

Statutory Aggravation by Religious Prejudice in Scotland: Correcting the ‘The Lord Advocate’s Lacuna.’

This article represents the outcome of research undertaken into the current state of Scots Law regarding the statutory aggravation of a substantive offence by religious prejudice. The research was inspired by the news in August 2016 that the Lord Advocate, James Wolffe, QC, had written to the Scottish Justice Secretary Michael Mathieson following the conviction and sentencing of Tanveer Ahmed for the religiously-motivated murder of Asad Shah.¹ The Lord Advocate raised the issue of a potential gap in the law (the Lord Advocate’s lacuna) arising from a ‘decision by senior Crown Office and Procurator Fiscal Service (COPFS) counsel that the circumstances of the killing did not meet the statutory test for an offence to be aggravated by religious prejudice’.² Mr Mathieson indicated that the Scottish government would consider...[the Lord Advocate’s letter]...very carefully, and if necessary...bring forward legislation to address this very issue’.³ It is noteworthy that Lady Rae, in imposing an ‘exemplary sentence’ appeared to implicitly acknowledge the lacuna’s existence.⁴ It could be argued that her sentence, coupled with the Appeal Court’s refusal of Mr Ahmed’s appeal against it and the media’s coverage of the crime has sufficiently replicated the statutory aggravation regime so as to compensate for the consequences of the existence of the Lord Advocate’s lacuna. This does not however compensate for the fact of its existence.

Without prejudice to the recently announced Bracadale Inquiry,⁵ this article concurs with the Lord Advocate’s opinion. A condensed version of its findings has already been forwarded to the Lord Advocate’s Office and to the Scottish Justice Secretary in letter format. It recommends a simple amendment to the relevant Scottish statutory test for aggravation by

¹ Ahmed had pleaded guilty on 7th July 2016 to Mr Shah’s killing. On 9th August 2016, he was sentenced to 27 years’ imprisonment. His appeal against sentence was refused on 29 November 2016.

² Matt Coyle, ‘Asad Shah killer jailed for 27 years for murdering shopkeeper’ (*STV NEWS*, 9 August 2016) <<http://stv.tv/news/west-central/1363310-asad-shah-killer-jailed-for-27-years-for-murdering-shopkeeper/>> accessed 11 November 2016

³ Andrew Whitaker, ‘Asad Shah Murder Case Leads to Law Review’ (*Holyrood*, 10 August 2016) <www.holyrood.com/articles/news/asad-shah-murder-case-leads-law-review> accessed 22 November 2016

⁴ Sentencing Statement of Lady Rae, ‘HMA v Tanveer Ahmed’ (Judiciary of Scotland, 9 August 2016) <www.scotland-judiciary.org.uk/8/1639/HMA-v-Tanveer-Ahmed> accessed 20 December 2016. Lady Rae stated, *inter alia*, that she would ‘have regard to the various factors put forward as mitigation but none of them...truly mitigate[d], to any great extent, the brutality...premeditation and motive behind those actions...[the]...lack of remorse...[and Ahmed’s pride in those actions]. For all of these reasons she imposed an exemplary sentence.

⁵ Untitled, ‘Review of hate crime legislation’ (Scottish Government website, 26 January 2017) <<http://news.gov.scot/news/hate-crime-legislation-review>> accessed 6 February 2017

religious prejudice, namely the Criminal Justice (Scotland) Act 2003, s74(2). This involves inserting an additional stand-alone clause that provides for ‘the evincing by an offender of malice and ill-will towards their victim based on *the victim’s expression of personal religious belief(s)*’ This would correct the Lord Advocate’s lacuna and would not involve the enactment of completely new legislation.

In making its case, the article will firstly demonstrate that Tanveer Ahmed’s conduct in murdering Asad Shah was undoubtedly motivated by religious prejudice *as a matter of fact*, if not, as the Lord Advocate’s lacuna demonstrates, as a matter of law.

After briefly examining the misconception that statutory aggravations provide ‘protection’ for victims of prejudice-motivated crime, the article will then examine the chronological development of prejudice-based legislation in the UK. This will clearly demonstrate that the Lord Advocate’s lacuna arises from the rigid adherence of the Criminal Justice (Scotland) Act 2003, section 74, to an established drafting formula originally created in UK statutes addressing *racial* prejudice. It will then demonstrate how the later Offences (Aggravation by Prejudice) (Scotland) Act 2009 correctly addressed disability and sexual orientation prejudice by providing for individuals, whether or not those individuals constituted part of a wider societal vulnerable group.⁶

It will be shown that the drafting formula in all Scottish statutory aggravation provision reflects, to varying degrees, the absorption into EU, UK and Scottish policymaking of three policy rationales for regulating prejudice-motivated crime, namely Barendt’s ‘public order’, ‘abhorrence’ and ‘vulnerable group’ rationales.⁷ It will be further shown that it is the third rationale, or ‘group mentality’ that has assumed primacy in the relevant UK and Scottish legislation. As far back as 1963, the UK Parliament presciently acknowledged the difficulties⁸ of drafting legislation around ‘artificial cultural constructs’ such as racial categorisation.⁹ This article proceeds on the view that one unintended consequence of doing

⁶ Offences (Aggravation by Prejudice) (Scotland) Act 2009, ss1-2

⁷ Eric Barendt, *Freedom of Speech* (2nd edn, OUP, 2007) 177

⁸ See for example Public Order Bill debate, HL Deb 3 July 1963 vol 252, col 963 *per* Lord Conesford ‘I do not believe that it is a good thing to incite people to hate other people...but if these words were put in, what is the reason for this curious limitation and selection of the hatreds that are to be prohibited out of the many hatreds which are presumably not to be prohibited? Why only hatred on grounds of religion, race or colour? What about hatred on grounds of lawful occupations? What about hatred on grounds of a trade or profession which somebody is pursuing? What about incitement to hatred of landlords, which sometimes appears in political speeches? What about incitement to hatred of political Parties?’

