

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM ANDY BORTHWICK

I write concerning the proposed hate crime and public order bill.

In his preamble Lord Bracadale writes that hate crime fulfils a symbolic function, explicitly setting out to “change attitudes”. Indeed he writes laudably of police forces in England proactively extending the scope of hate crimes thus:

“Record misogyny as a hate crime... The long-term aim is to nudge people towards a culture shift and to reframe misogynist behaviour as socially undesirable”

The sentiment to change attitudes is echoed throughout the paper. However I would like to contrast that with the European convention on human rights article 9 “Freedom of thought, conscience and religion”

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

When beliefs are lawful, as in the police case above, freedom of belief is a fundamental protected right. Our liberal basis of government is predicated on the protection of a plurality of opinions – both correct and incorrect, “moral” and “immoral”. Therefore, on what basis does the government presume to take upon itself the right to manipulate its citizens into government determined moralistic behaviour? Who anointed the police to enforce not just the law, but also morals? Or even worse – to set the moral standard? Is the government the servant of the people, or are the people subject to the government?

Therefore I propose to you that before I discuss the detail of the bill, I would question its very existence. A corner stone of liberal democracies is the separation of church (the arbiter of “good and evil”) and state (the arbiter of legal and illegal)

Let me give an example. The overwhelming majority of the population would agree that for a person to cheat on their spouse is “wrong”. Yet it is legal to do so. Hence right and wrong and legal and illegal are **not** the same. “Wrong” can be, and often is “legal”.

Other traditions, including our own pre-liberal past, concluded otherwise. They regard the state as an extension of communal morality, and as such meld state and religion together. A limited form of democracy can still exist in such a climate, but it is subordinate to the ruling ideology that can no longer be challenged. After all, to challenge “good” means the challenger must therefore be “evil”. Consequently it is all

too easy to justify the persecution of those in opposition. Thus Catholics persecuted Protestants, and Protestants Catholics in turn. Anglicans persecuted non conformists, indeed the lowland hills of Scotland are strewn with lonely monuments to those who paid the ultimate sacrifice for their freedom of conscience.

And let us not dismiss this as history or a feature unique to religion. The sorry tale of state determined ideology evolved into the barbarity of Fascism and Communism, both of which used overtly moralistic overtones to motivate their acolytes into persecuting their neighbours. And always the actions are justified by appeals to “the greater good”.

However in this country we hit upon the solution that neutralised eternal sectarian conflict: Tolerance. Not tolerance in its lazy contemporary use as a synonym for “celebrate” (a cynical oxymoron), but in its true demanding sense. Where we explicitly accept that others have a right to their beliefs, even when their beliefs are objectionable, and even when they are demonstrably untrue. We invoke the Christian sentiment “do unto others as you would have them do to you” and so we do not withdraw our neighbours rights as we would not want them to withdraw ours. Thus society restrains itself from using state power to anoint a single ideology with the mantle of “right and wrong”.

Naturally, one would ask on what basis does government govern, if there is no moral touchstone? Obviously tolerance has its limits one might argue. This is true, we do not tolerate violence or its incitement. Slander remains a civil offence, but is not a criminal one. And we do not permit unrestrained freedom of action; yet freedom of thought and importantly freedom of speech remain closely cherished and protected.

Therefore claims that the government can wholesale remove civil liberties from certain groups of citizens simply because it disagrees with the ideological sentiment being expressed is by definition a deeply regressive act.

I understand that some people feel vulnerable. I freely admit that people will be offended. It is unsurprising that well meaning people would seek to assist the distressed, and at first glance the possibility of state regulation of social exchange in order to impose some civility on our chaotic and fractious public discourse is highly appealing to some.

However to do so hits a tripwire. Such action demands the state choose the ideology it wants to support, and in doing so it endorses some, and disenfranchises others. The selfsame rights that allow the perpetrator to cause offence protect the victim from state oppression. Thus their repeal is a double edged sword. Having established the precedent in one direction, the disenfranchised are motivated to respond in an equal and opposite fashion if they win office. And so the nation polarises in ever more sectarian oscillations. Indeed I would contend that we see this happening now.

