

Crown Office and Procurator Fiscal Service Written Response to the Desecration of War Memorials (Scotland) Bill, (Member's Bill)

1. The Crown Office and Procurator Fiscal Service (COPFS) prosecutors recognise the effect the desecration of war memorials has on individuals and families whose loved ones who are memorialised on them.
2. Prosecutors in Scotland understand the impact damage to a war memorial can have on the wider community and serving members of the UK Armed Forces and veterans.
3. As well as being historic monuments, war memorials may be treated as graves and tended by bereaved next of kin, families and comrades.
4. To many in Scotland they are emblematic of duty, sacrifice and honour.
5. Desecration of a war memorial is a form of aggravated offence of substantive crimes already known to the law of Scotland, and may be charged, depending on the circumstances under:
 - i) The common law of 'malicious mischief'
 - ii) The statutory offence of vandalism (under of sections 52(1) and (3) of the Criminal Law (Consolidation)(Scotland) Act 1995)
 - iii) Breach of the Peace
6. From a prosecutorial perspective it is not necessary to create a distinct new offence as is proposed by the Desecration of War Memorials (Scotland) Bill (the Bill) to capture this type of offending.
7. The seriousness of the offence could be marked by the introduction of a statutory aggravation which could be attached to existing substantive charges (such as vandalism or malicious mischief). This is addressed in further detail below.

Decision making:

8. It may be of value to set out the decision-making process that prosecutors currently follow when dealing with a report of alleged vandalism to a war memorial.
9. All reports from Police Scotland will be carefully considered and decisions made on a case-by-case basis in line with the publicly available [Prosecution Code](#).
10. The Prosecution Code sets out a range of factors which prosecutors will consider in any particular case. The factors which require to be taken into account in assessing the public interest will vary according to the circumstances of each case.
11. It has been suggested that the only consideration is the financial cost of damage. That is not the case.

12. Public concern and impact on the community will be key factors for the prosecutor to consider in cases involving vandalism, as will the significance of the structure, the location or nature of the item vandalised, and the motivation behind the alleged offending.
13. As set out in the Prosecution Code, the public interest is likely to require prosecution where criminal behaviour was motivated by any form of discrimination against the victim's ethnic or national origin or religious beliefs.
14. Where there is sufficient admissible, reliable and credible evidence of a crime committed by a reported individual and it is assessed that prosecutorial action is in the public interest, then there are a range of options available to prosecutors, from issuing warning letters, offering diversion from prosecution, issuing compensation orders, fiscal fines, fiscal work orders and prosecution in court.
15. Behaviour which involves desecration or vandalism of war memorials can be prosecuted under different charges, depending on the nature of the offending behaviour.
16. For example, a breach of the peace (a common law offence) could be used where the conduct is severe enough to cause alarm to ordinary people and threaten serious disturbance to the community.
17. However, the most likely offences are:
 - malicious mischief - the wilful or reckless destruction of property belonging to another, and
 - the statutory offence of vandalism under sections 52(1) & (3) of the Criminal Law (Consolidation)(Scotland) Act 1995. This is where any person, without reasonable excuse, wilfully or recklessly destroys or damages the property belonging to another.
18. The statutory offence of vandalism requires evidence of damage or destruction, but that is not the case for malicious mischief which offers flexibility in cases where there is no damage to the structure.
19. The statutory offence of vandalism can only be prosecuted at summary level and attracts a maximum sentence of 6 months imprisonment and or a fine not exceeding the prescribed sum (£10, 000).
20. For the offences of breach of the peace or malicious mischief, the sentencing powers for the court are unlimited at common law: the practical limit on sentence length being the relative sentencing powers of the court in which the crime is tried.
21. If the prosecutorial action taken is to raise proceedings, prosecutors select the forum most appropriate to the circumstances and/or as provided for in law. As a generality at summary level that is a maximum of one year imprisonment, at Sheriff and Jury it would be 5 years imprisonment, and at High Court it is unlimited.

22. For proceedings resulting in a conviction, it is for the court to make independent decisions about sentence based upon the specific facts and circumstances. If a Sheriff presiding over a solemn case decides that the maximum sentencing powers available are insufficient, it is open to them to refer the matter to the High Court.

The Bill as introduced:

23. In the view of prosecutors, the proposed legislation does not expand the circumstances which may already be prosecuted under the existing law.
24. It also does not create any additional sentencing powers for the courts.
25. This legislation would not mean that more cases were able to be detected and reported to prosecutors.
26. Whilst COPFS does not have a view on the maximum sentence that should be attached to this proposed legislation, the current offences available to prosecutors includes a common law offence where the sentencing powers are unlimited, as set out above.
27. The proposed maximum sentence of 10 years in this Bill would be less than the range of sentencing powers currently available to a judge in the High Court should a malicious mischief or breach of the peace charge be heard in that forum.
28. Prosecutors and the court can and do already take into account all factors including community impact and trauma caused by any desecration of a war memorial, not just the economic impact of the crime.
29. It may be of interest for the Committee to note that England and Wales do not have a separate offence for desecration of war memorials, instead the Police, Crime, Sentencing and Courts Act 2022 (the 2022 Act) enacted a provision which relates to criminal damage caused to all memorials with a commemorative purpose. This is different to the definition in this proposed Bill.
30. It appears one of the purposes of the legislation in the 2022 Act was to close an anomaly related to a link between the value of the criminal damage and the forum for prosecution which in turn, restricted sentencing options available in England and Wales. This is distinctly different from the position in Scotland where forum and thus sentencing options are not tied to the economic loss created by the offence of vandalism or malicious mischief.

The merits of creating a statutory aggravation in law

31. An alternative to legislating for a distinct offence could be achieved by creating a statutory aggravation which can be added to a substantive charge such as vandalism, malicious mischief or breach of the peace.
32. Statutory aggravations are commonly used in the criminal justice system to enhance an offence where there is already an existing law which covers the intended criminal conduct but there is a desire (i) to publicly mark the seriousness

of the offence and (ii) to provide the potential for the court to impose a more severe sentence.

33. A statutory aggravator only requires one source of evidence for it to be established. There is no need for the aggravation to be corroborated.
34. Currently where there is a finding of guilt, prosecutors will give a narrative of the offence to the presiding Sheriff or Judge, which will highlight any important or aggravating features of any offence, along with any details of community or economic impacts of a crime such as vandalism or malicious mischief. It is a matter for the court to decide on what elements it considers important in determining the appropriate sentence.
35. If a statutory aggravation was legislated for, then the court could be obliged to take the aggravation into account in determining the appropriate sentence and could be required to state, what additional element of the sentence is attributed to the aggravating feature.
36. The court could also be obliged to state on conviction, that the offence was aggravated by being related to the desecration of a war memorial and record the conviction in a way that shows this. The aggravation will appear on the criminal record of the individual.
37. The range of sentencing options currently open to the courts would remain intact.
38. The creation of a statutory aggravation could be applied in potentially wider circumstances than this Bill proposes. Depending on the wording this could allow for an aggravation to be added to other substantive offences other than the most used ones, such as vandalism or malicious mischief.
39. The creation of a statutory aggravation could meet the intended aim of this bill by elevating the status of war memorials in law to recognise the significance they play in communities across Scotland and the depth of feeling which occurs when they are vandalised or desecrated.