



Law Society
of Scotland

Response to the Call for Evidence

Hate Crime and Public Order (Scotland) Bill

24 July 2020



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 Law¹, Equalities, Mental Health and Disability Law Committees welcome the opportunity to consider and respond to the Scottish Parliament's Justice Committee's Call for Evidence on the Hate Crime and Public Order (Scotland) Bill (the Bill).² The committees have the following comments to put forward for consideration.

Executive Summary

Scotland in the 21st century is a diverse and multicultural society where in 2017 the National Records of Scotland estimated that 7% of the resident population of Scotland was born outside the UK.³ A study in Scotland in 2014 highlighted that ethnic diversity was growing, with the report finding that one in six Scottish households contained two or more multi-ethnic nationalities.⁴ That background provides the context in which the Bill is being introduced to present the Scottish Government's clear message that hatred should have no place now or in our future society."

There are some positive aspects to the Bill which include that:

- It is timely to consolidate hate crime to provide a modern code of offences, which includes tidying up the law by removing the archaic common law crime of blasphemy.
- The statutory aggravation model should continue to be the means used for prosecuting hate crime to maintain similar and appropriate thresholds for criminal offending as exist at present.

¹ The Criminal Law Committee is made up of members of defence solicitors across Scotland and COPFS as well as legal academics

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

³ <https://www.iriss.org.uk/resources/insights/migrant-integration-scotland-challenges-and-opportunities>

⁴ <https://policyscotland.gla.ac.uk/ethnic-diversity-changed-scotland/>

- Adding to the characteristics with age is relevant for today and reflects contemporary societal values.
- We have significant reservations regarding a number of the Bill's provisions which we outline below both in response to the specific questions and under the section headed Miscellaneous, which deals with sections, 6, 9 and 14 of the Bill.

These concerns include:

- The creation of new offences, specifically sections 3-5 of the Bill which in their own way will restrict freedom of expression. These provisions seem unduly wide without any specification provided as to the actual type of offending conduct that is intended to be criminalised. Criminal law must have certainty about the offending conduct it prohibits and intends to sanction by way of penalties. That is because the effect of a criminal conviction regarding any individual's life such as career and plans to travel may be significant.
- The need for policy justification and clarity affects a number of the Bill's provisions where there is a lack of information or policy justification. The Bill must make good law, which requires the effective use of parliamentary debate to ensure that that necessary clarity is obtained. When creating new criminal offences restricting existing personal freedom, the law needs to be fair and balanced.
- The Scottish Government expressed the intention that it sought "to ensure a consistent approach across the characteristics, including any new characteristics. This would involve a standard approach to how, for example, the statutory aggravations are applied, and would also help ensure there is not a perceived (or real) hierarchy between the characteristics."⁵
- We are not sure that this has been achieved in the respective drafting of sections 3 and 5 of the Bill. That is supported by our understanding that from the Scottish Centre for Crime & Justice Research in 2016⁶ that there is "underreporting and inconsistency in reporting practices [that makes] it difficult to analyse hate crime trends, but that the harms of this type of crime are widely experienced in Scotland....identified a perception that some protected categories are prioritised for action over others, that some groups are still marginalised in the research process (such as those with learning disabilities and people in prison), and that many stakeholders are unhappy with the terminology used to discuss hate crime."
- Issues of misogyny and indeed misandry are too important to be left to secondary legislation. Substantive changes to criminal law must be included in primary legislation where the policy intentions can be fully and publicly debated. We call upon the Scottish Government to include, by way of amendments during the Bill's passage, what their intentions are with regard to misogyny.
- Finally, this Bill should promote confidence among those reporting relevant crimes. Critically, the Bill should also ensure fair, transparent and effective prosecution in the public interest and appropriate sentencing reflecting on deterrence and punishment.

⁵ The Bill's Equality Impact Assessment Record <https://www.gov.scot/publications/hate-crime-public-order-scotland-bill-equality-impact-assessment/that>

⁶ <https://www.sccjr.ac.uk/news-events/news/hate-crime-in-scotland-is-underreported-sccjr-report-finds/>

General

We support the principles of the Bill in seeking to modernise hate crime laws in Scotland. It provides an unique opportunity for Scotland to “shape hate crime legislation so that it is fit for 21st century Scotland and, most importantly, afford sufficient protection for those that need it.”⁷ The Bill’s introduction has been awaited for some time and represents the culmination of work from September 2016⁸ comprising several consultations and reports.⁹

One of the main issues with the current legislation is that it lacks the certainty required by criminal law in order 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. Calling upon those who are responsible to account, as this legislation will do, is fundamental, recognising our collective responsibility to address all racism and other forms of hate, while ensuring dignity, respect and compassion for those affected in society. There should be no hierarchy of victims which is a part of the commendable approach and should be a strength of the Bill.¹⁰

Consolidation, which we discuss below more, fully brings together existing crimes and offences. The Bill, when supported by effective training and education, will show that hate crime is not tolerated by individuals in society. It is important too, to ensure that Scotland is a fair and just society, as outlined in *Justice in Scotland: Vision and Priorities*, where the Scottish criminal justice system should work effectively for all providing that “*victims of crime are confident that the criminal justice system will act fairly, effectively and will help to reduce the risk of further victimisation.*”¹¹

Though the Bill is in relatively short compass (with 21 sections and two schedules), its importance to Scots criminal law is key when considering the its objectives which include:

- Updating and consolidating the existing law and updating the list of the groups to be protected by the hate crime laws by adding age
- Creation of a crime of stirring up hatred against any of the protected groups
- Abolition of the crime of blasphemy.

