

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE ASSOCIATION OF SCOTTISH POLICE
SUPERINTENDENTS

Thank you for the invitation to submit evidence to the Scottish Parliament's Justice Sub-Committee on the above Bill.

I have consulted with members of the Executive Committee of ASPs who widely represent the senior operational leaders of the Police Service of Scotland (the Service) and have made the following comments and observations. In that connection and for ease of reference, I will lay this information out by answering each of the questions in the notice calling for evidence/submissions.

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?

The policy intentions of the Bill to modernise, consolidate and extend Hate Crime legislation in Scotland to provide greater clarity, transparency and consistency of approach are understood and generally supported. However, it is not entirely clear why the new provisions of this legislation (Part II in particular) are required without providing the context of how/why particular aspects of current legislation (which provides clear aggravations of extant crimes and offences) are failing to protect the public, and furthermore, how these gaps might be addressed without the need for further, primary legislation. For example, perhaps another approach to consider before further legislation is introduced would be greater investment in educational initiatives across Scottish society, to combat hateful behaviours where they are most likely to occur.

Parliament enacted the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 to combat offensive behaviours associated with football fans engaging in conduct, mostly verbalised, that was perceived as hateful towards others. There are clear lessons to be drawn from the practical experience of operationally applying unclear and subjective legislation, and of the reluctance of various courts to convict those charged with offences under that act, now repealed.

It is of note that public and political criticism for the failings of that 2012 Act were focused heavily upon the Police Service who were given the task of upholding the new law, rather than on the wider societal responsibilities of politicians, citizens and the football authorities to support the intentions of tackling hateful behaviours displayed so publicly. As oft-commented on by senior officers in the Service, Scotland could not expect to simply 'arrest its way out of sectarianism' and that wider, longer-term strategies founded on educational initiatives by the state and football clubs were more likely to provide the solutions being sought.

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?

There is merit in this approach to consolidate, simplify, and codify the relevant legislation under one Act. However, by omission of some protected characteristics under the Equality Act and the drafting of new characteristics not maturely defined elsewhere in law, there is a risk of creating further confusion rather than clarity and worryingly, an inequality of access to protection under law for the vulnerable. Whilst offences of hateful behaviour against 'marriage' and 'pregnancy' are not meantime prevalent, there may be merit in considering applying consistency and offer the same protection for all characteristics defined in other laws.

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?

The statutory aggravation model is effective when applied in other areas, particularly so for offences linked to domestic abuse and violence. However, these developments have been made over several decades of partnership working across a wide number of public and third sector agencies, with many 'lessons learned' along the way which may now help to inform the development of this new legislation. It is noteworthy that the proposed Bill does not protect all those characteristics defined in the Equality Act and this omission risks creating an actual or perceived hierarchy of offences to be prosecuted, with 'catching up' required if unintended gaps in protection open up.

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?

Aggravations should allow for standardisation of recording and collection of accurate, consistent and valuable data (which underpins future policy development) in relation to these types of offending. If the Bill is to be enacted, for completeness, all protected characteristics should be included and with an ageing population, it seems timely to ensure that those in the most vulnerable groups in our communities are offered that same equality of protection under law.

Thus, an age aggravation would offer both protection to a vulnerable group and consistency in terms of the recognised protected characteristics. However, the Association also recognises that members of our senior communities can find themselves the victims of crime as a result of perceived vulnerability rather than as a result of ill-will directed at them on the basis of their age *per se* and consequently such an aggravation may be difficult to prove in court in circumstances such as, for example, bogus callers. Therefore we would also be supportive of examining the viability of introducing separate vulnerability-based legislation outwith the hate crime framework.

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?

The term sectarianism can lead to confusion as there appears to be no definition in law as to what it actually is (although most people will have their own views as to what constitutes hateful behaviours motivated by sectarianism) and as such, is perhaps unhelpful and best avoided. The Bill should provide sufficient protection from hate motivated by what might generally be considered as sectarian behaviours through the protected characteristic of religion.

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?

These are new offences (except in relation to race) and concerns have been raised by many commentators that they might impinge on freedom of expression (Article 10, Human Rights Act), beyond the qualifications a state may apply in the wider interests of the community. The Association considers that the current law is adequate if applied fairly and consistently. Of particular concern is that the proposed threshold of proof is relatively low, needing only "*likelihood*" (we understand that government felt having only "*intent*" would be too restrictive) and including the

ambiguous term “*abusive*”, leading to some political concerns that it may capture people expressing relatively mainstream views, inappropriate or erroneous though they may be.

That said, the phrase “*threatening or abusive*” is consistent with existing terminology in Scots Law such as Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (although this legislation has a higher threshold than that proposed by the Bill, requiring as it does that the behaviour also induces reasonable fear and alarm in the victim), and so should be reasonably familiar to practitioners. Furthermore, to have a stand-alone crime would capture more accurately the prevalence of this type of offending (rather than the behaviour being prosecuted as a S.38 with an aggravator and thereby getting ‘lost’ amongst all the other S.38 offending statistics).

