

## CHAPTER 6: Stirring up hatred and online hate

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This chapter brings together discussion on issues which relate to the way in which ideas, views or comments are expressed: offences relating to stirring up of hatred, including threatening communications under section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, and online hate.

### **Part 1: Stirring up offences (including section 6 of the 2012 Act)**

The existing offences relating to the stirring up of hatred have been described in chapter 3. The first hate crime provisions in Scotland and the rest of the United Kingdom related to the stirring up of hatred on grounds of race. However, those offences have not been replicated in identical terms for other groups.

The 2004 Working Group considered, but rejected, the idea of creating new stirring up offences in Scotland. Likewise, the 2002 Cross-Party Working Group had rejected the idea in relation to stirring up religious hatred. This was mainly due to concerns about the potential impact of such offences on freedom of expression. Further offences were subsequently created in relation to threatening communications which stir up religious hatred (section 6 of the 2012 Act) and behaviour at regulated football matches which stirs up hatred against individuals or groups based on certain characteristics and is, or would be likely to incite public disorder (section 1 of the 2012 Act). However, James Kelly MSP has introduced a Bill with the aim of repealing these last two provisions: the main arguments supporting the proposed repeal in the Policy Memorandum accompanying the Bill are that the offences are unnecessary and illiberal.

The number of prosecutions which have been brought under the existing stirring up offences is small when compared with the other hate crime provisions. There have only been 9 cases involving charges under Part 3 of the Public Order Act 1986 (stirring up hatred on racial grounds) between 2006 and 2016. There have been a total of 32 cases involving charges under section 6 of the 2012 Act since that legislation came into force. Those figures include charges involving the threat of seriously violent acts (condition A) and stirring up of religious hatred (condition B). Official statistics do not distinguish between the two.

This chapter of the consultation document therefore asks questions to explore whether stirring up offences are needed and, if so, whether the current offences are drafted appropriately.

**Issue: overlap between stirring up offences and other existing offences, such as breach of the peace, uttering threats or abusive and threatening behaviour?**

The conduct involved in stirring up offences may be directed at society at large rather than at a specific individual with a particular ‘protected’ characteristic. For example, the offence in section 19 of the Public Order Act 1986 may be committed in relation to the publication of racist literature. However, in instances where hatred of a group is being stirred up, the same behaviour may also constitute a direct offence against individuals from that group.

The Academic Report notes the potential application of the offences under section 127 of the Communications Act (improper use of public electronic communications network) and section 38 of the Criminal Justice and Licensing (Scotland) Act (threatening or abusive behaviour) to conduct which would be covered by the existing or potential stirring up offences. The Scottish Government conducted an evaluation of section 6 of the 2012 Act, which noted that existing legislation (section 38 threatening or abusive behaviour and section 127 Communications Act) would remain appropriate for the majority of cases involving threatening communications.

The review has considered details of the summary complaints for the four religious cases charged under section 6 of the 2012 Act in 2016-17. Three of them had an alternative charge of section 127, and it appears from the limited material available as if the fourth could also have been so charged. Such offences could of course be charged in conjunction with one of the statutory aggravations, if the conduct in question was motivated by malice and ill-will towards a protected group.

Some might consider some speech blasphemous and capable of stirring up hatred on religious grounds. There may be a common law offence of blasphemy in Scots law, but there have been no cases brought under it for over 170 years.

The Academic Report notes that hate speech (and other stirring up offences) are to be distinguished from other forms of hate crime. In relation to hate speech and stirring up offences, hate is primarily relevant as a possible effect of the perpetrator’s conduct, rather than as the motive for the crime. However, as a matter of practice, it seems likely that individuals who act in a way which is intended (or likely) to stir up hatred against a group will also evince or be motivated by malice and ill-will against that group.

The Law Commission of England and Wales considered whether stirring up offences should be extended to disability and gender identity in a report in May 2014.<sup>7</sup> It concluded that there is a justification in principle for an extension, but a practical need to do so had not been established. The Law Commission considered the examples of conduct which

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<sup>7</sup> Hate Crime: should the current offences be extended? Law Com no. 348: [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348\\_hate\\_crime.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc348_hate_crime.pdf).

consultees felt might be prevented through the creation of a stirring up offence, and expressed a fear “that unrealistic expectations are held about what the stirring up offences would be capable of preventing or discouraging” (para 7.122).

**Question:**

Should there be offences relating to the stirring up of hatred against groups? If so, which groups? Please give your reasons for your answer.