We highlight concerns over the vagueness of the Bill resulting in a consequential lack of much needed certainty for the public when understanding what constitutes criminal behaviour. The Bill should be amended during its passage to avoid the need for clarification through caselaw in the future. There is also

⁷ Paragraph 7 of the Bill’s Policy Memorandum <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>

⁸ September 2016: A review by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion <https://www.gov.scot/publications/report-independent-advisory-grouphate-crime-prejudice-community-cohesion/>

⁹ 2017: Independent Review of Hate Crime Legislation in Scotland under Lord Bracadale (<https://www.gov.scot/publications/independent-review-hate-crimelegislation-scotland-final-report/>) 31 May 2019: Lord Bracadale’s Report on the Independent Review of Hate Crime Legislation (<https://www.gov.scot/publications/independent-review-hate-crimelegislation-scotland-final-report/>)

31 May 2019: Lord Bracadale’s Report on the Independent Review of Hate Crime Legislation (<https://www.gov.scot/publications/independent-review-hate-crimelegislation-scotland-final-report/>)

¹⁰ Paragraph 12 of the Bill’s Policy Memorandum

¹¹ <http://www.gov.scot/Publications/2017/07/9526/2>

in our view, a lack of evidence to justify the creation of certain of the Bill's provisions which are novel, such as stirring up hatred.

Scrutiny of the legislation must be robust especially where attention might otherwise tend to be preoccupied with the focus on the recovery of the country from COVID-19.

We provides responses to the Questions as follows:

General

Question 1: Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

We agree that there is a need for this Bill.

As we have stressed, “there are enormous benefits to be gained from having a clear set of rules and procedures. It brings increased clarity alongside a better understanding and application of the law.”¹² Legislation such as the Bill alone will not eradicate hate crime or make this topic “user-friendly”¹³ as attitudes must change if the overall objectives of “modernising, consolidating and extending hate crime”¹⁴ are to be achieved.

The Bill increases an awareness of the issues of hate and identifies prejudice.

Non-legislative routes such as the production of guidance and education on their own cannot achieve what is required by the Bill. Legislation which comprises the provisions in the Bill and the default to prosecutorial consideration of the “existing” common law offences such as breach of the peace will only go so far. We agree that there is a place for legislation and non-legislative measures to run in tandem.

The Bill ensures that there is an increase in the awareness raising of the issues of hate and prejudice. But there is a definite need for other and additional measures to be taken by the relevant Scottish criminal justice organisations. The Bill’s key message of “hate crime having no place in Scotland” should be articulated clearly by the Scottish Government publicly in the post passage of the Bill.

¹² <https://www.lawscot.org.uk/news-and-events/blogs-opinions/ve-day-and-the-hate-crime-bill/>

¹³ Paragraph 4 of the Bill's Policy Memorandum

¹⁴ Paragraph 4 of the Bill's Policy Memorandum

In working towards the commencement of legislation, others, such as third sector organisations including Victim Support Scotland,¹⁵ should also have responsibility in their role to stress their support to those who may suffer hate and to others, such as faith or ethnic minority groups, to raise awareness of the protections in the Bill.

At the same time as the legislation being enacted, we highlight a need for the review (and publication) of a revised Crown Office and Procurator Fiscal Service's (COPFS) prosecution code,¹⁶ the issue of operating procedures by Police Scotland, potentially the issue of sentencing guidelines issued from the Scottish Sentencing Council,¹⁷ and the review by the Judicial Institute for Scotland of their Equal Treatment Handbook.¹⁸

Education and training are also prerequisites which need to start from school and involve relevant cross-cutting Scottish Government's policies such as Getting It Right for Every Child.¹⁹ We also commend the focus which the Scottish Government is placing on the development of a new Human Rights framework which will add to increased awareness of individual rights in the future.

The question asks about other provisions. We would make the following observations (and refer to our heading below under Miscellaneous.)

Sectarianism: The Bill lacks clarification on the issue of "sectarianism" despite Lord Bracadale's Report and the Working Group on "Defining Sectarianism in Scots Law."²⁰

Sectarianism remains a serious and very active issue in certain parts of Scotland as was seen most recently in the riots in 2019 in Govan.²¹ That behaviour was fuelled historically by religious intolerance as described in the Bill's Policy Memorandum and is not acceptable in modern 21st century Scotland.

The Bill indicates that this type of conduct can be captured by the aggravation by religion. The offensive conduct in the case of *Orr v Mundell*²² illustrates just where our concerns lie with that statement.

The accused was found guilty of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, having brandished a placard with anti-religious sentiments directed at worshippers. This was held on conviction as amounting to unacceptable behaviour in a tolerant, civilized society. It was characterised as abusive and likely to cause a reasonable person fear or alarm. Is this included under that aggravation?

¹⁵ <https://victimsupport.scot/>

¹⁶ <https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance>

¹⁷ <https://www.scottishsentencingcouncil.org.uk/>

¹⁸ <http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookMarch2018.pdf>

¹⁹ <https://www.gov.scot/policies/girfec/>

20 Paragraphs 33 et al Bill's Policy Memorandum

21 <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-49526876>

22 [2018] SAC (Crim)11

Notwithstanding, whether any behaviour amounting to religious sectarianism is fully caught in terms of the Bill, we suggest that the Scottish Government should accompany the legislation in due course with an explanatory statement setting out the unacceptable nature of that kind of conduct. It is an area of hate crime on which there has previously been a spotlight, given the type of offending behaviour that focused on football matches with the passing of the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.²³

Sentencing: We continue to question the need for section 2(2)(d) of the Bill which provides that the Court must 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.

Lord Bracadale recommended that this should be discontinued since this was complicated in practice.²⁴ We consider that this practice may give rise to potential appeals and to a perception of, if not actual, inconsistencies in sentencing. We want to avoid any victims feeling aggrieved, should they consider that the sentence did not properly reflect the aggravation. Suggestions that the court would not be able to gather in the relevant statistical information as to aggravations and the type of prejudice would not provide justification for this continued practice.

