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Adam Tomkins MSP
Convener
Justice Committee

By email - justicecommittee@parliament.scot

20 October 2020

Dear Adam,

Further to my statement in Parliament on 23 September announcing Scottish Government changes to be proposed to the Hate Crime and Public Order (Scotland) Bill, I am writing to provide details of the amendments that the Scottish Government will lodge to the Bill at Stage 2 and a copy of the Bill as it would look if those amendments are approved by Parliament.

As you know, in my statement I advised that the Scottish Government would be seeking to change the operation of the stirring up hatred offences in the Bill relating to age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics. If approved by Parliament, these changes will have the effect that the stirring up hatred offences relating to these characteristics would require an intention on the part of the accused to stir up hatred as a necessary requirement for the offence to be committed. The list of amendments on this issue is included below and I attach separately a copy of how the Bill would look like if the amendments are approved.

I hope this is helpful and I look forward to giving evidence in front of the Committee later this month.

HUMZA YOUSAF

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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ANNEX

LIST OF AMENDMENTS

Hate Crime and Public Order (Scotland) Bill – Stage 2

Section 3

Humza Yousaf

- 1 In section 3, page 3, line 10, leave out <either—>

Humza Yousaf

- 2 In section 3, page 3, line 13, leave out from <or> to end of line 14

Section 5

Humza Yousaf

- 3 In section 5, page 4, line 35, leave out <either—>

Humza Yousaf

- 4 In section 5, page 4, line 38, leave out from <or> to end of line 2 on page 5

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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**THE FOLLOWING ACCOMPANYING DOCUMENTS ARE ALSO PUBLISHED:
Explanatory Notes (SP Bill 67-EN), a Financial Memorandum (SP Bill 67-FM), a Policy
Memorandum (SP Bill 67-PM) and statements on legislative competence (SP Bill 67-LC).**

This version of the Bill incorporates the proposed Government amendments to sections 3 and 5. The text that would be left out of sections 3 and 5 is shown in red using strikethrough text. This version of the Bill is provided for guidance only.

Hate Crime and Public Order (Scotland) Bill

[INCORPORATING PROPOSED GOVERNMENT AMENDMENTS]

An Act of the Scottish Parliament to make provision about the aggravation of offences by prejudice; to make provision about offences relating to stirring up hatred against a group of persons; to abolish the common law offence of blasphemy; and for connected purposes.

PART 1

AGGRAVATION OF OFFENCES BY PREJUDICE

5

1 Aggravation of offences by prejudice

(1) An offence is aggravated by prejudice if—

(a) where there is a specific victim of the offence—

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

(ii) the malice and ill-will is based on the victim's membership or presumed membership of a group defined by reference to a characteristic mentioned in subsection (2), or

15

(b) whether or not there is a specific victim of the offence, the offence is motivated (wholly or partly) by malice and ill-will towards a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (2).

(2) The characteristics are—

(a) age,

(b) disability,

20

(c) race, colour, nationality (including citizenship), or ethnic or national origins,

(d) religion or, in the case of a social or cultural group, perceived religious affiliation,

(e) sexual orientation,

(f) transgender identity,

(g) variations in sex characteristics.

25

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

- (4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice.
- (5) In this section—
- “membership”, in relation to a group, includes association with members of that group,
- “presumed” means presumed by the offender.

2 Consequences of aggravation by prejudice

- (1) Subsection (2) applies where it is—
- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice, and
- (b) proved that the offence is so aggravated.
- (2) The court must—
- (a) state on conviction—
- (i) that the offence is aggravated by prejudice, and
- (ii) the type of prejudice by which the offence is aggravated (by reference to one or more of the characteristics mentioned in section 1(2)),
- (b) record the conviction in a way that shows—
- (i) that the offence is aggravated by prejudice, and
- (ii) the type of prejudice by which the offence is aggravated (by reference to one or more of the characteristics mentioned in section 1(2)),
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
- (i) 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
- (ii) otherwise, the reasons for there being no such difference.