Only the neutral stance can hold the nation together. One cannot improve on liberal democracy by alloying it with a little bit of theocracy. Nor can liberal democracy thrive by selective application of authoritarianism. These things are poison. Calgacus said of Pax Romana “they make a desert and call it peace”. Similarly thought policing and

speech regulation makes an intellectual wasteland, inhospitable to liberty and free pursuit of truth even in small amounts. Facts dissolve in propaganda. Intellectual enquiry gives way to received wisdom.

Moreover such regression to coercive means are addictive to the government that indulges in them. Power is enticing, yet corrupts. The slippery slope argument is an old one, yet here we find ourselves some decades after the initial round of hate speech legislation discussing its comprehensive extension. I remember the debate last time, and the slippery slope arguments being dismissed as paranoia. Yet here we are.

Finally, before critiquing the legislation, I would make a defence of freedom of speech. Lord Braccadale is dismissive, citing existing legal precedents. However these very legal precedents are themselves contentious (such as the discredited offensive behaviour at football act) and thus his logic is circular. He also errs on the side of reducing the burden of evidence in order to obtain convictions, which I find deeply cynical. In short, for this and my own preamble above, I find his dismissal naive.

Firstly, I would question the efficacy of speech regulation from a practical perspective. There is no evidence that suppression of speech actually works. Let me give a personal perspective. I am married into a family of Jewish heritage. They arrived in Scotland 100 years ago fleeing Russian pogroms. The family that remained were then entirely exterminated in the holocaust. So I cannot think of something more distasteful than holocaust denial. Yet I strongly maintain that it is better for holocaust denial to be legal than illegal.

Holocaust Denial is illegal in Germany. Has this stopped the resurgence of the far right in Germany? Is holocaust denial extinct there? No! Meanwhile in the UK it is legal. Has holocaust denial exploded in the UK? Is it rampantly colonising the minds of the youth by virtue of its protection by freedom of speech? No! In fact our freedom of speech allowed for the most glorious intellectual take-down of holocaust denial in history, when David Irving was trounced in civil court and shown to be a fraud for all the public to see. *This victory would not have been possible in Germany*

Freedom of speech allows for bad ideas to be challenged, and challenged with integrity. When we pursue truth we do not strawman our opponents, but fairly represent them. Therefore when one idea triumphs it does so on its own merits, and for all to see.

The alternative, when we ban a perspective, all the world can see that the idea is barred from answering its critics. To claim to be liberal while denying our ideological opponents a voice makes us hypocrites. That attracts sympathy, creating idea martyrs and so instead of killing pathological ideas you keep them festering on life support. Speech regulation does not achieve its proclaimed ends.

So in defence of freedom of speech I would propose that it is the fundamental way that we as society settle our differences and pursue meaning and truth. It is society's safety valve. The common man uses his liberty to speak truth to power and thus hold the powerful to account. Indeed, it is his only tool to do so, whereas the powerful can

use not only speech but coercion to achieve their ends. It is because of this asymmetry that freedom of speech must be vigorously defended.

It has been said that “free speech is not hate speech” or “free speech is not freedom to offend”, yet the very act of speaking truth to power is offensive to those who are challenged. The freedom of speech that protects pleasant talk is no freedom at all, for it is pointless to oppose such activity. However, to challenge received wisdom? That is deeply offensive.

Was not the Catholic church insulted by Copernicus when he claimed the earth orbited the sun? Did they not accuse him of insolence for daring to challenge Papal decree? If this were played out today where a fundamental tenant of modern secular humanism was challenged, what would stop vexatious prosecution in the absence of free speech? Only the goodwill of the government, and that is not a foundation for liberty.

Therefore in order that freedom of speech may execute its purpose, we must conclude that any and all calls for the limitation of free speech based on the claim of offending others or lack civility must be wholeheartedly rejected, otherwise the freedom is neutralised.