The role and understanding of judicial 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. There is a role here for judicial education and awareness which includes both the Scottish Sentencing Council (SSC)²⁵ and the Judicial Institute for Scotland²⁶ in ensuring that a balance is maintained between freedom of expression and other human rights. We observe that the SSC has already undertaken to issue guidelines in relation to sexual offences as part of its ongoing work.²⁷

²³ <http://www.legislation.gov.uk/asp/2012/1/crossheading/offensive-behaviour-at-regulated-football-matches/enacted>

²⁴ "There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation." Recommendation 8 of Lord Bracadale's Independent Review of Hate Crime Legislation <http://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

²⁵ <https://www.scottishsentencingcouncil.org.uk/>

²⁶ <http://www.scotland-judiciary.org.uk/59/0/Judicial-Training#:~:text=The%20Judicial%20Institute%20for%20Scotland%20was%20formed%20on,which%20came%20into%20effect%20on%2029%20June%202018.>

²⁷ <https://www.scottishsentencingcouncil.org.uk/news-and-media/news/sentencing-guidelines-to-be-developed-on-rape-sexual-assault-and-indecent-images/>

Consolidation

Question 2: The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

We have been consistent in encouraging consolidation from the outset of the development of the policy work on hate crime.²⁸ We therefore welcome the Scottish Government's commitment to consolidate hate crime in one piece of legislation.²⁹ The current legislation has developed in a piecemeal fashion over many years. Consolidation allows for that much needed clarity of Scots law. That is essential in order to achieve fairness, transparency and consistency which is required to ensure that criminal law can be enforced successfully.

Clarity provides:

- Prosecution solicitors with the evidential requirements required for instructing prosecution in the public interest.
- Defence solicitors with the means of providing effective representation and advice for their clients.
- The public with a clear statement of what amounts to criminal conduct and what law protects those in society who are most vulnerable to prejudice.

Consolidation allows a "one stop shop" for all concerned similar to the approach taken with the Sexual Offences (Scotland) Act 2009. It allows for the simplification of legislation, while seeking to modernise, in keeping with the diverse community which Scotland represents in the 21st century. However legislative change as set out in the Bill while sending out a message about the seriousness of tackling a range of unacceptable crimes, is not enough on its own. There must be active public awareness and education campaigns from the grassroots up, such as investing in work to tackle sectarianism in schools.³⁰

We highlight Lord Bracadale's observations that consolidation offers that important opportunity for all relevant organisations to "renew and revise"³¹ their existing procedures to ascertain how they interact with other relevant parties. We see this as reaching out to the groups who experience hate crime. This highlights the need for an inclusive approach towards commencement of the legislation which is directed towards them and their communities. This will promote an understanding of exactly how these people are affected. It can also help to identify what more can be done to understand how the legislation supports

²⁸ https://www.lawscot.org.uk/media/361864/22-2-2019-crim-one-scotland-hate-has-no-home-here-consultation-response_.pdf

²⁹ Law Society of Scotland's response on One Scotland: Hate has no Place Here 24 February 2019 https://www.lawscot.org.uk/media/361864/22-2-2019-crim-one-scotland-hate-has-no-home-here-consultation-response_.pdf

³⁰ <https://www.gov.scot/policies/community-safety/sectarianism/>

³¹ Paragraph 60 of the Bill's Policy Memorandum

them and in ensuring that they are encouraged, supported and protected to make complaints in an appropriate fashion.

We have set out the advantages of consolidation. What is important is that all existing criminal conduct is included and where there is to be a proposed extension of the criminal law that this is justified evidentially and proportionately as being required. It must maintain the appropriate balance between the state and the individual, is clear to enable prosecution to ensue in the public interest and thereafter, if appropriate, conviction as required.

We should highlight too that the production of any list is likely to have the unintended consequence of exposing people with unprotected characteristics. Some of them may be more sensitive about that unprotected characteristic than people are with some of the “protected characteristics.” What would otherwise amount to a hate crime may be committed against them with impunity, altogether or at least as an aggravation.

We query whether section 1 of the Bill where it refers to “a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (2)” should be replaced simply with “a group of persons based on the common characteristics of that group” (or similar)?

How to prosecute hate crime?

Question 3: Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

Yes.

We agree that the statutory aggravation model should continue to be the means used for prosecuting hate crime as it continues to use the similar thresholds as before.³²

What needs to be stressed, is that section 1(4) of the Bill has to be understandable in the public context and that whatever the aggravation is, it “attaches” to the baseline offence; the baseline offence of assault or otherwise still requires corroboration in its own right with the aggravation itself falling to be provided by “evidence from a single source that is sufficient to prove the aggravation of the offence by prejudice.” Corroboration is not therefore being eliminated.

We are also pleased to see that the list of characteristics as set out in section 1(2) of the Bill is largely the same as the list of “protected characteristics” within the Equality Act 2010. It represents the former law with the addition now of “age” and “transgender identity.” We agree that consolidation of the aggravations of offences by prejudice makes it more user friendly.³³

It also seeks to ensure a degree of future proofing in representing societal values now. Considering specifically future proofing, there have been recent parliamentary discussions around protection for retail workers so consideration could be given to ensuring there is flexibility to such an appropriate aggravation were this thought to be a policy intention going forward.³⁴

We have concerns over the continued use of “evince malice and ill-will.”³⁵ We supported the modernisation of the legislation including the elimination of what we perceive to be “archaic language [that] plays a role in promoting that confusion as well”³⁶ as did Lord Bracadale.³⁷ It is disappointing that the Bill retains that obscure wording in substantially similar form. Arguments³⁸ that only by retaining “evince malice and ill will” provides a guarantee that there is no change to the level of the minimum threshold for the aggravation are not particularly convincing.

We support the use of plain English in legislation where possible. The definition of “evince” includes “to constitute outward evidence of.”³⁹ There may therefore be scope for replacing “evince” with “reveal”, “demonstrate” or “display.” If there is a concern that hostility demonstrates a lower baseline than malice and ill will, these are arguably more common expressions where the meanings might be more apparent to the public and jurors. We encourage the Scottish Government to look again at the use of this wording, especially as paragraph 79 of the Bill’s Policy Memorandum acknowledges the issue where it states: “[t]his does not [suggest] that the Scottish Government ...sympathetic to the need to ensure wider understanding of how this area of law operates.”

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.” A range of questions arise:

- To whom is this guidance to be directed?

