

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH PALESTINE SOLIDARITY CAMPAIGN

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?

Having stirring-up offences is not per se a bad thing. However, they should all be limited to behaviour, communication, or possession which is “intended” to stir up hatred. Where the offence includes behaviour etc. that is “likely” to stir up hatred, it is able to capture behaviour where no malicious intention exists.

It would appear from the Scottish Government’s commentary on this issue that it is “intention” which it wishes to criminalise, but that this “would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused’s intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.”

On the contrary, the courts routinely decide on intention by looking objectively at the whole facts and circumstances. There is no reason to consider that the Courts will find difficulty here.

Lord Bracadale “considers that the wider test including both intention & likelihood would give more flexibility and does not consider the inclusion of behaviour that is likely to stir up hatred would unduly interfere with freedom of speech/expression.”

With respect, it is not clear why anything less than “intention” should be the *mens rea*, and there should be no flexibility for the courts to criminalise anything less.

Where likelihood is retained in order to assist with the perceived evidential difficulties suggested by the Scottish Government, prosecutions will inevitably arise where there is no evidence of intention, as it would not be a requirement. In practice, intention may become an irrelevance, when, in reality, it should be the focus. The proposed statutory defences assist to a degree but these are not ideal as, in practice, cases would often have to proceed to trial and the defence be made out after the Crown case. This is because Police are unlikely to feel that it is their role to consider a reasonableness defence when they are of the view that they have threatening behaviour likely to stir up racial hatred. Police are much more likely to consider that the reasonableness or otherwise is for the court to decide.

Where, on the other hand, intention is required, investigating authorities would have to consider this element at the investigation and reporting stage. This might have the effect of reducing the number of unfounded prosecutions, and also of better focussing the investigations of well-founded complaints and therefore improving the chances of convictions.

It is incumbent on the State not to prosecute without first ensuring that a proper investigation is carried out. Even where no conviction results, simply being prosecuted for such crimes can be especially harrowing, given the understandable stigma and the potential impact on inter alia employment prospects etc.

The above is relevant to the existing stirring-up offences (racial hatred), as well as the proposed new offences.

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?

We agree with Lord Bracadale. In practice, there is no reason to believe that removal will make any significant difference to either victims or perpetrators.

In addition, the opportunity to make politically-motivated malicious or vexatious complaints over legitimate criticism or debate might be reduced. This is not a minor issue. As noted above, even where no conviction results, to be prosecuted for such crimes can be especially harrowing, given the understandable stigma and the potential impact on inter alia employment prospects etc.

Furthermore, as is well understood, the courts are used to dealing with the “threatening or abusive” criteria, and there is merit in maintaining that approach in the absence of compelling evidence to the contrary, which does not exist here. It also fits in with the policy aim of simplifying “hate crime legislation and avoid having different thresholds and tests for offences or aggravations relating to different characteristics.”

Other issues

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

It is concerning that by singling out just two characteristics, it could (and almost certainly would at some stage) be argued that a lesser degree of protection of freedom of expression exists in relation to others.

Scottish Government endorsement of the IHRA

The Scottish Government has accepted Lord Bracadale’s ‘recommended that it was not necessary to create a statutory aggravation to cover hostility towards a political entity or socio-economic status.’

The introduction to Lord Bracadale’s question ‘Should an aggravation apply where an offence is motivated by malice and ill-will towards a political entity’ largely focused on the International Holocaust Remembrance Alliance’s (IHRA) working definition of anti-Semitism. The Scottish Government reports that ‘74% (382) of respondents thought this should not be added to Scottish hate crime legislation’ and that ‘those opposed believed that it would be an infringement on freedom of speech and the

right to political protest while also undermining existing hate crime laws'. Those opposed included the Faculty of Advocates, the Law Society of Scotland, the Senators of the College of Justice and the Coalition for Racial Equality and Rights.

There is serious concern therefore that the Scottish Government has continued their endorsement of the IHRA working definition, including "all of the accompanying examples of contemporary anti-Semitism provided by the IHRA". It is important that the Scottish Government clarify how their continued endorsement of IHRA is compatible with Lord Bracadale's recommendation, concerns raised regarding freedom of speech and the right to political protest, and with the implementation of the proposed hate crime legislation in Scotland.

References:

Hate Crime and Public Order (Scotland) Bill, Policy Memorandum, <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>

Hate Crime and Public Order (Scotland) Bill, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf>

Scottish Government adoption of full IHRA definition of anti-Semitism: FOI release, published: 3 Sep 2018, <https://www.gov.scot/publications/foi-18-02128/>

Independent Review of Hate Crime Legislation in Scotland, Consultation Paper, https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/user_uploads/final-paper-1.pdf

Scottish Palestine Solidarity Campaign
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