⁹ See John T Omohundro, *Thinking Like an Anthropologist: A Practical Introduction to Cultural Anthropology* (McGraw Hill, New York, 2008) 33. The author defines ‘cultural construct’ as a conceptual model of reality

so has been the manifestation of the Lord Advocate's lacuna. The main argument of this article is that the Scottish legislature, in seeking to follow a laudable policy aspiration to provide for aggravation by religious prejudice in terms of 'protecting' perceived members of 'religious groups', has failed to acknowledge the *sui generis* conceptual nature of personal religious expression as articulated in European law and jurisprudence, wherein, it will be argued, membership of some wider vulnerable societal group is not actually required. It will be further argued that the *sui generis* nature of personal religious expression necessitates statutory acknowledgment of the vulnerability of *individuals* expressing their own personal take on their religious beliefs, if such 'protection' is to be truly credible and comprehensive. It will then articulate the essence of the Lord Advocate's lacuna and assert the view that as the law stands, Scotland offers insufficient remedial comfort to individual victims of religious prejudice-motivated crime (such as the family of Asad Shah) in contravention of a number of internationally recognised instruments. In line with the recent view of the Lord Advocate and Secretary of State for Justice, the article concludes by offering the legislative solution outlined previously.

The Misconception of Statutory Aggravations as 'Protective'

The Scottish Parliament and Government have frequently expressed the view that the Scottish statutory aggravation framework provides 'protection' to vulnerable sections of society. For example, the stated policy objective underpinning the Offences (Aggravation by Prejudice) (Scotland) Bill (now the 2009 Act) was:

to create new statutory aggravations to *protect* victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability. Similar statutory aggravations already exist to *protect* individuals and groups targeted on racial or religious grounds.¹⁰

This objective repeated the aspirations stated by then Justice Secretary Kenny MacAskill during the Scottish Parliament's debate on the same Bill.¹¹ Later in the same debate however, he subsequently clarified the official and correct position:

shared by a group, but argues cogently that racial categorisation is a flawed model of reality, used principally to justify colonization from the 16th century onwards.

¹⁰ Scottish Parliament, *Offences (Aggravation by Prejudice) Scotland Bill SP 9, Policy Memorandum* <[www.parliament.scot/S3_Bills/Offences%20\(Aggravation%20by%20Prejudice\)%20\(Scotland\)%20Bill/BBV_133.pdf](http://www.parliament.scot/S3_Bills/Offences%20(Aggravation%20by%20Prejudice)%20(Scotland)%20Bill/BBV_133.pdf)> para 3, accessed 31 January 2017 emphasis added

¹¹ Scottish Parliament Official Report, 18 March 2009, Question Time, on motion S3M-3694, in the name of Patrick Harvie, on the Offences (Aggravation by Prejudice) (Scotland) Bill, per Kenny MacAskill, 'People— whoever they are, whatever disability they are afflicted by and whatever sexual orientation they possess—are

[Statutory Aggravations]...help to underline the seriousness with which hate crime is viewed...[and]...help to ensure a consistent approach from law enforcement and criminal justice agencies...[they]...have been shown to serve a number of purposes: they ensure that, throughout Scotland, there are appropriate and consistent reporting and prosecution policies from the various agencies in the criminal justice system; they send a clear message that prejudice and hatred towards social groups as a motive for committing a crime are unacceptable and will not be tolerated; and they allow us to monitor the extent of such crimes in Scotland and tailor our approaches to tackling them.¹²

Mr MacAskill's clarification proves that, whilst adding value in the form of recording and monitoring, and a degree of largely subjective deterrence value, the statutory aggravations regime cannot be said to *protect* any classification of individual or group from prejudice-motivated offending. Such measures represent, at best, *ex post facto* remedial 'reassurance' provisions designed to mitigate the post-traumatic effects experienced by victims of prejudice-motivated offending and provide supplementary State recognition of them as one of several 'vulnerable sections of society'.¹³ Scotland's statutory aggravation regime represents the best that the state can offer victims after the fact of failure to prevent prejudice-related offending through optimal measures such as inter-group contact and education intervention.¹⁴

The Current Scottish Statutory Aggravation by Prejudice Regime

That said, the regime, bolstered by the improvements wrought by the Criminal Justice and Licensing (Scotland) Act 2010,¹⁵ provides for the following common consequences impossible upon a finding of any aggravation by prejudice in Scotland. Courts *must*: label the offending as motivated by a particular form of prejudice;¹⁶ record the conviction in a way

entitled to the *full protection* of the law, to be treated with dignity and compassion, and to be fully and properly *protected*. *The aggravations that are created by the bill will protect* victims of crime who have been targeted as a result of their sexual orientation, transgender identity or disability—actual or presumed (emphasis added)

¹² Scottish Parliament Official Report, 18 March 2009, Question Time, on motion S3M-3694, in the name of Patrick Harvie, on the Offences (Aggravation by Prejudice) (Scotland) Bill.

¹³ Sara Stewart (Criminal Law & Licensing Division), 'Introduction of the Offences (Aggravation by Prejudice) (Scotland) Bill: Background briefing to accompany SCANCE Note (16 May 2008)

<www.whatdotheyknow.com/request/3772/response/10978/attach/29/024.pdf> accessed 31 January 2017

¹⁴Maureen McBride, Scottish Centre for Crime and Justice Research, *What works to reduce prejudice and discrimination? A review of the evidence* (Scottish Government, 2015) 3-4

¹⁵ Explanatory Note to Criminal Justice and Licensing (Scotland) Act 2010, s25 states that s25 (1) substitutes subsection (5) of section 96 of the [Crime and Disorder Act]1998 [and] requires that, where an aggravation relating to prejudice is proved, the court must also explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to race. S.25 (2)(a) inserts a new subsection (2A) into section 74 of the [Criminal Justice (Scotland) Act] 2003. This provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore ensures consistency between the two provisions. S25 (2)(b) replaces subsections (3) and (4) of section 74 of the 2003 Act with subsection (4A), which requires that, where an aggravation relating to prejudice is proved, the court must explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to religion.

¹⁶ For present purposes see Criminal Justice (Scotland) Act 2003, s74(4A)(a)

that shows that the offence was so aggravated;¹⁷ take the aggravation into account in determining the appropriate sentence;¹⁸ and state either, 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 where otherwise, the reasons for there being no such difference¹⁹. Although corroborative evidence is required in proving the particular substantive offence, the requirement is removed as regards proving the aggravation by prejudice.²⁰ Although the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (as amended) has brought about a ‘welcome harmonisation of aggravations across all areas’,²¹ there exists criticism in some quarters of the failure to embrace provisions in the areas of aggravation by age-related prejudice and gender prejudice.²² At the time of writing, Lord Bracadale has been announced as the Chair of a 12 month inquiry into: the Criminal Law (Consolidation) (Scotland) Act 1995; Criminal Justice (Scotland) Act 2003; Offences (Aggravation by Prejudice) (Scotland) Act 2009 and the controversial Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.²³

Was Tanveer Ahmed’s murder of Asad Shah motivated by religious prejudice?

