

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

COPFS approach to Hate Crime

Hate crime is an affront to the fundamental values to which our society is committed - values of tolerance, respect for human dignity and equal treatment – and it is legitimate to use the criminal law to make clear that behaviour which is an affront to those values will not be tolerated.

We acknowledge that hate crimes are under-reported in Scotland. Therefore we are committed to working with stakeholders, including Police Scotland and Scottish Government, to raise awareness of the impact of hate crime on individuals and communities and to encourage people to report hate crimes to the police or third party reporting organisations.

Where there is sufficient evidence in law, Prosecutors will take effective and appropriate action against any incident of hate crime.

General Comments

There is a practical benefit to a single piece of consolidated, consistent hate crime legislation. It can help clarity and understanding and can assist with the effective analysis of offences, offering greater opportunity to tackle offending.

Clear, simple, descriptions of an offence helps the understanding of victims, witnesses or other members of the public and the accurate recording of relevant offending behaviour. The current relevant legislative framework including section 50A of the Criminal Law (Consolidation) Act 1995, section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1998 is not obvious as relating to hate crime. Consolidation of the legislation will improve clarity in this area.

Consolidated legislation allows a consistent approach to be taken to different characteristics. Currently the characteristics are dealt with in separate pieces of legislation, were introduced at different stages in the evolution of our understanding of hate crime and have different evidential tests applying across the characteristics. Introducing clear, uniform evidential tests across the characteristics gives clarity to the public and to those investigating and prosecuting criminal offences.

Part 1 – Aggravation of Offences by Prejudice

General

Statutory aggravations are familiar to Scots law. Prosecutors use the charge that best reflects the facts and circumstances of the case, and will add a statutory aggravation where the evidence supports it.

Corroborated evidence is always required to prove the core offence. Adding a statutory aggravation does not change that requirement. Evidence from a single source is sufficient to establish a statutory aggravation and prosecutors and courts look to the circumstances specific to the offence and the words or actions of the accused for that evidence.

A statutory aggravation requires the court to take in to account certain factors when sentencing and to record the sentence in a specific way. Where the aggravation is established, the court must:

- state on conviction that the offence is aggravated by prejudice and record the conviction in a way that shows that the offence is so aggravated,
- take the aggravation into account in determining the appropriate sentence, and
- state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or state the reasons for there being no such difference.

'Evincing malice and ill-will' (section 1(1)(a)(i))

It is noted that the proposed statutory aggravation in the Bill retains the phrase “evincing malice and ill-will” which is used in existing provisions. Whilst prosecutors and the courts are accustomed to that language, victims, witnesses, and the public, may find such language unclear and outdated.

Lord Bracadale, in his review of Hate Crime in Scotland 2018, made a recommendation that the language be changed from ‘evincing malice and ill-will’ to ‘demonstrating hostility’. Any such change, were it to be made, would not change the nature of the test being applied or impact on the ability of prosecutors to use the aggravation effectively.

Aggravation Relating to Age (section 1(2)(a))

In February 2019 COPFS provided written and oral evidence to the Justice Committee on a potential statutory aggravation relating to age as part of the Committee’s inquiry in to the Prosecution of Elder Abuse.

The Scottish Government recognise in the Policy Memorandum that an aggravation relating to age as introduced in the Bill would only apply in a relatively small number of cases each year. Lord Bracadale reached a similar conclusion and this conclusion is borne out by the experience of prosecutors dealing with the cases currently reported to COPFS.

There is a distinction between offences which demonstrate hostility towards someone’s age, and offences where the accused has exploited someone because of their age and perceived associated vulnerability. The aggravation relating to age in the Bill captures the former but not the latter. Prosecutorial experience is that there are relatively few cases of age hostility, as defined in the Bill, reported to COPFS.

The new aggravation would not be used, for example, in a typical ‘bogus workman’ case committed against an elderly person. In such a case there would generally be no evidence available to support a contention that the accused was motivated by malice and ill will towards elderly people as a group or towards an individual due their membership of that group.

In such cases, prosecutors will provide relevant background information to the court, or lead evidence from the victim as to the impact of the offence. The court is able to take in to account any exploitation of vulnerability at sentencing.

Further Potential Aggravations

Where any new aggravation is being added careful consideration must be given to the requirement for and scope of such an aggravation. It is important to ensure that the definition of any new aggravation is clear and that its relationship with other aggravations does not have the potential to complicate understanding for the public or for those involved in investigating and prosecuting offences.

Aggravation Relating to Sex

Section 15 provides for the power to add the characteristic of sex to the list of aggravations by way of Regulations. Any decision to add a specific aggravation relating to sex would require a clear definition and clarity on the context in which the aggravation should be applied. It is noted that the Scottish Government intends to establish a Working Group to consider such an aggravation.

