 2 of the Bill. To this end, and to ensure the Working Group has the space and flexibility required to develop the distinct approach required to tackle misogyny in Scotland, an enabling power is included within this Bill. This will allow sex to be included as an additional characteristic within the hate crime legislative framework at a later date, for example if that is recommended by the Working Group. Further detail on the enabling power can be found at paragraphs 240 to 257.

⁹ <https://onescotland.org/wp-content/uploads/2019/01/2018-Report.pdf>

Consultation and evidence

‘One Scotland: Hate Has No Home Here’ Consultation

39. On 14 November 2018 the Cabinet Secretary for Justice and Cabinet Secretary for Communities launched a public consultation on hate crime legislation in Scotland¹⁰ in response to recommendations made by Lord Bracadale.

40. The consultation also included questions on the recommendations made by the Working Group on Defining Sectarianism in Scots Law. This asked for views on whether sectarianism should be included within this Bill and, if so, how sectarianism would be defined.

41. The consultation exercise ran from 14 November 2018 to 24 February 2019, with 1,159 written responses submitted in total. A total of 1,051 responses were received from individuals (91% of responses) and 108 responses from organisations (third sector bodies, public sector and partnership bodies, faith groups and other organisations). The analysis of responses showed that organisations and individuals often had differing perspectives and views on the issues under consideration.

42. Additionally, a series of 11 consultation roadshows were held across Scotland from December 2018 to February 2019 enabling approximately 400 individuals and organisations to engage in discussion and have their views heard about Lord Bracadale’s recommendations.

43. Both the consultation and the associated events focused specifically on Lord Bracadale’s recommendations, but also provided an opportunity for suggestions to be made on what else should be included in new hate crime legislation.

44. There was broad support for hate crime laws and for consolidation and modernisation among organisations, however the majority of individuals were not supportive of hate crime laws suggesting that they restrict freedom of expression and create a hierarchy of victims. Those who

¹⁰ <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/2/>

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supported having hate crime laws saw it as important in protecting particular groups and that it sends a clear message about unacceptable conduct.

45. As with all consultations, the views offered are valuable in helping inform decisions to be made. A number of valuable responses from both individuals and organisations were received which informed the content of the Bill. As set out in the Equality Impact Assessment (EQIA), the views of equalities organisations were particularly valuable in informing the detail of the Bill provisions given that these organisations reflect, and are representative of the needs of those who have experienced hate crime, or have one or more of the characteristics included within the Bill. The findings from the consultation were independently analysed and published in June 2019.¹¹

46. Further and more specific information on the results of the consultation is provided throughout this report, setting out in many areas the views of consultees alongside information on the policy objectives, key information and alternative approaches considered.

Contextual evidence

47. The Scottish Government and criminal justice partners have been collecting evidence to inform policy development on hate crime for a number of years. While further more detailed information is available in the accompanying Equality Impact Assessment (EQIA), some high-level contextual evidence is summarised below, including information on the levels of hate crime that in recent years have:

- been recorded by the police;
- led to criminal charges being made by the Crown Office and Procurator Fiscal Service; and
- been recorded in relation to the numbers of proceedings and convictions in the criminal courts.

¹¹ <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/>

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48. In February 2019, the Scottish Government published the report 'Developing Information on Hate Crime Recorded by the Police'¹² which includes summary information on hate crime recorded by the police in relation to race, religion, sexual orientation, disability and transgender identity from 2014-15 to 2017-18. It found that:

- the police recorded 6,736 hate crimes in 2017-18. Two-thirds (67%) of those crimes included a race aggravation, 16% a sexual orientation aggravation, 7% a religion aggravation, 4% a disability aggravation and 1% a transgender identity aggravation. The remaining 5% had multiple hate aggravations;
- the most frequently recorded hate crimes in 2017-18 were threatening or abusive behaviour aggravated by prejudice (45% of all hate crimes recorded), racially aggravated conduct (23%), common assault aggravated by prejudice (13%) and offences relating to the Communications Act 2003 aggravated by prejudice (5%); and
- between 2014-15 and 2017-18, the number of hate crimes recorded by the police in Scotland has fluctuated between 6,600 and 7,000 (to the nearest 100).

49. In June 2019, the Crown Office and Procurator Fiscal Service (COPFS)¹³ published hate crime statistics for Scotland for 2018-19 for charges aggravated by race, sexual orientation, religion, disability and transgender:

- racial crime remains the most commonly reported hate crime with 2,880 charges in 2018-19, however this is the lowest annual total since consistent figures became available in 2003-04, and the number of charges reported has decreased by 37% , from a peak in 2011-12;
- sexual orientation aggravated crime was the second most common type of hate crime in Scotland (1,176 charges) with the

¹² <https://www.gov.scot/publications/developing-information-hate-crime-recorded-police-scotland> (Scottish Government statisticians are continuing to engage with Police Scotland as they develop the information they hold on hate crime. It is anticipated that a report on the findings of this exercise will be published in 2020)

¹³ <https://www.copfs.gov.uk/publications/equality-and-diversity>

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number of charges reported increasing year on year with the exception of 2014-15;

- the number of religiously aggravated charges reported in 2018-19 (529) is the lowest since 2004-05;
- the number of disability aggravated charges remained almost unchanged up 1% to 289 in 2018-19. With the exception of 2016-17, there have been year on year increases in disability aggravated charges reported since the legislation introducing this aggravation came into force in 2010; and
- there were 40 charges reported in 2018-19 with an aggravation of transgender identity, compared to 52 in 2017-18.

50. Statistics on Criminal Proceedings in Scotland¹⁴ provide a summary of offences dealt with by courts, and include information on disability, race, religion, sexual orientation and transgender identity. The numbers of convictions recorded for these types of aggravations in 2017-18 were:

- Race (650 convictions);
- Sexual orientation (354 convictions);
- Religious (249 convictions);
- Disability (58 convictions); and
- Transgender (12 convictions).

51. Convictions with racial and religious aggravations have fallen by 10% since 2016-17, which mirrors the overall trend in convictions. In contrast, convictions with aggravations relating to sexual orientation fell by only one per cent (from 356 to 354) and with aggravations relating to disability increased by nine per cent (from 53 to 58). Sexual orientation aggravated crime is therefore the second most common type of hate crime which has seen a year on year increase in charges reported and convictions recorded since the legislation introducing this aggravation came into force in 2010. Disability aggravated crime has seen an increase partially due to efforts to raise awareness of this type of crime, which is generally thought to be under reported. However this should be seen in the context of a 30% fall in

¹⁴ <https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/>

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levels of recorded crime more generally over the same period (see page 97 of 'Recorded Crime In Scotland, 2018-19').¹⁵

52. Importantly, it should also be noted that it is widely accepted that hate crime is often not reported to the police. Underreporting of hate crime is a key issue and tackling the issues surrounding that remains a key priority for the Scottish Government, Police Scotland and COPFS. Further evidence, data and background statistics on hate crime are provided in the other accompanying documents for this Bill, including the EQIA, Business and Regulatory Impact Assessment and the Financial Memorandum, including a range of information on prejudice, discrimination and harassment from our national surveys. This is summarised below.

53. In 2015, the Scottish Social Attitudes Survey¹⁶ measured the extent and character of discriminatory attitudes in Scotland, and found that 69% of people felt that 'Scotland should do everything it can to get rid of all kinds of prejudice'. This figure remained relatively stable between 2002 and 2015, and the survey reported that there appears to be a trend towards people in Scotland holding more positive attitudes to diversity.

54. Evidence shows that most people do not experience harassment, however a sizeable number do and of those, often these characteristics are seen as motivating factors. The most recent findings from the:

- Scottish Household Survey (SHS) in 2018¹⁷ found that 8% of adults reported that they had experienced discrimination and 6% had experienced harassment in Scotland at some point over the last 12 months. Groups more likely than others to report experiencing discrimination or harassment include ethnic minorities, people who are gay/lesbian/bisexual and those who

¹⁵

<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2019/09/recorded-crime-scotland-2018-19/documents/recorded-crime-scotland-2018-19/recorded-crime-scotland-2018-19/govscot%3Adocument/recorded-crime-scotland-2018-19.pdf>

¹⁶ <https://www.gov.scot/publications/scottish-social-attitudes-2015-attitudes-discrimination-positive-action/>

¹⁷ <https://www.gov.scot/publications/scotlands-people-annual-report-results-2018-scottish-household-survey/>

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reported belonging to a religion other than Christianity. The most common reason cited as a motivating factor was the respondent's nationality.

- Scottish Crime and Justice Survey¹⁸ found that in 2017/18, 14% of adults reported that they had been insulted, pestered or intimidated in any way by someone outwith their household, an increase from 10% in 2012/13¹⁹. One in ten victims of harassment (10%) thought their gender, gender identity or perception of this was a possible motivating factor, with 9% believing their ethnic origin or race was an influence. 63% of harassment victims in 2017/18 did not think any of their characteristics were an influencing factor in their most recent experience.

Hate crime and public order (Scotland) bill provisions

55. Provisions contained in the Bill, and matters relevant to the provisions contained in the Bill, are discussed in this memorandum as follows:

- consolidation of existing hate crime legislation;
- aggravation of offences by prejudice;
- offences relating to stirring up hatred;
- further provision relating to the characteristics, and power to add characteristic of sex;
- abolition of the offence of blasphemy; and
- other information relevant to Bill provisions.

Consolidation of existing hate crime legislation

Policy objective

56. To bring together the vast majority of existing hate crime laws as noted below into one piece of legislation (namely this Bill):

¹⁸ <https://www.gov.scot/publications/scottish-crime-justice-survey-2017-18-main-findings/>

¹⁹ <https://www2.gov.scot/Resource/0044/00447271.pdf>

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- the current statutory hate crime aggravations set out under;
 - section 96 of the Crime and Disorder Act 1998 (race);
 - section 74 of the Criminal Justice (Scotland) Act 2003 (religion);
 - the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (disability, sexual orientation and transgender identity); and
- the bulk of the current stirring up of racial hatred offences set out under Part 3 of the Public Order Act 1986.

57. The consolidation will provide greater clarity, greater transparency and improved consistency within hate crime legislation in Scotland.

Key information

58. Lord Bracadale stated in his Independent Review of Hate Crime Legislation that he:

“considered the arguments for and against consolidation and concluded that all provisions relating to hate crime and hate speech should be consolidated into one piece of legislation”²⁰. and “This would cover all statutory aggravations and provisions relating to incitement/stirring up of hatred, including the subject-matter currently covered by Part 3 Public Order Act 1986, section 96 Crime and Disorder Act 1998, section 74 Criminal Justice (Scotland) Act 2003, and the Offences (Aggravation by Prejudice) (Scotland) Act 2009, as well as the new provisions recommended in the preceding chapters.”²¹

59. Lord Bracadale did not agree that consolidation risked over-simplifying and generalising hate crime legislation. He stated:

“The principles behind statutory aggravations and incitement to hatred are relatively simple and consistent across the different characteristics.”²²

60. Lord Bracadale was of the view that the process of consolidating existing legislation will give relevant authorities (including the police and the

²⁰ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/10/>

²¹ Ibid

²² Ibid

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COPFS) an opportunity to renew and revise existing procedures and consider how they interact with other relevant parties. As such, he viewed consolidating hate crime legislation as an opportunity to improve the experience of those who are involved in the criminal justice system in relation to hate crimes.

61. In responding to publication of Lord Bracadale's report²³, the Scottish Government accepted the recommendation to consolidate Scottish hate crime legislation into one new hate crime statute.

Alternative approaches

62. An alternative approach would be to do nothing and retain the existing position of different parts of hate crime law being situated in several different pieces of legislation. For the reasons given above, the Scottish Government does not consider that is an appropriate approach.

63. There were a number of approaches suggested by respondents to the consultation in the area of consolidation, but none of these were specifically alternative approaches to consolidation. Instead, the approaches suggested either related to not having hate crime laws at all or different ways in which development of such laws could be approached.

64. It was clear from the responses to the consultation paper that not everyone agreed with the Scottish Government's acceptance of Lord Bracadale's recommendation to maintain having hate crime legislation.