Lady Rae observed that Ahmed’s murder of Mr Shah:

was a brutal, barbaric and horrific crime, resulting from *intolerance* and which led to the death of a wholly innocent man who openly expressed beliefs which differed from...[those of Tanveer Ahmed]...this was a *religiously motivated crime*, although it was not directed towards the Ahmadi community...[a branch of the Muslim faith of which Asad Shah professed adherence]²⁴

Lady Rae’s conclusions in the agreed narrative are founded on the fact that Tanveer Ahmed unashamedly and unrepentantly admitted (via a statement made on his behalf by his solicitor) that his conduct was motivated by his religious intolerance of the religious beliefs as

¹⁷ *ibid*, s74(4A)(b)

¹⁸ *ibid*, s74(4A)(c)

¹⁹ *ibid*, s74(4A)(d)

²⁰ *ibid*, s74(5)

²¹ Criminal Justice and Licensing (Scotland) Bill, Written submission from the Equality and Human Rights Commission (2009) available at <<http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/CriminalJusticeandLicensing/CJL81.pdf>> accessed 31 January 2017

²² Law Society of Scotland, ‘Scottish Government Debate: Working Together to Prevent and Eradicate Hate Crime and Prejudice, The Law Society of Scotland’s Briefing for MSPs’ (Law Society of Scotland, 9 November 2016) 7, <www.lawscot.org.uk/media/948527/crim-briefing-scottish-government-debate-working-together-to-prevent-and-eradicate-hate-crime-and-prejudice-november-2016-3-.pdf> accessed 11 November 2016

²³ Bracadale Inquiry (n5)

²⁴ Sentencing statement of Lady Rae (n4)

expressed by his victim.²⁵ Lady Rae's use of the term 'intolerance', as opposed to 'prejudice' in her statement is somewhat unfortunate, as Scots Law currently does not make common law or statutory provision for 'intolerance'. A description of Ahmed's conduct as motivated by 'religious prejudice' would have perhaps served to narrow the gap identified by the Lord Advocate. Her words exemplify an apparent degree of inconsistency in Scottish society and Scots law as regards the usage and interpretation of the terms 'hate crime', 'intolerance', 'offensive' and 'prejudice'. Indeed, the specialist advisory group recently established by Scottish Ministers to examine the issue reported that, in the Scottish context, 'hate crime' remains 'relatively poorly defined and understood, both in terms how it is defined, and what the law says...the criminal law deals with 'prejudice' rather than hate'.²⁶ However, if literal (rather than legislative) English is applied to the Lord Advocate's lacuna, it is plain that 'intolerance' (unwillingness to accept views, beliefs, or behaviour that differ from one's own)²⁷ and 'prejudice' (dislike, hostility, or unjust behaviour deriving from preconceived and unfounded opinions)²⁸ are readily interchangeable. It is therefore not difficult to concur with Lady Rae's and Tanveer Ahmed's statements that the brutal murder of Mr Shah was, *as a matter of fact, motivated* by religious prejudice. Of course the issue raised by the Lord Advocate is that the circumstances of the murder were not, *as a matter of law, aggravated* by religious prejudice. A question therefore arises as to why the Scots law purporting to recognise that offending is aggravated if it is motivated by religious prejudice failed to do so in the case of Asad Shah.

Despite the inconsistencies previously referred to, it is acknowledged that Scottish courts possess longstanding common law powers to punish offenders more severely for the commission of crimes motivated by prejudice by taking into account aggravating factors when sentencing.²⁹ These have been complemented by a number of 'statutory aggravations

²⁵ Ahmed, a Muslim, claimed *inter alia*, that 'Asad Shah disrespected the messenger of Islam the Prophet Muhammad...[by claiming]...to be a Prophet', see BBC News 'Asad Shah death: Man admits killing shopkeeper because he 'disrespected' Islam', *BBC News* (6th April 2016) <www.bbc.co.uk/news/uk-scotland-glasgow-west-35976958> accessed 11 November 2016

²⁶ One Scotland, *Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion* (Secretariat to the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, September 2016) 11

²⁷ Definition of 'intolerance' (*Oxford English Dictionary*) <<https://en.oxforddictionaries.com/definition/intolerance>> accessed 22 November 2016

²⁸ Definition of 'prejudice' (*Oxford English Dictionary*) <<https://en.oxforddictionaries.com/definition/prejudice>> accessed 22 November 2016

²⁹ One Scotland, *Report of the IAG* (n26) 7

for criminal offences and substantive criminal law offences'.³⁰ Leaving aside the debate over terminology and any potential benefits of consolidation,³¹ Scots law's statutory aggravations include aggravation of substantive criminal offences by: racial prejudice;³² religious prejudice;³³ disability prejudice;³⁴ sexual orientation prejudice³⁵ and transgender identity prejudice.³⁶ An understanding of these contemporary Scots law provisions is best achieved by tracing their chronological evolution. This of course predates the 1998 statutory devolution settlement that saw legislative competence for criminal justice largely devolved to the new Scottish Parliament.³⁷ The earliest provisions relate to racial prejudice, and it will be shown that the later attempts to regulate other forms of prejudice are drafted in a similar, but in one aspect crucially different manner.

Barendt's Rationales for Proscribing Prejudice-based Offending: the Origins of the 'Group Mentality' in UK Legislation

Although outside the analytical scope of this article, there is some utility in referring to the rationale(s) underpinning the modern law regulating prejudice-motivated offending in the EU, UK and latterly in Scotland. This is because rationales inform legislative drafting and it is the drafting of the current Scottish legislative provisions relating to aggravation by religious prejudice-motivated offending that will be shown to constitute the Lord Advocate's lacuna. In assessing the arguments for and against the proscription of racist hate *speech*,³⁸ Barendt referred to three justificatory rationales.

