



## Consultation on amending Scottish hate crime legislation

### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
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Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
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The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

## Questionnaire

Respondents should take into consideration the information provided in this document alongside any other knowledge or personal experiences that could be relevant. All opinions are welcome.

We ask that you try to answer all the questions in each section, however, if you are unable to answer any question then please feel free to move on to the next.

There is a comments box below each question to allow you to set out your reasoning and provide general comments

### Part One: Consolidating Hate Crime Legislation

**Q1. Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?  
(Please tell us why in the comments box.)**

- Yes  
 No  
 No Opinion

CRER strongly objects to the disingenuous nature of this question. CRER does not agree that the statutory aggravation model is the “core method” of prosecuting all hate crimes in Scotland. Such a suggestion is fundamentally misleading, ignores the legal framework by which hate crimes are prosecuted in Scotland, and raises the possibility that responses to the consultation could be skewed.

In addition to the statutory aggravation method, crimes motivated by racial prejudice are also prosecuted using the standalone offences of racially aggravated harassment and stirring up of racial hatred.

In fact, as described in more detail in our answer to Question 30, just the standalone offence of Section 50A (racially aggravated harassment):

- **constituted 26% of all hate crime charges (and 42% of all racist hate crime charges)** in 2017/18<sup>1</sup>; and
- **resulted in 31% of total convictions for all hate crimes (and 47% of total convictions for all racist hate crimes)** in 2016/17<sup>2</sup>

CRER strongly believes that all currently available methods of prosecuting racist hate crimes in Scotland, including but not limited to the statutory aggravation model, should be maintained in order to avoid sending the message to both victims and to potential

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<sup>1</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

<sup>2</sup> Scottish Government (2018). [Criminal Proceedings in Scotland 2016-17](#); Scottish Government (2018). [Number of people convicted of standalone hate crime offences under Racially aggravated harassment: FOI release](#). More recent data is currently being requested via an FOI request by CRER.

perpetrators of racialised crime that racist hate crime is tolerated in Scotland. Maintaining every available legal avenue for justice for victims of racialised crime is even more critical when, according to the latest data from the Scottish Crown Office & Procurator Fiscal Service (COPFS), racialised crime is actually increasing in certain parts of Scotland.<sup>3</sup> For example, as described in more detail in our answer to Question 30, **there has been an increase in all racist hate crime charges in a third** (14 of the 41) **of the COPFS offices in Scotland** between both the 2010/11 and 2017/18 financial years and the 2016/17 and 2017/18 financial years. It is alarming that several of these offices are in rural parts of Scotland with smaller BME populations, where the impact of racist hate crime will have an even greater impact on communities.

**Q2. Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from ‘evincing malice and ill will’ to ‘demonstrating hostility’?**  
(Please tell us why in the comments box.)

- Yes
- No
- Unsure

Lord Bracadale’s final report recommends changing the language of the thresholds for the statutory aggravations (but not the legal meaning of the words themselves) in order to eliminate confusion for victims or potential offenders about what is required for behaviour to constitute a criminal offence. If the Scottish Government’s goal is to maintain the same legal thresholds needed for statutory aggravations to apply, as Lord Bracadale recommends, then the same language for the legal thresholds should continue to be used in order to effectively maintain cohesion and consistency from the courts.

CRER believes that the better way to address any confusion within communities about when a crime or incident can be reported to the police is through either a re-examination of the term “hate crime” itself, and/or a series of campaigns about what sort of behaviour rises to the level of a reportable offence. As we indicated in our response to Lord Bracadale’s consultation, the terminology which is most relevant and useful to the courts and legal system should be maintained within the legislation.

**Q3. Do you think changing the language of the thresholds for the statutory aggravations from ‘evincing malice and ill will’ to ‘demonstrating hostility’ would change how the thresholds are applied?**  
(Please tell us why in the comments box.)

- Yes
- No
- Unsure

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<sup>3</sup> Crown Office & Procurator Fiscal Service (2018). [Hate Crime in Scotland 2010-11 to 2017-18 \(breakdown by Procurator Fiscal Office\)](#).

CRER is concerned that a change in language of the thresholds for the statutory aggravations might result in unintended consequences, specifically a change or reduction in how the thresholds are currently applied in legal practice. CRER recommends a specific review into the legal implications of “demonstrating hostility” (including analysis of prior caselaw to determine if past cases could have been brought forward with the proposed language) before committing to any change in legislation in order to avoid diluting or reducing any of the current legal protections against crime based on racial prejudice.

**Q4. Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation? (Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q5. Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated? (Please tell us why in the comments box.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q6. If you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?**

Please see our response at Question 35.

## Part Two: New Statutory Aggravations

**Q7. Do you agree with Option A to develop a statutory aggravation for gender hostility?**

**(Please provide details in the comments box below.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q8. Do you agree with Option B to develop a standalone offence for misogynistic harassment?**

**(If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q9. Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)?**

**(If you agree please tell us why.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q10. Do you agree with Option D of taking forward all of the identified options? (This would include development of a statutory aggravation based on gender hostility (Option A); development of a standalone offence relating to misogynistic harassment (Option B); and work to build on Equally Safe (Option C)?**

**(If you agree, please tell us why.)**

**(Please provide examples of the types of behaviour that could be captured by the standalone offence.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q11. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?**

**(Please provide details in the comments box below.)**

- Yes
- No
- Unsure

Offences Against Older People: CRER believes the key distinguishing factor in what is understood as a “hate crime” is the identity (or, in some cases, the assumed identity) of the victim or person associated with the victim, rather than perceived vulnerability (and assumptions relating to that vulnerability). As Lord Bracadale himself recognises in his recommendations, offences against older people are often motivated by perceived vulnerability rather than malice and ill-will. As such, (unless evidence exists of violence against older people regardless of perceived vulnerability) it may be better to create a vulnerability related aggravation, separate from the offences motivated by malice and ill-will, as opposed to creating a new statutory aggregation within hate crime legislation based on age hostility.

Offences Against Young People: Where an offence is committed against a young person, in the majority of cases, we understand that the malice and ill-will which motivated the crime would likely be based on another characteristic of the young person (e.g. race, sexual orientation, disability), rather than the young person’s age. Indeed, Lord Bracadale’s report notes that he would expect that “most hostility-based offences based on age would be committed against elderly persons.” As such, more prescriptive guidance on ‘prejudice based bullying’ in schools (and its potential criminality) would be sufficient to address concerns regarding young people.

However, if any new statutory aggravations are enacted, CRER strongly believes that no catch-all “hate crime” aggravation should be created, but rather, separate aggravations for individual protected characteristics should be maintained. Maintaining individual criminal offences for different protected groups is vital for stakeholder engagement, and for establishing records and statistics relating to specific protected characteristics in order to obtain a clear picture of criminal actions and the impact on individual community groups.