65. A number of respondents, for example some individuals and some faith organisations, expressed general opposition to hate crime legislation, or the principles underpinning it, with some calling for hate crime legislation to be repealed altogether. Those expressing this view felt that hate crime laws are unnecessary because all relevant conduct could be prosecuted using existing offences and relevant motivations can be taken into account by the court as a matter of common law without the need for statutory aggravations. In addition, a general point was made by those respondents that all criminal conduct and all victims of crime should be treated the same, and that hate crime laws based on particular groups would seem to risk undermining the principle of equality before the law. Therefore, an

²³ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

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approach would be to repeal all hate crime legislation and rely on the common law instead. It is important to stress that such an approach would still permit relevant facts and circumstances of offending behaviour to be taken into account in a given case, but this would not be done through a formal statutory hate crime framework.

66. A further approach, put forward mainly by the public and third sectors, was to suggest rather than consolidating the current mainly statutory aggravation model, a new model based on further standalone offences or a combination of further standalone offences and aggravations for all characteristics should be used to deal with hate crime in Scotland. Those taking this view argued that:

- existing standalone offences served an important purpose and were well used,
- aggravations did not provide a direct route to prosecution and did not cover situations where a main offence had not been committed, or the threshold or corroborative requirements of a main offence had not been reached, and/or
- it was important to maintain a full range of legal options in this area. Some argued specifically for retaining the standalone offence relating to race and introducing new standalone offences covering other groups protected by hate crime legislation.

67. Those broadly supportive of hate crime legislation considered that the current approach might be strengthened through the adoption of:

- a rights-based approach;
- a victim-centred approach;
- an approach that aimed to redress discrimination based on structural inequalities and power imbalances in society; and
- a whole system approach – including robust legislation and non-legislative activity – to tackle prejudice and hate crime aimed at different groups.

68. Further, those advocating a greater shift in direction argued for:

- a ‘generic’ approach to formulating legislation that recognised that different groups can be targeted but did not specify and define particular groups;

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- a system based on equality before the law, with no reference to, or special treatment for, any particular groups;
- an approach that gave greater priority to the protection of freedom of speech and freedom of religious expression;
- a US-style system based on freedom of speech and a generic 'emergency test' which allows the prosecution of speech that is judged, taking full account of the context, to 'directly cause specific imminent serious harm'; and
- a non-legislative approach to tackling prejudice and building understanding between groups.

69. However, after considering all the evidence and the views from those responding to the consultation, the Scottish Government agrees with Lord Bracadale's clear recommendation that indicates the most appropriate and effective approach to take in dealing with hate crime in Scotland is based on the existing model and this is therefore the approach being adopted in consolidating existing hate crimes law in this Bill.

Consultation

70. The consultation paper explained that the Scottish Government agreed with Lord Bracadale's recommendation that hate crime laws in Scotland should be consolidated into a single piece of legislation in order to provide clarity, transparency and consistency.

71. The Scottish Government also agrees with the recommendation that the statutory aggravation model should continue to be available as a means of addressing hate crimes in Scotland, agreeing in particular that this approach was effective and supported clear recording and production of statistics.

72. As the Scottish Government agreed with Lord Bracadale's recommendation that all hate crime laws in Scotland should be consolidated, it should be noted that no specific question was asked about consolidation in the consultation paper.

Part 1: Aggravation of offences by prejudice

Threshold for proving an aggravation

Policy objective

73. Retaining the existing threshold for proving an aggravation, while also committing to ensuring practical and helpful guidance is published for implementation of this legislation, will ensure that the existing thresholds continue to operate at the same level and ensure help is given for the public and others in more easily understanding the law in this area and, in particular, the level at which the thresholds operate at.

Key information

74. The Scottish Government consultation explained that:

“the existing core method of prosecuting hate crimes in Scotland is via the attachment of a statutory aggravation when a person has committed an offence.

A statutory aggravation ‘attaches’ to an offence in certain circumstances based on the conduct or motivation of the offender. In order for an aggravation to attach, there needs to be an underlying piece of criminal conduct i.e. a baseline offence committed. The circumstances that require to be met are sometimes referred as the ‘threshold’, or test for proving the aggravation.

At present, the various statutory aggravations in relation to different characteristics share a common framework as to when the aggravation will apply, and a similar ‘threshold’ for proving an aggravation applies in each case.”²⁴

75. The characteristics which are listed in section 1(2) of the Bill in relation to the aggravation of offences by prejudice are:

- Age

²⁴ <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/3/>

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- Disability
- Race
- Religion
- Sexual orientation
- Transgender identity
- Variations in sex characteristics.

76. Under Part 1 of the Bill, an offence is aggravated by prejudice if either:

- where there is a specific victim, at the time of committing the offence or immediately before or after doing so, the offender evinces malice and ill-will towards the victim based on the victim's membership (or presumed membership) of a group defined by reference to a characteristic listed in section 1(2); or
- the offence is motivated (wholly or partly) by malice and ill-will towards members of a group defined by reference to any such characteristic.

77. In considering the issue, Lord Bracadale came to the conclusion that the existing thresholds operated at the appropriate level and he saw no reason to change the level at which the thresholds apply. However, Lord Bracadale also indicated a desire for the law in this area to be more user-friendly so that it could be more easily understood in respect of the operation of the threshold. He therefore recommended that the language of 'evincing malice and ill-will' should be changed to 'demonstrating hostility'.

78. The Scottish Government has considered this area carefully with the aim of achieving the policy goals expressed by Lord Bracadale; namely maintaining the current level at which the thresholds operate while aiding understanding for the public and others about how the thresholds operate.

79. Informed by various responses to the Scottish Government consultation including from Police Scotland, it is considered that the only way to ensure the current thresholds are maintained is actually to keep using the existing wording i.e. malice and ill-will. This does not mean that the Scottish Government is not aware of and sympathetic to the need to ensure wider understanding of how this area of law operates.

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80. It is therefore intended that the Scottish Government will produce guidance to accompany this legislation when it is being implemented (on the assumption it is passed by the Scottish Parliament). This guidance will help explain how the law operates in user-friendly ways so that those who may benefit most from the operation of this legislation are aware of how it operates.

81. This guidance will include an explanation of the thresholds as provided for in the Bill. By doing this, the Scottish Government considers that the ultimate policy goals as expressed by Lord Bracadale will be achieved, even though not in the manner as suggested by Lord Bracadale.

Alternative approaches

82. The main alternative would be to proceed with the recommendation from Lord Bracadale. This was to change ‘evincing malice and ill-will’ to ‘demonstrating hostility’. In proposing this change, Lord Bracadale was clear in his report at paragraph 3.10 that:

“I stress that in recommending this change in the language I am not suggesting that there should be any change in the meaning or the legal definition of the thresholds.”²⁵

83. The Scottish Government considers that the only way to guarantee there is no change in the level of the threshold is to maintain the existing wording. Any change to other wording runs the risk of changing the level of the threshold. So while the Scottish Government has considered carefully whether changing the wording to, for example, demonstrating hostility would achieve the twin policy goals as sought by Lord Bracadale, the Bill does not propose to make this change. This is because the Scottish Government does not want to risk changing the threshold. This position also takes account of concerns raised by a number of respondents to the consultation.

Consultation

84. A range of views were offered in response to the Scottish Government consultation. The analysis of the consultation responses revealed that:

²⁵ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

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“Respondents were divided on whether the language of the thresholds for statutory aggravations would be easier to understand if it were changed from ‘evincing malice and ill will’ to ‘demonstrating hostility’: 35% agreed, 40% disagreed, and 25% were unsure (representing 268, 302 and 187 respectively out of a total of 757 respondents). Views were also mixed on whether the proposed change would affect the application of the thresholds: 43% agreed, 24% disagreed, and 33% were unsure (representing 308, 171 and 238 respectively out of a total of 717 respondents).”²⁶

85. Of those that offered views, the Scottish Government notes amongst both those who supported changing the wording and those who argued for retention of the existing wording, there was broad consensus that easily accessible information about the operation of the thresholds (whatever wording was used) was an important step that could improve understanding of this area of law amongst those who may benefit most from the law.

Application of aggravation where presumption as to membership of a group exists or association with a group exists

Policy objective

86. To ensure appropriate protections exist by extending the operation of existing provisions relating to a person being presumed to be a member of a group and person being associated with a group so that they apply to all characteristics, will ensure consistency across the characteristics and afford protection for those who are victims where the offending behaviour they have been subject to has been motivated, at least in part, due to their presumed membership of a group or their association with a group.

Key information

87. At the moment, the existing statutory aggravations in relation to the characteristics of race, religion, disability, sexual orientation and transgender identity may also apply where the offender evinces malice and

²⁶ <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/5/>

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ill-will towards a victim based on an incorrect presumption that the victim is a member of a group defined by reference to one of those characteristics. For instance, an assault may be aggravated by prejudice because the offender evinces malice and ill-will towards the victim based on a mistaken presumption that the victim is a Muslim. This is because the statutory aggravations apply even in cases where the malice and ill-will is based on an incorrect presumption by the offender that the victim is a member of a group defined by reference to one of the above characteristics. In the example given, the relevant characteristic in this case would be religion.

88. The existing statutory aggravations relating to the characteristics of race and religion also apply in relation to persons who have an association with someone with the characteristic. This is because section 96 of the Crime and Disorder Act 1998 (racial hatred aggravation) defines membership of a racial group as including association with members of the group. Likewise, section 74 of the Criminal Justice (Scotland) Act 2003 (religious hatred aggravation) defines membership of a religious group as including association with members of the group.

89. This is different to the offender being mistaken as to the victim being a member of a particular racial group or religious group. Rather, the application of the aggravations in relation to people who have an association applies where, for example, a white person is assaulted because they socialise with a person of a different race.

90. In his report, Lord Bracadale recommended that:

“The statutory aggravations should also apply where hostility based on a protected characteristic²⁷ is demonstrated in relation to persons who are presumed to have the characteristic or who have an association with that particular identity.”²⁸

91. The Bill provides that all of the hate crime statutory aggravations apply in relation to people who are presumed to have the characteristic or who have an association with the characteristic. For example, if a person

²⁷ For the purposes of this document, where Lord Bracadale is quoted as using the term ‘protected characteristic’ it is in reference to the characteristics included within hate crime legislation.

²⁸ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

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is targeted because the perpetrator presumed they were gay (i.e. this is an example of the aggravation applying where there is a presumption that a person has a specific characteristic), or a parent is targeted because they are with their disabled child (i.e. this is an example of the aggravation applying where there is an association with the characteristic).

Alternatives approaches

92. An alternative approach would be not to extend the protections of the aggravations relating to the characteristics noted above. This would, however, mean that those who were, for example, associated with a disabled person and were attacked for that purpose (e.g. if they have a disabled child) would not be protected by the disability aggravation.

Consultation

93. The analysis of the Scottish Government Hate Crime consultation revealed:

“There were mixed views overall about whether statutory aggravations should apply in cases where people are presumed to have one or more protected characteristic (35% of respondents said ‘yes’, 47% said ‘no’, and 19% said they were unsure, representing 176, 237 and 95 out of 508 respondents, respectively). However, compared to individuals, organisations were overwhelmingly in support of this proposal, with 91% (61 out of 67 respondents) agreeing.

Similarly, there were mixed views overall on whether the statutory aggravations should apply where people have an association with an individual who is a member of a protected group. Once again, however, compared to individuals, organisations were overwhelmingly in favour, with 82% (56 out of 68 respondents) agreeing.”²⁹

²⁹ <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/11/>

Court requirement to state sentencing impact of aggravation

Policy objective

94. Retaining the current condition whereby a court is required to state in open court the extent, if any, that a sentence has been increased due to the operation of a statutory aggravation, will aid transparency in sentencing and help victims and others to better understand sentencing decisions.

Key information

95. The way in which statutory aggravations operate in hate crime legislation (as well as other legislation) is that when proven, the court is required to undertake a certain number of specified steps. In hate crime legislation specifically, these are as follows:

- state on conviction that the offence was aggravated in relation to the particular characteristic;
- record the conviction in a way that shows that the offence was so aggravated; take the aggravation into account in determining the appropriate sentence; and
- state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or, otherwise, the reasons for there being no such difference.

