Faculty of Advocates Response to the Independent Review of Hate Crime Legislation in Scotland

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Question 1

Do you consider that the working definition, discussed in this chapter, adequately covers what should be regarded as hate crime by the law of Scotland?

No.

It is not a very clearly expressed working definition.

The requirement for *mens rea* (guilty intent) in the commission of criminal conduct is at the heart of Scots criminal law. Any attempt to define crimes by reference to other concepts risks a diminution of this fundamental principle.

Question 2

How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be hate crime, and what can be proved as hate crime?

Clear definitions are required. The drafting and adopting of clear definitions should obviate any difficulty arising in the context of tensions and misunderstandings.

By way of illustration, for many years the crime of breach of the peace was regarded as a catch-all offence covering a wide variety of scenarios. As a result there was continuing uncertainty as to its scope until the crime was authoritatively considered and defined by the Appeal Court in the case of Smith v Donnelly (2002 J.C. 65). The Court's definition of the crime – conduct severe

enough to cause alarm to ordinary people and threaten serious disturbance to the community – is easily understood by lawyers and lay people alike.

Question 3

Should we have specific hate crime legislation?

Although others, in particular those to whom such behaviour is directed, are understandably concerned at the effects of such conduct, it is submitted that the common law and existing legislation are robust enough in their current form.

Question 4

Do you believe there is a need to bring all the statutory sentencing provisions, and other hate crime offences, together in a single piece of legislation?

Yes. In the event that it is felt necessary to introduce further specific hate crime legislation, it is essential that definitions of any aggravations and applicable sentences are clearly expressed in a single piece of legislation. To do otherwise militates against transparency and accessibility.

Question 5

Do you consider that the current Scottish thresholds are appropriate?
Should evincing malice and ill-will be replaced by a more accessible form of words?

Mens rea is the current threshold. Given that motivation in this context equates to *mens rea,* it is appropriate to keep this as the threshold.

Regarding the use of the phrase "evincing malice and ill will", it is submitted that there is no need to change this at present. It is thought that the term can be relatively easily explained to jurors. Many seemingly arcane legal terms that are not easily understood in a lay context – such as "culpable homicide" or "corroboration" – may nonetheless accurately and succinctly describe important legal concepts. 'Evincing malice and ill will' is one such term.

Question 6

Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity (e.g. foreign country, overseas movement) which the victim is perceived to be associated with by virtue of their racial or religious group?

No. This is clearly a sensitive matter but, on balance, it is submitted that such a scenario is not readily equated with the other named "characteristics". Freedom to hold differing political views and to express them is essential in a democracy, even in circumstances where expression of those views may be motivated by malice or ill will.

Question 7

Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held an individual rather than a wider group?

Yes. Religion is part of identity in a way that holding political views is not. Dr Glover's position is to be preferred.

Question 8

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

No.

Question 9

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

If by "effectively" it is meant that what is being offered to be proved by the Crown is clearly understood by practitioners, the answer is yes.

Question 10

Is it necessary to have a rule that the sentencing judge states the difference between what the sentence is and what it would have been but for the aggravation?

Not necessarily. It is feasible that hate crime legislation will introduce new offences for actions which would not be offences but for the "hate" element. Indeed, such instances occur under the existing law. In such situations, it is not practical or indeed possible to identify the "difference" identified in the question.

An example of this might be a situation where A says to B "go back home …[to country C]". In these circumstances how can the court identify what the sentence would have been but for the "hate" element when there would have been no offence but for the "hate" element?

Question 11

Racially aggravated harassment and conduct: Is this provision necessary?

There are other provisions which are capable of covering this sort of conduct.

Should the concept of a standalone charge be extended to other characteristics?

There are already other provisions in existence which cover the conduct envisaged.

Question 12.

Should there be offences relating to the stirring up of hatred against groups?

From a human rights perspective there is a genuine danger that such offences will also impact adversely on freedom of speech. There is a danger with such legislation that genuine and legitimate criticism could be construed as "stirring up hatred".