**Q12. Do you think there is a need for sectarianism to be specifically addressed and defined in hate crime legislation?**

**(Please give your reasons for your response.)**

- Yes
- No (you may wish to go to question 15)
- Unsure

Please see our response at Question 35.

**Q13. If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation?**

**(Please give your reasons for your response.)**

- Yes
- No (you may wish to go to question 16)
- Unsure

Please see our response at Question 35.

**Q14. If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation?**  
**(Please give your reason for this.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q15. If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and/or perceived British or Irish citizenship, nationality or national origins of the victim?**

**(Please give your reason for this.)**

- Yes
- No
- Unsure

Please see our response at Question 35.

**Q16. If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism?**

**(Please give your reason for this.)**

Please see our response at Question 35.

**Q17. The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?**

Please see our response at Question 35.



**Q18. Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?  
(Please provide details in the comments box.)**

- Yes
- No
- Unsure

CRER understands that equality law (and the specific protected characteristics) pertains to immutable, intrinsic characteristics that an individual or group has that constitute part of an individual or collective identity. We believe that levels of condemnation levied against prejudice-based crimes will diminish if aggravations are brought forward that do not pertain to the listed, inherent protected characteristics. In addition, CRER shares some of the concerns that have been highlighted by various stakeholders regarding the government’s adoption of the International Holocaust Remembrance Alliance’s working definition of anti-Semitism and related examples.

If any new statutory aggravations are enacted, CRER strongly believes that no catch-all “hate crime” aggravation should be created, but rather, separate aggravations for individual protected characteristics should be maintained. Maintaining distinct criminal offences for different protected groups is vital for stakeholder engagement, and for establishing records and statistics relating to specific protected characteristics in order to obtain a clear picture of criminal actions and the impact on community groups.

**Q19. Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)?  
(Please provide details in the comments box.)**

- Yes
- No
- No Opinion

CRER is unaware of any other groups or characteristics to which new statutory aggravations should apply. We believe that levels of condemnation levied against prejudice-based crimes will diminish if aggravations are brought forward that do not pertain to the listed, inherent protected characteristics that are laid out in the Equality Act 2010. Please see our response to Question 18 for additional concerns.

However, if any new statutory aggravations are enacted, CRER strongly believes that no catch-all “hate crime” aggravation should be created, but rather, separate aggravations for individual protected characteristics should be maintained. Maintaining separate criminal offences for different protected groups is vital for stakeholder engagement, and for establishing records and statistics relating to specific protected characteristics in order to obtain a clear picture of criminal actions and the impact on community groups.

**Q20. Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

In regards to hate crime legislation, CRER believes statutory aggravations should only apply to offences motivated by malice and ill-will towards a protected characteristic, given the intrinsic and inherent nature of these characteristics and their correlation to wider equality law. As such, an aggravation should not strictly apply in these instances, as it would pertain to the beliefs of an individual rather than the intrinsic characteristics of a wider community. Individual religious beliefs are distinct from membership of an established religious group or belief system, and the law should reflect this.

**Q21. Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristic?**

**(Examples of protected characteristics are religion, sexual orientation, age, gender, race, disability, transgender identity and intersex).**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Given the assertions from COPFS and Lord Bracadale that charges can proceed with more than one statutory aggravation, CRER is satisfied that the current legislation allows for consideration of offences based on malice and ill-will relating to more than one protected characteristic. While the current COPFS publication of hate crime statistics includes charges that have more than one hate crime aggravation in its overall figures within each category of hate crime, it may also be useful if a bespoke list was published which detailed these intersectional aggravations in particular. If hate crime aggravations are consolidated into a single piece of legislation, guidance could be issued to clarify the potential to bring charges forward with more than one statutory aggravation, and could detail how data recording and monitoring for this type of incident should be carried out.

**Q22. Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)?**

**(Please tell us why?)**

- Yes
- No
- Unsure

It is the motivation of the offender, not the identity of the victim, which is essential to the criminal element of hate crimes. CRER is satisfied with the current state of the law, which allows for a racial or religious statutory aggravation to apply where someone associated with a particular ethnicity or religion is targeted because of that association. CRER agrees that the Scottish Government should maintain the current definitions of “membership” and “presumed membership” (which includes association) for the racial and religious statutory aggravations in order to continue the protections for victims of a crime who are targeted because of their association (such as marriage, familial, professional, etc.) with a third party because of the third party’s ethnicity or religion.

CRER does not object to extending the existing protection of association for racial and religious aggravations to other statutory aggravations, provided that there is no reduction or removal of any of the currently-existing legal protections against crime based on racial prejudice.

### Part Three: New Stirring Up of Hatred Offences

**Q23. Do you agree with Lord Bracadale’s recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics? (Please provide details in the comments box.)**

- Yes
- No
- Unsure

CRER is not aware of evidence of stirring up of hatred against other groups, which is a stark contrast to the situation for race. White nationalist organisations and even some political parties (e.g. Britain First) proclaim hateful stances against minority ethnic groups and could be said to stir up hatred for these groups. Racial hatred seems to remain exceptionally permissible.

For example (as detailed further in our answer to Question 30), the most recent COPFS statistics on hate crime show that **racist hate crime charges accounted for 61% of all hate crime charges in 2017/18—three times** the proportion of the next largest group of hate crimes (sexual orientation accounted for 21% of hate crime charges).<sup>4</sup>

Additionally, recent regional statistics show that there has been an increase in racist hate crime charges in one-third of the local Procurator Fiscal offices in Scotland, both since 2010/11, and in the last financial year.<sup>5</sup> Moreover, national data<sup>6</sup> shows that overall racist hate crime charges are at approximately the same level as they were in 2003. More details regarding this data are included in our answer to Question 30.

This is a particular situation compared to other protected groups, and as such, we do not see the necessity for extending this offence to other groups.

Nevertheless, if a need for this was evidenced, we would not oppose the creation of separate offences pertaining to the stirring up of hatred for certain groups. However, as with the standalone charge of racial harassment and any new statutory aggravations, we would ask that extension not be coupled with consolidation, as this weakens the important, essential, and particular message this offence conveys.

**Q24. Do you agree with Lord Bracadale’s recommendation that any new stirring up hatred offences should require that the conduct is ‘threatening or abusive’? (If not, what do you think the threshold should be for the offence to be committed?)**

- Yes
- No
- Unsure

As stated above, CRER is not aware of the necessity for extending the standalone

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<sup>4</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

<sup>5</sup> Crown Office & Procurator Fiscal Service (2018). [Hate Crime in Scotland 2010-11 to 2017-18 \(breakdown by Procurator Fiscal Office\)](#).

