JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE SHERIFFS' ASSOCIATION

The Sheriffs' Association welcomes the opportunity to comment and offers the Justice Committee the following views in relation to the above Bill.

*General*

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?

**Answer 1**

**The need for the Bill is largely a matter of policy upon which the Association would not generally comment. If it is considered necessary to create the specific substantive offences mentioned in clauses 3 and 5, then clear legislative provisions are required.**

**The Association observes that the Bill continues to use somewhat archaic language such as "evincing malice and ill will" rather than the more easily understood expression of "hostility" referred to in Lord Bracadale's recommendations.**

**Many of the following observations relate to the formulation of the proposed legislative provisions rather than the content.**

*Consolidation*

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?

**Answer 2**

**As a matter of practicality, and under reference to the answers to questions 3 and 9 below, there is merit in consolidation of the existing disparate legislative provisions which have been seen to cause confusion.**

*How to prosecute hate crime?*

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?

**Answer 3**

**This is largely a matter of policy upon which the Association does not comment.**

**However, although the proposed legislation follows the recommendation that statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland it also creates the new "stirring up offences" which are in themselves substantive statutory crimes.**

**The Association is concerned that by continuing to proceed with a mixture of substantive standalone hate crimes and aggravations the Crown and the Courts could continue to fall into the sort of confusion which was seen in *RR v PF Aberdeen [2015] HCJAC 34, HCA/2015-000384-XJ* in which Lord Brodie and Lady Clark of Calton identified a difficulty where a substantive offence and an aggravation were conflated.**

**That case involved the interaction between *Section 38 of the Criminal Justice and Licensing ( Scotland) Act 2010* (threatening or abusive behaviour) and *Section 96 of the Crime and Disorder Act 1998,* as amended by section *25 (1) of the Criminal Justice and Licensing (Scotland) Act 2010.* It was observed that: -**

> *"…… matters become more complicated once a complaint avers, as this complaint does, that an offence which is in part constituted by the using of a*

*"racist" phrase, will be proved in terms of section 96 of the Crime and Disorder Act 1998 to have been "racially aggravated". The definition of "racist" offered by the advocate depute, which would otherwise seem to be reasonably satisfactory becomes more questionable. Whatever it is that constitutes the offence here it must be something other than what would amount to racial aggravation, as defined by section 96 of the 1998 Act (evincing malice and ill-will based on membership of a racial group). Otherwise there would be duplication between the offence and the aggravation of the offence. An aggravation is something additional which makes an offence worse; an offence cannot aggravate itself.*
*[9] What we consider to be the possible doubtful relevance of the charge might not have mattered had the evidence led at trial provided a basis for a finding of threatening or abusive behaviour which gave content to the allegation of contravention of section 38 distinct from the behaviour constituted by using a "racist phrase". However, the evidence would appear not to have done so. This may have misled the sheriff into losing sight of what was the substantive charge and what was the aggravation, with the result that she conflated the two or otherwise treated what was libelled as an aggravation as if it were the substantive charge."*

**The Bill does not address the problems inherent in prosecuting by way of aggravation in some cases and by way of the substantive stirring up offences in others.**

**Further, with regard to sentencing for the aggravated offences Lord Bracadale at recommendation 8 concluded that 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.**

**It is submitted that for the reasons discussed by Lord Bracadale at around paragraphs 3.64 to 3.66 of his Report, namely the requirement to follow the SSC guidelines, the application of the appropriate discount and the general considerations such as the overall impact of the sentence and the interaction with other aggravations such as bail aggravations the requirement to specify precisely the extent to which the sentence was augmented by the aggravation is not helpful. The requirement assumes that the sentence is more akin to a mathematical calculation rather than a fine balancing of competing factors.**

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?

**Answer 4**

**This is a matter of policy upon which the Association does not comment.**

*Other forms of crime not included in the Bill*

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?

**Answer 5**

**This is a matter of policy upon which the Association does not comment.**

*Stirring up offences*

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?