The Public Order Rationale

³⁰ Law Society of Scotland, 'Scottish Government Debate: Working Together to Prevent and Eradicate Hate Crime and Prejudice, The Law Society of Scotland's Briefing for MSPs' (*Law Society of Scotland*, 9 November 2016) < www.lawsco.org.uk/media/948527/crim-briefing-scottish-government-debate-working-together-to-prevent-and-eradicate-hate-crime-and-prejudice-november-2016-3-.pdf > accessed 11 November 2016

³¹ *ibid*, and see now Bracadale Inquiry(n5)

³² Crime and Disorder Act 1998, s96

³³ Criminal Justice (Scotland) Act 2003, s74

³⁴ Offences (Aggravated by Prejudice) (Scotland) Act 2009, s1

³⁵ *ibid*, s2

³⁶ *ibid*

³⁷ By virtue of the Scotland Act 1998, ss28, 29 and Sch 5, any matter not formally reserved to the UK Parliament became a devolved matter within the legislative competence of the Scottish Parliament. See also HL Deb 17 June 1998, vol 590 col 1569 *per* Lord Sewel at Scotland Bill, 2nd reading

³⁸ This article proceeds on the basis that prejudice-motivated *speech* constitutes part of broader prejudice-motivated *conduct*. This is because Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, Article 1 states that Member States shall take the measures necessary to ensure that the following intentional *conduct* is punishable: (a) publicly inciting to violence or hatred directed against a *group of persons or a member of such a group* defined by reference to race, colour, religion, descent or national or ethnic origin; (b) *the commission of an act* referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

The first relates to public order, wherein policymakers prohibit the expression of hatred on the grounds that public order issues may arise.³⁹ This is not an unduly cautious policy position given the UK's occasional explosions of racial tension.⁴⁰ The public order rationale has undoubtedly always, at least partially, underpinned regulation of prejudice-motivated offending in the UK and Scotland both at common law and in statute. Academic evidence is provided by Hare, who in addition to correctly identifying the Race Relations Act (RRA) 1965 (examined shortly) as the first statutory provision directly addressing racial prejudice, also comprehensively demonstrates its common law antecedents in the laws of sedition and public mischief.⁴¹ He restates Stephen's definition of 'Sedition', namely the 'intention...to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of *ill-will* and hostility between *different classes* of such subjects'.⁴² As regards common law 'public mischief', Hare restates the definition offered by Lord Hewart, CJ, namely 'all offences of a public nature, that is, all such acts or attempts as tend to the *prejudice* of the community'.⁴³ Statutory evidence is provided by the appropriately titled Public Order Act 1936. It provided, *inter alia*, that 'any person who in any public place or at any public meeting uses *threatening, abusive or insulting* words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'⁴⁴ The view that 'threatening, abusive or insulting words or behaviour' might stir up racial hatred remains largely unaltered in UK statutory drafting, as can be seen in the Public Order Act 1986.⁴⁵ Hare outlines failed attempts to criminalise incitement to religious hatred alongside racial hatred as far back as the passage of the Public Order Bill in 1936. This not only further evidences the longstanding influence of the 'public order' rationale, but also usefully illustrates how preventing religious prejudice in law has always been significantly more problematic.⁴⁶ Hare concludes that 'the rise in ethnic tensions and violence following the increase in immigration after the 1950s contributed to the placing of

³⁹ Eric Barendt, *Freedom of Speech* (n7) 177

⁴⁰ See for example David Renton, 'The Killing of Blair Peach', (2014) 36 (10) *London Review of Books* available at <<http://www.lrb.co.uk/v36/n10/david-renton/the-killing-of-blair-peach>> accessed 15 Jan 2017.

⁴¹ Ian Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred', (2006) (Aut) *Public Law* 521.

⁴² Stephen's Digest of the Criminal Law (9th edn, Sweet and Maxwell, London, 1950), Art.114 as cited in Hare (n41), emphasis added

⁴³ *R v Manley* [1933] 1 KB 529 *per* Lord Hewart CJ at 534, emphasis added

⁴⁴ Public Order Act 1936 (1 Edw 8 & 1 Geo 6 c6) s5, emphasis added

⁴⁵ Public Order Act 1986, s18(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if: (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby

⁴⁶ As Hare alludes to, England & Wales only legislated in relation to religious hatred in 2006 (the Racial & Religious Hatred Act 2006 amending the Public Order Act 1986 by inserting ss29A) after years of failure.

incitement to racial hatred in a class of its own'.⁴⁷

The 'Abhorrence' Rationale

Barendt's second rationale for hate speech proscription in law centres around the widely accepted view that 'it is right for a society to indicate its abhorrence of hate speech and the attitudes it reveals and to discourage the spread of racist views, the acceptance of which will, in the long run, be seriously harmful to good race relations'.⁴⁸ He is evidently unconvinced by this rationale however, finding that it 'runs counter to the principle that speech should not be inhibited because the government fears that it will affect popular attitudes or that individuals will act in response to it in disapproved ways-thinking less well of different ethnic groups and refusing to mix with them'.⁴⁹ He asserts that 'free speech guarantees that listeners will generally be able to make rational assessments of the credibility of the claims made to them, whether in the course of election campaigns or in other contexts', arguing that 'proponents of hate speech laws must show why this is not the case with respect to attacks on racial, ethnic or other groups'.⁵⁰ His views largely align with the modern American approach, where their courts have been 'consistently hostile to regulation of "hate speech", applying the First Amendment with vigor and insisting that the solutions to the harm that such speech causes is not in suppression but in more speech countering the hateful messages'.⁵¹ On the available evidence however, Barendt's opinion runs contrary to the endorsement of the 'abhorrence rationale' evident in EU,⁵² UK⁵³ and Scottish⁵⁴ policymaking.

⁴⁷ Hare (n41) 521

⁴⁸ Barendt (n7) 177

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ Michael Herz and Peter Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 3

⁵² See, for example Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, Recital 1. The European Agency for Fundamental Rights, *Ensuring Justice for Hate Crime Victims: Professional Perspectives*, foreword states that 'hate crime is the most severe expression of discrimination and a core fundamental rights abuse. It demeans victims and calls into question an open society's commitment to pluralism and human dignity.

