



Law Society
of Scotland

Scottish Parliament Stage 3 Briefing

Hate Crime and Public Order (Scotland) Bill

9 March 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 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. Now the Bill has reached Stage 3 where we have the following comments ahead of the Stage 3 debate on the Bill scheduled to take place on Wednesday 10 March 2021.

Our comments are grouped into sections where we consider:

- Hate crime, the Bill's messages and the Bill's progress
- Freedom of expression
- Consolidation/Future proofing
- Raising awareness and educational requirements

Hate crime, the Bill's messages and the Bill's progress

We recognise that the Bill has been subject to intense parliamentary scrutiny and criticism from stakeholders. This is, perhaps, in retrospect unsurprising, when considering that the Bill touches on issues of significance concerning human rights including freedom of expression.

Hate crime itself has no commonly recognised definition though Lord Bracadale's Report³ provided a good starting point (and importantly, where the work began, culminating now with the Bill before the Scottish Parliament). It outlining that hate crime are:

"Offences "which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from 'ordinary' crimes."

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 Independent review of hate crime legislation in Scotland: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2018/05/independent-review-hate-crime-legislation-scotland-summary-document/documents/00535937-pdf/00535937-pdf/govscot%3Adocument/00535937.pdf>

Hate crime is unacceptable in 21st century Scotland. That hate crime occurs far too often is also patently clear from the Police Scotland's statistics published recently.⁴ They confirmed the incidence of 6,448 hate crimes⁵ in 2019-20. Each of these crimes has a victim but is a complaint, not a conviction. They must be viewed with empathy for the distress caused by the effect of these crimes on those targeted and affected who suffer consequential mental and physical harm.

The Bill's message must be clear to society to promote a common understanding of:

- what comprises hate crime,
- what groups it protects and
- the effect of that protection.

An accepted legislative definition is a start, but the Bill needs to be supported by much more which includes raising awareness of its provision and the necessary training and education for all involved including the public.

The backdrop to the timing of the passage of the Bill should be recognised. Scotland has changed with its growing diverse ethnic and cultural communities, contributing significantly to its social fabric and economic development.⁶ For Scotland to be a fair and just society, diversity should not engender isolation for any person or group on account of who they are but should support inclusion.

That is achieved by emphasising that hate crime is and will not tolerated, acceptable by or directed to any individuals/groups in Scottish society. The Bill affords an opportunity that "victims of crime [should be] confident that the Scottish criminal justice system will act fairly, effectively and will help to reduce the risk of further victimisation."⁷

The Bill's progress has been subject to a high level of robust scrutiny. The Scottish Government has come a long way in making substantial changes to the Bill at Stage 2 reflecting issues expressed by us⁸ among others in relation to the lack of original detail and policy justification.

We support the Bill in making that start on seeking to support and encourage an integrated, equal and diverse Scottish society in which all can live, work and play irrespective of any of the characteristics in section 1(2) of the Bill.

We have the following additional observations to make:

⁴ Characteristics of police recorded hate crime in Scotland: study. <https://www.gov.scot/publications/study-characteristics-police-recorded-hate-crime-scotland/pages/5/>

⁵ It is important to note that for the report that a hate crime is any crime which is perceived by the victim or any other person, to be motivated (wholly or partly) by malice and ill-will towards a social group. In Scotland, the law recognises hate crimes as crimes motivated by prejudice based on the characteristics 'Developing Information on Hate Crime Recorded by the Police in Scotland' report.

⁶ In 2017, National Records of Scotland estimated that 7% of the resident population of Scotland was born outside the UK

⁷ <https://www.gov.scot/publications/justice-scotland-vision-priorities/>

⁸ <https://www.lawsco.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf>

Freedom of Expression

That parliamentary scrutiny has included the holding of a recent roundtable event on 22 February 2021 which explored the potential scope of a freedom of expression defence where a range of options was outlined and discussed.⁹

When the Bill was introduced, we had questioned if the defences outlined originally at sections 11 and 12 of the Bill went far enough so debate was important, especially as in deciding what amounts to freedom of expression such as criticism is subjective. It is difficult to establish when offensive behaviour stops being just criticism and should be potentially actionable.

As Lord Justice Sedley in *Redmond-Bate v. DPP*¹⁰ 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 ..”

In the amendments now brought forward at Stage 3, the Scottish Government is seeking to satisfy a broad range of interests. What is important in view of the Bill’s message about inclusion is that there should be a consensus for the Bill. All victims of whatever characteristics should have similar expectations of what amounts to offending behaviour.

Generally, we are content that 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. We still feel given the Bill’s over-riding modernisation agenda, that we would have preferred the inclusion of a defence that did 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.

By including freedom of expression provisions, however, this will 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 any subsequent prosecution.

We also have concerns that the freedom of expression provisions will not now be as easily understood, lack a degree of clarity and send confusing messages about boundaries and therefore what is /what is not acceptable. Legislation calls those responsible to account as this is fundamental, recognising collective responsibility to address all racism and other forms of hate, while ensuring dignity, respect and compassion for those affected in society.

