

Independent Review of Hate Crime Legislation in Scotland: Analysis of Consultation Responses

**Alison Platts and Dawn Griesbach
Alison Platts Research and Griesbach & Associates**

January 2018

Table of contents

Executive summary	1
1. Introduction and background	5
Policy context	5
About the analysis	7
The report	8
2. About the respondents and responses.....	9
Number of responses received	9
About the respondents	9
About the responses	10
The content of responses	10
Responses to individual questions	10
3. Definitions and justifications (Q1 – Q3)	11
The working definition of hate crime (Q1)	11
Preventing tensions and misunderstandings (Q2)	15
Should Scotland have specific hate crime legislation? (Q3)	17
4. Statutory aggravations (Q4 – Q12)	21
Bringing hate crime provisions and offences together (Q4)	21
Thresholds for establishing hate crime (Q5)	23
Wording relating to the thresholds (Q6)	26
Malice and ill-will towards a political entity (Q7)	27
Malice and ill-will towards religious beliefs held by individuals (Q8)	29
Referring to transgender identity and / or intersex in the law (Q9)	31
Malice and ill-will based on more than one characteristic (Q10)	33
Recording of statutory aggravations (Q11)	34
Explanation of sentences in hate crime cases (Q12)	36
5. Standalone offences (Q13 and Q14).....	38
A standalone charge of racially aggravated harassment (Q13)	38
Standalone charges for other groups (Q14)	40
Calls for parity of approach regarding standalone charges	43
6. Stirring up hatred and online crimes (Q15 –Q19).....	44
Offences relating to the stirring up of hatred against groups (Q15)	44
Need for specific provision protecting freedom of expression (Q16)	48
Effectiveness of the current law in relation to online hate (Q17)	50
Gaps in existing legislation regarding online activity (Q18)	54
Target for prosecution in relation to online hate crime (Q19)	56
7. Offensive behaviour at football (Q20 – Q27).....	59
Clarity of 2012 Act (Q20)	60

Sectarian singing, waving banners, making gestures (Q21)	63
Sectarian behaviour in a non-football context (Q22)	66
Extra-territorial provisions of the 2012 Act (Q23)	68
Extra-territorial provisions for non-football related hate crime (Q24)	70
Implications of <i>MacDonald (PF Dingwall) v Cairns 2013</i> (Q25)	72
Coverage of section 1 offences in other legislation (Q26)	76
Use of football banning orders by football clubs (Q27)	78
8. Extending the law to other groups (Q28 and Q29)	82
Distinguishing between bullying behaviour and hate crimes (Q28)	82
Requirement for specific legislation for other groups (Q29)	86
9. Other specific issues (Q30 – Q34)	92
Addressing under-reporting of hate crimes (Q30)	92
Reporting of the identity of the complainant in hate crimes (Q31)	94
Third party reporting schemes (Q32)	96
Diversion and restorative justice (Q33 and 34)	98
Annex 1: Organisational respondents	102
Annex 2: Response rates for individual consultation questions	104

Note to terminology

Throughout this report, the following conventions are used.

- Individual versions of the three consultation papers are referred to as:
 - The technical consultation paper
 - The non-technical consultation paper
 - The easy read consultation paper
- Unless stated otherwise, references to ‘the consultation paper’ should be taken to mean both the technical and non-technical consultation papers issued by the review team.
- Unless stated otherwise, references to the ‘consultation questionnaire’ should be taken to mean the full online response form containing all 34 consultation questions.
- Although the questions in the consultation questionnaire (and in the technical and non-technical consultation papers) were not numbered, they have been numbered for ease of reference in this report.
- Easy read questions use the follow numbering convention: Question ER1, Question ER2, etc.

Executive summary

1. In January 2017, the Scottish Government invited Lord Bracadale to conduct an independent review of hate crime legislation in Scotland. As part of this review, a public consultation was carried out, the main findings of which are summarised here. Full details of the responses and views expressed in relation to individual questions can be found in the full analysis report.

The review

2. Hate crime is crime motivated by hate of, or prejudice against, particular groups in society, or where the person shows prejudice or hostility towards a victim of crime because of their membership of a particular group.

3. The remit of the independent review of hate crime legislation was to ‘consider whether existing hate crime law represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice’. In particular it aimed to examine the current mix of statutory aggravations, common law offences and specific hate crime legislation; the scope of existing laws; the need for new categories of hate crime; the scope for simplifying, rationalising or harmonising current laws; and how a new legislative framework might best address any identified issues. The review gathered evidence and information from a wide range of sources, and also involved a public consultation which ran from 31 August to 23 November 2017.

About the consultation

4. The consultation paper set out the current law regarding hate crime, and highlighted relevant developments and issues for consideration. It included 34 questions covering: definitions and justification; statutory aggravations; standalone offences; stirring up hatred and online hate crimes; offensive behaviour at football; extending the law to other groups; and other more procedural issues (including under-reporting and the use of diversion and restorative justice).

5. The review team took steps to ensure the consultation was accessible to a wide audience and issued three versions of the consultation paper targeted at different audiences (technical, non-technical, and easy read). Additionally, the team attended a series of events across Scotland in order to promote the consultation.

Response to the consultation

6. The consultation received 457 responses from 76 organisations and 381 individuals. Organisational respondents included third sector bodies (42), local authorities, partnership bodies and other public sector organisations (16), legal, justice and law enforcement bodies (9), and a range of other organisations with an interest in this issue (9).

7. Not all of the questions were answered by all respondents. In addition, a large proportion of the responses, mainly from individuals, had a ‘campaign-like’ quality, in that they focused on specific issues and reflected very specific viewpoints. For example, a substantial number of individual respondents raised concerns at a range of consultation questions about the potential adverse impact of hate crime legislation on freedom of expression, and freedom of religious expression in particular. A second smaller group of respondents addressed the questions relating to conduct at football matches (Questions 20–27), highlighting what they saw as the unfair targeting of football fans within hate crime laws. A third, relatively small group of respondents focused on Question 7 which sought views about introducing an aggravation relating to malice and ill-will towards a political

entity. This group highlighted the importance of maintaining a distinction between anti-Semitism and criticism of the state of Israel, and the implications of endorsing the International Holocaust Memorial Association's definition of anti-Semitism.

8. As with all consultations, the views expressed by respondents are not necessarily representative of the views of the wider public. Thus, the main focus in analysing the responses was to understand the range of views expressed, rather than to identify how many people held particular views.

Main findings and key themes

9. Responses to many of the consultation questions showed a clear difference in the views of organisations and individuals. This was particularly the case for questions that raised issues – directly or indirectly – about freedom of speech, or which discussed extending hate crime laws (standalone charges or aggravations) to other groups.

10. On the whole, the individuals who responded to the consultation tended to be opposed to (or have reservations about) current hate crime legislation, and any broadening of its scope or its extension to other groups. This was because of their concerns about how this might affect freedom of speech and freedom of religious expression, or because they felt that the law should treat all groups the same, and there was, therefore, no need for special laws to protect specific groups. Further, they thought such laws had the effect of creating a hierarchical legal system which prioritised the protection of some groups over others. Those who held these views thought this would ultimately be divisive for society. This group of respondents wished to see the repeal of current hate crime laws and / or were opposed to extending the law to other groups.

11. In contrast, most organisations were supportive of the principle of having hate crime legislation and of adopting a victim-orientated approach. They thought it was important that society protected groups who are vulnerable to victimisation, and they saw hate crime law as a useful tool in achieving this. Organisations were largely supportive of the working definition of hate crime discussed in the consultation paper, and in favour of extending the law to other groups or to other types of behaviours, although there were differences in opinions about how this might be done (e.g. by extending the current statutory aggravations, or by introducing additional standalone offences).

12. Main themes and issues discussed by respondents are presented below.

Protecting freedom of expression

13. As discussed above, the issue of freedom of expression was a particular concern for some respondents, especially within the context of religious or political debate. However, there was strong support among **all** respondents for protecting the right to free speech, which was seen as fundamental to all democratic societies. Those who were generally supportive of the need for hate crime legislation made a clear distinction between 'stirring up hate' on the one hand, and the lawful exercise of the right to freedom of expression on the other. However, other respondents argued that the distinction can become blurred, particularly where individuals express views not widely held by the general public.

Definitions and thresholds

14. There were mixed views on how to define hate crime. Among those supportive of the concept of hate crime, some thought that the working definition set out in the consultation captured appropriate behaviours while also offering sufficient flexibility in its application; other thoughts that the definition needed to be broadened to explicitly include specific circumstances and groups. While some respondents thought the legal thresholds offered

clarity and objectivity, others thought they were too 'high' in that they were difficult to evidence or potentially excluded certain types of crimes which respondents thought should be regarded as hate crimes.

15. Those opposed to, or with reservations about, the concept of hate crime in general were critical of the working definition and legal thresholds as being too 'broad' or too 'low', or too subjective and open to interpretation.

16. Respondents often stressed the importance of clarity about the types of conduct – verbal, written, online – which constituted hate crime, including in relation to the distinction between freedom of speech and debate on the one hand, and hate speech and criminal behaviour on the other. There were different views about how bullying should be seen within a hate crime legal framework.

Language and terminology

17. Language, terminology and the need for clarity in definitions and legislation were issues which recurred across the consultation questions. Respondents frequently discussed the ways in which different offences were defined, and whether these definitions were appropriate, sufficiently objective, and / or clear. There were frequent calls for more user-friendly language, and a range of suggestions for legislation to be accompanied by appropriate guidance and / or examples in order to assist professionals working in this area and raise public awareness and understanding of hate crimes.

Extending hate crime legislation to other groups

18. Several of the consultation questions invited views on whether hate crime legislation in its various forms should be extended to other groups, and if so, which groups.

19. Among respondents (and particularly organisations), there was widespread support for creating specific legislation to deal with gender-related hate crime (or misogyny), which should cover both online and face-to-face offences. There were differences of opinion about whether this should be achieved through a new standalone offence, or an extension of the list of statutory aggravations.

20. There was also general agreement that certain groups in society (including older people, and people with disabilities) are often targeted by 'criminals' because they are seen to be vulnerable. There were, though, differences of opinion about whether this type of criminal behaviour should constitute a hate crime and / or whether there were sufficient protections already available in law to deal with it.

Parity of treatment in hate crime legislation vs different laws for different groups

21. In considering which groups should be covered by hate crime legislation and how this might be done, there was a recurring debate among respondents about whether the law should aim to achieve greater parity of treatment among groups, or whether different groups should be covered by different laws. Among those who favoured parity of treatment within hate crime legislation, some argued for the removal of the standalone offence for racial harassment and the use of statutory aggravations for all hate crimes. Others, however, favoured the extension of the standalone concept to all groups with protected characteristics (this included the suggestion that a single standalone hate crime offence should be introduced, with aggravations which covered each of the protected groups).

Online hate crime

22. Respondents highlighted the growing problem of online abuse, the perception that this was not taken as seriously as face-to-face abuse, and the many difficulties of policing

online hate crime. There was debate about the most effective way of tackling this issue. Some called for improved legislation, and a combined focus on the prosecution of individuals and better regulation of social media companies. Others thought such approaches were impractical and thought that non-legislative solutions aimed at improving education and awareness would be more effective.

Offensive behaviour at football matches

23. The consultation sought views in relation to several aspects of the Offensive Behaviour at Football and Threatening Communication (Scotland) Act 2012 (the 2012 Act).¹ There was general agreement that the 2012 Act (or some aspects of it) required greater clarity. Respondents also repeatedly expressed concern that the Act appeared to single out football fans for special treatment under the law. There was some debate about whether legislation was needed to address sectarian behaviour at football matches. However, there was broad agreement that such behaviour exists in other contexts (outside football), and that it should be treated the same way regardless of where it occurred.

Support for victims of and a system wide approach to tackling hate crime

24. There was a great deal of consensus about the importance of providing appropriate support for victims of hate crimes. Respondents advocated multi-stranded approaches involving improved procedures, information and communication which were sensitive to the needs of different groups; training for those working in the justice system; a range of routes for reporting hate crimes, including some support for third part reporting centres; and anonymity for those reporting hate crime crimes.

25. Across a range of questions, there were calls for a society- or system-wide approach to tackling hate crime, involving education, information and awareness raising activities. Respondents were keen that action was taken to address under-reporting but they also wished to see a focus on promoting equality and diversity in order to reduce offending.

Other specific aspects of legislation relating to hate crimes

In addition to offering their views on the concept of hate crime legislation, and the principles on which this should be based, respondents also made a range of more technical points on the current operation of existing hate crime laws (including the 2012 Act) and the implications of possible changes. Additionally, respondents emphasised the need for consistency and transparency of process – e.g. in recording of aggravations and providing of explanations about sentencing – and the importance of good quality statistics and evidence to inform policy and practice in this area. Organisational respondents in particular often thought that consolidation of legislation in this area would provide an opportunity for modernising and improving the law.

¹ Note that, at the time the consultation was carried out, the Scottish Parliament Justice Committee was also considering the possible repeal of the 2012 Act.

1. Introduction and background

1.1 In January 2017, the Scottish Government invited Lord Bracadale to conduct an independent review of hate crime legislation in Scotland. The review included a public consultation which ran from 31 August to 23 November 2017. This report presents findings from the analysis of the responses received to the consultation.

Policy context

1.2 Hate crime is crime motivated by hate of, or prejudice against, particular groups in society, or where the person committing the crime shows prejudice or hostility towards the victim because of their membership of a particular group. Hate crime legislation in Scotland has developed in a piecemeal way over a period of about 50 years, and includes a mix of standalone offences, and statutory ‘aggravations’ based on race, religion, disability, sexual orientation or transgender identity which must be taken into account in sentencing those convicted of crimes.

The review

1.3 The current independent review of hate crime legislation led by Lord Bracadale commenced in February 2017. The review follows on from the report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, published in September 2016, which recommended that the Scottish Government undertake further work exploring the language used in relation to hate crime, and the scope of current hate crime legislation.²

1.4 The remit of the current review is to ‘consider whether existing hate crime law represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice’. In particular, it is considering the appropriateness of the current mix of statutory aggravations, common law powers and specific hate crime legislation; the scope of the existing laws; the need for new categories of hate crime; the scope for simplifying, rationalising or harmonising current laws in this area; and how a new legislative framework might best address any identified issues.

1.5 The first stage of the review involved gathering evidence and information in order to better understand what people consider to be hate crime and how well the current criminal justice system deals with this. This included meeting with relevant individuals, groups and organisations; reviewing currently available information; commissioning academic work; and conducting an online survey. This work informed a consultation paper that was subsequently issued by the review team. The findings of the consultation will be considered along with other relevant evidence and information gathered throughout the review process in preparing a final report and recommendation for Scottish Ministers.

The consultation

1.6 The consultation paper issued by the review team set out the current law regarding hate crime, and highlighted recent relevant developments and issues for consideration. The consultation paper covered the following broad issues:

² <http://www.gov.scot/Resource/0050/00506074.pdf>

- Definitions and justification
- Statutory aggravations
- Standalone offences
- Stirring up hatred and online hate crimes
- Offensive behaviour at football matches
- Extending the law to other groups
- Other more procedural issues (under-reporting of hate crime, and the use of diversion and restorative justice).

1.7 The review team took steps to ensure the consultation was accessible to a wide audience, including those in communities who might be vulnerable to hate crimes. In particular, they produced three versions of the consultation paper: a full technical consultation paper containing 34 consultation questions, a non-technical consultation paper aimed at a more general readership that contained 27 of the consultation questions (the questions omitted from this version of the paper were of a more technical nature); and an easy read consultation paper using simple language and illustrations with 12 questions of a more general nature.

1.8 Background information on the work of the review was also provided on the team's webpages.

1.9 All three versions of the consultation paper were available on the Scottish Government consultation hub, along with a consultation questionnaire which could be completed and submitted online. The online questionnaire contained all 34 consultation questions. All but four of the questions comprised two parts – a tick-box question (two tick-box questions in one instance) and a follow-up open question seeking further comment; the remaining four questions asked for comments only. A version of the consultation questionnaire could also be downloaded for completion and submission by post or email; this version of the questionnaire contained only open questions (i.e. there were no tick-box questions). The 12 questions in the easy read consultation paper comprised 11 two-part questions with a tick-box question (or questions) and a space for comments, and one open question.

1.10 Lord Bracadale's team contacted a wide range of organisations and individuals to direct them to the consultation hub and the range of papers produced.

1.11 Additionally, the review team attended a series of events to raise awareness of the consultation and to encourage well-informed responses. The consultation was launched at a Central Scotland Regional Equality Council (CSREC) event in Stirling, and Lord Bracadale and the review team attended 17 further events across the country, spanning Shetland to Dumfries. These included a mix of open and 'by-invitation' events hosted by bodies representing various equality groups and organisations with a professional interest in the operation of hate crime legislation. Details of events which were open to the public were featured on the consultation hub pages. A full list of events which the review team attended is included in Lord Bracadale's final report.

About the analysis

1.12 This report presents the findings of an analysis of the responses to the consultation.³ The 34 questions in the consultation questionnaire provide the structure for the report. The 12 easy read questions broadly mapped across to key questions in the main consultation questionnaire and are included at relevant points in the report.

1.13 Frequency analysis was undertaken in relation to all the closed (tick-box) questions in the consultation questionnaire and the findings are shown in tables throughout this report. (As noted above, four questions did not have an initial closed question, and so there are no tables for Questions 2, 9, 20 and 29.)

1.14 Comments made in response to each question were analysed qualitatively. The aim was to identify main themes and the full range of views submitted in response to each question or group of questions, and areas of agreement and disagreement in views between different groups of respondents.

1.15 Not all respondents answered all questions, and some made comments in relation to a question without ticking a response at the relevant closed question. As noted above, the questionnaire which could be downloaded from the consultation website did not include any of the tick-box questions; thus a relatively large proportion of responses consisted of comments only. In these responses, if the respondent's reply to the tick-box question was clearly stated in their written comments, the response to the tick-box question was imputed. The tables throughout this report include these imputed responses. Irrespective of whether it was possible to impute a response to the closed question, all comments from respondents were included in the qualitative analysis.

1.16 The easy read responses are included in the analysis at relevant points throughout the report. However, easy read responses are not included in the tables presented in the report, as the easy read consultation questions did not always use the same wording or address quite the same issues as the questions in the main consultation questionnaire. Instead, responses to the easy read tick-box questions are reported in the text. All comments made by easy read respondents are included in the qualitative analysis for appropriate questions.

1.17 As already noted (paragraph 1.7), seven of the consultation questions were targeted at technical / legal respondents in particular. These questions were included in the technical consultation paper and the consultation questionnaire, but were not included in the non-technical consultation paper. These questions were, though, answered by a full range of respondents (e.g. legal and justice bodies, public and third sector bodies as well as individuals) who drew on varying perspectives and levels of knowledge and experience in making their responses. The analysis for these questions takes account of all comments submitted but, as with other questions, information is provided about the types of respondent making particular points where this is relevant to the views expressed, or the

³ All consultation responses received have been considered as part of the review process. However, inclusion in the analysis report, consideration by the review team or publication of a response should not be taken to indicate endorsement or acceptance of any information or views put forward. All responses (where the respondent has given permission) will be published on the Scottish Government website. Responses will be published in full, apart from where they have been redacted (or withheld) to remove offensive language, personal information, or potentially defamatory information.

point being made. In some instances organisational respondents are named where their specific statutory role means that it is helpful to do so.

1.18 In interpreting the quantitative findings, the relatively high proportion of ‘don’t know’ responses across the tables should be noted.

1.19 As with all consultations, the views submitted and presented in this report are not necessarily representative of the views of the wider public. Anyone can submit their views to a consultation, and individuals (and organisations) who have a keen interest in a topic – and the capacity to respond – are more likely to participate in a consultation than those who do not. This self-selection means that the views of consultation participants cannot be generalised to the wider population. For this reason, the main focus in analysing consultation responses is not to identify how many people held particular views, but rather to understand the range of views expressed.

The report

1.20 The remainder of this report is structured as follows:

- Chapter 2 presents information on the respondents to the consultation and the responses submitted.
- Chapters 3 to 9 present the results of the analysis of the responses to each of the consultation questions.
- Annexes to the report are included as follows: Annex 1 presents a list of organisational respondents; and Annex 2 presents the response rates for individual questions. The latter shows how the easy read questions align with the questions in the main questionnaire.

1.21 It should be noted that the purpose of this report is to provide an overview of the responses received in the consultation. It cannot include all the detailed points made in responses, or present all relevant context and background information. Further explanation about the policy area and the issues under consideration is included in the three consultation papers issued by the review team. In addition, the review report provides a full overview of the work undertaken by the review team, the recommendations made, and the consideration given to different evidence and views in reaching those recommendations.

2. About the respondents and responses

2.1 This chapter provides information about the respondents to the consultation and the responses submitted.

Number of responses received

2.2 The consultation received 476 responses. Nineteen respondents submitted more than one response to the consultation (e.g. they responded using the online questionnaire and also submitted an email response with comments, or submitted more than one email response to the consultation). In one case, the respondent withdrew one of their submissions. In all other cases, multiple responses from the same respondent were combined to create a single amalgamated response.

2.3 Thus, the analysis in this report is based on **457** responses.

About the respondents

2.4 Responses were submitted by 381 individuals and 76 organisations or groups. (See Table 2.1.)

Table 2.1: Types of respondent (substantive responses only)

Type of respondent	Number of respondents	% of total (base=457)
Individuals	381	83%
Organisations or groups	76	17%
Total	457	100%

2.5 Table 2.2 below provides further information about the organisational respondents.

Table 2.2: Organisation / group types

Organisation / group type	Number of respondents	% of total (base=76)
Third sector organisations	42	55%
Local authorities, partnership bodies and other public sector organisations	16	21%
Legal, justice and law enforcement organisations	9	12%
Other organisational or group respondents	9	12%
Total	76	100%

2.6 More than half of the organisations (42 out of 76) responding to the consultation were third sector bodies. This category included faith groups, organisations with a general interest in equalities, and organisations working with or on behalf of particular groups (e.g. the LGBTI (lesbian, gay, bisexual, transsexual and intersex) community, those with disabilities) The remaining organisational respondents comprised local authorities, partnership bodies, and other public sector bodies; legal, justice and law enforcement organisations including both statutory agencies and bodies representing different sectors within the legal profession; and a range of other organisations with an interest in issues related to hate crime. A complete list of organisational respondents is included at Annex 1.

About the responses

2.7 Around two-thirds of responses were submitted through the Scottish Government's online consultation hub. The remaining responses were submitted by email or post.

2.8 Three-quarters of the responses were 'standard' in that they followed the structure of the consultation questionnaire. This figure includes all responses submitted using the online consultation questionnaire, and a quarter of those submitted by post or email. The remaining responses did not follow the structure of the questionnaire. These included submissions (mainly short) focusing on specific issues of concern to the respondents, as well as lengthier responses covering a range of issues and consultation questions. In relation to these responses, the content of the response was read and then allocated to appropriate consultation questions for the purposes of analysis.

2.9 Six responses submitted by organisations were based on consultation and discussion with groups of individuals. These are included among the organisational responses shown in Table 2.1 above. A number of other organisations indicated that their responses were informed by consultation with members, stakeholders, etc.

2.10 Nineteen respondents completed the easy read questionnaire. This comprised 13 individuals and 6 organisations. (Note that these responses are included in Table 2.1.) In all cases, the organisations had used the easy read questions as the basis for discussion with groups of individuals, and the responses contained summaries of the views of these groups.

The content of responses

2.11 A significant proportion of the responses, mainly from individuals, focused on specific questions or issues and reflected very specific viewpoints. In many cases these responses had a campaign-like quality in that they tended to make the same points, and express broadly the same views using variations on a standard text, although they did not use identical language. For example, there was a large number of responses from individuals who raised concerns about the potential adverse impact of hate crime legislation on freedom of expression, and freedom of religious expression in particular. This group made similar points at a range of questions throughout the questionnaire. A second group of respondents focused on the questions relating to conduct at football matches (Questions 20 to 27), and raised concerns about the unfair targeting of football fans within hate crime laws. A third group of respondents focused on the question relating to the option of introducing an aggravation relating to malice and ill-will towards a political entity (Question 7). These respondents discussed the distinction between anti-Semitism and criticism of the state of Israel, and the implications of endorsing the International Holocaust Memorial Association definition of anti-Semitism.

Responses to individual questions

2.12 As noted above (paragraph 1.15), not all respondents answered all the questions in the consultation questionnaire. The response rate for individual questions ranged from 5% for Question 26b to 74% for Question 3b. (See Annex 2 for details). Questions 20 to 27, which focused on offensive behaviour at football matches, generally attracted fewer responses than other groups of questions. (Possible reasons for this are discussed in Chapter 7.)

3. Definitions and justifications (Q1 – Q3)

3.1 Chapter 1 of the consultation paper explained what is meant by ‘hate crime’ and considered the reasons for having hate crime legislation. In particular the chapter: (i) set out a working definition of hate crime; (ii) described the victim-orientated approach to hate crime recommended by the Macpherson report;⁴ and (iii) discussed the justification for hate crime laws, drawing on academic work and the responses to the survey carried out by the review team. Questions 1 to 3 in the consultation questionnaire invited views on the working definition (Q1), the tensions and misunderstandings that can arise from adopting a victim-orientated approach (Q2), and whether Scotland should have specific hate crime legislation (Q3).

3.2 This chapter looks at each of these questions in turn, although there was a great deal of commonality in the views expressed across all three of these questions. In addition, many of the themes identified in relation to these questions recurred repeatedly in responses to questions throughout the consultation.

The working definition of hate crime (Q1)

3.3 The consultation set out a working definition of hate crime, as outlined by Chakraborti and Garland in their book *Hate Crime: Impact, Causes and Responses*:⁵

...the creation of offences, or sentencing provisions, ‘which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim’s identity should be treated differently from “ordinary” crimes’ although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim’s identity, or the selection of the victim on the basis of a particular feature.

3.4 Question 1 in the consultation questionnaire asked for views on this working definition:

Question 1a: Do you consider that the working definition, discussed in this chapter [Chapter 3 of the consultation paper], adequately covers what should be regarded as hate crime by the law of Scotland? [Yes / No / Don’t know]

Question 1b: Please give reasons for your answer.

3.5 A total of 184 respondents answered Question 1a. Table 3.1 below shows that the majority of respondents disagreed that the working definition adequately covered what should be regarded as hate crime by the law of Scotland (31% answered ‘yes’, 59% answered ‘no’ and 10% answered ‘don’t know’). There was, though, a notable difference in the views of organisations and individuals. Organisations were divided in their views on whether the working definition of hate crime was adequate (43% answered ‘yes’ and 54%

⁴ The Stephen Lawrence Inquiry: Report of An Inquiry by Sir William Macpherson of Cluny: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf.

⁵ Neil Chakraborti and John Garland (2015) *Hate Crime: Impact, Causes and Responses*, 2nd edn.

answered 'no'), while individuals were more likely to think that the working definition was not adequate (28% answered 'yes', while 60% answered 'no'). It should be noted that the comments made by some individuals who answered 'yes' (i.e. they considered the working definition to be adequate) suggested that they shared the concerns of many of those who answered 'no' (see paragraphs 3.15 to 3.17). The figures presented in Table 3.1 should therefore be treated with caution.

Table 3.1: Question 1 – Do you consider that the working definition adequately covers what should be regarded as hate crime by the law of Scotland?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	15	43%	42	28%	57	31%
No	19	54%	89	60%	108	59%
Don't know	1	3%	18	12%	19	10%
Total	35	100%	149	100%	184	100%

* Percentages may not total 100% due to rounding.

3.6 The easy read consultation paper did not ask for views on the working definition of hate crime. Instead, the consultation paper provided a description of what constitutes hate crime, and respondents were asked if they thought the meaning of hate crime should be better explained:

Question ER1a: Do you think the meaning of hate crime needs to be better explained?
[Yes / No]

Question ER1b: Please tell us why.

