CHAPTER 8: Should the law be extended to other groups?

The review has been asked to consider, in particular, whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered). In the course of our initial information gathering, we have identified a number of characteristics that people have argued should be covered by new standalone offences or statutory aggravations. This information has come from responses to our questionnaire, a consideration of the characteristics covered in other jurisdictions in the Academic Report and campaigns by organisations or interest groups. We have also taken into account the conclusions of the Independent Advisory Group on hate crime, prejudice and community cohesion, and the 2004 Working Group.

Before going on to consider the individual characteristics, it is worth reviewing the general arguments for and against the existence and extension of hate crime legislation as set out in chapter 1. It has been argued that there should be a ‘level playing field’ between different groups who are protected in existing equality law, and that hate crime laws jeopardise the principle of equality by providing additional protection to some groups but not others. On the other hand, it has been suggested that extending legislation to a wide range of new characteristics means creating so many different priorities that nothing is truly a priority. This could make provisions difficult to apply in practice and risks undermining the purpose of having hate crime provisions. Chapter 5.2 of the Academic Report sets out a number of principled approaches that have been advocated for selecting which groups should be protected through hate crime legislation: the existence of a group identity; immutability of the characteristic; groups with a history of discrimination/ oppression; vulnerability and difference; groups which are unjustly marginalised as a result of perceived differences.

Age (older people):
We have heard concerns about offences committed against the elderly because they are perceived to be vulnerable. Commonly cited examples are fraud, breach of trust and neglect in care homes. There is some anecdotal evidence of older people being subject to verbal and other abuse for moving slowly in the street, or for being perceived as having particular political affiliations.

Action on Elder Abuse is a UK-wide charity which has campaigned for a new aggravated offence of elder abuse since June 2016. It considers elder abuse to include being targeted by scammers, neglect, abuse of Powers of Attorney, physical abuse and psychological intimidation.
In February 2017, it conducted a poll of 3,183 people across the UK to assess attitudes to making elder abuse a hate crime. Almost 95% of respondents considered that the abuse of older people should be an aggravated offence like hate crimes based on race, religion or disability. The survey also showed that 95% of respondents agreed (40%) or strongly agreed (55%) that older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.

Action on Elder Abuse argue that offences committed against older people are not treated as seriously as offences committed against other groups. Within care settings, they refer to anecdotal evidence that the social care system tries to ‘manage’ instances of abuse internally via adult protection referrals, without involving the police or criminal justice systems. They believe this is a key reason why so few cases of abuse reach the courts. They argue that having a specific aggravation provision relating to offences committed against the elderly would encourage criminal justice authorities and the courts to take the issue more seriously, and result in the imposition of more significant sentences.

The Amnesty International UK briefing paper ‘Tackling hate crime in the UK’ also includes a recommendation that existing categories of hate crime should be extended to include age, though the paper itself does not include substantive evidence or arguments in favour of such an extension.

The examples given of offending against the elderly may suggest that the offending is motivated by the perceived vulnerability of those offended against, rather than any particular hatred of or animosity towards them. This raises the question of whether such offending could be tackled through a statutory aggravation provision based on malice and ill-will towards the group, or whether a provision which focuses on the reason the victim has been ‘selected’ is more appropriate (see the discussion of models of hate crime in chapter 4 of the Academic Report). Alternatively, it might be argued that a free-standing offence of ‘elder abuse’ is more appropriate.

**Age (younger people):**

From the information we have received so far, we do not understand there to be a significant problem of offending against younger people which is motivated by malice or ill-will based on age. There are of course a number of existing offences where the age of the victim is fundamental to the offence (e.g. sexual offences involving young people), but these may not amount to ‘hate crime’ as currently understood.

The review received a large number of responses from young people to the questionnaire (77), which indicates the strength of feeling from young people about this topic. Responses outlined experiences largely around prejudice or harassment relating to race, religion, disability and sexual orientation. Those surveyed also reported that they
had witnessed hate crime against others. Online hate crime was also a feature as noted in chapter 6, part 2 of this paper.

We have heard concerns about the effectiveness of the legal system to protect young people from criminal behaviour motivated by malice and ill-will based on the existing protected characteristics, and the extent to which conduct against young people is taken seriously. We have heard that incidents may be recorded as anti-social behaviour or bullying rather than hate crime.

This is especially the case where the conduct is carried out by other children, where issues about the scope for criminal responsibility arise. The Scottish Parliament Equal Opportunity Committee published a report on bullying on 6 July 2017, which considers the relationship between bullying of children based on certain characteristics and hate crime. Recommendations 6 and 14 specifically deal with the need for clarity about when bullying behaviour constitutes a crime (in particular a hate crime or sexual offence). The Scottish Government National Anti-Bullying Approach is currently under revision in light of the Equal Opportunities Committee’s report.

**Question:**
Do you consider any change to existing criminal law is required to ensure that there is clarity about when bullying behaviour based on prejudice becomes a hate crime?
If so, what would you suggest?

