

One Scotland: Hate Has No Home Here

**Consultation on amending Scottish
hate crime legislation**

Analysis of responses

June 2019



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FINAL REPORT

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Executive summary

1. The Scottish Government is considering reforms to hate crime legislation in Scotland. As part of this process, a consultation sought views on consolidating and modernising hate crime laws; new statutory aggravations; new stirring up offences, and other related issues.¹ Findings from an analysis of the responses are summarised here.

The response to the consultation

2. A total of 1,159 responses were received: 108 from organisations (third sector bodies, public sector and partnership bodies, faith groups and other organisations) and 1,051 from individuals. The analysis of responses showed that organisations and individuals often had differing perspectives and views on the issues under consideration.

3. As with all consultations, the views of respondents cannot be considered to be representative of the views of the wider public. Thus, the main focus in analysing the responses is not on identifying the number (or proportion) of respondents holding particular views, but rather on understanding the range of views expressed.

Key themes

4. Two key perspectives were apparent in the responses to this consultation:

- A substantial proportion of respondents (including most individuals) had concerns about the impact of hate crime laws on freedom of speech and religious expression, and about laws designed to protect specific groups. Many called for the repeal of hate crime laws or, at least, did not want such laws to be extended. These views shaped their responses to the consultation.
- Other respondents (including most organisations) saw hate crime laws as important in protecting vulnerable groups, and sending out a message about the unacceptability of prejudice-based conduct. Within this group there was a range of perspectives on how to ensure the protection of particular groups.

5. Across the consultation, respondents highlighted the importance of:

- Taking a society-wide or a ‘whole system’ approach to addressing prejudice and related behaviour – some saw the law as having a key role in this; others thought this should be tackled largely outwith the justice system
- Consulting relevant individuals, organisations and communities on any reforms, and ensuring policy and practice was informed by robust evidence
- Using clear, easily accessible and well-defined language, and being consistent with terminology used in legislation and other official contexts
- Taking account of ‘intersectionality’ – i.e. that an individual may have more than one protected characteristic and that offences can be motivated by hostility towards the **combination** of an individual’s characteristics
- Ensuring laws are workable in practice.

¹ The consultation paper, *One Scotland: Hate Has No Home Here*, is available from <https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/>

Part 1: Legal models, thresholds and language

6. Part 1 of the consultation covered legal models, thresholds and language. Here, organisations mainly supported the proposals, while individuals (and faith groups) did not.

7. Those who supported the statutory aggravation model as the core method of prosecuting hate crimes offered two main views. Some highlighted the effectiveness of the model, and thought it provided flexibility and parity across groups. Others offered qualified support for the model, **if** hate crime legislation were to remain in place. Those opposed to the aggravation model also offered two main views. For some, their opposition was part of a general opposition to hate crime laws. However, others (including some public and third sector bodies) said they favoured the use of standalone offences rather than, or as well as, aggravations.

8. Those who supported the suggested rewording of the thresholds for statutory aggravations thought clear, consistent and accessible language would enhance understanding of, and confidence in, hate crime laws, while also having a neutral (or possibly positive) impact on the application of the thresholds. However, others were concerned that the suggested wording was ‘vague’, ‘subjective’ or ‘open to interpretation’, which some thought could lead to a ‘lowering’ of the legal thresholds in this area. There was also a separate concern that changing the current wording risked causing confusion for the groups the legislation was intended to protect.

Creation of separate intersex and transgender categories in hate crime laws

9. There was a mix of views on creating a separate intersex category. Those in favour generally agreed that intersex was a physical condition and not an expression of gender identity, and that the two groups should not be linked together in law. Those against creation of a separate category were often opposed to the inclusion of transgender (rather than intersex), and argued for the law to be based on biologically determined ‘sex’. Some respondents felt further consideration of the policy response to intersex issues was needed. With regard to terminology, some said it was important for the language of the law to evolve to reflect society. However, others saw difficulties in agreeing acceptable terms that were clear and would stand the test of time.

Part 2 and Part 4: New and revised aggravations

10. The consultation considered options for a number of new statutory aggravations. In the main, organisations supported aggravations for gender, age, vulnerability and association with a protected group; however, they were opposed to aggravations (or any new laws) for sectarianism or political entities, and expressed a mix of views on a possible aggravation relating to religious beliefs of individuals. None of the options put forward were supported by a majority of individuals.

Gender / misogyny

11. In general, organisations (but not individuals) supported a legislative response to the issue of crimes motivated by gender prejudice or misogyny. Organisations were also more likely to favour a statutory aggravation for gender hostility rather than a standalone offence for misogynistic harassment. However, third sector bodies with expertise in women’s issues generally favoured the latter, and other respondents often deferred to the views of such organisations. There was no consensus on whether any new law should cover women only, or women **and** men, although organisations with expertise in women’s issues thought the focus should be on women only. There was

also discussion on whether the law should be based on 'sex' or 'gender', with some pointing out that the protected characteristic in the Equality Act was 'sex' not 'gender'.

Age / exploitation of vulnerability

12. There was more support for a vulnerability-based aggravation outwith hate crime laws than for an aggravation based on the protected characteristic of age. In either case, those supporting these proposals thought there was an issue that needed to be addressed by law. Those supporting an age aggravation thought there should be a consistent approach across all protected characteristics. Those opposed thought there was little evidence of crime motivated by age-related hostility (with some arguing that offences committed against the elderly were likely to be motivated by a perpetrator's perception of the victim's vulnerability), or they thought that existing laws sufficed. Respondents saw challenges in defining and applying either aggravation.

Sectarianism

13. The overall balance of opinion was opposed to the introduction of legislation relating to sectarianism. Those favouring legislation thought this was a serious issue that was not covered by current laws; most of this group preferred the creation of a statutory aggravation – for reasons of clarity and consistency – rather than a standalone offence. There were also calls, mainly from organisations, for the definition of sectarianism to reflect (i) current and potential future expressions of sectarianism, and the multi-cultural nature of Scotland, and (ii) international law and standards. In contrast, others thought the conduct that constituted sectarianism was already covered by existing laws.

Other groups / characteristics

14. Those in favour of a new **political entity** aggravation argued that people should be able to express political views without being subjected to personal attacks. Those opposed thought such an aggravation would infringe on freedom of speech and the right to political protest, and might undermine existing hate crime laws.

15. Those in favour of an aggravation for **religious views held by individuals** argued that this would be in line with human rights legislation, and also described evidence of increasing need for such an aggravation. However, others argued that, by definition, hate crime laws should apply only to crimes motivated by prejudice towards a **group**.

16. Those supporting continuation of current provisions related to **association** with a protected group argued that it is the motivation of the offender, not the identity of the victim, that is the essential component of a hate crime. Those opposed generally argued that all victims of crime should be treated the same; they also saw difficulties in proving 'association'.

17. There was no consensus in favour of new aggravations for any **other** groups.

Part 3: Stirring up offences

18. Views were sought on the introduction of possible new stirring up offences.

19. Most organisations supported the introduction of new offences for all protected characteristics – they emphasised the importance of legal parity and clarity, and thought laws of this type could protect all relevant groups while also respecting freedom of speech. Individuals and faith groups largely opposed the introduction of new offences because they disagreed with laws protecting particular groups, and / or they

had concerns about the impact on freedom of speech and religious expression (some other organisations also shared concerns in this area). A small number of respondents (mainly third sector bodies) queried the need for new offences and / or were concerned that changes to the law in this area might make the prosecution of race-related offences more difficult.

20. There were differing views on how any new offences should be formulated – while some were happy with the wording proposed in the consultation, others were concerned the wording would set the threshold too high or, conversely, too low. However, there was broad agreement that stirring up offences should include a protection of freedom of expression provision, although there were differing views how this should be framed.

21. With regard to online stirring up, those who thought legislation was not needed thought that such conduct was covered by existing (or proposed) legislation; or thought legislation was not merited, or would not be effective. However, others saw online hate as a serious and increasingly prevalent issue that required a specific legal response.

Part 5: Other issues

22. There were two main arguments regarding the **repeal of Section 50A**. Some said the offence was no longer needed, and that repeal would offer benefits of consistency, simplification and improved statistical data. Others favoured repeal as part of a preference for wider repeal of hate crime legislation. In both these cases, respondents thought repeal would have minimal impact. However, others said that Section 50A was well used and that other options did not offer equivalent substitutes; this group were concerned that repeal would send out the ‘wrong message’ about society’s attitude to racially motivated crimes.

23. Those who favoured **the requirement to state in court the extent to which an aggravation had altered a sentence** thought this (i) sent a clear message about the unacceptability of hate crimes; (ii) aided transparency and consistency of practice; and (iii) encouraged reporting and deterred offending. The alternative view was that the requirement was unnecessary, complicated in practice and could have a negative impact on victims.

24. There was broad agreement on the importance of **support for victims of crime**. However, while some felt victims of hate crimes had specific needs, others focused on support for **all** victims. There was also a common view that improvements in this area did not require legislation.

25. In the main respondents thought **restorative justice and diversion** had a role in tackling hate crime (and crime in general). Respondents thought such measures could help address the causes of crime and be positive and empowering for individuals and communities. However, they stressed that the interests of victims should be paramount in developing work in this area.

1. Introduction

1.1 The Scottish Government has undertaken a public consultation on proposals for new hate crime legislation. The consultation paper, *One Scotland: Hate Has No Home Here*, was published on 14 November 2018, with a closing date of 24 February 2019 for submission of responses to the consultation.² This report presents findings from the analysis of the responses received.

Policy context

1.2 Hate crime is the term used to describe behaviour which is both criminal and rooted in prejudice (as defined by Lord Bracadale in his review of Scottish hate crime legislation – see paragraph 1.4). Current hate crime legislation allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. Prejudice or hostility also lies at the heart of some other offences which are recognised as hate crimes. These are sometimes referred to as standalone hate crime offences and they criminalise behaviour specifically because it is motivated by racial prejudice.

1.3 An Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion was established in October 2015 to examine the impact of prejudice on victims and communities, and to suggest ways of tackling these issues more effectively. The findings and recommendations of the Independent Advisory Group were published in September 2016³ and included a recommendation for the Scottish Government to consider whether the existing criminal law provides sufficient protections for those who may be at risk of hate crime.

1.4 Following this, in January 2017, the Scottish Government appointed Lord Bracadale to carry out an independent review of Scottish hate crime legislation. The wide-ranging remit of the review 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, the review examined the appropriateness of the current mix of statutory aggravations, common law powers and specific hate crime offences; the scope of the existing laws; the need for new categories of hate crime; the scope for simplifying, rationalising or harmonising the current laws in this area; and how a new legislative framework might best address any identified issues. The review involved evidence gathering and a public consultation exercise. Its findings and recommendations were published in May 2018.⁴

1.5 In addition, the Working Group on Defining Sectarianism in Scots Law published its report in November 2018.⁵ This group was established following a recommendation

² *One Scotland: Hate Has No Home Here: Consultation on Amending Scottish Hate Crime Legislation*. Available at: https://consult.gov.scot/hate-crime/consultation-on-scottish-hate-crime-legislation/user_uploads/sct08182935681.pdf

³ Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion. Available at: <https://www2.gov.scot/Resource/0050/00506074.pdf>

⁴ Independent Review of Hate Crime Legislation in Scotland. Available at: <https://www2.gov.scot/Resource/0053/00535892.pdf>

⁵ Final Report of the Working Group on Defining Sectarianism in Scots Law. Available at: <https://www.gov.scot/publications/final-report-working-group-defining-sectarianism-scots-law/>

made by the Scottish Parliament's Justice Committee. During their Stage 1 considerations of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, the Justice Committee heard evidence from a number of sources which suggested that the lack of a legal definition of the term 'sectarianism' was a hindrance to police and prosecutors in pursuing cases of abusive sectarian behaviour. The Working Group considered whether this could be achieved; the technical obstacles to achieving it; and what a legal definition could look like. The Group also recommended the development of a statutory aggravation for sectarian hate crime.

1.6 Following Lord Bracadale's review, the Scottish Government committed to consolidating and modernising hate crime legislation in Scotland. Amongst other things, this included giving consideration to whether the scope of Scotland's hate crime laws should be extended to cover additional groups, and whether sectarianism should also be included, as recommended by the Working Group on Defining Sectarianism in Scots Law (see paragraph 1.5 above).

The consultation

1.7 The consultation paper published by the Scottish Government, *One Scotland: Hate has No Home Here*, sought views on what should be included in new hate crime legislation in Scotland.

1.8 The consultation contained 35 questions – 29 two-part questions, each comprising a closed (tick-box) question and an open question inviting respondents to explain their answer, and 6 open questions. The questions addressed the following broad topics:

- Consolidating and modernising hate crime legislation (Q1 to Q6)
- New statutory aggravations (Q7 to Q22)
- New stirring up of hatred offences (Q23 to Q27)
- Exploitation and vulnerability (Q28 and Q29)
- Other issues (Q30 to Q35).

1.9 The consultation paper and the accompanying online consultation questionnaire could be accessed on the Scottish Government consultation hub. An easy read version and a British Sign Language video presentation were also produced to increase the accessibility of the consultation.

1.10 Activities to promote the consultation included a launch event attended by the Cabinet Secretary for Justice, the Cabinet Secretary for Communities and Local Government and the Lord Advocate which was covered by the media. A news release and Parliamentary Question were also used to highlight the consultation launch. In addition, eleven consultation events were held across the country. These events were designed to give individuals and organisations an opportunity to find out more about the consultation and discuss the key recommendations and proposals. See Annex 1 for further details of the consultation events. The consultation team also developed a facilitator pack to enable stakeholders to run their own events prior to responding to the consultation.

About the analysis

1.11 This report presents findings of an analysis of the responses to the consultation.

1.12 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, six questions did not have an initial closed question, and so there are no tables for Questions 6, 16, 17, 29, 31 and 35.)

1.13 Qualitative analysis has also been carried out in relation to the comments submitted in response to each question. The aim of the qualitative analysis 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. Views expressed at consultation events and comments made in response to the easy read consultation paper are included in the qualitative analysis at relevant questions.⁶

1.14 Not all respondents answered all questions, and some made comments in relation to a question without ticking a response at the relevant closed question. However, if a 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.

1.15 In interpreting the quantitative findings, the relatively small number of organisational responses and the relatively high proportion of 'unsure' responses reported in the tables at certain questions should be noted.

1.16 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 time, ability and 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 or what proportion of respondents held particular views, but rather to understand the range of views expressed.

⁶ Views expressed at events and via the easy read consultation questionnaire are NOT included in the tables showing the results of quantitative analysis.

The report

1.17 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 17 present the results of the analysis of the responses to each of the consultation questions.
- Chapter 17 provides a brief summary of other comments to the consultation.

1.18 Annexes to the report are included as follows:

- Annex 1 presents information on the consultation events organised by the Scottish Government.
- Annex 2 presents a list of organisational respondents.
- Annex 3 presents the response rates for individual questions.

2. The respondents and responses

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

Number of responses received and number included in the analysis

2.2 The consultation received 1,174 responses. Fifteen responses were removed prior to analysis for the following reasons:

- Seven respondents submitted more than one response to the consultation. In two cases, one of the responses was a subset of the second; in these two cases, the more complete response was retained in the analysis and the shorter response was removed. This resulted in the removal of two responses. Five respondents submitted two different responses. In each of these cases, responses from the same individual were combined to create a single amalgamated response. Where there were differences in the respondent's answers to closed questions, the answers from the more recent response were used in the amalgamated response. This process resulted in the removal of five responses – while the five amalgamated responses were retained for the analysis.
- Four responses were removed as they were entirely blank.
- Four responses were excluded because of their offensive content.

2.3 Thus, the analysis in this report is based on **1,159** responses (1,174 submitted responses minus 15 removed responses).

About the respondents

2.4 Responses were submitted by 1,051 individuals and 108 organisations or groups. (See Table 2.1.)

Table 2.1: Types of respondent

Respondent type	Number	%
Individual	1,051	91%
Organisation	108	9%
Total	1,159	100%

2.5 Table 2.2 below provides further information about the organisational respondents. More than two-fifths of the organisations responding to the consultation (44%; 47 out of 108) were third sector organisations. This group included organisations involved in the justice sector (e.g. working with victims or offenders), organisations with a general interest in equalities, and organisations working with or on behalf of particular groups (e.g. women's groups, those with disabilities, etc.). Public sector and partnership bodies and faith groups accounted for around a quarter (23%; 25 out of 108) and a sixth (17%; 18 out of 108) of organisations respectively. The 'other organisational respondents' category is made up of law and justice bodies, including

both statutory agencies and professional bodies; trade unions; and other organisations with an interest in issues related to hate crime. A complete list of organisational respondents is provided at Annex 2.

Table 2.2: Organisation / group types

Organisation type	Number	%
Third sector organisations	47	44%
Public sector / partnership bodies	25	23%
Faith groups	18	17%
Other organisational respondents	18	17%
Total	108	100%

The 'Other organisational respondents' category includes law and justice bodies, trade unions, and other organisations with an interest in issues related to hate crime.

Percentages may not total 100 due to rounding.

Consultation events

2.6 As noted in Chapter 1, the Scottish Government organised a series of 11 consultation events across Scotland. These attracted around 400 participants in total. A summary of the main points raised was produced by the consultation team for each of these events, and the content of each of these summaries has been included in the qualitative analysis presented in this report.

The content of responses

2.7 A substantial proportion of responses to the consultation focused on specific issues or reflected very specific viewpoints. Most notably, a large group of respondents used their responses to set out their concerns about the impact of current hate crime legislation – and the proposed reforms – on freedom of expression, and freedom of religious expression. A subset of this group, which comprised around half of all individual respondents, only answered Questions 1 to 6 (consolidating and modernising hate crime legislation), and Questions 23 to 27 (new stirring up of hatred offences). These two groups of questions attracted more responses than any other groups of questions in the consultation (See paragraphs 2.9 and 2.10 below). Some individuals answered other questions in the consultation, but they often repeated points they made at Questions 1 to 6, and Questions 23 to 27. In many cases the responses submitted by this group of respondents had a campaign-like quality in that they made the same points, and expressed broadly similar views, although they did not use identical language.

2.8 Other smaller groups of respondents also focused on questions which aligned with their particular interests – for example, the options for introducing standalone offences or statutory aggravations relating to specific groups or characteristics (e.g. gender (Questions 7 to 10), age and vulnerability (Questions 11, 28 and 29), political entity (Question 18), or proposals for tackling sectarianism (Questions 12 to 17)).

Responses to individual questions

2.9 As noted above (paragraph 1.14), not all respondents answered all the questions in the consultation questionnaire. Questions 1 to 6 (covering Part 1 of the consultation) which focused on consolidation of hate crime laws, legal models and language, and Questions 23 to 27 (Part 3) which dealt with stirring up of hatred generally attracted more responses than other groups of questions. This was particularly notable amongst individuals – the questions relating to Part 2, 4 or 5 of the consultation were answered by less than half of all individuals who responded to the consultation.

2.10 Across the consultation questionnaire, the closed questions tended to attract more responses than the open questions. The response to closed questions ranged from 37% for Question 34 on restorative justice and diversion to 91% for Question 23 on the possible introduction of new stirring up offences. For the open questions, responses ranged from 10% for Question 34, again, on restorative justice and diversion, to 75% for Question 1 on continuation of the aggravation model as the core method for prosecuting hate crimes in Scotland. (These figures exclude questions only directed at respondents who provided particular answers to previous questions.) (See Annex 3 for full details).

Part One:

Consolidating and modernising hate crime legislation

3. Rationale (Q1)

3.1 The consultation paper explained that the Scottish Government agreed with Lord Bracadale’s recommendation that all hate crime laws in Scotland should be consolidated into a single piece of legislation in order to provide clarity, transparency and consistency. The Scottish Government also concurred with the recommendation that the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland, agreeing in particular that this approach was effective and supported clear recording and production of statistics. Question 1 in the consultation asked for views on this issue as follows:

Question 1: Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland? [Yes / No / Unsure]

Key points

- ◆ Across all respondent types, 22% (225 out of 1,003 respondents) agreed and 76% (767 out of 1,003 respondents) disagreed that the statutory aggravation model should continue to be the core method of prosecuting hate crimes. However, organisations (with the exception of faith groups) were more likely than individuals to agree – 73% (58 out of 80 respondents) compared to 18% (167 out of 923 respondents) respectively.
- ◆ Respondents frequently used Question 1 to set out their broad views on hate crime legislation. Some saw hate crime laws as important in protecting vulnerable groups, in recognising the particular harm caused by hate crimes and in sending out a message about the unacceptability of prejudice-based conduct. However, individual respondents (along with a few organisations) were generally opposed to hate crime legislation – they disagreed with laws designed to protect particular groups and thought such laws presented a risk to freedom of speech and freedom of religious expression.
- ◆ Those who answered ‘yes’ at Question 1 offered two main views. Some endorsed the arguments put forward by Lord Bracadale, and highlighted the effectiveness of the aggravation model, and the importance of flexibility and parity across groups. Others offered more qualified support and agreed that this approach should continue **if** hate crime legislation was to remain in place.
- ◆ Those who answered ‘no’ at Question 1 also offered two main views. For some, opposition to the aggravation model was part of a wider opposition to hate crime laws. However, those making more specific points argued that aggravations were not needed to allow sentences to reflect the circumstances of cases, or said they had concerns about the corroborative requirements for aggravations. In contrast, other respondents (including some public and third sector bodies) who were generally supportive of hate crime legislation said they favoured the use of standalone offences instead of (or as well as) aggravations.

The wider relevance of responses to Question 1

3.2 Question 1 in the consultation asked for views on the continuation of the statutory aggravation model as the core method of prosecuting hate crimes in Scotland. However,

respondents frequently offered their overall views on hate crime legislation in response to this question, commenting on its role and value, the way it operated, and its impact on society. Most often, respondents – particularly individuals – expressed concern about such legislation, particularly with regard to its perceived impact on freedom of expression.

3.3 The same is also true of Questions 2 and 3 (see Chapter 4). The responses to these questions raised a range of issues which were central to people’s understanding of, and attitudes towards, hate crime legislation.

3.4 Thus, it should be noted that the views expressed in response to Questions 1 to 3 often provided the foundation for responses to other consultation questions, and that the points raised at Questions 1 to 3 were often repeated in response to multiple consultation questions. In some cases, respondents drew out the specific relevance of their views at other individual questions; in other cases, respondents simply repeated their overall views. Where possible, points covered in Chapter 3 (or Chapter 4) are not repeated in detail in subsequent chapters (and vice versa). However, some repetition is inevitable in order to fully understand respondents’ views on individual consultation questions.

Views on continuation of the statutory aggravation model

3.5 Table 3.1 shows that 22% of respondents agreed, and 76% disagreed that the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland. However, organisations were more likely than individuals to answer ‘yes’ to this question (73% compared to 18%). In contrast to other organisations, 12 out of 16 faith groups disagreed that the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland.

Table 3.1: Q1 – Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	24	75%	7	22%	1	3%	32	100%
Public sector / partnerships	20	91%	2	9%	–	0%	22	100%
Faith groups	4	25%	12	75%	–	0%	16	100%
Other organisations	10	100%	–	0%	–	0%	10	100%
Total organisations	58	73%	21	26%	1	1%	80	100%
Total individuals	167	18%	746	81%	10	1%	923	100%
Total (organisations and individuals)	225	22%	767	76%	11	1%	1,003	100%

Percentages may not total 100 due to rounding.

3.6 Altogether, 864 respondents (75 organisations and 789 individuals) provided further comments at Question 1. The sections below present the views of those who agreed and disagreed with the continuation of the statutory aggravation model. Two further sections present a summary of comments on broad approaches and principles that might guide or underpin the way Scotland deals with hate crimes, and on other relevant issues.

Support for continuation of the statutory aggravation model

3.7 There were two different perspectives evident in the comments from those who agreed that the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland as described in this section.

3.8 Some respondents expressed support for the continuation of the statutory aggravation model alongside broad support for hate crime legislation and the consolidation and other reforms recommended by Lord Bracadale. Respondents offering this view included representatives of all organisational types, and some individuals. These respondents thought that hate crime laws were important in protecting vulnerable groups, in recognising the particular harm caused by hate crimes (for individuals and communities), and in sending a message to society at large as well as to potential victims and perpetrators about the unacceptability of prejudice-based conduct.

3.9 With regard to statutory aggravations in particular, respondents in this group largely endorsed the arguments put forward by Lord Bracadale, and argued that this model:

- Is well established and works effectively; there was no reason not to continue with this approach
- Is simple and accessible, easy to explain, and is understood by both professionals and the public
- Offers flexibility in two respects – aggravations could be attached to any crime and new aggravations covering additional groups could be added in the future within the context of an already established framework
- Ensures that hate crimes of all types can be prosecuted and recognised in sentencing, without the need for additional standalone offences to be created
- Provides consistency across all groups, and avoids the potential issue of a ‘hierarchy of victims’
- Supports consistency and continuity in operational approach and practice and in the recording of statistics related to particular groups which, in turn, is helpful in informing future policy development in this area
- Encourages reporting (because of the existence of a ‘main’ offence), and helps with investigation and prosecution (because of the different corroborative requirements for the main offence and aggravation)
- Makes sense, as most hate crimes are in fact linked to other offences; this link to a ‘main’ offence was also seen as helpful by some in avoiding the perceived risk to freedom of speech that hate crime laws presented (see paragraph 3.13 for further discussion of this issue).

3.10 Some in this group expressed a preference for aggravations **rather than** standalone offences (citing, for example, reasons related to parity, flexibility and the protection of freedom of speech); others thought there was a role for **both** legislative approaches.

3.11 In contrast, other respondents – mainly individuals and some faith groups – indicated more qualified support for the continuation of the statutory aggravation model. Respondents in this group offered one or more of the following main views:

- They noted broad concerns about hate crime legislation, with some suggesting that any consolidation process should aim to pare back the laws in this area. Some said they would prefer to see hate crime laws repealed in their entirety but said that **if** such legislation were to be in place, it should be implemented via statutory aggravations **rather than** standalone offences. In particular, respondents thought a model based on aggravations linked to a main offence offered some degree of protection to freedom of speech as it meant people could not be prosecuted purely because of something they said. The concerns noted by this group reflected the concerns of those who indicated disagreement with the continuation of the statutory aggravation model – see paragraph 3.13 below.
- They said that current laws in this area were adequate, and they thought there was no need for **additional** aggravations (or standalone offences) to be created.

Opposition to continuation of the statutory aggravation model

3.12 There were two main standpoints apparent among those who were opposed to the continuation of the statutory aggravation model.

3.13 Some respondents – mainly individuals and faith organisations – expressed general opposition to hate crime legislation, or the principles underpinning it, with some calling for all hate crime legislation to be repealed (some, however, made a distinction between ‘intrinsic’ characteristics such as race, sex and disability, and other ‘debatable’ or ‘choice-based’ characteristics). Respondents in this group made one or more of the following inter-linked points:

- They said that hate crime laws were unnecessary because all relevant conduct could be prosecuted using existing offences.
- They thought that all criminal conduct and all victims of crime should be treated the same, and that hate crime laws based on particular groups undermined the principle of equality before the law.
- They objected to laws designed to protect particular groups (i.e. those with protected characteristics). They argued that such an approach (i) pitted sub-groups against each other and was discriminatory and divisive, and (ii) risked the creation of ever-increasing and ever-changing categories.
- They argued that the law should not be used for ‘political purposes’ – that is, to signal support for particular groups in society – and should not be subject to change in response to lobbying from particular groups.
- They were critical of the lack of clear definition of a ‘hate crime’ or of ‘hate’.
- They were concerned that hate crime legislation presented a risk to freedom of speech and freedom of religious expression, and that the proposed reforms would exacerbate this. Respondents highlighted a perceived lack of clarity regarding the distinction between ‘disagreement’ and ‘hostility’, and thought hate crime laws could lead to the unnecessary criminalisation of some behaviours – some referred to incidents involving the arrest and (unsuccessful) prosecution of street preachers to explain their concerns.

- They thought that the prioritisation of some groups over others, the perceived subjectivity involved in defining offences, and the risk to freedom of speech undermined important principles of democracy, equality and legal certainty.
- They said there was no evidence that hate crime law ‘worked’ in terms of reducing prejudice, preventing hate crimes, and changing attitudes and behaviours; some said that hate crime laws were in fact counter-productive in fuelling divisions in society and giving rise to friction between communities.
- They thought that a focus on hate crime represented a waste of time and resources in terms of police and judicial time – they did not see this as a priority compared to other criminal justice challenges. They also suggested the effort involved in prosecuting hate crime was disproportionate to the scale of the issue.

3.14 The comments made by this group of respondents often suggested that their response to the tick-box part of Question 1 indicated disagreement with hate crime in general rather than any specific opposition to the aggravation model. Further, the arguments put forward were widely repeated by individuals at all the questions included in the consultation. However, some did offer comments with regard to the aggravation model specifically, as follows:

- They thought that aggravations were unnecessary because existing sentencing guidelines allowed the full circumstances of individual cases to be reflected.
- They expressed concerns about the different evidential requirements for aggravations and ‘standard’ offences – respondents saw the absence of a corroboration requirement in establishing an aggravation, and the potential reliance on the perception of victims or third parties as significant factors contributing to the ‘subjectivity’ of hate crime laws.

3.15 However, there was an alternative viewpoint amongst those opposed to the aggravation model. This was put forward mainly by public and third sector organisations (including those working with particular equality groups) who favoured the use of standalone offences or a combination of standalone offences and aggravations for all protected characteristics. These respondents argued (i) that existing standalone offences served an important purpose and were well used, (ii) that aggravations did not provide a direct route to prosecution and did not cover situations where a main offence had not been committed, or the threshold or corroborative requirements of a main offence had not been reached, and / or (iii) that it was important to maintain a full range of legal options in this area. Some respondents argued specifically for (i) retaining the standalone offence relating to race (these arguments are covered in more detail in Chapter 14), and (ii) introducing new standalone offences covering other protected groups, and misogynistic harassment in particular (this is discussed in more detail in Chapter 6).

3.16 Some in this group disputed that the core model for Scottish hate crime legislation was (or should be) based on aggravations. These respondents were concerned that the premise of the question might skew the responses received.

Approaches and underlying principles in dealing with hate crime

3.17 As well as commenting on the continuation of the ‘aggravation model’, respondents also offered more general comments on the approaches and underlying principles that might be employed in tackling hate crime and prejudice. Respondents who were broadly supportive of hate crime legislation suggested, for example, that the current approach might be strengthened through adoption of:

- A rights-based approach
- A victim-centred approach
- An approach that aimed to redress discrimination based on structural inequalities and power imbalances in society
- A whole system approach – including robust legislation and non-legislative activity – to tackle prejudice and hate crime aimed at different groups.

3.18 Respondents advocating a greater shift in direction argued for:

- A ‘generic’ approach to formulating legislation that recognised that different groups can be targeted but did not specify and define particular groups
- A system based on equality before the law, with no reference to, or special treatment for, any particular groups
- An approach that gave greater priority to the protection of freedom of speech and freedom of religious expression
- A US-style system based on freedom of speech and a generic ‘emergency test’ which allows the prosecution of speech that is judged, taking full account of the context, to ‘directly cause specific imminent serious harm’
- A non-legislative approach to tackling prejudice and building understanding between groups.

Other relevant comments made at Question 1

3.19 Respondents also made a number of general points related to the consolidation and modernisation of hate crime legislation. These included the following:

- Respondents argued for consistency in the concepts and terminology used within hate crime legislation and used in other laws (particularly the Equality Act 2010) and other official contexts.
- Respondents said the policy response to hate crime should be kept under scrutiny and should be informed by improved data recording and better evidence and research.

3.20 Respondents also raised a wide range of points relevant to other questions in the consultation – for example, the coverage of different groups within the legislation; thresholds and evidential requirements; the support and information needs of different groups; and the need for a public campaign to accompany any newly reformed legislation. Such points also arose in the context of other questions included in the consultation, and are covered elsewhere in the report.

4. Language of legal thresholds (Q2 and Q3)

4.1 There are currently two legal thresholds for proving statutory aggravations: (i) the offender, at the time of committing the offence, or immediately before or after doing so, evinces malice and ill-will towards the victim based on a protected characteristic; or (ii) the offence is motivated (wholly or partly) by malice and ill-will towards members of a group defined by reference to a protected characteristic. Lord Bracadale's review concluded that these thresholds should remain unchanged but recommended that the language used should be updated to make the thresholds more easily understood by a layperson. The review proposed replacing the phrase 'evinced malice and ill will' with 'demonstrating hostility' and the consultation paper asked for views on the proposed rewording (Question 2), and whether this revised wording might affect the application of the thresholds (Question 3).