<sup>6</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

stirring up of racial hatred offence to other groups, but would not oppose the creation of new, separate offences if a need was evidenced. That being said, CRER believes that any new stirring up of hatred offences should match the legal threshold requirements for the existing stirring up of racial hatred offence.

As explained in more detail in our answer to Question 25, the offence of stirring up of racial hatred currently criminalises conduct that is “threatening, abusive, or insulting.” CRER opposes the relaxation of the requirements to bring a stirring up of racial hatred claim (or any other stirring up of hatred claim) without a thorough review of existing law and all prior cases brought under the stirring up of racial hatred offence in Scotland. CRER is concerned that removing “insulting” from the stirring up of racial hatred offence (and any other new offences) may make it more difficult for victims to bring a claim.

**Q25. Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences?**

**(This would mean that the offence would apply where the behaviour is ‘threatening or abusive’, but not where it is only ‘insulting’.)**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

While CRER agrees that all stirring up of hatred claims should be formulated with the same legal threshold, CRER strongly opposes any revision of the current requirements for the stirring up of racial hatred offence that would make it more difficult for victims to bring a claim, and believes it is inappropriate to change existing (or any new) legislation without more evidence-based analysis of case law. In the current political climate, CRER believes that stirring up of racial hatred claims will increase over the next few years, and is concerned about any potential relaxation of current standards needed to bring such a claim.

The current law on stirring up of racial hatred prohibits conduct or material that is either “threatening, abusive, or insulting.” Without citing any evidence of Scottish crime rates, Scottish case law statistics, or analysis of Scottish cases brought under this statute, Lord Bracadale makes the assertion that deleting the reference to “insulting” would have no impact on the number of stirring up of racial hatred offences brought in Scotland. Lord Bracadale’s recommendation is entirely supported by his reliance on a recent amendment to remove “insulting” from the language of an English harassment offence. As Lord Bracadale notes in his final report, this amendment was only adopted after analysis from the Crown Prosecution Service indicated that all past cases could have been brought forward without “insulting” as a requirement.<sup>7</sup> CRER believes that no such revision should be considered to the stirring up of racial hatred offence (and any new stirring up of hatred offences) without similar analysis being conducted by the

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<sup>7</sup> Lord Bracadale (2018). [Independent Review of Hate Crime Legislation in Scotland: Final Report](#). Section 5.41.

Scottish COPFS on the past cases brought in Scotland under Sections 18 to 22 of the Public Order Act 1986.

**Q26. Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?**

**(If you answered yes to this question, do you have any comments on what should be covered by any such ‘protection of freedom of expression’ provision?)**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Yes, we would consider that this is needed, notably in the case of religion. While there can be no acceptable reason for expressing hostility or hatred towards an ethnic group, individuals do hold a variety of opinions about the beliefs and practices of different religious groups. These opinions, in a democratic society, should be open to debate and thus, a provision for freedom of expression is necessary. We further note that not all hate speech is hate crime. In this instance, it is the ‘stirring up of hatred’ which is key. This carries the requirement to prove that it was the intention of the potential offender to stir up hatred (or the intention to cause events likely to stir up hatred). While the intention to stir up hatred may be obvious in a situation in which a person condemns a group because of their religion and deliberately encourages violence against said group, a situation in which the potential offender has levied public criticism against a particular religious belief may fall short of this. It is important that this distinction is maintained in any forthcoming legislation.

**Q27. Do you agree with Lord Bracadale’s recommendation that no specific legislative change is necessary with respect to online conduct?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

As the consultation document states, hate crimes which occur online are subject to the same laws that would apply had the crime occurred in person. As such, we do not believe that the legislation is the issue; rather, the problem lies in the manner in which such crime is reported, investigated, and prosecuted. There are notable challenges associated with the anonymity of some forms of media (and proving the identity of the perpetrator in these instances) and the vast scale of the use of social media. To effectively tackle this problem, additional training for police may be needed, alongside a change in distribution of resources to adequately investigate cases. The role of social media platforms providers and online media sources must also be considered further.

As such, CRER is supportive of a three-pronged approach to the issue: 1) educating the public about what is illegal online behaviour, 2) increasing resources to effectively

prosecute individuals, and 3) increasing regulation of social media companies. One of these on their own will not be sufficient to tackle the issue. The public must understand better what is considered illegal activity, and what actions to take when this is encountered. It is unfair to place the burden of tackling online hate solely with police and prosecutors, but cases must still be brought forward not only to offer justice to victims, but to demonstrate the unacceptable nature of such activity. And, as the scope of the problem is too large to be dealt with solely by the Scottish criminal justice system, significant deliberation must be given to the role of social media providers going forward. The Scottish Government should call for specific work to be taken forward on the feasibility of regulating social media providers. However, we again stress that not all hate speech is hate crime. The use of bigoted or prejudiced language in itself, for example, should not automatically violate hate crime law. However, if the language was used in a way which would likely cause fear and alarm, such as threats of violence or promotion of public disorder, this would likely constitute a crime. This distinction must be made clear, and resources should be allocated to the most serious of offences.

## Part Four: Exploitation and Vulnerability

**Q28. Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Unless evidence shows a high rate of criminal activity motivated against older people regardless of perceived vulnerability, CRER favours introducing a vulnerability-related aggravation, separate from hate crime legislation, over the introduction of a new hate crime statutory aggravation based on age hostility (see our response at Question 11). However, CRER takes no position regarding the need for a general vulnerability-related aggravation outwith of hate crime legislation in the context of Scotland's current criminal statutes.

**Q29. If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you think such an aggravation should cover?**

Please see above at Question 28.



## Part Five: Other Issues

### Q30. Do you think that Section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment should be repealed?

(Please provide details in the comments box.)

- Yes
- No
- No Opinion

CRER strongly opposes the repeal of Section 50A. A standalone offence of racial harassment and conduct, independent of the statutory aggravation scheme, is crucial to combating racism in Scotland, and any repeal would greatly reduce the efficacy of any hate crime legislation meant to combat racist abuse.

As explained in more detail below, CRER opposes repealing this important piece of legislation for the following reasons:

- Removing Section 50A ignores the rampant spread and unique position of racism and racist hate crime in Scotland;
- Revoking Section 50A would greatly harm the relationship between Scotland's BME communities and institutions in power as it would send a clear message that racism does not matter to the Scottish Government;
- Section 50A is potentially the most effective tool against racist hate crime, as it currently makes up about half the charges of all racist hate crime, and well over half of the convictions for racially aggravated harassment/threatening or abusive behaviour; and
- Section 50A is potentially broader in scope than Section 38 with a racial aggravation, meaning that a repeal of Section 50A may result in a gap of legal protections for Scotland's BME communities.