3.7 Fourteen respondents (4 organisations and 10 individuals) answered Question ER1a, with 10 answering 'yes' (i.e. they thought hate crime needed to be better explained) and 4 answering 'no'.

3.8 Comments were made by 215 respondents (51 organisations and 164 individuals) at Question 1b, and 15 respondents (5 organisations and 10 individuals) at Question ER1b. The views discussed are presented in the sections below under three main headings: views of those who thought the working definition was adequate; those who thought the definition needed further consideration or development; and views of those who did not think the definition was adequate. Two additional sections discuss other hate crime definitions, and understanding the meaning of hate crime. The views of those who responded using the easy read questionnaire are largely covered in this final section.

Views of those who thought the working definition was adequate

3.9 Those who thought the working definition was adequate offered the following main reasons for their views:

- They thought that the definition was broad enough to ensure all relevant crimes and all relevant groups in society were included within the scope of the law.
- They welcomed the fact the definition recognised that crimes could be triggered by someone's identity, and that this could include: (i) crimes *motivated* by hatred,

(ii) crimes involving the *demonstration* of hostility, and (iii) crimes where the victim was *selected* on the basis of a particular feature.

- They thought the definition provided clarity about the distinction between ‘ordinary’ crimes motivated by dislike or hate of an individual, and those motivated by hostility, prejudice or hatred towards a wider group.
- They thought the definition was consistent with other equality legislation.

3.10 Some respondents also found the references to ‘prejudice’ and ‘hostility’ to be helpful in building awareness and understanding of hate crime in communities, and more appropriate in establishing the ‘thresholds’ for hate crime than the terms ‘hate’ or ‘hatred’.

3.11 In some cases respondents who indicated general support for the working definition also suggested that it might include reference to:

- The perceptions of victims / third parties as the basis for establishing if a hate crime had been carried out
- The importance of circumstance and context in interpreting the law (e.g. language and the acceptability of different terms to different communities can change over time, and communities may ‘reclaim’ negative terms for their own use – examples were given of words such as ‘dyke’ or ‘faggot’ being used by the LGBTI community; and tone, body language and gestures can be as important as any specific words used).

3.12 It was also suggested that the definition may be appropriate for aggravations where the primary offence committed provides context which helps in determining the presence of hostility or hatred, but could nevertheless be problematic in relation to standalone offences.

3.13 It was also common for those who were supportive of the definition to acknowledge that this was a difficult area in which to legislate, and the definition was in some cases regarded as being ‘as good as it gets’.

Views of those who thought the definition needed further consideration or development

3.14 Included among those who answered ‘yes’ and those who answered ‘no’ to Question 1 were respondents who argued that the definition needed to be further considered or developed to take account of different groups and circumstances. These included:

- The particular nature and hierarchical dynamics of abuse and violence against women and girls – some respondents representing women’s groups of various types argued that there needed to be a distinct approach to dealing with misogynistic or gender-motivated hate crime within the law
- Situations where the victim (i) is perceived to be part of a group; (ii) is associated with a particular group (e.g. as a family member or carer), or (iii) has characteristics associated with a particular group

- Situations where the perpetrator of a crime demonstrates hostility or prejudice against a particular group (i.e. they use homophobic or racist language), regardless of whether the victim is a member of the group in question
- Crimes where the victim is a member of a protected group (e.g. older people or those with disabilities), but is targeted because of their vulnerability, rather than any hostility towards the protected group per se. (Some thought the term 'identity-based crime' might be more appropriate in covering this type of crime.)

Views of those who did not think the working definition was adequate

3.15 The views of respondents who were opposed to the definition were often linked with wider concerns about hate crime legislation. These respondents thought the definition was too subjective, and open to reinterpretation and extension over time. They expressed particular concern about the use of terms such as 'hostility' and 'prejudice', the impact on human rights and free speech, and the potential criminalisation of people expressing different opinions and views. In most cases, respondents offering such comments focused on the impact on freedom of religious beliefs and expression. Respondents in this group frequently contested the concept of hate crime or the need for specific laws to deal with such crimes. This was the predominant view among individuals who responded to the consultation.

3.16 In discussing the working definition more specifically, some respondents in this group argued that the use of 'subjective' words, and a lack of definitional clarity (e.g. relating to words such as 'hatred' and 'hostility') would inevitably lead to a lack of **legal** clarity, and an unacceptable degree of ambiguity for those involved in the justice system. Thus, respondents argued that the definition did not meet the test of providing 'legal certainty'. Additionally, some drew attention to the statement in the consultation paper that there was 'no single accepted definition of what constitutes a "hate crime"' in support of their view that it was not possible to construct a clear, workable definition.

3.17 Additional points made by those who opposed the definition included the following:

- That it was not possible to develop sound law based on emotion (i.e. 'hate') which can be difficult to evidence
- That the definition should allow for a defence of 'fair and honest debate'
- That establishing crimes on the basis of the demonstration of hostility or hatred undermined the principle that crimes should involve 'intent' ('mens rea')
- That any definition of hate crime should incorporate protection of important fundamental human rights.

Reference to other current definitions of or guidance on hate crime

3.18 Some respondents who answered Question 1 (including those who were supportive of the working definition and those who had reservations about it) referred to a range of other definitions of hate crime and operational guidelines or protocols on dealing with hate crimes used by different organisations in Scotland and elsewhere (e.g. local authorities, police and criminal justice agencies, and third sector organisations). Respondents suggested these alternative definitions and guidelines could provide pointers for the current review.

Understanding the meaning of hate crime

3.19 A wide range of respondents stressed the importance of making the meaning of 'hate crime' as clear as possible. Although some respondents thought the working definition put forward in the consultation paper was clear or stated that they understood the meaning of hate crime (as explained in the easy read consultation paper), others said this was not the case, and some organisational respondents reported low levels of understanding among their client groups.

3.20 Increasing understanding of hate crime was seen as important for potential victims and communities in general, but also for potential offenders who should understand that their behaviour could be regarded as criminal. There was a range of calls for: (i) the working definition to be broken down further and expressed in plainer language, (ii) a simple definition expressed in plain language to be developed, and / or (iii) information and guidance which explained hate crime laws and the type of conduct which would fall within the scope of the law using simple language and accessible formats suitable for those with different needs. There was a specific suggestion that the difference between conduct which constituted discrimination and fell within the scope of civil law and conduct which fell within the scope of the criminal law should be made clear.

Preventing tensions and misunderstandings (Q2)

3.21 Question 2 explored the implications of adopting a 'victim-orientated' approach to hate crime, as advocated by the Macpherson report. It asked for views on how tensions and misunderstandings arising from this approach can be prevented:

Question 2: How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be hate crime, and what can be proved as hate crime? Please give reasons for your answer.

3.22 This question asked for comments only (i.e. there was no tick-box to complete) and was answered by 176 respondents – 40 organisations and 136 individuals.

3.23 Respondents answering this question expressed two main views, broadly aligned to whether or not they accepted the concept of hate crime and / or the working definition put forward in the consultation paper, as discussed below. It should be noted that it was common for respondents to talk generally about tensions and misunderstandings related to hate crime rather than to attribute these directly to a 'victim-orientated' approach.

3.24 Respondents who were **supportive** of the concept of hate crime and / or the working definition generally endorsed the victim-orientated approach advocated by the Macpherson report. They recognised, however, that there was potential for tensions and misunderstandings to arise in an approach which gives prominence to the perceptions of victims and third parties. They advocated a range of steps which they thought would minimise tensions and misunderstandings, and ensure appropriate expectations among complainants. These included:

- Clear legislation expressed in user-friendly language
- Clarity of definitions, thresholds and processes

- Appropriate guidance and training for all those involved in the criminal justice process
- Education and awareness raising among the public and particular groups about hate crime, acceptable behaviour and language, and the processes involved in making a hate crime complaint
- Appropriate services and support for those involved in hate crime cases – specific suggestions related to information and resources which met the needs of all groups, and effective communication during the progress of a case.

3.25 In a small number of cases respondents in this group stated that they did not think tensions and misunderstandings were a significant issue.

3.26 Respondents **opposed to or expressing reservations about** hate crime made the following common points:

- Tensions and misunderstandings were inevitable if hate crime law depended on a 'subjective' definition and subjective thresholds, and took account of victim and third party perceptions.
- The criminal law did not provide an effective way of tackling 'hate', or 'prejudice', or changing attitudes and behaviours. This group thought that tolerance, respect for others, and tackling prejudice and inequality could all be addressed through education, discussion and debate. Some respondents specifically saw a role for discussion and debate and 'finding common ground' rather than prosecution through the criminal courts in response to individual complaints.
- The law needed to be based on a narrow objective definition of hate crime which provided (i) a reasonable balance between protecting freedom of expression and protecting individuals from abuse, and (ii) clarity on the distinction between legitimate differences of opinion, and speech that would fall within the scope of hate crime.

3.27 Some respondents went on to argue for the retention of the current hate crime definition and thresholds; others argued for scrapping the concept of 'hate crime' altogether. In a small number of cases, though, respondents offered more specific technical comments on the perceived problems with hate crime legislation, making the following points:

- Legislation should be developed based on 'bigotry' (an objective state involving views held contrary to fact) rather than 'hatred' (an emotional state).
- Legislation should incorporate a 'reasonable person' test, as used in other areas of the law (i.e. would a reasonable person be offended by the conduct or speech in question?).
- Hate crime offences based on aggravations should require corroboration like other offences.
- It was not possible to construct a legally robust concept of hate crime, which depended on motivation rather than action.
- Hate crime legislation should focus on incitement of criminal activity.

Other comments

3.28 There were a number of other points made across all groups of respondents (i.e. those supportive of and those concerned about hate crime legislation):

- Any legislation in this area should be carefully worded to avoid tensions and misunderstandings.
- The term ‘hate crime’ was not helpful and could contribute to tensions and misunderstandings. Some respondents argued that the use of the word ‘hate’ deterred victims from reporting incidents as it (i) ‘set the bar too high’, particularly in relation to low-level incidents experienced over a period of time; (ii) was misleading as not all hate crimes were in fact motivated by ‘hate’; or (iii) was not a term that was recognised by affected communities. Such respondents preferred terms such as ‘prejudice-based’ or ‘bias-based’ crimes. Alternatively, other respondents argued that the term ‘hate crime’ was inappropriate as many crimes, regardless of the characteristics of the victim, were motivated by hate.
- Clarity was needed about the distinction between a ‘hate incident’ and a ‘hate crime’.

Should Scotland have specific hate crime legislation? (Q3)

3.29 The final question in this section of the consultation questionnaire asked whether Scotland should have specific hate crime legislation:

Question 3a: Should we have specific hate crime legislation? [Yes / No / Don't know]

Question 3b: Please give reasons for your answer.

3.30 The easy read questionnaire included a corresponding question as follows:

Question ER2a: Do you think we should have hate crime law? [Yes / No]

Question ER2b: Please tell us why.

3.31 A total of 317 respondents answered either Question 3a – 302 respondents answered Question 3 and a further 15 respondents answered Question ER2a.

3.32 Table 3.2 shows that the majority of respondents answering Question 3a disagreed that Scotland should have specific hate crime legislation (23% answered ‘yes’, 73% answered ‘no’ and 4% said ‘don’t know’). Organisations and individuals, however, offered contrasting views on this question – 89% of organisations thought there should be hate crime legislation compared to 11% of individuals. In addition, all the respondents who answered Question ER2a in the easy read questionnaire (4 organisations and 11 individuals) agreed that Scotland should have hate crime laws.

Table 3.2: Question 3 – Should we have specific hate crime legislation?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	40	89%	29	11%	69	23%
No	4	9%	217	84%	221	73%
Don't know	1	2%	11	4%	12	4%
Total	45	100%	257	100%	302	100%

* Percentages may not total 100% due to rounding.

3.33 A total of 326 respondents – 54 organisations and 272 individuals – provided comments at Question 3b explaining their views on whether Scotland should have hate crime legislation. A further 16 respondents – 5 organisations and 9 individuals – commented at Question ER2b. The views of all respondents are discussed below. Some individuals stated that their views were based on personal experience.

Views of those who thought Scotland should have hate crime legislation

3.34 Respondents who thought Scotland should have hate crime legislation offered the following reasons for their views:

- Legislation in this area demonstrated a commitment to equality, and was in line with domestic and international equality and human rights legislation and conventions.
- It was important that society offered protection to minorities and vulnerable groups.
- Legislation sent out a strong message to potential victims and wider communities that crimes of this type would be taken seriously by the criminal justice system, and provided a legal framework for dealing with perpetrators.
- It was right to recognise the specific nature of hate crime, the disproportionate targeting experienced by particular groups, and the impact such crime had on victims, communities and wider society.

3.35 In addition, respondents thought that having specific hate crime laws brought important benefits such as:

- Increasing the profile and visibility of such behaviour, and the existence of a legal remedy, and encouraging reporting by victims
- Acting as a deterrent to potential offenders
- Allowing the recording and monitoring of such behaviour.

3.36 In offering their support for hate crime legislation, some respondents also advocated:

- A society-wide approach to tackling prejudice and combating hate crime, and promoting equality and diversity
- A move away from the term 'hate crime' (see also paragraph 3.28)

- The issuing of guidance to assist with the implementation of hate crime legislation (see also paragraph 3.24)
- Greater clarity and consistency across hate crime laws, with some specific calls for codification and consolidation of legislation in this area (see paragraphs 4.5 to 4.6)
- Continued coverage of existing groups and development of the law to cover other groups, including by extending statutory aggravations.

Views of those who did not think Scotland should have hate crime legislation

3.37 Respondents who did not think Scotland should have hate crime laws offered comments focusing on four inter-linked issues:

- **Human rights and legal principles:** Respondents frequently argued that hate crime laws were too subjective and open to abuse, and put important human rights such as freedom of speech and freedom of religious expression at risk. Some argued that such laws represented a move away from legal principles such as the importance of 'intent' on behalf of the perpetrator, of crimes being judged by actions rather than motivations, and of the law being based on objectivity, and offering clarity and certainty. It was additionally argued that the law should not be used by governments to send out messages or make political statements. Some suggested that, by undermining such principles, hate crime laws were a risk to democratic society.
- **Impacts and implications:** Some respondents were concerned about the implications of hate crime laws. As noted above, the impact on freedom of speech and religious expression was a major concern for some. However, other concerns included the creation of different classes of victims and crimes, and the perceived privileging of some groups in society over others; the potential divisiveness of laws which created or reinforced subgroups within society; and the perpetuation of a state of 'victimhood' among some groups.
- **The need for hate crime laws:** Some respondents disputed the need for hate crime laws. Instead they thought the law should (and did) offer the same protection to all individuals regardless of protected characteristics, and that existing law (i.e. non-hate crime laws) was adequate in this respect. Some also disputed the claim that hate crimes had any greater impact on the victims than other sorts of crimes. Respondents also suggested that the reportedly low number of recorded hate crime offences indicated that there was no great need for such laws.
- **Alternative ways of dealing with hatred / intolerance:** Some felt that the criminal law, and hate crime law in particular, did not offer an effective way of dealing with hatred and intolerance, and were concerned about the potential demands placed on the criminal justice system by such laws. Instead, respondents thought that education and debate offered better routes for dealing with such behaviour, and teaching tolerance of the views of others.

Other views

3.38 Among those who answered 'yes' and those who answered 'no' to Question 3, there were some respondents who offered a degree of support for having hate crime legislation, but thought that the current laws were sufficient and / or that no **new** hate crime laws should be introduced. Additionally, some respondents (i) singled out race hate crime legislation for support, on the basis that race was an objective characteristic and / or that race hate crime was a significant issue which merited special attention, (ii) supported hate crime laws dealing with incitement, or (iii) thought that laws should be available, but only for dealing with 'serious' cases.

Other comments

3.39 Additional points were raised by respondents as follows:

- This was a 'grey area' where it was difficult to legislate, and there needed to be further exploration of the issues raised by the 'freedom of speech vs freedom from hate speech' debate.
- The current definitions, use and understanding of terms and concepts relating to race and ethnicity needed to be reviewed as a precondition to the development of sound hate crime laws.
- Any legislative change in this area would need to be approached carefully, and be informed by a systematic approach to evidence, evaluation and best practice.
- It was important to improve data recording and collection to allow effective monitoring and evaluation; standardised definitional categories should be adopted and used consistently across all agencies.

4. Statutory aggravations (Q4 – Q12)

4.1 Chapter 4 of the consultation paper covered issues relating to statutory aggravations. These related to (i) the need to bring hate crime legislation together; (ii) tests for determining a hate crime, and the language used in describing those tests; (iii) the possible establishment of two new aggravations; (iv) the language used when referring to transgender and intersex in the law; (v) the effectiveness of the law in dealing with cases involving more than one protected characteristic; (vi) consistency in recording of hate crime; and (vii) the need for judges to explain their sentencing in hate crime cases. The consultation questionnaire included nine questions (Questions 4 to 12) covering these issues.⁶

Bringing hate crime provisions and offences together (Q4)

4.2 Scotland’s hate crime laws have evolved over several decades and currently include a mix of standalone provisions and aggravations which can be added to other charges. Question 4 asked for views on bringing these arrangements together into a single piece of legislation:

Question 4a: Do you believe there is a need to bring all the statutory sentencing provisions, and other hate crime offences, together in a single piece of legislation? [Yes / No / Don’t know]

Question 4b: Please give reasons for your answer.

4.3 Altogether, 115 respondents answered Question 4a. Table 4.1 shows views were mixed across all respondents on whether hate crime offences and aggravations should be brought together in a single piece of legislation (31% in favour, 45% against, and 23% saying ‘don’t know’). The majority of organisations (71%) were, however, supportive of this suggestion, compared to a minority (16%) of individuals.

Table 4.1: Question 4 – Do you believe there is a need to bring all the statutory sentencing provisions, and other hate crime offences, together in a single piece of legislation?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	22	71%	14	16%	36	31%
No	6	23%	46	54%	52	45%
Don't know	2	7%	25	29%	27	23%
Total	30	100%	85	100%	115	100%

* Percentages may not total 100% due to rounding.

4.4 Eighty-three respondents – 31 organisations and 52 individuals – made comments at Question 4b.

⁶ Note that Questions 4, 11 and 12 were included in the technical consultation paper only.

4.5 There was a great deal of consensus in the views of those who **supported** consolidation of the law. These respondents were positive about the role of hate crime legislation and thought that consolidated legislation, along with appropriate guidance, would be helpful – for both professionals and the public – in bringing clarity, transparency and consistency of approach to this area of law. Attention was drawn to the perceived benefits of consolidated legislation in other areas (the Sexual Offences (Scotland) Act 2009 and the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 were both mentioned). Respondents also made the following points:

- Adopting a unified approach to all hate crimes was appropriate given the similar issues encountered in most cases. It would avoid the perceptions of a ‘hierarchical’ approach, associated with the current piecemeal system, and be helpful for crimes involving more than one protected characteristic.
- Consolidation would allow the law to be modernised, and rationalised. More specifically, it would allow overlaps, gaps and inconsistencies to be addressed, and confusion and uncertainty to be dealt with. There would be an opportunity to ensure the law was put on a sound, principled basis, and to focus on factors important in prosecuting and sentencing such crimes. There was a view that consolidation would be particularly welcome if other legislative changes went ahead (e.g. the introduction of new aggravations or offences, or the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012).
- Consolidation would be helpful in raising awareness and understanding of hate crime, and increasing visibility of cases within the criminal justice system. It would also encourage reporting of crimes by victims, and act as a deterrent to perpetrators.
- Consolidation would allow for greater alignment with wider equality and diversity policies and legislation. It would also be helpful in improving statistics and understanding trends in offending.

4.6 All legal and justice bodies who answered Question 4a or 4b saw benefits to consolidation. They were particularly likely to say that consolidation would bring benefits in terms of modernisation and rationalisation of the law. One justice body noted, however, that those working within the criminal justice system were ‘well-versed’ in the current system, and that any consolidated legislation would need to be accompanied by appropriate guidance and introduced over a transitional period.

4.7 In some cases respondents noted qualifications or caveats to their support for consolidation. Respondents were, for example, concerned that no current protections were lost, and that the understanding and treatment of individual groups was in no way diminished through any such process. Some respondents suggested that harmonisation which was nevertheless still based on separate aggravations, via separate sections within a single piece of legislation, might provide a way of dealing with this.

4.8 Those **opposed** to consolidation comprised two distinct groups as follows:

- Respondents who were generally supportive of hate crime legislation: These respondents were concerned that consolidation or codification of the law in this

area might be detrimental in tackling hate crime offences. Specifically, they thought it might lead to an over-simplified generic approach which did not cater for complex cases or recognise the nuances between the experiences of different groups – this view was expressed particularly in relation to tackling gender-based crime. In relation to race hate crime, there was also a call to retain the current standalone offence which was seen as sending out an important message, even if aggravations were to be consolidated. There was a more general concern that a single piece of legislation would be difficult to achieve, and could become unwieldy or overly prescriptive. There was also a view that the current legislation worked effectively, and the case for consolidation was, therefore, not strong.

- Respondents who expressed general opposition to hate crime legislation: These respondents generally thought current arrangements were adequate and that the time and effort required for the consolidation process was not merited. Alternatively, they simply argued that all hate crime laws (with the exception, in some cases, of race hate crime which was viewed somewhat differently by some respondents) should be repealed rather than consolidated. In a small number of cases respondents in this group argued that consolidation could lead to an over-simplified or vague approach that would present an increased risk to freedom of speech, and an increased risk of inadvertent offending.

Thresholds for establishing hate crime (Q5)

4.9 Under current legislation, there are two thresholds for establishing whether a hate crime has been committed: (i) the offence must be motivated by hate of, or prejudice against, a specified group, or (ii) the perpetrator must at the time of the offence, or immediately before or after, show prejudice or hostility towards the victim because of their membership of a specified group. This is phrased in the legislation as ‘evinced malice and ill-will’ towards the victim relating to their membership of a specified group. Question 5 asked for views on whether these thresholds were appropriate:

Question 5a: Do you consider that the current Scottish thresholds are appropriate?
[Yes / No / Don't know]

Question 5b: Please give reasons for your answer.

4.10 Question ER3 in the easy read questionnaire also focused on the thresholds for hate crime, but asked respondents if they were clear about the ‘test’ for such crimes:

Question ER3a: Are you clear about what the test for a hate crime is? [Yes / No]

Question ER3b: How can this be improved?

4.11 Although the questions posed were slightly different, the issues raised in response to Question 5 and Question ER3 were similar, and the two questions are therefore discussed together.

4.12 Altogether, 120 respondents answered Question 5a. Table 4.2 shows that just under half of all respondents (48%) thought that the current thresholds for hate crime – relating to motivation, and to evincing malice and ill-will – were appropriate. Organisations were, though, more likely than individuals to offer this view – 64% of organisations thought the thresholds were appropriate compared to 43% of individuals.

Table 4.2: Question 5 – Do you consider that the current Scottish thresholds are appropriate?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	18	64%	40	43%	58	48%
No	8	29%	21	23%	29	24%
Don't know	2	7%	31	34%	33	28%
Total	28	100%	92	100%	120	100%

* Percentages may not total 100% due to rounding.

4.13 Fourteen respondents (2 organisations and 12 individuals) answered Question ER3a, with responses showing divided views on whether people were clear about the test for a hate crime: seven respondents said 'yes', six said 'no' and one said 'yes' and 'no'.

4.14 Eighty-three respondents made comments at Question 5b – 36 organisations and 47 individuals. Twelve respondents – 5 organisations and 7 individuals – made comments at Question ER3b. Views are discussed below. Comments focusing on the wording and clarity of the thresholds are considered at Question 6 below.

Support for the current thresholds

4.15 Respondents who endorsed the current thresholds thought that:

- The thresholds provided clear and objective tests, and incorporated the principle of 'intent' (or 'mens rea').
- There was sufficient flexibility to deal with partial motivations and to consider actions before or after offences were committed in establishing motivation.
- Having two thresholds increased understanding and ensured appropriate interpretation of the latter threshold which requires evidence of the perpetrator's feelings towards victim (referred to by some respondents as the 'animus' threshold).

4.16 It was also noted that the thresholds were in line with the approach adopted in other countries.

Qualified support

4.17 Some respondents were happy with the current thresholds and thought they provided an appropriate balance between protecting individuals and protecting free speech, but indicated that they would be opposed to any change which would extend the scope of the hate crime legislation. Among this group, some thought that any change would undermine free speech and freedom of religious expression; others were concerned that an increase in the number of offences 'caught' by a lowered threshold would make the

law unworkable. In contrast, a few respondents argued that any change which ‘tightened’ the thresholds risked excluding legitimate cases.

4.18 Some respondents supported the thresholds, but commented on their interpretation and application. Most frequently, respondents commented on the evidence requirements, with some acknowledging that the thresholds could be difficult to evidence, and others noting the importance of proving motivation, or calling for consistency in the requirements for corroboration across different hate crimes.

Opposition to the current thresholds

4.19 Those opposed to the current thresholds fell into two groups: those who thought the thresholds were too ‘low’, and those who thought they were too ‘high’.

4.20 Among those who thought the thresholds were **too low**, there was widespread concern about their subjectivity, and the impact on free speech and / or religious expression. Respondents argued that showing or being motivated by ‘hostility’ or ‘prejudice’ towards a group should not be sufficient to constitute a hate crime, and were particularly concerned that this might be based on third party perceptions of an incident. Instead respondents called for thresholds based on showing ‘hatred’ or ‘malevolence’ towards a group. Others argued that the law should be based on actions, rather than motivation.

4.21 Those who thought the thresholds were **too high** made the following main points:

- There could be difficulties in providing evidence to meet the required thresholds, and the evidential timeframe of ‘immediately before or after the offence’ was too restrictive and would not, for example, allow social media postings over a period of time to be used as evidence of motivation.
- The thresholds excluded particular types of crime which should be regarded as hate crimes. These included (i) crimes in which members of particular groups (e.g. older or disabled people) were targeted because of their vulnerability rather than because of any hostility towards the group in general; (ii) repeated low-level incidents over an extended time period; (iii) crimes involving multiple motivations.
- It was important to understand the context of incidents and not focus solely on the use of specific ‘offensive’ words or terms in determining if they should be classed as hate crimes.

4.22 Some also thought the thresholds were too open to the perceptions of investigators and prosecutors rather than victims, and there was a suggestion that representatives of protected groups might have a role in advising on this.

Other comments

4.23 Additional points made by respondents included the following:

- It was important that the thresholds had clear legal meaning and were well known to and understood by both professionals and the public.
- Clarity was needed on whether both thresholds needed to be met.

4.24 Some respondents restated general opposition to hate crime legislation at this question, without offering specific comment on the thresholds themselves.

Wording relating to the thresholds (Q6)

4.25 In setting out the hate crime thresholds, the law currently uses the phrase ‘evincing malice and ill-will’ (see paragraph 4.9 above). Although this is a phrase that is widely used in law, it is not commonplace in non-legal contexts, and the consultation sought views on whether this phrase should be replaced:

Question 6a: Should ‘evincing malice and ill-will’ be replaced by a more accessible form of words? [Yes / No / Don’t know]

Question 6b: Please give reasons for your answer.

4.26 Question 6a was answered by 126 respondents. As shown in Table 4.3, views were divided among all respondents with 41% supporting replacement of the term ‘evincing malice and ill-will’, and 44% supporting its retention. Organisations were, though, more likely than individuals to think that the wording should be replaced – three-quarters of organisations (76%) answered ‘yes’ compared to a quarter (28%) of individuals.

Table 4.3: Question 6 – Should ‘evincing malice and ill-will’ be replaced by a more accessible form of words?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	26	76%	26	28%	52	41%
No	7	21%	48	52%	55	44%
Don't know	1	3%	18	20%	19	15%
Total	34	100%	92	100%	126	100%

* Percentages may not total 100% due to rounding.

