REF NO. J/S5/20/HC/363

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE MEDIA LAWYERS ASSOCIATION

I write on behalf of the Media Lawyers Association ("**MLA"**) in response to the Justice Committee's call for views on the Hate Crime and Public Order (Scotland) Bill (the "**Bill"**).

The MLA is an association of in-house lawyers from major newspapers, magazines, book publishers, broadcasters and news agencies. A full list of the MLA's corporate membership is attached to this letter. The MLA exists to promote and protect freedom of expression and the right of everyone to impart and receive information, ideas and opinions.

The MLA provides input on behalf of the media on issues that have significant implications for the public's right to receive information, for media freedom and the ability of publishers and broadcasters to report and investigate on matters of public interest.

To this end the MLA fully supports and endorses the concerns expressed by the Scottish Newspaper Society and that response should be read in conjunction with this one.

Accordingly, I do not intend to repeat the content of that response. However, please note the following additional points.

Whilst the MLA can understand the desire to modernise, consolidate and potentially extend hate crime legislation in Scotland in an attempt to provide greater clarity, transparency and consistency in hate crime law, the MLA is concerned that there is a real risk of far reaching unintended consequences from the current drafting of the Bill.

The Bill has a lack of definitions, including but not limited to the examples provided by the Scottish Newspaper Society, and given the considerable criminal penalties imposed, greater clarity is required for the definitions which are provided.

The Bill as currently drafted repeats problematic and imprecise drafting from previous legislation, including the Public Order Act 1986 which has been the subject of criticism and which is difficult to reconcile in practice with Article 10 of the European Convention on Human Rights. Words contained in the Bill such as "abusive", "inflammatory" and "insulting" are open to wide and subjective interpretation.

In the context of journalism, the use of such vague terms in legislation can lead members of the public to erroneously consider that they have rights to have legitimate editorial choices made the subject of criminal prosecution. In addition, judges are tempted into usurping the role of editors which is a position which has been repeatedly held to be unlawful in the highest courts.

Where journalists wish to defend themselves on the basis that their communications are reasonable or that their possession of “inflammatory” material is reasonable, the Bill provides that the accused is subject to an evidential burden of proof to bring forward enough evidence to raise an issue with respect to the defence; the legal burden of disproving the defence and proving that the offence has been committed remains with the prosecution.

With all due respect this approach removes the obligation upon prosecutors to investigate, consider and decide if there is sufficient evidence to determine that a criminal offence has been committed and that criminal proceedings should be initiated. We suggest that any legislation should make it incumbent on police, Procurator Fiscals and Advocates Depute to first review the communication alongside Article 10 of ECHR, the statutorily backed Ofcom Broadcasting Code, the BBC Editorial Guidelines or other relevant Editorial codes before deciding to proceed with an investigation or then to commence prosecution. The obligation should be for the Crown to prove that freely expressed speech is criminal in the context it was made not for the person expressing freely to defend themselves, incur legal expense and be subject to intrusive investigation based on the subjective views of individual police or prosecutors.

For example, where journalists are producing public interest documentaries or writing articles about far right extremism, it would be an unlawful infringement of their Article 10 rights to force them to justify their work under jeopardy of active prosecution or under threat of their premises being searched. Such work is likely to contain offensive and inflammatory content in a legitimate context.

It is not the role of the Crown to demand editorial justifications having initiated prosecutions. It is not the role of the Crown to prevent offence. It may be appropriate for the Crown to prosecute communications which clearly incite racial or other hatred, however, the Crown should be in a position to have sufficient evidence to show that there was an intention to incite hatred.

Where the prosecution wishes to show that communications are likely to have the consequence that hatred will be stirred up against a particular group, again, it is for the prosecution to have sufficient evidence of this likely consequence before any prosecution is initiated. Indeed, we suggest that the consequence of the communication should be proven beyond reasonable doubt and not on balance of probabilities.

Also, as currently drafted, there is no defence in the Bill for an accused who did not intend to stir up racial hatred, to prove he did not intend, and had no reason to suspect, that his conduct was threatening, abusive or insulting. Instead, it is proposed that the defence which currently exists in the Public Order Act 1986 be replaced by an objective ‘reasonableness’ defence which, in our view, is insufficient. The Bill as drafted would also criminalise conduct where an accused has no reason to believe that what they have said or written would be heard or seen outside of their home.

There is also a lack of protection for journalism and there is no protection of journalistic material in the search provisions of the Bill. Scotland lacks the protections of the Police and Criminal Evidence Act 1984. It would prevent unlawful recovery of journalistic material and protect journalistic sources if such protections were included in this Bill. As you will be aware, in England an Order to search and seize specific journalistic material will only be made if, among other factors, a Judge is satisfied that there are reasonable grounds for believing that an indictable offence has been committed, that the material is likely to be of substantial value to the investigation and that the material is likely to be relevant evidence.

It is worth keeping in mind that the European Court of Human Rights and the Court has repeatedly emphasised that freedom of expression is an essential foundation of a democratic society and stressed the duty on the media to play the vital role of public watchdog. Although the media must not overstep certain bounds, its duty is nevertheless to impart information and ideas on all matters of public interest. Not only do the media have the task of imparting such information and ideas; the public has a right to receive them without interference from a public authority under Article 10. Publishers and broadcasters are therefore permitted to offend so long as the material is presented fairly, accurately and responsibly. However, as currently drafted, the Bill whilst it does not appear intended to target the media, creates a situation where journalism would be caught by its provisions and that after chilling, expensive and time consuming prosecution, a Sheriff or Judge would be placed in the invidious position of having to act as an editor.

The MLA would urge you to reconsider the Bill and the risk of serious threat to freedom of expression that it poses.

Media Lawyers Association
24 July 2020