CHAPTER 1: Hate crime: definition and justification

This chapter is in two parts: Part 1 explores what is meant by the term “hate crime” in Scotland; Part 2 examines the justification for having hate crime legislation.

Part 1: What is meant by hate crime

The term “hate crime” is well established in Scotland, the rest of the United Kingdom and other jurisdictions. It is clear from chapter 1 of the Academic Report that there is no single accepted definition of what constitutes a “hate crime”. This was also reflected in some of the responses to the questionnaire. Different definitions may reflect different purposes.

This consultation paper is concerned with hate crime in the context of Scottish criminal law. In Scotland the term is commonly used by the police, prosecutors, the Scottish Government and many organisations in the community representing currently protected characteristics and potential additional characteristics. It is reflected in the annual statistics published by the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Government.

A working definition

It may be convenient for the purposes of this consultation paper to use as a working definition that identified in the Academic Report, quoting from N Chakraborti and J Garland Hate Crime: Impact, Causes and Responses, 2nd edn (2015) 13:

“…the creation of offences, or sentencing provisions, ‘which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim’s identity should be treated differently from ‘ordinary’ crimes’ although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim’s identity, or the selection of the victim on the basis of a particular feature.”

Using this definition a number of features of hate crime may be identified.

What is covered by hate crime

It is important to understand that this definition does not cover every crime driven by hatred. It would not, for example, include a crime committed simply out of personal hatred of an individual. So, for example, an assault on a neighbour motivated by hatred due to a long-running feud would not necessarily fall within the recognised category of hate crime. What lies at its core is the phrase “towards particular features of the victim’s identity”. In the context of Scottish criminal law this is reflected in statutory provisions in relation to a number of specific protected characteristics. Those currently protected are: race; religion; disability; sexual orientation and transgender identity. A similar approach is adopted in
many other jurisdictions. Some jurisdictions have additional protected characteristics such as age or gender. Whether any additional characteristics should be included in the Scottish provisions will be explored in chapter 8 of the consultation paper.

**Motivation**

Another feature which emerges from the working definition relates to motivation. Although the starting point is that the crime is motivated by hatred, it may not be necessary to prove either motivation or hatred. As explained in chapter 4 of the Academic Report, existing provisions in Scotland are “animus” based. (”Animus” is defined in the Concise Oxford Dictionary as “animosity shown in speech or action”.) At its highest, the animus model might require proof that “the offence was motivated by hate against a group of people”. This requires proof of motive and of hate. That high threshold may be reduced in two ways. First, by requiring no more than a “demonstration” of the feeling and, second, by substituting the concept of “hate” with the less demanding concept of “prejudice”. Typically, this is achieved by a provision that an offence may be aggravated by a demonstration of hostility in relation to a protected characteristic. In Scotland this is reflected by the use of the phrase “evincing malice and ill-will”.

Thus, if, for example, a person commits a breach of the peace by shouting and swearing in the street at someone of a different ethnic background and in the course of that makes remarks of a racist nature about that person, the offence would be aggravated by evincing of malice and ill-will towards the person on the basis of the protected characteristic of race.

Although the word “hatred” appears in certain stirring up provisions, in other provisions the words “hate” or “hatred” do not appear at all. Thus, a hate crime may be committed on the basis of something less than hatred. It is important to understand this because, as the Independent Advisory Group noted, sometimes neither the victim nor the perpetrator recognises their experience or actions to be based on, or driven by, hate.

The Academic Report quotes a source as observing that “most hate crimes tend to be committed by relatively ordinary people in the context of their everyday lives”. A similar observation was made in a report published in 2004, commissioned by Stonewall, which noted: “Many perpetrators would not necessarily think themselves capable of committing a ‘hate crime’.”
Whether certain terms of abuse constitute a hate crime offence

In the course of gathering evidence our attention was drawn to examples of cases in which a term of abuse was used but there was doubt about whether the offender intended the term to indicate malice and ill-will related to the victim’s membership of a protected group. Examples included the use of words such as ‘dyke’ or ‘poof’ as general terms of abuse, regardless of an individual’s sexual orientation. Such abuse would not fall within the working definition of hate crime. It has been suggested by some that a prosecution as a hate crime of the use of such expressions in circumstances which do not truly reflect the evincing of malice and ill-will in relation to a protected group may undermine the arguments in favour of justification of hate crime legislation, and is in danger of artificially increasing the hate crime statistics giving rise to a perception that levels of prejudice are in fact higher than they are. However, it is also generally accepted that there is considerable under-reporting of hate crime, as we explore in chapter 9.

The statutory requirements

As will be explored in more detail later in the consultation paper, the bundle of offences which currently comprise hate crime in Scotland include statutory sentencing aggravations of existing crimes in relation to all the currently protected characteristics; a stand-alone offence of racial harassment or conduct; and stirring up of hatred offences in relation to race. Stirring up offences are sometimes referred to as “hate speech”. In addition, certain offences under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 would fall under the umbrella of hate crime.