#### **A. Removing a viable tool in the fight against racist hate crime completely ignores the pervasive scope of racist hate crime in 2019 Scotland.**

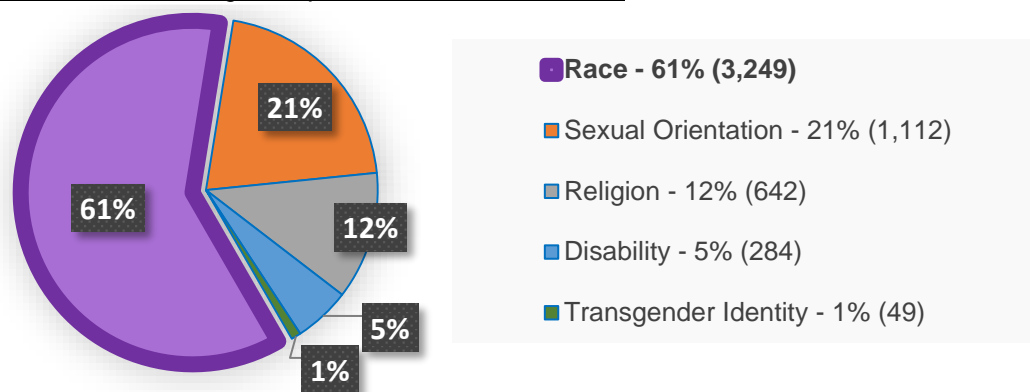
Lord Bracadale's recommendation to repeal Section 50A ignores that racist hate crime holds a uniquely pernicious place in the context of all hate crime in Scotland.

Racist hate crime remains the most commonly reported hate crime, as it has been since at least 2003/04. According to most recent COPFS data, in 2017/18, there were 3,249 racist hate crime charges, or 61% of all hate crime charges – **this is triple the proportion of any other group of hate crime:**<sup>8</sup>

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<sup>8</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

*All Hate Crime Charges Reported to COPFS, 2017/18*



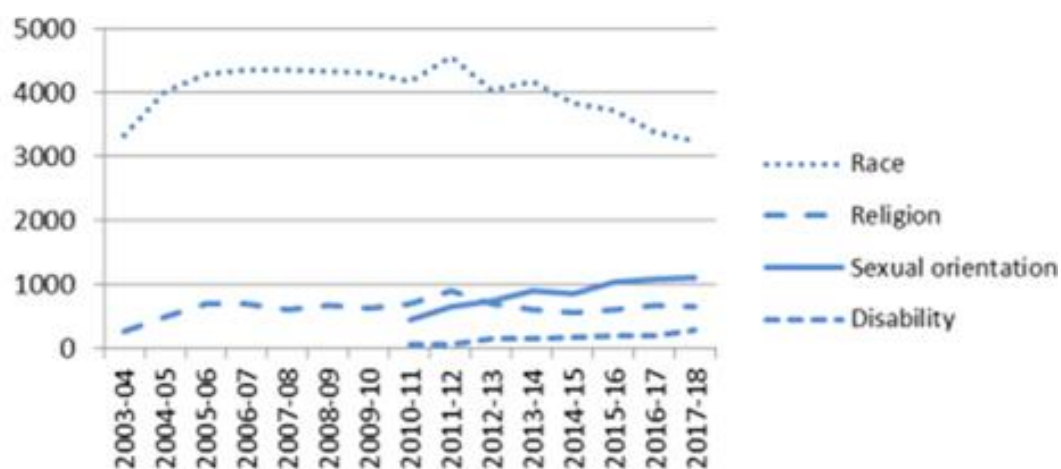
Source: COPFS (2018), *Hate Crime in Scotland 2017-18*

This stark figure alone should be enough to make anyone pause before recommending removing any of the existing tools currently available to combat racist hate crime. Yet, Lord Bracadale advocates repealing Section 50A in part because there has been a decrease in the number of charges and convictions under Section 50A since 2011/12. The decrease in charges and convictions under Section 50A does not mean that this offence should be repealed, particularly (as we argue in section C below) as Section 50A still makes up the majority of convictions for racially aggravated harassment/threatening or abusive behaviour, and almost half of all racist hate crime charges.

Moreover, even if Section 50A is not used as much as it was in 2011, it is critical to maintain all available tools for prosecuting racist hate crime, particularly given the context of racist hate crime in Scotland:

1. While racist hate crime charges have declined since 2011/12, national data shows that **all racist hate crime charges in Scotland are at approximately the same level as they were in 2003/04:**<sup>9</sup>

*All Hate Crime Charges Reported to COPFS, 2003/04 to 2017/18*






























Source: COPFS (2018), *Hate Crime in Scotland 2017-18*

<sup>9</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

2. Recent regional statistics show **an increase in racist hate crime charges in one-third of the local Procurator Fiscal offices in Scotland**, both since 2010/11, and in the last financial year.<sup>10</sup> It is alarming that several of these offices are in rural parts of Scotland with smaller BME populations, where the impact of racist hate crime will have an even greater impact on communities.

*Increase in Racist Hate Crime Charges by Procurator Fiscal Office, from 2010/11 and 2016/17 to 2017/18 Financial Year*

	2010/11 to 2017/18	2016/17 to 2017/18	BME % of Population*
 indicates an increase in racist hate crime charges *Population of the Local Authority in which the PF office is located (2011)			
Aberdeen			8.1%
Airdrie			2.1%
Alloa			1.5%
Ayr			1.3%
Banff			1.5%
Campbeltown			1.2%
Dumbarton			1.6%
Dumfries			1.2%
Dundee			6.0%
Dunfermline			2.4%
Dunoon			1.2%
Edinburgh			8.3%
Elgin			1.1%
Falkirk			1.9%
Forfar			1.3%
Fort William			1.4%
Glasgow			11.6%
Greenock			1.4%
Hamilton			2.3%
Inverness			1.4%
Jedburgh			1.3%
Kilmarnock			1.1%
Kirkcaldy			2.4%
Kirkcudbright			1.2%
Kirkwall			0.7%
Lanark			2.3%
Lerwick			1.5%
Livingston			2.4%
Lochmaddy			0.9%
Oban			1.2%
Paisley			2.7%
Perth			2.0%
Peterhead			1.5%
Portree			1.4%
Rothesay			1.2%
Selkirk			1.3%

