



Consultation Response

Consultation on Amending Scottish Hate Crime Legislation

The Scottish Commission for
Learning Disability
February 2019



The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to respond to this important consultation. SCLD is an independent charitable organisation and strategic partner to the Scottish Government in the delivery of Scotland's learning disability strategy, *The keys to life* (2013)¹. The strategy defines a learning disability as a significant, lifelong, condition that started before adulthood, which affects development and means individuals need help to understand information, learn skills, and cope independently. SCLD is committed to finding new and better ways to improve the lives of people with learning disabilities and is focused on sharing innovation and good practice so that those providing services and interventions can learn from each other. SCLD also aims to be a knowledge hub and to build an evidence base, sharing how policy is being implemented and building on an understanding of what really works. This response has been written with a focus on the strategic outcomes of *The keys to life* (2013)².

SCLD submitted a response to the original consultation to Lord Bracadale's review on behalf of *The keys to life* Expert Group, a group of adults with learning disabilities who are supported by SCLD to give their views to influence policy and change. This group were able to give their views to this initial consultation. Building on the initial response SCLD has chosen to submit an organisational response which draws on existing research and what people with learning disabilities have told us about their experiences of hate crime over the years. Views that were gathered from people with learning disabilities in the earlier part of this consultation process have been considered by SCLD while developing this response.

In focusing our response on the experience of people with learning disabilities, SCLD has chosen to focus on the following areas:

- Explaining hate crime and statutory aggravations (Questions 1 & 2)
- Gender aggravation and misogynistic harassment (Questions 7 to 10)

¹ [The keys to life \(2013\)](#)

² [The keys to life \(2013\)](#)

- Age as a statutory aggravation (Question 11)
- Stirring up hatred (Questions 23 & 24)
- Online conduct (Question 27)
- Exploitation and the challenge of a vulnerability label (Questions 28 & 29)
- Wider legislative implications (Questions 32 & 33)
- Data Collection (Question 35)

Before addressing the above, SCLD has outlined the particular experience of hate crime amongst people with learning disabilities and the importance of embedding an intersectional approach within hate crime legislation.

Experiences of people with learning disabilities

People with learning disabilities in Scotland have historically experienced exclusion from civil, political and social citizenship. This exclusion has taken place both in physical environment, through institutionalisation and at a societal level through lack of access to education³, employment⁴, relationships⁵ and family lives⁶.

This multi-layered process of exclusion has seen people experiencing a societal 'othering'. As Parr and Butler (1999)⁷ stated, individuals with learning disabilities in communities following deinstitutionalisation were viewed as "the ultimate other". This marginalised other status of people with learning disabilities is starkly clear in the high levels of harassment, bullying and discrimination experienced by people with learning disabilities. Some of these incidents can be categorised as hate crime, hate incidents or exploitation.

³ [ENABLE \(2018\)](#)

⁴ [SCLD \(2016\)](#)

⁵ [SCLD \(2018\)](#)

⁶ [SCLD \(2016\)](#)

⁷ [Parr & Butler \(1999\)](#)

The Equalities and Human Rights Commission (EHRC)⁸ have cited Disability Rights Commission and Capability Scotland's survey report (2004)⁹ which found that of the 129 people with disabilities surveyed, 47% had experienced hate crime.

In the same report, EHRC cited research by Gillen, (2007)¹⁰ which found that 16% of 2,000 people with learning disabilities, who had responded to the community care survey in 2007, had experienced street bullying.

Considering the ongoing othering people with learning disabilities experience, it is critical that adequate attention is given to tackling hate crime directed at people with learning disabilities. In doing this, legislators must avoid homogenising people with learning disabilities. This issue is addressed further below.

Addressing intersectional experience

People with learning disabilities are a diverse group who may also have other characteristics covered by the hate crime legislation. This point has been clearly articulated in the wider disability movement by Morris¹¹ who stated:

“The experiences of Black and ethnic minority disabled people, disabled women and disabled gay men and lesbians are integral to the experience of being disabled. Disabled people as a group, are made up of Black people, women, gay men and lesbians as well as white men and heterosexuals. Sexism, racism and heterosexism affect us all...”