The statutory offences and aggravations require evidence to prove that (a) the conduct was motivated by malice and ill-will towards members of a group; or (b) the perpetrator evinced malice and ill-will towards the victim based on membership of the group. In other words the prosecutor must prove that one or other of these thresholds has been crossed.

Question:

Do you consider that the working definition, discussed in this chapter, adequately covers what should be regarded as hate crime by the law of Scotland? Please give reasons for your answer.

A victim oriented approach

The recommendations in the Macpherson report into the murder of Stephen Lawrence led to a change in the approach adopted by police forces across the United Kingdom in relation to the investigation and recording of hate crime. The report reflected concern that the police and wider criminal justice system made decisions about what had happened, and why, without listening effectively to victims’ and families’ fears that this was a hate crime. Sir William Macpherson therefore recommended that any incident which is perceived as racist by the victim or any other person should be recorded as a
racist incident. He also recommended that the term “racist incident” should be used for all incidents reported as such by the public, whether or not the police initially considered them to be crimes, and that all should be reported, recorded and investigated with equal commitment.

This recommendation led Police Scotland to record “hate crime” and “hate incidents”. Hate crime is recorded as “Any offence which is perceived by the victim or any other person as being motivated by malice or ill-will towards a social group” (see Police Scotland: “Hate Crime Standard Operating Procedure”). The intention is that recording in this way will require investigators to take seriously the possibility that a crime might be hate-motivated and ensure they secure and preserve any relevant evidence which may show that. If the allegation does not amount to a crime, the police will record it as a “hate incident”. This is described as being “any incident that is not a criminal offence, but something which is perceived by the victim or any other person to be motivated by hate or prejudice”.

Members of the public are encouraged to report any such incidents as well as hate crimes.

This approach can, however, give rise to a certain tension. There are some circumstances where the police initially record a crime as a hate crime because the victim or another person perceived it as such, but there turns out to be insufficient evidence to proceed with prosecuting it as a hate crime. Prosecutors have told us that this can result in dissatisfaction for victims. Similarly, the recording of hate incidents can give rise to misunderstandings as to what amounts to hate crime.

The upholding of the post-Macpherson approach is seen by many as essential because it was designed to ensure that perceived ‘hate-fuelled’ behaviour is properly investigated. However, it appears that the attempt to record information about the two categories may also contribute to the lack of understanding about the definition of hate crime which was detected by the Independent Advisory Group.

Question:
How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be hate crime, and what can be proved as hate crime? Please give your reasons for your answer.
Part 2: Justification for hate crime law

What is the justification for having hate crime legislation? This is explored in detail in chapter 3 of the Academic Report. What emerges from that chapter is that there is near universal agreement among scholars that hate crime should be punished more severely than non-hate crime. The Academic Report refers to a series of robust studies which demonstrate that hate crimes are more likely to cause harm both to the direct victim and to members of the group to which the victim belongs, or was perceived to belong, than non-hate crimes. Under reference to a number of studies, the Academic Report concludes that this argument is particularly compelling. It also describes as “persuasive” the argument that it is important to send a message to victims of hate crime that bias and inequality of treatment is roundly condemned by the State. Such a message may also be viewed as positively encouraging community cohesion, where people have a common vision and sense of belonging, regardless of any differences between them. The Academic Report concludes that the harm argument and the “message” argument taken together provide a compelling justification for punishing hate crime more severely. In addition, it is clear from the Academic Report that many jurisdictions share the view that legislating against hate crime is justified.

Question 3 of the Questionnaire asked about the impact that the experience of hate crime had on people. In the Analysis of Questionnaire Responses, Dr McPherson identified a number of themes into which the responses to question 3 could be organised. These included: emotional effects; mental health impact; social and practical impacts. The emotional effects included: feeling scared and fearful, hurt or upset; feeling powerless and helpless; feeling intimidated; feeling panicked; being shocked or horrified; feeling ashamed or guilty; experiencing anger and annoyance; being offended/disgusted; feeling vulnerable, frustrated, resentful, unsettled and uncomfortable. The mental health impacts included stress, depression and anxiety. The social and practical impacts included: social isolation; feeling disengaged from society; losing trust; having to move house to a different area; moving job; altering behaviour. These responses broadly reflect the findings of much larger studies referred to in the Academic Report.

On the other hand arguments are advanced against distinguishing hate crimes from other crimes. Some of these were advanced to the Working Group on Hate Crime which reported in 2004. Critics of hate crime legislation argued that it amounted to punishment of opinions and created a “slippery slope” whereby particular groups were singled out for special treatment under the law. Some argued that the fact that hate crime legislation punished the motivation as well as the crime meant that a person convicted of hate crime can receive a more severe punishment than someone who has been convicted of the same offence but without the additional motivation. Others submitted that it represented an extreme form of political correctness.
Again, some of the responses to the questionnaire voiced concern over the very idea of hate crime.

**Question:**
Should we have specific hate crime legislation? Please give reasons for your answer.