



Law Society
of Scotland

Stage 2 Briefing

Hate Crime and Public Order (Scotland) Bill

1 February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee has previously responded to the Scottish Parliament's Justice Committee's Call for Evidence¹ on the Hate Crime and Public Order (Scotland) Bill (the Bill)² introduced on 23 April 2020. We also produced Stage 1 Briefing on 14 December 2020.³ Now the Bill has reached Stage 2, we have the following comments ahead of the Stage 2 debate on the Bill scheduled to take place on Tuesday 2 and 9 February 2021. Our comments are grouped into under the various sections of the Bill.

General –Need for education and raising social awareness

We fully support the Bill's important and crucial message that hate crime is not to be tolerated or acceptable for individuals in Scottish society. Scotland must be a fair and just society and ensure that the Scottish criminal justice system works effectively so "victims of crime [should be] confident that the criminal justice system will act fairly, effectively and will help to reduce the risk of further victimisation."⁴

The Bill alone cannot get rid of prejudice which must be viewed along with Scotland's growing diverse ethnic and cultural communities who contribute significantly to our social fabric and economic framework and development. The 'mosaic of [these] differently mixed areas'⁵ partially provides the backdrop to the introduction of this important Bill.

¹ <https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf>

² <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hatecrime-and-public-order-bill.pdf>

³ <https://www.lawscot.org.uk/media/370108/2020-12-14-crim-stage-1-briefing-hate-crime-and-public-order-scotland-bill.pdf>

⁴ <https://www.gov.scot/publications/justice-scotland-vision-priorities/>

⁵ <https://policyscotland.gla.ac.uk/ethnic-diversity-changedscotland/#:~:text=Ethnic%20diversity%20is%20increasing%20throughout%20Scottish%20society%2C%20as,the%20extent%20to%20whi,ch%20th at%20diversity%20has%20spread>

If the Bill is passed, it is vital that a programme of education and raising social awareness supports the Bill's key message that needs to start from school and continue through all strands of society. It starts with the GIRFEC⁶ curriculum. Since the success of the Bill is so interconnected with awareness raising and the need for an effective community education programme, consideration should be given as to how best to ensure that should be achieved and measurable.

Should monitoring and scrutiny provisions should be built into the Bill as part of its parliamentary progress? We note that the Scottish Government has brought forward an amendment under section 15 for the Bill to require that the Chief Constable of the Police Service must, no later than 6 months after the end of each reporting year, publish a report on records made by the Police Service during that reporting year of cases categorised by the Police Service as (a) offences aggravated by prejudice within the meaning of section 1, and (b) offences under this Act. Though welcomed as a step in identification of what kind of aggravations and against which groups are more commonly occurring, we suggest that that should be published and laid before the Scottish Parliament for scrutiny but should include some measure of commitment towards raising awareness and education monitoring.

Our comments now link to the various sections of the Bill.

Overall, we appreciate the willingness of the Scottish Government to bring forward significant amendments to the Bill. We support the positive nature of these amendments in addressing issues which we raised in our Call for Evidence and Stage 1 briefing as some of the Bill's provisions were obscured by a significant lack of policy detail and clarity when it was originally introduced.

- **Section 1 Aggravation of offences by prejudice**

In particular, we welcome the proposed modernisation of language within the Bill to remove "evinces" and replace by "demonstrates." That, we agree, will avoid any risk of public confusion.

When creating new criminal offences restricting existing personal freedom, as the Bill entails, the law must be fair and balanced. The Bill must stand alone and avoid where possible the need for clarification through caselaw. There should no role for "guidance to accompany the legislation [should it be passed] [to] help explain how the law operates in user friendly ways so that those who may benefit most from the operation of the legislation are aware of how it operates."⁷ The Bill should be easy to understand and apply.