<sup>10</sup> Crown Office & Procurator Fiscal Service (2018). [Hate Crime in Scotland 2010-11 to 2017-18 \(breakdown by Procurator Fiscal Office\).](#)

	2010/11 to 2017/18	2016/17 to 2017/18	BME % of Population*
↑ indicates an increase in racist hate crime charges *Population of the Local Authority in which the PF office is located (2011)			
Stirling		↑	3.2%
Stornoway			0.9%
Stranraer			1.2%
Tain			1.4%
Wick	↑		1.4%

Sources: COPFS (2018), *Hate Crime in Scotland 2010-11 to 2017-18* (breakdown by Procurator Fiscal Office); National Records of Scotland (2011), *Scottish Census 2011*

3. Reliance on COPFS charging data alone to observe trends in racist hate crime results in an undercounting of the true levels of racist hate crime in Scotland. **Unfortunately, both a problem with access to data on racist incidents reported to the police and the high level of underreporting of racist crimes and offences obscures an accurate count of racist hate crime in Scotland.** The most recently published data available on racist incidents reported to the police (as opposed to racist hate crime charges reported to COPFS) was published **over three years ago**. The Scottish Government’s page on Racist Incidents states that this publication is due to be published annually, yet no data has been published since November of 2015 (which contained information on the 2013/14 year).<sup>11</sup> Moreover, from engagement with stakeholders, we know that there is a high rate of underreporting of racist hate crime. This is likely due to a widespread lack of faith by BME communities in the underlying criminal justice system and reporting process, which is part of a larger systemic problem in Scotland.

**B. Revoking Section 50A would send a strong message to Scotland’s BME communities that racist hate crime does not matter to the Scottish Government as much as it once did.**

Racial harassment and conduct is a particular type of hate crime which is not simply an attack on an individual, but is something much deeper which undermines an individual’s family, community, and culture. Racist hate crime is also inextricably tied to the idea of white supremacy, which describes the historically-based, institutionally-perpetuated system of exploitation and oppression of continents, nations, and peoples by white groups and nations of the European continent for the purpose of maintaining and defending a system of wealth, power, and privilege.

As Lord Bracadale’s consultation document noted, Section 50A came about due to concerns that the problems of racial harassment and racially-motivated violence were not treated seriously enough by the criminal justice system. Over 20 years on, BME communities still share these concerns. During the 2nd reading of the Crime and Disorder Bill 1998 which created this offence, Baroness

<sup>11</sup> Scottish Government (2015). [Racist Incidents](#).

Amos stated, “I have seen the impact of repeated acts of victimisation and violence on individuals and families and I have seen the build-up of anger, fear, and resentment within ethnic minority communities... We need to instil in our communities confidence that crimes of racial violence and racial harassment will be dealt with seriously. That is why I welcome the Government’s commitment to tackling racial violence and harassment and their determination that the criminal law should be adequate to protect victims of crime which is motivated by intentions amounting to racial hatred.” The justification raised in 1997 still hold true today; this specific charge is needed to protect victims of crime and to convey the serious nature (and State condemnation) of racial harassment. Repealing the standalone offence would communicate that the problems behind the creation of the offence have now been solved – clearly, from the statistics detailed above, racist hate crime and racial harassment are still very much present for Scotland’s BME communities.

The symbolic impact of repealing the standalone offence would not simply result in community groups feeling unheard and abandoned by the Scottish Government, but such a repeal would risk exacerbating the deeply harmful schism between institutions of political power and BME communities. We know from community feedback that BME groups do not have a high engagement rate with generic campaigns (such as the Hate Crime Awareness Week) because these campaigns are not specifically targeted to the lived experiences of BME individuals. Repealing a clearly-defined statute that specifically calls out racially aggravated harassment and conduct in favour of aggravating racial harassment with another offence risks increasing levels of underreporting and decreasing the overall engagement levels of Scotland’s BME communities.

Further, should the Scottish Government create a new standalone offence against misogyny while also repealing the existing (and relied upon, as detailed below) standalone offence against racial harassment or conduct, it will be communicating to Scottish BME individuals and groups that misogyny matters more than racism (despite the statistics showing the wide-spread prevalence of racist hate crime). CRER does not opine on the need for a standalone offence against misogyny. However, if the Scottish Government does adopt any new standalone offences, CRER strongly believes that the existing offence against racial harassment should be maintained, and that any new standalone crimes should not be consolidated under a single “hate crime” standalone offence, but should be maintained as individual offences.

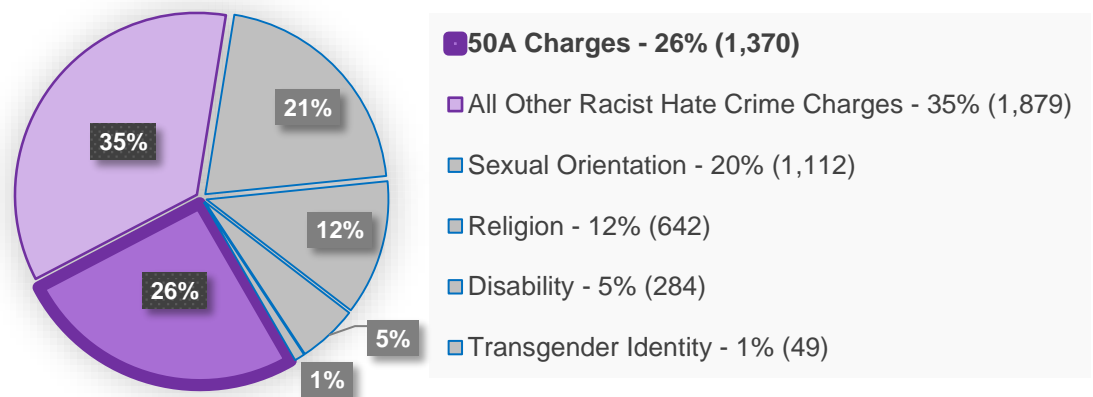
**C. Section 50A is currently being used more effectively to prosecute racial harassment than other criminal statutory schemes in Scotland.**

Not only would removing this standalone offence send the exactly the wrong message at a very volatile time, it would remove the provision most effective in combating racial harassment. As shown by the following charts, just the standalone offence of racially aggravated harassment (Section 50A) **constituted 42% of all racist hate crime charges in 2017/18<sup>12</sup> and resulted in 47% of total convictions for all racist hate crimes in 2016/17<sup>13</sup>** (analysis of the 2017/18 conviction data is pending, as CRER has requested this information from the Scottish Government).