Additionally, society and all individuals are imperfect. We mould ideas and improve them by mutual critique. Thereby all of society learns and improves. Who is to say that the ideals we cherish now will not be discredited in the future? If an idea is flawed, is it not better to let it go than hold on? But what happens when we introduce received wisdom? Or make certain subjects taboo? We are no longer pursuing truth. We inevitably cherry pick evidence to fit the prescribed narrative, and in so doing reinforce it. When the truth offends, we lie. And then we must lie to cover our lies. We become so concerned with the price of offence or non-conformity we forget – what is the cost of lies? Every lie we tell incurs a debt to the truth, and ultimately that debt must be paid. In a society that loses its orientation to truth, reason metastasizes into sophistry. And sophistry catalyses tyranny.

And finally, it is said that said that when people stop talking they reach for their swords. Therefore we must keep talking. Freedom of speech allows for the frustrated and the angered to express themselves, often in an offensive way, but in so doing prevents repressed exasperation and resentment erupting in violent acts. It is a safety valve that protects society from violence. The price we pay is to tolerate objectionable rants – but this is infinitely preferable to acts of political violence.

I will now use the remainder of the letter to raise specific criticisms of the bill at hand.

Section 1 proposes the extension of protected classes. If one is to have a “protected group” one should at least be consistent with a definition of why one group deserves such a demarcation and another does not. Otherwise, how do we say our society is equal if some groups are arbitrarily allocated additional rights than others? What stops the group allocation becoming politicised? The present list appears ideologically biased in favour of intersectional critical theory. This is not a universally accepted philosophy.

I would also oppose this escalation in protected classes. It fosters a sense of victimhood and grievance as opposed to resilience. There is much clinical evidence that this psychological disposition is unhealthy and leads to mental illness. Contrast the encouragement of group affiliation based on oppression with the mental health treatment Cognitive Behavioural Therapy (CBT). The social psychologist Jonathan Heidt (amongst others) has identified that the victimhood narrative of critical theory teaches precisely the opposite of the resilience narrative of CBT, and thus is inevitably detrimental to mental health. This observation also fits societal data, where children's mental health has significantly decreased at population level as critical theory based "social justice" education has expanded.

In terms of new groups, "age" seems a curious choice. If this is to protect "the vulnerable" then why not specify what is meant by vulnerable, and so include all vulnerable groups in a generic fashion? The elderly are not all vulnerable, and neither are the youth. I find the blanket protection of age as a proxy for vulnerability patronising and excessively blunt an intervention.

I would also challenge the aggregation of race and ethnicity (which includes culture) as a simultaneous protected class. Race is an intrinsic characteristic and so is irrelevant to conduct. Consequently discrimination on that basis is obviously wrong. But to equate that to culture is incorrect. Culture is not innate – and does strongly influence behaviour. There are cultural practises that are absolutely up for debate. For instance we do not accept the cultural practices of FGM, or polygamy. This law could be used to close down valid debate by claiming that legitimate criticism is insulting to ones nationality or ethnicity. I would prefer that the law rested unambiguously on race only.

Religion is absolutely inappropriate target for a protected class. This is due to the fact that religions are philosophies, a sets of ideas. They absolutely are not innate, on the basis that people convert or become apostate. They must be open to criticism, and often that criticism will be "perceived" as insulting or offensive. This grouping as proposed absolutely violates the very idea of freedom of belief and freedom of speech.

Sexual orientation and transgender identity are both related, and are inappropriate candidates on the basis that there is no societal consensus on these topics. It is extremely fractious. Is gender fluid? Is it innate? On one hand we have scientific biological essentialists who argue gender is a function of sex, and that sex is biologically determined. This was used to argue in favour of homosexuality against assertions that homosexuality was a learned behaviour. However we now have the intersectional critical theorists that argue that gender (including sexual orientation) is entirely a social construct, and is fluid. Arguments abound as to whether "sex" and "gender" are separate classes, the same class, that there's no such thing as gender (only sex) or no such thing as sex, (only gender). Causing offence is all but inevitable in this debate, as is exemplified by the recent "cancelling" of both Germaine Greer and JK Rowling. For the government to weigh in on such a debate is absolutely an infringement on freedom of expression. This should be left open to free enquiry, especially as society cannot even agree the definitions or associated language.