⁵³ Home Office, 'Action Against Hate: The UK Government's plan for tackling hate crime' (*GOV.UK*, July 2016) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf> accessed 29 December 2016. The Home Secretary's foreword reflects the abhorrence rationale stating, *inter alia*, 'it is utterly unacceptable that people should suffer abuse or attacks because of their nationality or ethnic background. We must stand together against hate crime and ensure that it is stamped out'

⁵⁴ Scottish Government, 'Action to tackle Hate Crime and Sectarianism' (*Scottish Government*, June 2015) <www.gov.scot/Topics/Justice/policies/reducing-crime/tackling-hate-crime> accessed 29 December 2016. The abhorrence rationale is reflected in the statement 'Hate crime has no place in Scotland and will not be tolerated. Our justice system is equipped to effectively deal with hate crimes to give victims the confidence to report them and bring those responsible to justice'

The ‘Group’ Rationale

Barendt describes his third and final justificatory rationale for hate speech proscription as ‘more promising’.⁵⁵ This is founded on the view that racist hate speech should be proscribed because ‘it is “highly wounding” to members of the targeted *group*, in some cases inflicting psychological injury or causing fear of isolation or physical attack...[and]...more generally...[lowering]...the self-esteem of those affected, particularly where there has been historical oppression’.⁵⁶ Herz and Molnar reinforce this, asserting the existence of a ‘definitional challenge’ for governments seeking to intervene to proscribe certain forms of hate speech, acknowledging that the preferred approach has been based on the ‘general understanding that the problematic speech must be directed at a group, or an individual on the basis of membership in a group, as opposed to being merely personal’.⁵⁷

This appears to be the justificatory rationale at EU level, where, as regards racism, the legislature explicitly states that ‘racism and xenophobia constitute a threat against *groups of persons* which are the target of such behaviour’.⁵⁸ Barendt further asserts (citing Home Office policymaking research)⁵⁹ that ‘modern British legislation in this area is generally defended now in terms of the hurt racist speech causes members of minority groups’.⁶⁰ He further observes that modern legislation fills a gap in the common law, where, although it was perhaps theoretically possible to secure a conviction for attacks on racial groups, in practice, prosecutions for sedition and similar conduct on this basis were wholly unsuccessful.⁶¹ This conclusion reinforces that of Hare.⁶²

UK & Scottish statutory regulation of racial prejudice: the seeds of the Lord Advocate’s lacuna in the ‘group mentality’

Hare’s aforementioned exposition of Stephens’ definition of sedition focuses on its opaque nature, but is interesting for two other reasons. The first is its use of the term *ill-will*, a description of prejudice-motivated conduct that remains present in anti-prejudice legislation

⁵⁵ Barendt (n7) 177

⁵⁶ Barendt (n7) 177 emphasis added

⁵⁷ Michael Herz and Peter Molnar, *The Content and Context of Hate Speech* (n51) 7

⁵⁸ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, Recital 5

⁵⁹ Home Office, *Review of Public Order Act 1936 and related provisions* (Cmnd 7891, 1980) para 107

⁶⁰ Barendt (n7)177

⁶¹ *ibid*, emphasis added

⁶² Hare (n29) 521, citing the failure to convict in *R v Osborne* (1732) 2 Swanst 503n, and *R v Caunt* (1948) (unreported)

to this day. The second is that, long prior to the introduction of statutory anti-prejudice legislation, and long prior to the immigration crises of the 1950s and early 21st century, the UK political class clearly perceived UK society as comprising ‘different classes of subjects’ (groups). This categorization of citizens therefore substantially predates the Race Relations Act (RRA) 1965 and later public order provisions on racial prejudice, as well as the EU Council Framework Decision on Racism and Xenophobia. The drafters’ search for appropriate terminology to implement remedial statutory provisions relating to offending involving racial prejudice saw Stephens’ ‘classes of subjects’ evolve into ‘any *section of the public...distinguished by colour, race, or ethnic or national origins*’ in the RRA 1965.⁶³ This Act proscribed the conduct of publishing or distributing ‘threatening, abusive or insulting’ written matter, or the use in any public place or public meeting of ‘threatening, abusive or insulting words’⁶⁴ with ‘intent to stir up hatred against such sections of the public’. As such, the group mentality applied to drafting anti-racial prejudice provisions became more entrenched. If the concerns of anthropologists such as Omohundro are set aside,⁶⁵ this entrenchment did not appear unduly problematic.

The (UK) Public Order Act 1986 represents the first statute to directly implement provisions deterring ‘acts intended or likely to stir up racial hatred’,⁶⁶ and in relation to possession of ‘racially inflammatory material’.⁶⁷ The Act borrowed drafting from its RRA 1965 predecessor, but narrowed ‘hatred’ to ‘racial hatred’, defining it as ‘hatred against a *group of persons...defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins*’.⁶⁸ Group protection was here to stay.

The first pre-devolution Act to directly address racial prejudice in Scotland was the Criminal Law (Consolidation) (Scotland) Act 1995, as amended by the (UK) Crime and Disorder Act 1998. This falls within the ambit of Lord Bracadale’s Inquiry.⁶⁹ This enacted a new Scotland-specific substantive offence of ‘racially aggravated harassment’,⁷⁰ which occurs where the offender intentionally pursues a racially-aggravated course of conduct (which includes

⁶³ Race Relations Act 1965, s6(1)

⁶⁴ These three descriptions of the law’s limitations to freedom of speech were established in the Public Order Act 1936, s5 and restated by Lord Reid in *Brutus v Cozens* [1972] 2 All ER 1297, 1301

⁶⁵ Omohundro (n9)

⁶⁶ Public Order Act 1986, ss18-22

⁶⁷ *ibid*, ss23-25

⁶⁸ Public Order Act 1986, s17

⁶⁹ Bracadale Inquiry (n5)

⁷⁰ Criminal Law (Consolidation) (Scotland) Act 1995, s50A, amended by the Crime and Disorder Act 1998, s33

speech)⁷¹ on two or more occasions⁷² amounting to harassment (which includes causing alarm or distress)⁷³ of a person,⁷⁴ or the conduct occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.⁷⁵ The offence is also complete if the offender ‘acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress’.⁷⁶ It is in this statutory provision that the beginnings of what evolved into an identifiable drafting pattern can be observed, in that a ‘course of conduct’ or an ‘action’ is racially aggravated if

(a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will *based on that person's membership (or presumed membership) of a racial group*; or

(b) the course of conduct or action is motivated (wholly or partly) by *malice and ill-will towards members of a racial group based on their membership of that group*.⁷⁷