PART 2

OFFENCES RELATING TO STIRRING UP HATRED

Offences of stirring up hatred

3 Offences of stirring up hatred

- (1) A person commits an offence if—
- (a) the person—
- (i) behaves in a threatening, abusive or insulting manner, or
- (ii) communicates threatening, abusive or insulting material to another person, and

- (b) either—
- (i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins, or
 - (ii) as a result, it is likely that hatred will be stirred up against such a group.
- (2) A person commits an offence if—
- (a) the person—
 - (i) behaves in a threatening or abusive manner, or
 - (ii) communicates threatening or abusive material to another person, and
 - (b) ~~either—~~
 - (i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (3), ~~or~~
 - (ii) ~~as a result, it is likely that hatred will be stirred up against such a group.~~
- (3) The characteristics are—
- (a) age,
 - (b) disability,
 - (c) religion or, in the case of a social or cultural group, perceived religious affiliation,
 - (d) sexual orientation,
 - (e) transgender identity,
 - (f) variations in sex characteristics.
- (4) It is a defence for a person charged with an offence under this section to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable.
- (5) For the purposes of subsection (4), it is shown that the behaviour or the communication of the material was, in the particular circumstances, reasonable if—
- (a) evidence adduced is enough to raise an issue as to whether that is the case, and
 - (b) the prosecution does not prove beyond reasonable doubt that it is not the case.
- (6) For the purposes of subsections (1)(a)(i) and (2)(a)(i), a person’s behaviour—
- (a) includes behaviour of any kind and, in particular, things that the person says, or otherwise communicates, as well as things that the person does,
 - (b) may consist of—
 - (i) a single act, or
 - (ii) a course of conduct.
- (7) For the purposes of subsections (1)(a)(ii) and (2)(a)(ii), the ways in which a person may communicate material to another person are by—
- (a) displaying, publishing or distributing the material,
 - (b) giving, sending, showing or playing the material to another person,
 - (c) making the material available to another person in any other way.

- (8) A person who commits an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine (or both).

4 Culpability where offence committed during public performance of play

- (1) This section applies where—
- (a) an offence under section 3 is committed during a public performance of a play by a person who is a performer in the play, and
 - (b) the commission of the offence—
 - (i) involves consent or connivance on the part of a person who presents or directs the performance, or
 - (ii) is attributable to neglect on the part of such a person.
- (2) The person mentioned in subsection (1)(b) (as well as the performer) commits the offence.
- (3) For the purposes of this section, a person is to be taken to have directed a performance of a play given under the person’s direction even if the person was not present during the performance.
- (4) In this section, “play” and “public performance” have the same meanings as in the Theatres Act 1968.

Offences of possessing inflammatory material

5 Offences of possessing inflammatory material

- (1) A person commits an offence if—
- (a) the person has possession of threatening, abusive or insulting material with a view to communicating the material to another person, and
 - (b) either—
 - (i) the person intends, in doing so, to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins, or
 - (ii) it is likely that, if the material were communicated, hatred would be stirred up against such a group.
- (2) A person commits an offence if—
- (a) the person has possession of threatening or abusive material with a view to communicating the material to another person, and
 - (b) ~~either—~~
 - (i) the person intends, in doing so, to stir up hatred against a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (3), ~~or~~

(ii) ~~it is likely that, if the material were communicated, hatred would be stirred up against such a group.~~

(3) The characteristics are—

- (a) age,
- (b) disability,
- (c) religion or, in the case of a social or cultural group, perceived religious affiliation,
- (d) sexual orientation,
- (e) transgender identity,
- (f) variations in sex characteristics.

(4) It is a defence for a person charged with an offence under this section to show that the possession of the material was, in the particular circumstances, reasonable.

(5) For the purposes of subsection (4), it is shown that the possession of the material was, in the particular circumstances, reasonable if—

- (a) evidence adduced is enough to raise an issue as to whether that is the case, and
- (b) the prosecution does not prove beyond reasonable doubt that it is not the case.

(6) For the purposes of this section, the ways in which a person may communicate material to another person are by—

- (a) displaying, publishing or distributing the material,
- (b) giving, sending, showing or playing the material to another person,
- (c) making the material available to another person in any other way.

(7) A person who commits an offence under this section is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or
- (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine (or both).

Further provision relating to the offences

6 Powers of entry etc. with warrant

(1) A sheriff or justice of the peace may grant a warrant under this section authorising a constable or a member of police staff to enter premises if the sheriff or justice of the peace is satisfied, by evidence on oath, that there are reasonable grounds for suspecting—

- (a) that an offence under section 3 or 5 has been, or is being, committed at the premises, or
- (b) that there is evidence at the premises of the commission of an offence under section 3 or 5.