Question 2: Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from 'evinced malice and ill will' to 'demonstrating hostility'? [Yes / No / Unsure]

Question 3: Do you think changing the language of the thresholds for the statutory aggravations from 'evinced malice and ill will' to 'demonstrating hostility' would change how the thresholds are applied? [Yes / No / Unsure]

Key points

- ◆ Respondents were divided on whether the language of the thresholds for statutory aggravations would be easier to understand if it were changed from 'evinced malice and ill will' to 'demonstrating hostility': 35% agreed, 40% disagreed, and 25% were unsure (representing 268, 302 and 187 respectively out of a total of 757 respondents). Views were also mixed on whether the proposed change would affect the application of the thresholds: 43% agreed, 24% disagreed, and 33% were unsure (representing 308, 171 and 238 respectively out of a total of 717 respondents). Note, however, that organisations generally agreed that changes to the language of the thresholds would make hate crime legislation easier to understand – 72% (59 out of 82 respondents) said 'yes' in answer to Question 2.
- ◆ Respondents who said 'yes' generally thought it was important that the language of the thresholds was clear, consistent and accessible to the general public to enhance understanding of and confidence in hate crime laws. They also agreed that the proposed wording would help in achieving this. Some did, however, argue for further simplification and the need for accompanying guidance and information.
- ◆ Those who said 'no' were mainly concerned that the wording put forward was 'too vague', 'too subjective' and 'too open to interpretation', and that the intended meaning of the threshold was therefore less clear than was currently the case. Less often, respondents said that a change of wording was not needed because the current wording was well established and understood, and that any change risked causing confusion among the communities the legislation was intended to protect.

- ◆ There were three main views on the likely impact of the proposed change in wording – that this (i) could lead to a ‘lowering’ of the legal thresholds and the capturing of an unacceptably broad spectrum of conduct within its definition, (ii) could have a positive impact in clarifying the full range of actions included within the remit of hate crime, and in improving understanding of hate crime, or (iii) would maintain the current meaning of the thresholds, and so would not have any significant impact on their application.

4.2 The following sections present views on the proposed change of wording, and its likely impact on the application of the thresholds. Other relevant comments on the wording and application of the thresholds are discussed briefly at the end of this chapter.

Changing the language of the thresholds (Q2)

4.3 Table 4.1 shows that respondents were divided on whether the language of the thresholds for the statutory aggravations would be easier to understand if it were changed from ‘evincing malice and ill will’ to ‘demonstrating hostility’ – 35% of respondents agreed, and 40% disagreed, with 25% unsure. However, organisations were more likely than individuals to answer ‘yes’ (72% compared to 31%), while individuals were more likely than organisations to answer ‘no’ (43% compared to 16%). Among organisations, 6 of the 12 faith groups who responded to this question disagreed that the language of the thresholds would be easier to understand if it was changed as proposed in the question.

Table 4.1: Q2 – Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from ‘evincing malice and ill will’ to ‘demonstrating hostility’?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	26	70%	6	16%	5	14%	37	100%
Public sector / partnerships	21	95%	–	0%	1	5%	22	100%
Faith groups	3	25%	6	50%	3	25%	12	100%
Other organisations	9	82%	1	9%	1	9%	11	100%
Total organisations	59	72%	13	16%	10	12%	82	100%
Total individuals	209	31%	289	43%	177	26%	675	100%
Total (organisations and individuals)	268	35%	302	40%	187	25%	757	100%

Percentages may not total 100 due to rounding.

4.4 Altogether, 496 respondents (74 organisations and 422 individuals) provided further comments at Question 2. The following sections look at views on whether the proposed change of language would make the legal thresholds easier to understand, and presents specific comments and suggestions related to the proposed wording.

Views of those who agreed that the language of the thresholds would be easier to understand if it was changed to ‘demonstrating hostility’

4.5 Respondents who said ‘yes’ at Question 2 generally thought it was important that the language of the thresholds was clear, consistent and accessible to the general public in order to enhance understanding of and confidence in hate crime laws, and to encourage reporting of potential hate crimes. For the most part, respondents in this group agreed that the proposed wording would help in achieving this.

4.6 However, some respondents (particularly public and third sector organisations) offered the following qualifications to their overall response: (i) they thought the proposed language might still present challenges for some groups with particular needs (e.g. young people, people with learning disabilities or with English as a second language) and thought further work might be required to ensure the language used was easily understood by all relevant groups, (ii) they highlighted the need for clear definitions (particularly with regard to the word 'hostility') and clear and consistent supporting guidance (for the public and professionals) to explain the thresholds, and (iii) they called for a public information campaign to raise awareness and understanding of hate crime laws. In addition, some respondents, including law and justice bodies and third sector organisations, highlighted the importance of clarity about the intended impact of the revised wording, and the importance of avoiding unintended consequences as a result of a change in wording.

4.7 Alongside those who offered broad, if qualified, support for the proposed change, there was another group of respondents (mainly individuals and faith groups) who answered 'yes' but offered a distinct reason for their response. This group said that while the proposed phrasing used simpler words that were easy to understand, they also had different meanings to those currently used and might have (or were likely to have) the effect of changing and, in particular, lowering the legal thresholds for hate crimes. The views of this group are discussed further in relation to Question 3.

Views of those who disagreed that the language of the thresholds would be easier to understand if it was changed to 'demonstrating hostility'

4.8 The most common view amongst those who said 'no' at Question 2 was that the wording put forward was 'too vague', 'too subjective' and 'too open to interpretation', and the intended meaning of the threshold was therefore less clear than was currently the case. Respondents argued that this lack of precision would lead to legal uncertainty, and / or would lower the legal threshold (intentionally or otherwise) and present a risk to freedom of speech. In particular, some thought the current wording better encapsulated the concept of 'intent' and the 'intention of doing harm' than the proposed wording. This view was put forward by faith groups and some types of third sector organisations as well as individuals, and is discussed further in relation to Question 3.

4.9 Less often, respondents argued that the current phrasing was well established and well understood, particularly by those with a professional involvement in the criminal justice system, and that it had a particular legal meaning which it was important to maintain. It was argued that clarity on the meaning of the thresholds could be provided by accompanying guidance and that attempts to update the language of the thresholds were unnecessary and / or misguided. Some third sector organisations offered a somewhat similar view, arguing that a change in wording might cause confusion among the public and affected communities. These respondents thought that understanding of the **current** wording could be improved further via education and awareness raising.

4.10 Other views put forward by those who answered 'no' included the following:

- Some respondents agreed that the proposed wording was simpler and more accessible, but also thought that the meaning of the threshold had been changed – this reflected the views of some respondents who answered 'yes' (see paragraph 4.7).

- Some said that simpler wording did not make the concept being described any easier to understand.
- Some respondents agreed with the objective of updating the language of the law but thought this should only go ahead if it was possible to do so without changing the meaning of the threshold.

Specific comments and suggestions on the proposed wording

4.11 A range of respondents (including those who answered ‘yes’, ‘no’ and ‘unsure’) offered comments on specific aspects of the proposed wording, as discussed below.

Comments on ‘malice and ill will’ versus ‘hostility’

4.12 There was a frequently expressed view that the terms ‘malice and ill will’ and ‘hostility’ were not directly equivalent. Most often respondents suggested that (i) ‘malice’ was a **stronger** term than ‘hostility’ and also conveyed the idea of ‘intent to cause harm’, and therefore set the legal threshold at an appropriate level of conduct; that (ii) ‘malice’ referred to a feeling towards an individual, while ‘hostility’ could also refer to a feeling towards a concept or idea, thus potentially criminalising differences of opinions related to beliefs, lifestyles or institutions; and that (iii) an individual could be hostile towards an idea or belief system without also feeling any ‘malice or ill will’ towards an individual supporting or promoting that idea. However, there was an alternative, less common view, that the word ‘hostility’ was less subjective than ‘malice and ill will’ and would therefore make the threshold easier to evidence.

4.13 Some accepted that the terms did not have the same ‘dictionary definitions’ but thought this could be addressed via a clear statement on policy intent, and clear guidance explaining the intended meaning and interpretation of the thresholds.

4.14 A range of specific suggestions for alternative wording were also put forward. In the main, these suggestions aimed to ensure the current understanding and application of the threshold was maintained, and included: ‘demonstrating a wish to cause harm’, ‘demonstrating malice and ill will and / or hostility’, ‘demonstrating hate and / or hostility’, ‘demonstrating harm or an intention to harm’, and ‘demonstrating threatening conduct’. However, there were also some suggestions which aimed to ensure the inclusion of an appropriately broad range of behaviours. These included, for example, the addition of the phrase ‘...and / or behaviour motivated by bias, prejudice or hatred’.

Comments on ‘evincing’ versus ‘demonstrating’

4.15 Some public and third sector organisations and some individuals agreed that the threshold language should be updated, but they thought that only the word ‘evincing’ needed to be changed. These respondents argued that the phrase ‘malice and ill will’ was well established and understood. They favoured the phrase ‘demonstrating malice and ill will’ which they thought would be accessible to members of the public while also offering greater assurance with regard to maintaining the meaning of the current threshold. However, there was a concern expressed by some in this group that the use of the word ‘demonstrating’ might suggest that the ‘hostility’ had to be observable at the time of the offence.

Views of those who were unsure whether the language of the thresholds would be easier to understand if it was changed to ‘demonstrating hostility’

4.16 In the main, respondents who were unsure about the possible rewording of the legal thresholds made similar points to other respondents – for example, they appreciated the aim of updating the language used, but were concerned about a possible loss of clarity, change of meaning or change of threshold; or, alternatively, they thought the language proposed was not simple enough and called for further work to be done in this area.

4.17 Amongst those who answered ‘unsure’ at Question 2, a small number of additional views were also put forward (mainly by individuals):

- Both the current and proposed wording were unsatisfactory – they were both too unclear, too ‘vague’ or too ‘subjective’ in their meaning.
- Adjusting the wording of the thresholds would not change the perceived problems with hate crime laws.
- The wording of the threshold was not important, as long as those applying the law adopted a consistent approach.

The impact of changing the language of the thresholds (Q3)

4.18 Table 4.2 shows that there was a mix of views on whether the proposed change of language would change how the thresholds for statutory aggravations are applied – 43% of respondents thought they would, 24% thought they would not, and 33% were unsure. However, individuals were more likely than organisations to answer ‘yes’ (44% compared to 30%) to this question – that is, they thought the change of wording would change the application of the thresholds. It is notable that half of organisations (47%) said that they were unsure on this issue.

Table 4.2: Q3 – Do you think changing the language of the thresholds for the statutory aggravations from ‘evincing malice and ill will’ to ‘demonstrating hostility’ would change how the thresholds are applied?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	5	15%	10	30%	18	55%	33	100%
Public sector / partnerships	5	24%	5	24%	11	52%	21	100%
Faith groups	7	58%	1	8%	4	33%	12	100%
Other organisations	5	63%	1	13%	2	25%	8	100%
Total organisations	22	30%	17	23%	35	47%	74	100%
Total individuals	286	44%	154	24%	203	32%	643	100%
Total (organisations and individuals)	308	43%	171	24%	238	33%	717	100%

Percentages may not total 100 due to rounding.

4.19 Altogether, 409 respondents (63 organisations and 346 individuals) provided further comments at Question 3. The views of respondents are discussed below.

Views on how a change of language might affect application of the thresholds

4.20 As shown in Table 4.2, there was a mix of views on whether changing the language of the thresholds for statutory aggravations would change their application. It is also notable that some respondents (over a third of those who answered 'yes' at Question 2) answered 'yes' to both Questions 2 and 3 – that is, they agreed that the proposed language was easier to understand, but also thought this would affect the application of the thresholds, and, in most cases, thought this was undesirable.

4.21 The comments made at Question 2 and 3 illustrated a range of views on the likely impact of the proposed change to the wording of the thresholds, with three main views expressed as follows:

- The proposed wording could lead to a 'lowering' of the legal thresholds and the capturing of an unacceptably broad spectrum of conduct within their definition. Respondents offering this view thought that the wording was 'too subjective' and 'too open to interpretation'. They thought this created a risk that expressing disagreement and differences of opinion and 'causing offence' could be interpreted as 'demonstrating hostility', and that the threshold would potentially criminalise low-level and trivial conduct.
- The revised wording could have a positive impact in clarifying the full range of actions included within the remit of hate crime; this could increase understanding and help with the identification, reporting and investigation of hate crimes, which may, in turn, lead to an increase in prosecutions and convictions.
- The proposed change maintained the current meaning of the thresholds and, therefore, it would not have any significant impact on how they were applied. Respondents offering this view thought that clear definitions and accompanying guidance would help ensure that issues did not arise regarding application of the threshold. Some did, however, suggest that the revised wording would help ensure the thresholds were more consistently and correctly applied.

4.22 Occasionally, respondents expressed concern that the proposed wording would have the effect of **raising** the legal threshold thus making it harder to prosecute incidents as hate crimes.

4.23 A number of additional views were also put forward – each offered by just one or two respondents:

- It was not possible to predict the impact of the proposed revised wording on the application of the thresholds.
- The impact of any change would be determined by police and judicial action and would become clear in the development of judgements and case law over time.
- Any change of language could lead to a perception that the meaning of the thresholds had changed, and steps would need to be taken to ensure that the correct message about the policy aim was conveyed.

Other relevant comments on the wording of the thresholds

4.24 Across all groups of respondents there was a number of common points raised, with respondents noting the importance of:

- Making any policy intention associated with the change of wording (including that of no change in meaning) clear, possibly by including in statute
- Any changes to hate crime laws being accompanied by easily accessible guidance for professionals and the public (including those with special needs) to ensure full understanding and appropriate application
- Clarity and consistency regarding terminology and definitions of the thresholds, and their application in practice (e.g. in relation to the meaning of 'demonstrating hostility' and the type of behaviour covered by this).

Other relevant comments on the legal thresholds

4.25 Respondents raised a number of other issues about the legal thresholds for hate crimes. These included the following:

- Some respondents who were concerned about the potential lowering of the legal thresholds called for the inclusion of a 'reasonable person' test (i.e. would a reasonable person think the conduct met the required threshold), clear evidence of intent, or a requirement for corroboration.
- Some respondents thought it was important that the thresholds were designed to capture a broad range of behaviours including (i) repeated low-level incidents which individually may not meet the threshold for criminal conduct; or (ii) conduct where an individual is targeted because of a group they belong to, but there is nevertheless no 'demonstration of hostility'.

5. Intersex and transgender (Q4–Q6)

5.1 Currently, Scotland's hate crime laws include 'intersex' (referring to people born with variations in sex characteristics) within the definition of 'transgender' (referring to people with a range of gender identities). However, Lord Bracadale's review acknowledged that intersex was not a sub-category of transgenderism and recommended the creation of a separate category within Scotland's hate crime legislation. The Scottish Government noted that this would ensure the legislation reflected current understanding and best practice in this area. Question 4 sought views on the introduction of a separate intersex category, while Questions 5 and 6 sought views on updating the language in this area:

Question 4: Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation? [Yes / No / Unsure]

Question 5: Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated? [Yes / No / Unsure]

Question 6: If you think the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?

Key points

- ◆ Overall there were mixed views on whether variations of sex characteristics (intersex) should be a separate category from transgender identity in hate crime laws – 30% of respondents agreed, 47% disagreed, and 24% were unsure (representing 207, 326 and 165 out of a total of 698 respondents). There were also mixed views on the need to update terminology – 26% of respondents agreed, 46% disagreed, and 28% were unsure (representing 177, 314 and 190 out of 681 respondents). However, most organisations agreed on both issues.
- ◆ Among respondents who agreed with the creation of separate categories, there was a general consensus that variations of sex characteristics (intersex) was a physical condition (or a range of conditions) and not an expression of gender identity, and the two groups should not, therefore, be linked together in law.
- ◆ Those opposed to the creation of separate categories were mainly opposed, on religious / moral grounds, to the inclusion of transgender identity as a category in the law, and they argued for the law to be based on biologically determined 'sex'.
- ◆ Some respondents, including some with specific knowledge of intersex issues, argued that creation of a separate intersex category was not appropriate at this point in time when broader consideration of intersex issues was needed.
- ◆ Respondents who favoured updating the language thought it important that the law evolved, and that individuals saw themselves reflected in the law. Respondents with reservations about this highlighted the difficulty of agreeing on acceptable terms that were clear and would stand the test of time.

- ◆ Across these questions, respondents said it was important to consult with relevant individuals / organisations on this issue, and to be consistent with language used in other legislation.
-

5.2 Views relating to Questions 4 to 6 are presented below. However, the following points arose repeatedly across this set of questions, and should be borne in mind when considering the sections that follow:

- Respondents often said it was important to consult with relevant individuals / communities and representative groups on this issue – organisations, in particular, said they would ‘defer’ to the views of those with expertise and direct experience, rather than (or as well as) offering their own views on these questions. Respondents (including a range of public and third sector organisations) highlighted the work undertaken by LGBT (lesbian, gay, bisexual and transgender) organisations such as Stonewall, Scottish Trans Alliance and the Equality Network, and the position taken by these groups with regard to categorisation, language and definitions. However, other respondents explicitly stated that they did not see such groups as representing the full range of views on this issue (respondents offering this view included individuals who described themselves as being part of the LGBT community). Some respondents also expressed concern about reforms being made on the basis of demands from different lobbying groups. Additionally, respondents with a particular interest in the experience of intersex people were often clear that they did not see the main LGBT groups as representing their views, and that specific input from those with direct experience of this issue would be important in any discussions.
- It was common for individuals to say they were unfamiliar with the terms under discussion (intersex and transgender), were unaware of or unclear about the difference between them, or had insufficient knowledge and understanding to offer a view in response to the questions asked.

5.3 The above points were common, although not restricted to, those respondents who answered ‘unsure’ at Questions 4 and 5 (around a quarter at each question). It should also be noted that the substantive points made by respondents who said they were unsure often mirrored the points made by other respondents. The views of such respondents are, therefore, not presented separately.

Categorisation of variations of sex characteristics (intersex) and transgender identity (Q4)

5.4 Table 5.3 shows that there were mixed views on whether variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation – 30% of respondents agreed, 47% disagreed, and 24% were unsure. However, organisations were more likely than individuals to answer ‘yes’ (58% compared to 27%), while individuals were more likely than organisations to answer ‘no’ (51% compared to 6%).

Table 5.3: Q4 – Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	16	62%	1	4%	9	35%	26	100%
Public sector / partnerships	12	57%	1	5%	8	38%	21	100%
Faith groups	3	33%	2	22%	4	44%	9	100%
Other organisations	7	70%	–	0%	3	30%	10	100%
Total organisations	38	58%	4	6%	24	36%	66	100%
Total individuals	169	27%	322	51%	141	22%	632	100%
Total (organisations and individuals)	207	30%	326	47%	165	24%	698	100%

Percentages may not total 100 due to rounding.

5.5 Altogether, 427 respondents (58 organisations and 369 individuals) provided further comments at Question 4, and the views offered are presented below.

Support for the creation of separate categories

5.6 Among those respondents who agreed that variations of sex characteristics (intersex) should be a separate category from transgender identity, there was general consensus that variations of sex characteristics (intersex) was a physical condition (or a range of very varied conditions) and not an expression of gender identity. Respondents further argued that intersex people and transgender people had completely different life experiences as well as different experiences in relation to prejudice and victimisation. For these reasons, it was seen to be inappropriate for the two groups to be linked together in law.

5.7 Respondents also made the following additional points:

- That it was right that the law reflected evolving understanding in society
- That it was important that different groups in society saw themselves accurately reflected in the language of the law – with regard to hate crime laws, this could (i) improve confidence in the justice system, and encourage reporting of crimes, and (ii) raise awareness of the experiences and needs of particular groups at both official and public levels
- That correct differentiation in the law ensured clarity and the provision of appropriate support and protection for all groups.

5.8 In most cases respondents answering ‘yes’ to Question 4 thought it was right that both groups should continue to be included in hate crime law covered by separate categories. However, there was some disagreement on this issue, among individuals in particular, with a number of different views offered on this point:

- Some queried whether the category as currently defined caused problems.
- Some did not think that there was sufficient evidence that one or other (or both) of these groups were victimised as a consequence of their intersex status or gender identity and therefore required the protection of hate crime laws.

- Some suggested that intersex did not merit a category on its own but should be captured within the current ‘disability’ category, or a new sex-based (rather than gender-based) category within hate crime legislation.

5.9 Additionally, some respondents highlighted the importance of seeking the views of intersex people, and groups representing their interests on this issue. However, it was also stated by some that intersex people (i) did not necessarily see themselves as part of a homogenous group, and (ii) did not wish to be covered by hate crime laws (at least not at this point in time, given the current limited understanding of intersex-related issues, and the needs of those affected by such conditions). In some cases, respondents emphasised the importance of a broader cross-policy approach to considering and responding to the needs of this group – some noted the forthcoming Scottish Government consultation on intersex as relevant to considerations in this area.

5.10 Some respondents (mainly individuals) noted their general opposition to hate crime laws based on protected characteristics, but said that it was important that intersex and transgender identity were treated separately if such laws continued to be in place. These respondents drew a distinction between the ‘objective’ biological basis of an individual’s intersex status as opposed to the ‘subjective’, ‘psychological’ or ‘choice-based’ nature of gender identity. They also argued that any reformulated hate crime categories would need to be clearly defined, and that the law in this area would need to include appropriate protections for freedom of speech.

Opposition to the creation of separate categories

5.11 Among those opposing the creation of a separate category covering intersex, a number of different reasons were offered.

5.12 Most commonly, respondents (individuals and faith groups in particular) explained that their opposition reflected wider concerns about hate crime legislation – that is, concerns about laws protecting specific groups within society and the increasing complexity of laws based on ‘ever-changing’ sub-groups, and concerns about the potential impact on freedom of speech. Further, this group often expressed objections (on religious or ‘moral’ grounds) to the concepts of ‘gender’, ‘transgender identities’ and to non-heterosexual sexual orientations and thought that the law should only recognise biologically determined sex (i.e. male and female) and heterosexuality. They were also concerned about preserving the right to debate such issues. Respondents offering such views often said that the current transgender category should be removed from the law. Some did, however, draw a distinction between transgender identity and intersex (which they recognised as having a biological basis) and medically diagnosed gender dysphoria and transsexual status in explaining their views. Thus, some were content with intersex / gender dysphoria (and, in some cases, transsexual status) being recognised in law, but **not** transgender identity. Some suggested that the transgender identity category might be retained **if** its meaning was restricted to the condition of gender dysphoria and gender reassignment. These respondents expressed similar views at Questions 5 and 6.

5.13 Those offering more specific reasons for not wishing to see the creation of a separate intersex category made a range of points, including the following:

- The current categories were adequate and / or were in line with other legislation (e.g. the Equality Act 2010).

- The very small numbers of intersex people in the population did not merit a separate category.
- There was no clear evidence of (i) need based on the incidence of hate crimes and / or (ii) the benefit that would be derived from such a change.

Updating the terms used (Q5 and Q6)

5.14 Table 5.4 shows that there were also mixed views about whether the terms used in relation to transgender identity and intersex should be updated – 26% of respondents agreed, 46% disagreed, and 28% were unsure. However, organisations were notably more likely than individuals to agree that these terms should be updated (63% compared to 22% respectively). In contrast, individuals were more likely than organisations to disagree with this (50% compared to 6%). Among organisations, faith groups were least likely to think that terminology should be updated (just one faith organisation gave this view, while two thought the terms should not be updated and five were unsure).

Table 5.4: Q5 – Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	18	67%	1	4%	8	30%	27	100%
Public sector / partnerships	14	67%	1	5%	6	29%	21	100%
Faith groups	1	13%	2	25%	5	63%	8	100%
Other organisations	8	89%	–	0%	1	11%	9	100%
Total organisations	41	63%	4	6%	20	31%	65	100%
Total individuals	136	22%	310	50%	170	28%	616	100%
Total (organisations and individuals)	177	26%	314	46%	190	28%	681	100%

Percentages may not total 100 due to rounding.

5.15 Altogether, 357 respondents (53 organisations and 304 individuals) commented at Question 5, and 226 respondents (46 organisations and 180 individuals) commented at Question 6. There was a great deal of commonality in the points raised at these questions and so the responses to each are reported together in the sections below.

Support for updating the terms used

5.16 Respondents who thought the terms used in relation to transgender identity and intersex should be updated largely reiterated the points made by those who thought that a separate intersex category should be created. That is, they thought it was important that (i) the law – and the language of the law – reflected change over time in wider society, and that (ii) different sub-groups within the population saw themselves accurately reflected in the law. The use of up-to-date inclusive language, which reflected that used by relevant groups, was seen as important to the overall objective of ensuring modern, relatable and effective legislation – see also paragraph 5.7.

5.17 Respondents also noted the importance of:

- Ensuring that the language adopted was, as far as possible, ‘future-proofed’ – some argued that broad ‘umbrella’ or ‘catch all’ terms were more likely to stand

the test of time, while others stated a preference for more specific terms as they thought that broader terms were often vague and prone to changing their meaning

- Using clear, simple language and well-defined terms that were easily understood by the general public
- Covering the full diversity of gender identities
- Aligning the language used with that used in other legislation (current and proposed) and official contexts – some argued that the language and categories in the Equality Act 2010 should be used across other pieces of legislation in a correct and consistent way, while others thought that the Equality Act terminology might also be updated; occasionally, respondents drew attention to the ongoing consideration regarding reforms to the law relating to gender reassignment, and a forthcoming Scottish Government consultation on intersex.

Opposition to or reservations about updating the terms used

5.18 As noted above, a substantial proportion of individual respondents used Questions 5 and 6 to reiterate their concerns about hate crime laws in general and the inclusion of a transgender category in particular (see paragraph 5.12), without commenting directly on the updating of the terminology used.

5.19 However, among those respondents who did comment directly on their reservations about or opposition to the updating of terminology, there were concerns about:

- The risk of confusion if any updating resulted in inconsistencies with language used in other contexts
- The difficulty of coming up with terms that were clear and well defined and did not date quickly – respondents often also highlighted a perceived lack of clarity with regard to current terminology
- The challenge of agreeing on language that was acceptable to a full spectrum of people, given that this was a controversial and contested issue for some groups.

Suggested language and terminology

5.20 Respondents who put forward proposals for language and terminology related to transgender identity offered the following main points:

- **Language relating to transgender identity:** Organisational respondents largely agreed that the terms ‘transvestite’ and ‘transsexual’ were outdated and should be replaced. Regarding alternatives, organisational respondents – including those representing the LGBT community – generally favoured ‘trans’ and / or ‘transgender’ or variations on this (e.g. ‘transgender person’, ‘trans man’, ‘trans woman’) as overall terms which covered a range of sub-groups. However, some expressed the view that ‘non-binary’ and (less often) ‘cross-dressing’ should also be explicitly referenced in the legislation. In contrast, individuals offered a greater mix of views on language. Some agreed with organisational respondents in supporting the use of ‘trans’ or ‘transgender’ and ‘non-binary’. However, there was also a distinct view among individuals that the terms ‘transvestite’ and

'transsexual' were **not** outdated and were, in fact, in current use and were the preferred terms of some individuals and groups. These respondents wished to see these terms retained in the legislation.

- **Language relating to intersex:** Respondents were less likely to offer alternatives for the term 'intersex', although some stated a preference for 'intersex *people*' or 'intersex *status*' or 'variation of sex characteristics **and** intersex'. However, some respondents stressed that variation of sex characteristics **or** intersex covered a very wide range of conditions and that those affected did not necessarily see themselves as part of a homogenous group or community to which a single 'label' could be applied. As such, they expressed a preference for the more descriptive phrase 'differences in sex development' or DSD when referring to this diverse group of people. (It should be noted, however, that some respondents offering such views also queried whether and how DSD (or intersex) should be included in hate crime legislation at all – see also paragraph 5.9).

5.21 Some respondents also expressed support for an 'issue based' approach to terminology, or they put forward more descriptive phrases which avoided the use of specific labels that might date quickly. Suggestions included:

- People whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth (offered by one organisation as a descriptor for transgender)
- Variations in sexual characteristics, identity and orientation
- People who consider their gender to be neither purely female nor male
- Non-traditional gender expression.

5.22 In addition to the above points, respondents occasionally made more detailed points highlighting the sensitivities in agreeing appropriate language – for example: 'trans' and 'intersex' should be used as adjectives (e.g. trans people / man / woman); the suffix '-ism' should be avoided as it suggested a belief system rather than an objective state.

Part Two:

New statutory aggravations

6. Gender (Q7–Q10)

6.1 This chapter discusses respondents' views about whether gender hostility should be included within new hate crime legislation and, if so, how.

6.2 The consultation document noted that one of the conclusions of Lord Bracadale's review of hate crime legislation was that gender-based hostility should be categorised as a hate crime. The consultation document set out the arguments considered by Lord Bracadale in relation to whether the offence should take the form of (i) a statutory aggravation based on gender hostility, or (ii) a standalone offence.

6.3 Following consideration of all these arguments, Lord Bracadale concluded that the clearest and most effective way to address gender hostility in hate crime legislation was through the use of a statutory aggravation. He thus recommended the creation of a new statutory aggravation based on gender hostility (Recommendation 9).

6.4 However, the consultation paper set out four options for addressing this issue, and asked respondents which they preferred: (i) Option A – establish a statutory aggravation based on gender hostility (Lord Bracadale's recommendation); (ii) Option B – develop a standalone offence relating to misogynistic harassment; (iii) Option C – build on the Equally Safe strategy to tackle misogyny; and (iv) Option D – take forward all of the first three options.

Question 7: Do you agree with Option A to develop a statutory aggravation for gender hostility? [Yes / No / Unsure] Please provide details.

Question 8: Do you agree with Option B to develop a standalone offence for misogynistic harassment? [Yes / No / Unsure] If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.

Question 9: Do you agree with Option C of building on Equally Safe to tackle misogyny? [Yes / No / Unsure] If you agree, please tell us why.

Question 10: Do you agree with Option D of taking forward all of the identified options? [Yes / No / Unsure] If you agree, please tell us why and provide examples of the types of behaviour that could be captured by the standalone offence.

Key points

- ◆ In general, organisational respondents supported a legislative response to hate crimes against women. Organisations were more likely to favour the development of a statutory aggravation for gender hostility (Option A) rather than the development of a standalone offence for misogynistic harassment (Option B). This group included public sector violence against women partnerships. However, in general, third sector organisations with specialist expertise in women's issues strongly favoured Option B, and organisations answering 'unsure' in response to these questions often explicitly stated that they deferred to the views of these expert organisations. Less often, third sector women's organisations expressed support for **both** a statutory aggravation **and** a standalone offence.

- ◆ Organisational respondents also generally supported building on the Equally Safe strategy (Option C), and it was common for organisations to say that any legislative approach to tackling misogynistic harassment should be complemented by efforts to change attitudes in society towards women and girls. There was no clear consensus among organisations regarding Option D (taking forward all the identified options, A, B and C). Those in favour suggested that Options A and C could proceed initially, while further work was undertaken to develop a standalone offence (Option B). In general, those who opposed Option D did so because they preferred an approach focused **either** on Options A and C, **or** on Options B and C, but not all three options.
 - ◆ In contrast to organisations, individuals either expressed opposition, or indicated no clear consensus, in relation to all four options, A, B, C and D. Individuals who were opposed to all options generally reiterated their opposition to hate crime legislation.
 - ◆ Issues raised by respondents across all four questions related to whether any legislative response to tackle hate crimes against women should provide protection to women only, or to both women **and** men. There was not a consensus on this issue, although organisations with expertise in women’s issues believed that the focus should be on women only. Respondents also repeatedly said that the protected characteristic specified in the Equality Act 2010 was ‘sex’, not ‘gender’ and that this should be reflected in hate crime laws. Some respondents specifically stated that they did not support a statutory aggravation for ‘gender’ hostility.
-

6.5 Before discussing the findings in relation to each of these questions, it is worth noting that respondents did not necessarily see the four options presented in the consultation paper as mutually exclusive – for example:

- 58 respondents (7 organisations and 51 individuals) answered ‘yes’ to both Question 7 **and** Question 8, to indicate that they supported a statutory aggravation relating to gender hostility (Option A) **and** a standalone offence for misogynistic harassment (Option B).
- It was also relatively common for respondents (both organisations and individuals) to indicate support **either** for Option A **or** Option B (but not both), **and** for Option C (building on Equally Safe – the non-legislative approach).
- The 83 respondents who answered ‘yes’ at Question 10 indicating support for Option D (taking forward **all** the identified options) provided a variety of combination of answers to Questions 7, 8 and 9.

Option A: A statutory aggravation for gender hostility (Q7)

6.6 Table 6.1 shows that a majority of respondents overall (59%) disagreed that there should be a statutory aggravation for gender hostility. However, over a quarter (28%) said ‘yes’ and 14% said ‘unsure’. The table also indicates that organisations and individuals held different views on this question, with 59% of organisations answering ‘yes’ and a similar proportion of individuals (64%) answering ‘no’. Among organisations, only faith groups were more likely to disagree than agree with Option A, with five out of eight respondents giving this view, although views were mixed among third sector bodies.

