CHAPTER 4: Statutory aggravations: some issues

Introduction
In this chapter we raise a number of issues in relation to the statutory aggravation provisions which arose in the course of gathering evidence and in respect of which we would welcome the views of consultees.

The scattered nature of the provisions
In chapter 3 we noted the piecemeal development of the law in relation to hate crime generally and sentence aggravation provisions in particular. A specific element of the review is to consider and provide recommendations on whether existing legislation can be simplified, rationalised and harmonised in any way such as through the introduction of a single consolidated hate crime Act.

Question:
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? Please give your reasons for your answer.

The current thresholds and the use of the phrase “evincing malice and ill-will”
In chapter 3 we noted that in respect of each of the currently protected characteristics an 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.

In England and Wales the sentence aggravation and penalty enhancement provisions require the offender to have demonstrated or have been motivated by “hostility”. Certain specified offences may be aggravated by hostility under the Crime and Disorder Act 1998. The Law Commission Consultation Paper number 213: Hate Crime: the Case for Extending the Existing Offences notes that “hostility” is not defined in the 1998 Act and there is no standard legal definition. The ordinary dictionary definition of “hostile” includes being “unfriendly”, “adverse” or “antagonistic”.

In Canada the sentence aggravation requires that the offence must have been motivated by bias, prejudice or hate. In New Zealand the sentence aggravation applies when the offence was committed “partly or wholly because of hostility” towards the protected group. In Western Australia the penalty enhancement provisions require the offender to have demonstrated hostility based on the victim’s membership of a racial group or have been motivated by hostility. Thus, it is clear that a similar approach is taken to that in Scotland in a number of other jurisdictions.

This approach is not, however, universal. In New South Wales and the Northern Territory reference is made to the offence having been motivated by hatred or hate against a group of people. As noted in the Academic Report, this is the most demanding of the animus model's thresholds. In Victoria the requirement is for the offence in the sentence aggravation to have been motivated wholly or partly by prejudice.

The phrase “evincing malice and ill-will” is well known to Scottish criminal lawyers. For generations it has been used as an aggravation of murder that the perpetrator “previously evinced malice and ill-will” against the victim. This aggravation would be libelled in a case where, for example, the accused has made threats to the deceased prior to committing the murder. The language may, however, not be particularly accessible. A question arises as to whether the use of the phrase should be revisited and more easily understood alternatives, such as “demonstrating hostility” considered.

**Question:**
Do you consider that the current Scottish thresholds are appropriate? Please give your reasons for your answer.
Should “evincing malice and ill-will” be replaced by a more accessible form of words? If so, please give examples of what might be appropriate.

**Perceived associations of certain groups**
In our initial evidence gathering, we have heard of cases where individuals feel that they have been subject to criminal conduct because of the perceived affiliations between a group that they belong to and another group. Where the first group is protected under existing hate crime legislation and the second group is not, it is not necessarily clear whether the conduct in question would or should be covered by the existing aggravations.

A specific example relates to the perceived links between the Jewish community and Israel. Some within the Jewish community report that the level of threatening behaviour which they experience in relation to political discourse about the state of Israel is much greater than would have been the case if they were not Jewish. They report a sense of feeling ‘held to account’ for the actions of a political state for which they have no responsibility. Under existing hate crime law, an offence is aggravated if it is motivated
by malice and ill-will against a religious group, but there is no equivalent aggravation if an offence is politically motivated. There may be some circumstances in which acts are motivated both by antipathy towards a political idea and towards a religious group which is thought to be connected to that idea.

The International Holocaust Remembrance Alliance has adopted the following definition of antisemitism:

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

The Alliance recognises that some anti-Zionist activity will also be antisemitic, but other activity will not. In essence, it is argued that criticism of Israel that would not have been levelled at any other country is a manifestation of hostility against Jews:

“Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Similar issues arise in relation to perceived links between Muslims and Islamist terrorist organisations, or indeed between Catholics and the IRA or Protestants and the UVF. Existing Scottish provisions on religiously aggravated offending specifically cover ‘a social or cultural group with a perceived religious affiliation’ (which might, for example, cover the Orange Order). However, there is no equivalent provision relating to a religious group with a perceived political or social association.

Question:
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? Please give your reasons for your answer.