(Morris, 1991, p.180)

For hate crime legislation to appropriately address the needs and experiences of people with learning disabilities, the concept of intersectionality of all protected characteristics must be thoughtfully considered throughout the bill drafting process.

⁸ [Equalities and Human Rights Commission \(2008\)](#)

⁹ [Disability Rights Commission & Capability Scotland \(2004\)](#)

¹⁰ [Gillen \(2007\)](#)

¹¹ [Morris \(1991\)](#)

Crenshaw¹² who in discussing racism and gender inequality summarises the key issue for consideration:

“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”

(Crenshaw, 1989, p.140)

By applying Crenshaw and Morris, SCLD recognises that we cannot understand a person’s experience without understanding how their characteristics interconnect. Therefore any consideration of hate crime legislation which does not consider people with learning disabilities as multifaceted human beings with a range of characteristics, fails to recognise the full scope of their humanity, and instead defines them solely by disability.

In a legal context, an intersectional approach may present challenges both for the judiciary and people with learning disabilities. This approach may present difficulties in deciding where it is appropriate to bring a case of hate crime and on what grounds prosecution can be made.

For this to be addressed, SCLD would recommend detailed guidance sitting alongside legislation which addresses the role a number of protected characteristics may have in the likelihood of experiencing a hate crime. The guidance should include case studies showing how hate crime incidents involving a person of more than one protected characteristic have been addressed within the legal system.

Explaining hate crime and statutory aggravations

Question 1: Do you think the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland?

¹² [Crenshaw \(1989\)](#)

SCLD agrees that the statutory aggravation model should continue to be the core method of prosecuting hate crimes in Scotland. The challenge here is to ensure wide spread public understanding. Simplified explanations of the legislation such as those aimed at people with learning disabilities have often failed to make clear the distinction between hate crimes, which is criminality based on dislike of a particular group, and a hate incident. The latter referring to incidents which may include name calling directed at their protected characteristics. Descriptions of hate crime as bullying over-simplify the legislation. However, this does give people a clear message that this sort of behaviour is not tolerated by Scottish society.

In order for people with learning disabilities to report hate crime against them they need to be able to clearly articulate the incident. This means they need to be supported to understand the law, to report the incident and to see the processing of the report through the criminal justice system.

EHRC (2011)¹³ have highlighted that people with learning disabilities can find it difficult to report hate crimes due to several barriers including, but not limited to:

- Not being viewed as a credible witness
- Overly complex reporting processes
- Staff and services not taking account of the individual's needs.

Considering this, SCLD would welcome the production and wide spread availability of accessible information which clearly articulates the law. This information should make distinctions between hate crimes and hate incidents. This should also outline what hate crime reporting can achieve.

Question 2: Do you think 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'?

¹³ [EHRC \(2011\)](#)

Question 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?

With regard to Questions 2 and 3 of the consultation document, SCLD considers 'demonstrating hostility' to be more accessible language than the terms 'evincing malice and ill will' and therefore are likely to be much more easily understood by members of the general population. However, both terms 'evincing malice and ill will' and 'demonstrating hostility' are terms open to interpretation. For example the term 'demonstrating hostility' could be interpreted as a lower threshold of crime than 'evincing malice and ill will'. Therefore, SCLD would suggest that a clear and detailed definition of 'demonstrating hostility' is given in the supporting guidance.

Gender aggravation and misogynistic harassment

Question 7: Do you agree with option A to develop a statutory aggravation for gender hostility?

Question 8: Do you agree with Option B to develop a standalone offense for misogynistic harassment?

Question 9: Do you agree with Option C of building on Equally Safe to tackle misogyny (this would be a non-legislative approach)?

Question 10: Do you agree with Option D of taking forward all the identified options?

