JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM NEWS MEDIA ASSOCIATION

As the trade association which represents the Scottish newspaper industry, we would like to take the opportunity to comment on the proposals contained in the Hate Crime and Public Order (Scotland) Bill introduced in the Scottish Parliament on April 23, 2020.

We fully appreciate the good intentions which lie at the heart of the legislation, and we certainly welcome the abolition of the offence of blasphemy, but that feels like a feint to deflect from the dangerous measures contained in the rest of the legislation and we have grave concerns about the considerable risks to freedom of expression it represents.

Having noted the questions set in the consultation document I will try to limit my comments to those which have the potential to affect our members directly, although they may wish to raise other points on the wider issues in their own responses.

1. Do you think there is a need for this Bill and, if so, why?
Not as far as the Press is concerned, and as currently framed we believe it poses a serious threat to freedom of expression in its broadest sense. A full explanation follows.

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?
In theory, yes.

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?
Without a requirement to prove that hatred was stirred up, just the potential to do so, the bill creates the equal potential for vexatious complaints and commentators in news publications would be primary targets. Even if there was a remote possibility of a successful conviction it would present a greatly increased opportunity to instigate worrying, time-consuming and costly investigations against news publishers, individual staff members and contributors.

Very few civil law defamation and privacy cases reach the Scottish courts but that is not representative of the number of complaints publishers receive and the new bill threatens to expose them to a similar number of complaints through criminal law, a very different proposition to dealing with civil complaints. Most civil actions never get to court because they are settled beforehand, not necessarily because the complaint is either valid or frivolous, simply because they are costly to contest. With criminal law there would be no way of limiting exposure to expensive and highly stressful legal process, particularly for individuals.

We know from the number and nature of referrals to the Independent Press Standards Authority many complaints are lodged on the basis of offence being taken and this legislation creates the conditions for such grievances to move through the criminal justice system. In his review of hate crime legislation, Lord Bracadale observed, *"At the end of the day the court will decide whether in a particular case an offence was being committed"*, but this does not recognise that a criminal prosecution would involve putting journalists and legitimate commentators through a police investigation and not a matter of legal departments dealing with technical matters. It should not be forgotten that of 67 journalists arrested in Operation Weeting, 57 were cleared but only after years in which their lives were on hold.

Going back ten years, a high-profile example would be the 21,000 complaints against the Daily Mail following the publication of a column by Jan Moir about the death of Boyzone singer Stephen Gately. It may be that under similar circumstances the columnist would not have been convicted, but it is hard to believe that under the proposed legislation it would not have resulted in a complaint for stirring up hatred, followed by a criminal investigation and all that would entail. The regulator, the Press Complaints Commission at the time, rejected the complaints on the basis of freedom of expression and there are many similar examples of complaints about opinions being handled by the regulator and we firmly believe that it where they should stay.

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?

Insult is surely part of robust debate and "insulting" should be removed, but our concerns about loose and subjective terminology go much further than just one word:

3(1)(a)(ii): A person commits an offence if the person *"communicates threatening, abusive or insulting material to another person."* Abusive or insulting is not clearly defined and is open to wide, subjective interpretation; abusive or insulting according to whom?

3(1)(b)(i): *"…the person intends to stir up hatred…"* Intention is a subjective judgement.

3(1)(b)(ii): *"it is likely that hatred will be stirred up"*. What is the definition of likely? Again this is open to wide, subjective interpretation.

3(4): *"It is a defence for a person charged with an offence under this section to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable."*
and **3(5)(a):** *" evidence adduced is enough to raise an issue as to whether that is the case,*" and **3(5)(b)** *"the prosecution does not prove beyond reasonable doubt that it is not the case."*
The subjectivity here could frequently result in cases being tested in courts and not

thrown out at an early stage, especially if the complaint has been the result of a high profile campaign.

3(6)(a): *"…includes behaviour of any kind and, in particular, things that the person says, or otherwise communicates."* This clearly encompasses speech and written communication.

3(7)(a): *"…displaying, publishing or distributing the material."* This has the potential to involve delivery agents and retailers in investigations and prosecutions.

That infringement of any of the above could result in seven years' imprisonment is, in our opinion, entirely disproportionate.

