

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM WEST OF SCOTLAND REGIONAL EQUALITY COUNCIL, YOUTHLINK SCOTLAND, SCORESCOTLAND AND INTERFAITH GLASGOW

Introduction

1. This is a single-issue submission to the Justice Committee regarding the Hate Crime and Public Order (Scotland) Bill ('the Bill'). It addresses:

anonymity orders, reporting restrictions and special measures for hate crime complainers.

2. In summary, this submission proposes that:
 - i. the Bill should include a **duty to consider** on the police and prosecution – i.e. a duty to consider in all hate crime cases whether an anonymity order, reporting restrictions and / or special measures are required;
 - ii. this duty should include an **additional harm factor** that must be taken into account in the course of that consideration, based on Lord Bracadale's finding that *"hate crimes are likely to cause harm which is additional to the harm caused by the underlying offence."*¹;
 - iii. having a 'duty to consider' strikes a fair balance between the constitutional principle of open justice and the need for the protection that the Bill aims to provide to be matched by protection in the process (i.e. it is a balance between the status quo and automatic measures);
 - iv. a legal duty is necessary as opposed to addressing this solely as an operational matter because:
 - a. there is a real risk of this matter being overlooked unless it is a requirement;
 - b. it ensures that the central factor to that consideration (the 'additional harm factor') is properly taken into account – a factor which is otherwise at real risk of being overlooked;
 - c. it can be used to build confidence in hate crime victims to report, thereby helping to address the issue of underreporting;

¹ (2018) *Independent Review of Hate Crime Legislation in Scotland – Final Report*, para.2.16.
Accessible in full here: <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

- v. ultimately, the justification for a duty mirrors the three reasons² identified by Lord Bracadale for having hate crime legislation – in terms of the harm it addresses, its symbolic function and its practical benefit.
3. This paper has been submitted by West of Scotland Regional Equality Council ('WSREC'), YouthLink Scotland, SCOREscotland and Interfaith Glasgow, who are all members of the Scottish Alliance Against Prejudice and Hate Crime ('SAAPaHC')³. The paper has been shared with the SAAPaHC membership.
4. The organisations that submitted this paper may have submitted a wider response to the call for views separately, either alone or with partners. This paper should not, therefore, be taken as the totality of any organisation's views on the Bill.

Case study

5. The following case study is set out to illustrate the issue. However, as demonstrated by the subsequent submissions, this proposal is not based on a single case. Rather, the proposal is based on the analysis that this case instigated.
6. A victim of an extremely serious hate crime was forced to immediately and permanently leave her home with two school aged children.
7. Prior to this, there had been numerous prejudice-based incidents over a long period concerning the perpetrator, which the victim had not reported to the police for fear of repercussions.
8. After the perpetrator was arrested and charged with the extremely serious hate crime, he ultimately pleaded guilty.
9. The victim's name was subsequently made public at the sentencing hearing.
10. The victim had not requested anonymity or reporting restrictions because:
 - i. it never occurred to her that her name would be made public at the sentencing hearing (or in any other part of the court proceedings) or that this would mean that the media were free to report it;
 - ii. she was not aware that she could request anonymity or reporting restrictions;

² (2018) *Independent Review of Hate Crime Legislation in Scotland – Final Report*, paras.2.15 to 2.19. Accessible in full here: <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

³ The Scottish Alliance Against Prejudice and Hate Crime ('SAAPaHC') consists of key stakeholders working to address and eradicate prejudice, hate crime and discrimination. A key aspect of SAAPaHC's work is to inform policy and practice using qualitative data from case studies involving prejudice, hate crime and/or discrimination.

- iii. even if she had been aware, she would have required assistance to do so which she did not have given that she had no representation. This assistance would have been required because:
 - a. she was dealing with the complex emotional, logistical and health consequences of the hate crime on her and her family;
 - b. English is not her first language;
 - c. she found the court proceedings and the correspondence that she had received about them difficult to understand;
- iv. even with assistance, she feels it would have been unreasonable to expect her to take the lead in initiating this given the significant impact of the hate crime on her and her family.

11. In the absence of an anonymity order or any reporting restrictions, her name was published by (at least) two mainstream media outlets.

12. The victim was alerted to this by friends who still live in the area where the hate crime was committed. These friends informed her that her name was being widely discussed in the community, including among community and family members who are supportive of the perpetrator.

13. Although the identified media outlets removed her name (once requested by a third sector organisation), the damage had already been done. In the victim's own words:

“Every time the buzzer goes, I think could that be someone coming for me?”

14. Enquiries were made with the Crown Office and Procurator Fiscal Service ('COPFS'), in particular as to what the process is for deciding whether COPFS should apply for reporting restrictions in a hate crime case.

15. COPFS explained that:

“...there is no process in place for COPFS to proactively decide whether to apply for reporting restrictions in a hate crime case.”

16. COPFS further explained that:

“...had the Procurator Fiscal been made aware at an early stage of the concerns of ████████ consideration could have been given to an application for witness anonymity or reporting restrictions...”

17. However, while COPFS would have considered it had it been raised, they rarely ever apply for reporting restrictions, which they explained as follows:

“With the exception of certain specific processes applied to seeking anonymity for the victims of sexual offences and victims of bribery and extortion, the Procurator Fiscal would rarely ever apply for reporting restrictions for the victim of a crime.”