1. **Significant proportions of hate crime charges are Section 50A charges.**

Prosecutors are continuing to heavily rely on Section 50A in bringing racist hate crime charges against offenders. According to the most recent COPFS data, **Section 50A comprised just over a quarter of all hate crime charges** in 2017/18:

*All Hate Crime Charges Reported to COPFS, 2017/18*



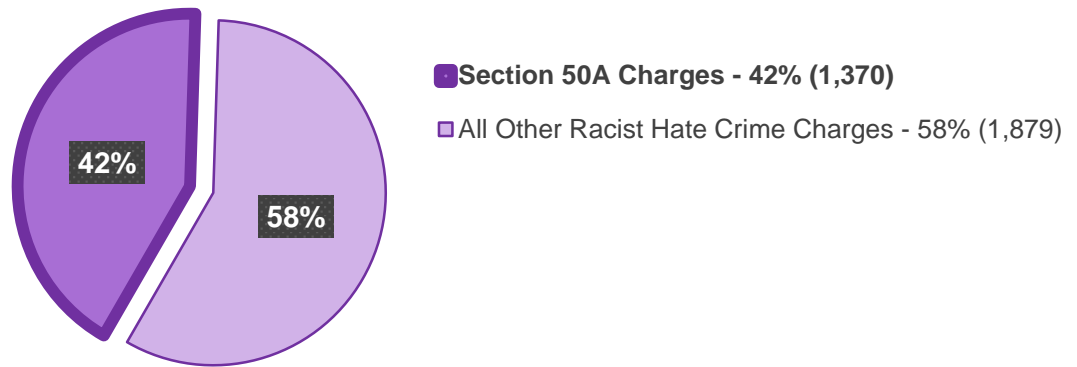
*Source: COPFS (2018), Hate Crime in Scotland 2017-18*

Moreover, in 2017/18, **Section 50A comprised almost half of all racist hate crime charges**, including Section 38 (offence of threatening or abusive behaviour) and any other crime which can be combined with a racial statutory aggravation:

<sup>12</sup> Crown Office and Procurator Fiscal Service (2018). [Hate Crime in Scotland 2017-18](#).

<sup>13</sup> Scottish Government (2018). [Criminal Proceedings in Scotland 2016-17](#); Scottish Government (2018). [Number of people convicted of standalone hate crime offences under Racially aggravated harassment: FOI release](#).

All Racist Hate Crime Charges, 2017/18



Source: COPFS (2018), *Hate Crime in Scotland 2017-18*

2. Despite being harder to prove, Section 50A results in more convictions for racial harassment than Section 38.

In addition to comprising almost half of all racist hate crime charges, evidence shows that Section 50A is an effective way to achieve convictions.

The most recent available data for specific convictions for Section 50A and Section 38 combined with a racial aggravation is from the 2016/17 year. CRER has requested conviction data broken down by these individual offences from the Scottish Government, and will update this analysis upon receipt of that data.

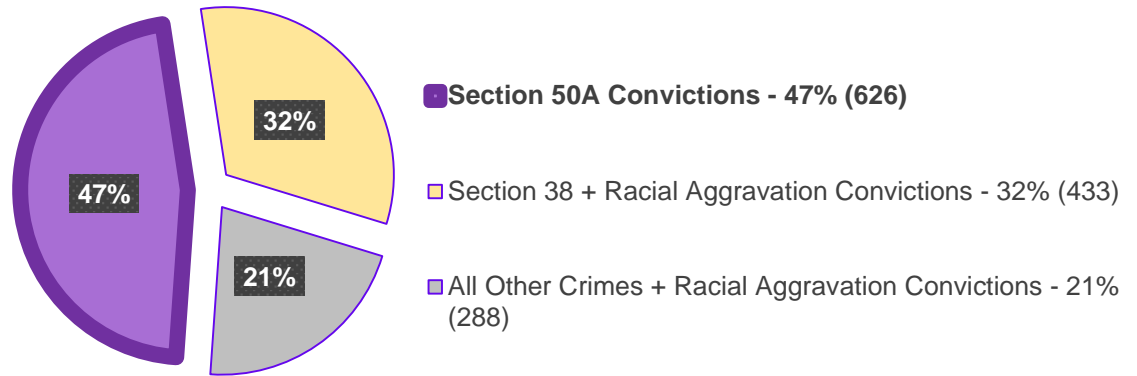
This data shows that the **proportion of convictions under Section 50A** (as a percentage of all racist hate crime convictions) **is greater than the proportion of charges under Section 50A** (as a percentage of all racist hate crime charges). Specifically, while Section 50A represented 44% of all racist hate crime charges in 2016/17<sup>14</sup>, it resulted in 47% of all racist hate crime convictions in 2016/17<sup>15</sup>:

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<sup>14</sup> Crown Office and Procurator Fiscal Service (2017). [Hate Crime in Scotland 2016-17](#).

<sup>15</sup> Scottish Government (2018). [Criminal Proceedings in Scotland 2016-17](#); Scottish Government (2018). [Number of people convicted of standalone hate crime offences under Racially aggravated harassment: FOI release](#).

All Racist Hate Convictions, 2016/17

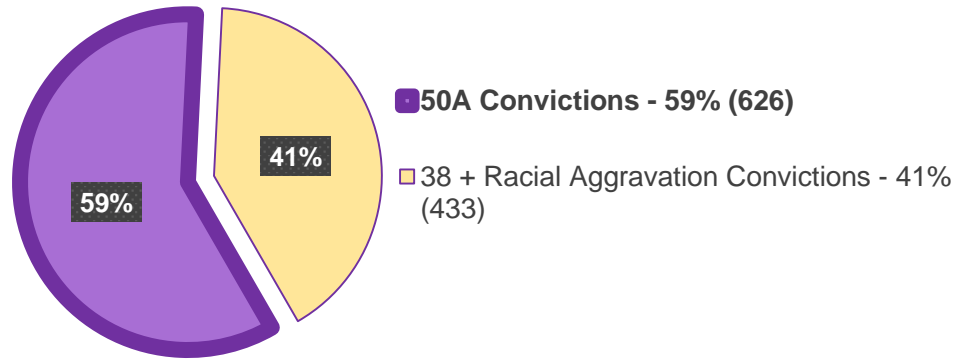


Sources: Scottish Government (2018), *Criminal Proceedings in Scotland 2016-17*; Scottish Government (2018), *Number of People Convicted of Standalone Hate Crime Offences Under Racially Aggravated Harassment: FOI Release*

This alone should be enough to justify the continued existence of this standalone statute, as this comparison makes it clear that the statute is effectively being used to prosecute racist hate crime.