4.27 Ninety-three respondents made comments at Question 6b – 37 organisations and 56 individuals.

4.28 Those supporting revised wording argued that user-friendly language accessible to a wide range of groups was important and would provide greater clarity for the public about hate crime and associated law. This was seen as particularly important for vulnerable groups (e.g. those with learning disabilities) and individuals for whom English was a second language. This reflects the views of respondents who answered Question ER3 and highlighted the need for a clear explanation of the ‘test’ for hate crime, the use of simple language and the inclusion of examples.

4.29 In terms of alternative proposals, the word ‘evincing’ attracted particular adverse comment. Common suggestions for replacement phrases were: ‘demonstrating malice and ill-will’, ‘demonstrating hostility’, ‘showing hostility’, ‘demonstrating hostility and aggression / ill-will’. The phrase ‘demonstrating bias, prejudice, hate or hostility’ was also suggested.

4.30 The value of consultation with relevant groups in determining appropriate wording was noted.

4.31 Among respondents who wished to see revised wording (as well as some of those who did not offer a clear view) there was, however, concern that any change (i) took account of precedent and case law and did not lead to unintended change in the substance of the threshold itself, and (ii) should continue to be well understood and precise in meaning.

4.32 In a small number of cases respondents supported revised wording as they thought the phrase ‘evincing malice and ill-will’ was too subjective and put free speech at risk.

4.33 Those favouring retention of the current wording offered three main arguments:

- The term ‘evincing malice and ill-will’ provided important legal precision, was underpinned by case law, and was well known and understood by those in the justice system; public understanding could, it was argued, be improved via information and guidance.
- Any change in wording risked introducing greater subjectivity to the law, and a lower threshold, and there were concerns about the impact on human rights and freedom of speech.
- The phrase was not too difficult for lay people to understand, especially given that other legal terms (e.g. ‘culpable homicide’) were accepted and used by the public.

Malice and ill-will towards a political entity (Q7)

4.34 The Scottish criminal law currently includes aggravations based on membership of a racial or religious group. However, these aggravations might not cover a situation in which hostility is shown towards a political entity which the victim is perceived to be associated with because of the racial or religious group they belong to. The consultation paper gave examples of Jewish people being targeted because of a perceived association with the state of Israel, and Muslims being targeted because of a perceived association with Isis. Question 7 asked for views on whether such situations should be regarded as ‘hate crime’ and covered by a specific aggravation:

Question 7a: Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group? [Yes / No / Don’t know]

Question 7b: Please give reasons for your answer.

4.35 A total of 115 respondents answered Question 7a. Table 4.4 shows that the introduction of an aggravation based on malice and ill-will towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group was supported by a minority of all respondents (25%). Organisations were, though, more likely than individuals to favour such an aggravation, with half indicating their support (50% of organisations compared to 19% of individuals).

Table 4.4: Question 7 – Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	12	50%	17	19%	29	25%
No	8	33%	53	58%	61	53%
Don't know	4	17%	21	23%	25	22%
Total	24	100%	91	100%	115	100%

* Percentages may not total 100% due to rounding.

4.36 One hundred and two respondents provided comments on this question – 66 individuals and 36 organisations. Those opposed to the introduction of a new category of aggravation were more likely to offer views than other respondents.

4.37 Those respondents supporting an aggravation of this type thought it was right that protection should be extended to this group, particularly given the linkage to race and religion. They noted the following:

- The malice and ill-will motivating the perpetrator in such cases was no different to the malice and ill-will required to evidence other current aggravations.
- Victims in such cases may be subject to attack because of the perpetrator's perceptions of the victim's membership of a religious or racial group, and such cases should therefore come within the law.
- It would be difficult to distinguish such attacks from other attacks motivated by malice and ill-will towards a racial or religious group per se.
- Such attacks breached equality legislation (e.g. in terms of representing indirect discrimination) and undermined social cohesion in the same way as other hate crimes do, and a new aggravation would therefore be in line with equality and human rights obligations.

4.38 However, the need for careful wording of a new aggravation was recognised, in order to protect free speech and political debate.

4.39 Those opposed to an aggravation of this type offered four main reasons for their views, focusing on the following:

- Principles of equality and hate crime legislation: Legislation in this area is based on protected characteristics reflecting intrinsic personal characteristics. Malice and ill-will towards a political entity could not, it was argued, be equated with malice and ill-will towards groups with protected characteristics, and introducing an aggravation based on malice and ill-will towards political entities would represent a move away from this important principle.
- Practicalities of a new / revised aggravation: A new aggravation in this area would be difficult to legislate for and potentially contentious, and would therefore introduce complexity and uncertainty into the law. In addition, a new aggravation would be open to interpretation and abuse for political ends, and open to change over time, depending on the political climate.

- The lack of need for a new / revised aggravation: There are other laws which can be used if an offence is committed or public order is threatened by politically motivated speech or actions. It was also specifically pointed out that, where malice and ill-will towards foreign countries or overseas movements arises from racist or religious sentiment, this could amount to negative stereotyping and generalisation on the grounds of race or religion which could potentially be prosecuted under existing hate crime laws (reference was made to Crown Prosecution Service (CPS) guidance for England and Wales on this issue – *Racist and Religious Hate Crime - Prosecution Guidance*).
- The risk to free speech: Freedom to hold differing political views, and to debate those views, is fundamental to a democratic society and should be protected. This included freedom to subject political entities and foreign states to legitimate criticism. A new aggravation of this type could, therefore, have unintended consequences regarding the curtailment of freedom of expression and freedom of political debate. It was argued that such an aggravation could be used for political ends – individuals could, for example, find themselves accused of committing a hate crime if they had been critical of policies and practices in other countries.

4.40 Respondents concerned about the risk to free political debate included a distinct group who discussed in some detail the implications of any change in the law for debate relating to the state of Israel. This group made it clear that they opposed anti-Semitism. However, they were keen to maintain a distinction between anti-Semitism and legitimate criticism of the Israeli state. They felt that a new aggravation of the type discussed would open up the possibility of criticism of the state or government of Israel being interpreted as a hate crime. These respondents also argued that the International Holocaust Memorial Alliance definition of anti-Semitism, endorsed by the Scottish Government, risked blurring the distinction between anti-Semitism and expressing opposition to the actions of the government of Israel.

4.41 An additional group of respondents restated their wider general views about hate crime legislation: that is, they thought (i) that the law should treat all groups the same, and thus they were opposed to the creation of aggravations to cover additional groups as this was seen as giving some groups preferential treatment under the law; and (ii) that the law should be based on actions not motivations.

Malice and ill-will towards religious beliefs held by individuals (Q8)

4.42 The consultation paper highlighted a 2016 murder case in which Asad Shah, a Glasgow shopkeeper, was killed. Although the killer made it clear that his actions were religiously motivated, the murder could not be classed as a ‘hate crime’ as the beliefs held by Mr Shah were individual and not shared by a wider group, as required by the law. Question 8 in the consultation asked if the law should be changed to include offences motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group:

Question 8a: Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group? [Yes / No / Don't know]

Question 8b: Please give reasons for your answer.

4.43 Altogether, 118 respondents answered Question 8a. Table 4.5 shows that the option of an aggravation based on malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group was supported by less than half of all respondents (39%). There was, though, a difference in views between organisations and individuals – two-thirds of organisations (68%) supported this option, compared to a third (30%) of individuals.

Table 4.5: Question 8 – Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	19	68%	27	30%	46	39%
No	5	18%	43	48%	48	41%
Don't know	4	14%	20	22%	24	20%
Total	28	100%	90	100%	118	100%

* Percentages may not total 100% due to rounding.

4.44 Eighty-three respondents offered comments at Question 8 – 52 individuals and 31 organisations.

4.45 Those supporting the introduction of this aggravation felt it was important that the law protected people from being targeted because of their beliefs, regardless of how widely held those beliefs were. In explaining their views, respondents made the following points:

- Society should not tolerate bias or inequality of treatment of any type.
- Religion (or other beliefs) forms part of an individual's personal identity, and the law should apply if a person is attacked because of who they are, or who they are perceived to be.
- The motivation of the perpetrator – i.e. their malice and ill-towards the victim's beliefs – is the same, regardless of whether the beliefs are held by an individual or group.

4.46 Some respondents made specific reference to the Shah case which they thought illustrated that the current aggravation was too narrowly defined and highlighted why a change in the law was needed. They argued that the attack had been clearly religiously motivated – i.e. that Mr Shah had been attacked because of his religious beliefs – and it was therefore no different from other religiously motivated hate crimes. They also thought it was difficult to explain to the public why this case had not been classed as a hate crime.

4.47 Respondents who were supportive of a revised religious aggravation made two different points regarding how such provision might be defined. Some were positive about the proposed inclusion of 'religious and *other beliefs*', welcoming the potential inclusion of non-religious beliefs, and suggesting that this approach was in line with wording used in the Equality Act 2010. Others, however, made the point that careful thought would have to be given to how to define religious and / or other beliefs, to prevent the law being open to abuse.

4.48 Those who did not think there should be an aggravation based on malice and ill-will towards religious or other beliefs held by an individual rather than a group offered a range of different reasons for their views focusing on the following:

- Principles of equality and hate crime legislation: Legislation in this area is specifically intended to demonstrate society's intolerance of prejudice and hatred towards identifiable vulnerable **groups** (i.e. those with protected characteristics), and cases involving individually held beliefs fall outwith this remit.
- Practicalities of a new / revised aggravation: It would be too difficult to define individual religious and other beliefs for the purposes of the law.
- The need for a new / revised aggravation: A new / revised aggravation was not required. It would make no material difference to how cases were prosecuted, and existing judicial discretion allowed relevant factors to be taken into account in sentencing. The handling of the Shah case was cited in support of this argument.
- The risk to free speech: It would be difficult to differentiate between a 'difference of opinion' and 'hate speech'. A new aggravation would therefore be open to interpretation and abuse, and would present a risk to freedom of speech and religious expression.

4.49 A few other points were made by respondents answering this question:

- Guidance may be needed for those working in the criminal justice system on investigating and prosecuting cases involving intra-religious intolerance.
- A new / revised aggravation may be helpful as it would allow trends in offences of this type to be monitored.
- A new / revised aggravation might provide clarity and ensure compliance with obligations under European Convention on Human Rights (ECHR) article 7 which prohibits criminal convictions and sentencing without legal basis. In addition, it contains the principle that criminal laws have to be sufficiently clear and precise so as to enable individuals to ascertain which conduct constitutes a criminal offence and to foresee what the consequences of transgressions will be.

Referring to transgender identity and / or intersex in the law (Q9)

4.50 Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 includes aggravation by prejudice against transgender or intersex people. The consultation paper noted that stakeholder groups had called for these terms to be reviewed and updated, and Question 9 asked for views on how transgender and intersex should be referred to in the law:

Question 9: Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?

4.51 Respondents were asked for comment only (i.e. there was no tick-box question). Altogether 100 respondents answered Question 9 – 29 organisations and 71 individuals. It should be noted that some respondents simply said that they did not feel qualified to comment on this issue, and some specifically deferred to the experience of others in this field. Among those who did offer fuller comments, there were two main views offered, as discussed in the following paragraphs.

4.52 Some respondents believed that this was an important issue that should be discussed and agreed with relevant stakeholder groups, and that the language adopted should align with other equality policies, legislation and conventions (domestic and international). Such views were generally put forward by organisational respondents, including third sector organisations representing the LGBTI communities. Respondents thought that those in the justice system should be given appropriate training in relation to language and terminology on this issue. Specific suggestions regarding language included the following:

- The need to capture the full diversity of identities, including ‘gender fluid’ and ‘non-binary’ individuals, within any language adopted, and to be clear about the distinction between transgender and intersex.
- The need to be flexible in relation to the language and terminology used, and to update over time, in line with best practice
- The updating of the definition of the term ‘transgender’ to ‘trans’ as an umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth, and specifically the moving away from the terms ‘transvestism’ and ‘transsexualism’
- Use of the term ‘sexual identity’ to cover both transgender and intersex.

4.53 Other respondents, particularly individuals, argued that the law should be based on biologically determined characteristics (i.e. sex) rather than socially constructed concepts (i.e. gender), and that this should determine the language used. Additionally, respondents in this group did not think that language should be changed to accommodate the current and potentially changing preferences of a small minority of people who did not accept ‘traditional’ sexual identities. Respondents did think that all people should, nevertheless, be referred to courteously and with respect. Among this group there was some concern that this issue was driven by ‘political correctness’, and a related concern that the law might penalise people for using incorrect language.

4.54 Respondents in this latter group often made it clear that their views on this issue stemmed from their religious beliefs which did not recognise gender / sexual identities outwith the biological states of male and female. Some respondents within this group did, however, acknowledge ‘intersex’ as a medical or genetic condition, and said that intersex people should be treated as a separate group.

4.55 Some respondents in the latter group took the opportunity to restate their concerns about hate crime legislation in general, and the impact on freedom of thought and expression, and their view that the law should not single out specific groups for protection.

Malice and ill-will based on more than one characteristic (Q10)

4.56 Under the current law, aggravations can relate to a single protected characteristic only, although it is possible to record multiple aggravations for a single offence. The consultation paper reported that some groups have suggested that this approach does not reflect the experience of victims, and can lead to an unhelpful ‘silo’ approach. Question 10 asked for views on whether the current arrangements operated effectively in cases involving malice and ill-will based on more than one protected characteristic:

Question 10a: Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic? [Yes / No / Don’t know]

Question 10b: Please give reasons for your answer.

4.57 A total of 116 respondents answered Question 10a. Table 4.6 shows that views on the effectiveness of the current law with regard to hate crimes involving more than one protected characteristic were mixed across all respondents – 35% thought the law was effective, 24% thought it was not effective and 41% said they didn’t know. This mixed picture was apparent for both organisations and individuals with around a third of each group answering ‘yes’ to Question 10. However, almost half of organisations (46%) answered ‘no’, i.e. they did not think the law operated effectively, while a similar proportion of individuals (49%) answered ‘don’t know’.

Table 4.6: Question 10 – Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	10	38%	30	33%	40	35%
No	12	46%	16	18%	28	24%
Don't know	4	15%	44	49%	48	41%
Total	26	100%	90	100%	116	100%

* Percentages may not total 100% due to rounding.

4.58 Seventy respondents – 35 organisations and 35 individuals – provided comments.

4.59 Those agreeing that the current law **operated effectively** fell into two broad groups:

- Respondents – mainly individuals – who simply stated that the current law provided adequate protection for all people, regardless of the characteristics of the victim, and who did not wish to see further change to the law in this area.
- Organisational respondents of various types who noted that the current arrangements allowed for the recording of more than one aggravation and thought that the process operated effectively in this respect (or indicated that they

were unaware of difficulties arising in this respect). These respondents often cited their experience of the law, or outlined current procedures. Some respondents in this group nevertheless thought that a specific provision for recording malice and ill-will based on multiple characteristics would be useful, or thought that further information on how such cases were dealt with as they progressed through the justice system would be helpful.

4.60 Respondents who thought the law **did not operate effectively** with regard to cases involving malice and ill-will based on more than one characteristic generally wished to see a provision to record and respond to aggravations based on **combinations** of characteristics. They thought this would be beneficial in (i) increasing awareness and understanding of the intersectionality of protected characteristics; (ii) recognising that victims (and all people) did not experience individual protected characteristics in an isolated way – some individuals outlined their own personal experience of suffering abuse directed at multiple characteristics; (iii) reducing complexities and inconsistencies in recording practices resulting from the current system of separate aggravations; and (iv) improving the data available on hate crime offences. In some cases, respondents in this group argued that crimes motivated by multiple characteristics should be regarded as more serious than other crimes and that this should be reflected in sentencing.

4.61 Some respondents in this group thought that consolidation and harmonisation of the law in this area would provide an opportunity for introducing provisions which accommodated cases involving combinations of protected characteristics (see Question 4).

4.62 Across all respondents, there were calls for a consistent approach, clear guidance, and monitoring of the operation of the law in this area.

4.63 Among those who did not think the law operated effectively with regard to malice and ill-will based on multiple characteristics was a group of respondents – mainly individuals – who reiterated the view that all crimes should be prosecuted in the same way regardless of motivation, or the characteristics of the victim.

Recording of statutory aggravations (Q11)

4.64 Question 11 addressed the recording of statutory aggravations in cases brought to court, and whether this should be done consistently. There is a current requirement for aggravations to be recorded as part of court proceedings, but the consultation paper explained that the extent to which that is done and how the requirement is implemented is not clear. Views on this issue were invited as follows:

Question 11a: Should the aggravation consistently be recorded? [Yes / No / Don't know]

Question 11b: Please give reasons for your answer.

4.65 Altogether, 97 respondents answered Question 11. Table 4.7 shows that the majority of organisations (92%) supported consistent recording of statutory aggravations, with the remaining 8% of organisations answering 'don't know'. Among individuals,

however, a majority (54%) answered 'don't know' to this question, while 32% answered 'yes' and 14% answered 'no'.

Table 4.7: Question 11 – Should the aggravation consistently be recorded?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	23	92%	23	32%	46	47%
No	-	0%	10	14%	10	10%
Don't know	2	8%	39	54%	41	42%
Total	25	100%	72	100%	97	100%

* Percentages may not total 100% due to rounding.

4.66 Fifty respondents provided comments at this question – 24 organisations and 26 individuals. Those in favour of consistent recording were more likely to make comments.

4.67 Those in favour of consistent recording wished to see this at all stages of the criminal justice process, from reporting to conviction to sentencing. They offered several reasons for their view, arguing that consistent recording:

- Enhanced transparency of the justice system
- Was helpful to victims of such crimes, would show that hate crime is being taken seriously, would increase confidence in the justice system, and encourage reporting of such crimes
- Would ensure historical information was available for previous offenders which could be used to inform sentencing decisions – in a few cases, respondents suggested highlighting hate crime convictions on PVG (Protection of Vulnerable Group) records, or establishing a separate hate crime 'register'
- Was important in order to understand trends in hate crime, and to monitor the impact of legislation. Respondents additionally noted that consistent and reliable hate crime statistics should be collated and published, in order to inform the development of effective policy and practice.

4.68 Respondents advocated guidance and training to ensure consistent recording; the need for guidance on recording of aggravations in 'art and part' cases (i.e. cases involving aiding and abetting) was noted by one respondent (a legal body). However, several legal and justice bodies provided information on current recording protocols, and suggested that recording of aggravations was not an area which currently caused problems.

4.69 Some of those who indicated support for consistent recording were nevertheless sceptical about hate crime legislation more generally. They noted that **all** crimes should be recorded consistently, regardless of type.

4.70 Those respondents who did not support consistent recording generally had broader concerns about hate crime legislation. In line with those concerns, they thought that there was no need for recording of aggravations, as all crimes should be treated in the same way. Additionally, there was some concern that recording of hate incidents could disadvantage those maliciously accused and subsequently cleared of hate crimes.

Explanation of sentences in hate crime cases (Q12)

4.71 Question 12 of the consultation focused on sentencing, and, in particular, whether judges should be required to explain the difference between a sentence for an aggravated offence and what the sentence would have been without the aggravation: This is required under the current legal arrangements but anecdotal evidence suggests that the latter part of the requirement (that of explaining what the sentence would have been without the aggravation) is not always adhered to. Views were sought as follows:

Question 12a: Is it necessary to have a rule that the sentencing judge states the difference between what the sentence is and what it would have been but for the aggravation? [Yes / No / Don't know]

Question 12b: Please give reasons for your answer.

4.72 Ninety-six respondents answered Question 12a. Table 4.8 shows a mix of views across all respondents with regard to whether judges should provide information on what a sentence would have been without an aggravation – 47% thought there should be a rule on this, 22% thought there should not, and 30% didn't know. However, three-quarters of organisations (78%) favoured such a rule, compared to around a third (38%) of individuals.

Table 4.8: Question 12 – Is it necessary to have a rule that the sentencing judge states the difference between what the sentence is and what it would have been but for the aggravation?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	18	78%	28	38%	46	47%
No	4	17%	17	23%	21	22%
Don't know	1	4%	28	38%	29	30%
Total	23	100%	73	100%	96	100%

* Percentages may not total 100% due to rounding.

4.73 Fifty-seven respondents commented at Question 12 – 27 organisations and 30 individuals. Those in favour of such a rule were more likely to offer comments than those against.

4.74 Those in favour of such a rule thought that an explanation of this type was helpful in:

- Promoting understanding of the law regarding hate crime and increasing transparency of the judicial process (for professionals involved in the judicial process as well as the public)
- Encouraging consistency in sentencing and allowing for the monitoring of sentencing practices – it was suggested that sentencing data should be published, and that sentencing in hate crime cases might be an issue for consideration by the Scottish Sentencing Council at some future point
- Sending out a message to victims and society in general that hate crime was being treated seriously, which would, in turn, help build trust in the system

- Acting as a deterrent to potential offenders, and ensuring those convicted understood the consequence of committing a hate crime.

4.75 One organisational respondent (a legal body) argued that not providing an explanation of the sentence in hate crime cases undermined the purpose of having hate crime aggravations, and would be out of line with requirements relating to other sentencing aggravations (e.g. previous convictions).

4.76 By and large those opposed to such a rule fell into two distinct groups, as follows:

- The first group, which included some legal / justice bodies, argued that sentencing was already a complex process, and that disaggregating sentences was not always realistic or helpful, and potentially left sentences open to criticism and / or appeal. Among this group, judicial discretion was seen as important – and effective – in delivering appropriate sentences for hate crimes. It was also pointed out that such an approach could not apply with regard to standalone offences which would not exist without the hate element.
- The second group consisted largely of individuals who thought that such a rule was not relevant and / or not required if hate crime did not exist. They argued that sentencing should reflect the crime and not the motive, and that sentencing for a hate crime should be no different to sentencing of a similar crime without an aggravation.

4.77 In addition to offering views on a rule requiring the explanation of sentences in hate crime cases, some respondents made more general comments on sentencing in such cases. In general, those who did so supported tougher sentences, especially for repeat offenders.

5. Standalone offences (Q13 and Q14)

5.1 Scotland currently has a standalone hate crime offence of racially aggravated harassment and conduct under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995. Chapter 5 of the consultation paper presented information on this standalone offence, and two questions invited views on (i) whether the provision was need, and (ii) whether it should be extended to other groups. The views of respondents are presented below for each of the consultation questions.

A standalone charge of racially aggravated harassment (Q13)

5.2 Questions 13 asked about the continuing need for a standalone charge of racially aggravated harassment:

Question 13a: Is this provision [a standalone charge for racially aggravated harassment] necessary? [Yes / No / Don't know]

Question 13b: Please give reasons for your answer.

5.3 A total of 158 respondents answered Question 13a. Table 5.1 shows that organisations were evenly divided in their views on the need for this provision – 48% thought the provision was necessary while 48% did not. In contrast just a quarter of individuals (24%) thought the provision was necessary, half of individuals (52%) thought the provision unnecessary while the remaining individuals (24%) selected 'don't know'.

Table 5.1: Question 13 – Is this provision [a standalone charge for racially aggravated harassment] necessary?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	11	48%	32	24%	43	27%
No	11	48%	70	52%	81	51%
Don't know	1	4%	33	24%	34	22%
Total	23	100%	135	100%	158	100%

* Percentages may not total 100% due to rounding.

5.4 Altogether, 119 respondents made comments at Question 13b (33 organisations and 86 individuals), and their views are presented below.

5.5 The following points should be noted about the analysis presented in this section:

- It was common for individuals to use Question 13 to state their views on extending the concept of a standalone offence to other groups – the points made by such respondents are discussed in the section relating to Question 14 (paragraphs 5.19 to 5.29).
- The comments made by some respondents – individuals in particular – suggest that they were not aware of the existing standalone provision, and thought they were being asked about the possible introduction of such provision.

Views of those who thought a standalone charge was necessary

5.6 Respondents who thought a standalone charge for racially aggravated harassment was necessary believed this was justified by the particular circumstances surrounding race hate crime, as opposed to other hate crimes. In particular they noted the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this had on community cohesion. Some respondents noted that the original rationale for introducing the provision (i.e. that race hate crime was a significant issue which the criminal justice system did not take seriously enough) still remained, and the problem of racism still needed to be addressed. Thus, they thought that a specific standalone offence was important in sending out a message that racism would not be tolerated, with some noting that the 'current climate' (in the wake of the EU referendum) made this all the more important. There was a related concern that repealing the provision may send out the *wrong* message.

5.7 In addition, respondents in this group made the following points:

- They thought that the current standalone provision provided definition and clarity regarding the law in this area.
- They suggested that the provision may allow the prosecution of cases where the harassment concerned did not involve a public element.
- They thought that the provision was useful in allowing monitoring of trends in race hate crimes.

5.8 Some also qualified their view suggesting that (i) the current provision could benefit from updating (e.g. with regard to online hate crime); (ii) standardisation of corroboration requirements across hate crimes might be helpful; and (iii) the provision was currently required, but that may not always be the case in the future.

5.9 Those who thought the current section 50A provision was still necessary included some who had reservations about the concept or impact of hate crime legislation generally but who nevertheless thought that crimes motivated by racial hatred should be treated as a special category and merited specific legislation. They gave similar reasons to other respondents who thought the provision was necessary, but were particularly likely to emphasise the 'objective' nature of 'race' as compared to other protected characteristics, and the deep-rooted nature of racism.

Views of those who did not think a standalone charge was necessary

5.10 Respondents who did not think a standalone charge for racially aggravated crimes was necessary fell into two broad groups: those who thought other hate crime provisions provided equally effective (or more effective) ways of dealing with race hate crime; and those whose opposition to the provision fitted in with more general reservations about hate crime legislation.

5.11 Respondents who thought there were equally or more effective ways of dealing with racially aggravated hate crimes argued that the use of common law offences and appropriate aggravations provided a more flexible option, with potentially better outcomes for victims. In particular, respondents noted that (i) corroboration of evidence was not required for aggravations, and that (ii) should the aggravation itself not be proven, a

conviction for the main common law offence still remained a possibility. Some in this group expressed general concerns about the inconsistencies in the corroboration requirements for different hate crime offences, and stated a preference for a system which treated all hate crimes the same – this was argued by some to be more in line with equality duties.

5.12 Respondents, particularly individuals, whose opposition to the standalone provision was linked to wider reservations about hate crime legislation were concerned about the impact on freedom of speech, debate and religious expression. There was, though, a specific concern about the threshold for the current standalone offence (i.e. conduct ‘likely to cause alarm and distress’), which was perceived as too low, or inappropriate for defining criminal conduct. It was also seen as too subjective and open to politically motivated complaints. Respondents in this group often argued that all hate crime legislation should be repealed, and that the criminal justice system did not provide the best route for tackling racism and / or that other laws could deal effectively with criminal behaviour regardless of motivation.

Other comments

5.13 Respondents answering Question 13 also made a small number of additional points as follows:

- The provision would not be needed IF steps were taken to consolidate all laws in this area, and ensure that the seriousness attached to race hate crimes was attached to all hate crimes.
- Any repeal of the provision would need to be accompanied by (i) a rigorous approach to recording aggravations, and (ii) a communication campaign to highlight the continuing importance of tackling race hate crime.

5.14 There was also some discussion around current use of the provision. While some noted that the provision was well used and accounted for around 40% of racially motivated hate crimes, others cited the falling numbers of charges over recent years as evidence that the provision was no longer needed.⁷ Some thought that more evidence and analysis on the use of the provision was required in order to decide on its continuing value.

Standalone charges for other groups (Q14)

5.15 Question 14 asked for views on whether the concept of a standalone charge should be extended to other groups with protected characteristics:

Question 14a: Should the concept of a standalone charge be extended to other groups?
[Yes / No / Don't know]

Question 14b: Please give reasons for your answer.