Table 6.1: Q7 – Do you agree with Option A to develop a statutory aggravation for gender hostility?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	13	43%	8	27%	9	30%	30	100%
Public sector / partnerships	18	82%	3	14%	1	5%	22	100%
Faith groups	3	38%	5	63%	–	0%	8	100%
Other organisations	7	78%	1	11%	1	20%	9	100%
Total organisations	41	59%	17	25%	11	16%	69	100%
Total individuals	108	23%	300	64%	64	14%	472	100%
Total (organisations and individuals)	149	28%	317	59%	75	14%	541	100%

Percentages may not total 100% due to rounding.

6.7 Altogether, 267 respondents (61 organisations and 206 individuals) commented at Question 7. Respondents expressed a range of complex views. There are two points to note:

- Respondents often made similar points in their comments, irrespective of whether they answered ‘yes’, ‘no’ or ‘unsure’.
- Respondents often expressed confusion – or requested clarification – about precisely what a statutory aggravation for gender hostility would entail.

6.8 Given both these points, caution should be exercised in interpreting the findings presented in Table 6.1 above.

6.9 The analysis set out below discusses the views in favour of, and the views opposed to, a statutory aggravation for gender hostility. This is followed by a discussion of other related points made by respondents.

6.10 It should be noted that third sector organisations with specialist expertise in women’s issues generally answered ‘no’ to Question 7. In addition, organisations who answered ‘unsure’ at Question 7 often said that they deferred to these expert organisations on this issue. In some cases, those who answered ‘unsure’ also made similar points to those who answered ‘no’ at Question 7.

Views in favour of a statutory aggravation for gender hostility

6.11 Respondents who answered ‘yes’ to Question 7 gave the following reasons for their view:

- Misogyny has long been a serious issue and offences motivated by misogyny are commonplace; the need to address this through legislation, and to provide justice to women is ‘urgent’.
- The proposed statutory aggravation would address a gap in current legislation – separate from that relating to domestic abuse – and would be consistent with the legislative approach taken in relation to (most) other protected characteristics.

- It would make it more socially and culturally acceptable to object to gender-related hostility – and would give victims greater confidence that complaints will be taken seriously by the criminal justice system.
- It would ‘send a clear message’ that such behaviour is not acceptable and will not be tolerated.
- It would result in better record keeping / statistics relating to these offences, and a more informed, targeted response to offenders and offending.
- A legislative response would be consistent with international obligations to prevent and protect against discrimination and violence targeted at women and girls.⁷

6.12 There were two other recurring views among those favouring a statutory aggravation for gender hostility.

6.13 First, respondents acknowledged that most cases of ‘gender hostility’ would relate to offences targeted at women by men. However, they thought that the law should be ‘equitable’ and provide for the possibility of gender-related offending against men. These respondents believed that a statutory aggravation for gender hostility could do this.

6.14 Second, it was also relatively common for respondents to query – and in some cases challenge – the use of the term ‘gender hostility’, arguing that (i) ‘gender’ is not a term which could be defined in law; (ii) gender is a social construct, open to interpretation, and may change during a person’s lifetime; and (iii) any statutory aggravation based on ‘gender hostility’ would be impractical to enforce. (Note that many of these same points were also made by those who answered ‘no’ and ‘unsure’ to Question 7.) These respondents suggested instead that statutory aggravations should reflect the protected characteristics defined in the Equality Act 2010, and that the proposed statutory aggravation should therefore be based on ‘sex’, not gender. Some respondents (including some of the public sector violence against women partnerships) stated that they supported this proposal, but wanted the definition to be changed to refer to hostility based on ‘sex’ rather than ‘gender’. Occasionally, respondents noted that this change would also provide protection to male victims of sex-related hostility.

6.15 Less often, respondents answering ‘yes’ to Question 7 expressed support for: (i) a statutory aggravation based **either** on gender **or** sex; (ii) a focus on ‘gender’ which would reflect the Equally Safe definition of ‘gender-based violence’; or (iii) the creation of a protected characteristic of ‘gender’.

Views opposed to a statutory aggravation for gender hostility

6.16 There were a range of different perspectives expressed by those who answered ‘no’ to Question 7. These addressed the following:

- **A focus on women ONLY versus a focus on women AND men:** Some respondents disagreed with a statutory aggravation based on ‘gender hostility’ because, in their view, it ignored (or was inconsistent with) the ‘overwhelming

⁷ The reference here is to the United Nations Convention on the Elimination of all Forms of Discrimination Against **Women** (CEDAW).

evidence' that gender-based harassment and hate is targeted at women by men. This group argued that, by focusing on 'gender hostility' (both misandry and misogyny), rather than 'misogyny', Option A fails to name the problem that the legislative response is meant to address. It also fails to recognise that violence against women and girls is a human rights violation rooted in historical inequality. Some in this group were concerned that a statutory aggravation for 'gender hostility' would lead to vexatious complaints about women by men and would further entrench indifference in society to incidents of misogyny. There was also opposition to the idea of transgender women (specifically, individuals who are biological males) receiving the same protections as women and girls under any new legislation intended to address misogyny – particularly since there is already protection for transgender identity in existing hate crime legislation.⁸ These views were expressed mainly by third sector organisations, including women's organisations, and some individual respondents. This group noted that the approach to create a statutory aggravation for gender hostility was not supported by organisations with expertise in violence against women and girls. Less often, respondents argued that any new legislation that protects women should also provide the same protection to men. Among those who answered 'no' to Question 7, this view was most often expressed by individuals.

- **'Gender' versus 'sex'**: Some respondents (including some faith organisations, some public sector / partnership bodies, and some individuals) said they did not support a statutory aggravation for gender hostility because the aggravation should be based on 'sex' not 'gender'. Thus, these respondents expressed similar views to some of those who answered 'yes' to this question (see paragraph 6.14).
- **'Hostility' versus 'malice and ill will'**: Some respondents objected to the use of the term 'hostility', arguing that it 'set the threshold too low' for defining a criminal offence. There were concerns among this group that gender hostility could be equated with 'unfriendliness' or 'disagreement' or that an offence based on this concept could stifle public debate on the subject of gender. These respondents called for the definition of the offence to include the concept of 'malice and ill will' which they thought would allow for easier implementation in practice. This view was expressed by some faith organisations, some academic organisations, and some individual respondents (see also Chapter 4).
- **Concerns about freedom of speech**: Related to the point above, there was a more general concern expressed by some individuals that 'hate crime' laws had the effect of stifling public debate (see also Chapters 3 and 4).

Other issues and concerns raised by respondents

6.17 Irrespective of whether respondents answered 'yes', 'no' or 'unsure' to Question 7, they occasionally raised other related issues and concerns in addition to those discussed above. These included the following:

- Legislation to address gender-related offending should recognise links to disability (including learning disability) as disabled women are twice as likely to experience gender-based violence than non-disabled women.

⁸ Note that several respondents referred to this issue and there was support for both sides of this argument.

- Any new legislation must be accompanied by the development of accessible, child- and young person-friendly reporting mechanisms.
- The legislation needs to be clearly defined to complement other legislation which addresses related issues, including domestic violence.

6.18 Finally, some said they found it difficult to comment on Option A without a clearer definition of what was meant by 'gender hostility'.

6.19 Some respondents also pointed to possible unintended consequences of a statutory aggravation for gender hostility. For example, it was noted that:

- Police statistics indicate that children and young people are disproportionately the perpetrators of identity-based bullying and 'hate' behaviour. It was suggested that there was a need to consider if this disproportionality would also arise in relation to gender hostility, and if so, what the implications would be for public policy relating to children and young people.
- Since every person has a 'gender' of some type, a statutory aggravation of 'gender hostility' would, it was suggested, result in nearly everyone (apart from non-binary people) being covered under hate crime legislation. Some respondents reiterated that this approach would trivialise the seriousness of misogynistic violence and harassment; others suggested that this was an argument for dispensing with statutory aggravations altogether, and focusing criminal legislation on acts of violence and abuse instead.

Option B: A standalone offence for misogynistic harassment (Q8)

6.20 Option B would involve developing a standalone offence relating to misogynistic harassment. Respondents in favour of this option were asked to provide examples of the types of behaviour that could be captured by this offence.

6.21 Table 6.2 below shows that a majority of respondents overall (58%) did not agree that a standalone offence should be created for misogynistic harassment. Among the remaining respondents, a quarter (24%) said 'yes' and nearly a fifth (18%) said 'unsure'. Individuals were more likely than organisations to say 'no' (61% vs 38%, respectively). Regarding organisations, there were mixed views among third sector organisations, public sector / partnership bodies, and other organisations.

Table 6.2: Q8 – Do you agree with Option B to develop a standalone offence for misogynistic harassment?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	9	29%	7	23%	15	48%	31	100%
Public sector / partnerships	6	26%	9	39%	8	35%	23	100%
Faith groups	–	0%	7	100%	–	0%	7	100%
Other organisations	3	38%	3	38%	2	25%	8	100%
Total organisations	18	26%	26	38%	25	36%	69	100%
Total individuals	108	23%	281	61%	73	16%	462	100%
Total (organisations and individuals)	126	24%	307	58%	98	18%	531	100%

Percentages may not total 100% due to rounding.

6.22 Altogether, 234 respondents (52 organisations and 182 individuals) commented at Question 8. The sections below present the views of those in favour of and those opposed to a standalone offence. Details of respondents' suggestions about the kinds of behaviours that a standalone offence should address are covered at the end of the chapter.

Views in favour of a standalone offence of misogynistic harassment

6.23 Respondents in favour of a standalone offence of misogynistic harassment generally made the point that this option was favoured by organisations with specialist expertise in this area. Furthermore, these respondents (mainly organisations) stated that they supported the position of those organisations and thought the Scottish Government should work closely with them in developing any legislative response to misogyny. (Organisational respondents who ticked 'unsure' often expressed similar views, saying that they were not in a position to comment on this issue, but thought that the Scottish Government should work closely with expert organisations in developing its response.)

6.24 This group made several points relating to the scale, pervasiveness and nature of the problem of misogyny:

- Misogynistic harassment is endemic in society and it affects every aspect of women's lives – 'constraining what they do, say and wear'.
- Misogynistic harassment is different to other forms of hate crime and can take many different forms – including 'acts or omissions intended or likely to cause death, or physical, sexual, psychological or economic harm' (e.g. social exclusion, discrimination, hostility, sexual objectification, etc.).
- Although sexual harassment in the workplace is illegal, similar behaviour is largely tolerated in public spaces, online, and in educational settings.
- There is currently a legislative gap relating to stirring up of hatred against women, unless the perpetrator makes threats of rape directed at a specific individual.

6.25 These respondents argued that a standalone offence would provide a better and more appropriately targeted remedy than the creation of a statutory aggravation.

6.26 Some respondents also highlighted what they perceived to be a lack of capacity among police and prosecutors in recognising and responding appropriately to crimes motivated by gender-based prejudice; and they thought the creation of a standalone offence would help to address this. This group also considered that the creation of a standalone offence was more consistent with the Scottish Government's commitment to implement the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

6.27 Respondents in favour of establishing a standalone offence often commented on aspects of how this option could be taken forward. Specifically, they suggested:

- A participatory approach should be used in developing the legislation (along similar lines to that taken in relation to new legislation on domestic abuse).
- The legislation should incorporate a comprehensive understanding of gender hierarchy. It should also address (i) the stirring up of hatred and (ii) online harassment / abuse.
- A 'mapping exercise' should be undertaken to ascertain the extent to which women's experiences of online harassment are covered by existing offences.
- Any legislative response to misogynistic hate crime should not conflict with other (existing) hate crime legislation – thus ensuring that sentencing practices are consistent and appropriately address the experiences of individuals with multiple protected characteristics – e.g. disabled women, black women, etc.

6.28 Occasionally, respondents in this group gave reasons in addition to those mentioned above (see paragraph 6.16) for **not** favouring the creation of a statutory aggravation. Some suggested that it would be difficult to prove 'hatred' as a motivating factor where the issue was more related to a power imbalance between the perpetrator and victim. Others simply said that they did not think a statutory aggravation model would be effective but did not provide further explanation for this view.

Views opposed to a standalone offence of misogynistic harassment

6.29 There were different views expressed by organisations and individuals who answered 'no' to Question 9. Organisational respondents (including some who answered 'unsure') were generally supportive of a legislative response to tackle prejudice, discrimination and violence against women, but they agreed with Lord Bracadale's recommendation that the development of a statutory aggravation was the clearest and most effective way to proceed. This group thought the creation of a standalone offence would cause confusion. Those who highlighted this issue were concerned that a separate (standalone) offence for misogynistic harassment would:

- Overlap considerably with other existing offences
- Undermine the collection of reliable data
- Risk portraying all women as potential victims and all men as potential perpetrators
- Potentially alienate transgender women.

6.30 Some organisations argued that the term ‘misogyny’ was too broad to be of practical use for the purposes of establishing a criminal offence, since it included both criminal and non-criminal behaviour. This group suggested that further work would be required to develop a legal definition of misogyny. (Note that this point was often echoed by respondents who answered ‘unsure’ to Question 9.) Other respondents were concerned that there was a risk of confusion in relation to crimes that appeared to be related to misogyny, but which (in the view of respondents) were not (e.g. female genital mutilation).

6.31 Among individuals who were opposed to a standalone offence of misogynistic harassment, the most common view was that all victims of crime should be treated equally under the law – and, therefore, there should not be additional protection for women. Those who expressed this view often went on to express more general opposition to hate crime legislation, or any criminal legislation based on the personal characteristics of the victim. Some within this group expressed concern that legislation to address misogyny would result in law enforcement resources being ‘diverted from serious criminal activities’.

6.32 Other relatively common reasons given by respondents for opposing a standalone offence of misogynistic harassment were as follows:

- It would not capture any offence which would not be captured by other existing offences (potentially with an aggravation of ‘gender hostility’ attached). This view was expressed mainly by individuals, but also some organisations.
- As far as possible, all hate crime should be treated within the criminal justice system in a consistent way. Related to this point was the view that there should be an ‘equality of protection’ for all individuals with protected characteristics. Some of those who raised this issue were concerned that the creation of a new standalone offence appeared to be giving additional protection to one group of individuals with a protected characteristic compared to others who also had protected characteristics. This view was expressed by some organisations.
- Although misogyny is an undesirable quality, it is not a crime, and should not be criminalised. This view was expressed mainly by individuals.

6.33 Among those organisations who answered ‘no’ to Question 9, some suggested that there may be a case for introducing a standalone offence ‘at some stage’ in the future, to cover all behaviour relating to violence against women. There were calls among this group to proceed with Option A as a priority, while Option B was explored further. However, there was also a view that it would be important to establish a strong evidence base before creating a standalone offence.

Option C: Building on Equally Safe (Q9)

6.34 Question 9 invited views about whether the Scottish Government’s response to gender-based hate crime should involve building on the Equally Safe strategy – the Scottish Government and COSLA’s joint strategy for preventing and eradicating violence against women and girls. This would be a non-legislative approach which, the consultation paper explained, could be taken forward in its own right, or in tandem with one or both of the legislative options (i.e. Option A and Option B).

6.35 Table 6.3 below shows that there were mixed views among respondents about whether they agreed with the idea of building on the Equally Safe strategy to tackle misogyny, with 25% in favour, 45% opposed and 30% unsure. However, organisational respondents were more likely than individuals to say ‘yes’ in answer to Question 9 (66% vs 19%, respectively). Faith groups (5 out of 6 respondents) and public sector / partnership bodies (17 out of 23 respondents) were particularly likely to support building on Equally Safe.

Table 6.3: Q9 – Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	16	59%	2	7%	9	33%	27	100%
Public sector / partnerships	17	74%	2	9%	4	17%	23	100%
Faith groups	5	83%	1	17%	–	0%	6	100%
Other organisations	5	56%	3	33%	1	11%	9	100%
Total organisations	43	66%	8	12%	14	22%	65	100%
Total individuals	82	19%	218	50%	133	31%	433	100%
Total (organisations and individuals)	125	25%	226	45%	147	30%	498	100%

Percentages may not total 100% due to rounding.

6.36 Altogether, 197 respondents (55 organisations and 142 individuals) commented at Question 9. Note that individuals who answered ‘unsure’ to Question 9 often stated that they did not know what Equally Safe was.

Views in favour of building on Equally Safe

6.37 Respondents who indicated support for Option C generally argued that any legislative approach to tackling misogynistic harassment should be complemented by efforts to change attitudes in society towards women and girls. Thus, these respondents did not think that Option C should be pursued **in lieu of** legislation, but rather **alongside** it. Indeed, some organisations (including public sector organisations) specifically stated that a non-legislative approach **alone** was unlikely to be effective, and that a holistic approach – which includes legislation, education and prevention – was more likely to be successful than legislation alone. Some respondents endorsed the Equally Safe strategy and suggested that Option C should be taken forward regardless of whether a statutory aggravation or standalone offence is created. This was the main view expressed by organisations. Some individuals also expressed this view, but this was not the **predominant** view among individuals. (See paragraph 6.41 and 6.42 below.)

6.38 Some organisations offered specific suggestions about how to build on Equally Safe. Examples included:

- Gathering more comprehensive data on the experiences of women and girls in relation to (i) online misogyny and (ii) misogynistic harassment in educational settings, the workplace and in public places. The point was made that a current lack of reliable data makes it difficult to understand the problem and create appropriately targeted solutions.

- Ensuring that there is a better multi-agency strategic and operational approach to tackling hate crime – one which is clearly linked to community planning structures and is underpinned by guidance for partners.
- Working with a wider range of stakeholders in taking forward the strategy – in particular, respondents called for greater involvement of non-public sector / non-statutory organisations such as those providing social care. It was noted that the social care sector is a large employer, and that issues of gender segregation in society impact upon the delivery of social care.
- Pursuing preventative approaches to changing attitudes and cultures, targeting children and young people; communities; workplaces; educational institutions (schools, colleges and universities); and online and print media.
- Undertaking better engagement with women with learning disabilities in relation to RSHP (relationships, sexual health and parenthood) education, to give them the knowledge, skills and values they need to make informed and positive choices about forming relationships, and to understand issues of consent.

6.39 Organisational respondents suggested that any efforts to build on Equally Safe should be undertaken through a ‘co-production’ approach with women’s organisations and should be informed by the views of children and young people.

6.40 Some individuals who answered ‘yes’ to Question 9 echoed the views of organisations – i.e. that a non-legislative approach to misogynistic hate crime should be taken forward in tandem with legislation. However, individuals were more likely to say that they preferred Option C because they thought a non-legislative approach was preferable to legislation. (This view was only rarely expressed by organisational respondents.) Individuals argued that a non-legislative approach was (i) more likely to be effective in changing attitudes than criminalisation and (ii) less likely to be ‘open to abuse’. This group of respondents called for education and prevention to be prioritised, and they suggested that the criminal law should be reserved for cases of assault or breach of the peace only.

Views opposed to building on Equally Safe

6.41 Among those who answered ‘no’ to Question 9, the most common view (expressed by both organisations and individuals) was that a non-legislative approach alone would not address the problem of misogyny in Scotland. Thus, these respondents essentially agreed with the views of organisations who answered ‘yes’ to this question.

6.42 Among individuals who answered ‘no’ to Question 9, there were two other recurring views: (i) that any policy response must give equal protection to men and women; and (ii) that misogyny should not be criminalised to avoid infringing on freedom of expression. Very occasionally, individuals in this group suggested that building on Equally Safe was unnecessary as women already ‘have far more rights and privileges than men’.

Option D: Taking forward all options (A–C) (Q10)

6.43 Table 6.4 shows that around two-thirds of respondents (64%) overall were **not** in favour of taking forward all three of the previously discussed options. However, views were more mixed among organisations than among individuals. Organisations were more likely than individuals to answer ‘yes’ (25% vs 15%, respectively) and ‘unsure’ (28% vs 18%,

respectively). There were mixed views among third sector organisations and public sector / partnership bodies, whereas all six faith groups that answered this question were unanimously **not** in favour of taking forward all three options.

Table 6.4: Q10 – Do you agree with Option D of taking forward all of the identified options?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	7	23%	12	40%	11	37%	30	100%
Public sector / partnerships	7	30%	10	43%	6	26%	23	100%
Faith groups	–	0%	6	100%	–	0%	6	100%
Other organisations	3	30%	5	50%	2	20%	10	100%
Total organisations	17	25%	33	48%	19	28%	69	100%
Total individuals	66	15%	295	67%	79	18%	440	100%
Total (organisations and individuals)	83	16%	328	64%	98	19%	509	100%

Percentages may not total 100% due to rounding.

6.44 In total, 168 respondents (50 organisations and 118 individuals) commented at Question 10. In general, the comments made at Question 10 repeated points already discussed above in relation to Questions 7, 8 and 9. These are not repeated here. Instead, the discussion below focuses mainly on the reasons people gave for preferring an approach involving all three options. As will be seen below (paragraph 6.48 and 6.49), those who indicated opposition to Option D generally did so because they preferred an approach focused on one or two of the options, but not all three.

Views in favour of taking forward all options

6.45 Respondents who answered ‘yes’ to Question 10 did not always give specific reasons for preferring an approach involving all three identified options (a statutory aggravation based on gender, a standalone offence relating to misogynistic harassment, and building on the Equally Safe strategy). Some simply stated that ‘this is the best option’ without providing further detail, or they suggested that ‘there’s no reason why all three cannot be taken forward’.

6.46 Among those who did give a reason (both organisations and individuals), several points were made:

- An approach involving all three options would ensure a comprehensive response to misogyny, ensuring that all aspects of misogynistic behaviour are covered. It would also provide the clearest, strongest message to the general public that violence against (and harassment of) women and girls is not acceptable.
- Option A is necessary to bring gender-related hate crime in line with other hate crime – to provide the same type of protection to women and girls as is available to people with other protected characteristics. A statutory aggravation would be able to deal with any offences with a misogynistic element. It would also allow appropriate updating if changes are made to (the whole body of) hate crime legislation in the future.

- Option B is also necessary to recognise the complexity of the issue and its basis in inequality. The systemic nature of misogynistic behaviour requires this stronger response. A standalone offence would potentially be more effective in ensuring that such crimes are treated with appropriate seriousness within the justice system.
- Option C is necessary because legislation on its own will not fully address the problem.

6.47 Among those who answered ‘yes’ to Question 10, it was also suggested that a statutory aggravation could be established relatively quickly, but that additional time would be needed to develop a standalone offence for misogynistic harassment. Those who raised this issue emphasised that implementation of any of the three options should not be delayed until all the options could be implemented. The view was that Options A and C should proceed, while work continued on the development of Option B. There was also a view that the implementation of Option A must not weaken the development of Option B.

Views opposed to taking forward all options

6.48 Among organisations, those who answered ‘no’ to Question 10 generally did so because they preferred an approach focused **either** on Options A and C, **or** on Options B and C, but not all three options.

6.49 Among individuals, there were two main perspectives. First, some individuals were generally supportive of a legislative (and in some cases a non-legislative) approach to tackling gender-based hate, but they answered ‘no’ for reasons similar to those given by organisations (i.e. that they preferred one or two of the options, but not all three).

6.50 The second perspective was expressed by other individuals who did not specifically explain why they opposed Option D. These respondents simply repeated points they made at Questions 7, 8 and 9 – (i) that all hate crime legislation should be repealed because it infringes on the right to freedom of expression, (ii) that all victims of crime should be equally protected (whether they are male or female), and (iii) that any proposed legislation to provide protection against misogynistic harassment would be ‘unworkable’.

Other issues raised in relation to taking forward all options

6.51 Occasionally, respondents raised other issues in their comments at Question 10.

6.52 Some reiterated that any new legislation should specifically aim to protect those groups most at risk (i.e. women and girls). These respondents suggested that any protection in law offered to groups not deemed to be affected by misogynistic behaviour was, essentially, ‘law for law’s sake’. This would lead to confusion among members of the public, the police and courts, and it could have the unintended consequence of increasing the existing inequality between men and women.

6.53 Some noted that protection is already provided to transgender / gender-fluid people through existing legislation, and any changes to that legislation should be specific to the needs of transgender / gender-fluid people. There was a view that any attempt to address the needs of women and girls together with those of the transgender community would risk confusion and undermine accurate monitoring.

6.54 Some organisations commented that they had no objection to the creation of new offences for misogyny / gender hostility so long as this does not result in the weakening of existing protections against racial abuse.

Behaviours that could be covered by a standalone offence

6.55 Respondents who answered 'yes' to Question 8 and / or Question 10 were asked to provide further details of the types of behaviour that could be captured by a standalone offence relating to misogynistic harassment. These respondents (and some who answered 'unsure') suggested a wide range of specific behaviours that could be covered by a new standalone offence.

6.56 Suggestions could generally be categorised into two types: (i) those relating to face-to-face behaviour and (ii) those relating to online behaviour – although in some cases there was an overlap between the two. The following list provides an indication of the kinds of face-to-face behaviour respondents mentioned. Note that some of these behaviours (including rape) are already criminal offences and able to be prosecuted under other existing legislation.

- Any abusive behaviour – or language – that is uniquely experienced by women and girls (respondents gave numerous examples of specific terms) including in circumstances where, for example, a woman (i) has politely declined a 'come on', or to otherwise engage with a man or group of men or (ii) is breastfeeding a baby in a public place
- Harassment of women in public places (including on the street)
- Rape (specifically rape of women and girls, as opposed to men and boys)
- Grooming and the targeting of vulnerable women and girls for sexual exploitation / sex trafficking
- Honour killings
- Female genital mutilation (note, however, the alternative view mentioned above that FGM is **not** a gender-based hate crime)
- Unwanted touching (including groping, kissing or hugging without consent)
- Cat-calling / street harassment by strangers / following a woman in a car
- Stalking
- Flashing
- Up-skirting
- Blaming female robbery or rape victims
- Defacing public property with graffiti that is derogatory to women.

6.57 Some respondents suggested that misogynistic behaviour can sometimes involve 'fairly low-level' behaviours which take place over a sustained period of time – similar to bullying and domestic abuse. Occasionally, respondents (mainly third sector organisations) suggested that domestic violence should be considered a hate crime.

6.58 Examples of online misogynistic behaviour included:

- Producing, selling, buying or sharing violent or degrading pornography
- Revenge porn – the posting of intimate pictures on the internet for the purposes of debasing or humiliating a woman
- Taking videos of a woman and posting them online without consent
- The posting of ‘rape fantasies’
- Sending unsolicited photos of male genitals or images meant to cause alarm
- The incitement to rape, sexual assault, or violence against women and girls
- Threats of rape towards an individual or someone close to them (such as their mother or daughter)
- Death threats.

6.59 There were also suggestions – made by both organisational and individual respondents – that certain types of behaviour commonly seen in workplaces and educational establishments should be covered by the offence. These suggestions included the following:

- Refusal to ensure gender equality in the workplace
- Workplace harassment and bullying (where there is an ongoing pattern of behaviour which may incorporate language, workload and unequal pay)
- Coercive behaviour
- Excluding women from decision-making processes in the workplace
- Controlling the clothes that women are permitted to wear at work
- Not providing facilities for privacy (separate toilets or changing areas in schools or workplaces)
- Over-explaining to hold a woman’s time and attention
- Taking credit for a woman’s work
- Work-related online (and offline) sexual harassment.

6.60 The point was made that such behaviours are often targeted at women on temporary or short-term contracts by men in senior managerial positions.

6.61 Some respondents offered more general views about what should constitute misogynistic harassment (rather than identifying specific types of behaviours). Examples included: (i) any behaviour that demeans or threatens an individual girl or woman; (ii) any sexual offence intended to ‘punish’ a woman; (iii) discrimination against women; (iv) not treating women as equal partners; (v) objectifying women; or (vi) any aggressive behaviour that affects a woman’s ability to conduct her life.

6.62 There was disagreement among respondents about whether and how transgender women should be protected under a standalone offence relating to misogynistic harassment. Some specifically clarified that, in their view, the focus of the offence should be on forms of harassment, threats and violence perpetrated by ‘biological men’ on

'biological women'. Others said that the law should protect people who are perceived by the perpetrator as 'feminine' (including non-binary and gender-non-conforming people).

6.63 However, other respondents simply suggested that further detailed consideration (and consultation with women and girls) would be needed to determine what should and should not be covered by the offence – particularly given the likely evidential requirements of a standalone offence. A concern was also expressed that it would be counter-productive for legislation to be **too** specific about the types of behaviour covered, as there are potentially unlimited ways of expressing misogyny.

6.64 Very occasionally, respondents mentioned examples of behaviours which should **not** be classified as misogynistic harassment. In particular, there was a concern that men may be criminalised for behaviour carried out 'under pressure' or through ignorance (due to upbringing). It was suggested that any legislation should be able to differentiate between low-level misogynistic behaviour, and more serious offences, and that there should be a proportionate response to sentencing.

7. Age (Q11)

7.1 The consultation paper discussed the issue of hostility based on age. Lord Bracadale's report of the independent review of hate crime legislation noted that, whilst many crimes against the elderly are motivated by a desire to exploit the perceived vulnerability of the victim, some crimes are motivated by hostility based on the perceived age of the victim. Lord Bracadale recommended that there should be a new statutory aggravation based on age hostility (Recommendation 10), and that this statutory aggravation would cover people of any age.

7.2 Respondents were asked if they agreed with Lord Bracadale's recommendation:

Question 11: Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? [Yes / No / Unsure]

Key points

- ◆ There were mixed views among respondents about whether a new statutory aggravation on age hostility should be created. Overall, 29% said 'yes'; 54% said 'no'; and 17% said 'unsure' (representing 155, 292 and 90 out of a total of 537 respondents). Organisations (64%; 46 out of 72 respondents) were more likely than individuals (23%; 109 out of 465 respondents) to say 'yes' to this question.
- ◆ Those in favour argued that there was a need for legislation in this area and there should be a consistent approach to statutory aggravations applied across all protected characteristics. These respondents also thought that the creation of a new statutory aggravation relating to age would act as a deterrent to age-related hostility and encourage reporting of crimes against older people.
- ◆ Those opposed thought that there was little evidence of age-related hostility being targeted either at older people or at young people and, therefore, legislation in this area was not needed. Some thought a statutory aggravation relating to age would be unworkable in practice.
- ◆ Respondents noted that most offences committed against the elderly were likely to be motivated by a perpetrator's perception of the victim's vulnerability, rather than hostility towards their age. Some respondents saw this as a reason not to introduce a new aggravation; others were concerned about the feasibility of distinguishing between these two motivations and called for 'clear guidance' to assist law enforcement bodies.

7.3 Table 7.1 shows an overall mixed response to whether a new statutory aggravation on age hostility should be added to Scottish hate crime legislation – 29% said 'yes'; 54% said 'no'; and 17% said 'unsure'. However, whilst a majority of individuals indicated disagreement on this point (60%), almost two-thirds of organisations (64%) expressed agreement. Compared to other organisations, who mainly agreed on this question, faith groups expressed mixed views.

Table 7.1: Q11 – Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	N	%
Third sector organisations	20	63%	2	6%	10	31%	32	100%
Public sector / partnerships	15	71%	3	14%	3	14%	21	100%
Faith groups	3	38%	4	50%	1	13%	8	100%
Other organisations	8	73%	3	27%	–	0%	11	100%
Total organisations	46	64%	12	17%	14	19%	72	100%
Total individuals	109	23%	280	60%	76	16%	465	100%
Total (organisations and individuals)	155	29%	292	54%	90	17%	537	100%

Percentages may not total 100% due to rounding.

7.4 A total of 257 respondents (66 organisations and 191 individuals) commented at Question 11. The remainder of this chapter discusses the views of those in favour of and those opposed to of a new statutory aggravation relating to age. Note that respondents who answered ‘unsure’ at Question 11 often made similar points to those who answered ‘no’ and therefore their views are not covered separately.

Views in favour of a new statutory aggravation on age hostility

7.5 Respondents who answered ‘yes’ to Question 11 (both organisations and individuals) gave three main reasons for supporting a statutory aggravation on age hostility.

- First, they believed that there was a **need** for legislation in this area. Third sector and public sector organisations, in particular, often described what they considered to be age-related hostility. This included physical assault, sexual assault, harassment, coercion, threats, intimidation, theft, fraud, neglect, lack of respect and being talked down to. It was suggested that hostility towards older people may be the result of perceptions that older people receive more state support (including financial support) than younger people. It was also said that offences against older people are often treated relatively leniently by the courts.
- Second, they pointed to an issue of **equality**: Some respondents argued that age is a protected characteristic under the Equality Act 2010 and suggested statutory aggravations for all protected characteristics would represent a consistent approach. This view was particularly common among third sector and some ‘other’ organisational respondents. Some within this group suggested that there was no good reason to exclude age as a statutory aggravation, even if the aggravation may not be used frequently. Others suggested that age-related hate / hostility may become more prevalent in the future given the ageing profile of Scotland’s population.
- Third, respondents thought that legislation could provide a **deterrent**: Some argued that the creation of a statutory aggravation relating to age would ‘send a strong message’ that the mistreatment of individuals based on their age will be treated seriously and will not be tolerated. It was suggested that this may therefore act as a deterrent, and may encourage more people to report crimes in

the belief that they will be taken more seriously. This view was expressed by law and justice bodies, some third sector organisations and some individual respondents.

