RESPONSE BY THE SENATORS OF THE COLLEGE OF JUSTICE TO THE CONSULTATION PAPER ON HATE CRIME LEGISLATION IN SCOTLAND

Introductory remarks

In the foreword to the consultation paper Lord Bracadale states that he is sure that "tackling hate crime is an important element in the drive towards creating a society in Scotland where people live together respecting one another, regardless of differences." The judges have no difficulty in agreeing with this. However, as is made clear in the paper, how to go about this raises numerous potentially contentious issues, many of which are matters of policy for the legislature. Traditionally, and for good reason, the judges do not comment on such matters, either individually or collectively. In due course they may be required to adjudicate on cases arising under the old provisions or under any new legislation, including matters of statutory interpretation. They require to reach decisions in an independent and impartial way. The ability to do this, or be seen to do this, could be compromised by opinions expressed in response to papers of the present kind.

In addition the paper discusses numerous matters in respect of which the judges have no, or no substantial practical experience. Sheriffs may be in a different position in that they have to deal with the current provisions on a more regular basis.

The above explains why this response does not address every question or issue raised in the consultation paper. However there are matters upon which the judges can offer views, and they are set out below in the context of the questions posed by Lord Bracadale.

Question 1

It is not easy to think of an appropriate one-size fits all definition, and this may be as good as any, although it might be thought to be somewhat vague. The reference to features of the victim's identity is helpful, in that it indicates that something more than personal animosity is envisaged. It might be better if the words "presumed or actual", or some similar formulation, were inserted after the words "particular features".

The proviso may require careful thought. On the face of it the whole issue is one of motivation. For example, the phrase "the selection of the victim on the basis of a particular feature" could cover hate crimes, but could also apply to the situation where the victim is targeted because he or she is vulnerable, rather than out of animosity.

Question 2

No response – see introductory remarks.

Question 3

While fundamentally this is a matter for Parliament, clearly the factors set out in the second paragraph on page 10 of the paper are powerful reasons in favour of hate crime legislation. With regard to some of the comments in the third paragraph on page 10, judges are well used to taking aggravating (and mitigatory) factors into account when deciding upon an appropriate sentence.

Question 4

The potential benefits of this are obvious. It might also provide an opportunity for the law to be both simplified and placed on a clearly expressed principled foundation.

Question 5

The current threshold provisions are based on objectively determinable criteria. It is not obvious why any change is required or desirable.

Question 6

It should be appreciated that, if introduced, such a measure could open a potentially wide door. It would depart from the concept of hostility towards a protected group. It would be likely to add a significant layer of complexity and uncertainty to the existing law. In general it is thought that the common law will be able to deal with cases which fall outside the current legislation and where additional condemnation is plainly required.

Question 7

Similar comments apply as for question 6, recognising that both questions raise issues of policy.

One judge commented that, unlike broadly based crimes such as breach of the peace, bespoke criminal offences (a) allow hate crime to be monitored and statistics compiled, and (b) are more in tune with article 7 of ECHR.

Question 8

No response – see introductory remarks.

Question 9

The judges have no reason to think that there is any difficulty in this regard.

Question 10

There should be little difficulty in recording when the aggravation applies. As to recording what the sentence would have been without the aggravation, this is likely to be a somewhat artificial exercise. Often the motivation will be bound up with the events, and it will be difficult to imagine the commission of the crime without it. In any event, more often than not, a sentence cannot sensibly be broken down into separate building blocks or percentages. Rather it is an exercise of evaluation or judgement involving a number of competing considerations. Speaking generally, the legislation surrounding the sentencing of offenders is already highly complicated, and often difficult to understand and apply. Particularly from the point of view of sheriffs faced with busy sentencing courts, it is highly desirable that the direction of travel should be towards simplification, not added procedural requirements.

Question 11

The judges are not aware of anything covered by section 50A which could not be dealt with on some other basis.

Question 12

This is a matter of policy. If further groups are being identified for stand-alone legislation, one question is whether the test remains hate crime, in the sense of motivation based on hatred; as opposed to, for example, an act directed at the elderly because they are vulnerable. The latter approach would extend the definition of hate crime well beyond the parameters discussed earlier in the paper.

Question 13

Whatever view is taken on this, freedom of expression is a fundamental part of our liberties and civil society. The criminal law must not be used to stifle legitimate views and debate. If it is thought that the safeguards in the European Convention on Human Rights can sometimes seem "nebulous", that may justify express safeguards in any new legislation. All that said, the quoted passage from the policy memorandum accompanying Mr Kelly's bill illustrates the potential difficulties of identifying and policing the boundary between the lawful and the criminal.

Question 14

No response – see introductory remarks.

Question 15

With reference to the discussion in the middle of page 47, it is a matter of concern if the ordinary football fan is unable to understand the boundary between lawful and unlawful activity. The issue is brought into sharp focus by section 1(2)(e) of the Act, which is discussed in the first full paragraph at page 49. It is a general principle that there should be clarity and predictability in respect of any penal provision.

Offending behaviour under the Act is likely to amount to at least breach of the peace or breach of section 38 of the 2010 Act. However, whether to have statutory provisions particular to football matches is a matter for Parliament. Indeed most of the issues raised in this multi-faceted question concern policy. That said, it does seem odd that a person may be regarded as having been on a journey to or from a football match whether or not the person actually attended or intended to be at the match.

Question 16

No response – see introductory remarks.

Question 17

An affirmative response seems appropriate, otherwise how would the court separate criminal from offensive/annoying behaviour? The structure of section 1 of the 2012 Act suggests that the intention was that the offence would be committed if behaviour falling within section 1(2) would, in the absence of effective counter-measures, be likely to incite public disorder if sufficient numbers were present. If the perhaps *obiter* comments of the court in *HMA* v *Cairns* have caused uncertainties as to what is required for proof of the offence, this would seem to be an appropriate matter for further consideration and clarification.

Question 18

Though the comments of the court in *Cairns* may raise doubts, it would appear that, as framed, the Act was directed more at emphasising the need for appropriate behaviour at football matches, rather than at creating new crimes.

Question 19

The logistics and practicalities of this proposition are unclear. Is it intended that the police and the prosecution authorities would be bypassed? If so, this would seem inappropriate, and may well create difficulties for the courts. Also, might it encourage football clubs simply to refer alleged recalcitrants to the court rather than taking appropriate steps themselves? The paper suggests that it is desirable that clubs should, where possible, deal with their own fans, and this quite apart from any criminal proceedings. On the face of it, clubs should be encouraged to police and regulate themselves, rather than delegate responsibility to the courts, which should be reserved for

cases where the prosecution authority considers it proper to put an accused person on a criminal charge.

Questions 20 – 24

No response – see introductory remarks.