In creating new criminal offences restricting existing personal freedom, the law must be fair and balanced so that the Bill avoids clarification through caselaw in the future. The Bill should stand on its own so that there is 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.” However, as these amendments stand, inevitably hard cases will come

⁹ <https://www.lawscot.org.uk/media/370516/2021-02-22-crim-hate-cime-and-public-order-scotland-bill-freedom-of-expression-f.pdf>

¹⁰ [1999] EWHC Admin 733

where case law will need to add clarity as well as a stress on the increased importance in the provision of training and education required for the Police Scotland and the Crown Office and Procurator Fiscal Service in handling of complaints received from the public as to whether the incident amounts to criminal conduct.

Consolidation/Future proofing

The Bill aims to consolidate hate crime into a modern code of offences, as we called for at the outset. The Bill, subject to the ongoing freedom of expression discussion, should provide a giant step forward in setting out a “one stop shop” like that achieved by the codification of sexual offences in the Sexual Offences (Scotland) Act 2009.

The Scottish Government has set up a Working Group on Misogynistic Harassment chaired by Baroness Kennedy considering the possibility of creating a new offence of misogynistic harassment in Scots law. If recommended, an amendment will be brought forward to the legislation using the order making powers under section 15 of the Bill with super- affirmative regulations. Substantive changes to criminal law must ensure policy intentions are fully and publicly debated.

While accepting that the use of these powers to include sex allows the necessary parliamentary debate, to take place, what must be stressed is that it is not merely consideration of misogyny but also misandry that is required. All hatred stirred up because of a person’s sex should be caught by the law and not just instances where the victim identifies as female. How the freedom of expression defences will fit in with sex as a characteristic still would need to be considered.

In considering longer -term if sex can be added, then why not consider the inclusion of other groups going forward. And how would that affect freedom of expression? The Bill includes powers under section 17(2) of the Bill to vary the characteristics under section 1(2) of the Bill but not add to them. We seek reassurance from the Scottish Government on any such different groups and other can be adequately safeguarded from hate crimes in future as this may well arise.

Raising awareness and education

The Bill alone will not get rid of prejudice.

Alongside with the Bill, there must be a programme of raising awareness and education for all. We support to that extent the principle of Margaret Mitchell MSP’s amendment (though would suggest that it is not restricted to age) where it outlines that “the Scottish Ministers must take such steps as they consider appropriate to promote public awareness and understanding about offences under the Act...”

Importantly, this programme needs to start within schools and the GIRFEC curriculum.

It would be helpful if the Scottish Government were to indicate how they intend to plan, when to announce and to publish such a plan plus commit resourcing to tackling the issue of raising awareness in education which is vital alongside commencement of the Bill. A public campaign should be aimed at:

- (1) promote public awareness and understanding of sections 1-3 of the Act
- (2) ensure that policy areas of education, training, sport and employment are specially included
- (3) engage and involve community groups and groups representing people with the characteristics in section 1 (2) of the Act
- (4) include a tracker system to monitor how the plan will be implemented.

That plan should include the provision of a Report to the Scottish Parliament. The Bill seems to us to be integrally interconnected with that necessary awareness raising and education programme.

Training is another key requirement for all involved in the Bill but specifically, we focus on Police Scotland and COPFS as they will be key to understanding in what circumstances to prosecute. The judiciary too has the role in sentencing to ensure effective punishment and deterrence results. The Scottish Sentencing Council could help in promoting the Bill by publishing Guidelines to help consistency of approach.

It is only then that those reporting crimes will have the necessary confidence in the system that there will be fair, transparent and effective prosecutions conducted in the public interest that allow for appropriate sentencing on conviction.

That is required to uphold the rule of law for the public to respect and obey the law, and to ensure Scotland functions effectively as a multi-cultural society. The Bill should seek to ensure a degree of future proofing in representing societal values now. There are significant concerns over the expressed intention in paragraphs 80 and 81 of Policy Memorandum of the Bill that the Scottish Government intends to produce “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.” We would highlight again the Stage 3 amendment which we had suggested being included which is contained under the Appendix.

Appendix

Hate Crime and Public Order (Scotland) Bill

Suggested Amendment for Stage 3

Section 15, Page 10 at end line 33 insert

<() **Duty of Scottish Ministers to raise awareness**

The Scottish Ministers must, after consultation with such persons as they think appropriate and no later than 9 months after Royal Assent, publish a plan outlining the steps to be taken in developing and delivering a public campaign to raise awareness of sections 1-3 of the Act.

(2) The public campaign must –

(1) promote public awareness and understanding of sections 1-3 of the Act

(2) ensure that policy areas of education, training, sport and employment are specially included

(3) engage and involve community groups and groups representing people with the characteristics in section 1 (2) of the Act

(4) include a tracker system to monitor how the plan will be implemented.

(3) The Scottish Ministers must provide a report to the Parliament within three years of the Royal Assent to include information on how the public campaign has been delivered



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