Such legislation could prevent legitimate demonstrations against the actions of a particular group on the basis that it could be construed as stirring up hatred.

Question 13.

If there are to be offences dealing with the stirring up of hatred against groups, do you consider that there needs to be any specific provision protecting freedom of expression?

Yes. Freedom of expression should be a fundamental right in any modern-day society. As such it should be jealously protected even for those with whom we fundamentally disagree.

Question 14.

Does the current law deal effectively with online hate?

Yes. Hate crimes which occur online are already subject to the same laws that would apply if the crime occurred in person. It would be somewhat iniquitous for actions that occur in person to be viewed differently and be treated less seriously than actions that occurred online.

These offences should be tackled both through the prosecution of the individuals and by regulation of social media companies. Without this dual approach and in particular the regulation of the medium through which these offences are committed, there is a real danger that any legislation will be less effective.

If the purpose of such legislation is not only to punish those individuals who commit such offences but also to discourage them and others so inclined to act in this way, then this cannot be achieved without robust regulation of the social media companies.

Question 15.

How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?

The legislation is not clear. In any event, whether it is clear or not there are clearly practical problems in the enforcing of such legislation.

Bigoted and sectarian behaviour is never acceptable and should be the subject of our criminal law whether or not it happens within the confines of a football match. If such behaviour is to be prosecuted in the context of a football match the same behaviour should be treated no differently were it to occur in wider society. However it seems clear that the number of prosecutions under this

legislation bears no resemblance to the number of offences occurring under it. There is therefore a real practical problem in the enforcement of such legislation. There may be little point in passing such legislation if the resources available, or appetite, to enforce it are open to doubt.

Question 16.

Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries?

It is beneficial in order to discourage those who attend football matches from acting in such a manner whether or not they are attending a match in another country. However, is this to be restricted to matches involving Scottish Clubs? If not, this would mean, for example, that someone from Scotland attending a club match in London involving two London clubs and engaging in such behaviour could be prosecuted in Scotland.

No. This would be very difficult and costly to police and prosecute. In addition, football hate crime is somewhat unique and by its very nature is more likely to be committed wherever a match is being played and not solely on home soil. It would be hoped that offences involving non-football hate crime committed in another country would be covered by that country's own domestic legislation. This applies especially in relation to other jurisdictions within the UK.

Question 17

Is it appropriate to have a requirement that behaviour is or would be likely to incite public disorder in order for it to amount to a criminal offence?

Yes. This is meant to be a public disorder offence; without such a requirement, a person could commit an offence even though there was no real likelihood of the conduct causing anyone upset, fear or alarm.

Question 18.

Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation?

No. This section has been so widely drafted that it is difficult to envisage any such behaviour that would not be covered by it and the pre-existing common law.

Question 19.

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

No. If a football club is concerned about an individual's behaviour then it should be reported to the authorities in order that they can take the necessary action if appropriate. There would seem little point in such a requirement given that the Police have only used this power on twenty occasions in six years.

Question 20.

Do you consider any change to existing criminal law is required to ensure that there is clarity about when bullying behaviour based on prejudice becomes a hate crime?

No.

Question 21.

Do you think that specific legislation should be created to deal with offences involving malice or ill-will based on:

- age
- gender
- immigration status
- socioeconomic status
- membership of gypsy/traveller community
- other groups (please specify).

It is submitted that the existing law is robust enough to deal with such behaviour. To extend the law to further specific groups would risk causing confusion and uncertainty as it is often difficult to place people into a particular group. For example, at what age does one become old?

Question 22

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

No.

Question 23

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

No. Such restrictions should not be permissible.

Question 24

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

This is a question that others may be better placed to answer. Having regard to the concerns raised by those with experience of the proposed scheme, it is difficult to envisage how improvements could be made.

Question 25.

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

Yes, for the less serious and more casual hate crime offences. An understanding of the impact of such behaviour by those who commit it is likely to have a more positive effect on society than simply by punishing them.

Question 26.

Should such schemes be placed on a statutory footing?

Yes. They should be placed on a statutory footing in order to ensure certainty and uniformity of application.