‘Racial group’ means ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins’.⁷⁸ ‘Membership’ includes association with members of that group, and ‘presumed’ means presumed by the offender.⁷⁹ It is immaterial whether or not the offender's malice and ill-will is also based, to any extent, on the fact or presumption that any person or group of persons belongs to any *religious group* or any other factor.⁸⁰

In the absence of accompanying Explanatory Notes, the reason why the definition of the term ‘racial hatred’ contained in the Public Order Act 1986⁸¹ is not replicated in the racially aggravated harassment provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 (as amended) is not readily evident. ‘Evinces’ seems a carefully chosen word meaning ‘to reveal the presence of, or indicate’.⁸² ‘Racial hatred’ is replaced by ‘malice and ill-will’. This may be because proving beyond a reasonable doubt that there was ‘hatred’ on the part of an individual offender, a very strong, subjective and emotive term, was thought to be too

⁷¹ *ibid*, s50A(6)

⁷² *ibid*

⁷³ *ibid*

⁷⁴ *ibid*, s50A(1)(a)(i)

⁷⁵ *ibid*, s50A(1)(a)(ii)

⁷⁶ *ibid*, s50A(1)9b)

⁷⁷ Criminal Law (Consolidation) (Scotland) Act 1995, s50A(2), emphasis added

⁷⁸ *ibid*, s50A(6)

⁷⁹ *ibid*, s50A(3)

⁸⁰ *ibid*, s50A (4) emphasis added

⁸¹ Public Order Act 1986, s17

⁸² Oxford Dictionary < <https://en.oxforddictionaries.com/definition/evince>> accessed 18 November 2016

difficult. Indeed the Scottish provisions actually enacted that require ‘malice and ill-will’ still represent a higher threshold of ‘nastiness’ than the counterpart English offence.⁸³ This only requires the ‘transient’ and ‘less nasty’ behavioural threshold of ‘demonstrating hostility’ towards the victim.⁸⁴ What can be seen in the finalised Scottish provision is the continuance of a drafting pattern that reflects a State policy of categorising *marginalised groups* felt to be in need of protection from malice or ill-will. It is therefore clear that, more or less from the outset, and as the common law was replaced by statutory provisions, the UK’s approach to remedying prejudice-motivated offending focused on the perception of individual victims of that offending forming part of wider, distinguishable societal ‘classes of persons’, ‘sections of the public’ or ‘groups of persons’. This may, where there are obvious distinguishable characteristics such as colour, seem conceptually relatively unproblematic, however it will be argued herein that distinguishable characteristics pertaining to ‘religious belief’ are virtually impossible to ascertain on either an individual or group basis.

The first Scottish statutory aggravation: racial prejudice

The Crime and Disorder Act 1998 additionally introduced section 96, also drafted specifically for Scotland. Aggravation of a substantive offence by racial prejudice will occur where

the offender *evinces* towards the victim (if any) of the offence *malice and ill-will based on the victim's membership (or presumed membership) of a racial group* or the offence is motivated (wholly or partly) by *malice and ill-will towards members of a racial group based on their membership of that group*.⁸⁵

Unsurprisingly (as they emanate from the same statute) the definitions of ‘member’, ‘presumed’ and ‘racial group’ replicate those for racially aggravated harassment.⁸⁶ More importantly for present purposes, the drafting pattern wherein the conduct required (the evincing of malice and ill will towards a person based on their membership/presumed membership of a *group* an offender sees as somehow different or repulsive in some way to him or her) is now clearly evident.

Aggravation by Disability-related prejudice: Getting it Right

⁸³ Crime and Disorder Act 1998, s28 (England & Wales)

⁸⁴ The requirement for different Scots provision never really is made clear, however see HL Deb 12 February 1998 vol 585 cols 1265-1325 and in particular Lord Monson, col 1277

⁸⁵ Crime and Disorder Act 1998, s96(2) emphasis added

⁸⁶ *ibid*, s33

Leaving aside the aggravation by religious prejudice provisions within the Criminal Justice (Scotland) Act 2003, the drafting pattern as established continues beyond that Act into the Offences (Aggravation by Prejudice) (Scotland) Act 2009, section 1, but with a crucial distinction. As for the older statutory aggravations by racial or religious prejudice, this applies where it is libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to disability,⁸⁷ and subsequently proved.⁸⁸ An offence is aggravated by prejudice relating to disability if:

- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will *relating to a disability (or presumed disability) of the victim*, or (b) the offence is motivated (wholly or partly) by malice and ill-will *towards persons who have a disability or a particular disability*.⁸⁹

Critically for present purposes however, it can be seen that, in addition to providing for offending based on the individual disabled person's membership of a wider vulnerable social group (disabled persons more generally), this provision is optimally drafted in that it brings within its ambit *an individual* exhibiting or 'expressing' a perceivable disability. Without stereotyping disability, it will usually be the case that for someone to be perceived as disabled and therefore liable to become subject to prejudice-motivated conduct, they will exhibit or express an identifier, indicator, behaviour or other characteristic that identifies them as either having a particular individual disability, or exhibit or otherwise express a characteristic that identifies them as disabled and part of a wider group of persons with a disability or particular disability.

Aggravation by prejudice relating to sexual orientation or transgender identity

The same 'individual expression' aspect applies in section 2 of the same statute.

An offence is aggravated by prejudice relating to sexual orientation or transgender identity if, at the time of commission or immediately before or afterwards, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to (i) the sexual orientation (or presumed sexual orientation) *of the victim*, or (ii) the transgender identity (or presumed transgender identity) *of the victim*, or the offence is motivated (wholly or partly) by malice and ill-will *towards persons who have (i) a particular sexual orientation, or (ii) a transgender identity or a particular transgender identity*.⁹⁰

⁸⁷ Offences (Aggravation by Prejudice) (Scotland) Act 2009, s1(1)(a)

⁸⁸ *ibid*, s1(1) (b)

⁸⁹ *ibid*, s1(2) (a) and (b)

⁹⁰ Offences (Aggravation by Prejudice) (Scotland) Act 2009 s2(2)

For the purposes of this provision, ‘sexual orientation’ is described as ‘sexual orientation towards persons of the same sex or of the opposite sex or towards both’;⁹¹ this is interpreted as ‘heterosexuality, homosexuality or bisexuality’.⁹² ‘Transgender identity’ is reference to ‘transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or any other gender identity that is not standard male or female gender identity’.⁹³ Government policy states that the definition

extends expressly to cover other persons under the generality of broad reference to non-standard gender identity...[including, but not limited to]...those who are androgynous, of...non-binary gender or...otherwise exhibit[ing] a characteristic, behaviour or appearance...[not conforming]... with conventional understandings of gender identity.⁹⁴

As for disability-related prejudice, the provision covers an *individual victim* whether or not in the context of being part of a wider social group, as well as aggravation by prejudice relating to victims perceived as belonging to a wider vulnerable group. Again, without wishing to resort to or inflict stereotypes on any member of society, for victims to become victims under this provision they will normally have (perhaps unwittingly) exhibited or expressed an identifier, indicator, behaviour or characteristic(s) that identify them to those in wider society who harbour prejudices against them.