**Issue: potential impact of stirring up offences on ability to debate issues of public importance – freedom of speech/expression**

As noted above, the main reason why the 2004 Working Group considered it inappropriate to create new provisions on the stirring up of hatred against groups in addition to race was because of concern about the impact of such offences on freedom of expression. There is a consensus of opinion in mainstream society that there are no acceptable grounds for expressing antipathy towards racial groups. By contrast, people hold a variety of opinions about the beliefs and practices of different religious groups, and it is considered important in a democratic society that such opinions are capable of expression and debate.

When provisions about incitement to religious hatred were included in section 6 of the 2012 Act, the Scottish Parliament sought to deal with these concerns in two ways. First, the conduct caught by section 6 is slightly narrower than that covered in the earlier race provisions. The race provisions apply to words and other conduct which is “threatening, abusive or insulting”, whereas the provisions about religious hatred in section 6 only apply to “threatening” material. Material which is merely abusive or insulting is therefore excluded. Section 6 also requires an intent to stir up hatred, whereas the race provisions also apply where the accused does not specifically intend to stir up hatred but, having regard to all the circumstances, racial hatred is likely to be stirred up.

Second, the Scottish Parliament made specific provision to safeguard freedom of expression through the provisions in section 7. That section provides, for the avoidance of doubt, that section 6 does not prohibit or restrict discussion or criticism of religions or the beliefs or practices of adherents of religions; expressions of antipathy, dislike, ridicule, insult or abuse towards those matters; proselytising; or urging adherents of religions to cease practising their religions. The provisions about stirring up of hatred on grounds of religion in England and Wales are qualified in similar terms<sup>8</sup>. Likewise, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices and the discussion or criticism of the sex of the parties to a marriage are specifically excluded from the England and Wales provisions about stirring up hatred on grounds of sexual orientation<sup>9</sup>.

<sup>8</sup> See section 29J of the Public Order Act 1986.

<sup>9</sup> Section 29JA of the Public Order Act 1986.

The requirements of articles 10 (freedom of expression) and 9 (freedom of thought, conscience and religion) ECHR are discussed at chapter 2 above. In terms of the Human Rights Act 1998, the courts are required to interpret legislation compatibly with Convention rights so far as it is possible to do so. It might therefore be argued that section 7 of the 2012 Act (and sections 29J and 29JA of the Public Order Act in England and Wales) merely reflect what the courts would be required to consider in any event. On the other hand, there may be benefit in spelling out these requirements expressly in order to avoid the mere existence of the provision having an unnecessarily ‘chilling’ effect on speech and debate. There is no equivalent provision applicable to the stirring up behaviour elements of the offence in section 1 of the 2012 Act.

The Policy Memorandum accompanying James Kelly’s Bill to repeal the 2012 Act criticises section 6 as sharing “some of the illiberal character of the section 1 offence, including lack of clarity and freedom of speech issues.”<sup>10</sup> It recognises the existence of section 7, but expresses concern that the boundary between stirring up hatred on religious grounds and expressing ‘antipathy, dislike, ridicule, insult or abuse’ towards religions or the practices of adherents of a religion seems very unclear and uncertain, making it difficult to distinguish between the two and identify what constitutes an offence.

**Question:**

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? Please give your reasons for your answer.

**Part 2: Online hate crime**

This part of the chapter explores issues specific to hate crime and hate speech which is committed online. There have been a number of cases reported in the press involving racist tweets etc. Hate crimes which occur online are subject to the same laws that would apply if the crime occurred in person. In our initial information gathering phase, we have heard views that online activity is not taken as seriously as that which occurs ‘in real life’. We have also heard that the speed and potential anonymity of activity online means that it can have an impact which is greater than similar offline activity. We have been told that young people are particularly affected. Some people have suggested to us that the existing legislative framework is not apt to cover technological developments.

<sup>10</sup> Para 26 of the Policy Memorandum.

Online hate crime can take many forms. The Coalition for Racial Equality and Rights have published a guide to responding to online hate speech and hate crime<sup>11</sup> which states that online hate crime in particular can include:

- online abuse, including verbal, emotional or psychological abuse;
- offensive literature and websites;
- abusive private messages and hate mail; and
- threatening behaviour and online bullying.

Such conduct can therefore be targeted at specific individuals, or be published to the world at large.