**Gender:**
For some time, women’s organisations have debated whether a statutory aggravation based on gender would be beneficial. In 2008, the collective view given in evidence to the Scottish Parliament Equal Opportunities Committee in the course of stage 1 evidence on the Offences (Aggravation by Prejudice) Bill was that there should not be an aggravation. A statutory aggravation was not thought to be the correct way to address the complexities of violence against women. In particular, women’s organisations were concerned that an aggravation would create a two-tier system where some cases of violence against women were thought to be motivated by gender hatred but others were not. This would be incompatible with the view that all gender-based violence against women is due to the endemic misogyny in society. If some offences of violence against women were considered to be caused by misogyny and others not, it would be difficult to draw the distinction and obtain appropriate evidence. At the time of the 2008 Bill, Engender noted that some jurisdictions had adopted gender aggravations (in particular, Canada and 19 US states), but these had resulted in few gender-based crimes being reported.

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These concerns about the implications of a gender aggravation continue to apply, although there continues to be debate on the topic. Some argue that the lack of any specific provision relating to gender hate crime sends an inappropriate message when violence against women is the most common form of human rights violation in Scotland. Some jurisdictions have adopted gender aggravation/incitement legislation because of the important message it sends even if it has little impact in practice. Amnesty International UK briefing paper ‘Tackling hate crime in the UK’ includes a recommendation that existing categories of hate crime should be extended to include gender.

We know that some police forces in England have started to record offences which are motivated by hostility on grounds of gender as hate crime. This does not alter the criminal offences or sentencing powers which are available in respect of those offences, but it has been suggested that classifying offences in this way means that they are taken more seriously by the relevant police force.21

In our initial information gathering phase, we heard from Engender and Scottish Women’s Aid that the main issue which has changed since a gender aggravation was last considered in 2008 is that of online harassment and incitement to hatred online (see chapter 6, part 2).

**Refugees/immigration status/asylum seekers:**
The Scottish Refugee Council have expressed the view that refugees are often targeted because of their immigration status rather than because of their specific race. It is difficult to quantify this because Police Scotland do not record the immigration status of victims. However, the Scottish Refugee Council did some work in the past which showed a correlation between areas where racially aggravated offending occurred and areas where there was a high concentration of refugees and asylum seekers.

We have heard anecdotal evidence of cases in England where refugees or asylum seekers were targeted specifically as a consequence of their immigration status rather than as a result of the victim being of a particular nationality.

A question arises whether cases where an offence is motivated by malice or ill-will towards a person as a result of their immigration status are capable of being prosecuted as being racially aggravated in any event. We were told of one case where the accused had shouted at Italian workers in a fish and chip shop in an abusive fashion, calling them ‘immigrant bastards’. The sheriff accepted a plea of no case to answer on the basis that the abuse had not been targeted at a specific racial group, but been aimed at ‘immigrants’ at large. By contrast, there is English House of Lords authority in *R v Rogers [2007] 2 AC 62* that it was wrong to argue that a racial group should be defined by what it is rather than

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what it is not. In *Rogers*, the defendant was found to have acted in a racially aggravated fashion by calling three Spanish women ‘bloody foreigners’ and telling them to ‘go back to your own country’.

**Socioeconomic status:**
Amnesty International UK briefing paper ‘Tackling hate crime in the UK’ includes a recommendation that existing categories of hate crime should be extended to include socio-economic status. The paper itself does not include substantive evidence or arguments in favour of this extension, but it is thought this might be intended to cover the homeless, recipients of state benefits, users of food banks etc.

**Travelling community:**
The term ‘Gypsy/Travellers’ is used by the Scottish Government and refers to distinct groups – such as Romany Gypsies, Scottish and Irish Travellers – who regard the travelling lifestyle as being part of their ethnic identity. There are also other types of Traveller, such as Occupational Travellers, Showpeople and New Age Travellers, distinct groups who do not necessarily regard themselves as Gypsy/Travellers.

The Scottish Government recognises Gypsy/Travellers as an ethnic group in its work and encourages others to do likewise. The Equality Act 2010 provides the legislative framework which protects people (such as Gypsy/Travellers) who are recognised as a distinct ethnic group from being discriminated against on the grounds of ethnicity. This follows an Employment Tribunal ruling in 2008 in the case of *MacLennan v Gypsy Traveller Education and Information Project*, which concluded that Scottish Gypsy/Travellers are a group which can be defined by reference to their ethnic origins and can therefore be afforded legal protection under race discrimination law.²²

The term ‘racial group’ in existing hate crime legislation means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins. It is expected that the criminal courts would interpret this definition in line with the approach taken by the civil courts, so as to treat those within the travelling community who travel as part of their ethnic identity as a racial group protected by the hate crime legislation. We would be interested to hear from any consultees with experience of this.

²² S/13271/07. Earlier English case law had recognised Romany Gypsies and Irish Travellers as racial groups. The initial Employment Tribunal in *MacLennan v Gypsy Traveller Education and Information Project* had accepted an argument that the Scottish Gypsy/Traveller community was not a distinct group. However, after hearing evidence from a selection of academics and travelling-community historians, the Tribunal concluded that Scottish gypsies were, in fact, a distinct ethnic community and must be treated as such under law.
The Scottish Government recognises that there are other travellers who would not regard themselves as Gypsy/Travellers. It is unlikely that these travellers would fall within the existing race provisions as a ‘racial group’.

Other groups:
We have heard from sheriffs that other groups who are often targeted for abuse include paedophiles (whether known or suspected) and drug users.

**Question:**
Do you think that specific legislation should be created to deal with offences involving malice or ill-will based on:
- age
- gender
- immigration status
- socioeconomic status
- membership of gypsy/traveller community
- other groups (please specify).

For each group in respect of which you consider specific legislation is necessary, please indicate why and what you think the legislation should cover.