96. This general approach is adopted outwith hate crime aggravations too. For example, the aggravations found in the legislation noted below all contain this basic formulation of steps for the court to undertake:

- offences aggravated by terrorism (section 31 of the Counter-Terrorism Act 2008);
- offences aggravated by connection with serious organised crime (section 29(1) of the Criminal Justice and Licensing (Scotland) Act 2010);
- offences aggravated by connection with human trafficking activity (section 5 of the Human Trafficking and Exploitation (Scotland) Act 2015); and

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- offences aggravated by abuse of partner or ex-partner (section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016).

97. Recommendation 8 of Lord Bracadale’s review on hate crime stated:

“Where a statutory aggravation is proved, the court should be required to state that fact expressly and it should be included in the record of conviction. The aggravation should be taken into account in determining sentence.

There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.”³⁰

98. Therefore, in effect, Lord Bracadale was recommending the continuation of the first three steps noted above that fall on the court as a result of an individual being convicted of an offence with a statutory aggravation, but the discontinuation of the final step.

99. Lord Bracadale argued the fourth step didn’t serve a clear purpose, was complicated in practice given the multiple factors that contribute towards making sentencing decisions, and had the potential to upset a victim if the difference attributed to the aggravation is less than they had hoped.

100. It is apparent that if the court decides that no increase in the sentence is appropriate as a result of the aggravation then this may lead to disappointment and possibly even disillusionment on the part of the victim, the victim’s family and the wider community. However, if this step was removed, the Scottish Government consider that this could result in even more disappointment due to the fact that no explanation by the court would be necessary as to why the sentence was not increased. Therefore, by retaining this step the Scottish Government believe the process would, in general terms, be more transparent and would lead to a better understanding of sentencing decisions.

101. Further, if this step is retained and the sentence is increased, the reasons for such an increase will continue to be set out by the court which

³⁰ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

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will lead to greater transparency in sentencing decisions and send a clear message to perpetrators and the wider community that the courts view such behaviour as unacceptable and hopefully act as a deterrent.

102. As stated above, the four steps a court must follow in respect of when an aggravation is proven not only apply to hate crime statutory aggravations but also to other statutory aggravations in Scotland. Therefore, repealing this step for hate crime would mean different requirements would be placed on the courts in relation to hate crime aggravations compared to others. This in itself is not an argument for not repealing this step, but the Scottish Government consider this highlights further consideration would be necessary as to whether it would be appropriate to remove this condition from all other statutory aggravations in Scotland.

103. During initial engagement with stakeholders following publication of Lord Bracadale's report³¹, the Scottish Government heard that stating the difference in the sentence sends a message to both victims and perpetrators that these types of crimes are being taken seriously. This is an important point but the Scottish Government accepts that this may not be such a strong argument if the sentence is not increased. However, clear guidance and a proper explanation as to why an individual was given a particular sentence can, in the view of the Scottish Government, only ultimately lead to a better understanding and more transparency in relation to sentencing decisions.

104. It is clear that better understanding in sentencing decisions will improve confidence in the justice system and help prevent victims and their families feeling let down as a result of the sentence given.

105. The Scottish Government's view is the requirement to state in open court the extent, if any, that a sentence has been increased does actually serve a clear purpose and is important in sending a clear message that such crimes are taken seriously by the courts, makes sentencing decisions more transparent and can be helpful in supporting victims of crimes.

³¹ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/1/>

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Alternative approaches

106. An alternative approach is to adopt Lord Bracadale's recommendation³² and to legislate in this Bill to remove the current step whereby a court is required to state in open court the extent, if any, that a sentence has been increased due to the operation of a statutory aggravation.

107. Some of those who responded to the consultation who supported removing this step were opposed in principle to hate crime legislation, therefore their underlying point could therefore be the idea that a sentence should never be increased because the offender was motivated by hatred based on a person's characteristic(s).

108. After considering all views expressed the Scottish Government is of the view that the positive aspects of retaining the requirement to state in open court the extent, if any, that a sentence has been increased outweighs the negative aspects of repealing it. Briefly, the Scottish Government consider retaining this requirement will:

- send a message to victims and society at large about the unacceptability of hate crime, and the seriousness with which it was treated;
- not undermine confidence in the justice system and encourage the reporting of crimes;
- ensure victims and wider society remain able to understand sentencing decisions made by the court in relation to statutory aggravations;
- provide data on incidents of hate crime by characteristic; and
- ensure the conditions placed on the courts in relation to hate crime aggravations are consistent with other statutory aggravations in Scotland.

Consultation

109. The majority of respondents who offered a definite view to this question in the consultation paper agreed with the Scottish Government's

³² <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

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proposal i.e. to retain the requirement to state in open court the enhancement, if any, of sentence. Only 17% supported the Lord Bracadale recommendation, 52% were opposed, (i.e. supported the Scottish Government's consultation position) and 31% were unsure.

110. There was a great deal of consistency in the views put forward by respondents of all types, (organisations and individuals), who supported the Scottish Government's proposal. They thought this condition was helpful in:

- enhancing transparency in sentencing, promoting understanding in relation to sentencing, and the role of aggravations in determining sentences;
- supporting scrutiny, accountability and consistency with regard to sentencing practice;
- sending a message to victims, perpetrators and society at large about the unacceptability of hate crime, and the seriousness with which it is treated;
- increasing confidence in the justice system, and encouraging reporting of crimes;
- ensuring the availability of consistent data which would allow for effective monitoring of sentencing practices; and
- validating the experience of victims (and affected communities) and providing reassurance about the response to such conduct.

111. Comments explaining opposition to, or reservations about, retaining this step were offered by just a few organisations including third and public sector bodies. However, amongst those opposing the Scottish Government's proposal were some stakeholders relating to the operation of the justice system (e.g. the Scottish Sentencing Council).

112. These respondents largely endorsed Lord Bracadale's position, and made the following points:

- the requirement was unnecessary, its discontinuation would not detract from the overall aims of ensuring aggravations were taken into account in sentencing and providing transparency on this process;

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- the complexity involved in setting sentences because of the need to take account of multiple factors, stating the difficulty in isolating the extent to which any single factor contributed to a final sentence; and
- victims may lose confidence in the justice system if an aggravation results in only a limited uplift in an overall sentence affected by a complex range of factors.

113. However, some of these respondents did continue to support the court, in some situations, offering a view on the extent of the enhancement, but proposed that this should be left to the discretion of the court to provide a statement in appropriate cases, suggesting that guidance might be provided on this.

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Part 2: Offences relating to stirring up hatred

Offences relating to stirring up hatred

Policy objective

114. To introduce new offences relating to stirring up hatred. These comprise the offences of stirring up hatred under sections 3(1) and (2) of the Bill, and also the offences of possessing inflammatory material under section 5(1) and (2) of the Bill (which also involve stirring up hatred).

115. The offences under sections 3(1) and 5(1) largely replace similar existing offences which apply in relation to the stirring up of hatred against a group (of persons) defined by reference to race, colour, nationality, or ethnic or national origins.

116. Section 3(2) and 5(2) create new offences, albeit in similar terms and with slightly higher thresholds, which apply instead in relation to the stirring up of hatred against a group defined by reference to age, disability, religion (or, for a social or cultural group, perceived religious affiliation), sexual orientation, transgender identity, and variations in sex characteristics.

117. The characteristics to which these offences apply are discussed in more detail later.

Key information

Scope of offences relating to stirring up hatred

118. Currently in Scotland, offences relating to stirring up hatred apply only in relation racial hatred. These offences are contained in sections 18 to 23 of the Public Order Act 1986 ('the 1986 Act'), which is a UK statute with certain provisions extending to Scotland. For the purposes of these offences, "racial hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

119. Sections 18 to 23 of the 1986 Act provide six offences covering a very broad range of conduct. These offences criminalise certain forms of

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conduct in circumstances where the conduct is intended to stir up racial hatred, or where racial hatred is likely to be stirred up thereby.

120. For each of these offences under the 1986 Act (involving racial hatred), the conduct includes some form of threatening, abusive or insulting words, behaviour, material, images or sounds. The prosecution must show that the accused intended his conduct to stir up racial hatred, or that racial hatred was likely to be stirred up by it. However, for each offence there is no requirement to prove that racial hatred was in fact stirred up in consequence of this conduct.

121. During Lord Bracadale's Independent Review of Hate Crime Legislation in Scotland³³, Lord Bracadale explored the merits of having stirring up offences and whether new stirring up of hatred offences should be introduced in respect of other characteristics (in addition to colour, race, nationality, or ethnic or national origins), and if so, in what form.

122. In his report, Lord Bracadale discusses the distinct nature of the conduct that is criminalised by a stirring up of hatred offence. He states:

“Stirring up hatred is conduct which encourages others to hate a particular group. It is dealt with as a standalone offence in our current legislation. This is distinct, and different from the concept of a baseline offence directed at a member or members of the group (e.g. harassment or assault) with a statutory aggravation in relation to a protected characteristic. In the case of the latter, the baseline conduct is already criminal; it is the motive or demonstration of hostility that marks it out as a hate crime. The offence is directed against a member, or members, of the group. In the context of stirring up hatred, the intention of the perpetrator is that hatred of the group as a whole is aroused in other persons. Hate is primarily relevant, not as the motive for the crime, but as a possible effect of the perpetrator's conduct.”³⁴

123. Lord Bracadale added:

³³ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

³⁴ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

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“unlike an aggravated offence, where the underlying conduct is itself criminal, a stirring up of hatred offence may criminalise conduct which would not otherwise be criminal.”³⁵

124. As criminalising conduct is a serious step, Lord Bracadale took into account a number of different considerations in deciding whether to recommend the extension of stirring up offences and was ultimately persuaded that:

“stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.”³⁶

125. Lord Bracadale set out his reasons for this recommendation with reference to a series of key considerations:

- wrongfulness;
- harm;
- seriousness;
- symbolism;
- frequency of prosecutions;
- whether there was a gap in a law; and
- whether there would be a practical benefit from the creation of new offences.

126. While Lord Bracadale stated that the strongest case for extending stirring up offences to other characteristics may be made in respect of religion, he also thought that ‘parity’ between all characteristics (current and new) was justified and desirable. The fact that it is less likely that people may commit offences of stirring up of hatred against people on the grounds of their disability or age did not mean that stirring up of hatred on these grounds should not be criminalised to enable action to be taken in the event that someone does engage in behaviour intended or likely to stir up hatred against people on the grounds of their disability or age.

³⁵ Ibid

³⁶ Ibid

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127. In arriving at his recommendation that stirring up of hatred offences should be extended to all characteristics, including any new ones, Lord Bracadale recognised the capacity for harm acts of stirring up hatred may cause.

128. While being intrinsically morally wrong with the potential to result in identifiable harm to groups of people and whole communities, Lord Bracadale also stated stirring up hatred has the potential to contribute to a social atmosphere in which prejudice and discrimination are accepted as normal.

129. In this regard Lord Bracadale noted the introduction of a suite of stirring up offences would allow the law to serve an important symbolic and educative function, sending a clear message that this type of behaviour attracts particular condemnation by society and will not be tolerated.

130. The Scottish Government accepts the recommendation that offences relating to stirring up hatred should be introduced in respect of each of the characteristics, including any new characteristics. Therefore, in addition to the offences in sections 3(1) and 5(1) of the Bill (which apply in relation to colour, race, nationality, or ethnic or national origins), new offences are created under sections 3(2) and 5(2) of the Bill which apply in relation to the additional characteristics of:

- age;
- disability;
- religion;
- sexual orientation;
- transgender identity; and
- variations in sex characteristics.

Thresholds for new offences relating to stirring up hatred (other than racial hatred)

131. During his review Lord Bracadale considered what the legal thresholds should be for new stirring up of hatred offences. In essence, the legal threshold can be thought of as setting out what conduct should give rise to a criminal offence being committed, as opposed to conduct which

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may, for example, be unpleasant or offensive but not worthy of criminalisation.

132. Existing racial stirring up of hatred provisions contained in the 1986 Act criminalise conduct which is threatening, abusive or insulting if the perpetrator intends thereby to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up thereby.

133. In England and Wales there are stirring up of hatred offences, not only in relation to race, but also in respect of religion and sexual orientation. There was also previously an offence of stirring up religious hatred at section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, prior to the repeal of that Act.

134. The threshold for the stirring up offences in relation to the additional characteristics of religion and sexual orientation in England and Wales and that which was previously in effect in relation to religion in the 2012 Act are different. In particular, for the stirring up offences in England and Wales which apply in respect of religion and sexual orientation, the conduct or material requires to be 'threatening' rather than 'threatening, abusive or insulting'. In addition, it is necessary to prove that the accused intended to stir up hatred; the fact that the accused's actions would be likely to result in hatred being stirred up is not sufficient.

