CHAPTER 3: Current Scots law: history and development

Introduction
The current provisions of Scottish statutory criminal law in relation to hate crime are set out and analysed in chapters 2, 6 and 8 of the Academic Report to which the reader is referred for a comprehensive, detailed study.

In this chapter, which should be read in conjunction with the relevant chapters of the Academic Report, we shall examine the history of the development of the current legislation on hate crime in Scotland and outline the salient features of the provisions. In later chapters we shall explore certain aspects of the provisions which may give rise to issues to be addressed in the review.

Race: Public Order Act 1986
The earliest provisions in relation to hate crime are those which provide for offences involving the stirring up of racial hatred. As explained in the Academic Report at paragraph 2.2.1 these date back to 1965. The current offences are provided in the Public Order Act 1986 sections 18, 19 and 23, which contain various offences related to stirring up racial hatred extending to Scotland as well as England and Wales. Much of the rest of the Act extends to England and Wales only. The provisions specifically refer to “hatred”.

Race: Crime and Disorder Act 1998
The next development came in the Crime and Disorder Act 1998, which introduced two significant provisions extending to Scotland. The first of these, section 96, introduced a sentencing aggravation in respect of any offence which was racially aggravated. This was the first time that a statutory aggravation on grounds of the status of a victim had been created. Similar, but more extensive, provisions were introduced for England and Wales. It was recognised that Scottish criminal common law had more flexibility in dealing with such behaviour than was possible in England and Wales. As will be examined in more detail later, the aggravation is underpinned by the concept of “malice and ill-will” rather than “hatred”.

The second hate crime provision extending to Scotland created by the 1998 Act introduced a new section 50A to the Criminal Law (Consolidation) (Scotland) Act 1995. As is explained in paragraph 2.2.2 of the Academic Report, this section created two separate offences: racially aggravated harassment and racially aggravated conduct or behaviour. The concept of racial aggravation is defined in similar terms to section 96 of the 1998 Act.
Religion: Criminal Justice (Scotland) Act 2003

The next development of the law in relation to hate crime came with the introduction of Section 74 of the Criminal Justice (Scotland) Act 2003. This section applies where an offence is aggravated by religious prejudice and follows a very similar pattern to that in section 96 of the 1998 Act in respect of race.

The history of the introduction of section 74 of the 2003 Act is as follows. A Cross-party Working Group on Religious Hatred was set up in response to various events in 2001. These included: action by the Cross-Party Sports Group on sectarianism; a proposal for a Member’s Bill by Donald Gorrie MSP which would have made sectarian behaviour an aggravation of a criminal offence; the Scottish Parliament’s consideration of proposals in the UK Anti-Terrorism, Crime and Security Bill to create new offences of incitement to religious hatred and new religiously-aggravated offences. The Scottish Executive announced that it considered the existing law in Scotland was sufficiently able to deal firmly with religious hatred, but that they would convene the Cross-party Working Group to consider whether there was a need for any new legislation on the issue in Scotland.

The Cross-party Working Group reported in 2002. While it recognised the arguments that the current common law allowed for religious or sectarian factors to be taken into account, it felt that there was a serious lack of evidence that was happening in practice. The Cross-party Working Group therefore concluded that legislation would provide much needed clarity about the seriousness with which the law views offences motivated by religious hatred and would also facilitate the keeping of the records and statistics required to monitor the effectiveness of the law. The new provision was added by amendment to the Bill by Donald Gorrie MSP following publication of the report.

The Cross-party Working Group also considered, but rejected, arguments in favour of legislation covering incitement to religious hatred. It was concerned with the potential implications for freedom of speech:

“A law against incitement to religious hatred could conceivably be used to prevent public preaching that the adherents of other faiths were in error. A law against incitement to religious hatred might also hinder people from discussing openly their concerns about particular religious practices that they might regard as harmful, whether within their own or another faith … Where an individual believes that any other particular set of beliefs is flawed and the adherents of that religion are in error, we are of the view that such an individual should be able to say so without fear of a law on incitement to religious hatred.” [paras 5.06, 5.07]
Disability, sexual orientation and transgender identity: Offences (Aggravation by Prejudice) (Scotland) Act 2009

After the lengthy history outlined below, the next development came with the passing of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. This Act introduced statutory aggravations for offences aggravated by prejudice relating to disability, sexual orientation and transgender identity which are similar to those already created for race and religion.

