

## Chapter 6: Stirring up hatred and online hate crime

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### Stirring up hatred

Offences related to stirring up hatred are sometimes referred to as ‘hate speech’, although they can also be committed through behaviour other than speech, such as the publication of documents. The behaviour is often directed at society at large, rather than a specific individual with a particular ‘protected’ characteristic.

The first hate crime offences in Scotland were brought in in 1965 and related to stirring up hatred on grounds of race. No further ‘stirring up’ offences were created until the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (‘the 2012 Act’). That Act created offences relating to threatening communications which stir up religious hatred (section 6) 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).

The Scottish Parliament is currently considering a Member’s Bill introduced by James Kelly MSP with the aim of repealing the 2012 Act. The main arguments supporting the proposed repeal are that the offences are unnecessary and illiberal and, so far as offences under section 1 are concerned, they unfairly target football fans.

The annual Scottish Government crime statistics show that there are very few prosecutions under the stirring up offences when compared with other hate crimes, such as racially aggravated harassment. There have only been 9 cases under the laws on stirring up racial hatred between 2006 and 2016. There have been a total of 32 cases of threatening communications under the 2012 Act since that legislation came into force. That covers both cases involving the stirring up of religious hatred, but also cases involving the threat of seriously violent acts. Official statistics do not distinguish between the two.

It may be argued that the low number of prosecutions indicates that there is not a significant problem in society of people stirring up hatred on racial, religious or other grounds. Against that, it could be argued that the low number of prosecutions is because the law has been successful in making certain types of discriminatory speech and conduct unacceptable in society, and that it therefore has an important role to play.

It may also be the case that the type of behaviour which stirs up hatred in society will also amount to an offence against a specific individual with a particular ‘protected’ characteristic. For example, a racially inflammatory speech might also result in a breach of the peace or threatening or abusive behaviour. Such a breach of the peace might be charged with a statutory aggravation if the perpetrator demonstrated, or was motivated by, malice and ill-will against a racial 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.

One concern about criminalising the stirring up of hatred on a wide range of grounds is that it could result in the stifling of public debate, and people not being able to express critical opinions – for example, of religious practices or certain sexual behaviour. Two separate working groups considered the extension of hate crime laws in 2002 and 2004, and both concluded that it would be best not to create new stirring up offences because of concern about the impact on freedom of expression.

When the Scottish Parliament passed the law on threatening communications which incite religious hatred in 2012, it tried to deal with these concerns in two ways. First, the religious provision is narrower than the earlier race provisions. The race provisions apply to behaviour which is “threatening, abusive and insulting”, whereas the religious provisions only apply to “threatening communications”. Communications which are just abusive or insulting are not covered. The religious offence can only be committed by a person who intends to stir up hatred on religious grounds. By contrast, the race offence also applies where the racial hatred is likely to be stirred up, even if the perpetrator did not specifically intend that to happen.

The Scottish Parliament also included a specific provision which says, for the avoidance of doubt, that the offence does not stop certain criticism or discussion of religious practices. However, the policy document which accompany James Kelly’s repeal Bill argues that there is no clear boundary between what is and is not permitted, making it difficult to identify what constitutes the offence.

When Parliament passed the 2012 Act, it included a provision which would allow the Scottish Ministers to extend the threatening communications offence to communications which stir up hatred against other groups if Parliament approved. This could be used to extend to groups defined by sexual orientation, disability or transgender identity, but the offence has not been extended to date.

**Question:**

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

## **Online hate crime**

This part of the chapter explores issues specific to hate crime and hate speech which takes place online. 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. Social media can be a positive means of communication and is a part of modern society. However, it can also be used to harass others and spread prejudice. There have been a number of cases reported in the press involving racist tweets etc.

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 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.

## **The current legal position**

Hate crimes which occur online are subject to the same laws which would apply if the crime occurred in person – for example, they may amount to the offence of threatening or abusive behaviour or breach of the peace. There is also a specific offence of “improper use of a public electronic communications network” which applies where a person uses such a network to send a message which is grossly offensive or indecent, obscene or menacing.

In our information gathering phase, we have heard views that online activity is not taken as seriously as physical crime. We have also heard that the speed and potential anonymity of activity online means that it can have a significant impact. We have been told that young people are particularly affected. Some people have suggested to us that the existing law is not appropriate to keep up with technological developments.

The Crown Office and Procurator Fiscal Service has published guidance setting out how it deals with offences involving communications sent by social media. The guidance distinguishes between different categories of communications. If the communication in question specifically targets an individual or group, and is considered to be hate crime, domestic abuse or stalking, then it is very likely that court proceedings will be brought. The same applies if the communications involve threats of violence or incite public disorder. By contrast, communications which are grossly offensive, indecent, obscene or false but do not involve a credible threat of violence or activity targeted at individuals are treated

differently. This category might include offensive jokes about a particular group online. In such cases, prosecutors must consider the context of the communication, and whether it goes beyond merely being 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.

Prosecutors and sheriffs have told us that the current 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 current law does not cause a problem in practice.

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 gather 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 significant harassment. Some individual acts of harassment were very minor and others were much more serious (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. 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. 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.

**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.