7.6 Occasionally, respondents thought that a statutory aggravation relating to age could help address age-related discrimination in the workplace and in recruitment processes. This view was mainly expressed by individuals.

7.7 Some respondents (mostly third sector organisations) who answered 'yes' to Question 11 supported the point made in the consultation paper that a statutory aggravation relating to age should also cover age-related hostility directed towards children. This group acknowledged that most situations in which a child or young person is a victim of a hate crime are likely to relate to child's ethnicity, religion, sexual orientation, disability or transgender identity, rather than their age. Nevertheless, they thought it was important that children and young people received the same protection from the law as other groups should this occur. Some respondents suggested that there is a 'persistent societal and media prejudice' towards children and young people, which can result in children being exploited, or exposed to violence.

Views opposed to a new statutory aggravation for age hostility

7.8 Respondents who answered 'no' to Question 11 (both organisations and individuals) generally thought that a new statutory aggravation relating to age hostility was unnecessary. This group often commented that there was little evidence of age-related hostility targeted either at older people or young people. Instead, they argued that crimes committed against older people were more likely to be motivated by the perceived vulnerability of the victim, rather than by hatred per se. (See also paragraphs 7.12 to 7.14.)

7.9 Some respondents in this group thought a statutory aggravation relating to age would be unworkable in practice – and they queried what specific age(s) the aggravation would apply to. They also argued that a perpetrator's perception of a person's age may differ from their actual age.

7.10 Finally, one organisation highlighted the point made by Lord Bracadale in his report that many of the crimes committed by children are committed against other children – and may be regarded as bullying. Whilst bullying may cover a wide range of behaviours, some of which may amount to hate crime, Lord Bracadale considered that this did not require a change in the law – rather, the problem of bullying should instead be addressed through other policy activity.

7.11 Among individual respondents, a range of other views were expressed, including that: (i) all victims should be given the same protection and support, regardless of their age or other characteristics; (ii) only physical acts of hostility (not insults) should be criminalised; (iii) there is no need for any additional statutory aggravations or other development of hate crime legislation as current legislation is sufficient; and (iv) the focus should be on tackling the 'root causes' of prejudice through improved education rather than creating new offences. Some individuals suggested that introducing more categories of hate crime would simply add complication and waste resources.

Age-related hostility versus age-related vulnerability

7.12 A recurring theme in the comments at Question 11 related to the distinction between age-related hostility and the exploitation of vulnerability. This issue was raised both by organisations and individuals, irrespective of whether respondents ticked 'yes', 'no' or 'unsure' to the closed question. In addition, the views expressed were often applied both to older people and children and young people.

7.13 The main points made (as noted above) were that crimes against older people were more likely to be motivated by the perpetrator's perception of the victim's vulnerability rather than age-related hostility. Respondents who answered 'no' or 'unsure' often highlighted this point in their explanation for opposing or expressing uncertainty about the creation of a new statutory aggravation. Respondents also voiced concern about the practical feasibility of distinguishing between these two types of motivations. Those who answered 'yes' suggested that 'clear guidelines' and examples would have to be made available to the police and prosecutors to avoid operational confusion.

7.14 Other views, mentioned less often, including the following:

- There were suggestions that it may be more appropriate to introduce an 'exploitation of vulnerability' aggravation. (See Chapter 13 for further discussion of this.)
- Some respondents raised concerns about possible unintended consequences for children and young people of introducing a new statutory aggravation on age hostility. The point was made that careful consideration was needed to ensure that the behaviour of children and young people is appropriately addressed – through education and rehabilitation – whilst also ensuring that the rights and needs of victims are supported and defended.

8. Sectarianism (Q12–Q17)

8.1 This chapter discusses the question of whether sectarianism should be included in new hate crime legislation and, if so, how sectarianism should be defined, as covered in Section 5 of the consultation paper.

8.2 In March 2018, the Scottish Parliament voted to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (hereafter referred to as the 2012 Act). Shortly before this, in January 2018, the Scottish Parliament's Justice Committee recommended that 'the Scottish Government gives consideration to introducing a definition of sectarianism in Scot's Law, which – whether or not the 2012 Act is repealed – would help any future parliaments and governments in taking forward laws to tackle sectarianism'. This led to the establishment of the Working Group on Defining Sectarianism in Scots Law (referred to hereafter as 'the Working Group'), whose remit was to consider the pros and cons of establishing a legal definition of 'sectarianism' in Scots Law. The key aim of the Working Group was to provide a basis for further discussion of this issue (through the current consultation) rather than offer a definitive conclusion. Members of the public and stakeholder groups were therefore given the opportunity to offer their views on any definition of sectarianism in this section (Questions 12 to 17).

8.3 Meanwhile, Lord Bracadale's report on the independent review of hate crime legislation was published in May 2018. This recommended that there should be no statutory replacement for Section 1 of the 2012 Act (concerning offensive or threatening behaviour at football matches). He also recommended that the conclusions of the Working Group should inform how best to deal with offences of a sectarian nature – and whether such offences should be classed as a form of hate crime or treated as something distinct.⁹

8.4 The Working Group published its report in November 2018.¹⁰ This recommended that sectarianism **should be** defined in law and that the definition should reflect the common understanding of sectarianism in modern Scotland. Specifically, the Working Group proposed that sectarianism should be defined as:

'Hostility based on perceived (a) Roman Catholic or Protestant denominational affiliation, (b) British or Irish citizenship, nationality or national origins, or (c) a combination of (a) and (b).'

8.5 Furthermore, the Working Group recommended that a new statutory aggravation of 'sectarian prejudice' should be incorporated into future consolidated hate crime legislation.

8.6 The current consultation invited views on the Working Group's recommendations, specifically: (i) whether there was a need for sectarianism to be addressed and defined in hate crime legislation (Question 12) and (ii) if so, whether this should be done through a statutory aggravation or a standalone offence (Question 13 and 14). The consultation also invited views on (iii) the Working Group's proposed definition of sectarianism (Question 15

⁹ See recommendation 19 of the report of the Independent Review of Hate Crime Legislation in Scotland.

¹⁰ Final Report of the Working Group on Defining Sectarianism in Scots Law:

<http://www.gov.scot/publications/final-report-working-group-defining-sectarianism-scots-law/>

and 16), and (iv) any other steps that could be taken to address sectarianism in Scotland (Question 17).

Question 12: Do you think there is a need for sectarianism to be specifically addressed and defined in hate crime legislation? [Yes / No / Unsure]

Question 13: If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation? [Yes / No / Unsure]

Question 14: If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation? [Yes / No / Unsure]

Question 15: If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and / or perceived British or Irish citizenship, nationality or national origins of the victim? [Yes / No / Unsure]

Question 16: If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism? (Please give your reason for this.)

Question 17: The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?

Key points

- ◆ A majority of respondents (59%; 311 out of 527 respondents) did **not** think there was a need to address and define sectarianism in hate crime legislation, i.e. they said 'no' at Question 12, while 26% (139 out of 527 respondents) said 'yes', and 15% (77 out of 527 respondents) said 'unsure'. Organisations had more mixed views on this issue.
- ◆ Those who said 'yes' thought that sectarianism was a serious issue that needed to be addressed. This group argued that current hate crime laws, which specify race and religion as protected characteristics, did not adequately cover sectarianism.
- ◆ Those who said 'no' (or 'unsure') argued that sectarianism was adequately addressed in existing legislation. Some expressed a more general concern about criminalising sectarian behaviour on the basis that it would potentially restrict freedom of expression.
- ◆ Among those who supported addressing and defining sectarianism in hate crime legislation, there was greater support for the creation of a statutory aggravation – for reasons of clarity and consistency – than for a standalone offence.
- ◆ Among those who supported addressing and defining sectarianism in hate crime laws, 64% (87 out of 135 respondents) indicated agreement with the Working Group's proposed definition of sectarianism. However, less than half of organisations (46%; 6 out of 13 respondents) agreed with the definition. Those who disagreed with the definition thought it was too restrictive. This group suggested that the definition should (i) reflect both current and potential future expressions of sectarian prejudice in

Scotland, (ii) take account of the multi-cultural nature of modern Scotland, and (iii) be consistent with international law and standards.

- ◆ In terms of non-legislative approaches to addressing sectarianism, respondents thought that education and community engagement were key.

The option of defining sectarianism in hate crime legislation (Q12)

8.7 Table 8.1 shows that, overall, a majority of respondents (59%) did **not** agree that there was a need for sectarianism to be specifically addressed and defined in Scottish hate crime legislation – i.e. they said ‘no’ at Question 12. A quarter of respondents said ‘yes’ (26%), and 15% were unsure. Organisations were more divided in their views on this question than individuals, and also more likely to express uncertainty. Individuals were more likely to disagree that there was a need for sectarianism to be specifically addressed and defined – 61% of individuals answered ‘no’.

Table 8.1: Q12 – Do you think there is a need for sectarianism to be specifically addressed and defined in hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	7	26%	8	30%	12	44%	27	100%
Public sector / partnerships	3	14%	12	55%	7	32%	22	100%
Faith groups	2	29%	5	71%	–	0%	7	100%
Other organisations	2	29%	4	57%	1	14%	7	100%
Total organisations	14	22%	29	46%	20	32%	63	100%
Total individuals	125	27%	282	61%	57	12%	464	100%
Total (organisations and individuals)	139	26%	311	59%	77	15%	527	100%

Percentages may not total 100 due to rounding.

8.8 Altogether, 243 respondents (47 organisations and 196 individuals) commented at Question 12. Their reasons for agreeing or disagreeing that sectarianism should be addressed and defined in hate crime legislation are discussed below. Respondents who answered ‘unsure’ at Question 12 generally made similar points to those who answered ‘no’.

Views in favour of addressing and defining sectarianism

8.9 Respondents who answered ‘yes’ to Question 12 repeatedly stated that sectarianism is a serious issue that requires to be both recognised and specifically addressed. This view was especially common among third sector organisations and individuals. Some individuals reported having witnessed, or personally experienced, sectarianism, and the issue was seen to be particularly prevalent in the west of Scotland. Some individuals described sectarianism as ‘Scotland’s shame’.

8.10 In general, respondents who answered ‘yes’ to Question 12 thought that current hate crime legislation, which includes aggravations based on race and religion, did not adequately address the issue of sectarianism. However, occasionally, respondents in this group (including faith groups) suggested that there may be only a limited number of sectarian-related offences which would not be covered by existing legislation.

8.11 Respondents in favour of creating a criminal offence relating to sectarianism saw several benefits from doing so. They thought that (i) it would help in cases where the victim's characteristics do not enable prosecution of perpetrators under existing criteria for hate crimes linked to race or religion, (ii) it would provide an extra tool in responding to the problem of sectarianism, and (iii) it would provide a deterrent to sectarian behaviour.

8.12 Among respondents who supported addressing sectarianism in legislation, a less common view was that sectarianism was especially problematic in the context of football. This view was mainly expressed by individuals, who also pointed to football-related sectarianism in public transport settings. These respondents thought that the Scottish Football Association (SFA) was not doing enough to tackle sectarianism among football fans. However, there was disagreement among this group about the repeal of the 2012 Act: some expressed disappointment that this legislation had been got 'rid of'; others thought it was 'rightly repealed'.

Views opposed to addressing and defining sectarianism

8.13 In contrast to the views of those who answered 'yes' to Question 12, those who answered 'no' did not see sectarianism as distinct from offences motivated by race and religion. Thus, the main view among this group was that there was adequate provision in current legislation and that it was unnecessary to address and define sectarianism separately within hate crime legislation. It was noted that the existing model of statutory aggravations allowed for the application of multiple aggravations to a single charge, thus allowing the 'intersectional aspects' of sectarian offences to be recognised.

8.14 Some respondents who answered 'no' to Question 12 expressed a more general opposition to the idea of criminalising sectarianism. This group saw sectarian behaviour (e.g. chanting, singing offensive songs, waving banners, etc.) primarily as an issue of freedom of expression (some said freedom of religion). They noted that while such behaviour may be offensive to some people, it should not be criminalised unless it encourages violence or results in violence. Some who raised this point suggested that criminalising offensive speech would simply have the effect of pushing offensive ideologies 'underground and making them more dangerous'. These respondents argued that it would be better to have such views aired in public where they can be debated openly.

8.15 Less often, respondents gave other reasons for opposing the creation of a criminal offence of 'sectarianism'. For example, some respondents (both organisations and individuals) thought that such a move would create further divisions in communities, rather than bringing them together. There was a related view expressed by faith groups that it would undermine efforts being made to develop positive ecumenical relations between Christian denominations in Scotland. This group suggested that the focus in the proposed definition of sectarianism on 'anti-Catholic', 'anti-Protestant', 'anti-Irish' or 'anti-British' bigotry assumes that the perpetrators are from another Christian denomination or of Irish / British ethnicity – and this may not necessarily be the case in modern-day Scotland.

Defining sectarianism

8.16 Irrespective of whether respondents were in favour of or opposed to addressing sectarianism in hate crime legislation, they often commented on the potential difficulties of adequately defining sectarianism in law. Those who raised this issue suggested that there

was no agreement among stakeholders about what constitutes sectarianism; they also thought that there had been insufficient consultation with stakeholder communities on how to define it. Further detailed views on the definition of sectarianism are discussed below in relation to Questions 15 and 16.

Other points

8.17 Occasionally, respondents raised other relevant points, including that:

- Any efforts to tackle sectarianism through legislation should be evidence-based. One organisational respondent also specifically suggested that further research should be carried out to assess the impact of repealing the 2012 Act.
- The legal sanctions for sectarian offences should ensure that the perpetrator is punished appropriately.

Statutory aggravation or standalone offence for sectarianism (Q13 and Q14)

8.18 The consultation included several follow-up questions targeted at those respondents who indicated support (in Question 12) for sectarianism to be addressed and defined in hate crime legislation. The first two of these follow-up questions (Question 13 and Question 14) invited views about whether (i) a statutory aggravation or (ii) a standalone offence relating to sectarianism should be created.

8.19 Table 8.2 below shows that 90% of the 136 respondents replying to Question 13 thought that a statutory aggravation should be created relating to sectarianism. This pattern of response was the same among organisations and individuals.

Table 8.2: Q13 – If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	6	86%	–	0%	1	14%	7	100%
Public sector / partnerships	3	100%	–	0%	–	0%	3	100%
Faith groups	2	100%	–	0%	–	0%	2	100%
Other organisations	1	100%	–	0%	–	0%	2	100%
Total organisations	13	93%	–	0%	1	7%	14	100%
Total individuals	110	90%	4	3%	8	7%	122	100%
Total (organisations and individuals)	123	90%	4	3%	9	7%	136	100%

Table includes only those respondents who answered 'yes' at Question 12.

Percentages may not total 100 due to rounding.

8.20 Table 8.3 below shows that, overall, two-thirds of respondents (66%; 87 out of 132 respondents) thought that a standalone offence relating to sectarianism should be introduced. However, there was a difference in the views of organisations and individuals, with a slight majority of organisations – seven out of twelve – answering 'no' to this question. Caution should be exercised in interpreting these findings, given the small number of organisational responses to this question.

Table 8.3: Q14 – If your response to question 12 was yes, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	3	60%	1	20%	1	20%	5	100%
Public sector / partnerships	–	0%	3	100%	–	0%	3	100%
Faith groups	–	0%	2	100%	–	0%	2	100%
Other organisations	1	50%	1	50%	–	0%	2	100%
Total organisations	4	33%	7	58%	1	8%	12	100%
Total individuals	83	69%	21	18%	16	13%	120	100%
Total (organisations and individuals)	87	66%	28	21%	17	13%	132	100%

Table includes only those respondents who answered 'yes' at Question 12. Percentages may not total 100 due to rounding.

8.21 Note that around two-thirds of respondents (4 organisations and 80 individuals) answered 'yes' to **both** Question 13 and 14. This may indicate some confusion among respondents about the distinction between a statutory aggravation and a standalone offence; alternatively, respondents may have wished to see both options introduced.

8.22 Altogether, 61 respondents (11 organisations and 50 individuals) commented at Question 13, and 52 respondents (7 organisations and 45 individuals) commented at Question 14. The views expressed are presented below.

Views in favour of a statutory aggravation relating to sectarianism

8.23 Organisations in favour of the creation of a statutory aggravation relating to sectarianism argued that it would (i) achieve clarity and a consistency of approach if sectarian hate crimes were prosecuted in a similar manner to other hate offences, and (ii) enable an increase in the sanction (at sentencing) which could be applied to the offence. Some in this group noted that the Working Group had recommended the creation of a statutory aggravation for sectarian offences.

8.24 Individuals were less likely than organisations to directly address the question in their comments; rather, they reiterated their views that legislation was needed to tackle the 'shame' of sectarianism in Scotland. Occasionally, individuals suggested that making sectarianism a statutory aggravation was an important step in eradicating this behaviour.

Views in favour of a standalone offence relating to sectarianism

8.25 Those (mostly individuals) who were in favour of creating a standalone offence relating to sectarianism did not generally provide specific reasons for their view. Among those who did, it was suggested that a standalone offence would demonstrate a greater determination to eradicate this form of hate crime and would also provide greater deterrence (than a statutory aggravation). Respondents reiterated their views that existing legislation seemed to be inadequate to deal with this issue.

The Working Group definition of sectarianism (Q15 and Q16)

8.26 Respondents who answered ‘yes’ at Question 12 (indicating support for addressing and defining sectarianism in Scottish hate crime legislation) were asked two further follow-up questions. The first (Question 15) asked if they agreed with the definition proposed by the Working Group. The second question (Question 16) invited views from those who answered ‘no’ to Question 15 about what should be included in a legal definition of sectarianism. The latter was an open question with no initial tick-box.

8.27 Table 8.4 shows that, overall, 64% of respondents agreed (representing 87 out of 135 respondents who answered this question), 21% (29 respondents) disagreed, and 14% (19 respondents) were unsure about the Working Group’s definition of sectarianism. However, less than half of organisations (6 out of 13 respondents) agreed with the definition. All three of the public sector organisations responding to this question agreed with the Working Group’s proposed definition; however, there were mixed views among other organisational respondents. Caution should be used in interpreting the findings related to this question because of the small number of organisational respondents.

Table 8.4: Q15 – If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and / or perceived British or Irish citizenship, nationality or national origins of the victim?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	2	33%	2	33%	2	33%	6	100%
Public sector / partnerships	3	100%	–	0%	–	0%	3	100%
Faith groups	1	50%	1	50%	–	0%	2	100%
Other organisations	–	0%	1	50%	1	50%	2	100%
Total organisations	6	46%	4	31%	3	23%	13	100%
Total individuals	81	66%	25	20%	16	13%	122	100%
Total (organisations and individuals)	87	64%	29	21%	19	14%	135	100%

Table includes only those respondents who answered ‘yes’ at Question 12.

Percentages may not total 100 due to rounding.

8.28 Altogether, 124 respondents (20 organisations and 104 individuals) commented at Question 15, and 202 respondents (26 organisations and 176 individuals) commented at Question 16.

Agreement with the Working Group’s proposed definition

8.29 In general, respondents who agreed with the Working Group’s proposed definition had little further comment to make. These respondents simply endorsed aspects of the definition (e.g. ‘it is the *perception* that is the issue’), or they expressed the view that the definition was ‘comprehensive’ and ‘unambiguous’.

8.30 Occasionally, respondents went on to suggest that any legislative definition of sectarianism should introduce controls on ‘Orange Walks’ (which were described as ‘hate marches’) and address sectarianism in football.

8.31 Some in this group suggested that the definition of sectarianism may need to be more 'sophisticated'; these respondents made similar comments to those who disagreed with, or were unsure about, the Working Group's proposed definition. (See, in particular, paragraphs 8.32 to 8.34 below.)

Disagreement with the Working Group's proposed definition

8.32 Similar views were expressed by those who disagreed with or were unsure about the Working Group's proposed definition. Among these respondents, the most common point made was that the proposed definition was too narrow and restrictive.

8.33 This group argued that the definition should not be limited to Christian denominations, since sectarian behaviour is also evident in other, non-Christian, religions. The definition should, therefore, incorporate all forms of sectarianism which exist in Scotland as a modern and multi-cultural society, and not simply relate to the form of sectarianism which has the longest history in Scottish society.

8.34 Less often, respondents expressed a variety of other views about the Working Group's proposed definition including, for example:

- Sectarianism is about more than religion and national origin; it also involves political stances and views and cultural distinctions.
- 'Protestant denominational affiliation' is less of a factor than 'Orangeism' – which, respondents suggested, espouses a certain kind of cultural and religious ideology.
- The use of songs to incite violence, and to glorify and celebrate the loss of life and terrorist activity should be recognised within the definition.
- The definition should refer to 'malice and ill will', rather than 'hostility' to avoid criminalising people who are 'unfriendly' or who express opposition to other views.
- The law cannot be based on 'perceptions' (i.e. that the perpetrator was motivated by a 'vague' notion of 'hatred'), but on objective 'facts' only (i.e. a physical assault or violent behaviour).

8.35 Some within this group pointed out that 'sectarianism' would be classed as 'xenophobia' if it were targeted at people from other countries (apart from Ireland / Britain). There was a recurring view among these respondents that crimes committed against an individual based on their (perceived) citizenship, nationality or national origins should be considered as racism rather than sectarianism. There was some concern that the inclusion of perceived nationality or national origin in any definition of sectarianism would result in confusion in terms of prosecution of both racism and sectarianism.

Alternative definitions proposed by respondents

8.36 The main point made by respondents was that the definition of sectarianism should reflect both current and potential future expressions of sectarian prejudice in Scotland. Whilst it was recognised that the Working Group's definition reflected the most commonly understood notion of sectarian hostility in Scotland, respondents also thought that any new legislation to tackle sectarianism should take into account the multi-cultural nature of

modern Scotland and be consistent with international law and standards. Respondents suggested that this would help to future-proof the legislation.

8.37 Very occasionally, respondents offered suggestions about what a legal definition of sectarianism should include. For example, it was suggested that all reference to specific institutions (i.e. denominations, churches) and nations should be removed, and that the definition could be made more general by referring to ‘cultural affiliation’.

8.38 Two respondents offered specific suggestions of alternative definitions. These are quoted verbatim here:

‘Hostility towards: (i) any perceived religious faith, observance, denominational affiliation or sympathy; and / or (ii) perceived citizenship, nationality, national origins or national affiliations often regarded as being connected to a religious belief or affiliation (“perceived connection”).’ (Other organisational respondent)

8.39 The organisation proposing this definition went on to discuss possible legal tests of proof relating to this definition.

8.40 One faith group set out the Church of Scotland’s definition of sectarianism, as follows:

‘A complex set of attitudes, actions, beliefs and structures at personal, communal and institutional levels, which involves religion and typically involves a negative mixing of religion and politics. It arises as a distorted expression of human needs, especially for belonging, identity and the freedom of expression of difference, and is expressed in destructive patterns of relating.’ (cited from Joseph Leichty of the Irish School of Ecumenics). (Faith group)

8.41 Finally, there was also a call for any proposed new definition of sectarianism to be ‘fully worked through with Police Scotland’ and other criminal justice partners before implementation.

Other actions to address sectarianism (Q17)

8.42 The section on sectarianism concluded with an open question (Question 17) inviting views about what else (apart from legislation) could be done to address sectarianism.

8.43 Altogether, 367 respondents (48 organisations and 319 individuals) commented at Question 17. The two main themes in the responses to this question related to (i) education and (ii) community engagement.

8.44 With regards to education, respondents did not always specify who they thought this should be directed to. However, some suggested that educational initiatives should focus on (i) young people via schools or youth groups, (ii) parents and families, (iii) workplaces, and (iv) frontline practitioners in health and social care services. Others highlighted the importance of public education and awareness-raising campaigns in fostering positive community relations.

8.45 Some respondents commented on the content of educational programmes and suggested that this should (i) include information about a range of faiths as well as atheism

(although some also called for religious education to be removed from schools entirely), (ii) promote an understanding of what sectarianism is and how it affects individuals and communities, and (iii) deliver improved human rights education, emphasising the right of all people to be treated with dignity and respect. Some public sector respondents suggested that funding was needed for teaching resources and staffing to address the issue of sectarianism in classrooms.

8.46 Also related to the theme of education, there were a range of views expressed about whether denominational / faith-based schooling was responsible (or not) for the perpetuation of sectarianism. Some respondents argued that faith-based schooling should be abolished, or, at the very least, should not be state funded. This view was expressed by some faith groups, as well as third sector and 'other' organisations, and was also prominent among individual respondents. Others argued that if faith schools were to continue, these should be more inclusive and represent a broader range of faiths. However, a third group saw the issue of sectarianism as not primarily an issue of faith-based schooling.

8.47 With regards to the issue of community engagement, respondents saw communities as having a key role in addressing the issue of hate crime. Faith groups, youth clubs, third sector agencies, football clubs and other sporting organisations, businesses and workplaces and 'civil society' in general were all identified as having a part to play. Some respondents called for support for 'community-led, community-based projects' to be directed at promoting the integration of those from differing backgrounds. Occasionally respondents (particularly those in the third sector) referred to community initiatives that they were aware of, and which they considered to be successful – for example, Give Racism the Red Card, a church-led anti-sectarianism project in Kilmarnock, and a short film entitled Judge for Yourself made by residents of a community in Glasgow were mentioned. Restorative justice programmes – particularly those involving community-led mediation processes – were also advocated. (Note, however, there was also a view that restorative justice measures may not always result in the outcomes desired.)

8.48 It was also relatively common for respondents to say that the Scottish Government, local authorities, and the police all had a role to play and that political leaders (MPs, MSPs, councillors) should set a positive example in their conduct and use of language.

8.49 Also related to the theme of engagement, some individuals expressed the view that an evidence-based approach should be taken to policy development. This would involve, for example, making use of stakeholder advisory groups or working groups and evaluating the effectiveness of diversity training.

8.50 A range of other suggestions were offered, mainly by individual respondents about other ways of addressing sectarianism. The most common of these was a suggestion to ban, or reduce, the number of 'parades' (Orange Order marches, etc.). Other suggestions, made less often, included (i) abolishing all churches / religion; (ii) developing a more punitive response within football to hate crime offences within the context of football (banning fans, and allowing clubs to apply for banning orders); and (iii) addressing wider societal issues such as poverty, unemployment, and racism which can be linked to a range of social problems including sectarianism.

8.51 Finally, some (mainly individual) respondents suggested that there was no need to do anything in relation to this issue. There were three perspectives among this group: (i) that no intervention would be effective; (ii) that the situation is already improving; and (iii) that the problem is not serious enough to warrant any action.

9. Other groups or characteristics (Q18–Q20)

9.1 Section 6 of the consultation paper considered the need for new statutory aggravations to address: (i) circumstances where an offence is motivated by hostility towards a political entity which the victim is perceived to be associated with by virtue of their racial or religious group (referred to in the consultation as ‘political / religious / racial cross-over’) and (ii) any specific new groups or characteristics (apart from gender or age).

9.2 Regarding the first point above, Lord Bracadale argued that attributing protected characteristics to political entities would (i) extend the concept of hate crime too far, thus diluting its impact, and (ii) risk infringing on the right to engage in political debate and protest. He also argued that, in most cases, the existing statutory aggravations of race or religion could be attached to other offences. Thus, he recommended that a statutory aggravation to cover hostility towards a political entity was not required.

9.3 Regarding the second point above, Lord Bracadale considered whether new aggravations were required to cover hostility towards specific new groups – including (i) immigrants, (ii) members of the Gypsy / Traveller community and (iii) Gaelic speakers – or new characteristics, including a person’s socioeconomic status. Lord Bracadale argued that immigrants, Gypsy / Travellers and Gaelic speakers were already covered under the existing race aggravation, and that it would stretch the concept of hate crime too far to treat offending based on socioeconomic status as a hate crime. He therefore concluded that aggravations to cover hostility towards any specific new groups or characteristics (other than gender or age) were not required.

9.4 Section 6 also considered whether the existing religious statutory aggravation should be extended to include religious or other beliefs held by an individual. On this point, Lord Bracadale concluded that there was no rationale for departing from the core approach of recognising hate crime in relation to a group with a protected characteristic. Thus, he recommended not extending the current religious aggravation to capture religious or other beliefs held by an individual rather than a group (Recommendation 7).

9.5 The Scottish Government proposed to accept Lord Bracadale’s recommendations on these three issues and invited views on each in turn.

Question 18: Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation? [Yes / No / Unsure]

Question 19: Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)? [Yes / No / Unsure]

Question 20: Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual? [Yes / No / Unsure]

Key points

- ◆ Three-quarters of respondents (74%; 382 out of 517 respondents) thought that a new statutory aggravation on hostility towards a political entity should **not** be added to Scottish hate crime legislation. This group thought a new statutory aggravation would infringe on freedom of speech and the right to political protest, and would dilute and undermine existing hate crime laws. Those who supported the introduction of a new aggravation argued that people should be able to express political views without being subjected to personal attacks.
- ◆ Overall, two-thirds of respondents (66%; 340 out of 514 respondents) thought that no other new statutory aggravations should be added to Scottish hate crime legislation – although, compared with individuals, the views of organisations were more mixed. Contrary to the recommendation of Lord Bracadale, those in favour of the introduction of new statutory aggravations identified three main groups for inclusion in hate crime legislation: (i) migrants, refugees and asylum seekers, (ii) Gypsy / Traveller / Roma people, and (iii) homeless people or people claiming benefits. These particular groups were considered to be among the most vulnerable to hate crimes, and least likely to receive protection through the law. Those opposed to the introduction of new statutory aggravations generally agreed with Lord Bracadale’s conclusions that (i) existing legislation already covered hate crime against the first two of these groups, and (ii) the third group should not be covered by hate crime legislation because ‘socioeconomic status’ is not an intrinsic characteristic.
- ◆ A majority of respondents (61%; 313 out of 513 respondents) agreed with Lord Bracadale’s recommendation that the existing religious statutory aggravation should **not** be extended to include religious or other beliefs held by an individual. However, compared to individuals, the views of organisations on this issue were more mixed. Those in favour of extending the existing religious aggravation argued that human rights legislation provides protection for the religion or beliefs of individuals as well as groups, and suggested that Lord Bracadale’s interpretation of the protected characteristic of ‘religion’ as relating only to defined religious groups was too narrow. This group also pointed to increasing instances of intra-religious hostility, as well as a growing community of ‘apostates’ (people who have left a religious group) who have faced victimisation. Those opposed to extending the existing religious aggravation argued that, by definition, hate crime should apply only to crimes motivated by prejudice towards a particular group.

Hostility towards a political entity (Q18)

9.6 Question 18 invited views about whether a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation. The consultation paper noted that the Scottish Government accepted Lord Bracadale’s recommendation that such a statutory aggravation was not necessary.

9.7 Table 9.1 shows that three-quarters of respondents (74%) answered ‘no’ in response to Question 18. Thus, they agreed with Lord Bracadale’s recommendation that a new statutory aggravation on hostility towards a political entity should **not** be added to Scottish hate crime legislation. This pattern of response was similar for organisations and individuals, although a third (32%) of organisations expressed uncertainty on this issue.

Table 9.1: Q18 – Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	1	4%	12	50%	11	46%	24	100%
Public sector / partnerships	–	0%	16	73%	6	27%	22	100%
Faith groups	–	0%	8	89%	1	11%	9	100%
Other organisations	–	0%	6	75%	2	25%	8	100%
Total organisations	1	2%	42	67%	20	32%	63	100%
Total individuals	40	9%	340	75%	74	16%	454	100%
Total (organisations and individuals)	41	8%	382	74%	94	18%	517	100%

Percentages may not total 100% due to rounding.

9.8 A total of 244 respondents (42 organisations and 202 individuals) provided further comments at Question 18. The views of those who answered ‘yes’ and ‘no’ to Question 18 are discussed in the sections below.

9.9 With regard to those who answered ‘unsure’ to this question, some simply said that they had insufficient information to be able to reply. Others wanted clarification on certain aspects of the question, including (i) the meaning of ‘hostility’ (whether it relates specifically to physical violence or the threat of physical violence, or whether it relates to harshly criticising, mocking or challenging a political entity), and (ii) the definition of ‘a political entity’.