Furthermore there appears to be a debate on the inclusion of misogynistic harassment. I would strongly argue that an asymmetric approach contradicts equal rights. For sexual equality one would have to add a counterbalancing misandry offence. However I would argue that neither should be included.

Given these concerns, I agree that “hate crime” (if insisted upon) is definitely left in the preserve of an aggravated offence, and not a stand alone offence. However I would challenge the waiving of corroboration in obtaining a conviction. As an engineer, I frequently design high integrity systems. In that regard, it would be negligent to the point of incompetence for a system that makes a decision with high potential for harm in the event of error to be based on a single data point. I refer you to the Boeing 747 max fiasco as contemporary example. Consequently purposefully reducing the burden of proof guarantees an appreciable false conviction rate. Frankly I am appalled at the bills preoccupation with increasing conviction rate and associated cavalier attitude to the risk of convicting the innocent. Even as an aggravated offence, the damage to the citizen in the event of false conviction can be substantial, and the state has a duty of care to minimise false convictions. Even just the corroboration of 2 pieces of evidence would have a tremendous statistical improvement on false convictions.

Section 2 proposes a stand alone offence of “stirring up hatred” This is the most objectionable part of the bill as the threshold of conviction is ludicrously low as it includes “insulting behaviour” This was included despite Lord Bracadale specifically proposing its exclusion as an infringement of freedom of expression.

To “insult” is “to treat or speak insolently or with contemptuous rudeness; to affect an affront; offend or demean” This is so subjective as to enable arbitrary prosecution. This places all of the power in the hands of the authorities. Who defines what is insulting? The state. And how does one mount a defence that a statement, publication or even artistic expression is not “insulting”? Given the contentious nature of some of the protected classes it is guaranteed to be offensive to someone. And even so the law is written in such a way that the state does not even need to provide that individual, as a victim is not required. The state simply determines what is insulting. Even sarcasm or humour could be cynically misrepresented by the state if it so wished to. To protect the citizen there must be an objective threshold applied. I would propose the threshold as “threatening” as incitement to violence is the universally accepted limit of free speech.

This is a power grab from the citizen by the state. It cannot be described as anything other than authoritarian. When powers are provided to the state they are used. Consider the gentlemen arrested under terrorism law for slow hand clapping the prime minister at party conference. That was an absolute abuse of power – but was lawful. The state cannot be trusted with that much authority over its citizens as it has such an extensive record of abusing powers when it suits its purpose. Such a subjectively low threshold is objectionable.

The protection of free expression clause in section 11 is woeful, as the inclusion of “insult” simply neutralises it. Besides that, there is no specific mention of academic pursuit, journalistic investigation, artistic expression, humour, or educational

purposes. This bill is a mandate for vexatious prosecutions and will pour petrol on “cancel culture” rather than encourage tolerance.

Finally – I will end this letter with a compliment. I agree whole heartedly with section 16 – abolition of the offence of blasphemy. However it is hollow praise for the offence is extinct in practice having not been used since 1843. I would also point out with some bitterness that this is a slight of hand by the government. Rather than abolishing blasphemy, the government in this bill has merely updated and released this as a modern blasphemy law preventing criticism of any religion, as well as some modern moralistic philosophies intersectionalism. The resuscitation of the principles behind such ancient censorious laws is testament to just how regressive this bill is.

So in conclusion, Lord Braccadale says “Diversity is Scotland’s strength” - I politely, and profoundly disagree. Scotland’s strength is our enlightenment heritage. Freedom of thought, freedom of speech and tolerance of those we find offensive. This proposed bill cuts to the core of that heritage. It offers cheap promises of a more civilised society, as long as we sacrifice some civil liberty to obtain it. It asks us to “sell our birthright for a mess of potage”. It is deeply regressive and I absolutely condemn it in the most strident way possible.

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