



Law Society
of Scotland

Hate Crime and Public Order (Scotland) Bill - freedom of expression

Submission for the Roundtable Event

22 February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to attend the Scottish Parliament's Justice Committee's roundtable event to provide evidence on the proposed amendments to the Hate Crime and Public Order (Scotland) Bill (the Bill)¹ relating to the proposed provisions dealing freedom of expression in advance of the Bill's Stage 3.

We discuss the background to the roundtable concluding that **Option 3** is our preference. We also include a note on Article 10 of the European Convention on Human Rights (ECHR) in Appendix 2.

Background to the roundtable discussions

The letter from the Cabinet Secretary for Justice, Humza Yousaf MSP to the Justice Committee dated 17 February 2021 provides the background to these roundtable discussions. That letter sets out four options to deal with the freedom of expression provisions which were not what was included in the Bill as it was originally introduced.

Each of the four options approaches the issue of freedom of expression in a slightly different fashion, though their actual format is generally similar in terms of drafting. The standard of criminality outlined in sections 3(1) and (2) of the Bill will not be reached where such behaviour or material involves or includes certain types of expression specified in the four suggested options (the premise for each option being slightly different)

Illustrative scenarios alongside the options have been provided which are helpful in clarifying the Bill's policy intentions.

Since the implications of being convicted of an offence under section 3(1) and (2) of the Bill are considerable, those offending must be aware of the risk of offending and when their conduct merits prosecution. Ultimately, that decision to prosecute lies at the discretion of the Crown Office and Procurator

¹ The Bill as amended at Stage 2- <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/stage-2/bill-as-amended-at-stage-2.pdf>

Fiscal Service (COPFS), based on sufficient admissible evidence as to a crime having been committed and prosecution being in the public interest. Where that burden of proof is satisfied, it will be for the defence to establish that the defence to the actions under freedom of expression has been made out as a reverse burden. This is a burden placed on the accused to demonstrate that the freedom of expression has been made out.

It is therefore of considerable importance in relation to which offences that the accused can avail themselves as to the freedom of expression defence and as what constitutes that defence such as criticism and discussion. It is therefore important that the scope of the defence and the circumstances as to when it can be relied upon is clear and easily understood.

Our Position

We responded to the Justice Committee's Call for Evidence² on 24 July 2020. We discussed Sections 11 and 12 of the Bill that dealt with the protection of freedom of expression for religion and sexual orientation, respectively.

At that time, we questioned whether the scope of these sections went far enough. There may have been a historic justification on retaining freedom of expression provisions for certain categories of characteristics such as religion. However, in the interests of the Bill's over-riding modernisation agenda, we prefer the inclusion of a defence that does not differentiate among the characteristics set out in section 1(2) of the Bill, thereby either creating intentionally a hierarchy or a perception of a hierarchy of victims/characteristics.

Hate crime is unacceptable in 21st Scotland; all victims of whatever characteristics should have similar expectations of what amounts to offending behaviour.

We had suggested then that a similar defence for all characteristics should be included, reflecting the terms of the now repealed section 7 of the Offensive Behaviour and Threatening Communications Act 2012 (2012 Act) where it stated:

(1)... nothingprohibits or restricts (a) discussion or criticism of religions³ or the beliefs or practices of adherents of religions, (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, (c) proselytising, or (d) urging of adherents of religions to cease practising their religions.

We note that each of the four options follow substantially the wording from that section albeit that they contain modification depending on which characteristics are included.

Generally, discussion and criticism are wide concepts and should not justify prosecution except where the respective threshold of offending outlined in sections 3(1) and (2) is reached. Deciding what amounts to

² <https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf>

³ Religions includes a) religions generally, (b) particular religions, and (c) other belief systems.

criticism is subjective and difficult to establish when offensive behaviour stops being just criticism and potentially actionable.

The Cabinet Secretary's letter supports that "very robust criticism, is in itself not a matter for prosecution under this Bill." As Lord Justice Sedley in *Redmond-Bate v. DPP*⁴ stated:

"Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative... Freedom only to speak inoffensively is not worth having .."

Freedom of expression provisions help to reinforce the boundaries of the criminal law by protecting the right to express views that may be distasteful or offensive to many, but nonetheless are not and should not be the business of the criminal law and subsequent prosecution.