Support for a statutory aggravation on hostility towards a political entity

9.10 Table 9.1 shows that one organisation and 40 individuals answered ‘yes’ to Question 18. The organisational respondent was specifically concerned about the need to protect women (‘feminists’) who are involved in politics and political activism from what the respondent described as ‘unprecedented’ levels of hate. The topic of misogynistic harassment is covered in Chapter 6, and it was not clear the extent to which the respondent was advocating for a distinction to be made between misogynistic harassment and hostility towards a political entity.

9.11 Among the individuals who answered ‘yes’ at Question 18, there was a general view that people should be free to express political views without being subjected to personal attacks. Respondents in this group often reported personal experiences of feeling intimidated or uncomfortable during the 2014 Scottish independence campaign and / or the 2016 Brexit campaign and in the period following these votes. Some suggested that legislation was required to deal with a growing incidence of hostile ‘rhetoric’ and ‘abuse’ directed at individual politicians or members of the public because of their political beliefs. Respondents who answered ‘unsure’ also sometimes acknowledged that people may face hostility because of their political beliefs, and they suggested that there is a need to protect people in the public eye (including political leaders, religious leaders, heads of schools, etc.). However, they did not necessarily believe that a new statutory aggravation was the best way to do this.

Opposition to a statutory aggravation on hostility towards a political entity

9.12 In general, respondents who answered 'no' at Question 18 (both organisations and individuals) endorsed the views of Lord Bracadale, as described in the consultation paper. They repeatedly commented that the introduction of a statutory aggravation on hostility towards a political entity would:

- **Infringe on freedom of speech and the right to political protest:** Those who raised this point emphasised that being able to criticise a political entity is a fundamental democratic right. This group was concerned that the introduction of a new statutory aggravation on hostility towards a political entity would encroach to an unacceptable extent on the freedom of speech and the engagement in political debate and protest. This view was almost unanimously voiced by respondents who answered 'no' to Question 18.
- **Dilute and undermine existing hate crime legislation:** Those who raised this point thought that the focus of hate crime legislation should remain on the protected characteristics defined in the Equality Act 2010 – those immutable, intrinsic characteristics which are part of an individual or group identity. They also explicitly stated that affiliation with a political entity should not be considered a protected characteristic – that to do so would risk undermining and / or adding unnecessary complexity to existing legislation. This view was expressed by third and public sector / partnership bodies, and some individuals.

9.13 Some respondents opposed to the introduction of a new statutory aggravation on this issue also considered that it was unnecessary, as most crimes targeted at individuals because of their political affiliation could be prosecuted through other existing legislation.

International Holocaust Remembrance Alliance's working definition of antisemitism

9.14 Among those who answered 'no' or 'unsure' at Question 18 (both organisations and individuals), there was a recurring concern voiced about the Scottish Government's endorsement of the International Holocaust Remembrance Alliance (IHRA) working definition on antisemitism. Those who raised this issue were not concerned about the working definition itself (i.e. 'words or actions expressed as hatred towards Jews'), but about the examples of 'antisemitism' which accompany it. These respondents saw the examples as problematic because, in their view, they equated criticism of the State of Israel with 'hatred towards Jews'.

9.15 This group saw the IHRA working definition as causing confusion in the effort to tackle antisemitism and racism. They also believed it posed a threat to freedom of expression and freedom of political protest, and they suggested that the definition had been used to restrict campaigns in support of human rights for Palestinians.

9.16 This group asked the Scottish Government (i) to withdraw its endorsement of the IHRA working definition and (ii) not refer to this working definition in any hate crime legislation or related guidance. Alternatively, 'as an absolute minimum', they asked that the illustrative examples attached to the definition should be disregarded.

Hostility towards any other new groups or characteristics (Q19)

9.17 Question 19 invited views about whether it was necessary to create any other statutory aggravations to cover hostility towards any other specific groups or characteristics (apart from gender or age, which were discussed separately in the consultation paper). The consultation paper noted that: (i) Lord Bracadale considered that additional statutory aggravations were not necessary, and that (ii) the Scottish Government proposed to accept this recommendation.

9.18 Table 9.2 shows that overall, two-thirds of respondents (66%) thought that other new statutory aggravations should **not** be added to Scottish hate crime legislation. Although a majority of both organisations and individuals offered this overall view, there was a more mixed response among organisations (of the 64 who responded, 19% said ‘yes’, 55% said ‘no’, and 27% said ‘no opinion’). Public sector / partnership bodies and faith groups were most likely to think that no other statutory aggravations were needed. However, caution should be exercised in interpreting these findings because of the small numbers of organisational respondents who responded.

Table 9.2: Q19 – Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)?

Respondent type	Yes		No		No opinion		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	5	19%	8	31%	13	50%	26	100%
Public sector / partnerships	2	10%	14	70%	4	20%	20	100%
Faith groups	1	11%	8	89%	–	0%	9	100%
Other organisations	4	44%	5	56%	–	0%	9	100%
Total organisations	12	19%	35	55%	17	27%	64	100%
Total individuals	53	12%	305	68%	92	20%	450	100%
Total (organisations and individuals)	65	13%	340	66%	109	21%	514	100%

Percentages may not total 100% due to rounding.

9.19 Altogether, 192 respondents (42 organisations and 150 individuals) commented at Question 19.

Groups or characteristics that should be covered by new aggravations

9.20 Of the 65 respondents who answered ‘yes’ to Question 19, around two-thirds made further comments. In general, this group disagreed with Lord Bracadale’s assessment regarding one or more of the specific groups he had considered in his review. Specifically, they (and, occasionally, also some who answered ‘no opinion’) suggested that one or more of the groups considered by Lord Bracadale **should** be covered by hate crime legislation – despite his recommendation to the contrary. The three groups identified most often (both by organisations and individuals) are listed below. (Note that not all of these groups were mentioned by all the respondents.)

- **Migrants, refugees and asylum seekers:** Respondents argued that prejudice against these groups is sufficiently discrete from hostility based on race to

warrant a separate statutory aggravation. The point was also made that these groups often have little or no recourse to justice.

- **Gypsy / Traveller / Roma people:** Respondents thought that these populations were not well protected under current legislation, and that they are often victims of complex types of offences.
- **Homeless people, or people claiming benefits:** Respondents acknowledged that a person's socioeconomic status may change over their lifetime. However, they argued that the prejudice and violence experienced by homeless people and people claiming benefits was significant and could not, in many cases, be separated from patterns of discrimination and inequality. There was also a view that, contrary to Lord Bracadale's assertion, socioeconomic status **can** be equated with an identity characteristic, given the evidence that, for example, children born into poorer households are less likely to 'succeed' at school.

9.21 Among those who answered 'yes' at Question 19, there was a view that these particular groups are among the most vulnerable to hate crimes. However, these groups have largely been excluded from existing policy and legislative frameworks because of the perception society has of them as being 'undesirable', 'criminogenic', or 'less worthy' than 'more legitimate' groups who have access to lobbying support and the necessary political experience to advocate on behalf of their own rights.

9.22 Occasionally, individuals (but not organisations) mentioned other groups considered by Lord Bracadale – including goths, Gaelic speakers, and users of British Sign Language (including those who are not disabled) – as facing discrimination and prejudice, and in need of the protection afforded by a separate statutory aggravation.

9.23 Other groups or characteristics not considered by Lord Bracadale were also mentioned (usually by just one or two individuals) as potentially in need of a new statutory aggravation because of the violence, discrimination, abuse or harassment that they face:

- People who are 'asexual' (do not experience sexual attraction), or 'aromantic' (do not experience romantic attraction)
- Those who lack faith (including atheists, agnostics and apostates)
- People with alternative lifestyles; people with tattoos or piercings; people who support different football teams; people with particular political affiliations
- People of different nationalities, especially British, English, Irish, Scottish people
- Bald men; short people, and particularly short men; those who are overweight or anorexic; people with dwarfism; people who are disfigured; people who stutter
- People working in certain occupations (e.g. people working in the police or security jobs, and people in low earning jobs).

Views opposed to new statutory aggravations for new groups

9.24 Organisational respondents who answered 'no' at Question 19 generally stated that they agreed with Lord Bracadale's reasons for **not** introducing new statutory aggravations for other groups. Specifically in relation to migrants, refugees and asylum seekers and Gypsy / Traveller / Roma people, this group agreed that existing legislation was sufficient.

9.25 Some organisations answering ‘no’ at Question 19 (faith groups in particular) were opposed in principle to extending hate crime legislation to cover new groups. These respondents echoed points made at earlier questions in arguing that:

- **Legal certainty is needed:** They suggested that there were challenges associated with the definitions of some protected characteristics, and that these challenges were likely to be even greater in relation to those groups discussed in the consultation paper. There were concerns that this could result in over-criminalising people engaged in discussion and debate.
- **There should not be a hierarchy of rights:** They thought that the introduction of statutory aggravations relating to other groups and characteristics would result in a hierarchy of rights, and that this would have the effect of disadvantaging and marginalising other groups.

9.26 Some organisations and individuals answering ‘no’ at Question 19 suggested that the Scottish Government could consider a more ‘generic approach’ to hostility and hate crime, rather than developing separate statutory aggravations defined by specific characteristics. However, others argued for the importance of continuing to have separate aggravations for individual protected characteristics, emphasising that this was necessary for reporting and statistics in order to obtain a clear picture of the impacts of hate crime on communities (see also Chapter 3).

9.27 Other organisations (including some in the public sector) commented that extending the list of statutory aggravations to incorporate new characteristics would not, in itself, achieve the outcome of a Scotland free from hate. Nor would it lead to a reduction in hate crime or future offending unless accompanied by measures aimed at addressing underlying attitudes and behaviours.

Other issues raised at Question 19

9.28 A recurring theme in the comments at Question 19 – both among individuals and organisations – was that the protected characteristic under the Equality Act 2010 was ‘sex’ not ‘gender’. Those who made this point were addressing the reference in the question to the possibility that a new statutory aggravation would be created to address hostility based on ‘gender’. This issue has already been discussed in Chapter 6 of this report and is not covered again here.

Religious or other beliefs held by an individual (Q20)

9.29 Question 20 invited views about whether the existing religious statutory aggravation should be extended to include religious or other beliefs held by an individual. The consultation paper noted that: (i) Lord Bracadale considered this to be unnecessary, and that (ii) the Scottish Government proposed to accept his recommendation.

9.30 Table 9.3 shows that, overall, a majority of respondents (61%) agreed with Lord Bracadale’s recommendation that the existing religious statutory aggravation should **not** be extended to include religious or other beliefs held by an individual. The remaining respondents were split between those who answered ‘yes’ and ‘unsure’ to this question (one-fifth of respondents in each case). Individual respondents were more likely than organisations to answer ‘no’ to this question (63% compared to 43%), whereas views

among organisations were more mixed – apart from faith groups who were more likely than other organisations to answer ‘no’. Caution is required in interpreting these findings, given the small number of organisations responding.

Table 9.3: Q20 – Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	10	40%	5	20%	10	40%	25	100%
Public sector / partnerships	2	10%	12	57%	7	33%	21	100%
Faith groups	–	0%	6	86%	1	14%	7	100%
Other organisations	4	57%	3	43%	–	0%	7	100%
Total organisations	16	27%	26	43%	18	30%	60	100%
Total individuals	88	19%	287	63%	78	17%	453	100%
Total (organisations and individuals)	104	20%	313	61%	96	19%	513	100%

Percentages may not total 100% due to rounding.

9.31 A total of 236 respondents (34 organisations and 202 individuals) commented at Question 20.

Views in favour of extending the existing religious aggravation

9.32 Respondents who supported extending the current religious aggravation to include religious and other beliefs held by individuals often stated explicitly that they disagreed with Lord Bracadale’s conclusions on this question.

9.33 This group frequently referred to the religiously motivated murder of Asad Shah in their arguments, but they also highlighted other circumstances in which, in their view, an extension of the existing religious aggravation could be applicable and would be desirable. This group included mainly third sector organisations, some public sector / partnership bodies, some individual respondents, and one faith group who answered ‘unsure’ to this question. The latter group was sympathetic to the idea of extending the religious aggravation to cover the religious or other beliefs of individuals, but they were concerned that the thresholds for hate crime aggravations should be based on ‘malice and ill will’ rather than ‘hostility’ (see Chapter 4).

9.34 The following reasons were given:

- **Lord Bracadale’s conclusions are contrary to human rights legislation:** Respondents argued that Lord Bracadale’s conclusion on this matter was flawed by his narrow interpretation of the protected characteristic of ‘religion’ as applying only to a ‘defined religious group’. These respondents pointed out that human rights legislation (Article 9 of the European Convention on Human Rights (ECHR)) as implemented in the Human Rights Act 1998) states that ‘*everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship,*

teaching practice and observance'. This group argued that the law cannot legitimately be limited to a 'religious group' as this would make it incompatible with the Human Rights Act 1998.

- **Intra-religious hostility / malice is not uncommon:** Respondents commented that in an increasingly diverse and multi-cultural society, there are often cases of malice and ill will between individuals of the same religious, ethnic or cultural group, with this being motivated by differences in religious views of these individuals.

9.35 These respondents called on the Scottish Government to amend hate crime legislation to comply with equalities and human rights legislation – and to recognise crimes motivated by hostility towards the manifestation of individual beliefs. They noted that the protection of 'belief' as well as 'religion' would address the gap in legislation highlighted by the case of *Ahmed v HM Advocate* (2016). They also argued that failing to extend the existing religious aggravation in this way sends out a message to society that some forms of belief will be protected and respected in Scotland, and others will not.

9.36 Some respondents (both organisations and individuals) referred to the comments made by Lord Bracadale regarding the extension of criminal law to cover religious intolerance towards humanists and atheists – i.e. that hate crime legislation should not apply to the beliefs of individuals, and that there was no evidence to suggest that such an extension was required in the case of humanists and atheists. Respondents who raised this issue commented that:

- Atheism, agnosticism and humanism are philosophical positions equivalent to faith, and those who hold these beliefs should be afforded the same protection under the law as individuals who are affiliated with a religious group.
- Several religions prescribe behaviours (which may include hostility or violence) towards 'non-believers' and how they should be treated.
- While there may be no official statistics, there is nevertheless a growing number of individuals in Scotland – apostates – who have faced significant harm (including harassment, persecution, coercion, threats and even violence) after leaving a religious group. Reports were cited of individuals being pursued by family or sect members who seek to damage the lives of those who leave religious communities. The point was made that these cases are not 'rare occurrences' but rather are quite prevalent.
- Both the Equality Act 2010 and the Human Rights Act 1998 define 'religion' to include 'philosophical belief' and those with no religion or religious belief. This would include humanism and atheism.

Views opposed to extending the current religious aggravation

9.37 Those who answered 'no' at Question 20 generally agreed with Lord Bracadale's conclusions on this issue. Respondents in this group commented that:

- Individual religious beliefs are distinct from membership of an established religious group or belief system. By definition, hate crime should apply to crimes motivated by prejudice towards a particular group.

- There should be a consistent approach across all the protected characteristics.
- There is no compelling evidence of the need to extend the current religious aggravation to cover the beliefs of individuals, or hostility towards those with no belief. These arguments were mainly put forward by faith groups, some law and justice bodies, and some public sector / partnership bodies.

9.38 This group argued that crimes against individuals (and crimes motivated by hostility towards the belief of individuals) can be prosecuted through existing common law.

9.39 Some faith groups and some individual respondents also commented that the law should not prevent people from robustly criticising the beliefs held by individuals. There was a concern that extending the religious aggravation in this way could have an unintended 'chilling effect' on freedom of expression.

10. Association with a member of a protected group (Q21 and Q22)

10.1 The consultation paper explained that the existing statutory aggravations in relation to race, religion, disability, sexual orientation and transgender identity each apply where an offence is motivated by hostility towards one or more of these protected characteristics even in cases where the victim does not have the characteristic. The example given in the consultation paper was in relation to an individual who is assaulted because of the perpetrator's prejudice against Muslims, but the victim is not a Muslim. In other words, the statutory aggravations apply where the perpetrator **presumes** that the victim has the identity characteristic – even if the perpetrator is mistaken. Lord Bracadale recommended that statutory aggravations should continue to apply in this way (Recommendation 5).

10.2 The consultation paper also noted that, at present, the race and religion statutory aggravations apply in cases where a victim does not have a protected characteristic but is nevertheless targeted by a perpetrator because of their **association** with someone with a protected characteristic. The consultation paper gave an example of a white person assaulted because they socialise with a person of a different race. This 'association principle' does not currently apply in relation to the protected characteristics of disability, sexual orientation and transgender identity. However, Lord Bracadale recommended that it should apply in relation to all the protected characteristics covered by hate crime legislation (again, Recommendation 5).

10.3 The consultation paper stated that the Scottish Government proposes to accept Lord Bracadale's recommendation on these points, and views were invited as follows:

Question 21: Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristics? [Yes / No / Unsure]

Question 22: Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)? [Yes / No / Unsure]

Key points

- ◆ There were mixed views overall about whether statutory aggravations should apply in cases where people are presumed to have one or more protected characteristic (35% of respondents said 'yes', 47% said 'no', and 19% said they were unsure, representing 176, 237 and 95 out of 508 respondents, respectively). However, compared to individuals, organisations were overwhelmingly in support of this proposal, with 91% (61 out of 67 respondents) agreeing.
- ◆ Similarly, there were mixed views overall on whether the statutory aggravations should apply where people have an **association** with an individual who is a member of a protected group. Once again, however, compared to individuals, organisations were overwhelmingly in favour, with 82% (56 out of 68 respondents) agreeing.

- ◆ With regard to both Question 21 and 22, those in favour argued that it is the motivation of the offender, and not the identity of the victim, that is the essential component of a hate crime. Those opposed generally argued that all victims of crime should be treated equally under the law, and that there should not be additional protections given to some groups over others. These respondents also believed that it would be difficult to prove ‘association’.
- ◆ Respondents repeatedly highlighted the ‘intersectional’ nature of protected characteristics – i.e. that some individuals may have more than one protected characteristic and that offences can be motivated by hostility towards the **combination** of an individual’s characteristics. Those who raised this issue wanted Scottish hate crime legislation – and monitoring arrangements – to better recognise the intersectionality of protected characteristics.

Presumed membership of a protected group (Q21)

10.4 Lord Bracadale recommended that statutory aggravations should continue to apply in cases where an individual is presumed by a perpetrator to have one or more protected characteristic, and the Scottish Government proposed to accept this recommendation. Question 21 invited views on this issue.

10.5 Table 10.1 shows that there were mixed views overall on whether statutory aggravations should apply in cases where people are presumed to have one or more protected characteristic (35% of respondents said ‘yes’, 47% said ‘no’, and 19% said they were unsure). However, amongst organisations, the vast majority (91%; 61 of 67 respondents) agreed – with only faith groups expressing more mixed views on this question.

Table 10.1: Q21 – Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristics?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	28	97%	–	0%	1	3%	29	100%
Public sector / partnerships	21	100%	–	0%	–	0%	21	100%
Faith groups	3	43%	3	43%	1	14%	7	100%
Other organisations	9	90%	–	0%	1	10%	10	100%
Total organisations	61	91%	3	4%	3	4%	67	100%
Total individuals	115	26%	234	53%	92	21%	441	100%
Total (organisations and individuals)	176	35%	237	47%	95	19%	508	100%

Percentages may not total 100% due to rounding.

10.6 A total of 226 respondents (55 organisations and 171 individuals) provided comments at Question 21.

10.7 The comments indicate that there may have been some confusion among respondents about what this question was asking. The intention of the question was to invite views about whether the statutory aggravations should (continue to) apply when a

perpetrator is motivated by hostility towards a particular protected characteristic – even when the victim does not, in fact, have that characteristic. In other words, the victim has been subjected to an assault or attack based on the perpetrator’s prejudice, but the perpetrator is mistaken about the victim’s membership in a certain protected group.

10.8 However, most organisational respondents, and some individual respondents, understood the question to be asking about the application of hate crime legislation when a person has **more than one** protected characteristic. In other words, respondents thought the question was asking about the ‘intersectionality’ of protected characteristics.

10.9 Given this possible confusion, the findings shown in Table 10.1 above should be treated with caution.

10.10 Note that those who answered ‘unsure’ to this question generally made one of two types of comment: (i) that they did not understand the question, or (ii) that they believed the protected characteristics were stated incorrectly in the question. The latter issue is discussed in further detail at the end of this section (see paragraph 10.17).

Views in favour of an aggravation applying in cases of presumed membership of a group with protected characteristics

10.11 In general, respondents answering ‘yes’ to Question 21 did not provide detailed reasons for their views regarding the application of the statutory aggravations where a victim is presumed by the perpetrator to have one or more protected characteristics. Some simply stated that they agreed with Lord Bracadale’s conclusion and recommendation on this issue. Occasionally, organisations commented that the communities they represented were often targeted for abuse on the basis of other people’s (incorrect) perceptions of – for example – their religion, sexual orientation, sex, or transgender identity. Some individuals said that, in such cases, the victim should be given the same protection that a person with the protected characteristic would have.

10.12 Respondents – both organisations and individuals – repeatedly raised another issue in their comments at this question. Specifically, they highlighted the ‘intersectional’ nature of protected characteristics – i.e. that some individuals have more than one protected characteristic and that offences can be motivated by hostility towards the **combination** of an individual’s characteristics. For example, it was noted that there is often a gendered dimension to Islamophobia due to the greater visibility of Muslim women who wear the veil. Similarly, it was reported that disabled people with other protected characteristics are more likely to be victims of hate crime than non-disabled people who have those same protected characteristics. These respondents emphasised that the intersectionality of protected characteristics can increase the impact of hate crime, both on the individual victim and on the community (or communities) to which they belong.

10.13 Those who raised this issue wanted Scottish hate crime legislation – and monitoring arrangements – to better recognise the intersectionality of protected characteristics. Whilst respondents understood that it is currently possible to bring forward charges involving more than one statutory aggravation, they suggested that guidance should be issued to law enforcement organisations to clarify the potential for doing so. This group suggested that where an individual has multiple protected characteristics, multiple aggravations should always be applied, and taken into account at sentencing.

10.14 Regarding the monitoring of intersectional hate crime offences, some respondents commented that, at present, the Crown Office and Procurator Fiscal Service publishes information on the number of charges that had more than one aggravation applied. However, they noted that offences involving hostility towards more than one characteristic are recorded separately by each characteristic. These respondents thought this method of recording did not allow for the effective monitoring of these kinds of offences. Instead, they suggested that details should be given not only about the number of charges that had more than one aggravation, but also the **combinations** of protected characteristics that were subject to multiple aggravations.

Views opposed to an aggravation applying in cases of presumed membership of a group with protected characteristics

10.15 Among those who answered ‘no’ at Question 21, the most common view was that all victims of crime should be treated equally regardless of their characteristics or presumed characteristics. Some individuals went further and argued that no protected characteristic should get any special treatment or exemption from discussion and / or criticism. Those who offered the latter view were generally concerned about the effects of hate crime legislation on freedom of speech and advocated for the repeal of all hate crime legislation. Occasionally, some respondents in this group made the distinction between ‘hate speech’ – which they thought should not be criminalised – and other ‘serious’ offences, such as those involving assault or murder – which they thought should be dealt with through existing common law.

10.16 Less often, individual respondents answering ‘no’ addressed the intention of the question and commented on the use of the word ‘presumed’. In general, these respondents argued that the law should not be concerned with ‘presumptions’, but only with evidence (which they described as ‘facts’). There were concerns about criminalising individuals on the basis of what someone else assumed they thought.

Comments on the need to correctly reference the protected characteristics

10.17 A recurring theme in the comments at Question 21 – irrespective of whether respondents answered ‘yes’, ‘no’ or ‘unsure’ – was that the protected characteristics had been listed incorrectly in the consultation paper and consultation question. Respondents expressed concerns about this, and emphasised its importance, given that the topic of the consultation was about legislative change. These concerns were raised both by organisations and individuals. The points made by this group were that:

- Sex, not gender, is the protected characteristic.
- Gender reassignment, not transgender identity, is the protected characteristic.
- Intersex is not a specific protected characteristic, and there was a suggestion that it should not be listed separately from ‘sex’. (See Chapter 5 for further discussion of this issue).
- Some respondents noted that there are other protected characteristics, which were not referred to in the question. These were: pregnancy and maternity, and marriage and civil partnership.

Association with a protected group (Q22)

10.18 Lord Bracadale recommended that the ‘association principle’ should apply in relation to all the protected characteristics – not just the protected characteristics of race and religion, as it does at present. This would allow a statutory aggravation to be applied in cases where an individual is not a member of a protected group but is nevertheless targeted by a hate crime because of their association with a protected group. The Scottish Government proposed to accept Lord Bracadale’s recommendation, and respondents were asked for their views.

10.19 Table 10.2 shows that there were mixed views overall about whether statutory aggravations should apply in cases where a person has an association with a particular protected characteristic (29% said ‘yes’, 52% said ‘no’, and 19% were ‘unsure’). By contrast, amongst organisations, a large majority (82%; 56 out of 68 respondents) agreed that the statutory aggravations should apply in such cases. Only faith groups did not share this level of consensus and instead expressed more mixed views.

Table 10.2: Q22 – Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	25	81%	1	3%	5	16%	31	100%
Public sector / partnerships	19	90%	1	5%	1	5%	21	100%
Faith groups	3	43%	3	43%	1	14%	7	100%
Other organisations	9	100%	–	0%	–	0%	9	100%
Total organisations	56	82%	5	7%	7	10%	68	100%
Total individuals	90	21%	254	59%	88	20%	432	100%
Total (organisations and individuals)	146	29%	259	52%	95	19%	500	100%

Percentages may not total 100% due to rounding.

10.20 A total of 223 respondents (55 organisations and 168 individuals) provided further comments at Question 22.

10.21 As in the comments to Question 21, respondents (mostly individuals) who answered ‘unsure’ to Question 22 generally made one of two types of comment: (i) that they did not understand the question, or (ii) that they believed the protected characteristics were stated incorrectly in the question. (This issue also arose in relation to Question 21 – see paragraph 10.17.)

Views in support of the ‘association principle’ in hate crime legislation

10.22 Respondents answering ‘yes’ to Question 22 often stated that the proposal to extend the ‘association principle’ to other statutory aggravations seemed ‘reasonable’ and ‘logical’. This group, which included organisations and individuals, pointed out that there is considerable evidence of harassment, abuse and assault being targeted at the families, friends and other associates of people who have (or are perceived to have) protected

characteristics. Some respondents reported that the carers of disabled people have been targeted; others commented that even a **perceived** association could be sufficient to make someone a victim of hate crime.

10.23 This group of respondents repeatedly argued that it is the motivation of the offender, and not the identity of the victim, that is the essential component of hate crimes. Some respondents commented that the targeting of individuals who are associated with a protected group is an attempt to isolate and intimidate the protected group through the intimidation of their friends. Thus, in their view, statutory aggravations should apply in any case of criminal behaviour motivated by prejudice towards a particular group – regardless of whether the victim belongs to, is presumed to belong to, or associates with that particular group.

10.24 Respondents also noted that the proposed extension of the ‘association principle’ would bring about greater consistency in hate crime legislation, and better reflect the protections afforded to people under the Equality Act 2010 – which includes the concept of discrimination by association. Respondents said this change would ensure the protection, not only of the families, friends and other associates of individuals with protected characteristics, but also of those people who act as advocates and champions for groups with protected characteristics.

10.25 Less often, some third sector respondents stated that they had no objection to extending the existing protection of association for racial and religious aggravations to other protected characteristics. However, their view was contingent upon having no loss or reduction in the existing legal protections against racial prejudice.

Views opposed to the ‘association principle’ in hate crime legislation

10.26 Among respondents answering ‘no’ at Question 22, there was concern that extending the ‘association principle’ to other statutory aggravations could lead to confusion and uncertainty, and could be problematic, given the ‘highly nuanced nature of associative discrimination’.¹¹ Some respondents suggested that it can be difficult to prove ‘association’ and there was a recurring view that the concept of ‘association’ was ‘too vague’, ‘unclear’, or ‘fraught with misinterpretation’.

10.27 Other common views, expressed mainly by individuals, were that: (i) all victims of crime should be given the same protections in law regardless of their associations; (ii) hate crime legislation should be abolished because it is authoritarian, and it infringes upon freedom of belief and freedom of expression; (iii) criminal offences should not be based on perceptions about the motivations of the perpetrator; and (iv) the police are unable to prosecute ‘normal crime’ because they spend too much time prosecuting ‘hate crimes’.

10.28 Very occasionally, individuals said they answered ‘no’ to this question because they believed that the protected characteristics were listed incorrectly in the question (as discussed in paragraph 10.17).

¹¹ Reference was made to the UK Supreme Court case of *Lee v Ashers Baking Company Ltd* which, it was suggested, highlighted the highly nuanced nature of associative discrimination. See <https://www.supremecourt.uk/cases/uksc-2017-0020.html> for details of the case

Part Three:

New stirring up of hatred offences

11. Stirring up offences (Q23–Q26)

11.1 Stirring up hatred is behaviour which involves encouraging others to hate a particular group. Currently, standalone stirring up hatred offences only exist in relation to race. These existing offences – contained in Sections 18 to 22 of the Public Order Act 1986 – capture actions that are ‘threatening’, ‘abusive’ or ‘insulting’, with the intention of stirring up racial hatred, or which, having regard to all the circumstances, are likely to stir up racial hatred. Lord Bracadale’s review considered the need for stirring up offences for other groups and recommended that such offences should be introduced for each current protected characteristic (as defined in the Equality Act 2010), as well as any new protected characteristics. Question 23 in the consultation sought views on this recommendation. Subsequent questions asked for views on the threshold for any new stirring up hatred offences (Question 24), the possible reformulation of existing standalone provisions relating to stirring up racial hatred in line with any new provisions (Question 25), and the need for a specific provision protecting freedom of speech (Question 26).

Question 23: Do you agree with Lord Bracadale’s recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics? [Yes / No / Unsure]

Question 24: Do you agree with Lord Bracadale’s recommendation that any new stirring up hatred offences should require that the conduct is ‘threatening or abusive’? [Yes / No / Unsure]

Question 25: Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences? [Yes / No / Unsure]

Question 26: Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred? [Yes / No / Unsure]

Key points

- ◆ A substantial majority of respondents (80%; 844 out of 1,051 respondents) disagreed with the introduction of stirring up offences for each protected characteristic. However, most organisations (69%; 55 out of 80 respondents) agreed.
- ◆ Those who supported the introduction of new stirring up offences thought this would achieve parity for all groups, and would recognise the gravity of hate crimes and the impact on those affected. It would also support consistent data collection.
- ◆ There were three main reasons for opposing new stirring up offences: disagreement with the principle of laws based on protected characteristics (this was a common view amongst individuals and faith bodies); concerns about the impact on human rights and freedom of speech; and disagreement with the need for new offences. Some supported the current standalone race offences but did not wish to see further offences introduced.
- ◆ A majority of all respondents (72%; 743 out of 1,030 respondents) disagreed that any new stirring up offences should require ‘threatening or abusive’ conduct. However, most organisations (56%; 43 out of 77 respondents) agreed.
- ◆ Respondents who agreed with the requirement for threatening or abusive conduct thought this phrasing (i) offered the right balance in protecting freedom of expression

and protecting identified groups, and (ii) was consistent with other legislation. Some were opposed to hate crime laws but agreed with the wording **if** new offences were to be created. Those who disagreed with the requirement offered two contrasting views: some said the proposed threshold was ‘too high’, while others said it was ‘too low’.

- ◆ There were mixed views on the option of revising the existing race provisions to be in line with other proposed stirring up offences – 45% of respondents agreed, 32% disagreed, and 23% were unsure (representing 299, 211, and 156 out of a total of 666 respondents), although most organisations (63%; 40 out of 64 respondents) agreed.
 - ◆ Those supporting revision of existing provisions thought this would promote parity and clarity; however, there were a range of views on how this might be achieved. Organisations that disagreed with reformulation (mainly third sector bodies) were mainly concerned that this might make the prosecution of race cases more difficult, while individuals generally had wider concerns about hate crime laws.
 - ◆ The vast majority of all respondents (91%; 955 out of 1,047 respondents) agreed that stirring up offences should include a protection of freedom of expression provision.
 - ◆ There was general agreement on the need to protect freedom of expression and uphold the rights contained in the ECHR. Respondents often saw this as an issue of ‘balance’ between freedom of expression, responding to stirring up, and protecting relevant groups. However, views differed on the point at which that balance should be struck.
 - ◆ Across these questions, respondents stressed the importance of consulting with relevant groups, and ensuring any resulting legislation was clear and well defined.
-

Introduction of additional stirring up of hatred offences (Q23)

11.2 As noted above, Lord Bracadale recommended that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics (Recommendation 13). Lord Bracadale set out his reasons for this recommendation with reference to a series of key considerations: wrongfulness, harm, seriousness, symbolism, frequency of prosecutions, whether there was a gap in a law, and the benefit that might be gained from the introduction of new offences. And, while Lord Bracadale stated that the strongest case for extending stirring up offences to other protected characteristics may be made in respect of religion, he also thought that ‘parity’ between all protected characteristics (current and new) was justified and desirable. Question 23 invited views on this recommendation.