(2) A warrant granted under this section may authorise a constable or a member of police staff to—

- (a) enter the premises by force if necessary,
- (b) search the premises and any person found in the premises,

(c) seize and detain any material found on the premises, or on any person in the premises, if the constable or member of police staff has reasonable grounds for suspecting that it may provide evidence of the commission of an offence under section 3 or 5.

5 (3) A constable or a member of police staff who is authorised by a warrant granted under this section to seize and detain material may, if the material is only capable of being looked at, read, watched or listened to (as the case may be) after conversion from data stored in another form, require that the material—

(a) be converted into such a form in a way which enables it to be taken away, or

10 (b) be produced in a form which is capable of being taken away and from which it can be readily converted.

(4) In this section—

(a) “constable” has the same meaning as in section 99(1) of the Police and Fire Reform (Scotland) Act 2012,

15 (b) “member of police staff” means an individual appointed under section 26 of that Act,

(c) “premises” means any place and includes any—

(i) land or building,

(ii) vehicle, vessel, trailer, aircraft or hovercraft,

20 (iii) tent or moveable structure.

7 **Recording conviction for offence under section 3 or 5**

Where a person is convicted of an offence under section 3 or 5, the court must—

(a) state on conviction, and

(b) record the conviction in a way that shows,

25 the characteristic (or characteristics) to which the offence relates (by reference to it being an offence under section 3(1) or 5(1) or by reference to one or more of the characteristics mentioned in section 3(3) or 5(3)).

8 **Forfeiture and disposal of material to which offence relates**

(1) Where a person is convicted of an offence under section 3 or 5—

30 (a) the court may order the forfeiture of any material to which the offence relates, and

(b) the court may order that any of the forfeited material be disposed of in such manner as the court may direct.

(2) An order made under subsection (1)(b) does not take effect until—

35 (a) if an appeal is brought against the conviction or sentence, after the appeal is finally decided or abandoned, or

(b) otherwise, after the expiry of the period within which an appeal against the conviction or sentence may be brought.

(3) For the purposes of subsection (2), the lodging of an application for a stated case or note of appeal against sentence is to be treated as the bringing of an appeal.

9 Individual culpability where organisation commits offence

- (1) This section applies where—
- (a) an offence under section 3 or 5 is committed by a relevant organisation, and
 - (b) the commission of the offence—
 - (i) involves consent or connivance on the part of a responsible individual, or
 - (ii) is attributable to neglect on the part of a responsible individual.
- (2) The responsible individual (as well as the relevant organisation) commits the offence.
- (3) For the purposes of this section—
- (a) “relevant organisation” means an organisation listed in the first column of the table in subsection (4),
 - (b) “responsible individual” means, in relation to a relevant organisation—
 - (i) an individual falling within the corresponding entry in the second column of the table in subsection (4), or
 - (ii) an individual purporting to act in the capacity of an individual falling within the corresponding entry.
- (4) The table is as follows—

<i>Relevant organisation</i>	<i>Individual</i>
company as mentioned in section 1 of the Companies Act 2006	director, manager, secretary or other similar officer
	member, where the company’s affairs are managed by its members
limited liability partnership	member
other partnership	partner
any other body or association	individual who is concerned in the management or control of its affairs

10 Provision in relation to providers of information society services

Schedule 1 makes further provision about offences under sections 3 and 5 in relation to persons providing information society services (as defined in paragraph 5 of that schedule).

11 Protection of freedom of expression: religion

- (1) This section applies for the purposes of sections 3(2) and 5(2).

- (2) Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—
- (a) discussion or criticism of—
 - (i) religion, whether religions generally or a particular religion,
 - (ii) religious beliefs or practices,
 - (b) proselytising, or
 - (c) urging of persons to cease practising their religions.

12 Protection of freedom of expression: sexual orientation

- (1) This section applies for the purposes of sections 3(2) and 5(2).
- (2) Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—
- (a) discussion or criticism of sexual conduct or practices, or
 - (b) urging of persons to refrain from or modify sexual conduct or practices.

13 Interpretation of Part 2

- (1) This section applies for the interpretation of this Part.
- (2) “Material” means anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form.
- (3) References to an offence under a particular section include references to an offence of—
- (a) attempting to commit an offence under that section,
 - (b) aiding, abetting, counselling, procuring or inciting the commission of an offence under that section,
 - (c) conspiring to commit an offence under that section.