The freedom of expression provisions applied collectively across the four options will provide clarity for those engaging in the exercise of their rights to free speech. If the freedom of expression defences are available for some rather than all characteristics effectively sends a message that offers greater protection to certain individuals and groups and inevitably less to others. That seems not to be the clear message required.

Supporting option 3 as our favoured approach as outlined above has several advantages. It is simple. It is easy understood. It has clarity and ensures that each of the characteristics is treated equality. It sends a comprehensive message about boundaries and what is /what is not acceptable. It protects freedom of discussion and criticism.

For completeness, we outline a summary of our views in respect of each option below

- **Option 1 includes provisions applying to all characteristics in the Bill. It includes additional provisions in respect of religion. This additional provision relates to types of expression that are not necessarily merely discussion or criticism**

This has the benefit of including all the characteristics in section 1(2) of the Bill.

The Bill as introduced only offered specific freedom of expression protections in respect of religion and sexual orientation. This continues the specific protections outlined under sub-section 2 which echo section 7 of the 2012 Act. This creates a hierarchy of victims.

It is not necessarily clear in policy terms why additional protections are required for religion. We are aware that these were included and agreed at Stage 2 so careful consideration is needed now to exclude them.

However, this option, as highlighted above, risks sending message that expressions of religious bigotry are treated with greater sensitivity than any criticism of the other characteristics.

⁴ 1999 Crim LR 998

Option 2 has the same effect as option 1 except no provision for race is included

This has the benefit of including all the characteristics in section 1(2) of the Bill. It has the same effect on religion as stated above.

What this means is that there would be no freedom of expression protection in respect of discussions concerning race. We look forward to hearing the Scottish Government's policy justification for this approach. From the COPFS's Report on Hate Crime in Scotland 2019-2020⁵, racial crime remains the most commonly reported hate crime where 3,038 charges relating to race crime were reported in 2019-20 which was an increase of 4% compared to 2018-19.

Option 3 has the same effect as option 1 except no additional provision for religion is included.

Our preferred option for the reasons stated above. This takes the most consistent approach across all the characteristics. No characteristic is singled out for what may be perceived to be preferential treatment. All characteristics should be equal before the law.

The option allows an opportunity to adopt a holistic approach to send this clear message.

Option 4 has the same effect as option 1 except no provision for race is included and no additional provisions

This has the benefit of including all the characteristics in section 1(2) of the Bill except race. Our comments under option 2 apply. This approach may be appropriate if it is perceived on policy grounds that the defence of freedom of expression should not apply to race.

Finally, we would highlight too the need to consider possible changes being made to the list of characteristics in section 1(2) of the Bill. While focused perhaps on the possible inclusion following Baroness Kennedy's⁶ Misogyny and Criminal Justice in Scotland Working Group Report to include sex, there is a further benefit in the option 3 approach. That would allow that freedom of expression provision to apply equally to that or any other characteristic to be applied in the future. That would avoid any debate on the tiering of future modified or varied characteristics.

Appendix 1

⁵ <https://www.copfs.gov.uk/images/Documents/Statistics/Hate%20Crime%20in%20Scotland%202019-20/Hate%20Crime%20in%20Scotland%202019-20.pdf>

⁶ <https://www.gov.scot/groups/misogyny-and-criminal-justice-in-scotland-working-group/>

Article 10 of the European Convention on Human Rights (ECHR) -Freedom of Expression

Since the question of Article 10 is relevant we felt that we should include some discussion as to Article 10 which underpins the freedom of expression provisions however included in the Bill.

The right to freedom of expression is described as one of “the essential foundations of a democratic society.”⁷ This right includes the freedom to hold opinions and to receive and relay information and ideas without interference by public authorities and regardless of any frontiers.⁸ In exercising these rights, restrictions as those intended by the Bill and other legislation apply to prevent disorder and crime, to maintain public safety and order and to respect the protection of others. Breaches that follow are dealt with by criminal sanctions. These restrictions conflict with Article 8 ECHR guaranteeing the right to respect for private life, family life, home and correspondence.

Article 10 states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Any interference regarding freedom of expression must be proportionate. The Bill however it is finally framed must be careful to ensure that is achieved.

⁷ Handyside v. United Kingdom (1976) 1 E.H.R.R.737

⁸ Pillans, Brian Delict: Law& Policy 5th Edition W Green at page 41



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