While SCLD can see the potential merit in including gender as an aggravating factor, the organisation strongly supports the suggestion of including a standalone offence relating to misogynistic harassment. This would extend protections to women in order to reflect the endemic nature of misogynistic harassment in society. SCLD understands that the aggravation model has been found to be challenging for gender based violence and harassment, as it is difficult to prove 'hatred' as a motivating factor for such actions when issues of power come in to play. Social

structures that undermine the position of women and girls have created an ingrained power imbalance. The experience of this power imbalance can be exacerbated when women experience multiple protected characteristics.

Studies suggest that disabled women experience high levels of unwanted attention in public places. A report from the Scottish Learning Disabilities Observatory¹⁴ cited Hollomotz (2009)¹⁵, Huges et al (2012)¹⁶ and McCarthy and Thompson (1996)¹⁷ and stated:

*“People with learning disabilities, especially women and children, are particularly at risk and in the UK are more likely to be subject to sexual violence than physically impaired peers”.*¹⁸

(Wiseman and Watson, p.6-7)

The standalone offence of misogynistic harassment could disproportionately benefit women with learning disabilities. Women with learning disabilities may be targeted due to the lack of information, education, and support given to them to build safe and healthy relationships leading to them being less prepared and alert to potential sexual harassment¹⁹. SCLD would welcome misogynistic harassment as a standalone offence and looks forward to the opportunity to contribute, along with other partners, to its development to ensure that the experiences of women with learning disabilities are taken into account.

Alongside a standalone offence of misogynistic harassment, SCLD welcomes building on equally safe to tackle engrained misogyny. This will include embedding appropriate RSHP provision for children and young people with learning disabilities.

¹⁴ [Scottish Learning Disabilities Observatory](#)

¹⁵ [Hollomotz \(2009\)](#)

¹⁶ [Hughes et al \(2012\)](#)

¹⁷ [McCarthy and Thompson \(1996\)](#)

¹⁸ [Wiseman and Watson](#)

¹⁹ [SCLD \(2018\)](#)

SCLD's own research²⁰ found that RSHP education in schools for people with learning disabilities is limited. This needs to be improved in order to support all people with learning disabilities to understand issues around consent and healthy sexual relationships.

Addressing gender and disability discrimination could be addressed through schemes similar to I Am Me Scotland²¹. This organisation runs workshops in schools focusing on disability hate crime with the aim of changing the pupils' perceptions of people with learning disabilities and reducing the levels of bullying and other harassment experienced by this group.

Age as a statutory aggravation

Question 11: Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation?

The view of *The keys to life* Expert Group who took part in discussions during the first phase of the consultation was that age should be included in the legislation. SCLD considers age to be a potential factor in targeting someone for exploitation based on perceived vulnerability. Therefore attention should be paid to how learning disability and age interconnect and may potentially increase potential perceived vulnerability (please refer to addressing intersectional experience p. 3-4 of this response).

Stirring up of hatred

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?

²⁰ [SCLD \(2018\)](#)

²¹ [I AM ME SCOTLAND](#)

SCLD agrees that stirring up of hatred offences should be introduced in respect of each of the protected characteristics. Particular attention should be paid to ensuring people with learning disabilities are protected from hate speech, due to the ongoing process of othering people with learning disabilities experience.

Examples of this type of othering include the villainisation of people with disabilities in times of austerity. Examples of this include media and political discourse on 'benefit scroungers'. Research published by Turn2Us²² shows how the media is skewed towards negative representations of people in receipt of benefits. Turn2Us found that newspaper articles about disability benefits were overly focussed on concepts of deservingness, dishonesty and fraud. In their study of newspaper articles on benefits they found that between 21% and 39% referenced fraud, which they suggest, is high given the actual incidence of benefit fraud.

Taking this type of othering into consideration, SCLD would support stirring up of hatred offences that protect people with learning disabilities and disabilities more widely. This legislation should exist to tackle serious cases of hate speech and incitement to violence and crime.

Question 24: Do you agree with Lord Bracadale's recommendation that any new stirring up of hatred offences should require that the conduct is 'threatening or abusive'?