Religiously motivated offending
There is a specific issue arising from the application of section 74 of the Criminal Justice (Scotland) Act 2003 in relation to offences aggravated by religious prejudice. This is specifically raised in the remit.

On 7 July 2016, at the High Court in Glasgow, Tanveer Ahmed pled guilty to the murder of Asad Shah, a shopkeeper in Glasgow. Mr Shah was a member of the Ahmadi sect of Islam. Most Muslims believe that Muhammad was the final Prophet and many consider that any statement to the contrary is blasphemous, but Ahmadis believe that Muhammad was not the final Prophet. Mr Shah had used social media to publish messages which were capable of being interpreted as meaning that he himself claimed to be a prophet. When Tanveer Ahmed pled guilty to the murder, he issued a statement explaining that he had committed the murder because he felt Mr Shah had disrespected the Prophet Muhammad and had claimed to be a prophet himself. There was no suggestion that other members of the Ahmadi sect considered Mr Shah to be a prophet. Therefore, Tanveer Ahmed’s statement could be interpreted in terms of his attitude of malice and ill-will against the individual religious beliefs of his victim and the way in which the victim had expressed those beliefs. Accordingly, the Crown took the view that the case did not fall within the terms of the religious aggravation in section 74 of the 2003 Act.

In an article entitled “The Lord Advocate’s Lacuna”, published in the Juridical Review in November 2016, Dr Phil Glover of Aberdeen University argues that section 74 was drafted too narrowly and on the assumption that individual religious practitioners inevitably form part of a wider religious, social or cultural group. Dr Glover notes that religious expression is an individual act of expression. The freedom of thought, conscience or religion enshrined in Article 9(1) ECHR (discussed at chapter 2 above) may be exercised “either alone or in community with others”. Accordingly, Dr Glover argues that section 74 should also be capable of applying in relation to offences motivated by intolerance of the expression an individual’s beliefs as well as malice and ill-will based on membership of a religious group.
The counter argument is that it does not matter whether the religious aggravation provision in section 74 of the 2003 Act applies to this kind of offence because the judge was able to deal with the matter as being a crime aggravated at common law. In passing sentence, Lady Rae specifically commented:

This was a brutal, barbaric and horrific crime, resulting from intolerance and which led to the death of a wholly innocent man - who openly expressed beliefs which differed from yours - but - who also exercised an understanding and tolerance of others whose religious beliefs might be different from his own.

It is accepted by you in the agreed narrative that this was a religiously motivated crime, although it was not directed towards the Ahmadi community.

Ahmed was sentenced to life imprisonment, with a punishment part set at 27 years. Lady Rae did not set out in detail how she arrived at the punishment part (save in relation to a limited reduction by reference to Ahmed’s guilty plea), but it seems clear from the wider comments that she took the religious motivation into account. However, reliance on the common law rather than the statutory aggravation does, of course, mean that the conviction would not be recorded as religiously aggravated. Neither would the impact on sentence be recorded in terms as required by section 74(4A) of the 2003 Act. The conviction would not appear as a hate crime on the offender’s criminal record and would not be included in the hate crime statistics, so the overall picture of hate offending may not be clear.

Question:
Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group? Please give your reasons for your answer.

Transgender and intersex

The statutory aggravation in section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 includes aggravation by prejudice against transgender or intersex people.

Transgender is an inclusive umbrella term for anyone whose gender identity (our internal sense of our gender) or gender expression (how we express our gender, for example through clothing, speech and social interactions) do not fully correspond with the sex they were assigned at birth.

We heard from the Equality Network and the Scottish Trans Alliance that the language used within the definition of transgender identity in section 2 needs to be updated. The definition is welcomed as inclusive, but is considered to be out of date in its detailed language.
The definition also suggests that intersexuality is a form of transgender identity. Intersex variations, also known as differences or disorders of sex development (DSD), are when the physical sex characteristics a person is born with do not fit typical binary notions of male or female bodies. It is important to be clear that intersex issues are different and distinct to those of gender identity and sexual orientation. Some intersex people and organisations work together with LGB and trans people in a broad LGBTI movement, but others choose not to.