5.16 The easy read questionnaire included a corresponding question:

⁷ COPFS figures show the number of charges for racially aggravated harassment to have decreased from 2,574 in 2010/11 to 1,463 in 2016/17 (<http://www.copfs.gov.uk/publications/equality-and-diversity>).

Question ER4a: Should there be a specific harassment offence for groups other than race? [Yes / No]

Question ER4b: Please tell us why.

5.17 A total of 289 respondents answered either Question 14a or Question ER4b – 271 respondents answered Question 14a, and a further 18 answered Question ER4b. Table 5.2 shows a slight majority of organisations (55%) favoured extending the concept of a standalone charge to other groups, while a substantial majority of individuals (92%) were opposed. Those responding to Question ER4a all thought there should be a specific harassment offence for groups other than race.

Table 5.2: Question 14 – Should the concept of a standalone charge be extended to other groups?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	55%	8	3%	25	9%
No	9	29%	220	92%	229	85%
Don't know	5	16%	12	5%	17	6%
Total	31	100%	240	100%	271	100%

* Percentages may not total 100% due to rounding

5.18 A total of 239 respondents made comments at Question 14b (37 organisations and 202 individuals), while 16 respondents (6 organisations and 10 individuals) commented at Question ER4b. Points already discussed in relation to Question 13 (paragraph 5.6 to 5.14) are not repeated here in any detail.

Support for extending the concept of a standalone charge to other groups

5.19 Those who wished to see the concept of standalone offences extended to other groups thought that it was right or 'fair' that all protected groups who suffer from harassment should be treated the same under the law. It was argued that extending the concept of a standalone offence to other groups would send a strong message that hate crime was taken seriously, which could act as a deterrent and lead to a reduction in offences.

5.20 Respondents made particular mention of extending the concept to the following groups: women, older people, those with disabilities, members of the LGBTI community, members of the Gypsy / Traveller community, and religious groups. With regard to older people and those with disabilities, some respondents were keen to see standalone offences which recognised the targeting of individuals because of their vulnerability, rather than because of hostility towards a wider protected group as a whole. Other respondents made more general points, suggesting that the standalone concept might be extended to (i) characteristics over which the individual has no control (e.g. race or disability, as opposed to religious beliefs), or (ii) groups who it is judged are not treated seriously enough by the criminal justice system (i.e. where the same rationale as used to justify the introduction of section 50A for racially aggravated harassment can be said to apply).

5.21 One justice body suggested that there was no practical reason why the law could not be extended in this way. There were, though, some concerns relating to the ‘diluting’ of hate crime if a wide range of standalone offences were introduced, and some calls for (i) consolidation and harmonisation of the law, and (ii) clarity about the distinction between hate incidents and hate crimes.

Opposition to extending the concept of standalone to other groups

5.22 As with the existing standalone offence for racially aggravated harassment, those opposed to extending the concept fell into two main groups: those generally supportive of hate crime legislation and those with reservations about such legislation.

5.23 Those with reservations about hate crime legislation often restated their general concerns relating to (i) the potential impact on freedom of speech and religious expression, particularly given the ‘alarm and distress’ threshold for the standalone race offence; (ii) the need to treat all groups the same under the law; and (iii) the adequacy of current laws for dealing with all crimes regardless of motivation. In making the case against extending the provision, respondents made the following additional points:

- Introducing more laws to protect specific groups in society risked creating a hierarchical legal system, which prioritised some groups over others, and could be divisive for society in the long run.
- Such an approach would be unworkable – it would lead to shifting boundaries, with continuing pressure to extend the groups protected by standalone offences.
- The creation of new laws would lead to public money being wasted on potentially unsuccessful prosecutions.

5.24 The point was also made that steps would need to be taken to protect freedom of speech and religious expression IF standalone offences were extended to other groups.

5.25 In some instances respondents in this group were opposed to the current standalone offence for racially aggravated harassment, and thus did not wish to see the concept extended further. In other cases, respondents accepted that the specific features and history of racial harassment justified a standalone charge (see paragraph 5.9), but they did not wish to see the concept extended to other characteristics which were seen to be less fixed, harder to define and more open to opinion or debate.

5.26 Respondents who were broadly supportive of hate crime legislation but did not wish to see the concept of a standalone charge extended to other groups generally preferred the option of prosecuting hate crimes using other common law offences along with appropriate aggravations (as discussed above – see paragraph 5.11) and / or were concerned about the perceived hierarchy of hate crime offences which might be created by the introduction of standalone provisions for some groups and not others. This group included some who wished the current standalone charge to be repealed in preference for a system based wholly on aggravations.

5.27 In addition to the two broad grouping discussed above, there were a few respondents who felt unable to make a judgement about the extension of the standalone charge. Such respondents thought this was too broad a question, were unclear about the benefits of the current standalone provision and the benefits that might be achieved by

extending the concept, or thought a decision should be based on evidence of need. There was also some uncertainty about how this might work in practice (e.g. whether it would mean separate legislation for different groups), and how intersectionality would be covered.

Calls for parity of approach regarding standalone charges

5.28 Across both Question 13 and 14 there were calls for parity of approach in dealing with hate crime against groups with different protected characteristics. Some respondents argued for the removal of the standalone offence for race hate crime and the use of statutory aggravations for all hate crimes; others favoured the extension of the standalone concept to all groups with protected characteristics (this included the suggestion that a single standalone hate crime offence with aggravations which covered each of the protected groups should be introduced). There were also respondents who prioritised parity over their preferred option – for example, their preference was for section 50A offences to be revoked, but IF they should remain, they thought the provision should be extended to all groups.

5.29 Some thought that consolidation of hate crime laws into a single piece of legislation would help achieve parity across different groups.

6. Stirring up hatred and online crimes (Q15 – Q19)

6.1 Chapter 6 of the consultation paper focused on two issues: (i) stirring up hatred, sometimes referred to as hate speech (which may be either verbal or written); and (ii) online hate crime (which may take a variety of forms, including online verbal, emotional or psychological abuse; offensive literature and websites; abusive private messages and hate mail; and threatening behaviour and online bullying). There were five closed questions which all invited further comments on these two issues, as discussed below.⁸

Offences relating to the stirring up of hatred against groups (Q15)

6.2 The consultation paper noted that hate crime offences were first introduced in Scotland in 1965 and these related to stirring up hatred on the 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 created offences relating to threatening communications which stir up religious hatred (section 6), and offences related to behaviour at regulated football matches which stirs up hatred against individuals or groups based on certain characteristics and incites, or would be likely to incite, public disorder (section 1).

6.3 The consultation paper discussed a range of perceived problems in relation to the existing stirring up offences. It also highlighted that there have been very few prosecutions of stirring up offences compared with other types of hate crimes (for example, racially aggravated harassment) and it discussed the possible reasons for this. Respondents were invited to give their views on whether stirring up hatred offences against particular groups were needed, and if so, which groups.

Question 15a: Should there be offences relating to the stirring up of hatred against groups? [Yes / No / Don't know]

Question 15b: If so, which groups? Please give reasons for your answer.

6.4 The easy read consultation paper included a corresponding question as follows:

Question ER5a: Should there be offences that cover stirring up of hatred against groups other than for race and religion? [Yes / No]

Question ER5b: Please tell us why and what groups.

6.5 A total of 281 answered either Question 15a or Question ER5a – 266 respondents answered Question 15a, and a further 15 answered Question ER5a. Table 6.1 below shows that, overall, around three-quarters (74%) of those answering Question 15a were not in favour of offences relating the stirring up of hate against groups. However, there was a difference in views between organisations and individuals on this question: organisations were more likely to say 'yes' (76%), while individuals were more likely to say 'no' (82%).

⁸ Note that Questions 16 and 19 were included in the technical consultation paper only.

Table 6.1: Question 15 – Should there be offences relating to the stirring up of hatred against groups?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	25	76%	34	15%	59	22%
No	6	18%	192	82%	198	74%
Don't know	2	6%	7	3%	9	3%
Total	33	100%	233	100%	266	100%

* Percentages may not total 100% due to rounding.

6.6 Respondents replying to Question ER5a (5 organisations and 11 individuals) were nearly unanimous in support of having offences relating to the stirring up of hatred against groups. All but one respondent answered 'yes' to this question; the remaining individual ticked both 'yes' and 'no'.

6.7 A total of 290 respondents (41 organisations and 249 individuals) provided comments at Question 15b and 14 respondents (6 organisations and 8 individuals) provided comments at Question ER5b. Note that, although Question 15b specifically asked for comments from those who answered 'yes' at Question 15a, most of the individuals who answered 'no' also commented, and these comments all tended to focus on the same, relatively clear set of themes. Some of the individuals who answered 'yes' to this question discussed the same set of issues in their comments, and so the figures shown for individuals in Table 6.1 above may need to be treated with caution.

Views in support of having stirring up offences related to particular groups

6.8 A relatively common view among respondents who answered 'yes' to Question 15a or Question ER5a was that stirring up offences should be extended to **all** groups with a protected characteristic. This would help to avoid creating the perception of a hierarchy of discriminated-against groups. Respondents to Question ER5a emphasised that 'everyone is important' and 'everyone should be treated fairly'.

6.9 This group of respondents tended to see a clear distinction between stirring up hatred (or hate speech) on the one hand, and debating differences of opinion and belief on the other, and they argued that hate speech should be defined in law as inciting violence or expressing actual threats of violence. At the same time, though, other respondents called for greater clarity about what is meant by 'hate' or 'stirring up hate'.

6.10 A less common view among those who answered 'yes' to Question 15a was that offences relating to stirring up hatred should be created (or existing offences should be extended) to cover specific groups. Different respondents suggested the following:

- **Women:** Some respondents pointed to the increasing incidence of hate-related communications targeted at women and thought that any new hate crime should address incitement to misogyny, and that this should cover abuse directed at individuals as well as groups, and incidents where the perpetrator is an individual or a group.
- **Race / ethnicity:** Some respondents noted the large increase in online incitement related to racial groups.

- **Disabled people:** Some respondents highlighted a recent tendency among certain political groups or mainstream media outlets and on social media platforms to portray disabled people as ‘benefit scroungers’, responsible for their own unhealthy lifestyles. Other respondents distinguished between ‘someone that looks physically disabled’ and ‘the less visible manifestations of disability’ (including people with mental illnesses), and there was a view that both should be protected from those who would incite hate against them. Several respondents also discussed the pervasive abuse of people with learning disabilities, including online abuse, which can result in people having to avoid certain places, or not leave the house at all. The point was also made that there have been a growing number of ‘lynch mob’ style attacks on men with learning disabilities who have been falsely accused of paedophilia and other sexual offences.
- **Children and young people:** The impact of hate speech and verbal abuse targeted at young people on the internet and in schools was highlighted, and it was noted that the UK’s response to this issue has been criticised internationally, with the United Nations Committee on the Rights of the Child (UNCRC) identifying bullying as a form of violence against children and a violation of their human rights. A report by the UNCRC also raises concerns about the pervasiveness of bullying among LGBTI children, children with disabilities and children belonging to minority groups including Gypsy / Traveller communities.⁹
- **Older people:** Some respondents commented that certain groups were ‘stoking inter-generational hatred’ of older people by the young. These groups make claims such as: ‘baby boomers have stolen the future of the younger generation’, that ‘all pensioners are rich and have it easy’, and that ‘older people are a terrible burden on the NHS because they use up too many resources’.
- **Churches and religious groups:** Some respondents saw the potential for hate crime legislation to have an adverse impact on the articulation of religious beliefs, and public preaching in particular. These respondents emphasised that there should be protection for groups who voice religious beliefs, but who are not inciting others to hatred.
- **Speakers of Gaelic:** There was a concern voiced about offensive, abusive and insulting communications about Gaelic speakers, both online and in the mainstream media. This behaviour has resulted in some Gaelic speakers withdrawing from participation in online forums.

6.11 A slightly different view among a few respondents who answered ‘yes’ to Question 15 was that there should not be stirring up offences related to any **particular** groups; rather, stirring up hatred against **any group**, or **any person** should be prohibited. This argument was similar to that which was put forward by a large proportion of those who answered ‘no’ to Question 15.

Views opposed to having stirring up offences related to particular groups

6.12 Among the large number of individuals who answered ‘no’ to Question 15, there were particular concerns about the possible adverse impact of new stirring up offences on

⁹ CRC/C/GBR/CO/5, paragraph 48(a).

freedom of religion and on freedom of expression within the context of religion and public preaching specifically. Respondents made the following five points repeatedly:

- No new incitement laws should be created.
- All people should be protected from threats, not just 'privileged' groups of people.
- The word 'hatred' is too subjective to be used in criminal law, particularly in relation to religion. (Or 'there needs to be clarity about the meaning of 'hate' and the context it occurs in'.)
- Hate speech laws can damage free speech. A person's religion can be debated, whereas their race cannot.
- The existing religious hate law had to include a clause on free speech to prevent it being misused. It would be preferable ('safer', 'more logical') to repeal existing religious hate law.

6.13 Some organisational respondents made these same points – particularly voicing concerns about the possibility of stirring up offences having adverse impacts on freedom of speech, religious liberty, and stifling legitimate criticism. Others raised a diverse range of other issues, as follows:

- There is some evidence that offences relating to stirring up hatred against minority ethnic groups and individuals based on race are still needed. It is less clear that there is a need for stirring up offences for other groups. As the technical consultation paper points out, in England and Wales, offences related to stirring up hatred were created in relation to religious hatred in 2006 (Racial and Religious Hatred Act 2006) and in relation to sexual orientation in 2008 (Criminal Justice and Immigration Act 2008), but further extension to disability and gender was rejected by the Law Commission in England and Wales in 2014 on the basis that a practical need to do so had not been established.
- If a need is identified to extend stirring up offences to other groups, then the standalone offence for inciting racial hatred should not be consolidated with these new offences. This was seen to be essential to avoid weakening the particular message this offence conveys.
- Creating additional stirring up offences for other categories of people could add to confusion in the interpretation of online hate crime.

Other general issues raised in relation to stirring up offences

6.14 Some organisational respondents did not reply to the first part of Question 15 about whether stirring up offences should be created for other groups. These organisations often made more general points, including that:

- The two existing offences relating to stirring up hatred against groups have been used in relatively limited circumstances to date. However, there were differences of opinion about whether existing common law or other legislation would be sufficient to be able to prosecute hate speech if the 2012 Act were repealed. Related to this, it was noted that the 2012 Act includes different sentencing provisions than other current legislation. For example, section 127 of the

Communications Act 2003, which relates to the sending of threatening messages, carries a maximum sentence of 12 months imprisonment whereas section 6 of the 2012 Act carries a maximum sentence of 5 years imprisonment.

- There was a question about the extent to which disability hate crime legislation (for example) could have any positive impact, since current legislation is focused on individuals who stir up hatred, but does not address the stirring up of hatred by politicians or the media through their use of stigmatising language and negative portrayals intended to strengthen negative stereotypes.
- Stirring up hatred online is an increasingly severe threat and a major concern within some communities (including the Jewish community). Such behaviour can lead to great harm, exacerbate prejudice, and result in actual physical threat or attack. It also causes division within targeted communities. When it appears, it can spread quickly and communities may feel powerless against it.

6.15 Finally, some respondents commented on the challenges of identifying the threshold between freedom of speech and stirring up hatred. They made the point that some speech may be mistakenly perceived as stirring up hatred if the views expressed go against the mainstream consensus. Another respondent offered a definition of hate speech developed through discussion with a group of young people: ‘when the use of freedom of expression dehumanises someone else and when others then use that expression to justify their actions’.

Need for specific provision protecting freedom of expression (Q16)

6.16 The consultation paper outlined the range of issues which have been raised about the possible impacts (including unintended impacts) of stirring up offences on public debate and freedom of expression, and it discussed arguments for and against including a specific provision within any new hate crime legislation to protect the right of freedom of expression.

6.17 Respondents were asked whether, if there are to be offences dealing with the stirring up of hatred against groups, there needed to be any specific provision protecting freedom of expression.

Question 16a: 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? [Yes / No / Don't know]

Question 16b: Please give reasons for your answer.

6.18 A total of 156 respondents replied to Question 16. Table 6.2 shows that most (87%) answered ‘yes’ to this question. The pattern of response was broadly similar across organisations and individuals.

Table 6.2: Question 16 – 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?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	71%	119	90%	136	87%
No	4	17%	8	6%	12	8%
Don't know	3	13%	5	4%	8	5%
Total	24	100%	132	100%	156	100%

* Percentages may not total 100% due to rounding.

6.19 Altogether 160 respondents (29 organisations and 131 individuals) made further comments at Question 16. Note that irrespective of whether respondents answered ‘yes’ or ‘no’ to Question 16, they generally acknowledged the importance of freedom of expression, describing it as ‘a fundamental right in any modern democratic society’.

Views in support of specific provision protecting freedom of expression

6.20 Respondents who answered ‘yes’ to Question 16 agreed with the consultation paper that there was the potential for legislation that prohibits stirring up offences to adversely affect the right to freedom of speech and the right to freedom of thought (protected under the ECHR, articles 9 and 10). This group suggested that if there are to be such offences for additional groups, that there should be robust provisions within this new legislation that is equivalent to section 7 of the 2012 Act, or sections 29J and 29JA of the Public Order Act 1986.¹⁰

6.21 However, some respondents went further and argued that, even with a free speech clause written into legislation, the effect could be that individuals will ‘self-censor’ their speech more than necessary rather than risk being accused of a hate speech offence. These respondents preferred to see the repeal of the 2012 Act, and called for no further stirring up offences to be created in Scotland.

6.22 It was common for respondents in this group to recognise that the right to freedom of expression is not an absolute right, and may be subject to limits so long as those limits are legitimate and proportionate. They highlighted the necessity of ensuring that the right to freedom of speech is balanced against ECHR article 14 which provides for the right not to be discriminated against, and that the exercise of the freedom of speech must not incite hatred or violence.

6.23 Some respondents believed that the distinction between expressing disagreement, engaging in debate, and expressing opinion on the one hand, and stirring up hatred and inciting violence on the other, was clear. Some also attempted to explain the distinction: for example, it was suggested that ‘context, demeanour, vocabulary and previous conduct’ all contribute to making the judgement about the distinction between ‘rational argument’ and ‘rabble-rousing’. Others, though, pointed to specific examples where, for example, moderate preaching or discussion of religious beliefs had been (mis)interpreted as race-related prejudice or homophobia.

¹⁰ These sections specifically provide protections for freedom of expression.

Views opposed to a specific provision protecting freedom of expression

6.24 Among the relatively small number of respondents who answered ‘no’ to Question 16, some believed that specific provision for freedom of expression within any new stirring up offences was unnecessary. These respondents argued that the protection of this freedom is clearly set out in article 9 of the ECHR and is capable of being implemented by member states in a way which is compatible with legislation prohibiting hate speech and communication.

6.25 However, others in this group emphasised the negative impact of hate speech on society, and the need to protect individuals from harassment. These respondents argued (as already discussed above) that freedom of expression was not ‘an absolute’, and that freedom of expression needs to be balanced against the damage that can be done to communities by ‘so-called free speech’.

6.26 One view, which differed from those discussed above, was that if there were to be specific legislation (or specific provision within legislation) to protect freedom of expression, there was the potential for this to be used as a ‘shield’ by those accused of stirring up hatred. It was claimed that such a defence is already used by groups who publish communications which may be seen as inciting hatred towards other groups.

Other general points raised in response to Question 16

6.27 As noted above, some respondents believed that the boundary between hate speech and lawful freedom of expression was clear. However, others (both those who answered ‘yes’ to Question 16 and those who answered ‘no’) called for the law to provide clarity about the boundary between speech which stirs up or incites hatred (which should be sanctioned under criminal law) and speech which may be offensive but is not otherwise unlawful. It was suggested that guidance should be developed to set out the legitimate limits on freedom of expression, which may be used to prevent crime and disorder.

Effectiveness of the current law in relation to online hate (Q17)

6.28 The second part of Chapter 6 of the consultation paper explored issues specific to hate crime and hate speech that takes place online. It set out the current legal position – i.e. that hate crimes which occur online are subject to the same laws which would apply if the crime was committed in person – and it discussed the impacts (particularly on women and young people) of online hate crime, and the practical difficulties of addressing it.

6.29 Respondents were asked for their views about whether the current law deals effectively with online hate.

Question 17a: Does the current law deal effectively with online hate? [Yes / No / Don't know]

Question 17b: Please give reasons for your answer.

6.30 The easy read consultation paper included a corresponding question as follows:

Question ER6a: Does the current law deal effectively with online hate? [Yes / No]

Question ER6b: Please tell us why.

6.31 Altogether, 164 respondents answered either Question 17a or Question ER6a – 148 respondents answered Question 17a, and another 16 respondents answered Question ER6a. Table 6.3 shows that, among those who answered Question 17a, organisations were more likely to reply ‘no’ to this question (70%) while individuals were divided in their views (34% said ‘yes’; 27% said ‘no’; 40% said ‘don’t know’). Respondents to Question ER6a were unanimous in saying that current law does **not** deal effectively with online hate.

Table 6.3: Question 17 – Does the current law deal effectively with online hate?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	7	19%	37	34%	44	30%
No	26	70%	30	27%	56	38%
Don't know	4	11%	44	40%	48	32%
Total	37	100%	111	100%	148	100%

* Percentages may not total 100% due to rounding.

6.32 A total of 105 respondents (46 organisations and 59 individuals) provided further comments at Question 17b and 13 respondents (5 organisations and 8 individuals) commented at Question ER6b. An analysis of all these comments is presented here.

6.33 Similar points were often made irrespective of whether respondents answered ‘yes’ or ‘no’. In particular, whether they believed that the current law dealt effectively with online hate or not, respondents repeatedly expressed serious concerns about:

- An increasingly hostile online environment – particularly for women, children and vulnerable groups (including disabled people), and that among certain groups (including people with learning disabilities), the responses to this problem have often focused on keeping the victims away from the internet, rather than punishing the perpetrators
- The growing body of evidence about significant harm caused to individuals and groups as a result of online hate and harassment
- The perception (sometimes based on personal experience) that online hate is not taken as seriously as face-to-face abuse or physical assault would be; that it is less likely to be prosecuted; and that the penalties for engaging in it are not as severe and, as a result, it is under-reported
- The far-reaching and often persistent nature of online hate crime (victims can be targeted by international networks of perpetrators), and the long-term (sometimes devastating) impact not only upon individuals, but also upon social cohesion
- The perception that the regulation of social media companies is not adequate.

6.34 Both groups also highlighted the many practical difficulties of prosecuting online hate crime. These were seen by some respondents to be insurmountable. Those who

answered 'yes' to Question 17a tended to believe that the legal framework for prosecuting online offences was adequate, but that a lack of resources and the practical difficulties of gathering evidence made enforcement difficult; whereas those who answered 'no' said that the law was ineffective because of the difficulties in enforcement.

The difficulties of enforcement

6.35 Some respondents provided detailed information about the practical difficulties of policing online hate crime, highlighting the following issues:

- There can be challenges in identifying suspects – the legal process for obtaining information from overseas companies about online 'users' can take months and some companies do not retain information about their users.
- Where comments are posted on chat forums, the police have to rely on data protection requests for user information, but site administrators are not obliged to provide this information.
- Where an individual can be identified, there are challenges in gathering sufficient evidence to be able to attribute comments made online to that individual with the degree of certainty required to prove a criminal charge.
- There are difficulties in having offensive material removed by a service provider, with comments posted years ago still able to be accessed by search engines.

6.36 There was also a suggestion that, in certain cases, even where an attempt is made by the police to bring forward a case for prosecution, the procurator fiscal may deem that the case is not sufficiently in the public interest to warrant a prosecution.

Views that the current law requires to be reformed

6.37 While there was a general view among respondents that online hate crime is difficult to prosecute, there were differing views about how to tackle this situation. Some did not see the need for new legislation in this area,¹¹ but instead made other suggestions about how to improve the response to online crime. These are discussed in paragraph 6.38 below. In contrast, others thought that current legislation was not designed to enable it to keep up with technological developments and this group saw a need for improved legislation. The following specific issues were highlighted:

- The various different Acts which can apply in cases of online hate crime have different evidential tests. One of these tests is that the perpetrator's behaviour must be shown to have caused 'fear and alarm'.¹² This particular test was seen to be too restrictive and it was suggested that legislation was needed in which the test is 'causing fear, alarm **or significant distress**'. Other tests were seen to be not strict enough, or too broad and unable to be applied in relation to the wide range of hate-related behaviour which may be encountered online.¹³

¹¹ Some respondents set out in detail the various forms of legislation which can be applied in cases of online hate crime.

¹² See Section 38(1), Criminal Justice and Licensing (Scotland) Act 2010.

¹³ The reference here is to section 127 of the Communications Act 2003, which states that it is an offence to send through a public electronic communications network a message or other matter which is grossly offensive or of an indecent, obscene or menacing character for the purposes of causing annoyance, inconvenience or needless anxiety.

- Jurisdictional barriers to online hate crime being tried in court should be removed. In particular, it was suggested that cases should be tried where the victim has reported the crime, rather than in the jurisdiction where the perpetrator committed the crime.
- Recognition should be given to online misogyny as a form of online hate speech.
- Any future legislation in this area should allow for the legal presumption that messages were sent by the owner of a computer or other device, or by the registered owner of an email or social media account, unless that individual is able to prove otherwise.
- Any future legislation in this area should be sufficiently wide to cover future advances in technology that allow for the transmission of online hate.

Potential non-legislative actions / solutions

6.38 Respondents also made suggestions about how the challenges of prosecuting and preventing online hate offences could be addressed without having to create new legislation. The most frequent suggestion was that social media companies should be expected to take greater responsibility in this area, and to take steps to support enforcement of online hate legislation – for example, by requesting proof of identity for setting up an email or social media account. Some respondents called for increased regulation of social media companies. (These views are discussed further in relation to Question 19 below.) Other suggestions included:

- Increasing the resources available for prosecuting individuals who engage in online hate crime, and removing barriers to evidence gathering by the police and their partners (no specific details were provided about how this should be done)
- Improving awareness and education relating to online hate crime – it was noted that members of the public are often not clear about what constitutes an online hate crime, and what the process is for reporting it
- Considering whether there is scope for the Crown Office and Procurator Fiscal Service (COPFS) to take a more robust approach in relation to offences falling within Category 4 of their guidance¹⁴
- Undertaking research to learn more about disabled people’s experiences of online hate crime – in particular, there should be an equivalent response to hate directed at disabled people in person and online
- Considering the possibility of requiring minors to have the approval of a parent, guardian or other responsible adult when opening an account online, and / or considering introducing more general controls on registering for online accounts to enable the owners / users to be identified.

¹⁴ Category 4, referred to in the technical consultation paper, refers to communications which cannot be categorised strictly as hate crime, but which 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.

Other issues raised in relation to online hate crime

6.39 Some individual respondents offered comments that were not directly related to the question asked, but were of a more general nature. This group generally thought that existing legislation was sufficient to deal with any online hate that led to criminal behaviour, and that hate crime should be dealt with in the same manner regardless of whether it is expressed verbally, or through paper or online media. Some expressed concerns that if additional legislation were created to deal with online hate, this could have an impact on free speech.

Gaps in existing legislation regarding online activity (Q18)

6.40 Question 18 asked respondents whether there were any specific forms of online activity that should be criminal but which are not covered by existing law.

Question 18a: Are there specific forms of online activity which should be criminal but are not covered by the existing legislation? [Yes / No / Don't know]

Question 18b: Please give reasons for your answer.

6.41 Altogether 122 respondents answered Question 18a. Table 6.4 shows that a quarter of all respondents (27%) answered 'yes' to this question, while 53% said 'don't know'. However, among organisational respondents, half (50%) answered 'yes'.