135. Lord Bracadale in his report considered that the requirement for 'threatening' behaviour alone sets the legal threshold too high (i.e. the point at which conduct is criminalised is too high) as he is of the view that abusive conduct which was not necessarily threatening could still be intended to stir up hatred in relation to a characteristic or could give rise to the likelihood that hatred could be stirred up.

136. Within this context, Lord Bracadale concludes that the threshold about the nature of the conduct in a stirring up of hatred offence should be based on including conduct that is 'threatening or abusive'. This would be consistent with the approach in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

137. Lord Bracadale also considers the reference to 'insulting' conduct should not form part of any new stirring up offences. In this regard Lord Bracadale noted what happened in 2013 when the word 'insulting' was

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deleted from the English harassment offence under section 5 of the Public Order Act 1986. Following a review the Crown Prosecution Service (CPS) were unable to find any case where the conduct being prosecuted could not be characterised as ‘abusive’ as well as ‘insulting’ and took the view that from the perspective of the prosecution the word ‘insulting’ could safely be removed without undermining the ability of the CPS to bring prosecutions in appropriate cases.

138. The Scottish Government agrees with Lord Bracadale that adopting a threshold of threatening or abusive behaviour for stirring up hatred offences covering new characteristics strikes the right balance between conduct which ought to be criminalised and one’s right to freedom of expression, and represents a measure familiar to Scots law, which works well currently in practice.

139. It is recognised that that during the Scottish Government consultation on reforming hate crime legislation in Scotland concerns were expressed by some consultees that what constitutes ‘abusive’ behaviour involves a degree of subjective judgment. However, it is worth highlighting that the term ‘abusive’ is one that Scottish courts are very familiar with (for example through the offence of ‘threatening or abusive behaviour’ at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 with, for example, 3,759 convictions in 2017-18 for that offence in Scottish courts)³⁷.

140. During his review, Lord Bracadale also discusses whether the criminal intent associated with any new stirring up offence should be restricted to an intention to stir up hatred, or whether it should also extend to behaviour that is likely to stir up hatred, irrespective of the intent of the accused person, as is used in the stirring up of racial hatred offences. Lord Bracadale considers that the wider test including both intention & likelihood would give more flexibility and does not consider the inclusion of behaviour that is likely to stir up hatred would unduly interfere with freedom of speech/expression.

141. The Scottish Government accepts that to confine a stirring up offence to an intention to stir up hatred would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond

³⁷ <https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/pages/4/>

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reasonable doubt what the accused's intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.

142. Therefore, the Scottish Government has adopted Lord Bracadale's recommendation that all stirring up of hatred offences covering new characteristics should require conduct which is threatening or abusive; and include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances hatred in relation to the particular characteristic is likely to be stirred up thereby.

Thresholds for offences relating to stirring up racial hatred

143. Tied to the discussion above regarding the thresholds for the new offences relating to stirring up hatred created under section 3(2) and 5(2) of the Bill, is Lord Bracadale's recommendation for the reform of the existing stirring up offences in relation to racial hatred. Lord Bracadale considers the provisions in sections 18 to 22 of the 1986 Act are somewhat complicated and cumbersome and recommends they should be:

“revised and consolidated in a new act containing all hate crime and stirring up of hatred legislation.”³⁸

144. The Scottish Government agrees with Lord Bracadale that the consolidation exercise provides an opportunity to provide a more modern and easily understood suite of legislation and a more simplified approach would be beneficial due to the extension of the stirring up of hatred legislation to the new characteristics to be covered in the Bill.

145. Lord Bracadale saw merit in providing consistency in approach between racial stirring up hatred provisions, and any new stirring up hatred provisions covering other characteristics. He wrote:

“If the stirring up of racial hatred provisions in the Public Order Act 1986 are to be consolidated along with any new provisions it would be desirable that the tests would be consistent in relation to each protected characteristic. I therefore recommend that any new stirring up of hatred offences should include a requirement of an intention to stir up hatred or that having regard to all the circumstances hatred in

³⁸ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

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relation to the particular protected characteristic is likely to be stirred up thereby.”³⁹

146. As such, Lord Bracadale took the view that the existing stirring up offences should retain both intention and likelihood as a means of committing an offence.

147. Lord Bracadale further recommended that the stirring up of hatred offences on the grounds of race should be changed to no longer capture behaviour or conduct that is ‘insulting’. In support of this view, Lord Bracadale noted the amendment that occurred to section 5 of the 1986 Act in 2013, where the term ‘insulting’ was removed from that offence with no notable impact on the ability to commence a prosecution, according to the Crown Prosecution Service.

148. The removal of ‘insulting’ conduct from the scope of the current stirring up offences for racial hatred was explored during the Scottish Government’s own consultation exercise. There were mixed views on the option of removing ‘insulting’, with a clear difference in the view between individuals and organisations. Most organisations (63%) agreed with the proposal, compared to 43% of individuals. However, the majority of race equality organisations did not support the removal of the word ‘insulting’ in regards to stirring up of racial hatred.

149. Those supporting the removal argued that this would promote parity amongst the characteristics and clarity as to the type of conduct the offences would capture. Those in favour also point to the arguments put forward by Lord Bracadale that the removal of ‘insulting’ from the harassment offence in section 5 of the 1986 Act did not have any negative impact on the ability to prosecute such conduct and was supported by the Crown Prosecution Service.

150. Those who opposed the removal raised concerns that this might make the prosecution of stirring up race cases more difficult and would remove a ground for raising a prosecution to address such conduct, particularly in cases where behaviour that might objectively be described as

³⁹ Ibid

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'insulting' could be perceived by the person at whom it is targeted as abusive.

151. In addition, the Scottish Government considered the potential impact that removal of 'insulting' may have on the ethnic minority communities in particular. Removal of insulting could be perceived as suggesting it was in some way acceptable to insult on the basis of race in a manner that previously it would not have been. Such a perception, even if based on an incomplete understanding of the operation of criminal law, is not a perception that the Scottish Government is willing to risk arising.

152. Following careful consideration the Scottish Government has decided to retain 'insulting' behaviour within the scope of the revised stirring up of racial hatred offence(s). In this regard, it is acknowledged that racial hate crime accounts for the majority of hate crime offending in Scotland and has a particular heritage and significant place in Scots law. As such and as discussed above, its removal could be particularly damaging in terms of tackling racial hatred within Scottish society if such a removal could be perceived as a weakening of criminal law protection in the area of race. The Scottish Government is of the view that, due to the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion, a separate approach is justified.

153. The Scottish Government further notes this is a threshold which has been operating without difficulty in practice for nearly three decades and therefore are not persuaded its reformulation is necessary. The Scottish Government is therefore not persuaded that the threshold should be adjusted.

154. Accordingly, the new offences in section 3(1) and 5(1) of the Bill (which apply in relation to race and related characteristics) use the same thresholds as those for existing offences relating to stirring up racial hatred. In particular, these new offences require conduct or material which is 'threatening, abusive or insulting,' accompanied by an intention or likelihood to stir up hatred.

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Alternative approaches

Scope of offences relating to stirring up hatred

155. An alternative, more restricted approach which was considered was introducing new stirring up offences only insofar as would align Scotland with England and Wales. This would mean introducing new stirring up hatred offences in relation to religion and sexual orientation only. The Scottish Government takes the view the repeal of section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 has left a gap in the law in Scotland with regards religious hatred, which criminalised the making of threatening communications intended to stir up hatred on religious grounds; and stirring up of hatred on grounds of religion and sexual orientation are already offences in the rest of the UK. It should be noted, however, as explained above, there are significant differences in approach between these offences, and those relating to racial hatred in sections 18 to 23 of the 1986 Act.

156. While it is difficult to say for certain as there are not currently any such offences in Scotland, anecdotal evidence does suggest that stirring up of hatred on grounds of religion or sexual orientation is a more significant problem in practice, at least at this time, than stirring up of hatred on grounds of the other characteristics i.e. age or disability.

157. While it can be said there is less evidence that there are groups and/or individuals stirring up hatred against people on the grounds of age or disability, the Scottish Government recognises the advantage of replacing the existing offences relating to stirring up racial hatred with new offences which also apply in relation to the characteristics of age, disability, religion, sexual orientation, transgender identity, and variations in sex characteristics. Such an approach not only offers parity and equality among these characteristics, but also serves to help deter forms of prejudice which, although not common at present, might otherwise become more prevalent.

Thresholds for offences relating to stirring up racial hatred

158. An alternative approach would be to adopt Lord Bracadale's recommendation in full, and remove 'insulting' from the scope of the racial stirring up hatred offence(s). While this approach would promote parity and consistency amongst characteristics, for the reasons outlined above, the

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Scottish Government is satisfied the current legal threshold for racial hate crime is appropriate and should be retained.

159. This approach should be seen within the context of the decision to retain section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, which is a standalone offence of racially aggravated harassment, and unique to the characteristic of race. This, again, in part reflects the prevalence of racial hate crime within the context of all hate crime offending in Scotland and the fact that the laws in relation to racial hate crime have been in place for many years and appear to be working effectively.

Consultation

Scope of offences relating to stirring up hatred

160. The Scottish Government Consultation paper shows there is a clear difference between the views of organisations and individuals, with many individuals opposed to the very concept of hate crime. Bearing this in mind, a substantial majority of respondents to the consultation disagreed with the recommendation that stirring up of hatred offences should be introduced in respect of each of the characteristics, including any new characteristics – 80% of respondents disagreed and 15% agreed; the remaining 5% were unsure.

161. Organisations and individuals offered contrasting views. While 85% of individuals disagreed with this recommendation, 69% of organisations agreed. Again, it is important to bear in mind that the great majority of individuals who responded to the consultation were opposed in principle to hate crime law.

162. Among organisations, faith groups expressed different views to other types of organisation, with 13 out of 16 such groups disagreeing that offences relating to stirring up hatred should be introduced in respect of each of the characteristics including any new characteristics.

163. Those in support of the creation of a suite of standalone stirring up offences for all characteristics often cited:

- the importance of consistency and parity between characteristics;
- the principle of equal treatment;

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- the merits in avoiding legislative change which creates a hierarchy or the perception of a hierarchy of characteristics with some being seen as having greater protection than others; and
- the benefits of establishing certain minimum standards for all groups protected within hate crime legislation, with the recognition that while different groups experience hate crimes in different ways, certain minimum standards should be in place for all.

164. Some of those opposed to extending the stirring up offences to cover other characteristics, especially individual respondents, were opposed in principle to hate crime laws. However, a number of faith groups were also opposed, and expressed concerns that any extension of the law to cover religion, sexual orientation and transgender identity would have negative consequences for free speech and religious liberty, inhibiting freedom to preach and express religious views.

165. Some concerns were also raised by some (though not all) racial/ethnic minority organisations regarding the loss an extension and consolidation of the law could bring to the unique status of race, which accounts for the majority of hate crime offending in Scotland and has a particular heritage and pedigree in Scots law.

166. For those racial/ethnic minority organisations, almost all stirring up of hatred in Scotland is premised on stirring up race-based hatred and they consider the creation of separate offences for other characteristics is unnecessary and on the rare occasions that it does occur, could be dealt with using existing offences of e.g. threatening or abusive behaviour. However, it appears from discussions with some of those groups that their concern was at least partly based on the misapprehension that extending these offences to cover other characteristics would mean that it would no longer be possible to separately identify those cases specifically relating to stirring up of racial hatred (this will not be the case).

Thresholds for new offences relating to stirring up hatred (other than racial hatred)

167. The question of thresholds was also explored during the Scottish Government Consultation, where there were differing views as to how any new offences should be formulated. A majority of all respondents (72%;

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743 out of 1,030 respondents) disagreed that any new stirring up offences should require ‘threatening or abusive’ conduct. However, in this regard, it is worth noting that the majority of individual respondents were opposed to the creation of new offences concerning the stirring up of hatred and to specific ‘hate crime’ laws in general. By contrast, most organisations (56%; 43 out of 77 respondents) agreed with the recommendation that the offence should cover conduct which is ‘threatening or abusive’.