The history leading to the introduction of these provisions in the 2009 Act is as follows. Robin Harper MSP initially lodged amendments to the Criminal Justice (Scotland) Bill 2003 which sought to create statutory aggravations where offences were aggravated by prejudice on grounds of disability, sexual orientation, gender and age. Those amendments were rejected in the Scottish Parliament. In arguing for the rejection of the amendments, the Justice Minister, Jim Wallace MSP, submitted that the groups covered by the amendment might not all be in need of the protection of the criminal law in the way that they required protection from discrimination as a matter of civil law. It might be difficult to distinguish between whether a victim had been subject to an offence simply because they were vulnerable rather than because of some provable motive of ill-will or malice against them as a result of their status.

In June 2003 the Scottish Executive did, however, set up a Working Group on Hate Crime to consider the most appropriate measures needed to combat crime based on hatred towards social groups. The Working Group reported in 2004.2

The Working Group on Hate Crime concluded that some social groups were proportionately more often victims of harassment and crime largely motivated by prejudice against those groups. The Working Group considered that statutory aggravations should be created as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. The Working Group considered that more work was required in consideration of offences aggravated by prejudice on grounds of age or sex, but that the statutory aggravation which it recommended should be drafted in such a way that it could be extended to other groups by statutory instrument over time if appropriate evidence emerged that such other groups were subject to a significant level of hate crime.

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The Working Group also recommended that consideration should be given to whether a general statutory offence of harassment and alarming or distressing behaviour would be an effective tool to combat ‘lower-level’ harassment which they had been told about when carrying out their work. It considered that such an offence could be applied with a statutory aggravation.

The Scottish Executive initially rejected the Working Group’s recommendation to create new statutory aggravations. Subsequently, however, in January 2008, the Cabinet Secretary for Justice indicated that the Scottish Ministers were in agreement with the recommendation of the Working Group on Hate Crime and would support legislation to give effect to it. Patrick Harvie MSP lodged a proposal for a Member’s Bill which the Scottish Government decided to support, leading to the passing of the 2009 Act.

**Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012**

The next development in relation to hate crime in Scotland came in the wake of certain events in 2011 associated with football. A number of serious incidents occurred which led to calls for an examination of, and response to, sectarian attitudes in some sections of Scottish society. Concerns about incidents during football matches (particularly, but not exclusively, Old Firm matches between Celtic FC and Rangers FC) led to a Scottish Government organised summit in March 2011 involving Ministers, the police, football clubs and football associations. Viable parcel bombs and bullets had been sent to Celtic FC manager, Neil Lennon, former MSP Trish Godman, Paul McBride QC and two Celtic FC players. The police had also made arrests in connections with sectarian comments posted online which were directed at Mr Lennon and a footballer on loan to Rangers FC.

This led to the introduction of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. The Bill was introduced on 16 June 2011, with Scottish Ministers initially seeking to have it subject to the emergency legislation procedure so that its passage could be completed before summer recess and the start of the 2011-12 Scottish football season. The Policy Memorandum indicated this timescale was necessary in order to begin to repair the damage done to the reputation of Scottish football and Scotland more generally by the events mentioned above. Significant concern was expressed within Parliament and by interested parties about the implications of such a short timetable for proper scrutiny of the Bill. Following the stage 1 debate, the Scottish Ministers agreed to extend the timetable for stages 2 and 3 with the aim of allowing the Bill to complete its passage by the end of 2011. The Act received Royal Assent on 19 January 2012 and was brought into force on 1 March 2012.

In June 2017 James Kelly MSP introduced a Member’s Bill to repeal the 2012 Act. This is more fully discussed in chapter 7 of the Consultation Paper.
Conclusion
What emerges from an analysis of the chronological development of hate crime in Scotland is something of an evolving regime comprising a patchwork of provisions. There are a number of sentencing aggravation provisions covering race, religion, disability, sexual orientation and transgender identity. There are a number of provisions in relation to the stirring up of racial hatred. There is a provision of a somewhat different character in relation to the stirring up of religious hatred. There is the provision in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 which creates two offences in relation to racial harassment.

Salient features of the types of hate crime
Specific issues in relation to various types of hate crime will be explored in later chapters. For the purposes of this chapter we outline some of the salient features of the different types of offence.

Sentencing aggravations
The provisions for sentence aggravations of offences cover each of the currently protected characteristics of race, religion, disability, sexual orientation and transgender identity. As noted above, section 96 of the Crime and Disorder Act 1998 applies where an offence has been racially aggravated. Section 74 of the Criminal Justice (Scotland) Act 2003 applies where an offence has been aggravated by religious prejudice. The Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides equivalent statutory aggravations for offences aggravated by prejudice relating to disability, sexual orientation and transgender identity.

These statutory aggravation provisions do not create new offences. Instead, they require the court, in passing sentence on a person convicted of an offence along with a statutory aggravation, to take into account the prejudicial context of an offence when that prejudicial context relates to persons within certain groups. The statutory aggravation may apply to any offence.

