

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM JAMES KELLY MSP

- **General Principles and Consolidation**

I think consolidating hate crime legislation into one body of law is a sensible step. Currently, offences related to hate crime can be prosecuted under a number of different aspects of legislation - the Crime and Disorder Act (2003), Offences (Aggravation by Prejudice) (Scotland) Act (2009) and the Criminal Justice Scotland Act (2003).

Condensing the various legislation into one Act will hopefully make hate crime law more user-friendly and accessible for the general public. With hate crime being under-reported in Scotland¹, it is important that legislation clearly indicates to people what constitutes a 'hate crime' and what protections are in place to prosecute such offences.

- **Part One – Prosecuting Hate Crime and Statutory Aggravations**

The current means of prosecuting hate crime through the attachment of a statutory aggravation ensures that any motivating prejudice behind an offence against a person or group who possesses a protected characteristic is accounted for and prosecuted accordingly. I am supportive of the retention of this framework as the primary means of prosecuting hate crime in Scotland.

However, I think it is important that the legislation is as accessible as possible. To this end, I would support the Government's intentions to provide corresponding guidance for the public on statutory aggravations and how they are identified and attached in order to aid public understanding of the practicalities of this framework.

I believe there is room for improvement in terms of the hate crime data we have access to in Scotland. COPFS publish hate crime statistics each year but these aggregated figures only provide us with part of the picture. Disaggregated hate crime statistics would provide us with a clearer insight into which communities are disproportionately targeted, but I note that disaggregated racial hate crime statistics have not been published since 2013/14 and disaggregated statistics on religious hate have not been updated since 2017-18.

I am supportive of calls from BEMIS Scotland to integrate a legal requirement into the Hate Crime Bill which places a duty on the Government, Police Scotland and other associated organisations to develop a comprehensive system of racial and religiously aggravated hate crime data collection and disaggregation.

¹ <https://www.hatecrimescotland.org/faq/>

‘Stirring up Hatred’

I note that under the proposals for ‘stirring up hatred’ offences, a crime will be committed if an individual behaves in a “threatening, abusive or insulting manner” or if they communicate “threatening, abusive or insulting material” – whether they have intended to “stir up hatred” or not. Under these proposals, a person can be criminalised for behaviour which another person finds insulting, whether they have meant it or not, which sets an alarming legal precedent and differs from law in England and Wales under the UK Racial and Religious Hatred Act (2006) - where intent is required²

In addition, I remain unconvinced of the necessity to expand stirring-up hatred offences to include all protected characteristics as I note that these powers which are currently legislated for in relation to race crime, have only been used nine times in ten years from 2006-2016³. The almost inactive nature of those powers could be due to similar legal protections already existing to this end, including under the Criminal Justice and Licensing Scotland Act (2010) which criminalises behaviour which would be likely to cause a person to “suffer fear or alarm.”⁴

Insulting Behaviour’

Religious and secular groups alike including The Christian Institute⁵, Humanist Society Scotland⁶, National Secular Society⁷ and the Catholic Church⁸ have raised also raised legitimate concerns that the criminalisation of ‘insulting’ behaviour risks infringement on the right to freedom of speech and could criminalise the expression of religious views.

Further to the above, I have significant concerns about the legal standing of terminology such as “insulting” in law, as what an individual finds insulting is subjective and could cause serious legal confusion. Alarmingly, the vague nature of this terminology evokes memories of the ambiguity of language under the now-repealed Offensive Behaviour at Football and Threatening Communications Act (2012)⁹. Under the 2012 Act, behaviour which a “reasonable person would find offensive” was criminalised and the ambiguity of those provisions resulted in the criminalisation of legitimate expressions of culture and opinion. I fear that the Government have not learned any lessons from the six years that the 2012 Act was on the statute books as the Part Two proposals pertaining to the criminalisation of “insulting behaviour” suggests a misguided revival of the unworkable Offensive Behaviour at Football Act.

² <http://www.legislation.gov.uk/ukpga/2006/1/contents>

³ https://www.holyrood.com/comment/view.comment-the-hate-crime-bill-must-be-properly-scrutinised_15519.htm

⁴ <http://www.legislation.gov.uk/asp/2010/13/section/38>

⁵ <https://www.christian.org.uk/news/scot-hate-crime-bill-a-severe-threat-to-free-speech/>

⁶ <https://www.humanism.scot/wp-content/uploads/2020/05/Hate-Crime-and-Public-Order-Scotland-Bill-Humanist-Society-Scotland-Briefing-1.pdf>

⁷ <https://www.secularism.org.uk/news/2020/07/hate-crime-bill-threatens-free-speech-on-religion-nss-tells-minister>

⁸ <https://www.sconews.co.uk/news/57710/holding-catholic-beliefs-could-become-a-hate-crime-in-scotland-church-warns/>

- **Part Three – Inclusion of Age and Sex**

Age

The addition of an ‘age’ aggravation is a well-meaning step but there are some difficulties around the inclusion of this characteristic within hate crime legislation. If our understanding of hate crime is the targeting of a person(s) based on their perceived membership of a marginalised group and fuelled by prejudice towards that group, then it is difficult to prove that age is an aggravator in this context.

Before legislating for elder abuse as part of hate crime law, we must be able to conclusively prove crime towards elderly people is motivated by a hatred or discrimination of elderly people and not just because they are vulnerable or easy to target, which I am not yet convinced we can substantiate. Legislating for elder abuse as part of hate crime legislation could risk missing the mark in how we prevent such crime in the future and how we protect older people and as reported by SPICe fellow Hannah Bows, “just because an offence may fit within our comprehension of what ‘hate’ might entail, does not necessarily mean it’s advantageous to include it within hate crime law.”¹⁰

In a previous evidence session to the Justice Committee on elder abuse, Age Scotland and the Care Inspectorate both suggested framing a statutory offence around an aggravator of ‘vulnerability’¹¹ which may be a more workable option.

Sex

I note Lord Bracadale’s initial recommendation of a gender aggravation within the new hate crime law. However, I am in agreement with stakeholders such as Engender, Rape Crisis Scotland and Scottish Women’s Aid that the creation of a gender aggravation under the Bill risks being insufficient in capturing the complex reality and different forms of violence against women. On this issue, Engender said in 2019 that “...a gender aggravation would be a mistake. It would not fill the gaps in the law... international experience suggests that we would see very few investigations, prosecutions and convictions because it is not a model that aligns well with public understanding of women’s equality.”¹²

I am aware of calls to instead consider the creation of a stand-alone misogyny offence and support the Government’s commitment, in principle, to explore this option.

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https://www.parliament.scot/S5_JusticeCommittee/Inquiries/H_Bows_SPICe_ReportAddressing_older_victimisation.pdf

¹¹

https://www.parliament.scot/S5_JusticeCommittee/Inquiries/Convener_letter_to_Cab_Sec_Justice_on_elder_abuse_20190322_FINAL.pdf

¹² <https://www.engender.org.uk/content/publications/Making-Women-Safer-in-Scotland---the-case-for-a-standalone-misogyny-offence.pdf>

- **Part Four – Abolition of Blasphemy Offence**

I am supportive of proposals to abolish the blasphemy offence from law as it is no longer necessary or appropriate, with the last blasphemy case being prosecuted in Scotland in 1842.¹³

James Kelly MSP
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¹³ <https://www.theguardian.com/uk-news/2020/apr/24/blasphemy-to-be-decriminalised-in-scottish-hate-bill>