SCLD agrees that there needs to be workable thresholds for the law. We consider it important to be clear what the terminology refers to. For example, threatening is a term that could refer to physical violence, damage to property, reputation or quality of life. It is important that individuals' rights to live in safety and without fear are protected. This will need to be addressed in supporting guidance. SCLD welcomes the opportunity to contribute to the development of such guidance.

²² [Turn2Us \(2012\)](#)

Online conduct

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

SCLD agrees with Lord Bracadale that no further legislative change is necessary to prosecute online hate crime and hate speech at this stage. However, SCLD also agrees that Ministers should take account of the Law Commission's²³ work on online offensive communications, as well as other evidence, and consider reforms which could be of benefit across devolved and reserved matters.

Participants at a recent Mencap roundtable held as part of the UK Parliament Petition's Committee enquiry into the online abuse and the experience of disabled people, described how they couldn't do without social media.²⁴ Participants also explained that they had to regularly block people who posted abusive comments and content. Many had also been told that people with learning disabilities shouldn't be online. When abuse was reported to sites like Facebook, they only received automated replies; companies rarely followed up and if they did, they didn't tell the complainant about what was done to punish the abuser.

The EHRC (2011) found that when disabled people reported online abuse and harassment, the response from the police, their families and support workers focused on their perceived vulnerability, rather than the actions of the perpetrator, telling them to stay offline²⁵. The approach taken by some organisations in the learning disability sector has been to provide training and resources to help people with learning disabilities to stay safe online. CKUK have created a secure and safe social network just for people with learning disabilities²⁶. While this training can be helpful and provide important tips and give people confidence to use the internet, such initiatives still place the onus onto the person to keep themselves safe rather

²³ [Law Commission \(2018\)](#)

²⁴ [Petition's Committee \(2019\)](#)

²⁵ [Equality and Human Rights Commission \(2011\)](#)

²⁶ [CKUK](#)

than on preventing or restricting the behaviour of the abuser. Specialist social networks can also at times discourage people with learning disabilities from participating in the same 'public' space as the rest of society.

Hate crime limits people's lives, stops people socialising and damages their confidence. If we don't take the issue of online safety seriously then people with learning disabilities will continue to be excluded from digital spaces due to fear of abuse, and those who do experience hate crime online won't report it because they will think it's not important enough.

Exploitation and vulnerability

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?

SCLD agrees that introducing an additional statutory aggravation could be beneficial in regard to ensuring that people who have experienced exploitation are able to have this addressed by the justice system. The importance of stating this explicitly in law could provide people with learning disabilities with confidence that the justice system will take crimes against them seriously.

However, SCLD have two significant areas of concern regarding Lord Bracadale's proposal which we would welcome the opportunity to discuss more fully with the Scottish Government and address through the bill drafting process. These areas are:

1. Labelling people with learning disabilities as vulnerable
2. Ensuring visibility of people with learning disabilities within the statutory aggravation model

1. Labelling people with learning disabilities as vulnerable

SCLD has concerns regarding the proposed use of the term vulnerability. In particular the existing proposal which suggests that an offence,

‘...could be applied when a perpetrator exploits the vulnerability of a victim’²⁷

(Scottish Government, 2019, p.50)

SCLD views this particular use of language as disempowering for people with learning disabilities; as vulnerability is not an individual’s characteristic. A person may be vulnerable in certain circumstances but being vulnerable is not an intrinsic part of who they are. People should not be defined as vulnerable. Lord Bracadale recognises this when he states,

“Vulnerability will usually arise from issues associated with a characteristic rather than from the identity characteristic itself”²⁸.

(Scottish Government, 2019, p.47)

In line with Lord Bracadale, SCLD believes this should be reflected in any offence, through the use of the term ‘perceived vulnerability’. Using the word ‘perceived’ shifts the focus on to the perpetrator as it is their perception of the person as vulnerable that led them to commit the offence.