Response

The need for a specific process

18. Among the organisations making this submission, there is considerable day-to-day experience of frontline work supporting victims of hate crime. Based on this experience, there is familiarity with victims’ concerns about anonymity, fear of reporting hate crime, fear of being a witness in court and fear of reprisals. In other words, this is not an isolated case.
19. The correspondence with COPFS demonstrates that the issue illustrated in the case study is not that there was a process that was not followed correctly but rather **that there was no process to follow**.
20. It is also evident from the COPFS correspondence that, even if the police had raised the issue with them, they would “rarely ever” apply for reporting restrictions. Indeed, it is mainly where “*certain specific processes*” apply that they do so.
21. Further, in our view, this process should not rest solely on the police raising concerns in any event. If that were the case, there would be no consideration of the issue after the police send the case to COPFS. In the above case study, the perpetrator pleaded guilty and the anonymity issue arose at sentencing.
22. A robust process, requiring initial consideration by the police *and* subsequent consideration by COPFS, would instead have flagged a concern to the prosecutor before the victim’s name was read out in court, where the risk to the victim was clear on the face of the other facts that were read out in that hearing.
23. It is also to be noted that, while supportive of victims’ rights being communicated as clearly as possible to them, we agree with the victim of the case study that it would be unreasonable for the onus of initiating this process to fall on the victim.

The need for the ‘additional harm factor’

24. It is submitted that above demonstrates not only the need for a specific process, but for a process that takes proper account of Lord Bracadale’s finding that:

“hate crimes are likely to cause harm which is additional to the harm caused by the underlying offence.”⁴

⁴ (2018) *Independent Review of Hate Crime Legislation in Scotland – Final Report*, para.2.16. Accessible in full here: <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

25. Taking proper account of this factor would include taking into account Lord Bracadale’s explanation of what that additional harm may entail:

*“Harm to the victim may include physical injury as well as mental distress leading to depression, anger, or anxiety. It may have a social impact such as to change the behaviour of the individual to avoid further victimisation. This may include moving home or job, avoiding public spaces and becoming socially isolated [...]”*⁵

26. In the same way that this additional harm is central to the justification for hate crime legislation, it is central to the justification for the proposed duty. It is this additional harm that explains why additional protection may justifiably be required by hate crime victims in the criminal justice process.

27. Accordingly, it is submitted that a process that overlooks this essential factor will be an inadequate consideration of whether that additional protection is required.

Open justice: a fair balance

28. It is fully recognised that the need identified above has to be balanced with the important constitutional principle of open justice.

29. At one end of the spectrum, there is the status quo – i.e. *in theory* it is possible for a hate crime victim to be granted an anonymity order, reporting restrictions and / or special measures, but in practice it is *highly unlikely to happen*.

30. The other end of the spectrum would be to automatically grant these additional protections to all hate crime victims. However, it is acknowledged that an automatic provision, without any consideration of the facts and the additional harm factor in each case, risks encroaching on the principle of open justice where it is not necessary to do so.

31. Accordingly, it is submitted that a ‘duty to consider’ strikes a fair balance between the constitutional principle of open justice and the need for the protection that the Bill aims to provide to be matched by protection in the criminal justice process.

A legal duty as opposed to a solely operational matter

32. Based on experience of hate crime processes in practice, in our view there is a real risk of both the need for additional protection and the ‘additional harm factor’ being overlooked unless there is a legal requirement for them to be considered.

33. This is underscored by the above case study, in which the severity and nature of the hate crime was such that it would be difficult to conceive of a clearer example of where an anonymity order was required. The fact that it was not considered at any stage is, in our view, indicative of the real risk of this matter being overlooked in the absence of a requirement to consider it.

⁵ Ibid.

34. Further, in our experience, variances in levels of knowledge and understanding relating to hate crime are such that the ‘additional harm factor’ is not likely to be consistently appreciated by all involved in the process. Accordingly, it is submitted that this element is required as part of a legal duty to avoid it being overlooked in the consideration.
35. A further key benefit of having this duty included as part of the legislation is the clear message that it sends out to victims – i.e. that there is not just a law to help protect them from the additional harm but also a safe process by which they can come forward and report with confidence.
36. The need for this message is supported by the “*widely accepted*” fact of underreporting, as recognised by the Scottish Government in the Bill’s Policy Memorandum:

*“Importantly, it should also be noted that it is widely accepted that hate crime is often not reported to the police. Underreporting of hate crime is a key issue and tackling the issues surrounding that remains a key priority for the Scottish Government, Police Scotland and COPFS.”*⁶

Conclusion

37. For the above reasons, it is submitted that the justification for the duty proposed in this paper mirrors the three reasons⁷ identified by Lord Bracadale for having hate crime legislation in that:
- i. it provides additional protection for hate crime victims that is justified by the additional harm likely to be caused to them by the hate crime;
 - ii. it fulfils a symbolic function by sending a clear message to victims of hate crime that they can have the confidence to report because additional protection will be provided if necessary;
 - iii. it provides the practical benefit of having a clear process requiring a consistent approach to this issue, thereby helping to ensure “*that victims of hate crime will be supported throughout the criminal justice process.*”⁸

West of Scotland Regional Equality Council (WSREC), YouthLink Scotland,
SCOREscotland and Interfaith Glasgow
22 July 2020

⁶ (2020) *Hate Crime and Public Order (Scotland) Bill Policy Memorandum*, para.52. Accessible in full here: <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>

⁷ (2018) *Independent Review of Hate Crime Legislation in Scotland – Final Report*, paras.2.15 to 2.19. Accessible in full here: <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

⁸ *Ibid.* p.iv