JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM JUSTITIA, DENMARK

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Brief summary of our views:
Whilst welcoming the abolishment of blasphemy, we are concerned about (i) the freedom of expression implications of the Bill (ii) the integration of speech and actual physical violence under one law (iii) the lacking necessity of intent in relation to the former (iv) the particularly low thresholds attached to offences aggravated by 'prejudice' (v) the conflict between some of the provisions and International Human Rights Law (vi) the variation of thresholds amongst protected characteristics (vii) the suitability of criminal law as a means to tackle prejudice and hate (viii) and the negative impact of such a Bill on 'minorities' (ix) the impact of the Bill on an already polarized climate.

Our views will commence with a brief theoretical and socio-legal overview of hate crime legislation which we consider should be taken into account by the Scottish Parliament. This will be followed by particular points vis-à-vis the Bill and its provisions.

Hate Crimes: A Theoretical Overview

Scholars have discussed the impact of hate crimes in comparison with other crimes, and particularly whether or not such crimes are more destructive than others and thus merit the element of aggravation. Bakken argues that there exists no evidence demonstrating that hate crimes are more dangerous than other crimes (Bakken, 2000: 6). Others argue that victims of hate crimes suffer more psychological harm than victims of non-bias crimes. (Barnes & Ephross, 1994, Iganski & Lagou 2009). In the 1990s, Garnets, Herek and Levin found that victims of homophobic crimes may reconsider disclosing their sexual orientation, (Hershberger & D'Augelli, 2009) change their comportment, dress and places of socialisations to avoid re-victimisation. Craig-Henderson, 2009) Such consequences demonstrate that, beyond the direct physical and psychological harm, hate crime can impact its victims (but also their communities) on an existential level. Hate crimes can therefore create 'feelings of vulnerability, mistrust and fear among members of the community to which the victim belongs' (Herek, Cogan & Fillis, 2002, Lim, 2009). This

framework demonstrates the micro, meso and macro level of impact as well as the spatial elements of harm. Taking these three levels together, and the findings that exist on the psycho-social impact of hate crimes on a series of victims, could provide a framework through which the need to tackle hate and bias exists. The issue, however, lies with the *manner* in which this need is pursued.

It must be noted that the above discussion relates to physical violence and not speech. It is rather concerning that the Bill amalgamates hate crime and hate speech into one document and entitles it 'Hate Crime' given that speech and physical violence are two separate themes which are dealt with differently also under international and European human rights law.

The Criminal Law Route

***Freedom of expression concerns*:** Opponents of the criminal law route, such as Gellman, argue that, if sentence enhancement emanates from the recognition that bias is what underlies the perpetrator's motive, then such enhancements are, in fact, punishing thought. (Bell & Perry, 2014: 99). Furthermore, the very fact that hate is an 'elusive psychological concept' (Bakken, 2002:235) means that the State would be required to investigate the mind, mindset and ideology of the perpetrator, a task which 'might be very difficult to do with any consistent reliability' (Bakken, 2002: 235). Beyond the normative framework, free speech concerns in relation to *aggravation of offences by prejudice* in this Act are enhanced by the use of the words 'prejudice', 'malice' and 'ill-will.' It is rather surprising that a higher threshold was not attached to section 1 and that such broad terms, including mediocre negative emotions are incorporated. We are also concerned at that fact that the aforementioned *emotions* do not need to constitute part of the perpetrator's intent, he or she may have 'felt' them post-offence as noted in Section 1(a)(i). In addition, the low evidential requirement of just one single source to demonstrate the perpetrator's mindset and/or emotion is also of concern. All of the above are even more concerning when we take into account the fact that this section may lead to up to seven years' imprisonment and/or a fine. Furthermore, in terms of *stirring up hatred*, the present Bill endorses a much lower threshold than what is set out at an international and European level. Article 20(2) of the International Covenant on Civil and Political Rights provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The 2012 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression underlined that 'the threshold of the types of expression that would fall under the provisions of Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) should be high and solid.'[1] Further, UN's Rabat Plan of Action (RPA)[2] reiterates the importance of a high threshold for this article and has sought to clarify them through a six-part threshold test for the application of Article 20(2) which incorporates:

(1) the social and political **context**

(2) status of the **speaker**
(3) **intent** to incite the audience against a target group
(4) **content** and form of the speech
(5) **extent** of its dissemination and
(6) **likelihood** of harm, including imminence.