We note that various amendments being brought to seek to change the list of characteristics under section 1(2). We fully support the Bill including a necessary measure of future proofing so the Bill, once implemented, does not require frequent amendment subject to the anticipated conclusion to the work by the misogyny harassment group led by Baroness Helena Kennedy. However, any substantial change to

⁶ <https://www.gov.scot/policies/girfec/>

⁷ paragraphs 80 and 81 of Policy Memorandum of the Bill

the list of aggravations should be subject to robust scrutiny, preferably by use of the super-affirmatory regulation making powers as outlined in the amendment to section 15 of the Bill.

The Justice Committee has debated⁸ whether other groups should be included within the list of aggravations which has also brought in differing views relating to groups of “Gypsy, Gypsy Travellers, Roma and Travellers, asylum seekers and refugees” who represent a wide community. The reassurance from the Scottish Government on how such different groups and other can be adequately safeguarded from hate crimes under the current wording of this Bill is important.

Section 2 Consequences of aggravation by prejudice

We had proposed that section 2(2) (c) of the Bill should be removed. That requires a statement on how the sentence is different from that which the court would have imposed if the offence were not aggravated, the extent of and the reasons for that difference or the reasons for there being no difference.

Subject to the progress of the Stage 2 debate, we have included under the Appendix to the Briefing how our proposed amendment would read for consideration at Stage 3 as required.

Lord Bracadale in the “Independent Review of Hate Crime Legislation in Scotland” recommended that this practice should be discontinued since it complicated the sentencing process. We consider that this practice may give rise to potential appeals and to a perception of, if not actual, inconsistencies in sentencing where victims may feel aggrieved if it felt that the sentence did not properly reflect the aggravation.

This relates to the need to understand sentencing in relation to offending behaviour which is crucial in preventing hate crimes. The factors involved in sentencing are complex and relate partly to deterrence by sending out a message to those who have offended and public denunciation of the offending behaviour to those who have been the victims. Consistency of sentencing across Scotland is vital. This role is best achieved by Scottish Sentencing Council (in ensuring that a balance is maintained between freedom of expression and other human rights).

Consolidation

The Scottish Government has included has proposed an amendment at Stage 2 to include a new offence covering “racially aggravated harassment.” This amendment has two effects:

Consolidation: It addresses the need for the Bill to consolidate hate crime into a modern code of offences, which we called for at the Bill’s introduction. Removal of the archaic common law crime of blasphemy achieves that in part. Consolidation is important to allow all to deal with hate crime such as the police and prosecution service so that there is the benefit of a “one stop shop” as was achieved with codification of

⁸ Stage 1 Debate Paragraph 337 of the Bill’s Stage 1 Report
https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

sexual offences in the Sexual Offences (Scotland) Act 2009. This change is welcomed as the Bill should now if passed afford consolidation of hate crime offences for Scotland.

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995: Though we consider that the repeal of section 50A as recommended by Lord Bracadale “would have no material impact on the ability to prosecute offences,” if it is to be retained and modernised as the amendment proposes, that is a better fallback position. It would be helpful in going forward if its use of the offence could be monitored.

Section 50A has been modified slightly in line with modern drafting with an increase in the summary sentencing provisions which is entirely in keeping with modern sentencing powers and is unobjectionable.

Section 3 - Offences relating to stirring up hatred

We note the Scottish Government’s amendments insert a reasonable person test with regard to the commission of stirring up offences which again has the benefit of a well know tried and tested test with which the courts are fully familiar. These relate to both section (a) with regard to a person’s behaviour and (b) to communication of material.

We fully support the proposed amendment⁹ to remove insulting from the commission of this offence. This amendment seeks to remove insulting from the offence of stirring up hatred.

Section 3(1) of the Bill introduces an offence relating to stirring up hatred. Stirring up hatred is conduct which encourages others to hate a group and differs from the conduct caught by the offence in section 1 of the Bill. Stirring up offences are aimed at avoiding a “social atmosphere in which prejudice and discrimination are accepted as a norm.” The threshold for the commission of an offence of stirring up is too low as set out in sections 3(1)(a) and (b) of the Bill. That means a person who makes insulting or derogatory remarks about an individual or group defined by race and in doing so either intends to stir up hatred against a group of persons commits an offence.