While SCLD would suggest the term ‘perceived vulnerability’, we would also welcome further consultation with people with learning disabilities regarding this or any other wording of this offence. When the Adult Support and Protection (Scotland) Act (2007)²⁹ was being drafted individuals contributed to the development of the legislation. The term ‘vulnerable adults’ was replaced by ‘adults at risk of harm’ after the Government listened to the views of people likely to be subject of The Act³⁰. Similar discussions should go into developing terminology that can be widely agreed upon. SCLD would welcome the opportunity to facilitate further discussions

²⁷ [Scottish Government \(2019\)](#)

²⁸ [Scottish Government \(2019\)](#)

²⁹ [Adult Support and Protection \(Scotland\) Act \(2007\)](#)

³⁰ [Scottish Government \(2014\)](#)

with people with learning disabilities and the Scottish Government regarding agreeing definitions.

2. Ensuring visibility of people with learning disabilities within the statutory aggravation model

SCLD notes that the section on exploitation and vulnerability is the only section of the consultation in which people with learning disabilities are given specific focus. This lack of attention with regard to aggravating factors in hate crime can potentially reinforce a deficit based model. This model views people with learning disabilities as intrinsically vulnerable, passive and in need of intervention.

While SCLD understands and supports Lord Bracadale's intention of a statutory aggravation outside of hate crime, SCLD would welcome more focus on people with learning disabilities within the broader category of disability.

Similar to the above, SCLD recommends further engagement events which SCLD would welcome the opportunity to facilitate. These events should aim to sense check Lord Bracadale's suggestions with people with learning disabilities whom this legislation may directly impact.

Question 29: If you think a statutory aggravation (out with 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?

As stated, SCLD agrees with a statutory aggravation which applies to the exploitation of a person who is perceived as vulnerable. In establishing this, consideration will need to be given to how this aggravation would interact and impact on The Adult Support and Protection (Scotland) Act (2007)³¹. At times, protection focused measures can often lead to the victim of crime being subject to restrictions designed to protect them, while the perpetrator experiences no form of

³¹ [Adult Support and Protection \(Scotland\) Act \(2007\)](#)

consequence. Exploiting vulnerability as an offence out with the current hate crime legislation, provides an opportunity to ensure that a wider range of offences can be legislated for.

Lemos and Crane³² gives examples of people with learning disabilities who experienced exploitation and manipulation from people who they considered friends. This included taking advantage of them for access to money or a home.

“I met a girl called Lori. I met her when I was out. She asked me for money. I think she was homeless. She put pressure on me to give her money... She sometimes promised me we would do sexual things together but we didn’t... She moved herself into my flat and only came round when I was about to get my money. She knew when the staff were there and didn’t come round when they were there”

(Lemos and Crane, 2012, p.30)

In order for these incidents to be prosecuted there would need to be a clear threshold for both what is considered exploitation of perceived vulnerability and what is recognised as harm. The circumstances covered should be the more serious incidences of financial, sexual and emotional exploitation of a person who is at the time unable to set appropriate personal boundaries in order to protect themselves. There will be some legal complexities in establishing when exploitation of a person perceived vulnerable reaches the threshold for criminality. This will require further consultation with a number of groups including: people with learning disabilities, older people and people experiencing long term mental ill health.

Wider legislative Implications

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?

³² [Lemos and Crane \(2012\)](#)

SCLD strongly supports clear and consistent recording of statutory aggravation. This ensures maintenance of accurate records and allows for statistics to be kept and trends identified. Close monitoring of these figures is particularly important given the low level of hate crime reporting among people with learning disabilities and the challenges that people with learning disabilities can face when engaging with the criminal justice system³³. In our view, this practice promotes transparency of the justice system, and can hopefully encourage increased reporting of hate crime among people with learning disabilities.

SCLD also supports the requirement for any statutory aggravation to be taken into account when determining a sentence. This is important to reassure victims and their families that the fact an offence was motivated by prejudice has been formally recognised and informed the sentencing process. We agree with the view that this sends a message to both victims and perpetrators that these types of crimes are taken seriously by the criminal justice system.