33 Paragraph 77 of the Bill’s Policy Memorandum

34 Paragraph 95 of the Stage 1 report states: The Committee agrees that an aggravation could be applied where a retail worker is undertaking a statutory duty. The Committee recommends that such an aggravation could apply in relation to offences outlined in this Bill and to existing offences which apply where retail workers are enforcing age-restrictions. The Committee further recommends that such protection should be included in any future legislation which places such statutory duties on workers. <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

35 Section 1 of the Bill

36 https://www.lawscot.org.uk/media/361864/22-2-2019-crim-one-scotland-hate-has-no-home-here-consultation-response_.pdf

37 Paragraph 77 of the Bill

38 Paragraph 83 of the Bill’s Policy Memorandum

39 <https://www.lexico.com/definition/evince>

- What is the status of the guidance?
- Why is it needed?
- Where is it to be published?

Legislation must be clear, accessible and proportionate.

The thresholds as to exactly what constitutes the boundaries of offending and therefore criminal behaviour that apply, should be clear from the wording of the legislation. How these thresholds are to be applied lies, in due course, in Crown Office and Procurator Fiscal Service's (COPFS) prosecution guidelines⁴⁰ and Police Scotland's operational procedures. For example, lack of clarity means that the police report a case to COPFS believing that the threshold had been crossed. COPFS may/may not agree. If they prosecute, the court, then needs to decide on the evidence whether the threshold has been crossed.

We welcome the decision to remove reference to motivation in the aggravation. It is easier to prove that the accused demonstrated malice and ill will, rather than was motivated by it. These can be established objectively from their words and actions as in the case of *Orr v Mundell*.⁴¹ It also sits more comfortably with the general principles of criminal law where criminal responsibility lies with intent rather than motive.⁴² What is pertinent is that the accused used language or acted in such a way as to demonstrate prejudice.

Paragraph 77 of the Bill's Policy Memorandum sets out the debate over inclusion of an aggravation for sex hostility, and its inclusion in section 1(2) of the Bill and in the new offences set out under sections 3,4 and 5 of the Bill, preferring to leave this to affirmative regulations in due course. If this aggravation is to be included, this allows baseline crimes aggravated by misogyny or misandry⁴³ to be recognised where the evidence supports the inclusion of the aggravation. There may be relatively few cases, other than sexual offences, where it can be established that the crime is directed at a victim specifically because of their sex. However, if the policy intention is for the list of characteristics to mirror those in the Equality Act 2010, there appear reason to include sex at this stage.

We understand that the Scottish Government is intending to create a working group to consider how the criminal law deals with misogyny⁴⁴ including whether there are any gaps in legislation that could be filled by a specific offence on misogynistic harassment. While we welcome this approach of the working group and we would be interested to see the terms of reference and its membership in due course, we are concerned that all harassment conducted, or malice and ill will evinced or hatred stirred up because of a person's sex should be caught by the law not just instances where the victim identifies as female.

⁴⁰ <https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance>

⁴¹ [2018] SAC (Crim) 11

⁴² LA's Ref No 2 of 1992 1993 JC 43 and *Ralston v HMA* 1989 SLT 474.

⁴³ Our references to misogyny should be seen to include misandry

⁴⁴ "A working group will be established to take this forward and consider how the criminal justice system deals with misogyny, including whether there are gaps in the law that could be filled with a specific offence on misogynistic harassment." <https://www.gov.scot/news/hate-crime-bill/>

We are aware of the report published by Engender “*Making Women Safer in Scotland: the case for a standalone misogyny offence*”⁴⁵ There is a need to factor in the views of that report to ensure that protection is afforded to those who experience this type of criminal behaviour as part of the working group’s reference. This needs to take account too of the forthcoming report from Lady Dorrian’s Group⁴⁶ on “Improving the management of sexual offence cases” which had been due to report in early 2020.

Whatever the conclusion of that work is, misogyny must be addressed and should not be ignored.

Question 4: Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?

We can understand how there might be justification for inclusion of an aggravation based on the age of the person discriminated against, but we consider that it may be challenging to define exactly what is meant by vulnerability in the context of exploitation.

This issue may be worthwhile considering further. This fits in with the scope of the policy work currently being undertaken by the Society’s Criminal Law Committee on vulnerability. We refer to our report on the Vulnerable Accused Persons.⁴⁷ The publication of that report followed the roundtable event on how to achieve effective stakeholder communication of information for the vulnerable accused person across the Scottish criminal justice system. Though we primarily focused our report on the vulnerable accused person,⁴⁸ our first recommendation was more general in nature suggesting there should be the “development of a framework of understanding to be shared across the Scottish criminal justice system following a multi-agency review of definitions and interpretations of vulnerability.”

This seems to echo what is being highlighted in the question. These issues are pertinent in Scotland as it seeks to lead on fairness, inclusion and inclusive practices.

⁴⁵ <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

⁴⁶ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/03/20/improving-the-management-of-sexual-offence-cases>

⁴⁷ <https://www.lawscot.org.uk/media/362501/vulnerable-accused-persons-report-final.pdf>

⁴⁸ <https://www.lawscot.org.uk/media/362501/vulnerable-accused-persons-report-final.pdf>

Other forms of crime not included in the Bill

Question 5: Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

We refer to our answer to Question 1.

We consider that the issue of sectarianism has not been addressed clearly. We are not advocating that there necessarily needs to be the inclusion of a statutory aggravation or specific standalone offence but there needs to be clarity about the criminalisation of relevant offending behaviour.

Other than explaining that the working group⁴⁹ recommended the development of a statutory aggravation for sectarian hate crime, there is no further mention of work or relevant policy work being taken forward. There needs to be further information provided on the basis that there is no specific offence to be included in the Bill.

We suggest that there would be merit in work looking at the levels of offending behaviour along sectarian lines to consider specifically when it justifies action by the police, COPFS and in sentencing. This interlinks with work going forward on initiatives to prevent and educate on sectarian behaviour at grass roots level.⁵⁰⁵¹

Stirring up offences

Question 6: Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

Part 2 of the Bill introduces offences relating to stirring up hatred. Sections 3(1) and 5(1) of the Bill concern offences of stirring up hatred/possessing of inflammatory material and generally replicate sections 18-21 of the Public Order Act 1986 though that applied only to racial hatred. Sections 3(2) and 5(2) of the Bill set out the new standalone offences.

