JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM EKKLESIA

While we welcome the Hate Crime and Public Order (Scotland) Bill in principle, both in its intent to render legislation in this area consistent, and particularly in its effect of abolishing the common law offence of blasphemy – which we have long called for – there remain some serious concerns about the free speech impact of elements of the Bill, in the way that it is currently drafted.

In particular, we share widely held disquiet (expressed across the spectrum of political and religious / non-religious beliefs) over Part Two of the Bill and the extension of “stirring up hatred” offences with no proof of intent, and no clear definitions. Specifically, noting that the Scottish Government plans to retain the threshold of “threatening, abusive or insulting” behaviour in relation to the stirring up of hatred, we agree with Lord Bracadale’s view that “insulting” should be removed from this formulation. It is not the job of hate crime and public order legislation to criminalise insults or to protect persons from offence *per se*. Nor is it helpful to the realisation of the purpose of such legislation to do so.

We respect and endorse the principle behind new powers making it an offence for someone to behave in a threatening or abusive manner, or to communicate threatening or abusive material to another person where there is an intention or likelihood to stir up hatred in respect of the seven protected groups. We also understand that whether conduct is deemed threatening or abusive will finally be a matter for the courts, in ascribing the individual facts and circumstances of each case.

However, we are not yet convinced that the framing of all this takes sufficient precaution against its misuse in prosecuting in case where someone is merely offended by words or views deemed to be insulting or controversial, outwith a tangible context of threat, danger, harassment or menace.

In this context, we note the reasonable and concerning observation of the Director of the Scottish Newspaper Society that “social media is awash with people bearing extreme grudges against those with whom they disagree, and this legislation has the potential to give them a legal means to silence their opponents.” This would clearly be a damaging and unintended consequence of the Hate Crime and Public Order (Scotland) Bill, and one which does not appear to us to have been sufficiently guarded against in its current wording and formulation.

In this regard, we note the Scottish Government’s expressed view that the Bill “does not seek to stifle criticism or rigorous debate in any way” and that “it is important that people are free to express their views and opinions.” We respect that intent, but we are not convinced by the corollary, namely that “the bill does not change that.” In the respect we have outlined above, it seems to us that it is in real danger of doing precisely that.

A particular concern arises when there is talk of using legislation to “send a strong message” over issues. It is not the primary job of the law to “send messages”, but to effect implementable and just measures of crime and sanction. Reinforcing the message behind such legislation is the job of parliament, public representatives, civil society groups, campaigns against bigotry and hate of all kinds, religious and non-religious organisations, and so on. The task of the law in this respect is, by contrast, to be as clear and equitable as possible, to avoid excessive, vague, overly subjective or imprecise formulations (such as ‘insult’) and to focus on the discharge of clear public order measures designed to protect people generally – and particular groups singled out for threat and harassment – against behaviour properly designated criminal in this regard.

Repeated “bigoted abuse”, when it constitutes threat or harassment, should certainly be included within the purposes of this legislation, especially when accompanied by violent behaviour (which, in any case, will be a public order offence). But insulting a religious or philosophical belief, however unpleasant that may feel for an individual, does not on its own fit that end, especially where intent is neither required nor provable, and opens up a dangerous threat to freedom of expression.

It would appear that, at present, the legislation under consideration effects that individuals may commit a “stirring up hatred” offence without intending to do so, and without actually having done so, if the court feels their actions were “likely” to stir up hatred. The lack of *mens rea* – mental culpability – considerably widens the reach of the offence under consideration here, and in a way that is very uncertain in terms of its use and impact.

On this matter we agree with Amanda Millar, President of the Law Society of Scotland, who is on public record as saying: “Scotland is becoming increasingly diverse and it’s right that we have laws that reflect this and provide a clear message that hatred should have no place in our society now or in the future.

“However, we have significant reservations regarding a number of the Bill’s provisions and the lack of clarity, which could in effect lead to restrictions in freedom of expression, one of the foundations of a democratic society.

“We have real concerns that certain behaviour, views expressed or even an actor’s performance, which might well be deemed insulting or offensive, could result in a criminal conviction under the terms of the Bill as currently drafted.

“[New hate crime law] needs to ensure an appropriate balance is maintained to protect those in society who are most vulnerable to prejudice while preserving the right to comment or debate on matters. It must also instil confidence in our criminal justice system.”

It is also of concern that a key recommendation of the independent review of hate crime legislation carried out by Lord Bracadale, namely that “insulting” behaviour should be excluded, has not been taken on board to date – for the clear reasons we have set out, from our perspective, in this response.

Lastly, we note to points inter alai. First, that current protected characteristics include sex. Second, that sectarianism is not included in the Bill. While there may be good reasons for that, it is a notable omission, and it may in turn point to the wider difficulties of defining offences with sufficient legal clarity as to be just, specific and effective. This is another matter which may require further thought at the next stage of this process.

In summary, it is our view that this Bill needs careful re-consideration, amendment and redrafting in order to be acceptable, with a further stage of consultation and debate both within the Scottish Parliament and in civil society.

We would particularly encourage the Scottish Government to learn lessons at this juncture from the difficulties which led to the eventual repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. Here again was a piece of legislation with high and necessary ideals which was thwarted by too wide and imprecise a formulation in certain aspects.

It would be a great pity if necessary action, including the repeal of blasphemy and the protection of people with protected characteristics from threat, abuse and harassment, was endangered or weekend by lack of attention to important specific details and response to the widespread concern these have caused in both expert and lay circles.

Ekklesia
24 July 2020