Table 6.4: Question 18 – Are there specific forms of online activity which should be criminal but are not covered by the existing law?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	12	50%	21	21%	33	27%
No	3	13%	21	21%	24	20%
Don't know	9	38%	56	57%	65	53%
Total	24	100%	98	100%	122	100%

* Percentages may not total 100% due to rounding.

6.42 Altogether, 49 respondents (19 organisations and 30 individuals) offered further comments. This included five individuals and two organisations who answered 'no' to Question 18a. The five individuals made a range of disparate comments which suggested that they thought existing legislation was satisfactory, while the two organisations made more general comments about: (i) the overall coverage of legislation relating to online offences, and whether this coverage was satisfactory; and (ii) the need for better information and guidance from social media companies about how to report offensive content. The latter respondent was particularly concerned about how users of British Sign Language (BSL) can report offensive content (including content posted in BSL).

6.43 Those answering 'yes' to Question 18a suggested a range of activity which they believed was not covered by existing law, and which they thought should be considered as criminal, including: online bullying and harassment (also 'crowd sourced harassment'); online misogyny and incitement of misogyny; inciting self-harm or suicide; enabling pornography to be viewed by children; and the publication of 'fake news'. There was also a

suggestion that there was a need to address hate expressed through text, chat and voice on gaming platforms and gaming sites.

6.44 Some respondents in this group also thought that existing legislation was ineffective or too lenient in prosecuting online pornography and paedophilia; race-related harassment and hostility; harassment and hostility towards other groups with protected characteristics; impersonating another person online; posting photographs of a person or personal information about them without their consent and using these to harass, demean or degrade the individual; and threats to an individual's life, family or home.

6.45 A few respondents also offered specific suggestions:

- It should not be possible for children and young people to be able to freely access racially offensive material or pornography. At present, access to offensive sites or material can be blocked through the installation of complicated and ineffective barriers / filters (users can essentially 'opt out' of certain types of content). However, access should be through 'opting in'. Therefore, all computers, phones and tablets should have an inbuilt effective filter system which an individual user must choose to override.
- A new law relating to online offences should be developed to deal with four types of harm caused by online hate:
 - Harm caused to an individual when the harassment they experience takes place online but in a private form (for example, through emails or text messages). This may take the form of alarm or distress.
 - Harm caused to an individual when hate is communicated on social media or another public forum. As well as harassment, alarm or distress, a victim may suffer reputational harm (which may result in broken relationships, and harm to career and their ability to maintain a presence on the internet).
 - Harm caused by speech that is not directed at any one person in particular, but involves generalised hateful comments which 'poison the atmosphere' and demonise particular groups of individuals who share a protected characteristic.
 - The potential radicalisation of individuals or the entrenching of global hate movements.
- According to guidance from COPFS (cited in the technical consultation paper), hate speech targeted at an individual is not considered to be an offence in current law.¹⁵ It was suggested that this made it difficult to obtain a clear picture of an offender's behaviour or to assess the impact of hate speech on health and wellbeing.

¹⁵ See pages 39 and 40 of the technical consultation paper. The guidance sets out four categories of online communications which may give rise to criminal activity. Hate speech targeted at an individual appears not to be covered by any of the four categories.

Target for prosecution in relation to online hate crime (Q19)

6.46 The consultation paper asked respondents for their views about whether online hate crime should be tackled through the prosecution of individuals or the regulation of social media companies or a combination of the two. This was posed in the consultation questionnaire as a yes / no question, followed by a request to respondents to give reasons for their answer.

Question 19a: Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two? [Yes / No / Don't know]

Question 19b: Please give reasons for your answer.

6.47 As this question offered respondents three choices, it is unclear what a 'yes' or 'no' response would mean in this context. Several respondents pointed out that they were unable to answer the first part of the question for this reason, and so they left the question blank. Table 6.5 is therefore based on an analysis of respondents' written comments.

6.48 Altogether, 74 respondents (25 organisations and 49 individuals) made comments at Question 19. In addition, a further 32 respondents (1 organisation and 31 individuals) answered 'don't know' to the first part of the question.¹⁶ Table 6.5 shows most organisations (73%) and around a third of individuals (34%) were in favour of tackling online hate crime through a combination of the prosecution of individuals and regulation of social media companies. The largest proportion of individuals (39%) answered 'don't know' to this question.

Table 6.5: Question 19 – Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Prosecution of individuals	2	8%	3	4%	5	5%
Regulation of social media companies	1	4%	8	10%	9	8%
Combination of the two	19	73%	27	34%	46	43%
Neither	–	0%	6	8%	6	6%
Don't know	1	4%	31	39%	32	30%
Other comment	3	12%	5	6%	8	8%
Total	26	100%	80	100%	106	100%

* Percentages may not total 100% due to rounding.

6.49 There were a few lengthy and detailed responses to this question from experts on this topic. The discussion here includes only the key points from these responses.

¹⁶ Forty-two (42) respondents answered the first part of the question but made no comments. Of these, 5 said 'yes', 5 said 'no' and 32 said 'don't know'. Only those who answered 'don't know' to this question are included in Table 6.5.

Views in favour of a combined approach

6.50 Respondents who were in favour of a combined approach (through prosecution of individuals and regulation of social media companies) thought that individuals who post offensive, defamatory and hateful material should be prosecuted and pay the penalty for their behaviour. However, they also suggested that the prosecution of individuals alone will not be able to address the problem, and that the aim of legislation should be not only to punish individuals who commit online hate offences, but also to discourage them and others from behaving in an offensive way. The latter cannot be achieved without robust regulation of social media companies.

6.51 This group thought that social media companies should be expected to take greater responsibility and to have greater accountability for monitoring and moderating their sites. Respondents argued that such companies are publishers of content and should be subject to the same laws and regulations as any other publisher. They also argued that the major social media companies are reasonably well equipped to tackle these issues through appropriate allocation of resources and policy enforcement.

6.52 This group made a range of suggestions about what 'regulation' of social media might look like, including:

- Fines for social media companies that fail to respond to users who are known to be spreading hate on their sites
- Clearer and more robust reporting mechanisms for flagging up hate content on social media platforms, together with a requirement that such posts are also referred to the police
- Ensuring that users of social media accounts are required to provide proof of identity
- Filtering content generated from outside Scotland for hate crime.

6.53 At the same time, there was also a view that, while a combined approach may be necessary and desirable in principle, it was unclear (i) whether the regulation of social media platforms could be enforced, and (ii) the extent to which potential prosecutions could be actionable. As discussed above in relation to Question 17, respondents highlighted the difficulties of obtaining the necessary evidence for a criminal prosecution, and suggested that the scope of the problem was too great to be dealt with solely by the Scottish criminal justice system. The point was also made that the prosecution of individuals and the regulation of social media are very different, and tackling online hate through these different mechanisms would not necessarily address the same harms, or the seriousness of the harm suffered.

6.54 There was a view within this group that third party intermediaries could have a role in the regulation of online hate. However, if such an approach could be developed, it would be important that: (i) this is not at the expense of pursuing individual perpetrators; and (ii) the activities of the third party intermediaries are monitored to ensure that they are neither under- nor over-zealous in their removal of offensive content (to protect freedom of speech).

Views in favour of other types of approaches

6.55 Some respondents did not think that the regulation of social media companies was practically possible. The point was made that ‘companies and online applications start up and evolve every day globally, and regulating this would be unmanageable’. Some within this group argued that the focus should be on individual responsibility (‘if a person sends an email inciting violence, it would be unfair to prosecute the internet service provider’), and that this should be addressed within a context of restorative justice.

6.56 Others expressed concern about the proposal to regulate social media companies. Two points were made:

- Any attempt to regulate social media should bear in mind that other jurisdictions may view this as a precedent to justify developing their own regulations which would not be acceptable to people in Scotland.
- The regulation of social media could be viewed as an infringement on human rights and free speech.

6.57 Some respondents suggested expanding efforts to educate the public about the impact of this type of behaviour. It was noted that, in fact, many users of social media sites are very proactive in ‘policing’ their own communities, and will often report offensive comments or activity. By working alongside social media companies, and demonstrating how harmful online hate can be to their ‘communities’, it is possible to have offensive posts removed quickly.

6.58 A few respondents were not in favour of an approach that involved prosecuting individuals. These respondents argued that the prosecution of individuals involved in online hate speech or hate crime is impractical (‘it would take several generations of lawyers to prosecute all those involved’ in such behaviour), nor was it desirable to criminalise large numbers of individuals. These respondents thought that an approach involving the regulation of social media would be more productive. It was suggested that if legislation could focus on charging social media companies with ‘complicity in the offence’, the companies might be more willing to allocate the necessary resources for developing better automated systems to identify and get rid of offensive material quickly.

6.59 There was also a suggestion that any individuals caught stirring up hatred or using demeaning or derogatory language online should, in the first instance, receive a warning from the social media company. Only if that warning is not heeded should the individual be prosecuted.

Views in favour of neither approach

6.60 A few respondents (all individuals) thought that online hate crime should not be tackled **either** through prosecution of individuals **or** through regulation of social media. This group were primarily concerned about the potential adverse impacts of such actions on freedom of speech. The point was made that social media companies should never be regulated because people cannot agree on what is and is not hate speech. Others described the proposal as ‘tyrannical’ or ‘paternalistic’. Among this group, there was a suggestion that it would be preferable for social media companies to police their own sites, but that a requirement to protect freedom of speech should be imposed upon them.

7. Offensive behaviour at football (Q20 – Q27)

7.1 Chapter 7 of the consultation paper focused on the issue of offensive behaviour in the context of football matches. The chapter discussed the purpose of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (hereafter referred to as ‘the 2012 Act’), which came into force on 1 March 2012. Section 1 of the Act creates the offence of ‘offensive behaviour at regulated football matches’. The offence also applies to problems of disorder outside and en route to or from football stadia (e.g. on public transport and in the street) and in pubs and other venues where matches are televised.

7.2 The consultation questionnaire contained eight questions¹⁷ focusing on five issues:

- The type of conduct prosecuted under section 1 of the Act (Qs 20, 21 and 22)
- The application of section 1 to conduct outwith Scotland (Qs 23 and 24)
- The implications of the case *MacDonald (PF Dingwall) v Cairns* 2013 SCCR 422 (Q25)
- The extent to which conduct subject to prosecution under section 1 of the Act is covered by pre-existing common law or other legislation (Q26)
- The use of football banning orders by football clubs (Q27)

7.3 Compared to other sections of the consultation paper, the response rates for these questions were relatively low. Only between 15% and 19% of respondents answered any of the tick-box questions in this section, and between 5% and 16% of respondents answered any of the open questions.

7.4 The low response rate may be related to the ongoing work of the Scottish Parliament Justice Committee concerning the possible repeal of the 2012 Act.¹⁸ The Justice Committee issued a call for written evidence, with a closing date for submissions of 18 August 2017 – just a fortnight before the Independent Review of Hate Crime Legislation issued its consultation paper. Therefore, it is possible that some respondents, having given their views to the Justice Committee, did not feel it was necessary to submit a separate response to the review. Indeed, a few respondents simply provided a reference to their submission to the Justice Committee as their response to the review.

7.5 It is worth reiterating (as stated in the consultation paper) that the review will take into account any evidence submitted to the Justice Committee in the formulation of its final recommendations. However, in relation to the analysis below, only responses submitted directly to the review consultation are included – with one exception.

7.6 The response to the consultation from the Crown Office and Procurator Fiscal Service (COPFS) contained a reply to only one of the eight questions in this section. In lieu of responding to the other seven questions, COPFS attached a list of references with web links to previous statements made by them or evidence provided by them for other consultations or investigations.¹⁹ It was not, therefore, always straightforward to identify

¹⁷ Note that Questions 25 and 26 were included in the technical consultation paper only.

¹⁸ James Kelly MSP introduced a member’s Bill to the Scottish Parliament on 21 June 2017 to repeal the 2012 Act.

¹⁹ The list included: the Lord Advocate’s guidelines on the 2012 Act, annual statistics published by the Scottish Government in relation to the 2012 Act, and a report of the evaluation of the 2012 Act. It also included the Lord

their views on the individual consultation questions. However, given the unique perspective that COPFS has in relation to the operation of the 2012 Act, for the purposes of the analysis presented here, a decision was taken to examine two of the external documents cited in their response: (i) their written submission to the Justice Committee, dated 25 August 2017 (this includes a copy of a letter from the Head of Policy at COPFS, to James Kelly MSP in response to the consultation entitled ‘Proposed Football Act (Repeal) (Scotland) Bill’ dated 21 October 2016)²⁰ and (ii) the oral evidence presented by COPFS to the Justice Committee on 3 October 2017.²¹

7.7 The analysis of responses to Questions 20–27 is discussed below. Note that, because of the role that COPFS and Police Scotland have in the implementation / enforcement of the 2012 Act, where these two organisations raise issues not otherwise addressed in the responses, this is highlighted.

Clarity of 2012 Act (Q20)

7.8 The consultation paper noted that those who support repeal of the 2012 Act say that it is ‘illiberal, confusing and unclear’. It also pointed out that there may be some uncertainty among football fans about what is, and is not, acceptable behaviour in the context of football matches, and who decides what forms of behaviour are acceptable.

7.9 Question 20 was an open question (i.e. there was no tick-box) which sought views about the clarity of the 2012 Act, and in particular its clarity about which actions might constitute a criminal offence in the context of a regulated football match.

Question 20: How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?

7.10 Altogether, 70 respondents (31 organisations and 39 individuals) addressed this question and there was disagreement among them about whether the 2012 Act is clear about what actions might constitute a criminal offence in the context of a regulated football match. The most common view, both among individuals and organisations, was that the 2012 Act is **not** clear. Around three-fifths of individuals and around two-fifths of organisations expressed this view, compared with around a quarter of individuals and less than a fifth of organisations who thought the Act **is** clear. Note that approximately two-fifths of organisational respondents did not directly answer the question, but rather raised relevant issues for consideration by the review, or they expressed concerns that the 2012 Act may be perceived by **other** people (football fans, in particular) to be unclear.

Advocate’s and COPFS input to the original Bill proceedings, the response from COPFS to James Kelly’s consultation in October 2016, and their evidence submitted to the Justice Committee.

²⁰ Written Submission from COPFS on the Offensive Behaviour at Football Act and Threatening Communications (Scotland) Act 2012 dated 25 August 2017: http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR216-COPFS.pdf.

²¹ Evidence provided by the Head of Policy at COPFS to the Justice Committee, 3 October 2017: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11130>

Views on the clarity of the Act

7.11 Among those who commented on the clarity of the Act, views ranged from ‘I think it is quite clear’ on the one hand, to ‘it is completely unclear’ on the other.

7.12 While some respondents simply stated that it is ‘clear enough’ or ‘not very clear’ without further comment, others provided further information about why they believed it was clear; alternatively, they suggested specific aspects of the 2012 Act which they considered to be unclear.

7.13 Among those who thought the 2012 Act was clear (including COPFS and Police Scotland), several points were made:

- The Act sets out a two-part legal test in section 1(1), which must be met before an offence is deemed to have been committed. First, the behaviour must be one of five types set out in section 1(2). Second, the behaviour must also incite, or be likely to incite, public disorder. Both elements in this test must be satisfied before any prosecution can be commenced.
- The Act provides a clear definition of the **classes** of behaviour which would constitute an offence under section 1. It does not provide detailed examples of how this behaviour might be manifested in a real life situation. This approach is similar to that taken in legislation such as the Criminal Justice and Licensing (Scotland) Act 2010, section 38, which provides a broad framework for the offence of ‘threatening or abusive behaviour’ without specifying precisely what such behaviour entails.
- The Lord Advocate’s guidelines on the 2012 Act provide more detail on the type of behaviour to which the Act is likely to apply – although, again, it does not provide a definitive list of every kind of behaviour which could constitute an offence under section 1.

7.14 In contrast, other respondents thought that the following aspects of the Act were not clear (or not clear enough):

- **The specific behaviours defined as offences by the Act:** Some respondents thought that the offences created by the 2012 Act were unclear and ‘arbitrary’, and that the essential criminal behaviour had not been adequately defined. Specifically, some felt that the language used in section 1(2)(e) of the Act (‘other behaviour that a reasonable person would be likely to consider offensive’) was subjective, and they claimed that this had resulted in difficulties for enforcement, since what is ‘offensive’ to any particular individual is highly situational and subjective. A separate point was also made that it can be difficult to distinguish between stirring up hatred on religious and other grounds, which section 1(2)(a) to (c) prohibits, and expressing ‘antipathy, dislike, ridicule, insult or abuse’ towards religions and their practices, which section 7 allows.
- **The application of the Act during the journey to and from matches:** These provisions in the 2012 Act were seen to be ambiguous and potentially open to misinterpretation, particularly where overnight stays were involved. Respondents also noted the possibility that individuals could be prosecuted under section 1 of the Act, whether or not they actually attended or intended to be at the match.

7.15 Some within this group suggested that the number of appeals which had arisen following prosecutions under section 1 may be an indication that the legislation is not clear. On the other hand, it was also noted that, in relation to one such appeal (the case of *William Donnelly and Martin Walsh vs Procurator Fiscal, Edinburgh (2015) HCJAC 35*), the Appeal Court firmly rejected the argument by the appellants that the Act was unclear and did not meet the required standards set out in article 7 of the ECHR.²²

7.16 As noted in paragraph 7.14 above (first point), some respondents argued the 'reasonable person test' in section 1(2)(e) of the Act was 'subjective'. However, a counter-argument to this was that, in fact, this is an objective test, which involves an assessment by a judge or jury as to whether a reasonable person would be likely to find the behaviour offensive. It was also noted that this same test is used in other areas of law, including section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

7.17 Many of those who thought the Act was unclear called for it to be repealed while others simply thought that the lack of clarity needed to be addressed. Finally, regardless of whether respondents thought that the 2012 Act was clear or not, they often expressed the view that there should nevertheless be legislation which made it an offence to incite public disorder or to behave in a bigoted and / or threatening manner, and that anti-social behaviour among football fans needed to be tackled within this wider, more generic legislation. Several organisational respondents were concerned that the 2012 Act should not be repealed before sufficient other legislative provision was put in place.

Other relevant views

7.18 Respondents who did not comment specifically about the clarity of the 2012 Act made a range of other relevant points, and these points were frequently repeated in response to other questions in this chapter:

- **They disagreed with the principle of singling out anti-social behaviour related to football.** There were several slightly different variations on this theme; however, the main arguments were that it was inappropriate to target one group of sports fans for special treatment in law, and that any laws that apply to football matches should be applied consistently across society.
- **They argued that the legislation had not been effective in addressing offensive behaviour at football matches.** Respondents suggested that the 2012 Act has been widely flouted by football fans – for example, there was a report of fans holding their hands in front of their mouths while singing certain songs to avoid being identified as singing on CCTV, and a suggestion that the singing of certain songs had increased as fans see this as an act of defiance. It was suggested that this had led to practical problems in enforcing the law – since it is simply not possible to arrest thousands of football fans. One respondent highlighted the very low number of prosecutions under the Act for anti-LGBTI behaviour, and argued that this also was an indication that the Act is not being implemented effectively.

²² Article 7 of the ECHR prohibits criminal convictions and sentencing without legal basis. In addition, it contains the principle that criminal laws have to be sufficiently clear and precise so as to enable individuals to ascertain which conduct constitutes a criminal offence and to foresee what the consequences of transgressions will be.

- **They considered that football-specific legislation was unnecessary.** Some respondents believed that the issues which the 2012 Act was intended to address are already dealt with elsewhere in Scots law. Note, however, this view was not universally held. (These views are discussed further in relation to Question 26 below.)
- **They considered that the 2012 had the potential to adversely impinge on human rights.** These included the right to freedom of expression. Those who held this view thought that the 2012 Act had criminalised behaviour such as singing offensive songs or distributing literature which others may find offensive but which do not encourage violence.

7.19 A few respondents offered suggestions for alternative approaches. For example:

- The 2012 Act should be repealed and a more generic offence (possibly related to bigoted behaviour) should be enacted – which would also apply in a football context – and in relation to other offences as an aggravation.
- A restorative justice approach (rather than a punitive approach) should be used in dealing with offenders as this is likely to be the best way of bringing about changes in attitudes and behaviours.
- A non-legislative approach would be more effective – whereby football clubs take responsibility for sanctioning their own fans (including through the cancellation of matches, the revoking of season tickets, and banning orders).

Sectarian singing, waving banners, making gestures (Q21)

7.20 The consultation paper explained that there were three categories of behaviour which have consistently given rise to offences under section 1 of the 2012 Act since its introduction: (i) threatening behaviour; (ii) behaviour which expresses hatred of various groups, stirs up hatred or is motivated by hatred; and (iii) other offensive behaviour. The first category of offences does not fall within the remit of the review. Most of the remaining charges have related to conduct of a sectarian nature (i.e. singing, speech, the waving of banners and making of gestures in support of proscribed terrorist organisations such as the IRA or the UVF). Such behaviour may fall either within category (ii) or (iii).

7.21 The consultation sought views about whether this type of behaviour should be the subject of the criminal law, and if so, what kind of behaviour should be criminalised.

Question 21a: Should sectarian singing and speech and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all? [Yes / No / Don't know]

Question 21b: If so, what kind of behaviour should be criminalised?

7.22 The easy read consultation paper included a corresponding question as follows:

Question ER7a: Do you think that the singing songs like that [described in the consultation paper] or waving offensive banners or making gestures should be a criminal offence? [Yes / No]

Question ER7b: If so, what kind of behaviour should be criminalised?

7.23 Altogether, 98 respondents answered either Question 21a or Question ER7a – 83 respondents answered Question 21a, and 15 respondents answered Question ER7a.

7.24 Table 7.1 shows that, among those who answered Question 21a, there was disagreement about whether sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at football matches should be the subject of criminal law. Organisations were more likely to say ‘yes’ (74%) while individuals were divided in their views (35% said ‘yes’, 42% said ‘no’ and 23% said ‘don’t know’).

Table 7.1: Question 21a – Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	14	74%	22	35%	36	43%
No	2	11%	27	42%	29	35%
Don't know	3	16%	15	23%	18	22%
Total	19	100%	64	100%	83	100%

* Percentages may not total 100% due to rounding.

7.25 There were also differences of opinion among those who answered Question ER7a (3 organisations and 12 individuals): nine said ‘yes’, five said ‘no’ and one answered both ‘yes’ and ‘no’. All of the organisations responding to this question answered ‘yes’.

7.26 Sixty-three respondents (23 organisations and 40 individuals) provided further comments at Question 21b, and a further 10 respondents (4 organisations and 6 individuals) commented at Question ER7b. Those who commented included some respondents who did not answer the first part of the question, and some (mostly individuals) who answered ‘no’ or ‘don’t know’ to the first part of the question. The views of all respondents are discussed below.

The types of behaviour that should be criminalised

7.27 Those who answered ‘yes’ to these questions offered views about the types of behaviour that should be criminalised. These ranged from the very general (e.g. ‘all forms of abusive behaviour’ or ‘behaviour of a sectarian nature’) to the very specific (e.g. ‘the singing of songs such as the Famine Song, the Billy Boys, Glasgow Celtic IRA, etc.’ or ‘expressing or stirring up hatred on the grounds of the five hate crime protected characteristics’). At the same time, there was also a suggestion that care must be taken in banning singing, as many of the songs sung by football fans are ‘not obviously sectarian’.

7.28 The response from Police Scotland’s Football Co-ordination Unit for Scotland (FoCUS) highlighted that the overwhelming majority of investigations related to offensive behaviour at football (as noted above in paragraph 7.20) have centred on three broad

categories of behaviour: (i) behaviour which is threatening (often pre-planned disorder); (ii) behaviour motivated by hatred; and (iii) behaviour which supports terrorism, terrorist groups or terrorists. It was noted that in any context, the police would seek to take action in relation to such behaviour.

7.29 However, in general, respondents were more likely to discuss their reasons for being in favour of, or opposed to, criminalisation of the behaviours described in the consultation paper, rather than the types of behaviour they thought should be criminalised.

Views in favour of criminalisation

7.30 Some respondents thought that sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature unequivocally **should** be the subject of criminal law. Among this group, the following points were made:

- Such behaviour is an expression of hate and prejudice, deliberately intended to stir up hatred and provoke a violent response from opposing fans.
- Such behaviour should not be tolerated ‘as it has destroyed communities’, ‘perpetuates a religious divide in Scotland’ and causes its victims distress and ‘severe and life changing fear of others’.
- Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the common law offence of breach of the peace already criminalises behaviour which is abusive or threatening as well as behaviour which causes alarm to ordinary people and threatens disturbance to a community – any behaviour which meets these tests should be subject to criminal law.

7.31 A few respondents who answered ‘yes’ to this question also noted caveats to their response: for example, ‘whether the waving of banners should be the subject of the criminal law would depend on the banner message’, and ‘careful consideration needs to be given to the appropriate boundary / threshold of the offence’.

7.32 Some respondents in this group highlighted the role of football clubs in policing and sanctioning such behaviour, and there were differences of opinion on this issue. Some thought that clubs should have the primary role, and that any offensive behaviour among fans should result in fines or sanctions on clubs – which could be passed on to supporters through cancelled matches or increased ticket prices. However, the more common view among this group was that such acts were too serious to be considered solely as internal matters for football clubs.

Views opposed to criminalisation

7.33 Among those who did **not** think that sectarian behaviour should be criminalised, the following points were made:

- Although this behaviour is not acceptable by most people’s standards, it should be tolerated so long as it does not cross the line into violence (which would include throwing missiles, bottles or coins). This type of behaviour comes from a long-standing ethnic tradition (‘it is implicitly part of the culture and ethos’). ‘Nobody gets hurt and it can be good natured’.

- Sport and competition involves ‘passion’, and passion can cause division, but this is not the same as ‘hatred’.
- People should learn to cope with other people trying to offend them because it is a fact of life.
- ‘Sectarian’ behaviour is far too wide a concept to legislate against, and cannot be legislated against without restricting freedom of speech. The focus of legislation should be on conduct which would be classified as a religious hate crime.

7.34 These respondents were more likely than others to say that such behaviour should be dealt with by football clubs and football authorities.

Other issues raised in relation to Question 21

7.35 Other related views expressed by respondents, included that:

- It may be difficult to recognise or explain what a gesture of a sectarian nature is for the purposes of a criminal prosecution.
- While some people have argued that the 2012 Act unfairly targets football fans, it was pointed out that the Act does not specifically require the perpetrator to be a football fan; rather it requires the behaviour to have occurred in relation to a ‘regulated football match’; thus illustrating the point that it is the perpetrator’s behaviour that results in police action, not their status as a football fan.

7.36 Finally, a view expressed by both groups was that if such behaviour is treated as criminal in any other context, it should be treated as criminal in the context of a football match too; and likewise, if such behaviour is considered to be criminal at a football match, it should be classed as an offence in other situations too.

Sectarian behaviour in a non-football context (Q22)

7.37 The consultation sought views about whether sectarian behaviour existed outside a football-related context, and if so whether it should be subject to the same criminal law provisions. There were three parts to this question:

Question 22a: Does equivalent behaviour exist in a non-football context? [Yes / No / Don’t know]

Question 22b: If so, should it be subject to the same criminal law provisions? [Yes / No / Don’t know]

Question 22c: Please give reasons for your answer.

7.38 Table 7.2 shows that more than two-thirds of respondents (69%) thought that sectarian behaviour existed in non-football contexts. Nearly all organisations (91%) answered ‘yes’ to this question; among individuals, though, nearly one-third (30%) said they did not know.

Table 7.2: Question 22a – Does equivalent behaviour exist in a non-football context?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	20	91%	39	62%	59	69%
No	1	5%	5	8%	6	7%
Don't know	1	5%	19	30%	20	24%
Total	22	100%	63	100%	85	100%

* Percentages may not total 100% due to rounding.