⁴⁹ Paragraph 33 of the Bill's Policy Memorandum

⁵⁰ <https://news.gov.scot/news/2-million-to-tackle-sectarianism>

⁵¹ <https://nilbymouth.org/>

It is important to understand that stirring up hatred is conduct which encourages others to hate a group, differs from the conduct caught by the offences in section 1 of the Bill. We understand the justification in extending the concept to the possession of inflammatory material offences to ensure “parity between all [the protected] characteristics [as being] justified and desirable.”⁵² To do otherwise could indicate a hierarchy of victims which the Bill wishes to avoid. Stirring up offences are aimed at avoiding a “social atmosphere in which prejudice and discrimination are accepted as a norm.”⁵³

We note the threshold for the offences differs where sections 3(2) and section 5(2) of the Bill states that offences are set at a higher threshold since they are not satisfied by conduct that is merely insulting.

Our view is that the threshold for the commission of an offence of stirring up seems too low as set out in sections 3(1)(a) and (b) of the Bill. The behaviour need only be threatening, abusive or insulting. (our emphasis is added)

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 or as a result it is likely (our emphasis is added) that hatred will be stirred up, commits an offence. Lord Bracadale considered that insulting conduct should not form part of the new offence.⁵⁴ There seems no justification for this retention other than concerns that the message which its removal would send. We find that unpersuasive, emphasising again the need for clear messages to support the legislation once commenced. This should not alone be a standard for criminal conduct.

There may be an argument that by including “insulting” in section 3(1) of the Bill⁵⁵ and its exclusion in section 3(2) of the Bill⁵⁶ could possibly be discriminatory and arguably creating the hierarchy of victims which it is stressed was not the purpose of the Bill.

Accordingly, “threatening or abusive” would have to be construed as excluding conduct that was primarily “insulting” rather than primarily threatening or abusive. An accused person could state that they intended to be as insulting as possible towards a group of people with a specific mental health issue because the law permits but as the motive was to insult them, there was no behaviour constitute threatening or abusive conduct.

The question is to a large extent subjective as to what we find insulting, though there is some guidance to be found from English caselaw.⁵⁷ We recommend its deletion leaving the term “abusive” as is understood in domestic abuse cases to be the standard.

⁵² Paragraph 126 of the Bill’s Policy Memorandum

⁵³ Paragraph 129 of the Bill’s Policy Memorandum

⁵⁴ Paragraph 154 of the Bill’s Policy Memorandum

⁵⁵ where it refers to threatening, abusive or insulting conduct or communications intended to stir up hatred on grounds of race, colour, nationality (including citizenship) or ethnic or national origins

⁵⁶ parallels this in relation to people with other defined characteristics, including people with disabilities.

⁵⁷ *Harvey v Director of Public Prosecutions* [2011] All ER (D) 143

As noted, sections 3(2) and 5(2) of the Bill are drafted slightly differently. These require the behaviour to be threatening or abusive. There is an argument that both offences should be drafted consistently.

Furthermore, we have concerns about “how likely is likely”? Does this mean that there is more than just a chance that it will stir up hatred, or more probable than not? It might be more appropriate to require that there is a “significant risk” which is a term already used in relation to vulnerable witnesses in the sections 271- 271M of the Criminal Procedure (Scotland) Act 1995 which set the bar higher and can be subject to an objective test.

We welcome the clarification of the defence set out in section 3(5) of the Bill which clarifies any ambiguity as highlighted in *Urquhart v HMA*.⁵⁸

Just how sex would operate as an aggravator remains unclear. Further details may be helpful as the work from the Working Group is made available.

In any event, though paragraph 38 of the Bill’s policy memorandum indicates that the Working Group on Misogynistic Harassment may decide in due course that the characteristic of sex should be added by regulations to the list of characteristics where that enabling provision is included in the Bill.⁵⁹ We do not consider that this should be left to secondary regulations as that does not provide the level of scrutiny and debate required. The issue should be resolved as part of the Bill.

Question 7: Do you have any views on the Scottish Government’s plans to retain the threshold of ‘threatening, abusive or insulting’ behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale’s views that ‘insulting’ should be removed?

We refer to our answer to Question 6.

Question 8: Do you have any comments on what should be covered by the ‘protection of freedom of expression’ provision in the Bill?

We have considerable concerns regarding section 4 of the Bill which replaces section 20 of the Public Order Act 1986 (1986 Act). However, it is much more stringent than section 20 and as currently drafted, presents a significant threat to freedom of expression in the arts. The Bill’s policy memorandum is silent as to justification for the drafting of this section. It is not clear what mischief the section proposes to catch,

⁵⁸ [2015] HCJAC 101

⁵⁹ Section 15 of the Bill

though it may be unlikely that this section would be much utilised. Clarity of the law is essential. As section 4 of the Bill has been drafted, no justification for its conclusion has been made. If it is to be retained, it must mirror section 20 of the 1986 Act more closely. Our concerns are outlined as follows:

Extension of section 20 of the 1986 Act: That section refers to those who present or direct a public performance of a play. Section 20(4) of the 1986 Act excludes:

- (a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,
- (b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse, he performs otherwise than in accordance with that person's direction, and
- (c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance.

It seems that section 4 of the Bill states that if a person performing a play commits an offence under section 3 during a public performance, then they are guilty of the offence. The presenter or director, who need not be present at the performance, is also guilty if they consented or connived in the commission or the commission was attributable to their neglect.

No defences have been set out in section 4 so presumably the defence in sec 3(4) of the Bill is available but this requires clarification. The protections afforded by sections 11 and 12 of the Bill do not apply.

We have grave misgivings that the performer in a play is caught by the terms of section 4. This is especially so given the current drafting of sec 3(1) and 3(2) when all that is required it is 'likely that hatred will be stirred up against such a group.' There does not require to be any intent on the part of accused to stir up hatred.