PART 3

FURTHER PROVISION RELATING TO THE CHARACTERISTICS

14 Meaning of the characteristics

- (1) This section applies for the interpretation of sections 1, 3 and 5.
- (2) A reference to age includes a reference to an age falling within a range of ages.
- (3) A disability is a physical or mental impairment of any kind.
- (4) For the purposes of subsection (3) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.
- (5) A group defined by reference to religion is a group of persons defined by reference to—
- (a) religious belief or lack of religious belief,
 - (b) membership of or adherence to a church or religious organisation,
 - (c) support for the culture or traditions of a church or religious organisation,

(d) participation in activities associated with such a culture or such traditions.

(6) A reference to sexual orientation is a reference to sexual orientation towards—

(a) persons of the same sex,

(b) persons of a different sex, or

5 (c) both persons of the same sex and persons of a different sex.

(7) A person is a member of a group defined by reference to transgender identity if the person is—

(a) a female-to-male transgender person,

(b) a male-to-female transgender person,

10 (c) a non-binary person,

(d) a person who cross-dresses.

(8) A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither—

15 (a) those typically associated with males, nor

(b) those typically associated with females.

15 Power to add the characteristic of sex

(1) The Scottish Ministers may by regulations add the characteristic of sex to the list of characteristics in any of the following provisions—

20 (a) section 1(2),

(b) section 3(3),

(c) section 5(3).

(2) Regulations under this section may modify section 14 by adding interpretative provision relating to the characteristic of sex.

25 (3) Regulations under this section—

(a) may make incidental, supplementary, consequential, transitional, transitory or saving provision,

(b) may make different provision for different purposes,

(c) are subject to the affirmative procedure.

30

PART 4

ABOLITION OF THE OFFENCE OF BLASPHEMY

16 Abolition of the offence of blasphemy

The common law offence of blasphemy is abolished.

PART 5

GENERAL PROVISIONS

17 Ancillary provision

- 5 (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under this section may—
- (a) make different provision for different purposes,
 - (b) modify any enactment (including this Act).
- 10 (3) Regulations under this section—
- (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of this or any other Act,
 - (b) otherwise, are subject to the negative procedure.

18 Modifications of enactments

15 Schedule 2 contains modifications of enactments.

19 Crown application

- (1) Nothing in this Act makes the Crown criminally liable.
- 20 (2) The Court of Session may, on an application by the Lord Advocate, declare unlawful any act or omission for which the Crown would be criminally liable if it were not for subsection (1).
- (3) Subsection (1) does not affect the criminal liability of persons in the service of the Crown.

20 Commencement

- (1) This section and sections 17 and 21 come into force on the day after Royal Assent.
- 25 (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) may—
- (a) include transitional, transitory or saving provision,
 - (b) make different provision for different purposes.

21 Short title

30 The short title of this Act is the Hate Crime and Public Order (Scotland) Act 2021.

SCHEDULE 1
(introduced by section 10)

OFFENCES RELATING TO STIRRING UP HATRED: INFORMATION SOCIETY SERVICES

Non-UK service providers: restriction on institution of proceedings

- 5 1 (1) Proceedings for an offence under section 3 or 5 may not be instituted against a non-UK service provider in respect of anything done in the course of providing an information society service unless the derogation condition is satisfied.
- (2) The derogation condition is satisfied where the institution of the proceedings—
- 10 (a) is necessary for the purposes of the public interest objective,
- (b) relates to an information society service that prejudices that objective or presents a serious and grave risk of prejudice to that objective, and
- (c) is proportionate to that objective.
- (3) In this paragraph—
- 15 (a) “non-UK service provider” means a service provider established in an EEA state other than the United Kingdom,
- (b) “EEA state”, in relation to any time, means—
- (i) a state which at that time is a member State of the EU, or
- (ii) any other state which at that time is a party to the EEA agreement,
- 20 (c) “EEA agreement” means the agreement on the European Economic Area signed at Oporto on 2 May 1992, together with the Protocol adjusting that Agreement signed at Brussels on 17 March 1993, as modified or supplemented from time to time,
- (d) “public interest objective” means the pursuit of public policy.
- (4) For the purposes of sub-paragraph (3)(a)—
- 25 (a) a service provider is established in a particular EEA state if the service provider—
- (i) effectively pursues an economic activity using a fixed establishment in that EEA state for an indefinite period, and
- (ii) is a national of an EEA state or a company or firm mentioned in Article 54 of the Treaty on the Functioning of the European Union,
- 30 (b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute the establishment of a service provider,
- (c) where it cannot be determined from which of a number of establishments a given information society service is provided, that service is to be regarded as provided from the establishment at the centre of the service provider’s activities relating to that service.
- 35

Exceptions for mere conduits

2 (1) A service provider does not commit an offence under section 3 or 5 in respect of the information transmitted in the course of providing so much of an information society service as consists in—

- 5 (a) the provision of access to a communication network, or
(b) the transmission in a communication network of information provided by a recipient of the service,

if the transmission condition is satisfied.