**Question:**
Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?

**Intersectionality**

‘Intersectionality’ is a term coined by the American academic Kimberlé Williams Crenshaw. It refers to the idea that an individual’s experience is not governed solely by one facet of their identity, but by a number of intersecting facets. So, for example, a Muslim woman’s experience of discrimination or hate crime might be very different from the experience of a Muslim man or a non-Muslim woman. The theory proposes that individuals think of each element or trait of a person as inextricably linked with all of the other elements in order to fully understand that person’s identity⁴.

As described in chapter 3, hate crime legislation in Scotland has been developed over time through the creation of a series of provisions which each ‘protect’ a specific group. Many of the campaigning organisations which operate in the field of hate crime have a focus on one particular group, and some have argued that the ‘silo’ approach to identity in existing legislation can lead to competition between groups for resources or recognition and confusion for victims⁵.

There are undoubtedly important questions for criminal justice authorities and policy makers about how to deal effectively with criminal conduct which affects victims differently because of different aspects of a person’s identity. However, the important question for this review is whether the offences set down in legislation are an effective means to tackle such conduct.

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⁵ Hannah Mason-Bish; ‘Beyond the Silo: Rethinking hate crime and intersectionality’, Routledge International Handbook on Hate Crime
The Academic Report notes that it is important that provisions based on the motivation of the offender apply whether the motivation in question is the sole or partial motivation for the act. This is because of the intersectional nature of identity: the commission of hate crimes may often be related to a range of different characteristics on the part of a victim (only some of which might be protected by the relevant legislation). The fact that a person may be a victim of hate crime based on both their gender and their disability (for example) is an argument for drafting hate crime law in a way that does not require the offender to have been motivated by prejudice against a single protected group.

We have heard from members of the Crown Office and Procurator Fiscal Service that charges can proceed with more than one statutory aggravation – for example, in cases where the conduct in question is motivated by malice and ill-will relating to both religion and disability. The annual COPFS hate crime statistics also recognise this. Where a charge has more than one hate crime aggravation, it is included in the overall figures for each type of hate crime into which it falls.

**Question:**

Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic? Please give your reasons for your answer.

**Sentencing and recording**

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.

The history of this requirement is as follows. The original racial aggravation provisions simply required the court to take the aggravation into account in determining the appropriate sentence. The original religious aggravation provisions required the court to take the aggravation into account and, if the sentence was different, state the extent of and reasons for the difference. The current formulation was used for the first time in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Racial and religious aggravation provisions were subsequently amended in the Criminal Justice and Licensing (Scotland) Act 2010 in order to bring them into line with formulation used in the 2009 Act.
In the course of compiling this paper we received anecdotal evidence that there is, at best inconsistent practice in complying with these obligations. We also note that in *RR v Procurator Fiscal Aberdeen* [2015] HCJAC 34 the court commented on the failure of the sheriff to comply with the requirement of section 96(5)(d) the Crime and Disorder Act 1998 and the failure of the minute to comply with the requirement of section 96(5)(b). While the requirement to take into account the aggravation appears to be generally complied with, anecdotal evidence would suggest that the requirement to specify the difference in sentence because of the aggravation is less well complied with. Disquiet about this requirement has been expressed by some sheriffs. Where the aggravation is at a relatively low level it may be counterproductive to state the difference. Some sheriffs have indicated that there is an absence of guidance on the appropriate amount by which to increase the sentence; the sentence is often being adjusted in a number of different directions take account of, for example, a guilty plea or backdating; there is a limited amount of time to deal with each sentence; determining a sentence is ultimately a matter of judgement and an overly mathematical approach is not helpful.

As to recording, the requirement is limited to recording the aggravation. It is not clear how well this requirement is complied with. It is important that the sentencing judge takes the aggravation into account in determining the appropriate sentence. It may be thought highly desirable that there is consistent compliance with the requirement to record the conviction in a way that shows that the offence is aggravated so that it will appear on the schedule of previous convictions in any future case. In light of the observations of some sheriffs in relation to the requirement to state the difference in sentence to that which the sentence would have been in the absence of the aggravation, a question arises as to whether it is necessary for the sentencing judge to state the different sentence which would have been imposed if the offence had not been aggravated or the reasons for making no difference and whether it is necessary for that to be recorded.

**Question:**
Should the aggravation consistently be recorded? Please give your reasons for your answer.
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? Please give your reasons for your answer.