An example highlights concerns:

A new play is produced about Holocaust denial. The play in its context quite clearly condemns such conduct and the anti-Semitism often associated with it. A central character makes several speeches and behaves in a way that encourages others to act against the protected group. The conduct could incite others who see the play to take to social media to support the character's point of view or to post their own. Would the actor and director be subject to prosecution?

Previous defences: There are a range of defences for presenters and directors set out in section 2(2) of the 1986 Act. These seem not to be replicated.

Scope of section 4 of the Bill: Why is this section related only to the performance of plays in public. Why live theatre when other similar forms of entertainment are not covered, but which could be relevant such as live feeds over the internet, television performances and live stand-up performances? This again goes to the core issue of justification for the inclusion of this section.

We could not identify any cases where section 20 of the 1986 Act had been judicially interpreted. The Lord Advocate could issue guidance to the police and prosecutors on such matters as the threshold for behaviour to be caught by section 4 of the Bill. That guidance could be public, but there is no obligation to do so.

Comparatively few reported cases have considered the 1986 Act. Those relevant include:

- *Wilson v Dyer* or *Wilson v Higson*⁶⁰ concerning distribution of material designed to stir up racial hatred (s19(1)(a).
- *R v Sheppard, R Whittle*⁶¹ concerning the production and uploading of racially inflammatory material denying the Holocaust and with other antisemitic content.
- *MacDonald v Cairns*⁶² 2013 SLT 289 concerning interpretation of section 1(1) of the 2012 Act as to whether the behaviour would be likely to incite public disorder and provides some guidance on the threshold for such behaviour.⁶³

While there may be few prosecutions of journalists for these types of crime, there are concerns that there is a possibility of journalists being convicted and the inevitable disruption that this would cause. “Targeted disruption through the legal process”⁶⁴ even if conviction did not ultimately follow, could comprise a breach of their Article 10 ECHR rights. There is the potential of stifling free speech while seeking to protect those who are vulnerable.⁶⁵

Sections 11 and 12 of the Bill deals with protection of freedom of expression for religion and sexual orientation. The question is whether these provisions go far enough to protect free speech and have enough breadth in scope. Though there is historical justification for this additional defence, in view of the modernisation of the hate law, should a similar defence exist in respect of other categories such as the type of defence included under section 7 of the 2012 Act?⁶⁶

Criticism or discussion are wide concepts. Being able to cite “criticism or discussion” as a defence to prosecution provides a wide defence to anyone being prosecuted which is not offered in respect of other characteristics. Deciding what amounts to criticism is subjective and may be difficult to establish when offensive behaviour/offensive material stops being criticism.

The impact is that people who express offensive views about religion or sexual orientation have more protection, and by implication those who share those characteristics have less protection from these

60 2005 HCJAC 97

61 [2010] EWCA Crim 65

62 2013 SLT 289

63 [12] The sheriff correctly identified that to be struck at by section 1(1) behaviour must not only be such that a reasonable person would be likely to consider it offensive but it must also either be likely to incite public disorder or would be likely to incite public disorder.

64 <https://www.holdthefrontpage.co.uk/2020/news/ex-editor-issues-warning-over-impact-of-new-hate-crime-law-on-press/>

65 https://www.societyofeditors.org/soe_news/soe-proposed-scottish-hate-crime-law-change-threatens-free-media-in-the-whole-uk/

66 Section 7 freedom of expression <http://www.legislation.gov.uk/asp/2012/1/section/7/enacted>

offences being committed against them either as individuals or as a wider group. Is this the policy intention?

Article 10 of ECHR is not an absolute right and interferes on the right to private and family life under the Article 8 of ECHR rights of another. Freedom of expression does not confer a right to defame, but any attempt by the state to place a limit on the boundaries of free speech must be justified within the terms of Article 10.⁶⁷ and the caselaw which follows.

In order to be helpful for the purposes of our response, we have provided by means of the attached Appendix an outline of the European jurisprudence on the principles which govern freedom of expression.

Question 9: Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

Lord Bracadale's Report recommended that section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 (1995 Act) should be abolished. We are not persuaded by the rationale for retaining this section. If the Bill is truly to consolidate, there must be a way to draft provisions to ensure that the offending conduct covered by section 50A of the 1995 Act is caught within the scope of the offences outlined in the Bill. Arguments against its retention - that it may appear to victims as if the crime of racially motivated harassment was not taken seriously - are not persuasive. Retaining the offence seems to complicate the clarity of the message being endorsed by the Bill. Retaining legislation that is unfit for purposes or not used does not seem the approach to take on modernisation.

Question 10: What is your view on the plans for the abolition of the offence of blasphemy?

The Bill abolishes the offence of blasphemy. The last reported prosecutions for blasphemy in Scotland were in 1843: Thomas Paterson (1843) 1 Broun 629 and Henry Robinson (1843) 1 Broun 643. The now Professor Sir Gerald Gordon⁶⁸ in 1967 stated that "it is extremely unlikely that any prosecution will now be brought for blasphemy, and it may be said that blasphemy is no longer a crime." Since this offence has not been prosecuted in Scotland for more than 175 years, this seems sensible in achieving the policy intentions of modernising the law on hate crime and is consistent with the practices of other countries.

⁶⁷ (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.

⁶⁸ Gerald Gordon *The Criminal Law of Scotland* 1967 at page 935

Miscellaneous

We have further comments on various sections of the Bill which could not be covered in terms of the questions answered above. These are as follows:

- **Section 6 of the Bill relates to “powers of entry etc. with warrant.”**

In general, we are concerned that section 6 lacks specificity in that a warrant granted under these provisions would lack scope and may be considered to be unduly oppressive in terms of Article 8 of the ECHR as held in the Bill of Suspension by (1) Holman Fenwick Willian LLP AND (2) Duff & Phelps Ltd v PF, Glasgow.⁶⁹ It found that in the circumstances of the case, the terms of the warrant were limitless in date and wide in their description of the potential recoverable material and were too vague to have sustainable validity. This is compounded by the issues over the width and scope when referring to sections 3-5 of the Bill which we highlighted above.