(2) The transmission condition is satisfied if the service provider does not—

- 10 (a) initiate the transmission,
(b) select the recipient of the transmission, or
(c) select or modify the information contained in the transmission.

(3) For the purposes of sub-paragraph (1)—

- 15 (a) the provision of access to a communication network, and
(b) the transmission of information in a communication network,
include the automatic, intermediate and transient storage of the information transmitted so far as the storage is solely for the purpose of carrying out the transmission in the network.

20 (4) Sub-paragraph (3) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

Exception for caching

3 (1) This paragraph applies where an information society service consists in the transmission in a communication network of information provided by a recipient of the service.

25 (2) The service provider does not commit an offence under section 3 or 5 in respect of the automatic, intermediate and temporary storage of information so provided, if—

- (a) the storage of the information is solely for the purpose of making more efficient the onward transmission of the information to other recipients of the service at their request, and
(b) the condition in sub-paragraph (3) is satisfied.

30 (3) The condition is that the service provider—

- (a) does not modify the information,
(b) complies with any conditions attached to having access to the information, and
(c) where sub-paragraph (4) applies, expeditiously removes the information or disables access to it.

35 (4) This sub-paragraph applies if the service provider obtains actual knowledge that—

- (a) the information at the initial source of transmission has been removed from the network,
(b) access to it has been disabled, or

- (c) a court or administrative authority has ordered the removal from the network of, or the disablement of access to, the information.

Exception for hosting

- 4 (1) A service provider does not commit an offence under section 3 or 5 in respect of
5 information stored in the course of providing so much of an information society service
as consists of the storage of information provided by a recipient of the service, if sub-
paragraph (2) or (3) is satisfied.
- (2) This sub-paragraph is satisfied if the service provider had no actual knowledge when the
10 information was provided that the storage of the information by the service provider
constituted an offence under section 3 or 5 (as the case may be).
- (3) This sub-paragraph is satisfied if, on obtaining such knowledge, the service provider
expeditiously removed the information or disabled access to it.
- (4) Sub-paragraph (1) does not apply if the recipient of the service is acting under the
authority or control of the service provider.

15 *Interpretation*

5 In this schedule—

“information society services” has the meaning given in Article 2(a) of Directive
2000/31/EC of the European Parliament and of the Council of 8 June 2000 on
certain legal aspects of information society services, in particular electronic
20 commerce, in the Internal Market (Directive on electronic commerce),

“recipient”, in relation to a service, means a person who, for professional ends or
otherwise, uses an information society service, in particular for the purposes of
seeking information or making it accessible,

“service provider” means a person providing an information society service.

25 SCHEDULE 2

(introduced by section 18)

MODIFICATIONS OF ENACTMENTS

Public Order Act 1986

- 1 (1) The Public Order Act 1986 is amended in accordance with this paragraph.
- 30 (2) Sections 18 to 21 (stirring up racial hatred) are repealed.
- (3) In section 23—
- (a) in subsection (1)(a), the words “displayed, published, distributed, or” are repealed,
- (b) in subsection (1)(b), the words “distributed, shown, played, or” are repealed,
- 35 (c) in subsection (2), the words “display, publication, distribution, showing, playing,
or” are repealed.
- (4) In section 25(1), for paragraphs (a) and (b), substitute “an offence under section 23”.
- (5) In section 29—
- (a) the definitions of “distribute”, “dwelling” and “publish” are repealed,

(b) for the definition of “recording” (including the interpretation of “play” and “show”, in relation to a recording), substitute—

““recording” means any record from which visual images or sounds may, by any means, be reproduced;”.

5 *Crime and Disorder Act 1998*

2 Section 96 (offences racially aggravated) of the Crime and Disorder Act 1998 is repealed.

Criminal Justice (Scotland) Act 2003

10 3 Section 74 (offences aggravated by religious prejudice) of the Criminal Justice (Scotland) Act 2003 is repealed.

Offences (Aggravation by Prejudice) (Scotland) Act 2009

4 The Offences (Aggravation by Prejudice) (Scotland) Act 2009 is repealed.