In encompassing the expressions of individual identity that are rightly held precious by all individuals, and ensuring that prejudice-motivated offending against individuals whether or not part of some wider group is correctly labelled, sentenced and recorded, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 largely gets things right. Victims covered by this Act are not required to actively or passively constitute part of some wider stereotyped, vulnerable societal group. They can express their individual personality whatever way they see fit, and whether or not they are perceivable to the prejudiced, in the knowledge that Scots law will correctly label, sentence and record offending against them. It is in the individual expression of religious beliefs or characteristics that the Lord Advocate’s lacuna arises and the law lets down individuals like Asad Shah.

Aggravation by Religious Prejudice in Scotland: the current law

The drafting used in Scotland’s statutory provisions providing for aggravation by religious prejudice represent a virtually *verbatim* derivative of the UK legislature’s older provisions for

⁹¹ *ibid*, s2(7)

⁹² Offences (Aggravation by Prejudice) (Scotland) (Act) 2009, Explanatory Note to s2(7)

⁹³ Offences (Aggravation by Prejudice) (Scotland) Act 2009 s2(8)

⁹⁴ Offences (Aggravation by Prejudice) (Scotland) (Act) 2009, Explanatory Note to s2(8)

aggravation by racial prejudice previously outlined. The relevant statutory provision is section 74 of the Criminal Justice (Scotland) Act 2003. Section 74 is meant to apply ‘where it has been either libelled in an indictment or specified in a complaint, and, in either case, proved that an offence has been aggravated by religious prejudice’.⁹⁵

For the purposes of section 74, an offence is aggravated by religious prejudice if—

at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will ***based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation;***⁹⁶

or, the offence is motivated (wholly or partly) by malice and ill-will towards ***members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.***⁹⁷

It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.⁹⁸

Critically, for present purposes, section 74 defines ‘religious group’ as:

a ***group of persons*** defined by reference to their religious belief or lack of religious belief, membership of or adherence to a church or religious organisation, support for the culture and traditions of a church or religious organisation, or participation in activities associated with such a culture or such traditions.⁹⁹

Aggravation by Religious Prejudice: the gap in the law

As for racial prejudice, aggravation by religious prejudice only occurs in Scots law where the offender’s malice and ill-will is based on his or her perception (correct or otherwise) of their victim as belonging to a wider, *State-categorised vulnerable group* comprising persons against which the offender holds prejudice(s). Put another way, section 74 currently only extends to acts driven by evinced malice or ill-will founded on religious prejudice and is therefore only available to self-confessed or visibly obvious members of a religious *group* or of a social or cultural *group* with a perceived religious affiliation. An example of the former

⁹⁵ Criminal Justice (Scotland) Act 2003, s74(1)

⁹⁶ *ibid*, s74(2)(a) emphasis added

⁹⁷ *ibid*, s74(2)(b) emphasis added

⁹⁸ *ibid*, s74(2A)

⁹⁹ *ibid*, s74(7) emphasis added

would be a Muslim wearing a burkha. An example of the latter would be a member of the travelling community. As shown, all Scots law aggravations require the offender to evince malice and ill-will towards their victim on the basis of their perception of their victim as belonging to some group of persons that they (for reasons only they can ever articulate) find somehow irritating or feel some innate hostility towards and who are, in their view, different from them. Regrettably, Section 74 would have captured Tanveer Ahmed's conduct (as admitted) had it been motivated by malice and ill-will evinced towards Asad Shah's expressions of personal religious belief if Asad Shah had been a Christian, Jew, Sikh, Hindu, Buddhist or indeed any other religion than Tanveer Ahmed. It appears that, as they were both Muslims, albeit expressing their faith in very different ways, section 74 could not be applied to Ahmed.

By way of analogy, as Scots law currently stands, if I, as a Presbyterian by birth and belief, were to murder a fellow Presbyterian for expressing beliefs about some aspect of Presbyterianism that I could not tolerate, I would be murdering them in consequence of my intolerance of their expression of religious belief. I would not be murdering them on the grounds that I presume they belong to the Presbyterian religious group. I would be undoubtedly motivated by religious intolerance, and I would undoubtedly be evincing malice and ill will towards my fellow Presbyterian. As such the Crown Office would not be in a position to prove an aggravation by religious prejudice as my victim is ostensibly a member of the same religious group as me.

Regrettably therefore, it can be seen that the obvious lacuna is that, as drafted, 'aggravation by religious prejudice' cannot be applied to offences committed against *individuals* exercising, exhibiting or expressing their own personal take on their fundamental human right to freedom of thought, conscience or religion.¹⁰⁰ This is surely wrong. Asad Shah expressed his *personal* articulation of religious belief as permitted by this fundamental right but he could not be categorised as belonging to any particular 'religious group' as currently defined in the Criminal Justice (Scotland) Act 2003. Mr Shah was not murdered on account of 'malice or ill-will' towards a 'group of persons' to which he was presumed by Tanveer Ahmed as belonging. He was murdered on account of the 'malice or ill-will' Tanveer Ahmed evinced towards his *expressed religious beliefs*.

¹⁰⁰ European Convention on Human Rights, Article 9(1)

The issue is therefore (perhaps inadvertently) expressed by Lady Rae in her sentencing statement to Tanveer Ahmed based on an agreed narrative:

This was a...crime, resulting from intolerance...of a *wholly innocent man who openly expressed beliefs which differed from yours*...this was a religiously motivated crime, *although it was not directed towards the Ahmadi community*.