7.39 Respondents pointed to ‘Orange and Republican Marches’ and other ‘parades’ as examples of situations where sectarian behaviour existed outside a football match. Others noted cases where they had witnessed individuals being attacked by a crowd for wearing certain football colours (outside the context of a football match). Different respondents suggested that such behaviour could also be seen in pubs, comedy clubs, at concerts and other social gatherings, on the street, and even in workplaces. However, in relation to sporting events, the general view was that such behaviour was peculiar to football (although it was noted that there is evidence of more general discrimination and negative treatment of certain groups, including LGBTI people, within other sporting contexts).

7.40 Table 7.3 shows that, of the 59 respondents who answered ‘yes’ to Question 22a, more than two-thirds thought that sectarian behaviour outside of a football context should be subject to the same criminal law provisions as it would be within a football context.

Table 7.3: Question 22b – If so, should it be subject to the same criminal law provisions?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	85%	22	60%	39	69%
No	1	5%	13	35%	14	25%
Don't know	2	10%	2	5%	4	7%
Total	20	100%	37	100%	57	100%

Note that the table contains data only for those respondents who replied ‘Yes’ to Question 22a.

* Percentages may not total 100% due to rounding.

7.41 Among those who answered ‘yes’ to this second question, respondents consistently argued that if ‘something is criminal in one context, it should be criminal in other contexts too’. It was also noted that the behaviour dealt with under the 2012 Act would most likely lead to action by the police in other contexts too. At the same time, some offered an alternative view that there may be good reasons for legislating specifically to address certain behaviours in a specific context, if that context requires specific kinds of action from the criminal justice system.

7.42 Table 7.3 above also shows that there were 14 respondents who answered ‘yes’ to Question 22a, who went on to answer ‘no’ at Question 22b. In other words, this group believed that sectarian behaviour existed in non-football contexts, but that it should **not** be subject to the same criminal law provisions. Among those who answered in this way, just nine respondents (all but one of whom were individuals) provided further comment, and not all the comments directly addressed the question. A few in this group saw such

behaviour as relatively minor (e.g. describing it as ‘90 minutes of letting off steam’, and ‘banter’). However, others thought that: (i) while such behaviour can be unpleasant and objectionable, it is not criminal; (ii) classing it as a form of hate crime is too extreme a response; (iii) such behaviour should be permitted, so long as public safety and security can be guaranteed. It is worth noting that 13 of these 14 respondents also answered ‘no’ to Question 21 above, indicating their opposition to criminalising sectarian behaviour at football matches.

Extra-territorial provisions of the 2012 Act (Q23)

7.43 The consultation paper stated that section 1 of the 2012 Act enables the prosecution in Scotland of an offence under section 1 committed outside Scotland by a person who normally lives in Scotland. This provision was used in a case in 2013 when a person was prosecuted for singing offensive songs at a football match in Berwick between Berwick Rangers and (Glasgow) Rangers. The consultation asked for views about whether this provision within the 2012 Act is beneficial. This was a closed question, and respondents were invited to give the reasons for their answers.

Question 23a: Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? [Yes / No / Don’t know]

Question 23b: Please give reasons for your answer.

7.44 A total of 86 respondents answered Question 23a. Table 7.4 shows that there was disagreement among respondents in relation to this question. Organisations were more likely to say ‘yes’ (74%), while individuals were divided in their views (33% said ‘yes’, 37% said ‘no’, 30% said ‘don’t know’).

Table 7.4: Question 23 – Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	74%	21	33%	38	44%
No	4	17%	23	37%	27	31%
Don't know	2	9%	19	30%	21	24%
Total	23	100%	63	100%	86	100%

* Percentages may not total 100% due to rounding.

7.45 Altogether, 56 respondents (23 organisations and 33 individuals) made comments at Question 23.

Views in support of extra-territorial provision of 2012 Act

7.46 Among those who considered the extra-territorial provision of the 2012 Act to be beneficial, respondents gave four main reasons:

- **It acts as a deterrent and promotes good behaviour among individual football fans:** Respondents noted that perpetrators of hate speech in Scotland

are likely to commit the same offence when travelling abroad. Having the ability to prosecute these individuals upon their return to Scotland would help to discourage bad behaviour and 'hooliganism'. Respondents focused on the 'message' that such a provision would send to football fans – i.e. 'that they must behave lawfully' and that 'criminal behaviour will not be ignored' while they are abroad. In addition, it was also thought that having the ability to address such behaviour in Scotland (for example through diversionary programmes, under the Scottish criminal justice system) would help reduce reoffending.

- **It helps to prevent reputational damage (to Scotland, or to Scottish football teams):** Some respondents thought that individuals from Scotland attending football matches in other countries 'represent Scotland as a nation when they travel', and that their behaviour has the potential to 'reflect on the whole nation'. Thus, there was concern about the impact on Scotland's reputation if Scottish fans behaved badly when travelling to football matches in other countries. Other respondents thought that if people from Scotland behaved badly at football matches outside the country, it would 'give the football teams a bad name'.
- **It communicates (to the rest of the world) Scotland's values and high standards:** Some respondents suggested that the extra-territorial provision in the 2012 Act 'sends out a message to the world' that Scotland takes hate crime seriously, that such behaviour is unacceptable among the people of Scotland, and that the Scottish Government is prepared to prosecute offences carried out by its residents regardless of where they are perpetrated.
- **It promotes the safety and security of football fans in other jurisdictions:** Those who offered this reason for their views suggested that section 1 of the 2012 Act enables the prosecution of individuals who behave in ways that are criminal in Scotland, but which are not criminal in the jurisdiction where the game takes place. There was concern that, without this provision, such games would become a focal point for bad behaviour, since it may be perceived that there will be no consequences.

7.47 Among those who answered 'yes' to Question 23, there were also some caveats expressed and / or requests for clarification. These tended to focus on how the extra-territorial provisions of section 1 would operate in relation to the jurisdiction of the country where the offence took place.

7.48 Other caveats were that such a provision is beneficial, but only 'if the evidence exists **and** it relates to hate crime that is directed to groups and individuals living in Scotland'. Finally, there was also a suggestion that any offences committed by Scottish football fans in other countries should be prosecuted under the law in the country where the offence took place, but that action should **also** be taken upon the individual's return to Scotland – not criminal prosecution, but rather being 'refused entry to future matches or temporary suspension of season tickets'.

Views opposed to extra-territorial provision of 2012 Act

7.49 Those who answered 'no' to Question 23 described such a provision as 'heavy handed', and thought that if an individual from Scotland committed a crime in another country, it should be the responsibility of that country to prosecute. Some in this group

supported action being taken by football clubs to ban supporters who misbehave abroad from all organised football matches in the future.

7.50 Additional points made by this group included that: (i) no individual should be prosecuted twice for the same offence (i.e. in the jurisdiction where the offence was committed and also in Scotland); (ii) the extra-territorial provision had been seldom used since the 2012 Act came into force, and therefore, there did not appear to be any benefit from it; (iii) football clubs may be punished by UEFA, FIFA or the SFA (Scottish Football Association) if their supporters misbehave; these penalties should be adequate to discourage poor behaviour among supporters without the need for legislation; and (iv) if a football supporter from Scotland breaks the law in another country, it may be the duty of UK authorities to cooperate with the countries in which the offences took place.

Other issues raised regarding extra-territorial prosecution of football-related offences

7.51 A few respondents focused on the practical and legal difficulties of prosecuting an individual from Scotland for behaviour which took place outside of Scotland. The resource implications for the police and the Scottish legal profession were noted, as well as the potential challenges in gathering the necessary evidence (including corroboration and identification) to be able to prosecute such offences within the Scottish courts.

7.52 There was also a suggestion that the extra-territorial provision of the 2012 Act may be rendered *ultra vires* by section 54 of the Scotland Act 1998. However, written evidence from COPFS to the Scottish Parliament Justice Committee (25 August 2017) refers to the Sheriff's judgement in the case *Procurator Fiscal, Glasgow v Jordan Robertson* that the extraterritorial power in the Act is **not** outside the legislative competence of the Scottish Parliament and is not contrary to the Scotland Act 1998.

7.53 In addition, oral evidence given by COPFS to the Scottish Parliament Justice Committee (3 October 2017) highlighted that the extra-territorial provisions of the 2012 Act have been used in relation to football-related offences since the law was enacted, and that without these provisions, it would not otherwise be possible to prosecute in Scotland hate crimes committed by Scottish residents in the context of football matches taking place outside of Scotland.

7.54 A few respondents also pointed to other legislation which enables a person from Scotland to be prosecuted for behaviour committed outside of Scotland. This includes section 54 of the Sexual Offences (Scotland) Act 2009 (incitement to commit certain sexual acts outside the United Kingdom) and legislation on forced marriage and female genital mutilation which address crimes committed overseas by individuals normally resident in Scotland.

Extra-territorial provisions for non-football related hate crime (Q24)

7.55 Following the discussion about the extra-territorial provision in the 2012 Act in relation to football, the consultation invited views about whether a similar provision should apply to non-football related hate crime – that is, whether a person normally resident in Scotland should be able to be prosecuted within Scotland for non-football related hate crime committed while outside of Scotland.

Question 24a: Should a similar provision apply to non-football related hate crime?
[Yes / No / Don't know]

Question 24b: Please give reasons for your answer.

7.56 Table 7.5 below shows that the pattern of responses for this question was similar to that for Question 23 above. There was disagreement among respondents in relation to this question. Organisations were, though, more likely to say 'yes' (89%), while individuals were divided in their views (32% said 'yes', 39% said 'no', 29% said 'don't know').

Table 7.5: Question 24 – Should a similar provision apply to non-football related hate crime?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	89%	19	32%	36	46%
No	1	5%	23	39%	24	30%
Don't know	1	5%	17	29%	18	23%
Total	19	100%	59	100%	78	100%

* Percentages may not total 100% due to rounding.

7.57 Altogether, 42 respondents (20 organisations and 22 individuals) made comments at Question 24, and many of the arguments discussed in relation to Question 23 were used again. Indeed it was common for respondents to refer back to their responses at Question 23.

Views in support of prosecution of extra-territorial hate crime offences committed by individuals from Scotland

7.58 Among those who answered 'yes' to Question 24, an additional reason given was that there should be 'consistency' and 'fairness', and it was 'wrong' to separate out football-related hate crime as a special category. Respondents repeatedly expressed the view that all hate crime was the same and should be punishable, whether it takes place at a football match or in some other context.

Views opposed to prosecution of extra-territorial hate crime offences committed by individuals from Scotland

7.59 Among those who answered 'no' to Question 24, only nine respondents made further comments. In a few cases, the meaning of these comments was not clear. (It is possible that these individuals may not have understood that this question was asking about the prosecution of hate crime committed by people from Scotland **in other countries**). However, among those who specifically referred to the prosecution of offences committed overseas, the general view was that such offences should be prosecuted by the justice system of the country in which they occurred. Some respondents in this group also questioned whether the detailed evidence required to substantiate such a charge could fairly be brought to court in a country where the offence did not take place.

Other issues raised in relation to prosecution of extra-territorial hate crime offences committed by individuals from Scotland

7.60 A few respondents suggested that there could be benefit in having an extra-territorial provision for online hate offences, so that those who live outside Scotland and who target online hate at people living in Scotland would be seen as committing an offence in Scots law (and could potentially be prosecuted, for example if they travelled to Scotland).

7.61 This was a subject also addressed in COPFS oral evidence to the Scottish Parliament Justice Committee. Speaking about section 6 of the 2012 Act, COPFS Head of Policy stated that the Act had provided three main advantages over other existing legislation in addressing incidents of online hate crime: (i) the 2012 Act had greater applicability than other legislation to the variety of ways in which electronic communications can be used by persons engaged in offensive and threatening behaviour; (ii) the 2012 Act provides for greater sentencing powers than other legislation; and (iii) the extra-territorial provisions of the 2012 Act allow prosecutors to address offending by Scottish residents when they are abroad and have targeted offensive communications at a Scottish audience.

7.62 As with Question 23 above, a few respondents highlighted the potential for practical and legal difficulties in conducting investigations, and gathering and presenting sufficient evidence to successfully prosecute offences carried out in other countries, and questioned how this might work in practice.

Implications of *MacDonald (PF Dingwall) v Cairns 2013* (Q25)

7.63 The technical consultation paper discussed the application of section 1 of the 2012 Act²³ to the case *MacDonald (PF Dingwall) v Cairns 2013* and its implications for future prosecutions.

7.64 Subsections 1(1) and 1(2) of the 2012 Act set out a two-part legal test which must be met in order for behaviour to be considered an offence within the context of a regulated football match. First, the behaviour must be one of five types, described at subsection 1(2); and second, the behaviour must be (i) likely to incite public disorder, or (ii) would be likely to incite public disorder under certain conditions, described at 1(5). Among the five types of behaviour described at 1(2) is 'other behaviour that a reasonable person would be likely to consider offensive' (subsection 1(2)(e)). Subsection 1(5) states that behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that (a) measures are in place to prevent public disorder, or (b) persons likely to be incited to public disorder are not present, or are not present in sufficient numbers.

7.65 A summary of the key issues relating to the *Cairns* case are set out in the technical consultation paper.²⁴ It was suggested that the effect of the decision in the *Cairns* case is that, if it can be proved that behaviour would be considered offensive by the 'reasonable person', the likelihood of that behaviour inciting public disorder follows almost naturally.

²³ Specifically, subsections 1(1)(b), 1(2)(e) and 1(5)

²⁴ See page 52, https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/user_uploads/final-paper-1.pdf

7.66 Furthermore, the consultation paper noted that, in the views of some members of the legal profession, the consequence of this decision is that section 1 may be seen as a public disorder offence which could apply in circumstances where there was no real likelihood of public disorder occurring. Thus, the offence is easier to prove in court than was originally envisaged; furthermore, it is easier to prove than a charge of breach of the peace under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

7.67 As part of the review of section 1 of the 2012 Act, the consultation asked whether it should be a requirement that behaviour is likely to incite public disorder, or would be likely to incite public disorder, in order for that behaviour to be considered a criminal offence.

Question 25a: Is it appropriate to have a requirement that behaviour is or would be likely to incite public disorder in order for it to amount to a criminal offence? [Yes / No / Don't know]

Question 25b: Please give reasons for your answer.

7.68 A total of 75 respondents answered Question 25. Table 7.6 shows that respondents were divided in their views about whether there should be a requirement that behaviour is likely to, or would be likely to incite public disorder in order for it to amount to a criminal offence. However, the largest proportion of respondents (39%) answered 'yes'.

Table 7.6: Question 25 – Is it appropriate to have a requirement that behaviour is or would be likely to incite public disorder in order for it to amount to a criminal offence?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	7	37%	22	40%	29	39%
No	8	42%	15	27%	23	31%
Don't know	4	21%	19	34%	23	31%
Total	19	100%	56	100%	75	100%

* Percentages may not total 100% due to rounding.

7.69 Altogether, 43 respondents (21 organisations and 22 individuals) made further comments at Question 25.

7.70 Comments from some individual respondents were unclear and did not address the question. This may be because these individuals had not read the technical consultation paper prior to attempting to answer the question. The comments of other (mainly organisational) respondents raised a diverse and complex set of issues.

7.71 Before considering these comments below, it is worth noting that the response from COPFS to the consultation (written submission to the Justice Committee, 25 August 2017) states that:

'Both elements of the two-part test (see again paragraph 7.64 above) must be satisfied before any prosecution can be commenced. A charge cannot be pursued on the basis that there is behaviour which would be offensive

to a reasonable person unless that behaviour is also likely to, or would be likely to, incite public disorder.'

7.72 This statement indicates that, as far as COPFS is concerned, the public disorder test must be met in all cases in order for a criminal charge to be brought under section 1 of the 2012 Act.

Views supporting a public disorder test for a criminal offence

7.73 Among those who indicated support for a public disorder test for a criminal offence, comments generally focused on the specific context of the 2012 Act; that is, respondents did not suggest that a public disorder test must be met for **all** criminal offences, or even all **hate-related** offences. Instead, they discussed the requirement for a public disorder test in section 1 of the 2012 Act. This group made a range of comments suggesting that:

- It was the intention of Parliament in drafting the 2012 Act that this legislation be seen as addressing public disorder.
- The way in which section 1 is structured also indicates that this was the intention.
- In a football context, it is reasonable that the likelihood of causing disorder should be the main factor in determining criminality, since the safety and security of those attending matches is the primary concern of the authorities.

7.74 It was pointed out that there are provisions in other existing legislation which consider the effect of a perpetrator's actions on the victim, or the intention behind those actions.²⁵ The public disorder test distinguishes offences charged under the 2012 Act from these other offences. Moreover, it was thought that without the public disorder test, certain other aspects of section 1 would become 'unworkable'. Two examples were given:

- The first example was in relation to section 1(2)(c) which focuses on behaviour that is motivated (wholly or partly) by hatred of particular groups (defined in 1(2)(a)). Without the public disorder test, prosecutions under this section would have to prove the motivation of the perpetrator.
- The second example was in relation to 1(2)(e). Without the public disorder test, this clause could cover any behaviour which might reasonably be regarded as offensive, rather than behaviour which is sufficiently serious to be regarded as criminally offensive with possible consequences for public order.

7.75 Thus (it was suggested), the public disorder test gives police the ability to take action based on the behaviour of a perpetrator irrespective of the outcome of that behaviour at that specific time. As noted above, though, other legislative provisions have different tests for establishing criminal behaviour, and if the public disorder test were not used, criminal behaviour may be defined in other ways.

²⁵ Specifically: (i) the Public Order Act 1986, section 18, addresses 'threatening, abusive or insulting behaviour' accompanied by an intention to stir up racial hatred or a likelihood that racial hatred would be stirred up; and (ii) the Criminal Justice and Licensing (Scotland) Act 2010, section 38, addresses 'threatening or abusive behaviour' likely to cause a reasonable person to suffer fear or alarm, or that the perpetrator 'intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm'.

7.76 Other respondents made more general comments, but suggested that, in the context of the 2012 Act, the public disorder test was necessary – ‘otherwise how would the court separate criminal from offensive / annoying behaviour?’ One respondent observed that without a public order problem, ‘there is no crime, only words in a free society’. It was suggested that if the decision of the court in the *Cairns* case has caused uncertainties as to what is required for proof of the offence, it would be appropriate to clarify this.

7.77 Some respondents also expressed concern about the ‘troubling precedent’ set by the *Cairns* case – that behaviour likely to incite public disorder in one context (i.e. football) might automatically be considered to be criminal behaviour in all contexts, even where it will not incite disorder.

Views opposed to the public disorder test for a criminal offence

7.78 Respondents who answered ‘no’ to Question 25 tended to interpret the question in a more general way, rather than specifically in relation to section 1 of the 2012 Act. Some in this group (mainly those in the public and third sectors) thought that the public disorder test was too stringent for hate-related offences. The views expressed by this group were that:

- This would require a crowd to be present and fully understanding of the intent to incite public disorder.
- Threatening behaviour targeted at individuals should be criminalised regardless of the potential to incite public disorder.
- It is not merely the disorder, but the effect on the victim’s wellbeing that is of concern. In general (and not only in the context of football), it is reasonable to seek to **prevent** offensive behaviour or public disorder, and not to deal only with the perpetrators after the event. The law should therefore provide a clear objective test for conduct likely to have such results in all contexts, to enable the police to act in a timely manner to prevent it.

7.79 One respondent, referring specifically to the context of the 2012 Act, suggested that the focus on ‘causing unrest’ may be contributing to a low rate of charges for anti-LGBTI abuse in relation to football matches. This behaviour may take the form of insults or slurs directed at individuals, or songs and chants with homophobic or transphobic lyrics, which may not be seen by the police to have the potential to stir up public disorder.

7.80 Other respondents in this group took issue with the suggestion that a public disorder test may depend on the ‘likelihood’ that disorder may be caused, rather than **actual** disorder being caused, or the **intention** to cause disorder. For example:

- The law should not criminalise ‘the possibility of certain actions occurring when no such thing may occur’, and people should not be treated as criminals because of what ‘others may or may not do’.
- It is an area of concern that the existing legislation contains no requirement for an intention to incite public disorder.

7.81 The point was also made that the existing provisions of criminal law are sufficient to prosecute offensive behaviour and there is no need for any requirement that the behaviour

is likely to incite, or would be likely to incite public disorder in order for it to be considered as a criminal offence.

Coverage of section 1 offences in other legislation (Q26)

7.82 The consultation paper discussed the issue of whether offences under section 1 of the 2012 Act could be successfully prosecuted under other legislation. It noted that one of the arguments for repeal of the 2012 Act is ‘that it is not needed as existing laws already make it possible for offenders to be brought to justice’. The consultation asked respondents for their views on this matter.

Question 26a: Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation? [Yes / No / Don't know]

Question 26b: Please give reasons for your answer.

7.83 A total of 69 respondents answered Question 26a. Table 7.7 shows that most (65%) said they did not know whether there was any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation. A relatively small proportion of respondents (10%) answered ‘yes’ to this question and a quarter (25%) answered ‘no’.

Table 7.7: Question 26 – Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	5	29%	2	4%	7	10%
No	6	35%	11	21%	17	25%
Don't know	6	35%	39	75%	45	65%
Total	17	100%	52	100%	69	100%

* Percentages may not total 100% due to rounding.

7.84 Altogether, 23 respondents (15 organisations and 8 individuals) made comments at Question 26b. As this question was targeted at a technical / legal audience, the responses from COPFS and Police Scotland, which both have key roles in implementation and enforcement of the 2012 Act, are specifically highlighted here.

Conduct subject to prosecution under section 1 which would NOT be covered by pre-existing common law or legislation

7.85 COPFS was one of the five organisations who answered ‘yes’ to Question 26. In their written evidence to the Scottish Parliament Justice Committee, COPFS state that ‘there is some behaviour which may be prosecuted under section 1 of the Act which would not be capable, or would not be securely capable, of being prosecuted under any other provision’. They note, in particular:

- The use of different evidential tests: for example, offences such as breach of the peace and other offences under section 38 of the Criminal Justice and Licensing

(Scotland) Act 2010 would require the prosecutor to demonstrate that the conduct of the perpetrator had caused fear and alarm, or would cause a reasonable person fear and alarm. This test is not required to be met under section 1 of the 2012 Act. Moreover, it is possible to envisage behaviour which would be offensive to the reasonable person and which would cause or risk public disorder (thus allowing prosecution under section 1), but which might not constitute a breach of the peace, or fall within the scope of section 38 of the 2010 Act.

- The extra-territorial provisions of the 2012 Act are not available in other legislation which could be used to prosecute similar behaviour.
- Even where the same behaviour could potentially be prosecuted using another statutory offence, the maximum sentence available to the courts on conviction would not necessarily be the same.²⁶

7.86 COPFS also commented in their written evidence to the Justice Committee that ‘it is not uncommon for a new statutory offence to be created notwithstanding that the same offending behaviour could be prosecuted, in whole or in part, using existing offences.’ The example given was in relation to the Emergency Workers (Scotland) Act 2005 which introduced a number of offences intended to protect health workers, and which would, in most if not all cases, have been capable of being prosecuted under existing common law.

7.87 The response to Question 26 from Police Scotland’s Football Co-ordination Unit for Scotland also highlights the extra-territorial provisions of the 2012 Act as being unique and not available in legislation which might otherwise be used to prosecute similar behaviour. This response makes the following additional points:

- Prior to the 2012 Act coming into effect, the police used other legislation – principally breach of the peace – to report offenders for behaviour which has subsequently been reported as a section 1 offence. Such behaviour consisted of the singing of more overtly offensive types of songs involving religious prejudice or racist comments.
- Some forms of behaviour, including the singing of songs based on the politics and history of Ireland, have emerged or been identified in more recent years, and prosecution of this type of offensive behaviour has not been tested under alternative legislation, and thus it is not possible to state with certainty where these offences could be dealt with under alternative provisions.

7.88 Other respondents who answered ‘yes’ to Question 26a highlighted the following behaviour, which they believed would not be covered under alternative provisions:

- Mass singing inside a football stadium (which, it was suggested, would be more difficult to prosecute as a breach of the peace under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010)
- Overtly sexist and demeaning chanting against women.

²⁶ Note that this latter point was made specifically in relation to section 6 offences. In oral evidence to the Scottish Parliament Justice Committee (3 October 2017) COPFS Head of Policy indicated that this disparity in sentencing powers does not exist in relation to section 1 offences.

7.89 At the same time, however, there was also a call for legislation in this area to be more streamlined.

Views that conduct prosecuted under section 1 would be covered by other legislative provisions

7.90 Those who answered 'no' to Question 26 generally thought that pre-existing common law and other legislation such as section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 would cover any offences that are currently subject to prosecution under section 1 of the 2012 Act. Some within this group pointed to legal opinion which suggests that the 2012 Act duplicates other legislation, and therefore seems 'unnecessary and illiberal'.

7.91 However, within this group, it was also acknowledged that the 2012 Act is generally understood as relating primarily to sectarian behaviour, and the broader range of offences that the Act seeks to address are not widely known about or understood. One respondent commented that 'the focus on football and sectarianism obscures the intention to address hate crime more broadly'. Another suggested that 'the Act was directed more at emphasising the need for appropriate behaviour at football matches, rather than at creating new crimes'.

Use of football banning orders by football clubs (Q27)

7.92 The consultation paper noted that, where a person has been found guilty of an offence involving violence or disorder at a football match, or in some way associated with a football match, the sentencing court has the option to impose a football banning order for a period of 3, 5 or 10 years. If a person is convicted under section 1 of the 2012 Act, a football banning order is usually imposed.

7.93 It is also possible (though not common) for the police to apply to a court for a football banning order in relation to an individual who has not committed an offence. Such banning orders may be used where the person has been involved in violence or disorder in the past, and a ban may help to prevent future violence or disorder at football matches.

7.94 Football banning orders are seen as effective deterrents, and some football clubs have suggested that allowing clubs to apply for banning orders would be a useful way of maintaining discipline as required by football governing bodies. The consultation asked for views on this proposition.

Question 27a: Should a football club be able to apply to the court for a football banning order? [Yes / No / Don't know]

Question 27b: Please give reasons for your answer.

7.95 The easy read consultation paper included a corresponding question as follows:

Question ER8a: Do you think a football club should be able to apply to the court for a football banning order? [Yes / No]

Question ER8b: Please tell us why.

7.96 A total of 99 respondents answered either Question 27a or Question ER8a – 85 respondents answered Question 27a, and a further 14 answered Question ER8a.

7.97 Table 7.8 below shows that, among those who answered Question 27a, there was general agreement with the proposition that football clubs should be able to apply to the courts for football banning orders. Nearly all organisational respondents (91%) and more than half of individual respondents (56%) answered ‘yes’ to this question. However, just over a third (34%) of individual respondents said ‘don’t know’.

Table 7.8: Question 27 – Should a football club be able to apply to the court for a football banning order?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	21	91%	35	56%	56	66%
No	2	9%	6	10%	8	9%
Don't know	–	0%	21	34%	21	25%
Total	23	100%	62	100%	85	100%

* Percentages may not total 100% due to rounding.

7.98 There was also general agreement among those who answered Question ER8a (2 organisations and 12 individuals), with all but two answering ‘yes’.

7.99 Altogether, 48 respondents (26 organisations and 22 individuals) made further comments at Question 27b, and 8 respondents (1 organisation and 7 individuals) commented at Question ER8b.

Views in support of football clubs being able to apply for banning orders

7.100 Those who answered ‘yes’ to these questions described this proposal as ‘sensible’ and ‘appropriate’. There was general agreement that giving clubs this option would be a useful deterrent in preventing violence and disorder at matches and when travelling to matches, particularly since there are robust procedures already in place for enforcing these orders. This group of respondents thought that football clubs were in the best position to know about the disruptive behaviour of their fans, and that having the ability to apply for a banning order would not only empower clubs to take responsibility for tackling such behaviour, but also demonstrate their commitment to doing so. There was a view that giving football clubs this option would make clubs more accountable for maintaining discipline within their own stadia and for complying with the requirements of their governing bodies.