168. Respondents who agreed with the requirement for threatening or abusive conduct thought this phrasing (i) offered the right balance in protecting freedom of expression and protecting identified groups, and (ii) was consistent with other legislation. Some who were opposed to hate crime laws in general did, however, agree that the proposed wording is appropriate if new offences were to be created.

169. Those who disagreed with the requirement offered two contrasting views: some said the proposed threshold was ‘too high’, while others said it was ‘too low’. Those who considered it was too low a threshold had concerns that what amounted to ‘abusive’ behaviour was, in their view, subjective, while a common view among those who considered the threshold was too high was that if behaviour is intended or likely to stir up hatred, it should be criminal irrespective as to what form that behaviour takes. Others cited the existing threshold for stirring up racial hatred which criminalises behaviour that is ‘threatening, abusive or insulting.’

170. A detailed analysis of the responses received to this consultation can be found in chapter 11 of the independent report of responses which was published by the Scottish Government in June 2019.⁴⁰

Thresholds for offences relating to stirring up racial hatred

171. In response to the consultation, there were mixed views on the option of revising existing provisions concerning the stirring up of racial hatred so that they are formulated in the same way as the other proposed stirring up hatred offences – 45% of total respondents agreed, 32% disagreed, and 23% said that they were unsure (representing 299, 211, and 156 out of a total of 666 respondents). However, organisations were more likely than

⁴⁰ <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/12/>

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individuals to answer 'yes' to this question (63% compared to 43%), while individuals were more likely than organisations to answer 'no' (34% compared to 14%).

172. Organisations that did not wish to see the reformulation of existing race provisions (mainly third sector bodies) were generally concerned that this might make the prosecution of stirring up of racial hatred cases more difficult. A few individuals also expressed this concern. These respondents felt that the inclusion of 'insulting' conduct within the current formulation of the stirring up racial hatred offence had merit in capturing apparently low-level conduct (sometimes persistent in nature) that could be experienced as 'abusive' or 'threatening' by the individuals at whom it was targeted.

173. The remaining respondents who indicated disagreement with the reformulation of stirring up of racial hatred offences simply reiterated their opposition to or concerns about hate crime laws or stirring up offences. With regard to 'stirring up' in particular, some in this group (re)stated the view that such offences should apply to race but should not be extended to cover other characteristics.

174. Respondents who agreed that existing provisions concerning the stirring up of racial hatred should be reformulated to reflect the other proposed stirring up hatred offences thought that consistency across offences was important and made two main points:

- they wished to see parity of treatment for all groups covered by stirring up laws; and
- they thought that this would bring clarity to the law in this area, and be helpful both in terms of operational practice and public understanding.

175. Organisational respondents offering this view generally supported the proposal to achieve consistency by bringing the wording of the current stirring up of racial hatred offence into line with the wording of the additional stirring up offences now proposed. In particular, they expressed support for removing the reference to 'insulting' conduct. One respondent pointed to evidence suggesting that a similar reformulation of the law in England and Wales had had minimal impact on the prosecution of stirring up of racial hatred cases.

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176. Individuals who expressed support for consistent wording were also supportive of the proposal to exclude the reference to ‘insulting’ conduct. However, these respondents often also went on to offer further views about the common wording that should be used across all stirring up offences, for example, respondents expressed concern about the scope and ‘subjectivity’ of the legal threshold for stirring up offences, and called for any common formulation to set a high threshold based on tightly defined terms. Some respondents, particularly individuals, stated their opposition to hate crime or stirring up laws, but nevertheless wished to see consistency (based on a high threshold) if new offences were to be introduced.

177. A detailed analysis of the responses received to this consultation can be found in chapter 11 at paragraphs 11.23 to 11.32 of the independent report of responses which was published by the Scottish Government in June 2019.⁴¹

Protection of freedom of expression

Policy objective

178. To clarify that the new offences relating to stirring up hatred under section 3(2) and 5(2) of the Bill (which apply in relation to, among other things, the characteristics of religion and sexual orientation) do not unreasonably interfere with the rights of people to publicly discuss and debate matters relating to religion and sexual orientation.

Key information

179. In response to both Lord Bracadale’s ‘Independent Review of Hate Crime Legislation in Scotland’⁴² consultation and the Scottish Government’s consultation ‘One Scotland: Hate Has No Home Here’⁴³, a number of stakeholders expressed concerns about the impact that hate crime legislation would have on both freedom of expression and freedom of

⁴¹ <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/12/>

⁴² <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

⁴³ <https://www.gov.scot/publications/one-scotland-hate-home-here-consultation-hate-crime-amending-current-scottish-hate-crime-legislation/pages/2/>

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thought, conscience and religion. Of key concern for stakeholders was the right to freedom of expression under Article 10 of the European Convention on Human Rights ('the Convention').

180. From the consultation responses that informed his final report, Lord Bracadale acknowledges the concern about freedom of speech by those who were in favour of and those who were against stirring up of hatred offences. Those against cited the

“risk that such legislation could prevent legitimate demonstrations against the actions of a particular group and could stifle legitimate debate and criticism. Some pointed to the potential ‘chilling effect on freedom of speech and freedom of religion and belief.’”⁴⁴

181. Those in favour pointed out that freedom of speech was not absolute and that a distinction could, and should, be made between acceptable and even robust criticism amounting to insulting behaviour, and illegitimate threatening or grossly offensive behaviour.

182. In his report, Lord Bracadale considered the compatibility of stirring up of hatred offences with the Convention, noting that the ‘content and context’ of expression is important and that freedom of expression ‘carries with it duties and responsibilities’.⁴⁵ Lord Bracadale concluded that in his view stirring up of hatred offences are, in principle, compatible with Article 10 of the Convention. The Scottish Government agrees with this.

183. However, the Scottish Government is cognisant of the strength of the consultation feedback that the Bill may represent a potential risk to freedom of expression and freedom to manifest religion.

184. In the course of his review of hate crime legislation, Lord Bracadale identified and discussed two examples where similar offences to those provided for in the Bill were accompanied by express provisions to ensure that the provision was compatible with Article 10. Firstly, he notes that section 7 of the now repealed Offensive Behaviour at Football and Threatening Communications Act 2012 ('the 2012 Act') included express

⁴⁴ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

⁴⁵ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

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exceptions to ensure that the freedom to debate and express views relating to religion was protected. Secondly, he discusses section 29J and 29JA of the 1986 Act, which provide Article 10 protections in relation to the legislation prohibiting stirring up of hatred on religious and sexual orientation grounds in England and Wales.

185. In his report, Lord Bracadale recommended that a protection of freedom of expression provision similar to that in sections 29J and 29JA of the 1986 Act concerning religion and sexual orientation and section 7 the 2012 Act concerning religion should be included in any new legislation relating to stirring up offences.

186. Sections 11 and 12 of the Bill address concerns that the new offences relating to stirring up hatred in section 3(2) and 5(2) of the Bill might be misinterpreted as interfering unduly with people's rights to debate and discuss matters relating to religious belief and sexual orientation.

187. In respect of religion, section 11 of the Bill makes it clear that, for the purposes of the offences under section 3(2) and 5(2), behaviour or material is not to be regarded as threatening or abusive solely on the basis that it involves or includes: discussion or criticism of religions, or religious beliefs or practices; proselytising; or urging of persons to cease practising their religions. This is intended to make it clear that these offences do not interfere unduly with people's right to debate and discuss religion or religious beliefs and practices, to advocate or promote religious beliefs or practices or a change of religion, or to urge people to cease practising their religion.

188. In respect of sexual orientation, section 12 of the Bill provides that behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes: discussion or criticism of sexual conduct or practices; or urging of persons to refrain from or modify sexual conduct or practices. This is intended to make it clear that these offences do not interfere unduly with people's right to, among other things, express their views about whether it is right for people to engage in particular sexual practices and that expressing such views is not to be regarded, in and of itself, to be threatening or abusive.

189. However, where the behaviour or material involves or includes something more than solely the conduct specified in section 11(2)(a) to (c)

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or section 12(2)(a) or (b), any such behaviour or material may, depending on the circumstances or context, still amount to threatening or abusive behaviour. For example, an offence may be committed if the urging of people to cease practicing their religion is done in a threatening or abusive manner or, alternatively, it might be committed if a person were to urge people not to engage in same-sex sexual activity while making abusive comments about people who identify as lesbian, gay or bisexual.

Alternative approaches

190. One alternative approach would be not to make any explicit provision in the Bill for the protection of freedom of expression on the grounds that it is already clear from the terms of the Bill that only behaviour that is threatening or abusive is capable of amounting to an offence relating to stirring up hatred under either section 3(2) or 5(2). In the context of, for example, the offence of threatening or abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, it was not considered necessary to make specific provision setting out that certain forms of behaviour are not to be considered, of themselves, to be threatening or abusive.

191. However, in light of Lord Bracadale's recommendation and the strength of the consultation feedback in this regard with respect to issues around religious freedom, in particular, the Scottish Government has made explicit provision in sections 11 and 12 of the Bill that, for the purposes of the new offences in sections 3(2) and 5(2), behaviours and materials are not to be taken to be threatening or abusive solely on that basis that it involved or includes the things mentioned in sections 11(2)(a) to (c) (as regards religion) or section 12(2)(a) or (b) (regards sexual orientation).

192. Consideration was also given to whether specific provision should be made in respect of the other characteristics covered by the offences relating to stirring up hatred, namely age, disability, race (and related characteristics), transgender identity and variations in sex characteristics. However, Lord Bracadale did not make any recommendation in his report on this matter, and consultation respondents' concerns about the impact of the offence on freedom of expression related specifically to religion and sexual orientation.

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Consultation

193. The vast majority of all respondents to the consultation (91%; 955 out of 1,047) agreed with Lord Bracadale that a protection for freedom of expression provision should be incorporated in any stirring up offences. Support for this provisions was primarily based on the need to uphold the rights contained in the Convention. Respondents often saw this as an issue of ‘balance’ between freedom of expression, responding to stirring up, and protecting relevant groups. However, views differed on the point at which that balance should be struck.

Part 3: Further provision relating to the characteristics, including power to add characteristic of sex

Existing characteristics

Policy objective

194. Ensuring characteristics currently protected within the hate crime legislative framework continue to be protected to the same extent with updated language provided where considered necessary will ensure that the language used in the Bill reflects changes over time in wider society and that the individuals who are afforded protection by the law recognise themselves in the terminology used.

195. The use of up-to-date and inclusive language is an important overall objective in updating and modernising hate crime legislation and Scottish Government have sought to ensure that, where possible, the language used is simple and understood by stakeholders and the general public.

Key information

196. The definition and meaning for race remains as currently provided for within section 96 of the Crime and Disorder Act 1998. In that Act ‘racial group’ means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

197. In relation to religion, the intention is to provide protection for religious beliefs and groups. The definition of religion in this legislation, which is similar to section 74 of the Criminal Justice (Scotland) Act 2003, states that ‘religious group’ means a group of persons defined by reference to their—

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- (a) religious belief or lack of religious belief;
- (b) membership of or adherence to a church or religious organisation;
- (c) support for the culture or traditions of a church or religious organisation; or
- (d) participation in activities associated with such a culture or such traditions.

198. The remit of Lord Bracadale’s review included considering whether the existing religious statutory aggravation should be adjusted to reflect further aspects of religiously motivated offending, including consideration of extending the religious aggravation provision to capture beliefs held by an individual. Lord Bracadale recommended that it was not necessary to create a statutory aggravation to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group. He concluded that:

“In my view, a consistent approach across the protected characteristics is highly desirable. This allows for a clear understanding of what is meant by hate crime. At its core is the concept of a shared protected characteristic. It would require strong arguments to depart from that principle. I am not persuaded that these are made out here.”⁴⁶

199. The Scottish Government agrees with the above recommendation and the Bill does not extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group.

200. The meaning of disability has not changed from its description in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Disability means a physical or mental impairment of any kind. This includes a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature.

201. The definition of sexual orientation is similar to that within the Offences (Aggravation by Prejudice) (Scotland) Act 2009 but has been

⁴⁶ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

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updated to refer to sexual orientation towards persons of a ‘different’ sex as opposed to persons of the ‘opposite’ sex.

202. Section 2 of the 2009 Act defines the reference to ‘transgender identity’ as:

“In this section, reference to transgender identity is reference to—
a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or
b) any other gender identity that is not standard male or female gender identity.”

