JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM SENATORS OF THE COLLEGE OF JUSTICE

Introductory Remarks

In responding to the Consultation Paper on Hate Crime Legislation the judges observed that how to go about tackling hate crime raised numerous potentially contentious issues, many of which were matters of policy for the legislature. Now that a Bill has been published what was said on that occasion merits repetition. Traditionally, and for good reason, the judges do not comment on policy matters, either individually or collectively. In due course they may be required to adjudicate on cases arising under the old provisions or under any new legislation, including matters of statutory interpretation. They require to reach decisions in an impartial way. The ability to do this, or be seen to do this, could be compromised by opinions expressed in response to the publication of Bills such as the present one.

For these reasons this response does not address every area or question set out in the Call for Views. There are, however, matters upon which the judges can offer views, and these are set out below following the order of questions/issues set out in the Call for Views.

General

1. For the reasons stated in the introductory remarks we have no view to express on these matters, which are substantially policy questions.

Consolidation

2. The potential benefits of consolidating existing hate crime laws into a single piece of legislation are clear. The present Bill appears to accommodate the main areas addressed by existing enactments.

We have considered, but decided against, recommending the inclusion within the Bill of a formal definition of "hate crime". We do, however, consider that useful context and guidance as to the meaning of the key words and phrases in the proposed

offences could be derived from the inclusion, within the Explanatory Memorandum, of Lord Bracadale's understanding of the concept of hate crime. It was "…conduct which by its nature is so morally wrong and harmful that it must be dealt with by the criminal law."[1]

How to prosecute hate crime?

3. The retention of a statutory aggravation model for Part 1 of the Bill is consistent with Lord Bracadale's recommendation that statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland[2]. We do not offer any different view. The other questions raised are matters of policy to which we offer no response – see introductory remarks.

4. This question also raises matters of policy to which we offer no response – see introductory remarks.

It is, however, convenient at this point to comment on the terms of the Bill (although, since stirring up offences are raised as a separate issue in the Call for Views, we have given separate consideration below to clauses 3 and 5).

Clause 1

We note that clause 1 of the Bill retains the phraseology of "evincing malice and ill-will". Lord Bracadale considered that, to a layperson, a phrase such as "demonstrating hostility" was more easily understood, and recommended that such wording be adopted (without any change in the meaning or the legal definition of the thresholds)[3]. Since an important theme of the Final Report was the need for clear terminology, it is for consideration whether the phraseology of clause 1 merits reconsideration in line with his Lordship's recommendation.

Clause 2

We note that it is proposed, by clause 2(2)(d), to retain a statutory requirement that the sentencing court state what sentence would have been imposed if an offence

[1] Independent Review of Hate Crime Legislation in Scotland; Final Report, Executive Summary;
[2] Final Report, Recommendation 1;
[3] Final Report, paragraph 3.10;

had not been aggravated by prejudice. Lord Bracadale concluded that such a requirement was over-complicated, did not serve a clear purpose, and should be repealed[4]. His conclusion was consistent with the view previously expressed by the judges[5] that recording what a sentence would have been without the aggravation was likely to be a somewhat artificial exercise. That has been the experience of one of the judges, sitting as a sheriff, who expressed the view that the exercise of differentiating between an actual and a hypothetical sentence was often unintelligible. We doubt whether in these circumstances there would be any real value in sentencing data derived from the recording of the information prescribed. We remain of the view that it is highly desirable that the direction of travel should be towards simplification of the sentencing process, rather than added procedural requirements, and recommend deletion of clause 2(2)(d).

Clause 4

We are unclear as to why it has been considered necessary to make special provision, in clause 4, for culpability where an offence is committed during the public performance of a play. We acknowledge that Lord Bracadale recommended[6] that sections 18-22 of the Public Order Act 1986 should be revised and consolidated, and that section 20 of that Act is concerned with public performance of a play. But there may be other situations where an offence might be committed by one person against a background of consent, connivance or neglect by another or others.

That said, we question the adequacy of the definitions provided in clauses 4(3) and 4(4). The scope of clause 4 has the potential to cover a wide variety of different types of performance, both amateur and professional. Since clause 4 envisages the commission of offences by “the performer”, “the director” and “the presenter”, and, in the case of the director or presenter, in circumstances where “neglect” is established, the inclusion of clause 4 in the Bill ought to provide an opportunity for these terms to be clearly and concisely defined[7].

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[4] Final Report, paragraph 3.64;
[5] Response to Consultation Paper, p. 5 (question 10);
[6] Final Report, recommendation 15;
[7] cf. Theatres Act 1968, section 18(2); Public Order Act 1986, section 20(4);

Moreover, statutory offences in relation to public performance of a play have hitherto been directed towards persons who present or direct a performance [8], and not performers. We do not understand Lord Bracadale to have recommended any extension of criminal liability to those in a performing role. The emphasis in clause 4 is now in the opposite direction, with primary responsibility apparently resting with the performer. We, therefore, question (i) for the purposes of an offence committed by a "presenter" or "director" of a play, why clause 4 requires an offence also to have been committed by the performer, and (ii) why it is considered necessary to extend criminal liability to a performer at all, at least in circumstances where they are doing no more than reciting the lines ascribed to their character by the play in question. Freedom of expression is a fundamental part of our liberties and civil society. No doubt that is why the subject matter of clause 4 provides a difficult, and potentially hazardous, area in which to legislate. It is, therefore, concerning that there is absent, from clause 4, a statutory defence along similar lines to that contained in the Theatres Act 1968[9]. That defence was established if it was proved that the giving of the performance in question was justified as being for the public good on the ground that it was in the interest of drama, opera, ballet or any other art, or of literature or learning. It is not clear to us why a defence, linked at least to literary/dramatic merit, should not feature in that part of the Bill which is specifically directed towards public performance of a play.