COPFS has published guidance on cases involving communications sent via social media<sup>12</sup>. The guidance covers offences that are most likely to be committed by the sending of communications via social media. It sets out factors which prosecutors must take into account when dealing with such offences, in particular in relation to obtaining evidence and deciding whether it is in the public interest to prosecute. It sets out four categories of online communications which may give rise to criminal activity:

1. Communications which specifically target an individual or group of individuals in particular communications which are considered to be hate crime, domestic abuse or stalking.
2. Communications which may constitute threats of violence to the person, incite public disorder or constitute threats to damage property.
3. Communications which may amount to a breach of a court order or contravene legislation making it a criminal offence to release or publish information relating to court proceedings.
4. Communications which do not fall into categories 1, 2 or 3 but are nonetheless considered to be grossly offensive, indecent or obscene or involve the communication of false information about an individual or group of individuals which results in adverse consequences for that individual or group of individuals.

In the hate crime context, conduct which targets a specific individual is likely to fall within category 1 or 2; conduct which incites public disorder would fall within category 2; other behaviour which communicates grossly offensive information about a particular group may fall within category 4. Considering the distinction drawn between hate speech and other hate crime in the Academic Report, it can be seen that categories 1 and 2 are more likely to be considered hate crime (i.e. the underlying baseline conduct is criminal, and the motivation marks the conduct out as hate crime), whereas category 4 is more

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11 Hate Online: a guide to responding to online hate speech and hate crime. Coalition for Racial Equality and Rights – February 2016.

12 COPFS [guidance on cases involving communications sent by social media](#)

likely to be hate speech. Part 1 of this chapter discusses the potential overlap between circumstances in which conduct is aimed at society at large and stirs up hatred against groups, and circumstances in which the same conduct also amounts to a hate crime against individuals. Category 4 of the Crown Office guidance may be intended to cover communications which have the former, but not also the latter, effect.

For category 1 and 2 cases, the guidance states there is a strong presumption that it is in the public interest to instigate court proceedings where there is sufficient evidence to do so, particularly in cases motivated by prejudice or hate, and all such cases should be prosecuted robustly. By contrast, category 4 cases do not involve a credible threat of violence or activity targeted at individuals. This might include offensive jokes about a particular group online. In such cases, the guidance states that a high threshold test applies before such conduct amounts to a criminal offence. It is not entirely clear from the guidance whether it is attempting to set out where the threshold exists before conduct becomes criminal (as a matter of law) or whether it is a reflection of a COPFS policy that prosecutors will only take action in relation to the worst cases, even though others might cross criminal threshold. Prosecutors are required to consider the context of the communication and whether the communication itself goes beyond being merely offensive, rude etc. As with all cases reported to COPFS, even where there is sufficient evidence, prosecutors must consider whether it is in the public interest to prosecute. In making that decision, they may also take into account any expression of genuine remorse, whether the person responsible for the communication had taken action to remove it and the effect on any identifiable victim.

There are a number of offences listed in the guidance which may be relevant, depending on the content and effect of the communications: common law offences of uttering threats or breach of the peace; threatening or abusive behaviour contrary to section 38; section 127 Communications Act 2003; Part 3 Public Order Act 1986 – incitement to racial hatred; section 6 of the 2012 Act, which covers threatening communications with an intent to incite religious hatred<sup>13</sup>.

Prosecutors and sheriffs have told us that legal framework is broadly sufficient. There can be difficulties in prosecuting due to problems in proving who actually made a particular post, but once that stage is passed the terms of the various offences do not cause a problem in practice.

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<sup>13</sup> It may be noted here that the Malicious Communications Act 1988 may be used in England, Wales and Northern Ireland in relation to online communications. That Act was originally designed to deal with poison pen letters, and has since been amended to cover electronic communications. However, it does not extend to Scotland. When the Bill which became the Malicious Communications Act was before Parliament, the Government explained that it was not necessary for it to extend to Scotland because Scots common law offences already covered relevant conduct.