7.101 However, some respondents did raise the importance of having a fair process and certain protections in place to ensure that this power is not misused, or motivated by personal disagreements between individuals within football clubs.

7.102 Other views expressed by this group – by just one or two respondents – were as follows:

- The use of football banning orders by football clubs would not show up on the offender's criminal record – whereas (it was thought) that if the order was applied for by the police, it would appear on the person's criminal record.
- If clubs **are** given the power to apply for banning orders, Scottish courts should be able to ban a football club if the club consistently fails to address unacceptable behaviour among their fans.
- The power to apply for banning orders should not be limited to football clubs, but should be available to any organisation faced with an offensive attendee / member.

Views opposed to football clubs being able to apply for banning orders

7.103 Among the relatively small number of respondents who answered 'no' to Questions 27b and ER8b, five made further comments. This group thought that football clubs could not be relied upon to exercise this power sensibly, or they thought that concerns about an individual's behaviour should be reported to the appropriate authorities (the police) for action. There was also a contrasting view that football clubs should be able to impose banning orders on their fans without having to formally apply to a court. However, at the same time, it was noted that current provisions for clubs to ban members (whereby they may request a banning order through the police) had been largely unused.

Other issues raised in relation to use of banning orders by football clubs

7.104 A few organisational respondents raised a range of issues and concerns (without answering 'yes' or 'no' to this question) about the proposal to give football clubs the power to apply directly to the courts for banning orders. It was noted that, at present, only the Chief Constable of Police Scotland can apply for a football banning order under a summary application procedure set out in section 52 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. This involves gathering a detailed dossier of information sufficient to persuade a sheriff that the banning order is necessary and will prevent violence or disorder in connection with football matches.

7.105 In relation to this, respondents made the following points, some of which echoed issues already mentioned briefly above:

- It was pointed out that provisions are already in place for football clubs to share information with the police to request or support applications by the Chief Constable, but these have not been used to any great extent.
- Further information is needed about how this proposal would work in practice. There was a view that the police and prosecution authorities should not be bypassed by clubs in applying for a football banning order, as this could create difficulties for the courts, and might encourage football clubs to refer alleged offenders to the court rather than taking appropriate steps themselves to address behaviour among their supporters themselves.

- It was suggested that applications for banning orders should be made by the Crown after an assessment of the strength of a particular case. Football clubs would retain the right to apply for a civil interdict if appropriate.
- There was a question about whether clubs would seek additional supporting information or intelligence from the police in order to support an application for a football banning order, and if so, how this would be managed to ensure compliance with data protection regulations, and the management of police intelligence.
- Appropriate safeguards and procedures would need to be in place if the application for such an order was opposed.

8. Extending the law to other groups (Q28 and Q29)

8.1 Chapter 8 of the consultation paper considered the question of whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered) and certain other groups based on specific characteristics they have (immigration status, socioeconomic status, membership of Gypsy / Traveller community, etc.). Arguments for and against establishing new categories of hate crime were discussed. There were two questions in this section, the first addressing the distinction between bullying behaviour and hate crimes, the second addressing the creation of new categories of hate crime. The first was a closed question which invited follow-up comments, and the second was an open question.

Distinguishing between bullying behaviour and hate crimes (Q28)

8.2 The consultation paper referred to work carried out by the Scottish Parliament Equal Opportunities Committee, and the report of this committee (6 July 2017) which recommended greater clarity about when bullying behaviour (often carried out by children against other children) constitutes a crime (in particular a hate crime or sexual offence).

8.3 Question 28 asked respondents for their views on this matter.

Question 28a: 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? [Yes / No / Don't know]

Question 28b: If so, what would you suggest?

8.4 A total of 127 respondents answered this question. Table 8.1 shows that organisations were more likely to answer 'yes' (67%) and individuals were most likely to answer 'no' (64%). Note, though, that 10 individuals who replied 'yes' to this question submitted comments which expressed very similar views to those of individuals who answered 'no'. That is, they thought 'all groups should have equal protection under the law', that 'certain groups should not have greater privileges', and that 'all so-called hate crimes' should be abolished. Therefore, the figures shown below, particularly those from individual respondents, should be treated with caution.

Table 8.1: Question 28 – 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?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	18	67%	22	22%	40	31%
No	8	30%	64	64%	72	56%
Don't know	1	4%	14	14%	15	12%
Total	27	100%	100	100%	127	100%

* Percentages may not total 100% due to rounding.

8.5 Altogether, 77 respondents (36 organisations and 41 individuals) offered comments at Question 28. This includes 5 organisations and 24 individuals who answered 'no' to the first part of the question. The views of this group are considered separately below.

Views in favour of establishing greater clarity about when bullying behaviour based on prejudice becomes a hate crime

8.6 Respondents who answered 'yes' to Question 28, were asked a follow-up question: 'If so, what would you suggest?'

8.7 Among this group, there was a general view that clarity was needed in relation to the law in this area. Specifically, respondents in this group called for greater clarity about what constitutes a hate crime; when bullying behaviour based on prejudice reaches the threshold for criminal proceedings to be brought forward; and what the distinctions are between lawful but offensive speech on the one hand, and unlawful and criminal abuse on the other. This group believed that there was confusion, not only among the general public, but also among teachers and other professionals regarding these issues, and they noted some inconsistencies in existing legislation (for example, that a person could be charged with a criminal offence for calling someone a name based on their ethnic origin, but not for calling someone a name based on their disability or sexual orientation). This group suggested that particular attention needed to be given to the issue of online bullying.

8.8 One respondent noted that current criminal law does not address all potential situations of bullying based on prejudice. Examples given were in relation to online bullying, and prejudice based on gender. This respondent discussed four issues which should be considered in any attempt to clarify the law in this area. These were: (i) the threshold for action; (ii) the problem of terminology (and the variety of terms which may be used to refer to 'bullying' and online bullying in particular); (iii) the legal 'tests' for determining the threshold for prosecution; and (iv) the nature and extent of the harm caused to individuals subjected to bullying and hate.

8.9 Several respondents in this group set out what they saw as the distinction between 'prejudice-based bullying' on the one hand and 'hate crime' on the other. These generally focused on: (i) the behaviour / actions of the perpetrator; (ii) the intentions / motivations of the perpetrator; and (iii) the impact on the victim.

8.10 Regarding terminology (mentioned above), respondents pointed out that the term 'bullying' is commonly used to refer to a very wide range of behaviours – from physical violence and damage to property at one end of the scale, to exclusion from social activities at the other. The point was made that behaviours at both ends of the scale are easily recognisable as criminal or non-criminal, but the need for clarity is in relation to those behaviours that fall between the two extremes ('for example, in relation to name calling, the use of derogatory language, and the publication or sending of offensive written materials').

8.11 Respondents in this group expressed different views on the question of where the line between bullying and hate crime should be drawn. Some believed that bullying behaviour based on prejudice (or related to protected characteristics) was always wrong, and should be seen and treated as a hate crime. Those who held this view specifically focused on the cumulative and long-lasting harm caused to those targeted by such abuse,

and they noted that victims of this type of behaviour seldom have any legislative protection. Some within this group wanted to see specific legislation developed to ensure that prejudice-based bullying attracts criminal sanctions. Those with this view also argued that such a move would help to address the under-reporting of hate crimes directed at certain groups – for example, members of the Gypsy / Traveller community or disabled people.

8.12 Respondents also expressed differing views about the approach to take with children and young people who engage in prejudice-based bullying and hate crimes. One respondent noted that young people (both those in the 11–15 age bracket and those in the 16–20 age bracket) are among the most common perpetrators of reported hate crime in Scotland. Most respondents called for early action to be taken to address bullying and offending behaviour in schools and through public education. These respondents did not necessarily feel that initial responses to prejudice-based bullying by children and young people should involve the criminal justice system, and there was concern that any legislative response should prevent the unnecessary criminalisation of young people. There was a suggestion that dealing with hate crime requires a multi-agency response, with ‘policy goals framed within the context of Scotland’s fundamental values – which include strong commitments to social justice, advancing equality and upholding human rights’. There was, though, an alternative view that the law should apply to all ages of people including children – and that children and young people can be punished appropriately for this type of crime.

8.13 Finally there was a suggestion that, given the extension of domestic abuse provisions and the concept of ‘harm’ under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, there may be an argument to extend the provisions to bullying behaviour in workplaces or other institutions.

Views that clarity within the law is not necessary in relation to the distinction between prejudice-based bullying and hate crime

8.14 As noted above in paragraph 8.5, 5 organisations and 24 individuals who answered ‘no’ to Question 28 went on to give further comments. In addition, 10 individuals who answered ‘yes’ at Question 28 made similar comments to those individuals who answered ‘no’. It is possible that some of these respondents had not understood the question or read the consultation paper before responding. All of these comments are discussed here.

8.15 Among the organisations in this group, there were several shared points raised. None of these organisations thought there was any need for a change in existing criminal law. Views were expressed as follows:

- It is of concern that the review team have seen evidence that hate crime and prejudice-based bullying can become conflated. This leaves young people feeling that serious criminal behaviour is not being properly addressed.
- Prejudice-based bullying is distinct from hate crime. In Scotland, there is no legal definition of bullying and as such bullying is not a crime. Moreover, bullying involves a complex interplay of relationships. If laws were amended so as to criminalise bullying, they would be more likely to criminalise children and young people than any other group.

- There should be a presumption against criminalising children and young people. (There was one dissenting view which argued that if an act is considered to be criminal, it is criminal regardless of the age of the perpetrator, once the perpetrator reaches the age of criminal responsibility.)
- There is a need to provide better support, guidance and resources to teachers and other adults who work with children and young people to ensure they have a good understanding of when prejudice-based bullying becomes a hate crime. Rather than amending criminal legislation, the existing legal framework could be better implemented by taking action to raise awareness among practitioners and to improve the reporting of hate crime incidents.

8.16 These organisations also often discussed non-legislative approaches and possible changes that may be needed (particularly in relation to the development of resources for young people and teachers). Some of the points raised were that:

- There needs to be greater awareness among young people of what constitutes a 'hate crime', increased awareness of their rights and what the process is if they report an incident. Moreover, young people need to be listened to if they are victims of crime.
- School-based interventions could be used with respect to children and young people who may be perpetrators of prejudice-based bullying. These focus on developing a whole school / system approach, using nurturing and restorative approaches and developing empathy and a greater sense of fairness.
- There are already diversionary and behavioural change programmes in place to deal with bullying behaviour based on prejudice. These programmes involve school pupils working together with parents and teachers, and aim to avoid putting children and young people through the criminal justice system.

8.17 The main points made by individual respondents in relation to this question were that:

- The current law is clear and adequate and does not require to be changed. It is well understood by those working in the police and law courts. The current law should simply be enforced (or 'people need to obey it').
- Special provisions in law for particular groups (beyond race) should be unnecessary since all groups should have the same protection against hate crime. 'Fair treatment should be received by all'.
- Extending hate law could result in any disagreement between people (particularly disagreements on the basis of religious conviction) being treated as harassment, and could lead to severe restriction of free speech and debate.
- The motivation of a perpetrator should be irrelevant in determining the response to bullying behaviour. Only the actions of the perpetrator and the loss suffered by the victim should be considered. Speculation about a perpetrator's motives could risk prejudicing both the alleged bully and the alleged victim.

Requirement for specific legislation for other groups (Q29)

8.18 The consultation paper discussed the evidence gathered by the review in relation to a range of other groups who may be targeted by hate crime. Respondents were asked whether specific legislation should be created to deal with offences involving malice or ill-will directed at members of these other groups.

Question 29: 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 group (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.

8.19 The easy read consultation paper included a corresponding question as follows:

Question ER9a: Should there be hate crime laws to cover:

1. Age [Yes / No]
 2. Gender [Yes / No]
 3. Immigration status [Yes / No]
 4. Welfare status [Yes / No]
 5. Membership of gypsy / traveller community [Yes / No]
 6. Other groups [Yes / No]
- Please tell us which ones.

Question ER9b: Please tell us why.

8.20 A total of 129 respondents (46 organisations and 83 individuals) commented at Question 29. The number of responses to Question ER9a ranged from 10 to 14 for each of the categories listed. An analysis of all these comments is presented here.

8.21 Among individual respondents, there was a recurring view that specific legislation should **not** be created to deal with offences involving malice or ill-will based on the characteristics named in the consultation. In general, this group argued that all victims of crime should have equal protection under the law, and they thought it was inappropriate to give some groups greater protection than others since, if one group is given special protection, it soon becomes evident that other groups deserve similar levels of protection. Some of these respondents thought that a better approach would be to provide support for families, schools and workplaces to foster respect between people, regardless of age, gender or status.

8.22 The alternative and less common view among individual respondents was that there may be some benefit from having specific legislation to deal with hate crime offences targeted at certain groups. These views are discussed below in relation to each of the groups named in the consultation paper.

8.23 Among organisational respondents, there were differences of opinion about whether specific legislation should be created to deal with hate crime targeted at certain groups. Of

the 46 organisations who commented, over two-thirds suggested that specific legislation would be beneficial in relation to one or more groups, whereas around a quarter were **not** in favour of specific legislation being created to address hate crime targeted at certain groups. The remaining organisations made more general points rather than expressing views about the particular groups listed in the consultation paper. A few of these stated that they would defer to other organisations with greater expertise in relation to the needs of the specific groups.

8.24 Among the organisations in favour of specific legislation for one or more groups, there were differences in opinions about: (i) which groups required legislation, and (ii) whether any legislative approach should involve standalone legislation or an extension to the list of statutory aggravations.²⁷

Views in relation to specific groups

8.25 Among both individual and organisational respondents, there appeared to be widespread support for creating specific legislation to deal with gender-related hate crime (or misogyny). There was also support for creating specific legislation to deal with age-related hate crime. There was less support for specific legislation to address immigration status, socioeconomic status and membership of the Gypsy / Traveller community, or hate crime targeted at other groups. These findings were broadly consistent among respondents who answered Question 29 and those who answered Question ER9a. (Note, however, that among those who answered Question ER9a, there was relatively strong support for specific legislative protection for the Gypsy / Traveller community.)

8.26 The arguments presented in relation to each of the groups named in the consultation paper were complex and often lengthy, and only the points recurring most often are discussed here.

Gender

8.27 As noted above, respondents expressed a great deal of support for developing (or amending) legislation to allow hate crimes directed at women and girls to be prosecuted. Respondents highlighted the serious and routine abuse and harassment that women and girls receive from men and boys, and there was general agreement among respondents that such behaviour was targeted at women **because** of their gender. Such abuse can take the form of unwanted and unsolicited verbal, physical or online contact, and online abuse ('trolling') received by women frequently includes threats of violence and / or incitement of hatred towards women.

8.28 Respondents noted that current protected characteristics include sexual orientation and transgender identity, but legislation does not at present provide a means of addressing misogyny as a hate crime. Several respondents referred to the positive steps taken by some police forces in England and Wales to record incidents of misogynistic hate crime. However, they also noted that it is not possible for such incidents to be prosecuted under existing criminal law.

8.29 Respondents had different views about the best way of addressing this issue through legislation. Some favoured the creation of a new statutory aggravation based on

²⁷ Note, however, that in relation to the discussion about standalone legislation vs statutory aggravation, most respondents did not address this level of detail in their responses.

misogyny. Others argued for the creation standalone legislation. There was also some discussion about whether a legislative response in this area should be focused on 'gender' or on 'misogyny' more specifically.²⁸ An argument in favour of the latter was that any new legislation should not inadvertently redefine all violence against women as a hate crime. The counter-argument to this was that crimes such as rape and domestic abuse are, by their nature, 'inflected with misogyny', and crimes such as breach of the peace directed at women often incorporate explicitly misogynistic language.

8.30 Some respondents suggested that any response to this issue in criminal law should cover incitement to misogyny, as well as incitement to violence against individual women and groups of women.

8.31 Respondents thought that treating misogyny as a hate crime would allow such behaviour to be tracked, and provide a basis for improving the safety (both in the real and virtual worlds) for women and girls.

8.32 An alternative view, however, was that gender-related hate crime is seen as stemming from inequality and an imbalance of power, and some questioned whether it was the role of legislation to address these issues. Very occasionally, respondents also voiced reservations about having specific provision in criminal law related to gender / misogyny (e.g. 'I can see a lot of men saying that that's sexist'; and potentially 'furthering the distinction between men and women').

Age

8.33 There was general agreement among respondents that older people are often targeted by 'criminals' because they are seen to be vulnerable. There were, though, differences of opinion about whether this type of criminal behaviour should constitute a hate crime and / or whether there were sufficient protections already available in law to deal with it.

8.34 Some respondents pointed out that, in more recent years, older people have been increasingly subjected to abuse because of perceptions about their political views and voting patterns, and perceptions that older people receive more state support (including financial support) than younger people. Thus, this group argued that there is growing evidence of malice and ill-will being directed at older people simply because of their age.

8.35 Similar points were made in relation to children and young people. There was a view that children and young people often become victims of crime because of their powerlessness and vulnerability – rather than because of malice and ill-will. However, others thought that children and young people can be targeted and discriminated against specifically because of stereotypes held about people their age.

8.36 Some respondents argued that current criminal law was sufficient to prosecute crimes against children and young people, whereas others thought that the law required to be strengthened in relation to dealing with online crime against children and young people. It was also noted that the United Nations Universal Periodic Review of human rights in the

²⁸ Note that many respondents used these terms interchangeably, but a few made a distinction between them.

UK for 2017 contained a recommendation that the UK 'take appropriate measures against the sharp increase in all hate-related violent crimes especially involving young people.'²⁹

8.37 A few respondents made the more general point that, while a 'child' or 'young person' is defined in Scottish law, there is no definition of an 'old / older person'. Thus, they suggested that the development of age-related hate crime legislation could be complex and potentially impractical. There was also a suggestion that it may be preferable to create a vulnerability related aggravation which is separate from offences motivated by malice and ill-will.

Immigration status

8.38 Some respondents thought there should be specific protection in law for people based on immigration status. This group highlighted the increase in hate crimes directed at refugees and asylum seekers, and at European migrants within the UK, and argued that such groups are often targeted because of their perceived immigration status, rather than their nationality, which makes offences difficult to prosecute under existing legislation.

8.39 However, other respondents thought that malice and ill-will based on immigration status was likely to be covered by the provisions against race discrimination. Reference was made to section 96 of the Crime and Disorder Act 1998 which defines racial groups as 'a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins'. There was also a view that it could be difficult to prove that an offender was fully aware of the status of the person targeted. If an offender makes an assumption about an individual's status based on their race or religion, this would be covered by existing legislation.

Socioeconomic status

8.40 A few respondents supported the development of hate crime legislation in relation to socioeconomic status. These respondents argued that there has been an increasing vilification of people experiencing poverty, including verbal abuse and physical attacks of people who are homeless.

8.41 A counter-argument was that groups based on socioeconomic status would be very difficult to define, and that socioeconomic status was a potentially 'arbitrary' characteristic. It was noted that this characteristic is not inherent, and that socioeconomic status may change over time. There was also a view that crimes committed against economically disadvantaged people were targeted at their perceived vulnerability, rather than based on malice and ill-will.

Membership of Gypsy / Traveller community

8.42 A few respondents supported specific hate crime legislation to protect members of the Gypsy / Traveller community, although not all of these gave a specific reason for their view. Those who did argued that this group is subjected to high levels of discrimination and abuse, often fuelled by negative stereotypes portrayed in the media. Others noted that this group is defined as an ethnic group within the Equality Act 2010 and should therefore be given the same protection as any other ethnic group.

²⁹ See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/192/15/PDF/G1719215.pdf?OpenElement>, recommendation 134.103 on page 16.

8.43 More often, however, it was argued that existing legislation already protects this group which is recognised as a separate (white) ethnic group. Reference was again made to section 96 of the Crime and Disorder Act 1998, which was also cited in relation to immigration status – see paragraph 8.39 above.

Other groups

8.44 There were a small number of respondents who proposed additional categories of people who should be protected through the development of specific hate crime legislation. Each of these categories were suggested by fewer than five respondents:

- **Disabled people**³⁰: A small number of individual respondents and third sector organisations highlighted the vulnerability of people with disabilities to attack and abuse – e.g. people with epilepsy, people with poor mental health and other ‘invisible disabilities’, people with learning disabilities and people who are deaf. It was noted that people with disabilities are often subjected to abuse and harassment throughout their lives and think that it is ‘normal’ to be treated in this way.
- **People with non-binary gender identity**³¹: Any definition of transgender identities in any reformed law should cover all identities under the umbrella terms of transgender, including non-binary gender identities.
- **Gaelic speakers and other linguistic minorities**: Two respondents advocated specific protection in legislation for this group, although did not necessarily think that hate crime legislation was the most appropriate vehicle for this. These respondents stated that Gaelic speakers were subjected to ridicule, hostility and prejudice through social media and mainstream print media, and called for the review to consider what further protection may be given to these groups.
- **People who choose not to drink alcohol, or who do not drink to excess**: It is common for people to be teased for not drinking, or pressured to behave in a way they did not intend when they are out for a night with friends. It was suggested that such behaviour is evidence of Scotland’s unhealthy relationship with alcohol, and it should not be dismissed as casual banter, but something harmful for the wellbeing of individuals and the country.
- **Christians**³²: Some respondents thought that Christians are becoming increasingly marginalised in society and that protection in law was needed.
- **Members of alternative subcultures (e.g. Goths, Emos, Punks)**: Some subcultures were perceived as being subject to abuse.
- **People in recovery from addictions**: Despite article 12 of the Independent Press Standards Organisation’s Editors’ Code (which prohibits prejudicial or stigmatising language about health or disabilities), the national press routinely use stigmatising and prejudicial language such as ‘junkie’ and ‘alkie’, which inhibits people’s ability to seek help with their addictions.
- **Paedophiles**: A few respondents referred to the comment in the consultation paper that paedophiles (whether known or suspected) are frequently targeted for

³⁰ Existing legislation provides protection to people with disabilities.

³¹ Existing legislation provides protection to LGBTI people, including people with non-binary gender identities.

³² Existing legislation provides protection to people of different faiths / religions.

abuse. In the views of these respondents, there likely would be little public support to include paedophiles as a group within hate crime legislation.

Views opposed to having specific legislation to address hate crime targeted at groups with certain characteristics

8.45 Organisational respondents who were not in favour of creating specific legislation to deal with offences involving malice and ill-will based on certain characteristics gave a range of reasons for this, including that separate legislation for each personal characteristic was unnecessary, illogical and unwieldy, and, in most cases, the protection of these groups was covered by other legislation. These respondents suggested it would be preferable to have more 'generic' hate crime legislation, rather than separate laws, or separate provisions for a range of characteristics which may overlap.

8.46 Some individual respondents expressed exasperation with the idea of creating separate laws for different protected characteristics ('Height, weight, hair colour, size, gait... where does it end?') and they called for all people to have equal protection against crime under the law. In general, the respondents who expressed these views had also answered 'no' in response to the consultation question about whether Scotland should have specific hate crime legislation (Question 3) – see Chapter 3 above.

Other general points

8.47 Respondents made a number of general points in relation to Question 29. These included the following:

- Decisions about which characteristics are included in hate crime legislation should be based on a clear articulation of the rationale for hate crime legislation which is consistent with the general principles of the criminal law. One respondent suggested that basing these decisions on the broader equality agenda may offer such a rationale.
- It may be preferable in any new hate crime legislation to refer in a general way, as the working definition does, to 'selection of the victim on the basis of a particular feature', rather than attempting to list 'protected characteristics', as this would allow future changes to be accommodated without the need to amend the legislation.
- The 'intersectional nature' of hate crime means that victims do not necessarily fit neatly into one 'box', and miscategorising victims' identities can mean that they struggle to access appropriate support or they may be deterred for continuing with support.

9. Other specific issues (Q30 – Q34)

9.1 Chapter 9 of the consultation paper focused on a number of issues related to the reporting of hate crimes, and alternative ways of dealing with cases within the criminal justice system. There were five questions in total, each of which is discussed in turn below.

9.2 A small number of respondents used Questions 30 to 34 to restate their wider concerns about hate crime legislation in general. Such views are not repeated in any detail in the analysis presented below.

Addressing under-reporting of hate crimes (Q30)

9.3 Under-reporting has been identified as a long-standing issue with regard to hate crimes, and this is recognised in the current review. The consultation paper states that ‘a criminal justice system designed to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice can only make a meaningful impact if the victims of such offences are willing to report the offence to the authorities’, and notes that a multi-agency delivery group had been set up by the Scottish Government to explore the issue of under-reporting. The consultation paper raises the possibility of legislation on this issue, and Question 30 asked for general views on how the problem of under-reporting might be addressed:

Question 30a: Do you have any views as to how levels of under-reporting might be improved? [Yes / No / Don't know]

Question 30b: Please give reasons for your answer.

9.4 The easy read questionnaire included a corresponding section and question on how reporting of hate crime might be encouraged:

Question ER10: How can we encourage people to report hate crime?

9.5 The analysis presented below focuses on the comments made at Question 30b and Question ER10 which explored how respondents thought reporting could be improved.³³ Altogether, 72 respondents provided comments at Question 30b – this comprised 46 organisations and 26 individuals. A further 9 respondents – 6 organisations and 3 individuals – responded to Question ER10.

9.6 Respondents offering comments on how under-reporting might be addressed were in agreement that this was a significant issue, and there was a general view that a change of culture was needed within the police and criminal justice system in order to improve reporting. Respondents thought that the police in particular needed to take hate crimes more seriously, and that there needed to be a clear message conveyed to the public that complaints would be taken seriously and that there would be no negative consequences for individuals who did report crimes. Respondents argued that reporting would improve if

³³ Question 30 consisted of two parts – Question 30a was a ‘Yes / No’ tick-box question, while Question 30b asked respondents to give reasons for their answer. The response to question 30a is not shown in table format, as the results do not add to understanding about respondents’ views on addressing under-reporting.

trust in the system improved, and that positive experiences and outcomes for complainants would, over time, build trust and confidence in the criminal justice system.

9.7 It was common for respondents to describe multi-stranded approaches to improving reporting, suggesting that this might include a combination of the following:

- Clear laws explained in easily understood language, with the option of consolidation into a single piece of legislation mentioned by some, and guidance as to the type of conduct that falls within the remit of 'hate crime'
- Education and awareness raising among the general public and specific communities (e.g. young people, those with learning disabilities) about what constitutes hate crime, how it might be reported and the processes for prosecuting such crimes. It was seen as important to discourage people from just accepting hostile or abusive behaviour, and to encourage the reporting of low-level incidents in particular which people may not readily regard as criminal. Activity in this area might incorporate police engagement with different communities, groups and organisations, as well as the production of leaflets and other resources in accessible formats
- Improved policies and procedures relating to the reporting, recording, investigating and prosecuting of hate crimes to ensure that relevant cases were correctly identified and progressed as hate crimes, and complainants benefited from regular communication and updates throughout the course of a case
- Guidance and training for those working in the criminal justice system to raise awareness of hate crime, and to ensure that cases were dealt with appropriately and promptly, and those reporting crimes were dealt with sensitively, taking account of any special needs they had
- The establishment and promotion of a range of accessible routes for reporting hate crimes, including the use of third party reporting schemes (see paragraphs 9.21 to 9.29), free-phone, text, social media and online reporting
- Appropriate and easily accessible support and assistance for those reporting hate crimes – e.g. the use of appropriate adults to support young people making complaints, the use of independent advocates
- A partnership approach to tackling prejudice and unacceptable behaviour, with an emphasis on education, prevention and empowerment, and staff in relevant agencies (e.g. schools and social care services) trained to identify incidents which meet the hate crime criteria, and encouraged to support individuals in pursuing complaints.