Clause 6

Clause 6(3) provides that a constable or a member of police staff[10] may in certain circumstances "require" that seized or detained material be converted into a form which enables it to be taken away, or be produced in a form which is capable of being taken away and from which it can be readily converted. Clause 6(3) does not, however, define upon whom the duty to comply with such a requirement rests. It is possible to envisage a number of different possibilities: the owner of the material (presumably); an occupier of the premises with access to the material (being

[8] See Theatres Act 1968, section 2 (obscene performances of plays); Public Order Act 1986, section 20 (stirring up racial hatred); it will be noted that section 20(4) of the Public Order Act 1986 provides that a person shall not be treated as aiding or abetting the commission of an offence under that section by reason only of his taking part in a performance as a performer.

[9] 1968 Act, section 3;

[10] As defined in clause 6(4)(b);

someone other than the owner); anyone else who happens to have access to the material; a concierge. We consider that clause 6 ought to make clear upon whom the duty of compliance rests, and potentially include a penalty, on conviction of obstruction, in the event of non-compliance[11].

Clause 9

The purpose behind clause 9(3)(b(ii) is tolerably clear. It is less clear in what circumstances an individual may be said to be “purporting to act” in the capacity specified in the table in clause 9(4). A reference simply to “acting” in that capacity might better avoid the potential for confusion.

Other forms of crime not included in the Bill

5. No response – see introductory remarks.

Stirring up offences

6. Subject to our comments below, the inclusion, in Part 2 of the Bill, of offences of stirring up racial hatred, based on both race and other protected characteristics, is consistent with Lord Bracadale’s recommendations[12].

7. However, the retention of the threshold of “threatening, abusive or insulting” behaviour in relation only to the offence of stirring up racial hatred has resulted in a division in treatment between the conduct referred to in clause 3(1) and the conduct referred to in clauses 3(2) and 3(3). We consider that to be an undesirable outcome. Lord Bracadale’s view that the threshold should be limited to “threatening or abusive” behaviour across all offences of stirring up hatred (phraseology which is well known to the courts[13]) was reached on the basis of both evidence of practical prosecutorial experience, and what he conceived to be a desire for parity and the avoidance of a hierarchy of protected characteristics[14]. We do not know the reasons why the Bill has not followed Lord Bracadale’s recommendation on the threshold question.

[11] cf. Misuse of Drugs Act 1971, section 23(4)(a);
[12] Final Report, chapter 5, Recommendations 13-15;
[13] cf. Criminal Justice and Licensing (Scotland) Act 2010, section 38;
[14] Final Report, paragraphs 5.41-5.42;

However, for practical reasons, we see no reason to take any different view to his. It is easy to envisage circumstances in which offences covering the stirring up of both racial and religious hatred will arise from the same circumstances, and require a sheriff to apply, or a jury to be directed on, two different tests. We do not consider such a result to be either desirable, or consonant with the need for clarity in what will already be a linguistically complex area.

Indeed, if the threshold proposed is to be retained, we consider that it would be essential to the practical administration of justice for the Bill to articulate clearly (i) what is meant by “insulting” in the context of an offence under clause 3(1), and (ii) when, for the purposes of the proposed statutory defence (currently contained in clause 3(4)), it would be considered reasonable to behave in a manner otherwise caught by the primary provisions.

The phraseology “it is likely that hatred will be stirred up against such a group”, in clause 3, mirrors the wording employed in sections 18 and 19 of the Public Order Act 1986. The test contemplated is one of likelihood. But “likely” according to whose perception? We recommend that the opportunity is now taken to clarify towards whom that question is directed. For example, in setting an objective statutory test, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 employs wording directed towards the perception of the “reasonable person”. Is it intended that this test be applied by reference to such a person, or to a person bearing the particular protected characteristic, or someone else? The need for clarification may be thought to attract even greater traction in circumstances where it is currently sought to employ a different threshold as between clause 3(1), and clauses 3(2) and 3(3).

So far, we have commented only on the stirring up offences in clause 3. However, the same comments can equally be made of the provisions, including the proposed statutory defence, contained in clause 5.

Other issues

8. We question why the statutory protections in clauses 11 and 12 apply only to religion and sexual orientation. A theme of Lord Bracadale’s consideration of stirring

up offences[15] was the desirability of consistency of treatment for all protected characteristics. The absence of a statutory protection for freedom of expression, relative to what are currently clauses 3(1) and 5(1), militates against the achievement of that consistency. That said, protection of freedom of expression might be thought to justify more general application. We therefore recommend that, whatever view is finally taken on the offending threshold for the purposes of clauses 3 and 5, consideration is given to the inclusion of a protection clause relative to the scope of what is currently contained in clauses 3(1) and 5(1).

More generally, we note that clauses 11 and 12 omit the words “expressions of antipathy, dislike, ridicule, insult or abuse towards those matters”, which were included in the equivalent “protection of freedom of expression” provision in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012[16].

9. No response – see introductory remarks

10. No response – see introductory remarks

Senators of the College of Justice
24 July 2020

[15] Final Report, chapter 5;
[16] 2012 Act, section 7;