**Answer 6**
**As stated previously the creation of these offences is a matter of policy upon which the Association does not offer comment.**
**However with regard to the proposed wording of the clauses in the Bill, the following observations are made as a matter of law.**

**The offences of stirring up hatred are committed if**
**(a) the person—**
**(i) behaves in a threatening, abusive or insulting manner, or**
**(ii) communicates threatening, abusive or insulting material to another person, and**
**(b) either—**

**(i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins, or**
**(ii) as a result, it is likely that hatred will be stirred up against such a group.**

**The Association has the following concerns.**

1. **There is no definition of what amounts to "insulting" behaviour or material. It is submitted that if insulting behaviour or material is to be criminalised a statutory definition should be included in the legislation. As this goes beyond what has previously been criminalised in terms of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, some further guidance as to what might be considered as objective "insulting" may be required.**
2. **The Association notes that the word "insulting" is not used in the offence of stirring up hatred against the protected groups. In effect that means it is a criminal offence to insult someone because of their nationality but not because of their disability. There does not appear to be a clear logic to this distinction.**
3. **Any criminal offence requires to be proved against the accused beyond reasonable doubt. However the use of the word "likely" requires the decision-maker to carry out an exercise akin to as the balancing of probabilities. In other words the sheriff, judge or jury deciding the case will require to work out whether they are satisfied beyond reasonable doubt that the person's behaviour would, on the balance of probabilities, have been likely to stir up hatred. It is submitted that these concepts should not be conflated. It will be exceptionally difficult to direct a jury on these matters. The use of wording such as "would reasonably be expected to stir up hatred" might resolve this by introducing a greater element of what an objective bystander might consider the effect of the behaviour would be.**
4. **Subsection 5 seems to lay out specifically that it is for the accused to overcome the evidential burden of putting the defence in issue, again on the balance of probabilities, while the Crown has the probative burden of excluding the defence beyond reasonable doubt. This seems to add a further complication to the charge which the jury will have to be given particularly in light of what is said at paragraph 3 above. It is therefore**

**submitted that there should be clarity as to whether there is to be a legal or evidential burden on the accused.**

**The Association would highlight that for the reasons discussed Lord Bracadale was not in favour of "insulting" being part of the offence and observes that potential problems could be foreseen if a single act is caught by both clause 3(1) and (2).**
**Accordingly it is our view**

- **the word "insulting" should not be included in the clause 3(1) offence**
- **the word "likely" should be avoided without some objective test of reasonableness**
- **the formulation of the defence of reasonableness needs further refinement.**

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?

**Answer 7**

**As previously discussed the Association does not support the inclusion of the word "insulting" in the clause 3(1) offence for the reasons articulated by Lord Bracadale.**

*Other issues*

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

**Answer 8**
**It is not clear to why the protections for freedom of speech are limited to religion and sexual orientation. This is not consistent.**
**Clauses 4 and 5 could result in conflicts with freedom of speech with many performances becoming potentially criminal under clause 3 unless a defence of reasonableness is raised.**
**Clause 5 is potentially problematic when applied to an academic context. Plenty of academic material might be classified as "insulting". Clause**

**5(1)(b)(ii) contains the phrase "if the material were communicated", which would presumably include publication. So the academic or writer can always be put to their defence, which is that possession (rather than communication) is reasonable. However it appears that a number of scenarios can be envisaged which could expose artists, performers and academics (and possibly their employers) to potential criminality which could stifle legitimate debate and discussion.**

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?

**Answer 9**

**No, the Association does not agree for the reasons which are discussed and advanced in detail at Chapter 7 of the Bracadale Report. Reference is also made to answer 3 above.**

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

**Answer 10**

**This is primarily a matter of policy but since there has not been a prosecution under this law since 1843 it would appear to have no great value or relevance in modern Scottish society.**

***The Association also offers the following additional textual comments***
***Clause 4 –There is no statutory defence as is to be found in the Theatres Act 1968.***
***Clause 6 – It is not clear on whom the duty of compliance will lie.***
***Clause 9(3)(b)(ii) – It is not clear what is to be gained as to meaning by using the phrase "purporting to act" rather than just the word "acting".***
***Clause 12 – It is not clear why the protection is narrower than in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.***

The Sheriffs' Association
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