11.3 Table 11.1 shows that a substantial majority of respondents disagreed that stirring up of hatred offences should be introduced in respect of each of the protected characteristics, including any new protected characteristics – 80% of respondents disagreed and 15% agreed; the remaining 5% were unsure. However, organisations and individuals offered contrasting views. While 85% of individuals disagreed with this recommendation, 69% of organisations agreed. Among organisations, faith groups expressed different views to other types of organisation, with 13 out of 16 such groups disagreeing that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics.

Table 11.1: Q23 – Do you agree with Lord Bracadale’s recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	22	65%	9	26%	3	9%	34	100%
Public sector / partnerships	22	100%	–	0%	–	0%	22	100%
Faith groups	3	19%	13	81%	–	0%	16	100%
Other organisations	8	100%	–	0%	–	0%	8	100%
Total organisations	55	69%	22	28%	3	4%	80	100%
Total individuals	103	11%	822	85%	46	5%	971	100%
Total (organisations and individuals)	158	15%	844	80%	49	5%	1,051	100%

Percentages may not total 100 due to rounding.

11.4 Altogether, 822 respondents (68 organisations and 754 individuals) provided further comments at Question 23. The sections below present the views of those who agreed with the recommendation and those who disagreed, while a final section looks at other comments relevant to Question 23.

Support for the introduction of stirring up of hatred offences in respect of each of the protected characteristics

11.5 Respondents who supported the introduction of stirring up of hatred offences in respect of each of the protected characteristics offered the following main reasons, echoing many of the points made by Lord Bracadale in discussing this issue in his report:

- All groups with protected characteristics should be treated the same with regard to hate crime laws. This was seen as logical, and in line with international thinking. It also was thought to offer benefits in terms of avoiding the perception of a ‘hierarchy’ of groups and victims, and helping with public understanding of the law. (There was, however, a view put forward that not all groups included in the Equality Act 2010 should automatically be covered by a stirring up offence; rather, this should only happen where there was evidence of need.)
- Stirring up of hatred was a serious matter and there needed to be an adequate legal response to deal with it. The introduction of additional offences would acknowledge the seriousness of such conduct and the impact it had on the individuals and communities targeted. It would also send a clear message about the unacceptability of such behaviour. Some respondents provided evidence and examples of the abuse experienced by different groups (e.g. disabled people, the LGBT community) to support the case for introducing additional stirring up offences.
- Establishing stirring up offences for all protected characteristics would be helpful in supporting consistent data gathering and monitoring of abusive and threatening conduct targeted at different groups.

11.6 Occasionally, respondents acknowledged that limited use had been made of current offences related to stirring up racial hatred, but nevertheless thought it was important to have such offences on the statute book.

11.7 Some respondents noted that there would be challenges in drafting any new offences in a way that drew an appropriate distinction between expressing opinion and stirring up hatred. However, respondents in this group were generally of the view that it would be possible to achieve the right balance between freedom of expression and freedom from threat and abuse via clear legislation and well-defined thresholds (this issue is discussed further in relation to Question 24).

Opposition to the introduction of stirring up of hatred offences in respect of each of the protected characteristics

11.8 Comments from those who were opposed to the introduction of additional stirring up offences (largely individuals, faith groups and some third sector organisations) focused on three main issues, as follows:

- Respondents **disagreed with the principle of laws based on protected characteristics**. This view was mainly expressed by faith groups and individuals who thought the law should treat all groups the same, and that having offences that were applicable to particular groups (i) effectively created a hierarchy of victims, and (ii) opened up the possibility of ongoing pressure to change or extend the groups covered. This was a key point made by those who were opposed to hate crime laws in general (see Chapter 3). With regard to stirring up offences in particular, these respondents argued that all individuals / groups should be protected from abusive and threatening conduct and speech.
- Respondents (including faith groups, third sector organisations and individuals) **were concerned about the potential impact on human rights and freedom of expression**. They thought that the concept of stirring up hatred was poorly defined, and that there was too much subjectivity involved in (i) distinguishing between ‘disagreement and debate’ and ‘threatening and abusive conduct’, and (ii) determining ‘intent’ and assessing the ‘likelihood’ test. Thus, respondents thought that any new stirring up offences could have a negative impact on freedom of expression (including via self-censorship) and create a risk of encouraging unjustified or politically motivated complaints. Respondents often argued that freedom of expression and the right to challenge and disagree were essential to successful democratic societies and that laws that potentially suppressed opinion and debate could lead to increased tension and reduced community cohesion.
- Some respondents (including faith groups, some third sector organisations and some individuals) also **did not think that additional stirring up hatred offences were needed**, either because threatening and abusive behaviour was already adequately covered by existing legislation, or because they felt that there was insufficient evidence that stirring up hatred was a significant problem for the full range of groups with protected characteristics. Some also noted that the creation of additional stirring up offences ran counter to the aggravation-based legislative approach highlighted as ‘core’ in the consultation paper.

11.9 In many cases, respondents offering these views explicitly stated that they had considered this issue from a Christian perspective and that they had concerns about the impact on Christian traditions in Scotland. These respondents were concerned that extending stirring up offences to other groups would have the effect of shutting down

debate on issues such as religion, sexuality, same sex marriage and transgenderism, and inhibiting public preaching and the promotion and dissemination of religious teachings. However, it was also common for respondents to say that they thought the freedom to discuss opinions and beliefs should be available to those of all faiths and no faiths.

11.10 Among those respondents opposed to the creation of **additional** stirring up offences there was nevertheless a view that 'race' was a 'special case' in terms of protected characteristics. Respondents agreed that the targeted abuse and threatening behaviour suffered by minority ethnic groups justified a specific legal response. Indeed, there was some concern that the introduction of new stirring up offences may have the unintended consequence of weakening the important message conveyed by the existing standalone race offences. Respondents putting forward this view included third sector organisations with a particular remit with regard to BME (black and minority ethnic) issues.

11.11 The points made by respondents opposed to the creation of additional stirring up offences were repeated across Questions 24 to 27.

Uncertainty about the introduction of stirring up of hatred offences in respect of each of the protected characteristics

11.12 Some respondents explained why they were **unsure** about this recommendation. Individuals who were unsure tended to make similar comments to respondents who were opposed to the recommendation: for example, they said that they had concerns about (i) the degree of subjectivity involved in defining stirring up and applying the law in a consistent way, (ii) the impact on freedom of expression, and (iii) the potential for ongoing pressure in the future to change or extend the groups covered by the law. Organisational respondents who said that they were unsure (all third sector bodies) made two additional points: (i) they said they were not sure that stirring up hatred against other groups was a particular issue; or (ii) they called for a more holistic approach to tackling discriminatory behaviour and suggested that the need for stirring up offences for different categories should be considered in parallel with considering how to best formulate hate crime laws in general.

Other comments relating to new stirring up offences

11.13 Other points noted in response to Question 23, each made by just a few respondents, included the following:

- Further analysis was needed to consider the use made and effectiveness of the current race-related stirring up offence, and to establish the legal need for any new offences.
- It would be important to consult with relevant groups about the introduction and formulation of any new offences.
- A broader approach to tackling hate-related speech and behaviour was needed – there was a concern that additional stirring up offences could criminalise language and behaviour without addressing underlying views and attitudes.

Threshold for new stirring up offences (Q24)

11.14 Lord Bracadale recommended that any new stirring up of hatred offences should (a) require conduct which is threatening or abusive; and (b) include a requirement (i) of an intention to stir up hatred, or (ii) that having regard to all the circumstances, hatred in relation to the particular protected characteristic is likely to be stirred up thereby (Recommendation 14). He stated that (i) a requirement for ‘threatening or abusive’ conduct, rather than ‘threatening, abusive or insulting’ conduct, as required by the current offence of stirring up racial hatred, would be consistent with other existing legislation in Scotland and elsewhere in the UK, and (ii) the inclusion of both ‘intent’ and ‘likelihood’ tests offered appropriate flexibility in prosecuting offences. Question 24 invited views on this recommendation with a focus on the requirement for ‘threatening or abusive’ conduct.

11.15 Table 11.2 shows that the majority of respondents (72%) disagreed that any new stirring up hatred offences should require ‘threatening or abusive’ conduct. Amongst the remaining respondents, 22% agreed that new stirring up hatred offences should require ‘threatening or abusive’ conduct, while 6% were unsure. However, organisations were more likely than individuals to answer ‘yes’ (56% compared to 19%), while individuals were more likely than organisations to answer ‘no’ (75% compared to 32%). Among organisations, faith groups were markedly less likely than other organisations to agree with this recommendation, with all but one (14 out of 15 respondents) answering ‘no’ to this question.

Table 11.2: Q24 – Do you agree with Lord Bracadale’s recommendation that any new stirring up hatred offences should require that the conduct is ‘threatening or abusive’?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	15	45%	10	30%	8	24%	33	100%
Public sector / partnerships	19	90%	1	5%	1	5%	21	100%
Faith groups	1	7%	14	93%	–	0%	15	100%
Other organisations	8	100%	–	0%	–	0%	8	100%
Total organisations	43	56%	25	32%	9	12%	77	100%
Total individuals	184	19%	718	75%	51	5%	953	100%
Total (organisations and individuals)	227	22%	743	72%	60	6%	1,030	100%

One individual respondent answered ‘yes and no’. This response is not included in the table above.

Percentages may not total 100 due to rounding.

11.16 Altogether, 751 respondents (53 organisations and 698 individuals) provided further comments at Question 24. The sections below look at reasons for agreeing and disagreeing with the recommendation, while two further sections look at other aspects of the proposed thresholds, and the scope and application of the thresholds.

Agreement with the requirement for conduct that is threatening or abusive

11.17 Respondents who agreed with the requirement for threatening or abusive conduct thought that the proposed phrasing (i) offered an appropriate balance in terms of protecting freedom of expression and protecting identified groups, and (ii) was consistent with other legislation (e.g. the Criminal Justice and Licensing (Scotland) Act 2010, and

stirring up offences in England and Wales), and (iii) was easily understood (and already well understood in other contexts). Some respondents, nevertheless, emphasised the importance of ensuring the term 'abusive' was well defined. Respondents offering these views included public sector organisations, some law and justice bodies, and some individuals.

11.18 Less often, respondents (individuals and third sector groups) were willing to endorse the proposed phrasing **if** new offences were to be introduced, but also said that this formulation represented the minimum acceptable threshold in order to protect free speech. In some cases, respondents said that 'threatening' rather than 'abusive' behaviour should be key to the offence, or that there should be a clear link between the alleged stirring up and resulting criminal activity (see also paragraphs 11.19 and 11.20 below).

Disagreement with the requirement for conduct that is threatening or abusive

11.19 Respondents who indicated opposition to the suggested phrasing often expressed opposition to hate crime laws or stirring up offences in general. Those making more specific comments offered two main perspectives.

- The most common view, expressed by faith groups and individuals, was that stirring up hatred was a serious charge and required an appropriately high threshold. A threshold based on 'threatening or abusive' conduct was seen as involving too much interpretation and subjectivity which could lead to inappropriate prosecutions and put a burden on the justice system. These respondents generally endorsed the proposed exclusion of 'insulting' conduct on the basis that this represented too low a threshold for criminal law. However, they also opposed the inclusion of 'abusive' conduct, which they thought was too subjective and created too great a risk to freedom of speech and expression. These respondents argued for a threshold based solely on 'threatening' behaviour. Additionally, some respondents stressed that 'threatening' conduct would need to be well defined and, in any specific case, would need to be credible and clearly linked to criminal behaviour.
- Less often, respondents (mainly third sector groups) were concerned that the proposed threshold was too 'high'. Some commented directly on the proposed exclusion of 'insulting' conduct and argued that insults, particularly on a repeated basis, should meet the criteria for hate speech. In a number of cases, respondents (including some who nevertheless indicated agreement with the proposed phrasing at the tick-box part of Question 24) suggested the phrasing of the offence might be adjusted to include conduct / language that was 'grossly insulting', 'derogatory', 'devaluing' or 'depersonalising'.

Comments on other aspects of the proposed threshold

11.20 It was common for individuals, faith groups, and some types of third sector organisations to comment on the latter part of the proposed threshold – that is, the need for **intent** to stir up hatred, or (ii) the **likelihood** that hatred would be stirred up. These respondents thought that a clear link to resulting criminal action or clear evidence of 'intent' or of direct encouragement to others to take action should be crucial to the offence, and were concerned about how this would be evidenced. However, they were particularly opposed to the possibility of prosecution based on the **likelihood** of stirring up hatred –

they thought this relied on subjective interpretation to an unacceptable extent. In this context, some expressed a preference for the term ‘incitement’ or ‘vilification’ rather than ‘stirring up’.

11.21 In a few cases, respondents suggested the offence should incorporate a ‘reasonable person’ test – that is, how would a reasonable person judge the conduct?

Comments on the scope and application of any new stirring up offences

11.22 As well as commenting on the proposed phrasing of the threshold for any new stirring up offences, some respondents (individuals and third sector groups) also commented on the scope and application of any such offences – that is, who they might apply to, and the type of conduct that might be covered by the proposed definition. These respondents thought stirring up offences should:

- Take account of context, circumstances, demeanour etc. – this point was made by those supportive of and those opposed to additional stirring up offences
- Cover cumulative incidents that may not individually meet the set thresholds
- Cover the dissemination of false information that puts people at risk
- Cover any prejudiced, offensive, demeaning, or discriminatory conduct, including that conveyed in humour
- Address institutionalised stirring up by the media, politicians and other public figures, via negative portrayals and language.

Reformulation of existing stirring up offences (Q25)

11.23 Lord Bracadale recommended that, in the interests of consistency, any replacement of the current stirring up of racial hatred provisions included within consolidated hate crime legislation should use the same phrasing as that proposed for any new stirring up offences – that is, it should require conduct that is ‘threatening or abusive’; rather than ‘threatening, abusive or insulting’. Question 25 asked for views on this possible reformulation.

11.24 Table 11.3 shows that there were mixed views on the option of revising existing provisions concerning the stirring up of racial hatred so that they are formulated in the same way as the other proposed stirring up hatred offences – 45% of respondents agreed, 32% disagreed, and 23% said that they were unsure. However, organisations were more likely than individuals to answer ‘yes’ to this question (63% compared to 43%), while individuals were more likely than organisations to answer ‘no’ (34% compared to 14%).

Table 11.3: Q25 – Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	12	41%	8	28%	9	31%	29	100%
Public sector / partnerships	18	86%	–	0%	3	14%	21	100%
Faith groups	5	71%	–	0%	2	29%	7	100%
Other organisations	5	71%	1	14%	1	14%	7	100%
Total organisations	40	63%	9	14%	15	23%	64	100%
Total individuals	259	43%	202	34%	141	23%	602	100%
Total (organisations and individuals)	299	45%	211	32%	156	23%	666	100%

One individual respondent answered 'yes and no'. This response is not included in the table above.

Percentages may not total 100 due to rounding.

11.25 Altogether, 302 respondents (46 organisations and 256 individuals) provided further comments at Question 25. The following sections look at support for and opposition to or reservations about the possible reformulation of existing race provisions.

Support for reformulation of existing race provisions

11.26 Respondents who agreed that existing provisions concerning the stirring up of racial hatred should be reformulated to reflect the other proposed stirring up hatred offences thought that consistency across offences was important and made two main points:

- They wished to see parity of treatment for all groups covered by stirring up laws.
- They thought that this would bring clarity to the law in this area, and be helpful both in terms of operational practice and public understanding.

11.27 Organisational respondents offering this view generally supported the proposal to achieve consistency by bringing the wording of the current stirring up of racial hatred offence into line with the wording of the additional stirring up offences now proposed. In particular, they expressed support for removing the reference to 'insulting' conduct. One respondent pointed to evidence suggesting that a similar reformulation of the law in England and Wales had had minimal impact on the prosecution of stirring up of racial hatred cases.

11.28 Individuals who expressed support for consistent wording were also supportive of the proposal to exclude the reference to 'insulting' conduct. However, these respondents often also went on to offer further views about the common wording that should be used across all stirring up offences. The points made largely repeated those made in response to other questions – for example, respondents expressed concern about the scope and 'subjectivity' of the legal threshold for stirring up offences, and called for any common formulation to set a high threshold based on tightly defined terms. They also argued for the inclusion of provisions protecting freedom of speech (see paragraphs 11.39 to 11.42).

11.29 Some respondents, particularly individuals, stated their opposition to hate crime or stirring up laws, but nevertheless wished to see consistency (based on a high threshold) if new offences were to be introduced.

Opposition to or reservations about reformulation of existing race provisions

11.30 Organisations that did not wish to see the reformulation of existing race provisions (mainly third sector bodies) were generally concerned that this might make the prosecution of stirring up of racial hatred cases more difficult. A few individuals also expressed this concern. These respondents felt that the inclusion of ‘insulting’ conduct within the current formulation of the stirring up racial hatred offence had merit in capturing apparently low-level conduct (sometimes persistent in nature) that could be experienced as ‘abusive’ or ‘threatening’ by the individuals at whom it was targeted. Some queried whether analysis of the impact of the change in England and Wales provided adequate evidence to support the introduction of the same approach in Scotland. Some respondents in this group suggested that the concept of ‘abuse’ could be explicitly defined to include ‘insulting’ or ‘deliberately insulting’ conduct. One organisation that otherwise indicated support for the consistent formulation of stirring up offences suggested that the term ‘insulting’ might be replaced by ‘grossly insulting’.

11.31 The remaining respondents who indicated disagreement with the reformulation of stirring up of racial hatred offences simply reiterated their opposition to or concerns about hate crime laws or stirring up offences (see paragraphs 11.8 to 11.10). With regard to ‘stirring up’ in particular, some in this group (re)stated the view that such offences should apply to race but should not be extended to cover other protected characteristics (disability was also seen as an ‘exception’ by some respondents).

Other comments on the reformulation of existing race provisions

11.32 In discussing the possible reformulation of existing race provisions, respondents noted the importance of (i) seeking the views of BME groups on this issue; and (ii) ensuring that case law associated with the current stirring up racial hatred offence was not lost as a result of any legislative consolidation.

Protecting freedom of expression within stirring up offences (Q26)

11.33 Lord Bracadale’s report acknowledged concerns that any extension of stirring up hatred offences might have an adverse effect on freedom of speech and freedom of expression. Although he ‘[did] not consider that new stirring up of hatred offences would have the effect of stifling legitimate views or seriously hindering robust debate’, he nevertheless recommended that protection of freedom of expression be included in stirring up offences, in line with the approach taken in the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (referred to here as the OBFTC (Scotland) Act 2012), and in stirring up offences in England and Wales relating to religion and sexual orientation. Question 26 invited views on this recommendation.

11.34 Table 11.4 shows that the vast majority of respondents (91%) agreed that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred. This view was expressed by the majority of both organisations (84%) and individuals (92%). Amongst organisations, the three respondents who disagreed were all third sector organisations.

Table 11.4: Q26 – Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	20	71%	3	11%	5	18%	28	100%
Public sector / partnerships	19	90%	–	0%	2	10%	21	100%
Faith groups	18	100%	–	0%	–	0%	18	100%
Other organisations	6	75%	–	0%	2	25%	8	100%
Total organisations	63	84%	3	4%	9	12%	75	100%
Total individuals	892	92%	49	5%	31	3%	972	100%
Total (organisations and individuals)	955	91%	52	5%	40	4%	1,047	100%

Percentages may not total 100 due to rounding.

11.35 Altogether, 843 respondents (61 organisations and 782 individuals) provided further comments at Question 26.

11.36 It should be noted that the open question at Question 26 was targeted at those who answered ‘yes’ to the tick-box question and asked respondents if they had any comments on what should be covered by any such protection of freedom of expression provision. However, it was common for respondents to also use their comments to explain their reasons for agreeing with the recommendation, as well as to discuss how any such a provision might be framed and what it might cover, and each of these issues are covered in the section below.

11.37 Some of those who answered ‘no’ or ‘unsure’ provided comments, and their views are also covered.

11.38 It should also be noted that many of the comments made at Question 26 related to views on hate crime legislation or stirring up offences in general, rather than on the option of including provisions to protect freedom of expression in stirring up offences. These points – largely expressing opposition to hate crime legislation or concern about the potential impact on freedom of speech and freedom of (religious) expression – are covered in the analysis relating to Question 23 (paragraphs 11.8 to 11.10 above) (and elsewhere in the report) and are not repeated in any detail here.

Support for a freedom of expression provision

11.39 As shown in Table 11.4, there was widespread support – amongst both organisations and individuals – for Lord Bracadale’s recommendation to incorporate a protection for freedom of expression in any stirring up offences.

11.40 Across all respondent types, there was a clear view that it was important to protect freedom of expression and / or to uphold the rights contained in Articles 9, 10 and 11 of the ECHR (i.e. the rights to freedom of expression, thought, conscience, and religious expression). The proposed provision was seen as helpful in achieving this.

11.41 It was common for respondents, organisations in particular, to see this as an issue of ‘balance’ – they noted the need to achieve an appropriate balance in the law between allowing freedom of expression, and preventing or responding to ‘stirring up’ and providing adequate protection to relevant groups.

11.42 However, there were differing views about the appropriate point at which any balance should be struck, and the priority that should be attached to different perspectives in arriving at the correct balance. On the one hand, some respondents supported the inclusion of such a provision but argued that care was needed to ensure that any freedom of expression provision did not undermine the overall aim of the legislation in protecting groups and providing an effective response to the stirring up of hatred. On the other hand, other respondents (most notably, faith groups and individuals) tended to prioritise the right to freedom of expression (and religious expression in particular) and were concerned that any (new) hate crime offences did not impact on that freedom. Some in this latter group explicitly stated their opposition to hate crime laws or stirring up offences but said that **if** such laws are to be in place, they **must** incorporate robust and explicit protection for freedom of expression.

How the provision should be framed and what it might cover

11.43 Respondents of all types thought that the law needed to be clear in terms of what was and was not regarded as stirring up of hatred, and what was and was not covered by any freedom of expression provision. They also commented that this would need to be conveyed to the public in an effective way. Respondents noted the need for (i) careful drafting of any such freedom of expression provision, and (ii) guidance on how this would be implemented. There was a suggestion that the provision should be developed in consultation with relevant groups and communities.

11.44 In contrast, and less often, some respondents favoured a less prescriptive approach with some noting the role of police and judicial practice and legal precedence in establishing the distinction between acceptable debate and dialogue, and stirring up hate.

11.45 However, there was broad support for Lord Bracadale’s proposal that any freedom of expression provision should reflect the provisions included in the now repealed OBFTC (Scotland) Act 2012 (Section 7), and the Public Order Act 1986 (sections 29JA and 29JA).

11.46 In line with support for this approach, there were three specific suggestions (all made by faith groups and individuals) for protections that might be incorporated into the law:

- With regard to stirring up religious hatred, respondents called for protection for the right of individuals to affirm their religion as true and others as false, and to encourage people to change their religion.
- With regard to stirring up hatred on the basis of sexual orientation, respondents called for protections to allow individuals (i) to say that non-heterosexual orientation and behaviour was ‘sinful’, and to encourage people to renounce such lifestyles and practices, and (ii) to argue against same sex marriage.

- With regard to stirring up hatred on the basis of transgender identity, respondents called for protections to allow individuals to refute transgenderism and refer to people according to their sex at birth.

11.47 It was noted that, in the first two cases above, equivalent protections had been included in relevant stirring up offences in England and Wales and in the now repealed OBFTC (Scotland) Act 2012.

11.48 Some respondents, particularly faith organisations and individuals, offered further detailed comment as to what should be covered by a protection of freedom of expression provision. Such respondents called, variously, for protection for the following:

- All speech, with minimal exceptions
- All speech that falls short of threatening or encouraging violence, harassment or other crimes, or speech that does not impinge on the rights of others
- All speech relating to faith / belief
- All 'opinion-based' speech, including controversial / unpopular views, views challenging cultural norms and views that may offend others
- All dialogue, debate and opinion relating to political, social, moral, scientific and 'lifestyle' issues
- Academic debate and discussion
- Speech aimed at organisations / institutions / states rather than individuals
- Views expressed via art, comedy, or satire.

Opposition to or reservations about a freedom of expression provision

11.49 Fewer than 10% of respondents disagreed with (5%) or were unsure (4%) about the inclusion of a provision to protect freedom of expression in offences relating to the stirring up of hatred (see, again, Table 11.4).

11.50 Organisations that disagreed or had reservations about Lord Bracadale's recommendation had concerns about striking an appropriate balance between the right to freedom of expression and the right to protection from threat and abuse. There was a view that current protection of freedom of expression as provided by the ECHR was adequate. This group suggested that the inclusion of a specific provision within hate crime legislation was therefore unnecessary and may weaken the protection provided to groups with protected characteristics. There was also concern that this would send out the wrong message about the acceptability of different behaviours.

11.51 Individuals who disagreed or expressed reservations with Lord Bracadale's recommendation largely did so in the context of wider concerns about hate crime legislation, and its impact on freedom of expression.

Other comments on the creation of additional stirring up offences

11.52 Respondents offered a range of other comments related to the creation of additional stirring up offences, including the following:

- The need for a new stirring up hatred offence based on sex / gender should be considered alongside wider consideration of the legal response to misogynistic behaviour.
- Any new offences should be clearly defined, and should be accompanied by guidance to ensure a good level of understanding among professionals and the public about the application and interpretation of the law and the legal thresholds.
- The need for any new stirring up offences should be considered and understood alongside the need to include appropriate protections for freedom of speech.

11.53 Respondents who were generally opposed to new stirring up offences also suggested that:

- There should be the option of prosecuting anyone falsely accusing another individual of stirring up hatred.
- Threatening and abusive conduct should simply be a standalone offence, with no reference to protected groups.

12. Online hate (Q27)

12.1 Criminal offences committed online can be aggravated in the same way as offline offences. However, the consultation paper noted growing concern about the increase in hostile online activity and the response to this. Within this context, Lord Bracadale's review considered how well the current law operates in relation to online conduct, and whether any changes are needed. The review concluded that the proposed reforms to hate crime legislation (and the introduction of new gender-related laws in particular) would provide an appropriate response to both online and offline hate offences, and that no further specific legislative change focusing on online offences was therefore needed at this stage. Question 27 in the consultation asked if respondents agreed with this view, as follows:

Question 27: Do you agree with Lord Bracadale's recommendation that no specific legislative change is necessary with respect to online conduct? [Yes / No / Unsure]

Key points

- ◆ There were mixed views on the recommendation that no specific legislative change was necessary with respect to online conduct – 44% of respondents agreed, 23% disagreed, and 33% were unsure (representing 292, 153 and 224 out of 669 respondents). However, organisations were more likely than individuals to answer 'yes' (58% compared to 42%; 42 out of 73 respondents, and 250 out of 596 respondents respectively).
- ◆ Respondents who agreed that no legislative change was required mainly thought that online conduct was already covered by existing legislation, or that it would be adequately covered if other recommendations were taken forward. Additionally, some thought that the nature of online activity did not merit a legislative response, or that the challenges involved meant that legislative action was not worthwhile.
- ◆ Those who thought that legislation was required mainly said that online hate was a serious and increasingly prevalent issue which needed a specific tailored response.
- ◆ There was also a general view that legislation and enforcement activity in this area would be inherently difficult, and that a package of measures (legislative and non-legislative) was needed to address issues related to online conduct.

12.2 Table 12.1 shows that there were mixed views on Lord Bracadale's recommendation that no specific legislative change is necessary with respect to online conduct – 44% of respondents agreed, 23% disagreed, and 33% were unsure. However, organisations were more likely than individuals to say 'yes' to this question (58% compared to 42%), while individuals were more likely than organisations to say 'no' (24% compared to 15%).

Table 12.1: Q27 – Do you agree with Lord Bracadale’s recommendation that no specific legislative change is necessary with respect to online conduct?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	17	52%	6	18%	10	30%	33	100%
Public sector / partnerships	14	67%	1	5%	6	29%	21	100%
Faith groups	9	90%	–	0%	1	10%	10	100%
Other organisations	2	22%	4	44%	3	33%	9	100%
Total organisations	42	58%	11	15%	20	27%	73	100%
Total individuals	250	42%	142	24%	204	34%	596	100%
Total (organisations and individuals)	292	44%	153	23%	224	33%	669	100%

Percentages may not total 100 due to rounding.

12.3 Altogether, 285 respondents (62 organisations and 223 individuals) provided further comments at Question 27, and the views expressed are presented below. Respondents often made very similar points regardless of how they answered the tick-box question.

12.4 It should be noted that individual respondents in particular often used their comments to restate points made in response to previous questions in relation to the need for hate crime laws and the appropriate scope of hate crime legislation, the balance to be struck with protecting freedom of expression, and the legal thresholds that should be in place for such offences etc. Some simply restated their overall views on hate crime legislation (generally opposition) without offering any additional comments on the need for specific legislation covering online conduct.

12.5 Additionally, it was not always clear from people’s comments if they appreciated that the question was asking about the need for **additional** legislation beyond that proposed in Lord Bracadale’s other recommendations.

Support for no specific legislative change

12.6 Respondents who agreed with Lord Bracadale’s recommendation offered one of two main reasons for their view:

- They thought online conduct was already covered by existing legislation. This view was mainly put forward by individuals, faith organisations and some third sector organisations.
- They thought online conduct **would be** adequately covered if other recommendations related to new aggravations and stirring up offences were taken forward. This view was expressed by a range of organisations as well as some individuals.

12.7 Alongside both of these views, respondents argued that online conduct should be held to the same legislative standards and treated the same as offline conduct so therefore no separate legislative change was needed.

12.8 However, two further perspectives were offered by some individual respondents:

- Some thought that the nature of online conduct did not merit a legislative response. These respondents argued that online abuse does not cause direct harm, and that people have the choice not to look at content that they find offensive; there was also a view that social media companies are already taking reasonable action on this issue. Occasionally, respondents suggested that online activity was already over-regulated and this should be reduced, or ‘rolled back’.
- Others said that the challenge of enforcing laws against online conduct (e.g. because of the cross-border nature of online activity, the difficulty of identifying anonymous posters etc.) meant that legislative action would not be worthwhile.

12.9 Organisations who agreed that no specific legislative action was required to tackle online conduct often said that, while they saw online hate as a significant problem, they did not think that additional legislation was the answer. Instead they saw this as an issue of education and enforcement. These respondents made similar points to respondents who answered ‘no’ or ‘unsure’, and the relevant views are covered together at paragraph 12.15.

Opposition to no specific legislative change

12.10 Those respondents (representing a range of organisation types as well as some individuals) who disagreed with Lord Bracadale’s recommendations made two main points:

- They saw online hate as a serious issue that had a significant impact on individuals and communities and was increasing in prevalence. Respondents highlighted the incidence of online hate related to sex / gender, disability, LGBT communities, young people etc., with some providing evidence of the nature and extent of abuse experienced by different groups. There was a view that online conduct can be particularly abusive and hostile at least partly because of the potential for anonymity.
- They argued that current / non-specific laws are not well designed to accommodate online behaviour, particularly given the rapidly changing nature of online activity. As such, they thought this type of conduct required a tailored response.

12.11 Less often, respondents also suggested that specific legislation would (i) fill a gap left by the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, or (ii) provide clarity and transparency regarding the legal treatment of online abuse. There was one specific proposal for a new harassment offence covering both online and offline activity.

12.12 Respondents offered two different qualifications to their support for specific legislation in this area:

- Respondents (mainly organisations) often said that this was an inherently difficult area to legislate for, and that new laws on their own would not be enough to tackle online abuse. They thought that legislation would need to be accompanied by other measures. (See paragraph 12.15 for further discussion of this view).

- Less commonly, respondents agreed with the recommendation but stressed the need for any additional offence in this area to incorporate appropriate language and legal thresholds and appropriate protections for freedom of speech.

12.13 Occasionally, respondents (mainly individuals) argued that the nature of the online environment (e.g. because of its impersonal or indirect nature, because people could choose not to look at content) meant that **more limited** controls were merited and that any additional legislation and related penalties should reflect this. In addition, there were specific calls for the repeal of Section 127 of Communications Act 2003.

Uncertainty about the need for specific legislative change

12.14 Respondents who said they were unsure about the need for specific legislative change covering online conduct often made similar points to other respondents who had answered 'yes' and 'no'. In other cases, however, respondents said they (i) did not know enough about the issue, or were not familiar enough with the internet to give a view; or (ii) recognised this as a serious issue and thought action was required but did not know what the best solution was. There were also calls for clarification on how legislative arrangements would work in practice with respect to online conduct.