However, a close comparison of the conviction numbers for just Section 50A and Section 38 (combined with a racial aggravation) show an even more unambiguous reason why Section 50A continues to be critical. Proponents of the repeal of Section 50A argue that the standalone racial harassment or conduct offence (Section 50A) and the offence of threatening or abusive behaviour (Section 38), combined with a racial aggravation, both purport to punish the same type of behaviour. While CRER does not agree that the two offences cover the same exact behaviour (as argued below in section D), even if this were true, in 2016/17, **Section 50A resulted in more convictions than Section 38 with a racial aggravation.** According to the Scottish Government Criminal Proceedings database, in 2016/17 there were 626 convictions under Section 50A, compared to 433 under Section 38 with a racial aggravation. Accordingly, assuming these two statutes are criminalising the same behaviour, **Section 50A resulted in 59.1% of convictions for that criminal behaviour.**





Sources: Scottish Government (2018), *Criminal Proceedings in Scotland 2016-17*; Scottish Government (2018), *Number of People Convicted of Standalone Hate Crime Offences Under Racially Aggravated Harassment: FOI Release*

The impact of these figures is even more profound when considering that Section 50A requires two sources of corroboration, while a racial statutory aggravation only requires one. Therefore, even if these statutes cover the same type of crime (which CRER does not concede, as we argue below), 50A results in more convictions for racially aggravated harassment/threatening or abusive behaviour despite being a harder case to prove in court.

**D. Repealing Section 50A risks decriminalising certain racist behaviours because Section 38 and Section 50A potentially prohibit different conduct.**

CRER does not agree that Section 50A and Section 38, combined with a racial statutory aggravation, are equivalent under the law. CRER believes that Section 50A may be broader in scope, and thus prohibit conduct that would not be covered under Section 38. The two statutes differ, specifically in intent required and prohibited behaviour. Section 50A prohibits harassment (50A(1)) and conduct (50A(2)), whereas Section 38 prohibits threatening or abusive behaviour. It is not clear that threatening or abusive behaviour entirely encompasses every instance of “harassment” or “conduct.”

Moreover, at least one Scottish court has recognised that there may be different levels of intent required for the two statutes. Section 50A may prohibit racist behaviour that causes “alarm or distress,” even if the offender has no intention to cause that “alarm or distress.” See *King v. PF Dunoon* (2011) HCJAC 109. Section 38, however, requires an offender to either specifically intend to cause “fear or alarm” or be reckless about causing “fear or alarm.”

Accordingly, repealing Section 50A runs the risk of reducing currently-existing legal protections against racially-motivated crime by legalising currently prohibited racist behaviour.

**Q31. What do you think the impact of repealing section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?**

See our response to Question 30 for more details. CRER believes that repealing Section 50A will result in fewer racist hate crime convictions overall, less reporting of racist hate crime altogether, and a greater sense of distrust by Scotland's BME communities in institutions meant to protect them against racist hate crimes.

**Q32. Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence?**

**(This would mean that Lord Bracadale's recommendation on sentencing would not be taken forward.)**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Yes, it continues to be necessary to have a rule that the sentencing judge differentiate between what the sentence is and it would have been without the aggravation. This is necessary in order to clearly communicate the impact of racism and prejudice-based crime in Scottish society, both to perpetrators and victims of racist hate crime. This information should also be collated and published annually. This allows stakeholders to monitor the situation and determine priorities for future work and evaluate if current strategies are effective.

**Q33. Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

While CRER welcomes the review of hate crime legislation and the potential change it will bring about, we stress that change in wider societal attitudes is key in properly tackling racist crime. Unless marked moves towards equality are brought about in areas such as employment, participation, and community cohesion, racist hate crime will continue, despite the best efforts of decision makers to develop fit-for-purpose legislation.

However, while more than just legislation is required, we do not agree that no legislative change is needed to support victims of hate crime offences. Victims must receive support throughout the entire process of reporting a crime all the way through prosecution. If someone reports a hate crime, but are then largely ignored by the system and left in the dark about their case, it will discourage them from reporting in the

future (and may discourage their community as well). There should be bespoke, independent support in place for victims which is in place from the time of reporting through to the prosecution of the offence. CRER believes that a combination of legislative and non-legislative campaigns can help create a supportive structure for victims.

Within such campaigns, specific attention to victims of racism and racist hate crime should be explicit in any provisions for victim support services, and in any legislative measures instituted to provide greater support for victims of hate crime. As CRER explains in answers above, racial harassment and conduct is a particular type of hate crime which is not simply an attack on an individual, but is something much deeper which undermines an individual's family, community, and culture. Accordingly, support for victims of racist hate crime must be tailored to address the particular harm of these sorts of crime. CRER knows from community engagement that the currently available support options for victims of racist hate crime is woefully lacking, and where it does exist at all, is woefully ineffective. One need only look to the website of Victim Support Scotland, cited by Lord Bracadale as a reason why legislative change is not needed for additional victim support, to realise there is a shocking lack of focus on victims of racial abuse. CRER could only find a few references<sup>16</sup> to racism, racial abuse, or racist hate crime on Victim Support Scotland's website<sup>17</sup> – however, these references were not targeted towards victims themselves, but to policy makers and community organisers. CRER recognises that Victim Support Scotland is not the only way for victims of hate crimes to receive support in Scotland, but strongly suggests a greater focus on tailored support services going forward.

**Q34. Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland?**

**(Please provide details in the comments box.)**

- Yes
- No
- Unsure

Further consideration of both diversion and restorative justice, specifically from a race equality perspective, is needed before either scheme is placed on statutory footing. Bespoke research into the efficacy of restorative justice within a racist hate crime context should be explored.

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<sup>16</sup> Victim Support Scotland (2017). [Hate Crime Conference Pack: 28 September 2017](#); Kane, K. (2017). [Fostering a Victim Centred Approach to Hate Crime in Scotland](#). Victim Support Scotland.

<sup>17</sup> [Victim Support Scotland](#). Accessed on 22/2/2019.

## 35. What else do you think the Scottish Government should include in its proposals to update Scottish hate crime legislation?

### A. Perspective of Response

Our response to this consultation is from a specific focus on race equality issues. Accordingly, there are a number of questions relating to gender, sectarianism, and vulnerability in the consultation that we have not directly addressed. CRER defers these questions to organisations specifically engaged in these areas, provided that any proposed legislation does not lead to the reduction or removal of any of the currently-existing legal protections against crime based on racial prejudice. If evidenced, CRER would support legislative changes to extend legal protections to other groups.

### B. Consolidation

The consultation document states that the Scottish Government “intends to consolidate all Scottish hate crime legislation into a single statute to provide clarity, transparency and consistency.”