203. As part of his review into hate crime legislation Lord Bracadale recommended that:

“The drafting of any replacement for section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 should include ‘intersex’ as a separate category rather than a sub-category of transgender identity. Consideration should be given to removing outdated terms such as ‘transvestism’ and ‘transsexualism’ from any definition of transgender identity (without restricting the scope of the definition).”⁴⁷

204. Since the enactment of the 2009 Act, it has become clear that there are concerns with listing ‘intersexuality’ as an aspect of transgender identity. Intersex and transgender identity are now widely understood to be two separate and distinct characteristics (intersex being a physical condition, or range of conditions, relating to biological characteristics, and transgender identity relating to a person’s gender identity). Whilst the wording of the 2009 Act reflected understanding of the position at the time of enactment, this is no longer the case. Therefore ‘intersexuality’ will be removed from the definition of transgender identity given the clear differences between intersex and transgender identities. However, so as not to lose protection for this group of people, the Bill includes ‘variations in sex characteristics’ as a separate characteristic within hate crime law. The

⁴⁷ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/4/>

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term 'variations in sex characteristics', as opposed to 'intersex', is used in the Bill as this is the term most commonly used by stakeholders.

205. The terms 'transsexualism' and 'transvestitism' are also widely understood to be outdated and are therefore also removed from the definition included in the bill, helping to ensure that the definition is future proofed as far as possible. Cross-dressing people are included in the definition within the Bill to ensure the protection provided by the word 'transvestitism' is not lost.

206. Within the Bill's definition of 'transgender identity', paragraphs (a) and (b) ('a female-to-male transgender person' and 'a male-to-female transgender person') are included to cover transmen and transwomen.

207. The Bill's definition also includes non-binary people as they are currently protected by the existing definition's use of 'any other gender identity that is not standard male or female gender identity'.

Alternative approaches

208. An alternative approach would be to extend the religious aggravation provision to capture religious or other beliefs held by an individual rather than a group. However, such an approach would not be consistent with the other characteristics included within the Bill.

209. Another alternative approach would be not to update the definition of transgender identity or create a separate category for intersex/variations in sex characteristics. This would involve keeping the existing law, with the existing definition, in place. Some respondents to the consultation adopted this view in their response to the consultation, indicating that they felt the current categories were adequate and/or in line with other legislation.

210. However as there is a general consensus that intersex/variations in sex characteristics is a physical condition (or range of conditions) and not an expression of gender identity, it is our view that the two groups should not, therefore, be linked together in law. This change does not alter the level of protection (either to a greater or lesser extent) that is afforded to this group.

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Consultation

211. In regards to religious or other beliefs held by an individual, a total of 61% (313) of respondents were opposed to extending the existing religious statutory aggravation to include religious or other beliefs held by an individual. However, certain organisations believed that Lord Bracadale's interpretation of the protected characteristic of 'religion' as relating only to defined religious groups was too narrow and not in line with existing human rights legislation which did afford equal religious protection to both groups and individuals. They also cited increased instances of intra-religious hostility and the victimisation of 'apostates' (people who have left a religious group). In contrast, those opposed to extension of the religious aggravation argued that, by definition, hate crime should apply only to crimes motivated by prejudice towards a particular group.

212. Overall there were mixed views on whether intersex/variations in sex characteristics should be listed as a separate characteristic from transgender identity within hate crime law, with 58% of organisations agreeing that that intersex/variations in sex characteristics should be a separate category, compared to 27% of individuals. Only 6% of organisations felt that intersex/variations in sex characteristics should not be listed as a separate category.

213. There were also mixed views on whether terms currently used in hate crime legislation in relation to transgender identity should be updated. Only 26% of respondents agreed, however 63% of organisations agreed with only 6% disagreeing.

214. Respondents who favoured updating of the language for transgender identity thought it important that the law evolved and that individuals saw themselves reflected in the law. Respondents with reservations about this highlighted the difficulty of agreeing on acceptable terms that were clear and would stand the test of time.

215. Following the consultation, it is clear that the terms 'transvestite' and 'transsexual' are outdated and should be removed from hate crime legislation altogether (the majority of organisational responses expressed this view). Those groups, including those representing the LGBT community, generally favoured the terms 'trans' and/or 'transgender' as umbrella terms covering a range of sub-groups. Within their consultation the Equality Network defined transgender as 'people who find their gender

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identity or gender expression differs from the gender they were assigned at birth. This includes, among other identities, non-binary people, transwomen, trans men and cross-dressing people’.

216. Some respondents, including the organisation ‘dsdfamilies’, argued that the creation of a separate intersex/variations in sex characteristics category was neither appropriate nor helpful when wider consideration of intersex issues was needed. However, the Equality Network welcome the inclusion of intersex/variations in sex characteristics as a separate category within hate crime legislation. They believe that ‘intersex’ people, or people perceived to be intersex, can face ‘intersex-phobic hate crime’.

217. In one of its hate crime research reports, they found that 29% of intersex respondents had experienced hate crime based on being intersex (although noting the small number of respondents). However it states that more research is needed into intersex specific hate crime.

218. It is also worth highlighting that a number of respondents to the consultation expressed a preference for the terms, ‘differences in sex development’ or ‘variation in sex characteristics’ as opposed to the term ‘intersex’, which they indicated covered a very wide range of conditions.

New characteristics

Policy objective

219. Provisions for a new statutory aggravation for prejudice in relation to age will send a clear message to society that these offences will be treated seriously and will not be tolerated.

Key information

220. In regards to age, Lord Bracadale noted that stakeholders reported that while it may be that many crimes against the elderly are motivated by a desire to exploit a perceived vulnerability, some crimes are motivated by hostility based on the perceived age of the victim. Lord Bracadale made the following recommendation:

“There should be a new statutory aggravation based on age hostility. Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before

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or after, the commission of the offence, it would be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.”⁴⁸

221. Although there might only be a relatively small proportion of crimes relating to malice and ill-will towards a person because of their age, the Scottish Government wants to ensure that that these crimes are treated in the same way as other hate crimes through the use of the statutory aggravation model.

222. A statutory aggravation for prejudice in respect of age would cover persons of any age – in that it does not refer to a particular age group such as elderly persons or children and young people. It is noted that, in practice, it may be more likely that offences where the aggravation applies are committed against elderly persons.

223. Lord Bracadale also recommended that gender should be added as a new characteristic (see section on ‘Additional power to add characteristic of sex’ at paragraphs 240 to 257).

224. Lord Bracadale recommended that it was not necessary to create any new offence or statutory aggravation to tackle hostility towards a sectarian identity (insofar as that is different from hostility towards a religious or racial group) at this stage. However he noted that the Working Group on Defining Sectarianism in Scots Law was considering this separately.

225. The Working Group considered the merits of establishing a legal definition, rather than maintaining the status quo; the methods available to delivering a definition; the technical obstacles to achieving it; and what a legal definition could look like. In conclusion the Working Group recommended the development of a new statutory aggravation for sectarian hate crime based on a mix of racial and religious prejudice; provided a draft definition; and recommended that this should be taken forward as part of the Scottish Government’s work to develop consolidated and modernised hate crime legislation.

⁴⁸ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

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226. The Working Group was aware that its proposals could lead to an overlap with religious and racial statutory aggravations, but concluded that capturing the intersectional nature of sectarian prejudice in modern Scotland would enhance the current legislative framework and aid police and prosecutors in using legal methods to tackle criminal activity resulting from sectarian prejudice. The Working Group specifically argued that a new statutory aggravation of sectarian prejudice would allow, for the first time in Scots Law, fair labelling of the issue and establish sectarian prejudice as a condemnable motivation for offending.

227. Lord Bracadale also considered whether there should be any other new groups or characteristics. He did not consider it necessary for there to be new statutory aggravations in connection with prejudice toward immigrants/immigration status, the Gypsy/Traveller community or Gaelic speakers. That is because the existing statutory aggravation in connection with prejudice based on race is defined widely enough in the existing legislation to capture these other areas in so far as they are examples of nationality (including citizenship and ethnicity). He also recommended that it was not necessary to create a statutory aggravation to cover hostility towards a political entity or socio-economic status.

228. The Bill includes a new characteristic of age, as recommended by Lord Bracadale, and the Scottish Government agreed with Lord Bracadale's recommendations not to include any further characteristics as discussed above.

Alternative approaches

229. An alternative approach would be not to introduce a statutory aggravation for age and allow for courts to take into account the motivation of offender in terms of prejudice towards a person because of their age in the absence of a statutory aggravation. However, this would mean that there would be no requirement to record data and no message would be sent to society of the unacceptability of such crimes. Therefore this Bill has included age as a characteristic within the suite of statutory aggravations.

230. In some cases where a crime is committed against an older person, it may be that the victim is not targeted because of the offender's malice and ill-will towards older people but rather because the offender perceives the victim as being more vulnerable than other persons in society. The reason for the offence in those circumstances is exploitation of a perceived

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vulnerability – for instance if the victim is physically frail. Lord Bracadale draws a distinction between crimes motivated by the exploitation of a perceived vulnerability and crimes committed because of malice and ill-will based on the victim's perceived age i.e. malice and ill-will towards a person because they are old, or because they are young rather than exploiting older or younger people who might be perceived as more vulnerable because of their age.

231. The Scottish Government therefore considered as part of the consultation whether a general aggravation covering exploitation and vulnerability should be developed, noting this would be outwith hate crime legislation and this Bill. Such an aggravation could be in addition to any aggravation concerning malice and ill-will based on age and as noted below, would not necessarily be limited to vulnerability related to age.

232. In the longer term, the Scottish Government will consider whether there should be reforms to the criminal law to improve the protection available to people who may be at increased risk of becoming victims of crime because of their vulnerability, taking account of the responses received to the consultation. This will include consideration of whether a statutory aggravation would make a practical difference which would improve how the justice system responds to crimes committed against those who are especially vulnerable.

233. Another alternative approach would be to introduce a characteristic for sectarianism. The Scottish Government consultation exercise and wider engagement with stakeholders found that there was no clear consensus on the benefits, or otherwise, of including specific protections for sectarianism in the new hate crime legislation, therefore provisions for a sectarianism statutory aggravation have not been included in this legislation.

234. A further alternative approach would be to include characteristics to cover immigrants/ immigration status, the Gypsy/Traveller community or Gaelic speakers. However, the Scottish Government is content that these are covered by the characteristic of race (as outlined above).

Consultation

235. In regards to a new statutory aggravation for age, there were mixed views. A total of 29% of respondents were in favour and 54% were not,

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although 64% of organisations supported a new statutory aggravation for age. Those in favour argued that there was a need for legislation in this area and there should be a consistent approach to statutory aggravations applied across all characteristics. These respondents also thought that the creation of a new statutory aggravation relating to age would provide a deterrent to age-related prejudice. Those opposed thought that there was little evidence of age-related prejudice being targeted either at older people or at young people and, therefore, legislation in this area was not needed. Some thought a statutory aggravation relating to 'age' would be unworkable in practice.

236. Respondents felt that most offences committed against the elderly were likely to be motivated by a perpetrator's perception of the victim's vulnerability, rather than age-related prejudice.

237. Following the conclusions reached by both the Working Group on Defining Sectarianism in Scots Law and Lord Bracadale, the feedback from individuals attending the consultation events and the consultation responses showed a similar mix of opinions and opposing views. However the majority of respondents (59%; 311 out of 527) did not think there was a need to address and define sectarianism in hate crime legislation, while 26% (139 out of 527) thought it should be defined, and 15% (77 out of 527) were 'unsure'. Organisations who responded had more mixed views on this issue with 63 responding, 46% (29) did not think there was a need to address and define sectarianism, 22% (14) thought it should be defined and addressed and 32% (20) were unsure.

238. In regards to Lord Bracadale's considerations as to whether a new statutory aggravation for hostility towards a political entity should be included in hate crime legislation, 74% (382) of respondents thought this should not be added to Scottish hate crime legislation. Those who did favour introducing an aggravation argued that people should be allowed to express political views without fear of attack. However, those opposed believed that it would be an infringement on freedom of speech and the right to political protest while also undermining existing hate crime laws.

239. Overall 66% (340) of respondents were not supportive of introducing any additional aggravations to the existing hate crime legislation. However, certain organisations were in favour of new aggravations to be introduced for Gypsy Travellers and Asylum Seekers and Refugees in particular.