Lord Bracadale in the “Independent Review of Hate Crime Legislation in Scotland” considered that insulting conduct should not form part of the new offence. There seems no justification for this retention other than concerns that the message which its removal would send. This is unpersuasive, emphasising again the need for clear messages to support the Bill. Insulting should not alone be a standard for criminal conduct.

There may be an argument that by including “insulting” in section 3(1) of the Bill and its exclusion in section 3(2) of the Bill could be discriminatory and arguably, seek to create a hierarchy of victims which is not the purpose of the Bill.

Section 4 Culpability where offence committed during the public performance of play

We welcome the proposed deletion of this section.

⁹ Proposed by Dean Lockhart

Section 5 Offences of possessing inflammatory material

We welcome the proposed deletion of this section.

Section 6 Powers of entry etc with warrant

We welcome the recognition by the Scottish Government that there should be a time period on the exercise of any warrant of 28 days as proposed in the amendment. That is in line with other provisions permitting the grant and execution of warrants. We continue to have some concerns about how section 6(3) of the Bill will operate. We have outlined in the Appendix where we consider that amendment may provide some necessary clarity over the operation of this section. We propose that this may be revisited at Stage 3.

Section 15 Power to add the characteristic of sex

We note the Scottish Government's proposed amendment to ensure that any regulations that to add in sex will be subject to the super-affirmatory provisions which have been specified in full. Such regulations would be laid in draft before the Scottish Parliament by means of a proposed draft of the instrument so that there would be a period for representations to be made about the proposed draft. Though we consider that primary legislative measure would provide the most robust means for scrutiny if any such measures are to be added to the list of aggravations, this should provide an improved measure for appropriate scrutiny. It would also not delay unnecessarily making of any such changes by needed to find a suitable legislative opportunity. That measure of flexibility has been retained.

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Appendix Amendments for Stage 3

Amendment 1 Clause 2, Page 2, line 21, leave out <and> to end line 21

Effect

The amendment removes the requirement to state how the sentence is different from that which the court would have imposed if the offence were not aggravated, the extent of and the reasons for that difference or the reasons for there being no difference.

Reason

Lord Bracadale in the “Independent Review of Hate Crime Legislation in Scotland” recommended that this practice should be discontinued since it complicated the sentencing process. This practice may give rise to potential appeals and to a perception of, if not actual, inconsistencies in sentencing where victims may feel aggrieved if it felt that the sentence did not properly reflect the aggravation.

Understanding sentencing in relation to offending behaviour is crucial in preventing hate crimes. The factors involved in sentencing are complex and relate partly to deterrence by sending out a message to those who have offended and public denunciation of the offending behaviour to those who have been the victims. Consistency of sentencing across Scotland is vital. This role is best achieved by Scottish Sentencing Council (in ensuring that a balance is maintained between freedom of expression and other human rights).

Amendment 2 Clause 6, Page 6, line 11, at end insert

< () where the conversion or production of such material is required, a constable or a member of police staff will require to act reasonably with regard to time permitted for such conversion or production to take place and the form in which such conversion or production of material is to take. Any costs incurred in connection with the conversion or production of such material will be borne by those instructing a constable or member of police staff to seize or detain such material.>

Effect

The amendment ensures the reasonable exercise of the powers under section 6(3) of the Bill that require the conversion or production of material being seized for the constable or officer member of police staff.

Reason

Section 6(3) of the Bill is very wide where material being seized 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 (b) be produced in a form which is capable of being taken away and from which it can be readily converted.”

The amendment to act reasonably is appropriate to ensure that such conversion or production is afforded time for those requiring to convert or to produce such material and in relation to the form that the conversion or production is to take. Costs if any too should be borne by Police Scotland or those instructing the search.