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

It was disappointing to note that in his original evidence-gathering process, Lord Bracadale did not proactively contact any media organisation or any group, such as the Scottish PEN, with an interest in freedom of expression and we find this hard to understand. By contrast, when the Scottish Law Commission was drafting the Defamation and Malicious Publications Bill now going through the Scottish Parliament there was extensive consultation with media representatives.

We know that some store has been placed in the Bill's limited freedom of expression exemptions, but even they would not prevent investigation to see whether the exemptions were applicable and it would not be difficult to envisage situations where a judgement would be taken to proceed with prosecution. For example, the 2015 *Tackling Sectarianism and its Consequences in Scotland* report from the Scottish Government's advisory group led by Dr Duncan Morrow specifically blamed newspapers for stirring up religious hatred in the run-up to an Old Firm match.

While the report called for a commitment *"not to sensationalise and stoke flames of sectarianism through headlines"*, it claimed newspapers were responsible for *"intensifying feeling and anxiety as seen in the lead up to the recent Celtic v Rangers league cup semi-final".* Without defining what was meant by sensationalism, the report clearly stated that *"the repercussions of such sensationalism will always be harmful to society as a whole"*. This would be covered under the characteristics defined in 3(3)(c) of the new bill *"religion or, in the case of a social or cultural group, perceived religious affiliation".*

As referred to above, we know from defamation and privacy law, and to a lesser extent Contempt of Court legislation, that trying to pin down limits to the reach of law when it applies to the definition and use of words is extremely difficult. We recognise that effort has obviously been made to balance the legislation with freedom of expression, and indeed journalism practice features regularly in the explanatory notes which accompany the legislation, but we do not understand why religion and sexual orientation have been specified for freedom of expression exemptions and not the other defined characteristics. In any case the phrase *"is not to be taken to be"* in Clauses 11 and 12 is another very loose phrase open to wide application and the explanatory notes make the extremely limited nature of this defence very clear.

In our view, only with absolute exemptions can legitimate journalism escape the scope of this legislation and even then there are no guarantees. Even if absolute exemptions created loopholes, we believe they would not outweigh blocking a legal route to close down controversial or unpopular opinions. We do not have to go back far to find examples of commonly-held opinions which are now very much out of favour.

Publishing robust opinion and comment is an essential part of open accountability, as is public testing of actions carried out by organisations of all shapes, sizes and ownerships, but by its very nature it can be subject to legal attack and this legislation creates another, potentially more potent, weapon. We strongly believe this bill represents such a considerable threat to freedom of the Press that if it does make it into statute it must only be with absolute exemptions to prevent expensive, damaging and dangerous investigations before they start.

Publishers and broadcasters with strong and clear commitment to the public interest at their cores, who follow industry-recognised standards through demonstrable complaints systems, have clear transparency of authorship and accessibility, and who day after day show their willingness to follow the rule of law should not be subjected to this wholly unnecessary threat.

Other issues

We are aware other organisations have considerable concerns about the legislation, in particular those of broadcasters about the provisions for public performances in Clause 4, with the imprecise definition of “presents or directs” and “neglect” having similarities to the Lord Chamberlain theatre censorship abolished in 1968.

We also have concerns about Clause 8(1)(b) which says that *“the court may order that any of the forfeited material be disposed of in such manner as the court may direct”.* This is another dangerous principle with echoes of darker times. Would this extend to books? It would presumably cover back copies of newspapers and magazines but could also relate to deletion of material from the internet which we know is impossible to guarantee.

Conclusion

The recent controversy surrounding JK Rowling shows just how widely applicable such legislation could be. It would be foolish to second-guess the outcome of a non-existent case brought under legislation which has not been passed, but judging by the reaction to the author’s comments it’s highly likely a complaint would have been made under the terms of this bill. A police investigation would almost certainly have followed becasue the freedom of expression exemptions do not apply to transgender identity.

While we accept the purpose of this legislation is not to subject someone like JK Rowling or legitimate media organisations to police investigations for expressing publishing or broadcasting controversial opinions but we are in little doubt that would be the consequence.

Social media is awash with people bearing extreme grudges against those with whom they disagree and this legislation has the potential to put the full force of the law behind them. The justice committee has the chance to stop that happening.

News Media Association

23 July 2020