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These organisations were of the view that these groups were particularly vulnerable to hate crime and therefore should be recognised in hate crime legislation. However, the Scottish Government has not included these as characteristics within the Bill as the existing characteristic of race already provides protection for both of these groups.

Additional power to add characteristic of sex

Policy objective

240. Recognising that there is a clear need to tackle misogyny and gender based prejudice in Scotland, the Scottish Government is committed, in principle, to developing a standalone offence on misogynistic harassment and is establishing a Working Group to take this work forward. Provision is also included in this Bill for an enabling power to allow the characteristic of sex to be added to the hate crime legislative framework at a later date, after the Bill has passed if this is, for example, recommended by the Working Group.

241. The enabling power provides flexibility to allow sex to be included as an additional characteristic to the hate crime legislative framework at a later date and to define that characteristic. This power could therefore be used, at a later date, to extend the scope of the statutory aggravation in Part 1 of the Bill so that it also applies in relation to characteristic of sex and/or to extend the scope of the offences of stirring up hatred in section 3(2) and 5(2) of the Bill so that one or both also apply in relation to this characteristic.

Key information

242. Lord Bracadale recommended that:

“There should be a new statutory aggravation based on gender hostility. Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility. The court would be required to state that fact on conviction and take it into account when sentencing.”⁴⁹

⁴⁹ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

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243. However, a number of women's organisations are strongly opposed to this approach, calling for the development of a standalone offence for misogynistic harassment outwith hate crime legislation. Some organisations believe that the development of a specific offence would recognise that the reality of violence against women is a complex issue and requires a considered approach. Their concerns are that creating a gender aggravation would lead to a failure to deal effectively with violence against women and girls, and they are not convinced that the hate crime framework provides an appropriate model for dealing with gender based violence.

244. On 26 November 2019 Engender published their report, 'Making women safer in Scotland: the case for a standalone misogyny offence'⁵⁰ which sets out some of their key arguments. They concluded that:

'We are of the view that a 'gender aggravation' would be a mistake. It would not fill the gaps in the law. It would undermine our shared analysis of violence against women and girls. International experience suggests that we would see very few investigations, prosecutions, and convictions because it is not a model that aligns well with public understanding of women's inequality.

Instead, we are calling for a participatory development process for a standalone offence that would include the most iniquitous forms of misogynistic harassment and abuse."

245. In response to a recommendation made by the First Minister's National Advisory Council on Women and Girls to 'criminalise serious misogynistic harassment, filling gaps in existing laws' the Scottish Government made a commitment, in principle, to developing a standalone offence on misogyny. In order to progress this commitment, a Working Group is also being established to consider how the criminal law deals with misogynistic harassment, including whether there are gaps in legislation that could be filled with a specific offence on misogynistic harassment.

246. As well as considering the development of a standalone offence, the Working Group will consider whether a statutory aggravation and/or a stirring up hatred offence on the grounds of sex should be included within the existing hate crime legislative framework. To this end, and to ensure

⁵⁰ <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

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the Working Group has the space and flexibility required to develop the distinct approach required to tackle misogyny in Scotland, an enabling power is included within the Bill. This will enable sex to be included within the hate crime framework at a later date, for example if that is recommended by the Working Group.

247. Although Lord Bracadale used the term 'gender', the term 'sex' is being used within the Hate Crime Bill, as opposed to gender, in order to remain consistent with the Equality Act 2010.

248. The use of the enabling power to include the characteristic of sex within the hate crime legislative framework established by Parts 1 and 2 of the Bill would provide additional protection on an inclusive basis, including in cases where the application of this hate crime legislation is linked to the motivations of the perpetrator.

249. For example, when considering the protection that is provided to persons who are victims of an offence motivated by malice or ill-will towards women, the sex aggravation could equally be applied to provide protection towards a person who was born female, a transwomen (regardless of whether the transwoman has or does not have a Gender Recognition Certificate), or a man or a non-binary person (if that person were mistaken to be a woman). This is because, in this case, the motivation of the perpetrator was based on malice and ill will towards women and the person had been victimised because they were perceived to be a woman, whether they actually were or not. The statutory aggravation on sex could also be applied if a person was targeted because they have an association with women. For example, an offence that was motivated by malice or ill towards a man because he was fundraising for a women's cause.

250. To ensure additional flexibility in how sex could be included within the hate crime legislative framework, the enabling power provides, in effect, the option to add the characteristic of sex into the new statutory framework for aggravation of offences by prejudice under Part 1 of the Bill and/or to add it to the new framework for offences of stirring up hatred under section 3(2) and 5(2) of the Bill. This will allow the Working Group to consider these separately. A number of women's organisations have stated that a statutory aggravation based on sex would undermine the narrative of Equally Safe (the Scottish Government's strategy to take action on all

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forms of violence against women and girls) and that it would be unhelpful to label only some gendered offences as being aggravated by prejudice based on sex when their view is that they are all inherently a product of misogyny. Whether or not the Working Group reconsiders this position once further work on this topic has been undertaken, it may be the case that the Working Group considers that there is value in including a stirring up of hatred offence on the grounds of sex within hate crime legislation, for example to provide an additional tool to tackle the growing issue of online misogyny.

Alternative approaches

251. There are two alternative approaches which include: accepting Lord Bracadale's recommendation to include gender as a characteristic within hate crime legislation; or to not include the enabling power within the Bill.

252. A statutory aggravation on gender would be consistent with the model and recommendations proposed by Lord Bracadale and supported by the majority of organisations (60%) responding to the consultation, including Police Scotland and Victim Support Scotland. However, as outlined above, some of the women's organisations had significant concerns with the introduction of a statutory aggravation based on gender. The approach to include a power to enable sex (as opposed to gender to remain consistent with the Equality Act 2010⁵¹) to be included within the hate crime legislative framework ensures space and flexibility to develop a distinct approach to tackle misogyny and gender based prejudice in Scotland, which is supported by a number of stakeholders, including Engender, Rape Crisis Scotland, Scottish Women's Aid and Zero Tolerance.

253. A further alternative approach would be not to include the enabling power, which would, in effect, result in the omission within the hate crime legislative framework of any characteristic relating to sex. The Scottish Government is clear that there is a need for misogyny and gender based prejudice to be tackled in Scotland, therefore has committed, in principle, to developing a standalone offence on misogynistic harassment as well as making explicit provisions in this Bill for an enabling power to allow sex to be added to hate crime legislation at a later date, should that be recommended by the Working Group.

⁵¹ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

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Consultation

254. Four options were presented in the consultation:

- develop a statutory aggravation for gender hostility;
- develop a standalone offence for misogynistic harassment;
- take a non-legislative approach and build on Equally Safe to tackle misogyny; or
- all of the identified options.

255. In general, organisational respondents supported a legislative response to help tackle the issue of misogyny. Organisations were more likely to favour the development of a statutory aggravation for gender hostility rather than the development of a standalone offence for misogynistic harassment. They also generally supported building on the Equally Safe strategy, and it was common for organisations to say that any legislative approach to tackling misogynistic harassment should be complemented by efforts to change attitudes in society towards women and girls. However, some stakeholders (particularly Engender, Rape Crisis Scotland, Scottish Women's Aid and Zero Tolerance) did not want a statutory aggravation on gender to be included in hate crime legislation and have called for the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women. They are not convinced that the hate crime framework provides an appropriate model for dealing with gender based violence. Individuals generally expressed opposition to, or mixed views on all four options.

256. Issues raised by respondents across all four questions related to whether any legislative response to tackle hate crimes against women should provide protection to women only, or to both women and men. There was not consensus on this issue, although organisations with expertise in women's issues believed that the focus should be on women only. Some respondents also said that the protected characteristic specified in the Equality Act 2010 was 'sex', not 'gender' and that this should be reflected in hate crime laws.

257. Following the consultation a number of meetings have been held with various women's organisations to explore options for how gender might be included, or not, within this Bill. It remained clear that there were mixed views amongst stakeholders in regards to whether a statutory aggravation

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should be introduced or not in hate crime legislation in relation to gender. However there was broad support for the establishment of a Working Group to review how criminal law deals more broadly with misogyny.

Part 4: Abolition of the offence of blasphemy

Policy objective

258. Abolishing the common law offence of blasphemy removes outdated law that is no longer considered necessary or appropriate. This will bring Scotland into line with many other countries who have recognised the need to lead by example by not legitimising retention and use of such an offence. This will remove the potential for Scotland to be criticised for maintaining a blasphemy offence and cited by other countries, which use such an offence for the purposes of persecution of their citizens, as an example as to why blasphemy law is still appropriate.

Key information

259. The common law offence of blasphemy exists in Scots law as a crime against public order and decency. The offence has two aspects: (1) it challenges the veracity of an individual's spoken or written words against God or religion; and (2) the words are spoken/written with intent to cause disorder. The offence has not been prosecuted in Scottish courts since 1843.

260. The Humanist Society of Scotland and the National Secular Society have lobbied for the removal of blasphemy laws for some time. In July 2017 a petition (PE 1665)⁵² on the abolition of the common law of blasphemy was submitted. The committee agreed to defer consideration of the petition until the independent review of hate crime legislation in Scotland had been published, as crimes motivated by religious hatred would be covered in the review, stating that there would be an opportunity in the future to resubmit a petition depending on how the matter had developed.

261. In recent years, abolitions of blasphemy laws have taken place in Netherlands, New Zealand, Malta, Norway, Denmark, Iceland and Canada.

⁵² <https://www.parliament.scot/GettingInvolved/Petitions/PE01665>

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In 2018 the Republic of Ireland was the first country in the world to hold a referendum on ending blasphemy laws, which saw 64.85% vote yes to remove the prohibition on blasphemy from the Irish constitution.

262. There is also currently a campaign to repeal ancient blasphemy laws in Northern Ireland. In 2018 the Spanish Parliament passed an initial vote to remove blasphemy from the Spanish Civil Code in future.

263. Abolition would be in line with international thinking, and many other countries, including England and Wales, have already repealed their blasphemy laws. The current blasphemy laws are not used and are arguably inappropriate in a modern society. In addition, the continued retention of blasphemy laws in Scotland might be relied on by some other countries to justify retaining their own blasphemy laws in circumstances where they are used inappropriately to persecute individuals. This Bill therefore provides for the abolition of the offence of blasphemy.

Alternative approaches

264. The alternative to abolishing the law of blasphemy would be to retain the current offence. The Scottish Government intends to abolish this offence for the reasons stated above.

Consultation

265. The consultation sought views on what should be included in new hate crime legislation. As well as considering recommendations made by Lord Bracadale, the consultation included a question on whether anything else should be included within the Bill that wasn't already addressed within the consultation.

266. Only 288 respondents (41 organisations and 247 individuals) responded, and most reiterated points already covered in their responses to other questions. One significant theme to emerge was the call for blasphemy laws to be abolished in Scotland.

267. As well as calls from the Humanist society of Scotland and the National Secular Society of Scotland, 45 individuals also supported the abolishment of blasphemy laws.

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Other information relevant to Bill provisions

Approach in respect of retaining the section 50A offence of the Criminal Law (Consolidation) (Scotland) Act 1995

Policy objective

268. The Bill does not repeal, nor consolidate, the offence contained in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 in order maintain existing protections for those subject to racially-aggravated harassment.

Key information

269. Section 50A incorporates two offences; firstly, to pursue a racially-aggravated course of conduct which amounts to harassment of a person (the 50A(1)(a) offence) and, secondly, to act in a manner which is racially-aggravated and which causes, or is intended to cause, a person alarm or distress (the section 50A(1)(b) offence).

270. For either offence to be racially-aggravated, the course of conduct or action of the offender must evince malice and ill-will towards the person affected, based on that person's membership, presumed membership or association with a racial group; or be motivated by malice and ill-will towards members of a racial group based on their membership of that group.

271. Lord Bracadale recommended this offence should be repealed. In setting out his argument for repeal, Lord Bracadale stated that both of the offences contained within section 50A could be effectively charged under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ('section 38'), with a racial statutory aggravation. Section 38 provides an offence of threatening or abusive behaviour. This offence is committed if a person behaves in a threatening or abusive manner, the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and the perpetrator intends to cause fear or alarm or is reckless about doing so. The meaning of 'racially aggravated' for the purposes of section 50A and section 96 of the 1998 Act is effectively the same.