As such, unlike any other form of aggravation by prejudice in Scotland, Tanveer Ahmed's malice and ill-will towards his victim, although founded on religious grounds, does not aggravate his murder of Asda Shah by religious prejudice as a matter of law.

Implications of the Current lacuna

This represents a fundamental flaw in the relevant legislative provision, and was correctly identified and highlighted by the Crown Office and Procurator Fiscal Service as represented by the Lord Advocate. It is surely criminal acts or omissions motivated by an offender's malice and ill-will towards *individuals expressing their religious belief* that Scots criminal law and procedure should be labelling as such, rather than acts motivated by malice or ill-will towards 'presumed members' of 'religious groups'. Had this been the case, the appalling conduct of Tanveer Ahmed could have been dealt with more appropriately under the Criminal Justice (Scotland) Act 2003, s74(4A) in that Lady Rae could have exercised the implied discretion afforded to the judiciary in s74(4A) (c) to determine an increased sentence based on the aggravation and to state so under s74(4A) (d). .

The current lacuna as identified in Scots law undermines individuals' rights to State protection of their freedom of thought, conscience and religion, and to freely express that belief, under the following international treaties:

Universal Declaration of Human Rights, Articles 18 and 19;¹⁰¹

Charter of Fundamental Rights of the European Union, Articles 10 and 11;¹⁰²

European Convention on Human Rights, Articles 9, 10 and 14.¹⁰³

In addition, the lacuna demonstrates Scotland's current non-compliance with the Framework Convention for the Protection of National Minorities 1995, which requires States to 'take

¹⁰¹ Right to freedom of thought, conscience and religion, and to freedom of expression respectively

¹⁰² Right to freedom of thought, conscience and religion, and to freedom of expression respectively

¹⁰³ Right to freedom of thought, conscience and religion, and to freedom of expression respectively

appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or *religious identity*'.¹⁰⁴ The use of 'religious identity' is particularly noteworthy here as it clearly distinguishes the Framework's requirement upon States to protect *individual persons* vulnerable on account of their religious identity from Scots laws current protection of persons only if they can be categorised as falling within a particular religious, social or cultural group. As aforementioned, the lacuna also means that the sentencing provisions of the Criminal Justice (Scotland) Act 2003, s74 (4A) cannot be applied to crimes motivated by religious prejudice in circumstances similar to those of Tanveer Ahmed discussed herein. As such, Lady Rae's discretion to vary the sentence was undoubtedly affected (which she made implicitly clear) and despite the obvious aggravation by religious prejudice, Tanveer Ahmed avoided having his conviction appropriately labelled and possibly attracting heavier sanction.¹⁰⁵

Conclusion: Correcting the lacuna

It is plain from the Justice Secretary's statement regarding the introduction of new legislation if necessary that the Scottish Government is minded to correct the Lord Advocate's lacuna. The terms of reference for Lord Bracadale appear to confirm the Scottish Government's sincerity in the matter. Completely new legislation is not, however, required.

It is submitted that individual expression or exhibition of personal religious beliefs to wider society is *sui generis*. The issue can be problematic and controversial, however no offence is intended when asserting that expressions of race, colour, ethnicity, nationality all involve exhibiting or expressing identifiers, indicators, characteristics or physiological features that make the individual expressing them perceivable (rightly or wrongly) as belonging to some wider 'group of persons'. Similarly, perceptions (correct or otherwise) of individuals' sexual orientation, transgender identity, age and gender label such individuals as part of a wider

¹⁰⁴ Council of Europe, Framework Convention for the Protection of National Minorities, Article 6(2) emphasis added

¹⁰⁵ Sentencing statement of Lady Rae (n4), Lady Rae stated she was required 'to make an order setting what is called a punishment part, that is, the minimum period of time that ...[Ahmed would]...serve in prison to satisfy the requirements of retribution and deterrence...[but that she was]... obliged to consider a discount to...sentence because of the utilitarian benefit occasioned by [his guilty]...plea'. Consequently, she stated that 'sentence [is] to life imprisonment. For all of the reasons given...the punishment part I would have imposed would have been 30 years. I shall reduce that by three years thus the punishment part is 27 years. Had she been able to avail of the Criminal Justice (Scotland) Act 2003 regime, she may have been able to offset the utilitarian discount for the guilty plea by raising the sentence due the aggravation.

societal group. Such groups have been proven to be marginalised to varying degrees in varying circumstances, and as such have deservedly attracted protection from international and domestic law aimed at preventing discrimination and prejudice directed against those groups and individuals presumed to belong to them.

Expression of religious belief however, simply does not fit this altruistic policy mould. Religious expression is an individual act of expression. The protection afforded by ECHR, Article 9:

includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either *individually* or together with others, in public or in private...[it]...applies to all personal, political, philosophical, moral and, of course, religious convictions. It extends to ideas, philosophical convictions of all kinds, with the express mention of a person's religious beliefs, and their own way of apprehending their personal and social life.¹⁰⁶

As such, state protection for individuals expressing their personal religious beliefs should be founded on that very basis. On the specific problem of religious prejudice, this protection would be significantly more effective than that currently afforded by the State's well-intentioned but ultimately flawed policy decision to categorise individual religious practitioners as part of some wider religious, social or cultural group to which victims such as Asad Shah simply did not fit.

It is submitted that Lady Rae, in her sentencing statement for Tanveer Ahmed, inadvertently provided a partial draft solution to the problem raised by the Lord Advocate, which could be enacted as an amendment to the Criminal Justice (Scotland) Act 2003. The amendment is highlighted in bold,

For the purposes of section 74, an offence is aggravated by religious prejudice if—

at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will, based on:

the victim's expression of their personal religious beliefs;

or the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation;

or, the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

¹⁰⁶ See Generally, Council of Europe/European Court of Human Rights Research Division, 'Overview of the Court's case-law on freedom of religion' (2013) para 9, emphasis added
<www.echr.coe.int/documents/research_report_religion_eng.pdf> accessed 22 November 2016

It is submitted that this simple amendment would close the gap in protection for individuals, such as Asad Shah, expressing their personal religious beliefs, and ensure that those who evince malice and ill-will based on intolerance of an individual's expressed religious belief fall within the ambit of the legislation. This must surely align with the Scottish Government's wider policy on hate crime.