SCLD are less convinced on the question of whether it is necessary to maintain the requirement in sentencing to state the extent to which the statutory aggravation altered the length of sentence. In line with Lord Bracadale's views³⁴ regarding the complexity of the sentencing process and his concerns that where other factors may exist or where the aggravation is at a relatively low level, the overall difference in a sentence might be small. Where this is the case SCLD believes there is a risk that victims may feel that the criminal justice system is not delivering adequate justice in response to hate crime. SCLD cautions against any changes to the current legislative framework which could serve to undermine confidence in the criminal justice system on the part of people with learning disabilities or their families.

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

³³ [IRISS \(2014\)](#)

³⁴ [Scottish Government \(2018\)](#)

SCLD agrees with Lord Bracadale that effective hate crime legislation must be underpinned and supported by both a willingness of people to report hate crime and a criminal justice system that takes an effective and co-ordinated approach to reporting, preventing and responding to hate crime. It is essential that people with learning disabilities have access to appropriate support at all levels of the criminal justice system and receive clear and inclusive communication at each stage of the process. However, we recognise that legislative change may not be the best way to achieve this.

In 2016, SCLD undertook a mapping and scoping exercise on Third Party Reporting Centres (TPRCs)³⁵ which identified low levels of activity at existing sites and a lack of clarity about the exact role of a TPRC among the organisations in which they were located. Particular concerns were identified which centred around:

- Under-reporting of hate crime among people with learning disabilities
- The effectiveness of TPRCs
- The ability of the criminal justice system to communicate inclusively and accessibly with people with learning disabilities.

Furthermore, accounts from *The keys to life* Expert Group and other anecdotal evidence suggests that many people with learning disabilities:

- Have a lack of awareness of what hate crime is
- Often accept certain types of abusive conduct as part of every daily life
- Are unsure of whom to speak to report a hate crime
- Have a lack of confidence in the police to resolve the issues they face
- Have had negative experience of others of criminal proceedings.

SCLD welcomes the Scottish Government's Tackling Prejudice and Building Connected Communities Action Plan to tackle hate crime and build community

³⁵ [SCLD \(2016\)](#)

cohesion³⁶ and note the positive work by Police Scotland with regards to hate crime and learning disability. We would also welcome new guidance and training for those working in the criminal justice system to raise awareness and understanding of hate crime and learning disability so that those who report hate crimes receive the appropriate and necessary support.

Data collection

Question 35: What else do you think the Scottish Government could include in its proposals to update Scottish hate crime legislation?

SCLD believes strongly that learning disability should be recorded in hate crime statistics as a separate category. This is due to people with learning disabilities distinct experiences of hate crime. This disaggregation of data would allow a clearer picture to be formed of the level of reporting of learning disability hate crime. Being able to compare the rate of successful prosecutions compared to the incidence of other hate crime would allow us insight into how well the system is currently supporting people with learning disabilities to understand and action their legal rights.

Recommendations

Based on SCLD's examination of key areas of this consultation document, SCLD would welcome the following recommendations being given further consideration by the Scottish Government:

- Producing supplementary legislative guidance which gives consideration to intersectional experiences. This should include but not be limited to age and disability and gender and disability
- Producing clear and accessible information about hate crime legislation which is widely available

³⁶ [Scottish Government \(2017\)](#)

- Determining the threshold of ‘demonstrating hostility’ in legislative guidance
- Examining the potential of targeted initiatives about disability and gender alongside misogynistic harassment offense and implementation of The Equally Safe Strategy
- Developing a criminal threshold for the offence of stirring up of hatred
- Working with people with learning disabilities to discuss the establishment of a ‘perceived vulnerability offence’. This should involve consulting with The Mental Welfare Commission for Scotland on how this would interact with The Adult Support and Protection (Scotland) Act (2007)³⁷
- Ensuring the visibility of people with learning disabilities within the statutory aggravation of disability
- Producing of non-statutory guidance and training for those working in the criminal justice system to improve knowledge and awareness of hate crime, learning disability and barriers to reporting
- Disaggregating hate crime statistics for learning disability.

SCLD thanks the Scottish Government for the opportunity to respond to this important consultation and would welcome the opportunity to be involved in a further discussions where appropriate.

³⁷ [Adult Support and Protection \(Scotland\) Act \(2007\)](#)

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