The various statutory aggravation provisions follow a similar pattern. In each case the provision contemplates an offence libelled on an indictment or specified in a summary complaint. The offence is aggravated by prejudice relating to the relevant characteristic if one of two alternative thresholds is met. The first threshold is that at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to the characteristic or presumed (by the offender) characteristic of the victim. The second threshold is that the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a particular characteristic.
The statutory aggravation does not require to be corroborated. The base offence charged, which might, for example, be assault or breach of the peace or a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour), will require to be corroborated but the aggravation may be proved on the basis of evidence coming from one source. This reflects the position in respect of common law aggravations.

In each of the aggravation provisions there is a requirement on the sentencing court to state on conviction that the offence was aggravated in relation to the particular characteristic; to record the conviction in a way that shows that the offence was so aggravated; and to take the aggravation into account in determining the appropriate sentence. In addition, the sentencing court is required to 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.

**Section 50A Criminal Law (Consolidation) (Scotland) Act 1995: racially-aggravated harassment and conduct**

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 creates a free-standing offence of racially-aggravated harassment and conduct. There are two ways in which this offence may be committed. The first involves the pursuit of a racially-aggravated course of conduct which amounts to harassment of a person and is either intended to amount to harassment of that person, or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person. Harassment is defined as follows: “‘harassment’ of a person includes causing the person alarm or distress”. Conduct is defined as including speech and a course of conduct must involve conduct on at least two occasions. The course of conduct is racially aggravated if one of the same two thresholds which feature in the statutory aggravation provisions is met. The second way in which the offence may be committed is by acting in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress. An action is racially aggravated in one or other of the same ways already noted in relation to conduct, namely, if one or other of the two thresholds is met.

In order to prove a section 50A offence the racially aggravated element requires to be corroborated; where another aggravated offence is charged, the racially aggravated element need not be corroborated. The Lord Advocate’s Guidelines state that where there is corroboration the case should be prosecuted under section 50A.
Stirring up offences
The final category of hate crime offence in Scotland at present covers offences relating to the stirring up of hatred against particular groups. The conduct involved in such offences may be directed at society at large, rather than at a specific individual with a particular ‘protected’ characteristic. Such conduct is often given the shorthand title of hate speech. However, this is a misnomer, as the conduct in question can include other forms of communication and (at least in theory) conduct which stirs up hatred other than through communicating a particular message.

These offences are discussed at chapter 6 of the Academic Report. The Academic Report distinguishes between hate speech and other forms of hate crime. In relation to hate speech/stirring up offences, hate is primarily relevant not as the motive for the crime, but as a possible effect of the perpetrator’s conduct.

Part 3 of the Public Order Act 1986 creates offences where an individual engages in certain types of behaviour and thereby intends to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up. Section 18 applies to the use of threatening, abusive or insulting words or behaviour or the display of threatening, abusive or insulting written material. Section 19 relates to the publication or distribution of threatening, abusive or insulting written material. Section 23 relates to possession of written or recorded material which is threatening, abusive or insulting, with a view to displaying, distributing etc. such material.

Offensive Behaviour at Football and Threatening Communications (S) Act 2012
The 2012 Act contains various offences where the stirring up of hatred against certain groups or individuals based on their membership of such groups forms an element of the offence. However, these offences are not direct equivalents to the racial hatred offences in the Public Order Act 1986. Section 1 created an offence which is committed when an individual engages in behaviour in relation to a regulated football match which is likely, or would be likely, to incite public disorder. The section identifies five categories of behaviour, some of which relate to hatred based on protected characteristics:

- Behaviour expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of a religious group, a social or cultural group with a perceived religious affiliation or a group defined by reference to colour, race, nationality (including citizenship), ethnic or national origins, sexual orientation, transgender identity or disability.
- Behaviour expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of such a group.
- Behaviour that is motivated (wholly or partly) by hatred of such a group.
- Behaviour that is threatening; or
- Other behaviour that a reasonable person would be likely to consider offensive.
Section 6 of the 2012 Act created an offence of threatening communications which also includes an element related to religious hatred. The offence applies where a person communicates material to another person whether either condition A or condition B is satisfied:

- **Condition A** is that:
  - o the material consists of, contains or implies a threat or incitement to carry out a seriously violent act against a person or against persons of a particular description (which could include membership of a particular group);
  - o the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm and
  - o the person communicating the material intends by doing so to cause fear or alarm, or is reckless as to whether the communication of the material would cause fear or alarm;

- **Condition B** is that:
  - o the material is threatening, and
  - o the person communicating it intends by doing so to stir up hatred on religious grounds.