Other non-legislative activity to tackle online conduct

12.15 Across all groups of respondents, regardless of how they answered the tick-box question, there was a view that legislation (or specific legislative change) would not on its own represent a sufficient response to online hate. Respondents called for a package of measures including:

- Education and information targeted at the public in general, or specific groups, to ensure appropriate identification and reporting of online criminal conduct – guidance to accompany any new hate crime legislation was suggested
- Greater support and safeguarding for vulnerable groups using the internet – the specific point was made that the internet was an important resource for many groups (young people, LGBT people, the disabled) and steps needed to be taken to ensure this was a 'safe space' for potentially vulnerable individuals who should feel confident about taking action if they experience abuse
- More resources and training to support the policing and prosecution of legislation in this area
- Greater regulation of social media companies and platforms, including greater responsibility in term of monitoring content and taking action
- Action to encourage more positive online behaviour.

Other comments on addressing online conduct

12.16 There were a number of other comments made by a range of mainly organisational respondents who highlighted the complexity of tackling online conduct, and the challenges faced in reaching a judgement on the right course of action. For example, they said:

- This was a rapidly changing area, and that any decision about the need for specific legislative change required further research and investigation, and / or

should take account of work being undertaken by the Law Commission.¹² Some in this group agreed that no additional laws were currently required (they answered 'yes' to the closed question), but thought that the matter should be kept under review.

- This issue needed to be considered in the context of other reforms under consideration. In particular, there was a view that the response to online misogyny should be considered alongside other possible reforms to tackling offline misogyny.
- Other aspects of online activity – covering, for example (i) low-level, repeated and cumulative online abuse; (ii) encouragement to self-harm and suicide, (iii) 'grooming' etc. – also gave rise to concern, and also needed to be addressed, with some saying this should be done via legislative change.
- This was a global issue and could not be solved via Scottish legislation alone – there were calls for the development of a UK or international approach.

¹² See <https://www.lawcom.gov.uk/abusive-and-offensive-online-communications/>

Part Four:

Exploitation and vulnerability

13. Exploitation and vulnerability (Q28 and Q29)

13.1 The consultation paper explained that the threshold for an offence under current hate crime legislation requires evidence of hostility by the perpetrator towards a person or persons due to their perceived membership of a particular group.

13.2 However, Lord Bracadale's report distinguished between crimes based on hostility towards a particular group, and crimes where the perpetrator targets a victim because of the perpetrator's perceptions about the vulnerability of the victim. Lord Bracadale noted that vulnerability may arise from issues associated with a protected characteristic, rather than from the characteristic itself – e.g. older people may be frail and have memory difficulties. Lord Bracadale argued that if hate crime is redefined to include vulnerability – as well as hostility / prejudice – it would 'lose its special symbolic power'. Therefore, he recommended an alternative approach, involving the introduction of a general aggravation, outwith hate crime legislation, relating to the exploitation of vulnerability. (Recommendations 3 and 11). Respondents were asked for their views on this issue.

Question 28: Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim? [Yes / No / Unsure]

Question 29: If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you think such an aggravation should cover?

Key points

- ◆ Overall, views were mixed on a possible new statutory aggravation (outwith hate crime legislation) that could be applied in cases where a perpetrator exploits the vulnerability of the victim. However, most organisations, 62% (representing 39 of 63 respondents), favoured such an aggravation, compared to 45% of individuals (195 of 429 respondents).
 - ◆ Those who were in favour argued that there was a need for such a statutory aggravation to cover crimes against people with protected characteristics (particularly age and disability) that are not motivated by hatred / prejudice.
 - ◆ Respondents highlighted significant complexities and challenges in defining an offence with reference to the vulnerability of the victim. The concept of 'vulnerability' was also seen as problematic, given that vulnerability is relative, can fluctuate and can have a range of causes.
 - ◆ Those supporting the introduction of a vulnerability-related statutory aggravation thought that the offence should cover circumstances involving all types of harm (physical, psychological, sexual), neglect and conduct which involves the appropriation of (and which adversely affects) the property, rights or interests of the victim.
-

Views on a new vulnerability-related statutory aggravation (Q28)

13.3 Respondents were asked to give their views on whether a (new) statutory aggravation (outwith hate crime legislation) should be introduced in cases where a perpetrator exploits the vulnerability of the victim.

13.4 Table 13.1 shows that there were mixed views overall on this question – 48% said ‘yes’, 32% said ‘no’ and 21% said ‘unsure’. However, a majority of organisations supported this option (62% answered ‘yes’, compared to 45% of individuals). Faith groups were the only exception with five out of seven respondents answering ‘no’.

Table 13.1: Q28 – Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	15	54%	4	14%	9	32%	28	100%
Public sector / partnerships	18	82%	1	5%	3	14%	22	100%
Faith groups	1	14%	5	71%	1	14%	7	100%
Other organisations	5	83%	–	0%	1	17%	6	100%
Total organisations	39	62%	10	16%	14	22%	63	100%
Total individuals	195	45%	147	34%	87	20%	429	100%
Total (organisations and individuals)	234	48%	157	32%	101	21%	492	100%

Percentages may not total 100% due to rounding.

13.5 A total of 203 respondents (47 organisations and 156 individuals) commented at Question 28.

13.6 Regarding the organisations who answered ‘unsure’ to this question, it is worth noting the following points:

- Most organisations answering ‘unsure’ raised concerns about the complexity and challenges relating to the concept of ‘vulnerability’ and how a vulnerability aggravation would operate in practice. Similar issues were raised by those who answered ‘yes’ and ‘no’ to this question, and these issues are discussed further below (paragraph 13.13).
- Some third sector organisations favoured the introduction of a vulnerability-related aggravation specifically for older people, instead of the introduction of a new statutory aggravation based on age hostility (see Chapter 7 of this report) – unless there was evidence to indicate that crimes against older people are frequently motivated by age-related hostility. However, these organisations explicitly stated that they had no position on the question of whether there is a need for a general vulnerability-related aggravation.

13.7 Individuals who answered ‘unsure’ to this question made a wide range of disparate comments. The two main themes in these comments were that: (i) respondents did not understand the question, or (ii) respondents wanted clarification, in particular about the meaning of ‘vulnerability’.

Support for a new vulnerability-related aggravation

13.8 Respondents answering 'yes' to Question 28 generally agreed with Lord Bracadale's arguments that there is a distinction between offences motivated by hostility / prejudice and 'more opportunistic' offences which seek to exploit the vulnerability of the victim. They agreed that the latter should not be prosecuted through hate crime legislation, but they also believed that the exploitation of vulnerable individuals should be seen as an aggravated offence.

13.9 These respondents often pointed to a **need** for a new vulnerability-related aggravation – particularly with regard to crimes committed against older people and people with disabilities (including people with a learning disability, autism or mental illness). They argued that, at present, many crimes committed against these groups are not prosecuted because they do not meet the threshold for a hate crime (i.e. an offence motivated by hatred or prejudice towards an individual because of their membership of a particular group). In addition, it was reported that, where a prosecution **is** brought forward under hate crime legislation, it often fails if the offence can be characterised as opportunistic exploitation of the victim's (perceived) vulnerability. There was also a recurring view that crimes involving, for example, elder abuse or the exploitation of a disabled person, are not taken as seriously as crimes against other victims of abuse (e.g. children or victims of domestic abuse). Some individuals suggested that there is not currently enough protection given to the most vulnerable members of society; others said that they were surprised that there were not already criminal laws that protected vulnerable people from exploitation.

13.10 It was noted that procedures under the Adult Support and Protection (Scotland) Act 2007 (referred to elsewhere in this chapter as the 2007 Act) can be used to intervene and protect an adult at risk of harm. However, these measures do not involve criminal proceedings – the introduction of a statutory aggravation would give a clearer, stronger message that the exploitation of vulnerability will not be tolerated.

13.11 Some respondents identified other benefits of having a new statutory aggravation relating to the exploitation of vulnerability, including that:

- It would give proper weight to the impact of the crime on the victim.
- It would 'compel' judges to take these factors into account in sentencing decisions – rather than allowing this to be done on a discretionary basis.
- It would lead to greater consistency in how these kinds of offences are prosecuted.
- It may act as a deterrent.
- It would address the imbalance of power which makes vulnerable people more likely to be victims of crime.

13.12 While respondents often discussed this issue in relation to people with physical or mental disabilities and older people, some suggested that a new aggravation may also be applicable to children and young people, minority ethnic groups, victims of human trafficking, and people who cannot read or write. In addition, there was a recurring view in responses from public sector organisations that consideration should be given to whether the new statutory aggravation could cover women who are exploited through prostitution.

The concept of ‘vulnerability’

13.13 The main issue raised by respondents in relation to the introduction of a new general vulnerability-related aggravation concerned the complexity and challenge of defining an offence with reference to the ‘vulnerability’ of the victim. This issue was, in fact, raised not only by those who answered ‘yes’ to Question 28, but also those who answered ‘no’ and ‘unsure’. Respondents supporting the introduction of the new aggravation made several related points:

- **There were concerns about ‘labelling’ people as vulnerable.** This concern was raised repeatedly among organisational respondents. This group noted that labelling people in this way is disempowering, not only for older people – many of whom are not vulnerable – but also for individuals with disabilities (including people who are deaf and people with learning disabilities) who may not see themselves as vulnerable. Respondents thought it was important that the language used in the aggravation should not imply that certain groups are ‘helpless’ and ‘in need of protection’, nor should it give the impression that the victims are partly to blame for what has happened to them – i.e. because of their weakness. Some respondents suggested that the legislation should be defined in terms of the perpetrator’s **perception** of vulnerability, rather than the victim’s vulnerability. Others noted that similar issues were raised during the drafting of the 2007 Act, where the term ‘a vulnerable adult’ was replaced with ‘an adult at risk of harm’. Other suggestions for alternative terminology included: ‘crime against a disabled person’; ‘harm of an individual who requires support or care’; and ‘offence against an individual unable or less able to defend themselves or to recognise that they are being harmed’.
- **Vulnerability can fluctuate and can have many causes.** It was noted that anyone can be vulnerable at certain points in their lives, and that vulnerability is relative and can fluctuate. Moreover, vulnerability is not an attribute solely related to age or disability. It was noted that certain factors can increase a person’s vulnerability (e.g. loneliness, bereavement, dependence on others for care, etc.) Some respondents thought that further work was needed to ensure equity and consistency of application of any new statutory aggravation – particularly as the definition of ‘vulnerability’ may be open to interpretation. They also noted that vulnerability can be caused or exacerbated by being under the influence of alcohol, illegal substances, or prescribed medication, and they suggested that further consideration would need to be given to the specific kinds of vulnerability to be covered by the statutory aggravation.
- **There should be consistency in statutory definitions.** Some respondents thought that the definitions used in the drafting the new statutory aggravation should reflect existing statutory definitions – for example, those used in the 2007 Act. This would allow legislation created to support and protect adults at risk of harm to be clearly linked to the criteria for prosecution of those perpetrating harm. However, this view was not unanimous, since there was also a suggestion that the ‘three-point criteria’ for defining an adult at risk used in the 2007 Act may not be entirely appropriate as it currently excludes some groups.¹³ Section 12 of the

¹³ The ‘three-point criteria’ are set out in Section 3 of the 2007 Act.

Children and Young Persons (Scotland) Act 1937 was also mentioned as possibly offering parallels with the type of conduct towards older people which should be subject to criminal sanctions.

13.14 Some respondents asked for further details on how this new statutory aggravation would operate and be proven, and also how it would interact with hate crime legislation. Some were concerned that it may be operationally difficult for the police to distinguish between an offence motivated by hate / prejudice, and one which is seeking to exploit a perceived vulnerability.

Other issues raised by those supporting a new vulnerability-related aggravation

13.15 Some respondents in this group called for:

- Further consideration to be given to the definition of ‘exploitation’ (as well as the definition of ‘vulnerability’ as discussed above)
- A review of the use of the term ‘vulnerability’ across Scottish legislation and policy documents to promote standardisation and consistency
- A separate, standalone offence on ‘elder abuse’, in preference to a new aggravation relating to the exploitation of vulnerability
- The introduction of jury direction in cases of elder abuse, as a means of making juries aware of the unique dynamics of this type of crime; it was noted that a similar approach is working well in sexual assault cases
- All crimes targeted at a person with a learning disability to attract a statutory aggravation – regardless of whether the motive was based on hostility to their disability or a desire to exploit their perceived vulnerability; any decision **not** to apply the aggravation should require to be based on evidence that the desire to exploit the victim’s vulnerability was not a factor
- Greater visibility of people with learning disabilities within the statutory aggravation model – it was noted that the only section of the consultation in which people with learning disabilities were given a specific focus was the section on exploitation and vulnerability; the lack of attention to this group in relation to aggravating factors in hate crime can reinforce a view of people with learning disabilities as intrinsically vulnerable, passive and in need of intervention
- Further consultation with people with learning disabilities in drafting any new statutory aggravation.

13.16 There were concerns voiced by some respondents that the introduction of a new statutory aggravation relating to vulnerability should not carry a lesser sentence than if the crime was prosecuted as a hate crime. Regarding the issue of sentencing, one organisation commented that guidelines produced by the Sentencing Council of England and Wales highlight the importance of sentences reflecting the seriousness of an offence, both in terms of culpability and harm caused.¹⁴ Offences which are seen to justify a more

¹⁴ Respondents referred to the Sentencing Council of England and Wales guideline (2004): *Overarching Principles: Seriousness*. Available from: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf>

serious sentence would include: (i) deliberate targeting of vulnerable victim(s); (ii) abuse of power; and (iii) abuse of a position of trust. In addition, a factor indicating a serious degree of harm would relate to cases where the victim was particularly vulnerable. It was suggested that a similar approach to sentencing could be adopted in Scotland.

Opposition to a new vulnerability-related aggravation

13.17 Organisations answering 'no' to Question 28 (and some who did not answer the closed part of Question 28) made similar points to those discussed above about the complexity and difficulty of defining an offence in relation to a victim's vulnerability. Those who answered 'no' saw these issues as reasons **not** to introduce this type of statutory aggravation. This group made several related points:

- Research carried out into the under-reporting and under-prosecution of disability hate crime in England found that the criminal justice system is 'too quick' to categorise disabled people as 'vulnerable'. The effect of this is that it prevents disability hate crime from being fully recognised and perpetrators being appropriately punished.
- There is likely to be operational confusion between an aggravation by prejudice and an aggravation by vulnerability (as noted above). Furthermore, all the members of a particular group or all those with a protected characteristic may be incorrectly viewed by the police / prosecutors as inherently vulnerable and therefore, every crime against members of this group may be interpreted as involving exploitation of vulnerability. At the same time, the victim may not consider themselves to be vulnerable, and may believe that the offence was motivated by hostility towards their disability.
- If vulnerability is defined in terms of specific medical or physical conditions, it must be recognised that there are gradations in conditions, and some conditions (which could be seen as increasing an individual's vulnerability) may not be formally diagnosed. There is a risk that criminal prosecutions would end up focusing unhelpfully on the victim's disability, rather than the offence committed against them. Conceivably, the defence could challenge the credibility of the victim, or require the disclosure of personal sensitive information. Where abuse is not violent, but coercive (for example, in cases of forced labour, financial exploitation and some sexual crimes), there may be difficulty in proving that a person with a learning disability did not consent, or was not able to consent. All of these issues could result in discouraging victims from coming forward.
- Further detailed consideration is needed of how a vulnerability-related aggravation would relate to child protection legislation.
- There are a range of existing statutes which allow for the prosecution of individuals who exploit the vulnerability of their victim.¹⁵

¹⁵ These included: Section 315(3) of the Mental Health (Care and Treatment)(Scotland)) Act 2003; Section 83 of the Adults with Incapacity (Scotland) Act 2000; and Part 3 of the Health (Tobacco, Nicotine etc. and Care)(Scotland) Act 2016.

13.18 The main views expressed by individuals answering ‘no’ at Question 28 were that:

- The law should treat all people equally – there should not be additional sanctions for crimes against ‘protected groups’.
- There is no need for additional legislation in this area, since all victims of crime are to some extent vulnerable in the eyes of the perpetrator. This view was often also expressed as ‘current legislation is sufficient’ or ‘current law should be adequate’.

13.19 Less often, individuals commented that a vulnerability-related aggravation would be ‘unworkable’ and result in ‘legal arguments about vulnerability’. There were also suggestions that it could lead to people falsely claiming to be vulnerable when no such vulnerability exists.

Circumstances in which a vulnerability-related aggravation could apply (Q29)

13.20 Respondents answering ‘yes’ to Question 28 were asked to provide details of the circumstances that they thought should be covered by a new vulnerability-related statutory aggravation. Altogether, 163 respondents (36 organisations and 127 individuals) provided comments. (This includes 26 respondents who answered ‘unsure’ at Question 28.)

13.21 Respondents suggested that a new vulnerability-related statutory aggravation could apply to a wide range of circumstances. Some made very specific suggestions (e.g. ‘deliberately befriending a deafblind person who uses British Sign Language to steal their pension’). Others offered more general principles for defining such an offence. These included, for example, any crime committed against a person with a protected characteristic, where the protected characteristic was a factor in the crime – regardless of whether the perpetrator was motivated by hostility or an aim to exploit a perceived vulnerability. This would not apply to a victim chosen at random (for example, by a fraudster calling at every door), but only to those cases where the perpetrator **knew** (or presumed) that the victim had a protected characteristic. It could also apply in circumstances where, for example, a perpetrator threatened to reveal a protected characteristic to a third party (e.g. an individual’s mental health history to an employer) as part of an attempt to extort or defraud.

13.22 As mentioned above, some respondents also suggested that the victim of the offence should meet the same three-point criteria set out in Section 3 of the 2007 Act – where the victim is unable to safeguard their own wellbeing, property, rights or other interests (some respondents simply said, ‘where the victim lacks capacity’). The offence could include all types of harm, including physical harm, psychological harm, sexual harm, neglect, and conduct which involves the appropriation of (and which adversely affects) the property, rights or interests of the victim.

13.23 Respondents suggested that any of the following types of offences, perpetrated against a vulnerable person, should be subject to the new statutory aggravation:

- Financial harm / scamming / fraud (including doorstep crime, bogus callers, etc.), and financial exploitation (although it was noted that this can be difficult to prove,

because often the victim has given the perpetrator permission to manage their financial affairs)

- Cuckooing (where an offender takes over the home of a vulnerable person to use as a base for cultivating, storing and / or selling drugs)
- Abuse or neglect (of a child or vulnerable adult) by carers or guardians, or by some other individual in a position of trust and / or power in relation to the victim
- Human trafficking
- Modern slavery
- Physical / emotional abuse
- Grooming of a vulnerable adult.

13.24 Others discussed offences against specific groups, for example:

- **Older people:** financial abuse, from strangers and family members – including doorstep crime; violent crime, including robbery – in cases where an older person has been targeted for a violent crime because of their perceived vulnerability; abuse of an older person living in a care home setting
- **People with learning disability or autism:** financial exploitation – where an individual has been deceived into paying for a service that is never delivered; where a perpetrator has claimed to be a friend, or to represent an agency such as a local council, HMRC or a utility or telecoms provider; sexual exploitation – including situations in which an individual befriends a person and establishes a coercive or exploitative relationship; rape
- **Women:** crimes targeted at a woman who is alone at the time of the offence; being forced to work as a prostitute; crimes against women who are isolated, survivors of sexual violence, or those with mental health problems; rape of a woman who is known to have an alcohol or drug problem
- **Children and young people:** exploitation of a looked-after child; child sexual exploitation
- **Other groups:** ‘preying on’ people who are addicted to drugs or alcohol; exploiting a foreign national who may not understand English; assault of a homeless person.

Part Five: Other issues

14. Repeal of Section 50A – Racially aggravated harassment (Q30 and Q31)

14.1 Hate crime laws in Scotland currently include standalone offences relating to racially aggravated harassment, as contained in Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (as amended). These offences were introduced via the Crime and Disorder Act 1998, which also introduced a statutory racial aggravation to Scots law. There are no equivalent standalone offences for other protected characteristics. The introduction of racially motivated offences predates that of other statutory aggravations, and was informed by concerns that the issue of racial harassment and racially motivated violence was not treated seriously enough at that time. However, Lord Bracadale’s review concluded that the introduction of subsequent legislation (i.e. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010), along with the option of using the statutory racial aggravation meant that Section 50A was no longer needed, and that repeal would offer the benefit of simplifying the law in this area. Lord Bracadale therefore recommended that Section 50A be repealed.

14.2 The consultation asked two questions about the repeal of Section 50A as follows:

Question 30: Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed? [Yes / No / No opinion]

Question 31: What do you think the impact of repealing Section 50A of the Criminal Law (Consolidation)(Scotland) Act 1995 about racially aggravated harassment could be?

Key points

- ◆ There was a mix of views about whether Section 50A should be repealed. A third of respondents (34%; 152 out of 453) said ‘yes’, and a quarter (25%; 114 out of 453) said ‘no’. However, organisations were more likely than individuals to say ‘yes’ – 50% (29 out of 58 respondents) compared to 31% (123 out of 395 respondents).
- ◆ There were two main arguments for repeal: Some thought the offence was no longer needed, and that repeal would offer benefits in terms of consistency, simplification and improved statistical data, but also stressed the need for adequate replacement arrangements and for repeal to be appropriately communicated to the public. Others favoured repeal as part of a preference for a wider repeal of all hate crime legislation.
- ◆ Those who favoured retention of Section 50A said that the offence was well used, and that other options did not offer equivalent substitutes, and that its repeal would send out the wrong message. They also thought that the particular circumstances and enduring nature of racial prejudice meant that a specific standalone offence was merited. Some favoured retention as part of a wider preference for standalone offences (and the associated corroborative requirements) rather than aggravations.

- ◆ Those who favoured repeal thought this would have minimal impact (or even a potentially positive impact) because offences would continue to be prosecuted using other laws and aggravations. Those opposed to repeal were concerned about the impact on community relations and confidence in public agencies, and the impact on reporting and prosecution of hate crime incidents. Alternatively, some were concerned about a possible increase in the use of aggravations.

Repeal of Section 50A (Q30)

14.3 Table 14.1 below shows that there were mixed views among respondents about whether Section 50A should be repealed. A third of respondents (34%) said ‘yes’, and a quarter (25%) said ‘no’. However, while there were mixed views among both individuals and organisations, organisations were more likely than individuals to say ‘yes’ (50% compared to 31%). A relatively high proportion of respondents (two-fifths or 41%) said they had ‘no opinion’ on this question, with individuals particularly likely to say this (43% of individuals gave this answer compared to 28% of organisations).

Table 14.1: Q30 – Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed?

Respondent type	Yes		No		No opinion		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	8	31%	8	31%	10	38%	26	100%
Public sector / partnerships	15	75%	2	10%	3	15%	20	100%
Faith groups	4	67%	1	17%	1	17%	6	100%
Other organisations	2	33%	2	33%	2	33%	6	100%
Total organisations	29	50%	13	22%	16	28%	58	100%
Total individuals	123	31%	101	26%	171	43%	395	100%
Total (organisations and individuals)	152	34%	114	25%	187	41%	453	100%

One organisation answered 'unsure' in response to this question. This response is not included in the table above.

Percentages may not total 100 due to rounding.

14.4 Altogether, 149 respondents (48 organisations and 101 individuals) provided further comments at Question 30. The sections below present views for and against repeal.

Views of those in favour of repeal of Section 50A

14.5 There were two broad perspectives among those who supported repeal of Section 50A, as discussed below.

14.6 Organisational respondents (including third sector organisations, public sector bodies, faith groups, and law and justice bodies) and some individuals largely endorsed the reasons put forward by Lord Bracadale in his review report in support of repeal – that is:

- They agreed that this offence was no longer needed given its limited (and declining) usage and the availability of other appropriate legislative options.
- They thought that repeal would offer benefits in terms of (i) consistency in the treatment of different groups within hate crime laws, thus addressing the

perception that there was a 'hierarchy' of victims within the law; (ii) simplifying the law, and providing clarity for the public (including affected groups), and those working within the criminal justice system and (iii) improved statistical data which, in turn, offered benefits in terms of monitoring trends in offending behaviour and developing informed policy.

14.7 Respondents in this group thought repeal made sense within the context of the proposed consolidation and streamlining of hate crime laws in Scotland.

14.8 In contrast to the view above, individuals who supported repeal often simply stated (or restated) their opposition to hate crime legislation or called for the repeal of Section 50A alongside the repeal of all other hate crime laws. Some in this group did, however, state a preference for aggravations rather than standalone offences if hate crime legislation were to continue to exist, and supported repeal of Section 50A on that basis.

14.9 Respondents who agreed with repeal of Section 50A nevertheless offered a number of caveats and qualifications to their support for this course of action. These focused on the following:

- Communication: Most commonly, respondents acknowledged the risk that such a move might be perceived as sending out the 'wrong message' about the importance attached to combatting racism and racially motivated crime, and might have an impact on reporting and prosecution of such crimes. However, respondents generally thought that this could be addressed via an associated communication strategy and the provision of appropriate support to relevant communities.
- Implementation: Respondents called for any replacement arrangements to (i) offer a high level of protection for all groups ('levelling up' rather than 'levelling down') and capture repeated low-level incidents, (ii) be clear (regarding wording, definitions, coverage etc.), and (iii) be accompanied by appropriate guidance.

Views of those opposed to repeal of Section 50A

14.10 Respondents (organisations and individuals) put forward a number of different points in arguing for the retention Section 50A. It should be noted that third sector organisations, including those with a specific focus on BME or race-related issues, provided the fullest responses and their views are prominent in the discussion presented below. The main points raised by respondents were as follows:

- They were concerned that repeal would send out the wrong message to society as a whole and to BME communities in particular about the importance attached to addressing racism and racially motivated crime.
- They argued that Section 50A was an essential, and well-used tool in combatting racism and racially motivated crime. They noted that race-related offences were the most common type of hate crime in Scotland, and that Section 50A accounted for a substantial proportion of race hate convictions (some respondents provided evidence on this point).
- They disagreed that other options for prosecution (e.g. prosecution via Section 38 plus aggravation) provided an adequate substitute for Section 50A – respondents

argued that Section 50A was broader in scope and its repeal would therefore leave a gap in the law.

- They thought that the particular circumstances related to racial prejudice (its long history and continuing incidence, its entrenched nature, its serious impact on the lives of individuals and communities) meant that a specific standalone offence was merited – faith groups also highlighted the ‘intrinsic’ nature of a person’s race as a reason for treating this protected characteristic differently from others.
- They argued that racism continued to be a significant issue, and that official statistics masked regional variations, and were also affected by under-reporting.

14.11 The following additional views were also put forward:

- Some organisations called for the retention of Section 50A, and for standalone offences to be extended to other groups (some respondents who favoured repeal occasionally also thought that there might be merit in considering retention if standalone offences were extended to all groups). This view was expressed by public sector, third sector and some ‘other’ organisational respondents. There was also a view that repeal would be particularly inappropriate if a standalone offence for misogyny were to be introduced (see Questions 7 to 10).
- Some individuals said that the current law was straightforward and effective, and there was no reason for change.

Views of those who were unsure about repeal of Section 50A

14.12 As noted above, two-fifths of respondents said that they were unsure about the repeal of Section 50A. In many cases, those who were unsure made similar points to those for or against repeal. Typically, they acknowledged the potential benefits of repeal, but had concerns about (i) the message this would send out, and (ii) the impact this might have on offending and reporting rates, and sought reassurances on the arrangements that would be in place following repeal and how this change would be communicated.

14.13 In other cases, organisational respondents said that they did not wish to offer a view on this issue and instead wanted to defer to those with expertise in this area, while individuals often said that they didn’t know enough about this issue to comment, or that the consultation had not provide sufficient information to allow them to form a view.

Impact of repeal of Section 50A (Q31)

14.14 Altogether, 197 respondents (41 organisations and 156 individuals) commented at Question 31 on the impact of the repeal of Section 50A. Views tended to be linked to support for or opposition to repeal (see paragraphs 14.5 to 14.11), as summarised below.

14.15 Respondents who **supported repeal of Section 50A** generally thought that this move would have no impact or minimal impact, assuming that appropriate measures were put in place regarding communication and implementation (see paragraph 14.9). These respondents agreed that race hate crimes would continue to be prosecuted using other offences and aggravations. Some respondents said that the use of statutory aggravations attached to other offences could actually lead to an **increase** in prosecutions and convictions in the future because of the different corroborative requirements associated with the different legislative options, and identified this as a potentially positive impact.

14.16 In the main, respondents **opposed to repeal of Section 50A** were concerned that repeal would harm community relations and undermine confidence in public agencies, and have a negative effect on the reporting of race hate incidents. Additionally, respondents were concerned that repeal of Section 50A would effectively decriminalise some behaviour (because of the narrower scope of alternative legislative options), and thus lead to a reduction in race hate prosecutions and convictions. However, there was an alternative view, expressed by some individuals, that repeal would lead to an increase in hate crime prosecutions because of the lower evidential requirements associated with aggravations – these respondents did not think this would be a desirable outcome.

15. Sentencing (Q32)

15.1 There are currently four requirements related to the sentencing of hate crimes aggravations, by which the court must: (i) take the aggravation into account in determining the appropriate sentence; (ii) state on conviction that the offence was aggravated in relation to the particular characteristic; (iii) record the conviction in a way that shows that the offence was so aggravated; and (iv) state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or, otherwise, the reasons for there being no such difference.

15.2 Lord Bracadale recommended the continuation of the first three requirements, but the discontinuation of the final requirement. Lord Bracadale argued that stating in open court the extent to which the statutory aggravation altered the length of sentence did not serve a clear purpose, was complicated in practice given the multiple factors that contribute towards making sentencing decisions, and had the potential to upset a victim if the difference attributed to the aggravation is less than they had hoped.

15.3 The Scottish Government accepted Lord Bracadale's recommendations on the first three requirements. However, the Scottish Government believed that openly stating the difference in the length of a sentence due to the presence of a statutory aggravation was important as it gives a clear message that this type of crime is being taken seriously, and can also be helpful in supporting victims of crimes, and therefore proposed the retention of this requirement. Question 32 asked for views on this issue as follows:

Question 32: Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence? [Yes / No / Unsure]

Key points

- ◆ Views were mixed about whether the extent to which a statutory aggravation altered the length of sentence should continue to be stated in open court – 52% of respondents said 'yes', 17% said 'no' and 31% said 'unsure' (representing 237, 76 and 142 out of a total of 455 respondents). The response pattern was broadly similar for both organisations and individuals, although there was a mix of views across different types of organisational respondents.
 - ◆ Those who favoured continuation thought that this requirement helped send a clear message about the unacceptability of hate crimes, and also supported transparency and consistency of practice and recording. Respondents thought that this would, in turn, encourage reporting and deter offending.
 - ◆ Those who supported discontinuation endorsed Lord Bracadale's view, and agreed that the requirement was unnecessary, complicated to deliver satisfactorily in practice because of the wide range of factors considered in sentencing, and could have a potentially negative impact on victims.
-

15.4 Table 15.1 shows that there were mixed views among respondents about whether courts should continue to state publicly the extent to which a statutory aggravation altered the length of sentence – 52% said ‘yes’, 17% said ‘no’ and 31% said ‘unsure’. This pattern of response was similar among both organisations and individuals. However, there was a mix of views among organisational respondents – third sector organisations were most likely to answer ‘yes’ to this question, whilst faith groups were most likely to answer ‘no’. (These findings should be treated with caution given the small number of respondents involved.)

Table 15.1: Q32 – Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	21	72%	1	3%	7	24%	29	100%
Public sector / partnerships	9	41%	4	18%	9	41%	22	100%
Faith groups	1	17%	4	67%	1	17%	6	100%
Other organisations	5	56%	3	33%	1	11%	9	100%
Total organisations	36	55%	12	18%	18	27%	66	100%
Total individuals	201	52%	64	16%	124	32%	389	100%
Total (organisations and individuals)	237	52%	76	17%	142	31%	455	100%

Percentages may not total 100 due to rounding.

15.5 Altogether, 171 respondents (48 organisations and 123 individuals) provided further comments at Question 32. The sections below present views for and against continuation of the current requirement, while a final section briefly summarises other comments relevant to sentencing.

15.6 It should be noted that it was common for organisational respondents in particular to endorse the first three requirements relating to sentencing for aggravations, regardless of their views on the continuation of the requirement to state in open court the extent to which a statutory aggravation altered the length of a sentence.