CRER has several concerns regarding consolidation, most notably with the potential for racist hate crime to be subsumed within larger equality or anti-hate crime work.

Consolidation risks diluting the legal protections for Scotland’s BME communities, and weakens the important, essential, and particular message hate crime offences convey to any of the groups potentially protected by such legislation. Consolidation will contribute to the already diminution of focus in the identity-based inequality experienced by BME people (as well as other protected groups).

Homogenisation of hate crime legislation risks alienating the very community groups the Scottish Government is seeking to protect through this legislation. Given that we know that BME populations already lack faith in the police and existing reporting avenues (which underlies underreporting and other issues), the Scottish Government should not be sending the message that racist hate crime doesn’t matter as much as it once did. We know from stakeholder engagement that BME communities are less likely to respond to generic equality work such as “Hate Crime” events, rather than “Racist Hate Crime” pieces of work, because generic campaigns are not specifically targeted to the lived experiences of BME individuals. We expect, based on conversations with other equality groups, that this is likely the same for many other equalities groups.

Further, homogenisation of equality groups can in fact worsen outcomes for all equality groups. For example, along with several other equality groups in a joint submission to another consultation regarding the socio-economic duty, CRER noted with disappointment that a similar attempt at consolidation (the Equality Act 2010) has already resulted in a “glossing over or ignoring the specific

disadvantage and discrimination faced by specific groups of people” by public authorities.<sup>18</sup> As part of this response, CRER examined the 2017 PSED reports of all the Local Authorities in Scotland, and found that **only eight of the thirty-two Local Authorities included an equality outcome that specifically focused on race**, and the majority of those focused on recent migrants.

Finally, consolidation risks the loss of significant data necessary for policy and community work necessary to continue fighting against racism in Scotland. Because different groups experience hate crime differently, the dynamics and specific lived experiences of hate crime victims will be potentially be lost if all offences related to all types of hate crime are lumped together. Separate criminal offences for individual groups, and the publication of data related to those separate offences, will allow policy organisations to examine different rates of crime for different groups, different motivations for crime, and different relationships between assailants and victims<sup>19</sup>. Moreover, such a practice is in line with the UN Committee on the Elimination of Racial Discrimination’s recommendation to “systemically collect disaggregated data on hate crimes.”<sup>20</sup>

CRER urges the Scottish Government to consider the following when examining how to move forward with consolidated legislation:

- Avoiding the removal of any of the currently-existing legal protections against crime based on racial prejudice (such as repealing the current standalone offences for racially aggravated harassment and stirring up of racial hatred);
- Maintaining standalone offences and statutory aggravations as distinct statutes/criminal offences (including any new standalone offences or new statutory aggravations);
- Avoiding the creation of any catch-all “hate crime” statutory aggravations or “hate crime” standalone offences;
- Implementing a commitment within the legislation for a full review of the impact on individual equality groups of consolidated hate crime legislation within a particular timeframe;

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<sup>18</sup> Close the Gap, CRER, Engender, Equality Network, Inclusion Scotland, LGBT Youth Scotland, Scottish Women’s Aid, Scottish Women’s Convention, Stonewall Scotland, The ALLIANCE. [The Socio-Economic Duty: A Consultation; Equality Sector Response, September 2017](#).

<sup>19</sup> For example, recent research from the EHRC on hate crime in England and Wales noted that 75% of victims of anti-LGB hate crimes knew their assailant compared with only 31% of victims of race hate crime. Walters, et al. (2016). [Causes and Motivations of Hate Crime](#). Equality and Human Rights Commission; Research Report 102. Such particular insight into specific Scottish hate crime trends will not be possible without clear delineation between individual types of hate crime charges (both by group and type of crime).

<sup>20</sup> Committee on the Elimination of Racial Discrimination (2016). [Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of United Kingdom](#).

- Introducing a transitional period for prosecutors and the public to become familiar with the new legislation and any new terms and/or legal thresholds; and
- Committing to at least annual publication of disaggregated data relating to reported hate crimes, hate crime charges, hate crime convictions, and sentencing rates for all individual hate crime offences/crimes. Categories of published data should include at least the following (many of which were used in the formerly-published Scottish Government’s Racist Incidents dataset):
  - Location of incident (both by council area and by place of incident, such as shop or dwelling house)
  - Method of reporting of incident
  - Number of previous incidents reported by victim/complainer
  - Type of criminal charge
  - Type of aggravation applied
  - Conviction rates by individual charge type
  - Sentencing information by individual charge type
  - Relevant dates (date of reporting of incident, date of charge, date of conviction), including breakdowns of such information by day of the week, and by quarter of the year
  - All protected characteristics under the Equality Act 2010 (including for the perpetrator, victim, and complainer), with detailed categories as used in the Scottish Census for each characteristic

### **C. Definition of Hate Crime**

CRER is concerned that the term “hate crime” is not a helpful term when engaging with racially-motivated crime. From engagement with victims of racist hate crime, we find that there is hesitation to report and confusion about whether an incident was a “hate crime,” as the bar for hate is seen as quite high. A similar concern was expressed by the Independent Advisory Group on Hate Crime, Community Cohesion, and Prejudice. CRER also notes that a crime based on stereotypes or prejudices about a certain protected group is not necessarily motivated by hate, as the example of *R vs Aslett* given in “A Comparative Analysis of Hate Crime legislation” illustrates. Furthermore, we believe a strict definition of prejudice as a preconceived opinion not based on fact or experience is too limited in regard to hate crime definitions. Some perpetrators of so-called hate crimes have discriminatory attitudes towards certain groups which are not preconceived or pre-judged; rather, they are very deeply embedded.

CRER suggests that the Scottish Government consider implementing the following statutory guidance in any new hate crime legislation, along with campaigns and education around what is required to constitute criminal behaviour:

- “Hate” crime is a mechanism of power that involves criminal acts usually directed toward already stigmatised and marginalised groups.
- It is not a racially-motivated crime or racially-motivated speech where minority groups criticise events as racist behaviour or incidents.

- “Hatred” is not a required element to prove hostility, bias or prejudice.
- “Prejudice” includes both preconceived opinions not based on reason or actual experience and deeply-embedded discriminatory attitudes towards certain groups.

#### **D. Underreporting & Resourcing**

Underreporting of hate crime and racist incidents remains a problem in Scotland. We know from anecdotal resources that there is a particularly high level of underreporting of racist hate crime. CRER encourages the Scottish Government to consider the possibility of creating a duty within any new hate crime legislation to monitor and address levels of underreporting of racist hate crimes.

CRER also encourages the Scottish Government to carefully consider the potential for drafting into any new hate crime legislation specific provisions for resourcing, as has been done in prior legislation.