Part 2 – Offences Relating to Stirring up hatred

Offences of Stirring up Hatred (Section 3)

The Bill as it is currently drafted creates two separate stirring up offences – one for the characteristic of race and the second for the other protected characteristics. These two offences have different definitions of the types of criminal behaviour or communication. In relation to race, criminal behaviour or communication includes “insulting” behaviour or material. In relation to the other protected characteristics “insulting” behaviour or material is not included within the definition of criminal behaviour or material. This difference has the potential to create complexity, for example, where there is behaviour which is directed both at race and at one or more of the other characteristics.

Applying the ordinary principles of statutory interpretation, those involved in the investigation and prosecution of offences and the courts may be expected to proceed on the basis that this is a deliberate distinction and may identify behaviour which is captured by “insulting” but not by “threatening” or “abusive”.

Lord Bracadale recommended that the term “insulting” should not be included in the definition of a new stirring up hatred offence. “Threatening and abusive” is a term which is familiar to Scots law. The term ‘insulting’ is less familiar. COPFS is not aware of any behaviour commonly reported to COPFS under the current stirring up racial hatred offences under sections 18 to 22 of the Public Order Act 1986 (the 1986 Act), which would not be captured were the phrase “insulting” to be removed and the test simply be one of “threatening and abusive” behaviour.

Culpability where offence committed during public performance of play (Section 4)

COPFS notes that the offence under section 4 broadly mirrors that under section 20 of the 1986 Act. COPFS is not aware of any instances of criminal proceedings being taken in relation to an alleged contravention of section 20 of the 1986 Act.

Offences of Possessing Inflammatory Material (Section 5)

The offences in relation to possessing inflammatory material also have different definitions for race as compared to the other characteristics. The potential consequences of this difference are described above in relation to Section 3.

Criminal behaviour potentially captured by the possession of inflammatory material offences under Section 5, which would require evidence of the accused person’s intent to communicate, would potentially also be captured by an offence of attempting to stir up hatred under Section 3.

Defence of Reasonableness (sections 3(4), 3(5)(a), 5(4) and 5(5)(a))

The Bill sets out the circumstances in which behaviour, communication and material may be deemed to be reasonable, thereby establishing statutory defences to the stirring up hatred and possession of inflammatory material offences.

Those circumstances are where;

- (a) evidence provided is enough to raise an issue as to whether that is the case,
and
- (b) the prosecution does not prove beyond reasonable doubt that it is not the case.

Sections 3(5)(a) and 5(5)(a) appear to create an evidential burden on the defence, not only to lead evidence, but to lead “enough” evidence to establish the statutory defence.

There are two potential issues with the defence in its current draft. Firstly it implies that a court could not find an accused’s actions were reasonable and acquit without the accused leading evidence. Secondly the term “enough” evidence does not provide clarity in relation to the threshold required to establish the defence.

Finally, retention of the word ‘insulting’ in relation to the offences of stirring up racial hatred under section 3(1) and possessing racially inflammatory material under section 5(1) of the Bill, means that the threshold for the statutory defence in respect of race, differs to that of the other protected characteristics.

Individual culpability where organisation commits an offence (Section 9)

This section is similar to section 28 of the 1986 Act. However in applying individual culpability to “any other body or association” and “any individual who is concerned in the management or control of a body or association’s affairs,” the Bill extends culpability beyond individuals included in the 1986 Act. Identifying sufficient evidence of an individual’s culpability in a body or association without an identifiable and regulated structure may be challenging.

Protection of Freedom of Expression (Sections 11 and 12)

Sections 11 and 12 of Part 2 of the Bill mirror the approach adopted in the 1986 Act with regards to protection of freedom of expression in relation to religion and sexual orientation. The sections identify, with a degree of specificity, categories of speech which are not covered by the criminal offences in question, therefore providing guidance both to those who are expected to comply with the law and those charged with its application.

It is noted that the provisions within the Bill protecting free speech apply in relation to the characteristics of religion and sexual orientation, but not to the other categories referenced in the Bill.

Prosecutors may legitimately start from the perspective that if speech which stirs up hatred has been criminalised, that is a legitimate restriction on free speech in a democratic society. Nevertheless, prosecutors are aware of the requirement to consider the protection of freedom of expression when looking at any reported offence. This requirement is reflected in existing COPFS guidance.

Part 3 – Further Provision Relating to the Characteristics

Meaning of the Characteristics

COPFS notes that the definitions of the protected characteristics listed in section 14 of the Bill are similar to those within existing hate crime legislation, apart from the definition of transgender identity, which has been updated with more modern language and no longer includes any reference to intersex / variations of sex characteristics.

Part 4 – Abolition of the Offence of Blasphemy

Part 4 of the Bill abolishes the offence of blasphemy. Repeal or otherwise of the offence is a matter for Parliament. The offence of blasphemy has not been prosecuted in Scotland for over a century.

Crown Office and Procurator Fiscal Service
27 July 2020