272. However, a common concern among those who were against any repeal was that it would result in a gap in the law. This is because the

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section 50A offences are committed where the perpetrator carries out 'harassment of a person' or acts in manner which causes the victim 'alarm or distress', whereas an offence under section 38 is committed when a person engages in 'threatening or abusive behaviour' that would be likely to cause a reasonable person to suffer 'fear or alarm'.

273. Some groups felt that the section 38 offence did not adequately cover all behaviour that was caught by the section 50A offences and required a higher threshold of harm (i.e. fear or alarm as opposed to 'distress').

274. Therefore, following significant stakeholder engagement, the Scottish Government has taken the view not to repeal section 50A. Many stakeholders have argued that race related hate crime requires a unique approach due to the prevalence and nature of racial harassment and racially motivated violence. It has been argued by some that the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion, justifies a separate approach.

Alternative approach

275. The first alternative approach would be to adopt Lord Bracadale's recommendation to repeal section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.

276. Repealing section 50A would, on the face of it, contribute towards the overarching aim of new hate crime legislation, which is to consolidate and simplify hate crime legislation and avoid having different thresholds and tests for offences or aggravations relating to different characteristics.

277. The repeal of section 50A would also create consistency in the law by removing the standalone offence that exists only for racially motivated crimes. There is no equivalent to the section 50A offence in relation to any other characteristic within hate crime law and, as noted above, if left in force it could be perceived as creating a hierarchy of characteristics.

278. Some of those who supported repeal argued that it would ensure consistency and agreed with Lord Bracadale that this piece of legislation was no longer needed. However, the Scottish Government was aware that some stakeholders were concerned around the repeal of the section 50A

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offence and the potential message that this sends to victims, perpetrators and wider society. It had also been suggested that this would leave a gap in the level of protection provided to this group of people.

279. One of the main considerations when deciding whether to repeal section 50A is whether the offence of threatening or abusive behaviour in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, charged with a racial aggravation, would sufficiently deal with any matters that would previously have been charged under section 50A, or whether repeal would leave a gap in the law.

280. It is acknowledged that section 50A is broader in scope than section 38, accompanied with a racial aggravation, and that the two provisions are not identical. In particular, the statutes differ as to type of behaviour that is prohibited and the intent required for the offences to be committed.

281. Another alternative approach would have been to consolidate section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 so that all hate crime legislation is in one place. However as the Bill is not introducing equivalent offences in relation to the other characteristics the Scottish Government has taken the decision not to consolidate this piece of legislation.

282. Therefore after considering all views expressed the Scottish Government is of the view that the section 50A offence should be retained as an offence within the Criminal Law (Consolidation) (Scotland) Act 1995. This is reflected in the Bill not making provision to repeal this offence.

Consultation

283. In response to whether section 50A should be repealed, approximately 34% (152 respondents) supported the repeal and approximately 25% (114 respondents) opposed repeal. A further 41% (191 respondents) said they had 'no opinion'. There were mixed views among both individuals and organisations on this issue. Organisations were more likely than individuals to say 'yes' to repeal (50% compared to 31% respectively), and individuals were more likely than organisations to say they had 'no opinion' on the issue (43% compared to 28% respectively).

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284. Those supporting the repeal of section 50A often cited the importance of clarity within the law and the need to avoid complicating hate crime legislation. Several respondents noted that there is no equivalent to the section 50A offence in relation to any other characteristic within hate crime legislation, and felt that there was a need for consistency in approach across all of the characteristics.

285. The main concern expressed by organisations opposed to repeal of section 50A was that repeal could be viewed as a reduction in the Scottish Government's commitment to tackle racial harassment and would therefore damage relationships with ethnic minority communities.

286. Another common concern among respondents who were against any repeal was that it would result in a gap in the law, as discussed above.

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Impact assessments

Equality

287. The provisions of the Bill are not discriminatory on the basis of age, sex, race, disability, marital status, religion or sexual orientation. An Equality Impact Assessment (EQIA) has been carried out on the policies in the Bill. As a result of this impact assessment it has been concluded that the Bill will have no detrimental impact on equal opportunities, but will help promote equality of opportunity and good relations for people with protected characteristics under the Equality Act 2010. In particular, the Bill seeks to modernise and extend existing hate crime legislation by:

- including age as a new characteristic in new provision for the aggravation of offences;
- creating new offences relating to stirring up hatred that will apply in relation to all listed characteristics including age, disability, race, religion, sexual orientation, transgender identity and variations in sex characteristics (existing offences, which these new offences largely replace, apply only in relation to race).

288. The Bill ensures that characteristics currently protected within the hate crime legislative framework continue to be protected to the same extent with updated language provided where considered necessary. This will ensure that the language used in the Bill reflects changes over time and that the individuals who are afforded protection by the law recognise themselves in the terminology used.

289. The EQIA has also informed decisions taken by the Scottish Government not to accept a number of Lord Bracadale's recommendations including:

- Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed
- The current provisions in relation to stirring up racial hatred under the Public Order Act 1986 should be revised to include conduct which is threatening or abusive (removing the word 'insulting')
- There should be a new statutory aggravation based on gender hostility

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- There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.

290. For further details the published EQIA can be found in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>.

Children and young people

291. The Scottish Government undertook a Child Rights and Wellbeing Impact Assessment of the wider policy intent of hate crime legislation. Any child or young person targeted as result of their age, race, religion, disability, sexual orientation, variations in sex characteristics or transgender identity is a victim of prejudice. Hate crime legislation helps recognise the particular impact and harm caused by hate crime, and this impact assessment sets out how the Bill contributes to furthering child rights and wellbeing in Scotland and implementation of the United Nations Convention on the Rights of the Child (UNCRC). This Bill makes it clear that hate crime is not acceptable and sends a message to victims, perpetrators and wider society that this will not be tolerated. Overall, this assessment found that the Bill will have a positive impact on young people. For further details the published Child Rights and Wellbeing Impact Assessment can be found in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>.

Human rights

292. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights ('the Convention'). Article 10 of the Convention protects everyone's right to freedom of expression. It covers a wide range of expression, including spoken and written words, internet content, acts of protest and artistic performances.

293. It covers the expression of both facts and opinions, and can apply not only to the substance of the ideas and information expressed, but also to the tone and manner in which they are expressed. The courts have expressly noted that it protects expression which shocks, offends and disturbs other people.

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294. However, not all interferences with a person's freedom of expression are incompatible with Article 10. In some circumstances the European Court of Human Rights has held that what can be considered 'hate speech' is not protected by Article 10 by virtue of the application of Article 17 of the Convention (the prohibition on the abuse of rights). The Court has held that in some cases the expression is contrary to the 'values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.'⁵³ In other cases, where Article 10 does apply, expression which is protected can be lawfully interfered with by virtue of Article 10(2).

295. Article 10(2) provides that an interference with Article 10 rights can be justified if the interference is prescribed by law and necessary in a democratic society in the interests of one or more specified legitimate aims. These aims include measures taken for the prevention of disorder or crime and for the protection of the reputation or the rights of others.

296. Lord Bracadale came to the view that stirring up of hatred offences pursued the legitimate objectives of securing public safety, preventing disorder and crime and protecting the rights of others. He concluded:

"I do not consider that new stirring up of hatred offences would have the effect of stifling legitimate views or seriously hindering robust debate. I conclude that concerns about freedom of expression should not preclude the extending of stirring up hatred offences."⁵⁴

297. The consultation also disclosed concerns as regards the exercise of the right to manifest religion under Article 9 of the Convention.

298. It is accepted that the provisions of the Bill may also result in interferences with the right to manifest religion under Article 9 of the Convention, for instance in relation to proselytising. However, as with Article 10, an interference with the right to manifest religion is lawful where the interference is prescribed by law and is necessary in a democratic society in the interests of specified legitimate aims. These aims include the need to protect the rights of others to protect public order. The Scottish Government is of the view that, given the harms caused by prejudice based offending, it is proportionate for there to be a limited interference with

⁵³ *Norwood v. The United Kingdom* (2005) 40 EHRR SE11

⁵⁴ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

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Article 9 rights where that is to protect public order and the rights of others from the stirring up of hatred.

299. The Scottish Government has carefully considered the scope and content of the rights protected by Articles 9 and 10 and, based on the case law of the European Court of Human Rights and of domestic courts, is confident that the provisions of the Bill strike the correct balance. The Scottish Government considers that the provisions of the Bill are appropriately framed so as to ensure that only sufficiently serious conduct is caught by the Bill.

300. Section 1 only applies where there is an underlying offence and where it is proved that the perpetrator evinced, or was motivated by, malice and ill-will. The stirring up of hatred offences in sections 3 and 5 only apply where a person behaves in a threatening or abusive (or, as regards racial hatred, insulting) manner, communicates such material, or has possession of such material with a view to communicating it, and in doing so intended to stir up hatred (or where it is likely that hatred would be stirred up). Additionally, there is a defence of 'reasonableness' set out in sections 3(4) and 5(4).

301. As already stated above, in his report, Lord Bracadale considered the compatibility of stirring up of hatred offences with the Convention, noting that the 'content and context' of expression is important and that freedom of expression 'carries with it duties and responsibilities'.⁵⁵ Lord Bracadale concluded that in his view stirring up of hatred offences are, in principle, compatible with Article 10 of the Convention. The Scottish Government agrees with this.

302. The Scottish Government is of the view that the provisions of the Bill are compatible with Convention rights.

Island communities

303. To identify, and thereafter address, the impact that the Bill will have on island communities the Scottish Government held consultation events in Stornoway on the Isle of Lewis and in Lerwick on the Shetland Isles. Participants raised a number of pertinent points in relation to the content of

⁵⁵ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

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the new hate crime legislation, however none were distinct to those points raised by mainland participants. From the discussions about the likely provisions of the Bill at these events and from the responses to the consultation, including several from islands based organisations, the Scottish Government does not expect the Bill to have a disproportionate effect on island communities.

Local Government

304. Local authorities will have responsibility for implementing sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. Local authorities may also have one-off requirements and costs for updating training materials, guidance and IT systems, which, as far as possible, should be accommodated within regular review and update processes. The financial implications for local authorities are set out in the Financial Memorandum accompanying the Bill.

Sustainable development

305. The Bill is expected to provide social benefits by helping to tackle crimes based on prejudice and hatred, and by providing additional protection to some of society's most vulnerable groups.

306. The Bill is expected to have a positive social impact by contributing to ongoing efforts to reduce levels of crime by making clear that offences motivated by prejudice will be treated more seriously and will not be tolerated by society. Although this will contribute, as a core element of the Scottish Government's wider policy to building community cohesion and tackling hate crime, towards an increase in cohesion and solidarity, the legislation itself will not contribute directly towards positive economic benefits. No significant environmental effects are expected.

Business

307. The Business Regulatory Impact Assessment impacts on a limited number of businesses. It sets out that the Bill will have a minimal financial impact on the core criminal justice organisations: the Crown Office and Procurator Fiscal Service, Scottish Courts and Tribunal Service, the Scottish Legal Aid Board, the Scottish Prison Service and Police Scotland resulting from the new aggravations and new stirring up offences, although

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there will be a requirement for the updating of guidance, training materials and IT systems. There will be some impact on local authorities as the Scottish Criminal Justice Social Work Services may have to manage several new Community Payback Orders, although this impact is also expected to be minimal. A copy of the Business Regulatory Impact Assessment can be viewed in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>.

Data protection

308. A copy of the Data Protection Impact Assessment (DPIA), which includes an Article 36(4) Enquiry Form, can be viewed in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>. This sets out that no significant impact is expected.

Environment

309. A Strategic Environmental Assessment pre-screening consultation was carried out by the Scottish Government which found that the requirements of the Environment (Scotland) Act 2005 have been met. A copy of the Strategic Environmental Assessment pre-screening notification can be viewed in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>.

Digital

310. The Bill has been written in such a way as to ensure it is future proofed as far as possible in anticipation of future changes to technology and how these impact on, and are utilised by the justice system and by society at large.

Fairer Scotland duty

311. A copy of the Fairer Scotland Duty Impact Assessment can be viewed in the publications section of the Scottish Government's website <https://www.gov.scot/publications/>.

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Policy Memorandum

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