

ANNEX

17 January 2021

Dear Convener

Following MSPs members agreement to reconsider the approach to freedom of expression provision within the Hate Crime and Public Order (Scotland) Bill, it has been very helpful to discuss with all members of the Justice Committee how best a collaborative approach to freedom of expression provision can be developed. It is clear there is a range of views held on the appropriate approach which is not surprising given the sensitivities and complexities of this area.

The need for freedom of expression provision to cast light on the operation of the stirring up hatred offences to provide necessary reassurance and improved clarity has been a central theme of the scrutiny of the Bill by the Committee. Freedom of expression provision can also 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.

Ensuring that stakeholders can offer views to inform the decisions to be made by Parliament on freedom of expression provision is critical. That is why I consider it is appropriate to offer a range of options for Parliament to seek views on from stakeholders in this letter.

None of these options are Scottish Government preferred options; instead they set out how Parliament could decide to include freedom of expression provision. The annex to this letter contains four proposed provisions on freedom of expression. These options take slightly different approaches to freedom of expression provision and are intended to respond to views that may be offered on preferred approaches to be taken.

I am keen that the excellent collaboration between the Justice Committee and the Scottish Government continues as stakeholders are given the opportunity in a transparent and inclusive way to offer views.

I look forward to being involved in discussions as the Justice Committee seek to develop your thinking on how best freedom of expression provision can be approached within the Bill.

HUMZA YOUSAF

Annex – four options for freedom of expression provision

Overview

The format of each of the options is largely the same. Each provision makes clear that for the purposes of the stirring up hatred offences, certain behaviour or certain material is not to be taken to meet the thresholds of the stirring up hatred offences (threatening, abusive or, in the case of race, insulting) solely on the basis that such behaviour or material involves or includes certain types of expression. The provision then goes on to explain what those types of expression are¹.

You will note, that I have included the “discussion or criticism” formulation in each of the options proposed. I do believe it is important to give comfort to those concerned about the impact of the Bill on Freedom of Expression, that criticism, including very robust criticism, is in itself not a matter for prosecution under this Bill.

The effect of this approach can be illustrated by considering some specific examples relating to characteristics.

The act of, for example, writing a newspaper article or blogpost criticising, say, either members of a particular religion or the beliefs held by members of a particular religion could not be regarded, of itself, as behaviour which is either threatening or abusive towards followers of that religion. However, if, for example, the article or blog-post included abusive comments about followers of that religion, or threatened them with violence, it could still amount to behaviour that is threatening or abusive. It is worth reiterating, that the Committee agreed Government amendments to insert a “reasonable person” test in relation to threatening or abusive behaviour, confirming this is an objective test.

The act of, for example, holding a public meeting where speeches were made which criticised, say, people of a particular sexual orientation could not be regarded, of itself, as behaviour which is threatening or abusive towards people who may hold that sexual orientation. However, if, for example, the speeches included comments that a reasonable person would find abusive about people due to their sexual orientation, or threatened them with violence, it could still amount to behaviour that is threatening or abusive.

The act of, for example, discussing on social media and offering criticism towards, say, policies associated with transgender identity or stating the fact that one believes sex to be immutable, could not be regarded, of itself, as behaviour which is threatening or abusive towards trans people. However, if, for example, the criticism included comments a reasonable person would consider abusive about trans people, or threatened them with violence, it could still amount to behaviour that is threatening or abusive. It is important to reiterate, the new Stirring Up Offences can only be

¹ Each of the options will likely require some ancillary and/or consequential changes to the Bill. These are not included here.

committed if an individual intended to stir up hatred, and this can be proven beyond reasonable doubt in a Court.

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

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

Option 3 has the same effect as option 1 except no additional provision for religion is included. **Option 4** has the same effect as option 1 except no provision for race is included and no additional provision for religion is included.

Option 1

Protection of freedom of expression

- (1) For the purposes of—
 - (a) section 3(1), behaviour or material is not to be taken to be threatening, abusive or insulting,
 - (b) section 3(2), behaviour or material is not to be taken to be threatening or abusive, solely on the basis that it involves or includes an expression of a type described in subsection (2).
- (2) The types of expression referred to in subsection (1) are—
 - (a) discussion or criticism of matters relating to—
 - (i) age,
 - (ii) disability,
 - (iii) race, colour, nationality (including citizenship), or ethnic or national origins,
 - (iv) sexual orientation,
 - (v) transgender identity,
 - (vi) variations in sex characteristics,
 - (b) discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards—
 - (i) religion, whether religions generally or a particular religion,
 - (ii) religious beliefs or practices, whether religious beliefs or practices generally or a particular religious belief or practice,
 - (iii) the position of not holding religious beliefs, whether religious beliefs generally or a particular religious belief,
 - (c) proselytising, or
 - (d) urging of persons to cease practising their religions.

Option 2

Protection of freedom of expression

For the purposes of section 3(2), behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—

- (a) discussion or criticism of matters relating to—
 - (i) age,
 - (ii) disability,
 - (iii) sexual orientation,
 - (iv) transgender identity,
 - (v) variations in sex characteristics,
- (b) discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards—
 - (i) religion, whether religions generally or a particular religion,
 - (ii) religious beliefs or practices, whether religious beliefs or practices generally or a particular religious belief or practice,
 - (iii) the position of not holding religious beliefs, whether religious beliefs generally or a particular religious belief,
- (c) proselytising, or
- (d) urging of persons to cease practising their religions.

Option 3

Protection of freedom of expression

- (1) For the purposes of—
 - (a) section 3(1), behaviour or material is not to be taken to be threatening, abusive or insulting,
 - (b) section 3(2), behaviour or material is not to be taken to be threatening or abusive, solely on the basis that it involves or includes discussion or criticism of matters relating to a characteristic mentioned in subsection (2).
- (2) The characteristics referred to in subsection (1) are—
 - (a) age,
 - (b) disability,
 - (c) race, colour, nationality (including citizenship), or ethnic or national origins,
 - (d) religion, lack of religion or, in the case of a social or cultural group, perceived religious affiliation,
 - (e) sexual orientation,
 - (f) transgender identity,
 - (g) variations in sex characteristics.

Option 4

Protection of freedom of expression

For the purposes of section 3(2), behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of matters relating to—

- (a) age,
- (b) disability,
- (c) religion, lack of religion or, in the case of a social or cultural group, perceived religious affiliation,
- (d) sexual orientation,
- (e) transgender identity,
- (f) variations in sex characteristics.