A contrary view has been expressed by some women’s organisations and academics. In our initial information gathering, it has been suggested that online harassment and incitement to hatred online is a material problem which is not properly dealt with by the criminal justice system at present. Online forums allow people to coalesce around a particular idea or topic, particularly with the use of hashtags. This can result in a phenomenon described as ‘crowdsourced harassment’ or ‘dogpiling’, where a large number of people join in an outpouring of criticism or condemnation in a way which can be extremely intimidating for those subject to it. One recent example has been the ‘gamergate’ activity online in the USA, where various female journalists and video game developers were subject to a material degree of harassment. Some individual acts of harassment were very minor and others were much more significant (e.g. death threats, arranging for SWAT teams to attend the subject’s house etc) but all were co-ordinated through the use of the ‘gamergate’ hashtag<sup>14</sup>. Gender equality campaigners Engender suggested that similar campaigns of ‘crowdsourced harassment’ are becoming more common in the UK – referring to Caroline Criado-Perez and Stella Creasy MP who were subject to online harassment after having campaigned to get more women depicted on banknotes<sup>15</sup>. The argument is that this kind of online harassment is much more common in relation to prominent women online than it is in relation to men, and that therefore indicates that the harassment is in part motivated by malice and ill-will based on the subject’s gender.

The scale of the use of social media means that it may not be practicable to prosecute all serious cases. Every minute on the internet, there are approximately 500 new websites, 300,000 tweets, 40,000 Facebook updates and 600 hours of YouTube video posted.<sup>16</sup> This has prompted some policy makers to consider how internet service providers and social media platforms can be encouraged or required to take more action to address hate crime and illegal content online. Many complainers are primarily interested in ensuring that communications which they find offensive are removed from the internet (and not replaced) rather than whether the posters are prosecuted.

The House of Commons Home Affairs Committee published a report in April 2017 which explored the extent to which it is possible to combat hate online<sup>17</sup>. It considered both the responsibilities of individual posters and action which might be taken by social media providers. It recognised the importance of freedom of expression and open public debate, but noted that protecting democracy also means ensuring that some voices are not drowned out by harassment and persecution, by the promotion of violence against

14 See <http://www.bbc.co.uk/news/technology-29616197>.

15 In 2014, three people were convicted in England of offences under section 127 Communications Act in relation to this harassment.

16 Chis Wolf, *Viral Hate: Containing its spread on the internet*

17 Hate crime: abuse, hate and extremism online. 14<sup>th</sup> report of session 2016-17: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/609/609.pdf>

particular groups or by terrorism and extremism. Some argue that the deference given to rights of freedom of expression therefore goes too far.

A recent report assessing the legal regulation of online hate speech in Nordic countries<sup>18</sup> reaches similar conclusions: *“Many studies also show that the hostile online environment keeps many individuals from participating in the public discourse... This could ultimately lead to the silencing of some voices and hence to an effect where freedom of speech is a reality for some but not others... There is an uncertainty in the Nordic countries regarding how the provisions criminalising hate crimes should be applied and where to draw the boundaries in relation to freedom of expression, and consequently the provisions are rarely used. This means that the practical protection is limited for all groups, and currently non-existent for victims of violations based on gender, age, social status and political affiliation.”*

In relation to more systemic action that may be taken once hate has been expressed, the Home Affairs Committee contrasted the resources which social media providers put into dealing with copyright infringement (where they have potential financial liability) with that which they put into monitoring their sites for hate speech. The committee recommended that social media providers should be required to take more proactive action to identify and remove illegal content. There is also an EU Code of Conduct on Countering Illegal Hate Speech Online, entered into between the EU and various key social media providers, in which the social media providers undertake to monitor and remove offensive conduct. The Code of Conduct is linked to the e-commerce directive. There have been two private member’s bills in recent sessions of the Westminster Parliament which have aimed (in different ways) to get social media companies to take action in relation to offensive content online<sup>19</sup>.

It should be noted that the regulation of certain matters relating to telecommunications and broadcasting is reserved to Westminster in terms of the Scotland Act 1998. If it were concluded that online hate should be tackled through imposing additional obligations on social media providers, that may well require action by the Westminster Parliament rather than the Scottish Parliament.

### **Question:**

Does the current law deal effectively with online hate? Please give reasons for your answer.

Are there specific forms of online activity which should be criminal but are not covered by the existing law? Please give reasons for your answer.

Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two? Please give reasons for your answer.

18 Hat och hot på nätet – en kartläggning av den rättsliga regleringen i Norden från ett jämställdhetsperspektiv, NIKK, Mao Bladini, 21 June 2017.

19 Anna Turley MP’s Malicious Communications (Social Media) Bill in 2016-17 session of Parliament; Liz Saville Roberts MP’s Criminal Offences (Misuse of Digital Technologies and Services) (Consolidation) Bill in 2015-16 session (which would have extended to England, Wales and Northern Ireland only).