9.8 Some organisational respondents provided information on current programmes and initiatives, or indicated an interest in contributing to improvement work in this area.

9.9 Respondents also suggested:

- Increasing understanding of barriers to reporting, and working with those who have experienced hate crime to find out about the support they would have liked

- Improved data collection and monitoring and evaluation to allow greater transparency of police and judicial processes and support improvement in performance
- The establishment of a national agency to coordinate the response to hate crime, and a national phone line for reporting incidents.

9.10 In addition, a number of respondents noted the potential roles of anonymity for complainants and third party reporting centres in improving reporting of hate crimes. These issues are discussed in further detail in relation to Questions 31 and 32 below.

9.11 A few respondents who commented at Question 30 did not offer views on how reporting might be improved. Instead, they noted:

- That action to address perceived under-reporting may encourage people to interpret behaviour previously regarded as relatively benign as a ‘hate crime’, and may encourage a culture of ‘victimhood’
- That effort should be put into reducing the incidence of hate crimes and discriminatory behaviour.

Reporting of the identity of the complainer in hate crimes (Q31)

9.12 The consultation paper noted that concern about being identified in press coverage of court proceedings was a potential barrier to reporting hate crimes. This was seen as a particular issue for members of the LGBTI community who may fear being ‘outed’ as a result of reporting a hate crime. The paper acknowledged the tensions between the standard practice of court proceeding being open to the public and the press, and the need to protect vulnerable individuals, and asked respondents for their views on the option of restricting press coverage in certain circumstances:

Question 31a: Do you consider that in certain circumstances press reporting of the identity of the complainer in a hate crime should not be permitted? [Yes / No / Don’t know]

Question 31b: Please give reasons for your answer.

9.13 A total of 94 respondents answered Question 31a. Table 9.2 shows that the majority of organisations (85%) thought that press reporting of the complainer in a hate crime should not be permitted in certain circumstances, while individuals were divided in their views on this issue – just over a third (37%) answered ‘yes’ and a similar proportion (38%) answered ‘no’, while the remaining quarter of individuals (25%) answered ‘don’t know’.

Table 9.2: Question 31 – Do you consider that in certain circumstances press reporting of the identity of the complainer in a hate crime should not be permitted?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	22	85%	25	37%	47	50%
No	2	8%	26	38%	28	30%
Don't know	2	8%	17	25%	19	20%
Total	26	100%	68	100%	94	100%

* Percentages may not total 100% due to rounding.

9.14 Altogether, 62 respondents provided comments in response to Question 31. This comprised 27 organisations and 35 individuals.

9.15 Those respondents who thought that reporting of the identity of the complainant in a hate crime should not be permitted in certain circumstances generally endorsed the view that this would remove a potential barrier to reporting of hate crimes. They noted that complainants may be concerned about (i) further victimisation and retaliation; (ii) being shunned by others in their own community; (iii) having personal information made public (e.g. relating to their LGBTI status); and (iv) sensationalised reporting that focused on the victim rather than the perpetrator.

9.16 Respondents additionally noted the following points:

- Negative press reporting could have a wider adverse impact on community wellbeing and social cohesion.
- Reporting that contributed to the perpetuation of negative stereotypical images of different communities should be addressed using appropriate equality laws.
- Restrictions should cover social media as well as traditional press reporting.
- As well as encouraging reporting of crimes, restrictions on press coverage would make the process of taking a case to court less traumatic for victims.
- Cases could still be reported without victims being named.

9.17 Most often, respondents saw this as an issue which affected members of the LGBTI community, but reference was also made to benefits for other groups such as members of black and ethnic minority communities, those with disabilities and long-term illness (especially those with mental health issues), and children and young people.

9.18 While some favoured a standard approach of anonymity for all hate crime victims (and drew comparisons with the situation for victims of sexual offences), others thought restrictions on press reporting should be judged on a case-by-case basis. They thought this might depend on an assessment of the vulnerability of the complainant, the risk to their safety and wellbeing, or the risk to an individual's right to privacy. A few respondents also suggested that reporting restrictions might be lifted once a case had concluded, or should not apply should a complaint be found to be 'vexatious'.

9.19 Those who were opposed to anonymity for victims of hate crime in press coverage offered the following main reasons for their views:

- They thought it was important that justice ‘was seen to be done’, that the press should be free to cover court proceedings, and that the public had a right to know the identity of those making complaints.
- They did not think protection should be offered to complainants without also being offered to those accused of hate crimes (prior to conviction). They thought that protecting the identity of complainants could encourage false accusations.
- They did not think hate crimes should be treated differently to any other crimes.

9.20 In a small number of cases, respondents who answered ‘no’ felt this should be a matter for judicial discretion, and should be decided on a case-by-case basis.

Third party reporting schemes (Q32)

9.21 Third party reporting schemes allow individuals to report crimes via third party organisations rather than directly to the police. Staff at third party reporting centres can assist victims in reporting a crime or can report a crime on behalf of the victim. The consultation paper notes that, while third party reporting is generally seen as a positive initiative, there have been problems with the operation of such schemes in practice. Question 31 in the consultation questionnaire and Question ER11 in the easy read questionnaire asked for views on the role of such schemes in encouraging the reporting of hate crimes:

Question 32a: Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime? [Yes / No / Don't know]

Question 32b: Please give reasons for your answer.

Question ER11a: Are third party reporting centres a useful way to encourage people to report hate crime? [Yes / No]

Question ER11b: Please tell us why.

9.22 A total of 119 respondents answered either Question 32a or Question ER11a – 103 respondents answered Question 32a and 16 respondents answered Question ER11a.

9.23 Table 9.3 shows that the majority of organisations (80%) responding to Question 32a thought that third party schemes were valuable in encouraging reporting of hate crimes. In contrast, a minority of individuals (24%) offered this view, compared to 44% who said that they did not consider such schemes to be valuable, and 31% who answered ‘don't know’. In addition, of those answering Question ER11a, all but one (an individual) answered ‘yes’, i.e. they thought that reporting centres were a useful way to encourage people to report hate crime.

Table 9.3: Question 32 – Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	26	80%	17	24%	43	42%
No	3	9%	31	44%	34	33%
Don't know	4	11%	22	31%	26	25%
Total	33	100%	70	100%	103	100%

* Percentages may not total 100% due to rounding.

9.24 Sixty-five respondents made comments at Question 32b. This comprised 38 organisations and 27 individuals. A further nine respondents – 6 organisations and 3 individuals – provided comments at Question ER11b. Views are discussed below.

9.25 Those who answered ‘yes’ at Question 32b (or Question ER11b) thought that third party schemes fulfilled an important role in encouraging reporting by those who might otherwise be deterred from contacting the police because of lack of confidence, mistrust of the authorities, poor previous experience, or difficulties in accessing the police. In such circumstance it was seen as useful to allow people to use trusted independent third party organisations who could provide appropriate assistance and support in a less formal or intimidating environment, tailored to the needs of different groups. Some organisational respondents spoke positively of their experience of offering third party reporting services.

9.26 Very often, however, respondents (including some with third party reporting scheme experience) also argued that the current scheme was not working as well as it should be – they noted low awareness, low usage, and variable quality in service provided – and that action was needed to address this. This perception was confirmed by some individuals who noted that they had not heard of third party reporting centres.

9.27 Some respondents suggested learning from successful schemes elsewhere, undertaking a review of third party reporting schemes or acting on the recommendations of a review which had already been undertaken. Other respondents suggested specific improvements which included the following:

- Clarifying the role of third party reporting centres (and potentially extending it to include awareness raising and education), and building commitment among stakeholders
- Providing increased funding for the development of high quality sustainable services at local level, and the provision of resources and support at national level (e.g. access to translation and BSL assistance; provision of guidance; the collation of statistics for monitoring purposes)
- Improving coverage and accessibility of schemes – some suggested the police should establish partnerships with additional existing organisations and groups (statutory and voluntary) already working with different sectors within the population to improve geographic coverage of the scheme; others suggested the development of online reporting routes, although it was noted that not everyone had access to a computer or smartphone

- Raising awareness of schemes through information campaigns and marketing strategies including the introduction of an easily recognisable name, and ensuring that police officers are familiar with the scheme
- Increasing the quality and consistency of support provided through improved training and resources – an accreditation scheme was suggested.

9.28 Those who did not think that third party schemes were valuable in encouraging the reporting of hate crime, or who offered mixed views on this question, made three main points:

- The problems associated with schemes already in operation (as discussed at paragraph 9.26) suggested that the model was not effective in its current form. Some in this group suggested the need to review and reform the scheme, while others favoured alternative models such as services which provided support and assistance to those who wished to make a complaint directly to the police.
- Any reticence to contact the police should be tackled directly by taking steps to improve relations between the police and different groups, and ensure the service provided by the police was sensitive to the needs of all groups. This might be achieved through active community engagement initiatives, improved training and resources for frontline officers, and the provision of accommodation, facilities and support that met the needs of those wishing to report crimes (e.g. wheelchair accessible premises, translation services etc.).
- The involvement of third parties potentially complicated cases, introduced additional ‘hassle’ for complainants in having to deal with multiple agencies, and could interfere with or hinder the police and judicial process.

9.29 It should be noted that the comments from some respondents (individuals in particular) suggest that they may not have been entirely clear about the nature of ‘third party reporting schemes’, and believed them to be schemes which allowed people other than the victim to report hate crimes, based on their perceptions of an incident. Such respondents generally noted that they were concerned that a crime could be classified as a hate crime based on the perceptions of a third party. This misunderstanding may also be a factor in the responses provided at Question 32a and shown in Table 9.3.

Diversion and restorative justice (Q33 and 34)

9.30 The consultation paper described current national and local schemes which provide options for diversion from prosecution for particular types of cases – i.e. cases involving low-level crimes, where the person responsible accepts that they committed the offence and the victim is willing to be involved. The consultation paper also noted that consideration is currently being given to developing similar programmes which would apply as a form of community order following conviction. Question 33 asked for views on whether such options were useful in dealing with hate crimes:

Question 33a: Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime? [Yes / No / Don't know]

Question 33b: Please give reasons for your answer.

9.31 The easy read consultation paper included a section on 'other approaches to deal with hate crime', and Question ER12 asked for views on this:

Question ER12a: Do you think that programmes can be useful in dealing with hate crime? [Yes / No]

Question ER12b: Please tell us why.

9.32 A total of 115 respondents answered Question 33a or Question ER12a – 98 respondents answered Question 33a and 17 respondents answered Question ER12a

9.33 Table 9.4 shows that around half of respondents to Question 33a (54%) thought such schemes could be useful in dealing with hate crime. Organisations were, though, more likely than individuals to offer this view: 85% of organisations answered 'yes', compared to 42% of individuals. Of those who answered Question ER12a, all but one (an individual) answered 'yes', i.e. they thought that programmes can be useful in dealing with hate crime.

Table 9.4: Question 33 – Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	23	85%	30	42%	53	54%
No	1	4%	13	18%	14	14%
Don't know	3	11%	28	39%	31	32%
Total	27	100%	71	100%	98	100%

* Percentages may not total 100% due to rounding.

9.34 Sixty-eight respondents made comments at Question 33b – 37 organisations and 31 individuals, and a further 15 respondents – 6 organisations and 9 individuals – made comments at Question ER12b. All views are considered below.

9.35 Those who thought that diversion and restorative justice were useful tools in dealing with hate crime gave the following main reasons for their views, arguing that such programmes:

- Could play an important part in educating offenders and building empathy and understanding about the experience of victims, and challenging attitudes and behaviours which in turn could lead to reducing reoffending – some respondents cited evidence that programmes had been found to be effective in this way

- Could be particularly helpful in avoiding criminalisation of low-level first-time offenders, including young offenders, and were generally preferable to short custodial sentences which, it was suggested, would not stop future offending
- Could give victims a voice in the criminal justice system
- Were in line with approaches to reducing (re)offending based on early intervention and prevention, and with wider efforts to tackle prejudice and promote equality and diversity.

9.36 Some made the point that diversion and restorative justice had a role to play across the whole criminal justice system, not just in relation to hate crimes.

9.37 It was common for respondents to stress that the use of programmes of this type needed careful consideration, and should prioritise the protection and support of victims and accommodate any special needs. Some suggested that their use should be assessed on a case-by-case basis or restricted to certain circumstances, e.g. cases in which the victim consented; cases involving low-level offending; cases in which the offender showed genuine commitment to the process.

9.38 The importance of adequate funding was noted.

9.39 Those who did not think diversion and restorative justice programmes could play a useful part in dealing with hate crime offered the following reasons for their views, each of which were noted by a few respondents only:

- There was insufficient evidence on the effectiveness of such programmes, and more work on this was need.
- Such programmes were not effective.
- Such programmes were not appropriate – offenders should be prosecuted and sentenced in the normal way.
- Such programmes were not appropriate as the criminal justice system should not have a role in trying to change the views of individuals.

9.40 In a few cases, respondents stated that this was not a straightforward issue, and that there were tensions between punishing offenders, deterring future offenders and rehabilitating offenders by addressing their attitudes and behaviours. Some respondents were keen that such programmes were not viewed as ‘soft options’ by offenders, and should not undermine victims’ faith in the justice system. There was also a suggestion that programmes might be used in combination with other sentencing options.

9.41 Question 34 was a follow-up question to Question 33, asking for views on whether diversion and restorative justice schemes should be put on a statutory footing:

Question 34a: Should such schemes be placed on a statutory footing? [Yes / No / Don't know]

Question 34b: Please give reasons for your answer.

9.42 Eight-eight respondents answered Question 34a. Table 9.5 shows that almost two-thirds of organisations (64%) supported diversion and restorative justice schemes being put on a statutory footing compared to only a quarter of individuals (22%). Almost half of individuals (47%) answered 'don't know' to this question.

Table 9.5: Question 34 – Should such schemes be placed on a statutory footing?

Respondent type	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	14	64%	14	22%	28	31%
No	2	9%	21	32%	23	26%
Don't know	6	27%	31	47%	37	42%
Total	22	100%	66	100%	88	100%

* Percentages may not total 100% due to rounding.

9.43 Thirty-three respondents provided comments at Question 34 – 20 organisations and 13 individuals. Those who thought that such schemes should be placed on a statutory footing were more likely to explain their views.

9.44 Respondents who thought that such schemes should be placed on a statutory footing believed that this:

- Was important in establishing appropriate governance, oversight and standards and in bringing consistency in access and approach across the country
- Would ensure schemes were regarded as legitimate options by sheriffs in considering post-conviction disposals for those convicted of hate crimes
- Would assist with compliance, as offenders could be brought back to court if they did not engage with the process.

9.45 Respondents also suggested that schemes would need to be properly resourced, and that a statutory basis would ensure this happened.

9.46 Those who did not think such schemes should be placed on a statutory footing offered two main reasons for their views: some thought there was not enough evidence on the effective of such schemes to justify this move; others thought that there was no need to have different disposals for some crimes and not others

Annex 1: Organisational respondents

Third sector (42)

- Action on Elder Abuse Scotland
- African Council Ltd
- Amina – The Muslim Women's Resource Centre
- Blackhall Mosque, Edinburgh
- British Deaf Association Scotland
- CARE for Scotland
- Catholic Parliamentary Office of the Bishops' Conference of Scotland
- Central Scotland Regional Equality Council (CSREC)
- Coalition for Racial Equality and Rights
- Comunn na Gàidhlig
- Disability Equality Scotland
- Dumfries and Galloway Equalities Partnership
- Engender
- Equality Network
- Evangelical Alliance Scotland
- Glasgow Disability Alliance
- Grampian Opportunities and Learning Disability Group of Aberdeen and Aberdeenshire
- Health and Social Care Alliance Scotland
- Humanist Society Scotland
- I Am Me Scotland
- Inclusion Scotland
- LGBT Youth Scotland
- MECOPP
- Network of Photographers for Palestine
- People First (Scotland)
- Rape Crisis Scotland
- Respectme
- Scottish Friends of Palestine
- Scottish Commission for Learning Disability (SCLD)
- Scottish Council of Jewish Communities (SCoJeC) / Glasgow Jewish Representative Council
- Scottish Independent Advocacy Alliance
- Scottish Palestine Solidarity Campaign
- Scottish PEN
- Scottish Women's Aid
- Stonewall Scotland
- The Association of Palestinian Communities in Scotland (APCS)
- The Christian Institute
- The Tron Church, Glasgow
- Together (Scottish Alliance for Children's Rights)
- Victim Support Scotland
- West of Scotland Regional Equality Council – Advisory Panel for SAREC Hate Crime Project
- Youthlink / Young Scot / Scottish Youth Parliament

Local authorities, partnership bodies and other public sector organisations (16)

- Bòrd na Gàidhlig
- City of Edinburgh Council
- City of Edinburgh Council – Criminal Justice Social Work

- Community Safety Glasgow on behalf of Glasgow City Council
- COSLA
- East Ayrshire Council
- Falkirk Council
- Fife Centre for Equalities
- Inverclyde Council
- Kelvinbank Resource Centre (East Dunbartonshire Council)
- NHS Greater Glasgow & Clyde
- North Ayrshire Council
- Renfrewshire Council
- SEStran (South East Scotland Regional Transport Partnership)
- Stirling Council
- West Lothian Council

Legal, justice and law enforcement organisations (9)

- British Transport Police
- Crown Office and Procurator Fiscal Service
- Faculty of Advocates
- Glasgow Bar Association
- Law Society of Scotland
- Police Scotland
- Senators of the College of Justice
- Sheriffs' Association
- The Scottish Courts and Tribunals Service

Other organisational respondents (9)

- ADF International
- Corra Foundation
- Equalities and Human Rights Committee of the Scottish Parliament
- Scottish Parliament Equalities and Human Rights Committee / Scottish Youth Parliament Equalities and Human Rights Committee
- Scottish Parliament Cross Party Group on Palestine
- Scottish Trades Union Congress
- Supporters Direct Scotland
- The Scottish Professional Football League Limited
- University of Stirling / Open University Law School

Annex 2: Response rates for individual consultation questions

Chapter 1 – Hate crime: definition and justification

Question		Number of responses	% of total (438)
1a	Do you consider that the working definition, discussed in this chapter, adequately covers what should be regarded as hate crime by the law of Scotland? [Yes / No / Don't know]	184	42%
1b	Please give reasons for your answer.	215	49%
2	How can we prevent tensions and misunderstandings arising over differences in what is perceived by victims, and others, to be hate crime, and what can be proved as hate crime? Please give reasons for your answer.	176	40%
3a	Should we have specific hate crime legislation? [Yes / No / Don't know]	302	69%
3b	Please give reasons for your answer.	326	74%

Chapter 4 – Statutory aggravations

Question		Number of responses	% of total (438)
4a	[This question appears in the technical consultation paper only] Do you believe there is a need to bring all the statutory sentencing provisions, and other hate crime offences, together in a single piece of legislation? [Yes / No / Don't know]	115	26%
4b	Please give reasons for your answer.	83	19%
5a	Do you consider that the current Scottish thresholds are appropriate? [Yes / No / Don't know]	120	27%
5b	Please give reasons for your answer.	83	19%
6a	Should 'evincing malice and ill-will' be replaced by a more accessible form of words? [Yes / No / Don't know]	126	29%
6b	If so, please give examples of what might be appropriate.	93	21%
7a	Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity (e.g. foreign country, overseas movement) which the victim is perceived to be associated with by virtue of their racial or religious group? [Yes / No / Don't know]	115	26%
7b	Please give reasons for your answer.	102	23%
8a	Should an aggravation apply where an offence is motivated by malice and ill-will towards religious or other beliefs that are held by an individual rather than a wider group? [Yes / No / Don't know]	118	27%
8b	Please give reasons for your answer.	83	19%
9	Do you have any views about the appropriate way to refer to transgender identity and/or intersex in the law?	100	23%
10a	Does the current legislation operate effectively where conduct involves malice and ill-will based on more than one protected characteristic? [Yes / No / Don't know]	116	26%
10b	Please give reasons for your answer.	70	16%
11a	[This question appears in the technical consultation paper only] Should the aggravation consistently be recorded? [Yes / No / Don't know]	97	22%
11b	Please give reasons for your answer.	50	11%
12a	[This question appears in the technical consultation paper only] Is it necessary to have a rule that the sentencing judge states the difference between what the sentence is and what it would have been but for the aggravation? [Yes / No / Don't know]	96	22%
12b	Please give reasons for your answer.	57	13%

Chapter 5 – Standalone offence: racially aggravated harassment and conduct

Question		Number of responses	% of total (438)
13a	Is this provision necessary? [Yes / No / Don't know]	158	36%
13b	Please give reasons for your answer.	119	27%
14a	Should the concept of a standalone charge be extended to other groups? [Yes / No / Don't know]	271	62%
14b	If so, which groups? Please give reasons for your answer.	239	55%

Chapter 6 – Stirring up hatred and online hate crime

Question		Number of responses	% of total (438)
15a	Should there be offences relating to the stirring up of hatred against groups? [Yes / No / Don't know]	266	61%
15b	If so, which groups? Please give reasons for your answer.	293	67%
16a	[This question appears in the technical consultation paper only] 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? [Yes / No / Don't know]	156	36%
16b	Please give reasons for your answer.	160	37%
17a	Does the current law deal effectively with online hate? [Yes / No / Don't know]	146	33%
17b	Please give reasons for your answer.	108	25%
18a	Are there specific forms of online activity which should be criminal but are not covered by the existing law? [Yes / No / Don't know]	120	27%
18b	Please give reasons for your answer.	50	11%
19a	[This question appears in the technical consultation paper only] Should this be tackled through prosecution of individuals or regulation of social media companies or a combination of the two? [Yes / No / Don't know]	102	23%
19b	Please give reasons for your answer.	74	17%

Chapter 7 – Offensive behaviour at football

Question		Number of responses	% of total (438)
20	How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?	70	16%
21a	Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all? [Yes / No / Don't know]	83	19%
21b	If so, what kind of behaviour should be criminalised?	63	14%
22a	Does equivalent behaviour exist in a non-football context? [Yes / No / Don't know]	85	19%
22b	If so, should it be subject to the same criminal law provisions? [Yes / No / Don't know]	57	13%
22c	Please give reasons for your answer.	53	12%
23a	Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? [Yes / No / Don't know]	86	20%
23b	Please give reasons for your answer.	56	13%
24a	Should a similar provision apply to non-football related hate crime? [Yes / No / Don't know]	78	18%
24b	Please give reasons for your answer.	42	10%
25a	[This question appears in the technical consultation paper only] Is it appropriate to have a requirement that behaviour is or would be likely to	75	17%

	incite public disorder in order for it to amount to a criminal offence? [Yes / No / Don't know]		
25b	Please give reasons for your answer.	43	10%
26a	[This question appears in the technical consultation paper only] Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation? [Yes / No / Don't know]	69	16%
26b	Please give reasons for your answer.	23	5%
27a	Should a football club be able to apply to the court for a football banning order? [Yes / No / Don't know]	85	19%
27b	Please give reasons for your answer.	48	11%

Chapter 8 – Should the law be extended to other groups?

Question		Number of responses	% of total (438)
28a	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? [Yes / No / Don't know]	127	29%
28b	If so, what would you suggest?	80	18%
29	Do you think that specific legislation should be created to deal with offences involving malice or ill-will based on: <ul style="list-style-type: none"> • 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.	132	30%

Chapter 9 – Other specific issues

Question		Number of responses	% of total (438)
30a	Do you have any views as to how levels of under-reporting might be improved? [Yes / No / Don't know]	113	26%
30b	Please give reasons for your answer.	72	16%
31a	Do you consider that in certain circumstances press reporting of the identity of the complainer in a hate crime should not be permitted? [Yes / No / Don't know]	94	21%
31b	If so, in what circumstances should restriction be permissible?	62	14%
32a	Do you consider that a third party reporting scheme is valuable in encouraging the reporting of hate crime? [Yes / No / Don't know]	103	24%
32b	If so, how might the current scheme be improved?	65	15%
33a	Are diversion and restorative justice useful parts of the criminal justice process in dealing with hate crime? [Yes / No / Don't know]	98	22%
33b	Please give reasons for your answer.	68	16%
34a	Should such schemes be placed on a statutory footing? [Yes / No / Don't know]	88	20%
34b	Please give reasons for your answer.	33	8%

Notes: The figures in this table include text from non-standard responses (i.e. letters and emails) allocated to specific questions for the purpose of analysis. It should be noted that while the online questionnaire consisted largely of yes / no tick box questions with a follow-up question asking for further comment, the questionnaire which could be downloaded from the website for completion included only the open questions. This is reflected in the number of respondents answering different parts of different questions.

Easy read questions

The table below shows response rates for the questions included in the easy read consultation paper. It also shows how the questions broadly align with the questions included in the main consultation questionnaire. Note that not all the easy read questions corresponded directly to a question in the main consultation questionnaire, but the table shows how the questions were grouped for the purposes of the analysis.

Chapter 1 – Hate crime: definition and justification

Easy read question (and alignment with question(s) in main consultation questionnaire)		Number of responses	% of total (19)
ER1a (Q1a)	Do you think the meaning of hate crime needs to be better explained? [Yes / No]	14	74%
ER1b (Q1b)	Please tell us why.	15	79%
ER2a (Q3a)	Do you think we should have hate crime law? [Yes / No]	15	79%
ER2b (Q3b)	Please tell us why.	16	84%

Chapter 4 – Statutory aggravations

Easy read question		Number of responses	% of total (19)
ER3a (Q5/6)	Are you clear about what the test for a hate crime is? [Yes / No]	14	74%
ER3b (Q5/6)	How can this be improved?	12	63%

Chapter 5 – Standalone offence: racially aggravated harassment and conduct

Easy read question		Number of responses	% of total (19)
ER4a (Q14a)	Should there be a specific harassment offence for groups other than race? [Yes / No]	18	19%
ER4b (Q14b)	Please tell us why.	16	84%

Chapter 6 – Stirring up hatred and online hate crime

Easy read question		Number of responses	% of total (19)
ER5a (Q15a)	Should there be offences that cover stirring up of hatred against groups other than for race and religion? [Yes / No]	15	79%
ER5b (Q15b)	Please tell us why and what groups.	14	74%
ER6a (Q17a)	Does the current law deal effectively with online hate? [Yes / No]	16	84%
ER6b(Q17b)	Please tell us why.	13	68%

Chapter 7 – Offensive behaviour at football

Easy read question		Number of responses	% of total (19)
ER7a (Q21a)	Do you think that singing songs like that [described in the consultation paper] or waving offensive banners or making gestures should be a criminal offence? [Yes / No]	15	79%

ER7b (Q21b)	If so, what kind of behaviour should be criminalised?	14	74%
ER8a (Q27a)	Do you think a football club should be able to apply to the court for a football banning order? [Yes / No]	14	74%
ER8b (Q27b)	Please tell us why.	8	42%

Chapter 8 – Should the law be extended to other groups?

Easy read question		Number of responses	% of total (19)
ER9a (Q29)	Should there be hate crime laws to cover: <ul style="list-style-type: none"> • Age [Yes / No] • Gender [Yes / No] • Immigration status [Yes / No] • Welfare status [Yes / No] • Membership of gypsy / traveller community [Yes / No] • Other groups (please specify) [Yes / No] Please tell us which ones.	Between 10 and 14 responses for each part of ER9	
ER9b (Q29)	Please tell us why.	14	74%

Chapter 9 – Other specific issues

Easy read question		Number of responses	% of total (19)
ER10 (Q30b)	How can we encourage people to report hate crime?	9	47%
ER11a (Q32a)	Are third party reporting centres a useful way to encourage people to report hate crime? [Yes / No]	16	84%
ER11b (Q32b)	Please tell us why.	9	47%
ER12a (Q33a)	Do you think that programmes can be useful in dealing with hate crime? [Yes / No]	17	89%
ER12b (Q33b)	Please tell us why?	15	79%