There is no time period specified under section 6(1) of the Bill for execution of the warrant. It may be sensible to ensure that such a warrant must be executed within a specific period of 28 days⁷⁰ rather than leave the execution of the warrant open-ended.

Under section 6(2) of the Bill, the warrant is to be granted to the police or a member of police staff. A member of police staff cross-refers to section 26 of the Police and Fire Reform (Scotland) Act 2012 (PFR 2012 Act). This includes those employed by the police and under section 26 (2) (b) of the PFR 2012 Act those persons provided to the police under arrangements between police and a third party. This seems rather wide as do the provisions with regard to searching any person in the premises where there are reasonable grounds for suspecting that this may provide evidence of a commission of a section 3 or 5 offence. Exactly what would constitute reasonable grounds if a warrant were taken for a newspaper/media organisation⁷¹?

Section 6(3) of the Bill is also very wide as it authorises that where the materials being seized are 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.” No time period is specified for undertaking this exercise and presumably, not stated,

⁶⁹ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=746b35a7-8980-69d2-b500-ff0000d74aa7>

⁷⁰ Misuse of Drugs Act 1971

⁷¹ <https://api.parliament.uk/historic-hansard/commons/1987/feb/02/bbc-special-branch-raid>

the cost would need to be borne by the person required to undertake the conversion. This seems potentially unreasonable.

- **Section 9 of the Bill relates to “individual culpability where organisation commits offence”**

We have questions regarding the extent of this section which relates to the potential responsibility in the commission of stirring up offences under sections 3 and 5 of the Bill. Crucially, there is no policy justification or explanation for this section within the Bill’s Policy Memorandum. Though the provisions in section 9 seem to be derived from the rule in section 28 of the Public Order Act 1986⁷² which applies to the existing offences of stirring up racial hatred, we consider given the scope and implications arising from this section, this should be clarified.

It may be helpful to point out that section 9 of the Bill appears to be more precisely framed than that of section 28 of the 1986 Act. There, the liability is limited “consent or connivance” on the part of the individual which is essentially a sort of “art and part” liability.⁷³

Under section 9 of the Bill, the standard has been set lower than “art and part” in the sense that the liable person need not have actively participated. The requirement for “consent or connivance” represents a reasonably high threshold which should, subject to our observations below require the necessary seniority which probably means that they should be responsible for taking active steps to prevent the offence(s) taking place.

Section 9 also imposes liability on the basis of consent or connivance or neglect. Neglect appears to us to present too low a standard, particularly given the stigmatic nature of the offence. We suggest that brings a civil standard into criminal law and should be deleted. We appreciate that there are growing numbers of statutes which purport to impose responsibility on others within organisations that may have allowed the commission of an offence. However there needs to be clear causation, connection and responsibility. Within section 9 of the Bill, “responsible individual” is broadly defined and does not mean responsibility for the conduct in question, where there is no justification set out in the Bill’s Policy Memorandum for what an expansion of the criminal law in this way is. It may assist to expand on the understanding of circumstances where there is imposition of corporate criminal responsibility.

This lies in the Corporate Manslaughter and Culpable Homicide Act 2007⁷⁴ which relates to where someone has died. It refers to the responsibility of “management and control” of the organisations

⁷² <http://www.legislation.gov.uk/ukpga/1986/64/section/28>

⁷³ Scottish form of guilt by association. For an accused to be guilty on this basis, the Crown must establish concert, that is, an agreement or harmony of purpose to commit the crime -whether long-standing or spontaneous, it matters not.

⁷⁴ <http://www.legislation.gov.uk/ukpga/2007/19/contents>

concerned. There is also a rider in that responsibility is restricted under section 1(3) of the 2007 Act to an organisation only being guilty of an offence “if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to..” Senior management is further defined under section 1(4)(c) of the 2007 Act as meaning “persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities.

We would suggest that section 3 or 5 offences are not equivalent to the causation of a death so that any policy intention to extend responsibility beyond a person who is directly responsible for the stirring up offences needs justification, especially as this appears to be go much further both in relation to the responsibility and the persons who can be found to be criminally responsible.

Section 9 (1) of the Bill refers to (a) offences committed by the relevant organisation and (b) the commission of an offence involving consent or connivance on the part of a responsible individual. Both the organisation and individuals can be found guilty of an offence.⁷⁵

The organisations and individuals are defined under subsection 4⁷⁶ in a table where individual goes further in not only being within the category, but also where the individual purports to act in the capacity to act. These seem very wide and extensive provisions which are not restricted in any way with the inclusion of any defence.

Regarding the actual extent of responsibility, it (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. Connivance is not the most common terms though it is included in the Commissioner for Children and Young People (Scotland) Act 2003 schedule 2 paragraph 6⁷⁷ in relation specifically to offence of failing to comply with a notice, which does not seem compatible with the extent of this responsibility.

⁷⁵ Section 9(2) of the Bill

⁷⁶ The Table sets out the Relevant organisations to include:

company as mentioned in section 1 of the Companies Act 2006 where individuals are specified as director, manager, secretary or other similar officer or member, where the company’s affairs are managed by its members

limited liability partnership which individuals include member

other partnership which individual includes partner

any other body or association which individual includes an individual who is concerned in the management or control of its affairs

⁷⁷ <https://www.legislation.gov.uk/asp/2003/17/schedule/2>

We note that the dictionary⁷⁸ definition of “connivance” is “willingness to allow or be secretly involved in an immoral or illegal act.” Would the term “conspiracy” not be better to import more than complicity? We note too that section 13(3) (c) of the Bill specifically uses the term conspiring.

There should only be liability imposed on others where that is the policy intention and should be restricted to where the person was acting within the scope of their office or employment or on behalf of the legal person at the time or where offences have resulted from company policies or practices or other systemic failures to ensure compliance with the criminal law, provided that these failures can be ascribed to a director or similar person.

In conclusion, we could find no cases which set out what section 28 of the 1986 Act covered as there were no cases citing this section, so no caselaw helps in interpretation. That is why we consider this clarification must be obtained during the Bill’s passage by way of understanding what form of conduct it is seeking to prevent and who is responsible for preventing its commission.