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?

The Association takes a similar view to that offered by Lord Bracadale in his report. The repeated policy intention of the Scottish Government is to create ‘parity and consistency’ and ensure there is no perceived (or actual) hierarchy between characteristics. However, although it is reasoned why both s.50A and “*insulting*” are retained in terms of race, the fact that there are no similar provisions for other characteristics quite clearly treats those characteristics differently. Such policy offers different (inferior) levels of protection to non-race protected characteristics, implying a hierarchy of both victim and crimes.

Whilst members of the Black and Minority Ethnic groups might well perceive removal of these provisions as an erosion of their current level of protection, this concern must be managed by other means. Conversely, other individuals may form the perception that a hierarchy in this Bill means that their characteristic(s) is not as valued or as “*worthy*”, and this perception will be harder to manage in light of the reality of the lesser protection they are offered. A truly consistent approach would mean all characteristics having the “*insulting*” and “*harassment*” protections or none having them.

Other issues

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

The Bill in its current draft does not, in the Association’s view, provide sufficient, qualified protection for the human right of freedom of expression. Whilst the views expressed by some may insult the sensibilities of others and be intolerable to accept, a mature, democratic and truly tolerant society should be able to negotiate robust

and even rude and insulting public and social discourse without recourse to the criminal law, other than in the most extreme and genuinely harmful circumstances. We have some concerns that the enactment of this Bill may regularly situate police officers as the arbiters of relatively minor social disputes or expressions of opinion, a circumstance which neither the public nor the Police Service would likely welcome.

Of concern regarding freedom of expression, is the ever-increasing use of social media as a means of communicating and sharing ideas and viewpoints with concomitant increases in demand for Police involvement when people take offence either directly or on behalf of others. The Association would support any measures taken by the Scottish Government that would encourage or require the owners and operators of such media platforms to better regulate their use, and to penalise those users who do not follow the rules, rather than rely on the potentially disproportionate intervention of the criminal law.

In this connection, ASPS notes that the Lord Bracadale's comments on the now repealed Offensive Behaviour at Football Act 2012, strike a similar chord and warn against the State attempting to legislate for 'insulting' behaviour, the definitions for which would need to be very broad.

If the Bill passes into law without revision in this area, there will need to be very clear policy lines and guidelines developed by Lord Advocate to assist the Police in determining when intemperate name-calling or rabble-raising has crossed the line and become criminal behaviour.

In this connection, it may be helpful to look at the recent history of prosecutions under the common law crime of Breach of Peace, which now has a statutory offence, and the reluctance of the courts to accept that merely shouting and swearing in a public place, or indeed simply gesticulating in a way that upsets others, has caused sufficient alarm or annoyance to warrant enforcement by Police officers. By contrast, the modern offence under S.38 sees people arrested for abusive behaviour when a statutory aggravator is present. Previously, under common law, 'failing to desist' would have been a significant element of the crime but now, a single, offensive word linked to a protected characteristic, particularly for racist motivations, need be uttered only once and robust enforcement of the law will follow.

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?

The Bill proposes consolidation of extant legislation and creation of new measures to cover all of the current, protected characteristics. Therefore, it is not clear why this particular offence should remain on the statute books when there are other measures proposed for those hate crimes motivated by racism. What is the intent of

retaining S.50A of the 1995 Act and if the case is made to do so, does this indicate a weakness in the new Bill and what impact might that have on the other protected characteristics?

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

It is the Association's view that the offence of blasphemy may now be abolished. Indeed, a comparison may be drawn with our earlier comments about the wisdom or otherwise of allowing the continued use of the term "insulting" for only some offences when it appears quite clear that people may be insulted by profane or sacrilegious acts or words that insult their religious beliefs. If the offence of blasphemy is to be repealed, then the sound rationale for that decision should be applied across all protected characteristics to ensure that the Bill does unwittingly create a new, secular-age offence (with likeness to blasphemy) in the other protected characteristics, particularly where people are simply in furious disagreement, and regardless of how strongly held their particular views may be or self-belief in their absolute, infallible correctness.

To conclude, the Association will be pleased to participate in further consultations and discussions on the proposed Bill and in particular, to consider what opportunities it will provide to the Police Service and other public agencies for a review of equality and diversity training so as to ensure fair, transparent and sensible application of the new laws as passed. In that connection, the Association is of the view that the estimates for costs to policing contained in the Financial Memorandum fall woefully short of what will actually be required for comprehensive training and support to officers and staff who will carry the responsibility for responding to myriad, and complex complaints which are likely to increase.

Yours sincerely,

Stewart Carle
Chief Superintendent
President of ASPS

27 July 2020