Support for the continuation of the current requirement

15.7 There was a great deal of consistency in the views put forward by respondents of all types (organisations and individuals) who supported the requirement to state in open court the extent to which a statutory aggravation altered the length of a sentence. Generally speaking, respondents thought this requirement was helpful in:

- Enhancing transparency in sentencing, and promoting understanding in relation to sentencing, and the role of aggravations in determining sentences
- Supporting scrutiny, accountability and consistency with regard to sentencing practice – there was a suggestion that further consideration and guidance with respect to the sentencing of aggravations was needed
- Sending a message to victims, perpetrator and society at large about the unacceptability of hate crime, and the seriousness with which it was treated. The

potential deterrent effect was noted – some suggested this was fundamental to the value and purpose of hate crime legislation

- Increasing confidence in the justice system, and encouraging reporting of crimes
- Ensuring the availability of consistent data which would allow for effective monitoring of sentencing practices – respondents often also stressed the importance more generally of the collation and publication of high quality consistent data to allow for the monitoring of offender behaviour and the development of informed policy responses.

15.8 Some respondents also suggested that the requirement was helpful in validating the experience of victims (and affected communities) and providing reassurance about the response to such conduct.

Opposition to the continuation of the current requirement

15.9 Comments explaining opposition to (or reservations about) the requirement to state the extent to which a statutory aggravation altered the length of a sentence were offered by just a few organisations (including third and public sector bodies, and law and justice bodies). These respondents largely endorsed Lord Bracadale position, and made the following points:

- They thought the requirement was unnecessary, and that its discontinuation would not detract from the overall aims of ensuring aggravations were taken into account in sentencing and providing transparency on this process.
- They noted the complexity involved in setting sentences because of the need to take account of multiple factors. One respondent indicated that such factors could include the harm caused by the offence, the culpability of the accused, mitigating factors (such as previous convictions, or remorse), early guilty pleas etc., and noted the difficulty in isolating the extent to which any single factor contributed to a final sentence. This respondent went on to describe sentencing as a ‘matter of judgement’ and expressed concern at the possible loss of such an approach. Additionally, one organisation echoed Lord Bracadale’s view that victims may lose confidence in the justice system if an aggravation results in only a limited uplift in an overall sentence affected by a complex range of factors.
- They supported the discretion to provide a statement on the extent to which a statutory aggravation altered the length of a sentence in appropriate cases – there was a suggestion that guidance might be provided on this.

Other comments on sentencing with regard to aggravations

15.10 In addition to the above perspectives, individuals who said they were opposed to hate crime legislation in general often said that sentencing should be the same regardless of the characteristics of the victim. They thought that increasing sentencing in respect of aggravations sent a message to victims in non-aggravated cases that their experience was less important than that of a victim with protected characteristics. They thought that this could be counter-productive in fuelling resentment and encouraging perpetrators of hate crimes to hide their motivation. However, some in this group supported continuation of the

requirement to state the impact of aggravation on a sentence as a way of highlighting the discriminatory nature of hate crime laws, and building the case **against** their use.

15.11 Some third and public sector organisations thought greater priority should be given to addressing underlying behaviour and reducing reoffending in sentencing and that sentences for hate crimes might include 'awareness training' and other educational or rehabilitative programmes.

16. Wider context – support for victims and restorative justice (Q33 and Q34)

16.1 The Scottish Government’s consultation paper acknowledged that hate crime existed within a wider context characterised by inequality and prejudice, and that modernisation of the law was only one of a range of actions needed to tackle hate crime and build a more inclusive and equal society. The consultation paper sought views on two aspects of the ‘wider context’ – support for victims and restorative justice – as follows:

Question 33: Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences? [Yes / No / Unsure]

Question 34: Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland? [Yes / No / Unsure]

Key points

- ◆ There were mixed views about whether legislative change was needed in relation to support for victims – 43% said ‘yes’, 19% said ‘no’ and 38% said ‘unsure’ (representing 187, 83 and 167 out of a total of 437 respondents). There were also mixed views about whether legislative change was needed in relation to restorative justice and diversion from prosecution – 38% said ‘yes’, 15% said ‘no’ and 48% said ‘unsure’ (representing 163, 63 and 205 out of a total of 431 respondents). The response patterns were similar for organisations and individuals.
- ◆ There was broad consensus about the importance of support for victims. However, while some thought victims of hate crimes had special needs, others stressed the importance of support for **all** victims. Although many saw the need for improvement in this area, there was also a common view that this did not require legislation.
- ◆ For the most part, respondents thought there was a role for restorative justice and diversion from prosecution in responding to hate crime (and crime more generally). They thought such disposals could help address the causes of hate crime and could be positive and empowering for victims and communities. However, respondents stressed that the interests of victims should always be paramount, and that activity in the area should be taken forward cautiously.
- ◆ Respondents often stressed that any activity to address hate crime needed to be considered alongside other society-wide or ‘whole system’ approaches to addressing prejudice and related behaviour. Some saw the criminal justice system as having a key role in this wider approach to tackling hate crime, while others, individuals in particular, thought that this was an issue that should be dealt with largely outwith the justice system.

16.2 Questions 33 and 34 are covered separately in the sections below, while a final section looks at other issues related to the ‘wider context’ raised in response to both questions. However, the following common points should be noted:

- As with other consultation questions, some respondents, individuals in particular, used their comments to restate their opposition to hate crime laws or laws based on protected characteristics.
- Some respondents said they did not know enough about victim support work, restorative justice or diversion from prosecution, or current arrangements in these areas to comment. Some organisational respondents specifically deferred to the expertise of others in this area.

16.3 No further analysis is presented on the views of either of these groups.

16.4 In addition, there was a great deal of commonality in the points raised in response to these questions, regardless of how the initial tick-box question was answered. Thus, for each question, the analysis presented focuses on main themes, rather than arguments for and against legislative change.

Support for victims of hate crimes (Q33)

16.5 Lord Bracadale’s report highlighted the importance of tackling under-reporting of hate crimes, and of providing practical and emotional support to victims of such crimes. The report noted initiatives already underway – work being taken forward by the Tackling Prejudice and Building Connected Communities Action Group and the provision of extra government funding for Victim Support Scotland – to address this issue. The consultation paper highlighted additional actions commenced since the publication of Lord Bracadale’s review – for example, the establishment of a Victims Task Force and work being undertaken to develop a victim-centred approach by Victim Support Scotland. Question 33 asked respondents if they agreed that no legislative change was needed in relation to the support given to victims of hate crimes, as recommended by Lord Bracadale’s review.

16.6 Table 16.1 shows that there were mixed views among respondents about whether legislative change is needed in relation to the support given to victims – 43% said ‘yes’, 19% said ‘no’ and 38% said ‘unsure’. The high proportion of respondents answering ‘unsure’ (over a third of all respondents) should be noted. The pattern of responses was similar among organisations and individuals.

Table 16.1: Q33 – Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	8	32%	6	24%	11	44%	25	100%
Public sector / partnerships	11	55%	4	20%	5	25%	20	100%
Faith groups	4	67%	–	0%	2	33%	6	100%
Other organisations	4	67%	1	17%	1	17%	6	100%
Total organisations	27	47%	11	19%	19	33%	57	100%
Total individuals	160	42%	72	19%	148	39%	380	100%
Total (organisations and individuals)	187	43%	83	19%	167	38%	437	100%

Percentages may not total 100 due to rounding.

16.7 Altogether, 159 respondents (39 organisations and 120 individuals) provided comments at Question 33. The sections below present views relating to two main themes: the support needs of victims, and the need for legislative change.

Views on the support needs of victims

16.8 There was widespread agreement across all respondent types about the importance of providing support to victims of crimes. However, there were contrasting views on whether the needs of victims of hate crime were any different to the needs of victims of other types of crimes. Some respondents (most organisations and some individuals) thought the circumstances surrounding hate crimes and the impact such crimes could have on victims meant that the support needs of this group were particularly acute and specific in nature. Other respondents, mainly individuals, stressed that support was important for **all** victims of crime, not just victims of hate crimes – some argued that there was no justification for providing different services for different groups.

16.9 Those who identified victims of hate crimes as having particular needs thought that support for this group was critical in order to encourage reporting, to ensure an appropriate response to the experience of individual victims, and to ensure victims received relevant advice and assistance at all points of the judicial process. Respondents in this group often commended initiatives already underway in this area. Nevertheless, there was a common view, expressed by organisations in particular, that current support fell short of what was required, and further work was needed. The type of changes envisaged by respondents included:

- Increased training and guidance to improve the practice of the police and those working in the criminal justice system with regard to victims of hate crimes – some noted the need for a general change of approach or a change of ‘culture’, while others talked of the importance of ensuring that the police and the courts were trained to deal appropriately with different groups (e.g. those with learning disabilities)
- Improved support for victims and witnesses during court procedures – respondents noted options such as treating all hate crime victims as vulnerable witnesses, providing anonymity for witnesses, improving the appropriate adult service, and addressing issues of witness capacity to ensure those with learning disabilities had full access to justice
- Greater use of victim impact statements in court procedures and sentencing
- Improved access to victim-centred support tailored to the specific needs of individuals, and provided by staff with appropriate expertise – including support for those with learning disabilities and mental health issues, support for victims of race-related hate crimes, therapeutic support for those traumatised by hate crime victimisation, and practical initiatives such as helplines and advocacy services. Some respondents called for the role of third party reporting centres to be reviewed and / or for further development (and increased funding) of this service
- The provision of additional support (increased funding, training input etc.) for organisations providing support to victims – some individuals suggested that the proposed changes to Scotland’s hate crime laws may increase the demand on victim support services

- The development of appropriate information which took account of the needs of different groups.

16.10 In addition, respondents offering such views also highlighted the need for (i) publicity campaigns and awareness-raising activities to ensure that individuals knew what constituted a hate crime, how to report a hate crime and how to access support, and (ii) a society-wide approach to tackling inequality, prejudice and hate crime.

16.11 Among individuals there were two further views:

- That good support for all victims was already in place, and nothing specific was required for victims of hate crimes – there was also a view that under-reporting was not a major issue that needed to be addressed
- That support should only be provided for ‘genuine’ victims, and not those who had experienced ‘mean words’ or ‘hurt feelings’.

Views on the need for legislative action

16.12 Respondents did not often comment directly on whether legislation was or was not required to bring about the changes they thought were needed. However, those that did made the following points:

- Some respondents stated in their comments that the sort of changes and improvements they sought did not require legislation.
- In most cases, those who said that legislation was required did not explain the type of legislation they envisaged. However, those that did offer specific comments on this suggested that the right to appropriate support might be enshrined in law, and that the government should be made legally accountable for providing support to victims of hate crimes via an annual report to Parliament. The latter point was put forward by a number of third sector organisations.

16.13 Some respondents said they (i) were unsure about the need for legislation to bring about the changes they thought were needed, (ii) were concerned that a legislative approach would result in a prescriptive and non-individualised response to victims, or (iii) thought that further work should be undertaken in order to determine the needs of victims.

Restorative justice and diversion from prosecution (Q34)

16.14 Table 16.2 shows that there were mixed views overall about whether legislative change was needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation – 38% of respondents said ‘yes’, 15% said ‘no’ and 48% said ‘unsure’. It is notable that almost a half of all respondents (48%) answered ‘unsure’ to this question. The pattern of response was mixed among individuals and organisations, although organisations were more likely than individuals to answer ‘yes’ (46% compared to 37%), and less likely to answer ‘no’ (5% compared to 16%).

Table 16.2: Q34 – Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland?

Respondent type	Yes		No		Unsure		Total	
	n	%	n	%	n	%	n	%
Third sector organisations	7	26%	2	7%	18	67%	27	100%
Public sector / partnerships	12	57%	1	5%	8	38%	21	100%
Faith groups	4	67%	–	0%	2	33%	6	100%
Other organisations	4	80%	–	0%	1	20%	5	100%
Total organisations	27	46%	3	5%	29	49%	59	100%
Total individuals	136	37%	60	16%	176	47%	372	100%
Total (organisations and individuals)	163	38%	63	15%	205	48%	431	100%

Percentages may not total 100 due to rounding.

16.15 Altogether, 116 respondents (41 organisations and 75 individuals) provided further comments at Question 34. The sections below present views on the three main themes identified in respondents' comments – the role and value of restorative justice and diversion, current provision and use, and the need for legislative change. It should be noted that respondents did not always distinguish between restorative justice and diversion from prosecution in their comments.

Views on the role of restorative justice and diversion

16.16 For the most part, respondents thought there was a potential role for restorative justice and diversion from prosecution in responding to hate crime (and crime more generally). Respondents thought such options:

- Could play a role in addressing the causes of hate crime, in rehabilitating offenders, and in changing attitudes and behaviours, and offered a longer term solution to reducing prejudice and hate crime across society
- Could have a positive and empowering effect on individual victims and on affected communities
- Provided a more effective alternative to other types of disposal
- Were particularly appropriate for young people and low-level offenders, and were helpful in keeping such individuals out of the criminal justice system.

16.17 However, respondents often also highlighted the vulnerability of victims of hate crime and emphasised the need for any use of diversion and restorative justice to be managed carefully. They stressed that the interests of victims should always be paramount; that such disposals should only be used in appropriate cases (e.g., cases involving low-level offending, cases where the offender expressed remorse); that involvement in such processes should always be on an entirely voluntary basis; and that cases should be closely monitored and that the option to (retrospectively) impose another type of sentence should be available.

16.18 Less often, respondents (mainly individuals) said that they were opposed to the use of restorative justice in particular because they thought such approaches were not effective, not appropriate, or represented 'indoctrination'.

16.19 In discussing the role of restorative justice and diversion a range of organisational respondents referred to research and evidence to support their view. Some drew attention to research which they said demonstrated the benefits of such approaches, while others argued that research showed a more mixed picture and highlighted the need for caution in taking forward work in this area. Some respondents argued that more evidence was needed in order to inform the development of policy in this area, and that it would be important to take account of the views of victims in any further considerations.

Views on current provision and use of restorative justice and diversion

16.20 There was a mix of views on current provision and use of restorative justice and diversion from prosecution. Some respondents, individuals in particular, noted that such options were already in place, and that current provision was adequate, and / or appropriate for all victims. Other respondents argued that current provision and use was patchy across the country, and that more funding was needed in order to ensure consistent access and quality of service. It was also suggested that education and awareness raising was needed to change perceptions and increase use of such disposals.

Views on the need for legislative change

16.21 As with Question 33, respondents did not often comment specifically on why legislation might or might be needed in this area. However, those who argued in favour of legislative change suggested the following:

- A statutory duty to provide restorative justice would ensure consistent access across the country, and ensure the necessary funding for services.
- The consideration of restorative justice could be made mandatory in the sentencing of hate crime cases.
- Legislation could be used to regulate how diversion and restorative justice were used in hate crime cases.
- A legal duty for the government to report to Parliament on the use of restorative justice and diversion and prosecution might be introduced.

16.22 Those who thought that legislation was not required highlighted existing services and ongoing activities in this area and argued that further development work could be taken forward via non-legislative routes – for example, via the Victims Task Force, via Scottish Government directives, via sentencing guidelines, or via local activity pursued at community justice partnership level. There was also a view that restorative justice approaches in particular were still at an early stage in their development and legislation would be therefore be inappropriate.

Other comments regarding the wider context

16.23 Respondents made a range of other comments relevant to the 'wider context' of responding to hate crime. With regard to victim support work, restorative justice and diversion from prosecution, respondents often stressed that any activity in these areas should operate as part of a wider response to hate crime, and should be considered alongside other society-wide or 'whole system' approaches to addressing prejudice and related behaviour. Respondents made the following broad points, arguing that:

- Work in this area needed to be underpinned by appropriate principles as represented by, for example, a victim-centred, or rights-based approach (including human rights-based and children's rights-based approaches).
- A wide range of different activities were needed to tackle prejudice, build understanding between groups and educate people about hate crime. This might include, for example, school- and community-based initiatives aimed at children and young people to tackle bullying and other behaviours, broader public education and awareness raising, workplace based initiatives, community engagement work etc. Some saw this as reflecting the early intervention and prevention approach advocated with regard to dealing with other social policy issues. Some argued for the importance of focusing on specific groups rather than adopting a one-size fits all approach. The Scottish Government / COSLA Equally Safe strategy for dealing with violence against women and girls was highlighted by some as a positive example of activity in this area.
- It was important to address underlying structural issue such as inequality, and the power imbalances between different section in society which contributed to prejudice and could lead to hate crimes.
- There was a need to work with different groups in taking work forward in this area – this was seen as valuable in itself, but also as helpful in terms of building confidence in the system within different communities.

16.24 While some respondents saw an important role for the law and the criminal justice system in this wider approach to tackling hate crime, others, individuals in particular, thought that this was an issue that should be dealt with largely outwith the justice system.

17. Other views

17.1 This final chapter provides a brief summary of other points raised by respondents, some of which have been touched on at individual questions, and some of which have not been covered elsewhere in the report.

17.2 The analysis takes account of comments made at Question 35 of the consultation. This question asked respondents for views on anything else the Scottish Government could include in its proposals to update Scottish hate crime legislation. However, most of those who answered this question (288 respondents – 41 organisations and 247 individuals) simply reiterated points already covered elsewhere in their responses in relation to specific individual questions, or summarised their more general views on hate crime legislation.

17.3 One significant new theme to emerge in response to Question 35 was that of a call for blasphemy laws to be abolished in Scotland. With regard to this issue, respondents made the following common points:

- The current laws are not used (and haven't been used since the 17th century).
- Abolition would be in line with international thinking – many other countries, including England and Wales, have already repealed their blasphemy laws.
- Blasphemy laws are inappropriate in a modern, increasingly non-religious society – abolition would highlight the primacy of secular civil law as a basis for regulating all conduct.
- Blasphemy laws are incompatible with the aims of promoting equality and a positive approach to human rights and freedom of religion, belief and expression.
- Maintaining historical blasphemy laws provides a justification to other countries which persecute individuals through the use of blasphemy laws – abolition would show solidarity with campaigners elsewhere who challenge persecution.

17.4 Other general points that arose at Question 35, as well as in response to other questions, included the following:

- The need for more resourcing – for the police, the courts, for education, awareness raising and community-based initiatives etc. – in order to tackle prejudice and prejudice-based behaviour and respond effectively to hate crime
- The need for consistency and coordination across different pieces of legislation, and in the implementation and enforcement of the law, with appropriate training to support this
- The need for the law to be practical and deliverable
- The need for robust evidence in this area to monitor activity and inform policy development – this included high quality statistics on all aspects of the criminal justice process, based on consistent recording of aggravations (including multiple aggravations), and broken down to appropriate level (including by age, type of disability), more research into causes of hate crime and the needs of victims etc.,

experience of different groups, and more consultation and engagement with affected groups

- The need for the media and those in the public sphere to set an example with regard to respectful speech and language.

Annex 1: Consultation events

In order to promote the consultation, the Scottish Government organised a series of events across the country. These 'awareness workshops' were designed to give individuals and organisations an opportunity to find out more about the consultation and discuss the key recommendations and proposals.

Eleven workshops were held between December 2018 and February 2019 at the following locations: Aberdeen, Dundee, Edinburgh, Galashiels, Glasgow (two workshops), Inverness, Lerwick, Lockerbie, Stirling and Stornoway. The workshops were advertised on the consultation website and promoted via Eventbrite.

The workshops were open to all members of the public, with a total of around 400 people participating in the events.

The workshops consisted of presentations on the consultation, a video on the background of the consultation and hate crime, group discussions on key topics, and an opportunity for questions, and group discussion. The aim was to:

- Inform attendees about the Hate Crime consultation
- Allow attendees to discuss the key issues
- Provide attendees with an opportunity to highlight any impacts / risks
- Gather feedback as part of the public consultation.

Attendees were provided with a handout in advance of the workshop which included information on the format of the events, a summary of the recommendations and consultation questions, and details of how to access the consultation.

Summary reports of each of the eleven events (prepared by the Scottish Government consultation team) have been considered as part of the analysis presented in this report.

The consultation team also developed facilitator packs and provided these to stakeholders to enable them to run their own events prior to responding to the consultation. In addition to the eleven Scottish Government events described above, the following stakeholder groups also held their own consultation events: BEMIS, Community Justice Scotland, deafscotland, Fife Equality Network, Law Society of Scotland and YouthLink Scotland.

Annex 2: List of organisational respondents

Altogether, there were 108 organisational respondents.

Third sector orgs (47)

- Abused Men In Scotland
- Action on Elder Abuse Scotland
- Active Life Club (ALC)
- Advocating Together (Dundee) SCIO
- Age Scotland
- Amnesty International UK
- BEMIS
- British Deaf Association Scotland
- Call it Out: The campaign against anti-Catholic bigotry and anti-Irish racism
- Central Scotland Regional Equality Council (CSREC)
- Children in Scotland
- Coalition for Racial Equality and Rights
- Council of Ethnic Minority Voluntary Organisations (CEMVO) Scotland
- Deaf Scotland (formerly Scottish Council on Deafness)
- dsdfamilies
- ENABLE Scotland
- Engender
- Equality Network/Scottish Trans Alliance
- Fife Centre for Equalities
- For a Fair, Just and Inclusive Scotland (FJSS)
- Glasgow Disability Alliance
- Grampian Regional Equality Council Ltd.
- Humanist Society Scotland
- Inclusion Scotland
- LGBT Health and Wellbeing
- LGBT Youth Scotland
- National Secular Society
- People First (Scotland)
- PKAVS Minority Communities Hub
- Rape Crisis Scotland
- Royal Blind and Scottish War Blinded
- Sacro
- SCOREscotland (Strengthening Communities for Race Equality - Scotland)
- Scottish Bi+ Network
- Scottish Commission for Learning Disability
- Scottish Community Safety Network
- Scottish Pensioners' Forum
- Scottish Women's Aid
- Stonewall Scotland
- Together (Scottish Alliance for Children's Rights)
- Victim Support Scotland
- West of Scotland Regional Equality Council
- Wise Women
- Women and Girls in Scotland

- Youth Community Support Agency YCSA
- YouthLink Scotland
- Zero Tolerance

Public sector / partnership orgs (25)

- Adult and Child Protection Committee – Shetland
- Angus Child Protection Committee, Adult Protection Committee and Violence Against Women Partnership
- Angus Community Justice Partnership
- City of Edinburgh Council
- Community Justice Ayrshire
- Community Justice Scotland (CJS)
- COSLA
- East Ayrshire Council
- East Dunbartonshire Council
- East Renfrewshire Violence Against Women Partnership
- Equality and Human Rights Commission
- Falkirk Council
- Glasgow City Council
- Glasgow Hate Crime Working Group
- Glasgow Violence Against Women Partnership
- Midlothian Community Safety and Justice Partnership
- National Adult Protection Coordinator
- North Ayrshire Adult Protection Committee
- Perth and Kinross Council
- Renfrewshire Adult Protection Committee
- Scottish Borders Council
- Scottish Children's Reporter Administration
- South Ayrshire Council
- Stirling Gender Based Violence Partnership
- West Lothian Council

Faith groups (18)

- CARE for Scotland
- Catholic Parliamentary Office of the Bishops' Conference of Scotland
- Christian Concern
- The Christian Institute
- The Church of Scotland
- Dornoch and District Christian Fellowship
- Duncan Street Baptist Church
- The Evangelical Alliance
- Presbytery of the Outer Hebrides, Free Church of Scotland (Continuing)
- Reformed Presbyterian Church of Scotland
- Refuge Church
- River of Life Church
- The Scottish Churches Committee
- Scottish Council of Jewish Communities (SCoJeC)
- St Devenick's Church Vestry
- Stirling Baptist Church, Social and Ethical Issues Group

- Stornoway Reformed Presbyterian Church
- United Free Church of Scotland Church and Society Committee

Other organisations (18)

- British Transport Police
- Educational Institute of Scotland
- For Women Scotland (FWS)
- Law Society of Scotland
- MurrayBlackburnMackenzie
- Police Scotland
- Scottish Care
- Scottish Courts and Tribunals Service
- Scottish Learning Disabilities Observatory, University of Glasgow
- Scottish Palestine Solidarity Campaign
- Scottish Parliament Cross Party Group on Palestine
- The Scottish Professional Football League Limited
- Scottish Sentencing Council
- Scottish Trades Union Congress
- Scottish Women's Convention
- Unite Glasgow and Lanarkshire Community, Youth and Not for Profit Branch
- Unite the Union Glasgow Retired Members' Branch
- Women Together in Fife

Annex 3: Number of responses to individual questions

Question		Organisation		Individual		Total	
		n	%	n	%	n	%
	Part 1: Consolidating Hate Crime Legislation	(of total 108)		(of total 1,051)		(of total 1,159)	
1	Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland? [Yes / No / Unsure]	80	74%	923	88%	1,003	87%
	Please tell us why.	75	69%	789	75%	864	75%
2	Do you think that the language of the thresholds for the statutory aggravations would be easier to understand if it was changed from 'evincing malice and ill will' to 'demonstrating hostility'? [Yes / No / Unsure]	82	76%	675	64%	757	65%
	Please tell us why.	74	69%	422	40%	496	43%
3	Do you think changing the language of the thresholds for the statutory aggravations from 'evincing malice and ill will' to 'demonstrating hostility' would change how the thresholds are applied? [Yes / No / Unsure]	74	69%	643	61%	717	62%
	Please tell us why.	63	58%	346	33%	409	35%
4	Do you think that variations of sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation? [Yes / No / Unsure]	66	61%	632	60%	698	60%
	Please tell us why.	58	54%	369	35%	427	37%
5	Do you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated? [Yes / No / Unsure]	65	60%	616	59%	681	59%
	Please tell us why.	53	49%	304	29%	357	31%
6	If you think that the terms used in Scottish hate crime legislation in relation to transgender identity and intersex should be updated, what language would you propose?	46	43%	180	17%	226	19%

Question		Organisation		Individual		Total	
		n	%	n	%	n	%
	Part 2: New Statutory Aggravations	(of total 108)		(of total 1,051)		(of total 1,159)	
7	Do you agree with Option A to develop a statutory aggravation for gender hostility? [Yes / No / Unsure]	69	64%	472	45%	541	47%
	Please provide details.	61	56%	206	20%	267	23%
8	Do you agree with Option B to develop a standalone offence for misogynistic harassment? [Yes / No / Unsure]	69	64%	462	44%	531	46%
	If you agree, please tell us why and provide examples of the types of behaviour that could be captured by this offence.	52	48%	182	17%	234	20%
	Please provide examples of the types of behaviour that could be captured by the standalone offence.	5	5%	74	7%	79	7%
9	Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)? [Yes / No / Unsure]	65	60%	433	41%	498	43%
	If you agree, please tell us why.	55	51%	142	14%	197	17%
10	Do you agree with Option D of taking forward all of the identified options? [Yes / No / Unsure]	69	64%	440	42%	509	44%
	If you agree, please tell us why.	50	46%	118	11%	168	14%
	Please provide examples of the types of behaviour that could be captured by the standalone offence.	3	3%	46	4%	49	4%
11	Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? [Yes / No / Unsure]	72	67%	465	44%	537	46%
	Please provide details.	66	61%	191	18%	257	22%
12	Do you think there is a need for sectarianism to be specifically addressed and defined in hate crime legislation? [Yes / No / Unsure]	63	58%	464	44%	527	45%
	Please give your reasons.	47	44%	196	19%	243	21%
13	If your response to question 12 was yes, do you think a statutory aggravation relating to sectarianism should be created and added to Scottish hate crime legislation? [Yes / No / Unsure]	34	31%	248	24%	282	24%
	Please give your reasons.	20	19%	67	6%	87	8%
14	If yes to question 12, do you think a standalone offence relating to sectarianism should be created and added to Scottish hate crime legislation? [Yes / No / Unsure]	27	25%	229	22%	256	22%
	Please give your reasons.	12	11%	62	6%	74	6%

Question		Organisation		Individual		Total	
		n	%	n	%	n	%
	Part 2: New Statutory Aggravations (continued)	(of total 108)		(of total 1,051)		(of total 1,159)	
15	If your response to question 12 was yes, do you agree with the Working Group that sectarianism should be defined in Scots Law in terms of hostility based on perceived Roman Catholic or Protestant denominational affiliation of the victim and/or perceived British or Irish citizenship, nationality or national origins of the victim? [Yes / No / Unsure]	27	25%	225	21%	252	22%
	Please give your reason.	20	19%	104	10%	124	11%
16	If you disagree with the Working Group's proposed definition of sectarianism, what do you believe should be included in a legal definition of sectarianism? Please give your reason.	26	24%	176	17%	202	17%
17	The Scottish Government recognises that legislation on its own will not end sectarianism. What else do you feel could be done to address sectarianism?	48	44%	319	30%	367	32%
18	Do you think that a new statutory aggravation on hostility towards a political entity should be added to Scottish hate crime legislation? [Yes / No / Unsure]	63	58%	454	43%	517	45%
	Please provide details.	42	39%	202	19%	244	21%
19	Do you think that a new statutory aggravation should be added to Scottish hate crime legislation to cover hostility towards any other new groups or characteristics (with the exception of gender and age)? [Yes / No / No opinion]	64	59%	450	43%	514	44%
	Please provide details.	42	39%	150	14%	192	17%
20	Do you think that the religious statutory aggravation in Scottish hate crime legislation should be extended to include religious or other beliefs held by an individual? [Yes / No / Unsure]	60	56%	453	43%	513	44%
	Please provide details.	34	31%	202	19%	236	20%
21	Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one or more protected characteristic? (Examples of protected characteristics are religion, sexual orientation, age, gender, race, disability, transgender identity and intersex). [Yes / No / Unsure]	67	62%	441	42%	508	44%
	Please provide details.	55	51%	171	16%	226	19%

Question		Organisation		Individual		Total	
		n	%	n	%	n	%
	Part 2: New Statutory Aggravations (continued)	(of total 108)		(of total 1,051)		(of total 1,159)	
22	Do you think that the statutory aggravations in Scottish hate crime legislation should apply where people have an association with that particular identity (relating to religion, sexual orientation, age, gender, race, disability, transgender identity and intersex)? [Yes / No / Unsure]	68	63%	432	41%	500	43%
	Please tell us why.	55	51%	168	16%	223	19%
	Part 3: New Stirring Up of Hatred Offences						
23	Do you agree with Lord Bracadale's recommendation that stirring up of hatred offences should be introduced in respect of each of the protected characteristics including any new protected characteristics? [Yes / No / Unsure]	80	74%	971	92%	1,051	91%
	Please provide details.	68	63%	754	72%	822	71%
24	Do you agree with Lord Bracadale's recommendation that any new stirring up hatred offences should require that the conduct is 'threatening or abusive'? [Yes / No / Unsure]	77	71%	954	91%	1,031	89%
	If not, what do you think the threshold should be for the offence to be committed?	53	49%	698	66%	751	65%
25	Do you think that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other proposed stirring up hatred offences?(This would mean that the offence would apply where the behaviour is 'threatening or abusive', but not where it is only 'insulting'.) [Yes / No / Unsure]	64	59%	603	57%	667	58%
	Please provide details.	46	43%	256	24%	302	26%
26	Do you agree with Lord Bracadale's recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred? [Yes / No / Unsure]	75	69%	972	92%	1,047	90%
	Please provide details. If you answered yes to this question, do you have any comments on what should be covered by any such 'protection of freedom of expression' provision?	61	56%	782	74%	843	73%
27	Do you agree with Lord Bracadale's recommendation that no specific legislative change is necessary with respect to online conduct? [Yes / No / Unsure]	73	68%	596	57%	669	58%
	Please provide details.	62	57%	223	21%	285	25%

Question		Organisation		Individual		Total	
		n	%	n	%	n	%
	Part 4: Exploitation and vulnerability	(of total 108)		(of total 1,051)		(of total 1,159)	
28	Do you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim? [Yes / No / Unsure]	63	58%	429	41%	492	42%
	Please provide details.	47	44%	156	15%	203	18%
29	If you think a statutory aggravation (outwith hate crime legislation) should be introduced that could be applied when a perpetrator exploits the vulnerability of the victim, please provide details of the circumstances that you think such an aggravation should cover?	40	37%	153	15%	193	17%
	Part 5: Other issues						
30	Do you think that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should be repealed? [Yes / No / Unsure]	59	55%	395	38%	454	39%
	Please provide details.	48	44%	101	10%	149	13%
31	What do you think the impact of repealing Section 50A of the Criminal Law (Consolidations) (Scotland) Act 1995 about racially aggravated harassment could be?	41	38%	156	15%	197	17%
32	Do you think that courts should continue to be required to state in open court the extent to which the statutory aggravation altered the length of sentence? (This would mean that Lord Bracadale's recommendation on sentencing would not be taken forward.) [Yes / No / Unsure]	66	61%	389	37%	455	39%
	Please provide details.	48	44%	123	12%	171	15%
33	Do you agree that no legislative change is needed in relation to the support given to victims of hate crime offences? [Yes / No / Unsure]	57	53%	380	36%	437	38%
	Please provide details.	39	36%	120	11%	159	14%
34	Do you agree that no legislative change is needed in relation to the provision of restorative justice and diversion from prosecution within hate crime legislation in Scotland? [Yes / No / Unsure]	59	55%	372	35%	431	37%
	Please provide details.	41	38%	75	7%	116	10%
35	What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?	41	38%	247	24%	288	25%



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