Certainly, we consider that a publishing company that published a racist tract might find itself prosecuted and a director held liable by applying that section.

- **Section 14 of the Bill deals with the meaning of the characteristics.**

Section 14 of the Bill is an interpretation section dealing with the meaning of the characteristic. We suggest that widening of section 14(4) of the Bill should be considered where it refers to “a medical condition which has (or may have) a substantial or long-term effect”

Under that wording, if the condition is substantial but not long-term, it is covered, but only while the person has it. By way of example, if at some future date someone commits what would otherwise be a hate crime against everyone who has suffered from COVID-19 and recovered, that would not be covered by the legislation. That does not seem to be reasonable, particularly if it would be a crime if the conduct were directed at people who do at the time, have COVID-19. An amendment to include “or has had” would suffice.

78 <https://www.merriam-webster.com/dictionary/connivance>

Appendix

This appendix is referred to in Question 8. This is a note that discusses the background to and relevant caselaw that regarding Article 10 - Freedom of Expression

Article 10 of the European Convention on Human Rights (ECHR) sets out that:

(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.

Everyone has the right to freedom of expression.⁷⁹ It is described as one of “the essential foundations of a democratic society.”⁸⁰ 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.⁸¹ The exercise of this right is subject to such restrictions and the imposition of penalties as are outlined in the relevant legislation which includes the provisions of the Bill, if passed in due course. These restrictions and where appropriate penalties are justified when they relate, as in the Bill, to prevent disorder and crime, to maintain public safety and respect the protection of rights of others. Such restrictions interact with Article 8 of the ECHR that guarantees the right to respect for private life, family life, home and correspondence.

When freedom of speech relates to political matters, the functioning of the democratic process requires that citizens can exchange opinions about public issues. “Freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.”⁸² Judicial decisions (caselaw) on such issues are and will be regarded by politicians, the media, and ordinary citizens, as upholding the general standards of justice.

An example is the case of *Miller v. Chief Constable*⁸³ that had cause to consider freedom of speech in the context of the transgender rights debate. Mr Miller had issued a number of tweets. Following a complaint,

⁷⁹ Paragraph [49] *Handyside v. United Kingdom* (1976) 1 E.H.R.R.737

⁸⁰ *Handyside v. United Kingdom* (1976) 1 E.H.R.R.737

⁸¹ Pillans, Brian Delict: Law & Policy 5th Edition W Green at page 41

⁸² *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, at para. 42.

⁸³ [2020] EWHC 225

he was issued with a warning by the police. Mr Miller then asked the court to find that the warning was unlawful. The judge, Justice Knowles⁸⁴ stated that:

“I turn to [Mr Miller’s] tweets which give rise to this case. There were 31 tweets in total...posted between November 2018 and January 2019. I ..will set out a selection which I think fairly expresses their overall tone and impact. Some of them contained profanity and/or abuse. Mr Wise QC for the Claimant preferred to describe them as ‘provocative’...”

As Lord Steyn stated *“in law, context is everything.”*⁸⁵ in *Vajnai v. Hungary*,⁸⁶ the Court noted that *“...it is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society.”*

Mr Miller was *“not tweeting in a vacuum. He was contributing to an ongoing debate that [was] complex and multi-faceted.”* The warning was held to be unlawful and had infringed Mr Miller’s rights. The term of a “heckler’s veto” was applied to this situation in that a party who had disagreed with the speaker’s message was able to unilaterally trigger the event so that the result had effectively silenced the speaker.

Two authorities that were relied upon by the judge in that case are useful and significant:

- Lord Justice Sedley in *Redmond-Bate v. DPP*⁸⁷ 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 ..”

- Lord Justice Hoffman in *R v. Central Independent Television plc*⁸⁸ stated:

‘...a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.’

Article 10 is not an absolute right as these examples highlight. It does not confer a right to defame for example, but any attempt by the state to place a limit on the boundaries of free speech must be justified within the terms of Article 10.2 and the subsequent caselaw. Our comments above regarding the

⁸⁴ Paragraph 23 [2020] EWHC 225

⁸⁵ *R (Daly) v Secretary of State for Home Department* [2001] 2AC 532 at 548

⁸⁶ Application No. 33629/06

⁸⁷ (1999) 7 BHRC 375

⁸⁸ [1994] Fam 192

provisions of the Bill and any interference in freedom of expression must be proportionate. It is easy to see how one person's political opinion may become another person's hate crime.

Expanding further, we suggest that there are statements which may appear to be threats that also need to be considered in context.

In *Chambers v. DPP*,⁸⁹ Mr Chambers was charged under section 127 of the Communications Act 2003 (2003 Act) with sending a message of a "menacing character." The tweet read "... Robin Hood Airport is closed. You've got a week and bit to get your ... together otherwise I am blowing the airport sky high." When he was detained by the police, his position was that the tweet had been a joke. His original conviction was quashed on appeal. The Lord Chief Justice, Lord Judge, stated:⁹⁰

"The 2003 Act did not create some newly minted interference with the first of President Roosevelt's essential freedoms – freedom of speech and expression. Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation. Given the submissions by Mr Cooper, we should perhaps add that for those who have the inclination to use "Twitter" for the purpose, Shakespeare can be quoted unbowdlerised, and with Edgar, at the end of King Lear, they are free to speak not what they ought to say, but what they feel.."

"Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent.understandably concerned that this message was sent at a time when... there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece.....although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or to be taken as a serious warning. Moreover.... it is unusual for a threat of a terrorist nature to invite the person making it to [be] readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to image a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished.

⁸⁹ [2012] EWHC 2157 (Admin)

⁹⁰ Paragraph 28 [2012] EWHC 2157 (Admin)

While read literally the message sent by Mr Chambers might be regarded as threatening, the court recognised that it had to be seen in its proper context. Part of that context was the use of social media.

These examples illustrate some of our concerns at the scope of the provisions of the Bill which we articulate above.

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