In antithesis with the above, the Scottish Bill prohibits speech which, in relation to race, colour, nationality or ethnic or national origins, is not only threatening and abusive but also *insulting.* This lowers the threshold of acceptable speech to a dangerous level. Further, the fact that *insulting* is only reserved for the above characteristics whereas for the other characteristics – namely age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics, the speech must be threatening or abusive (but *not insulting*) means that the Bill has already established a structural hierarchy of some characteristics receiving more 'protection than others.' Free speech concerns regarding discussions on sexual lifestyles or religious beliefs are not the reason for this distinction since they are anyhow covered in Section 11 and 12. Further, it is also worrying that intention is not a requirement for offences relating to stirring up hatred. It is sufficient that a person behaves in a particular manner (e.g. abusive) if it is 'likely that hatred will be stirred up' against a group with the protected characteristics set out in the Bill. Again, this is contrary to the position of the United Nations - for purposes of Article 20(2), the 2012 Report of the Special Rapporteur defined advocacy as 'explicit, intentional, public and active support and promotion of hatred towards the target group.'[3] The vagueness associated to the Bill's reference to a *likeliness* that racial hatred could be stirred up could also pose a problem under European Convention on Human Rights since the law might not be sufficiently clear and accessible to satisfy the requirement that restrictions on Article 10 be 'in accordance with law.' We also note that the Bill incorporates the offence of possessing inflammatory material which may be threatening, abusive or insulting with a view of communicating the material to another person (regardless of his or her intention to stir up hatred) is particularly troublesome. What if someone is possessing material which may, in fact, be insulting, for research purposes? What if that person wishes to share that material with a colleague for the same purpose? At what point do authorities intervene and determine the intention to communicate? How will this happen in practice? The lines – both conceptually and practically are blurred. Further, we are concerned with the disproportionality that marks the punishment of 'stirring up hatred' which can be up to seven years' imprisonment. The European Court of Human Rights (ECtHR) has stressed, 'every formality, condition, restriction or penalty imposed in this sphere [i.e. Article 10] must be proportionate to the legitimate aim pursued.'[4] In *Lehideux and Isorni v France*, the Court found that the choice of criminal proceedings was 'disproportionate and, as such, unnecessary in a democratic society.'[5] An additional issue is the use of this law to silence minorities themselves. Moreover, the ECtHR has noted that States must avoid resorting to criminal proceedings.[6] It further noted that if criminal measures are to be adopted, they must have the potential to respond to the

impugned speech 'appropriately and without excess to such remarks.'[7] As such, the punishment must be proportionate to the legitimate aim pursued and necessary in a democratic society. It seems difficult to reconcile a seven-year imprisonment for an offence which is 'likely' (but not intended) to stir up the abstract and undefined by the Bill notion of hatred, with the doctrine of proportionality. The element of proportionality is also incorporated in the articulation of Article 19 of the ICCPR and relevant case-law of the Human Rights Committee. The Committee held that any restrictions to free speech must meet the strict tests of necessity and proportionality[8] and must not be too broad.[9]

The dangers to free speech become even more pressing with the present Bill which, although entitled 'Hate Crime and Public Order' also incorporates provisions on stirring up hatred (through speech). ***(ii) Impact of punishment on perpetrator and victim?*** It has been argued that punishing someone's bias has no impact on the elimination of that bias within the perpetrator. No punishment will turn a racist into an anti-racist (Bakken, 2002: 234). Further, the question of whether 'minorities' who constitute the victims of such offences must be tackled. An example from the U.S. is relevant to this discussion. In the framework of the Gender Expression Non-Discrimination Act (GENDA) - an anti-discrimination bill that would have incorporated gender identity and gender expression in hate crime and employment protection law in New York, U.S. LGBTQ groups, namely the Audre Lorde Project, a grass roots organisation working for the rights of LGBTQ people of colour and the Sylvia Rivera Law Project, offering free legal advice to trans people who have limited financial means and/or are of colour strongly opposed the passing of this bill. Their rationale was that extending the use of criminal law would 'expose our communities to more danger from prejudicial institutions' that are 'far more powerful and pervasive than individual bigots' (Sylvia Rivera Law Project, 2009). Therefore, the broader reality of the criminal justice system not accommodating for the rights of vulnerable groups constitutes the reason why some groups themselves are in antithesis with the enhanced role of criminal law *vis-à-vis* hate crimes. As summed up by Swiffen 'they oppose hate crime legislation not because they do not see hate crime as a problem but rather because they see the criminal legal system itself as being a significant source of that problem' (Swiffen, 2018: 131). However, for this to be effective in practice, the criminal justice system itself needs to be open to vulnerable groups who wish to report hate crimes and receive support throughout the process. Unfortunately, in the pan-European Hate Crime shadow report, released in September 2019 by the European Network against Racism, this does not seem to be the case and an array of improvements will need to occur before the criminal justice system ceases to be marred by structural obstacles, preventing it from being an accessible tool for victims. Reflective of this is the report's finding that, across the European Union 'there are policies and guidance in place but there is 'institutional indifference' (ENAR Shadow Report, 2014-2018: 29) to the impact of racial violence and at times denial about its existence' (ENAR Shadow Report, 2014-2018). In addition, the overly-broad provisions of this Bill have the potential to 'perpetuate and entrench the values of the dominant in-groups and further

marginalize out- groups.' This was reflected, in, for example, the application of the 1965 British Race Relations Act. The first person prosecuted for the offence of incitement to racial hatred was a black man whilst several other black citizens, including leaders of the Black Liberation Movement were prosecuted for anti-white hatred. Moreover, the Bill may lead to a complication of ties between different marginalized groups. Although there are provisions on freedom of expression protection in relation to religion and sexual minorities in sections 11 and 12 respectively, we cannot be sure that this Law will not be used to silence minorities. Examples could include, members of religious communities who are contrary to the development of gender identity issues or vis versa. The inclusion of the term 'solely' in those provisions is worrisome. As an example, Section 11 provides that:

> Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes— (a) discussion or criticism of— (i) religion, whether religions generally or a particular religion, 5 (ii) religious beliefs or practices, (b) proselytising, or (c) urging of persons to cease practicing their religions.

This therefore gives authorities the leeway to punish speakers if they find that the particular speech act when beyond the sole objective of discussion or criticism for example. This is rather fluid, contributing to the general uncertainty of the Bill. To exemplify further on this and the greater ramifications of the Bill on minority groups is the 2017 Glasgow Pride example where two LGBTP activists were, in fact, arrested for 'breaching the peace with homophobic aggravation.' Their actions were holding up a place cards with words 'These faggots fight fascists' which, by any reasonable standard, sought to empower rather than threaten or abuse the LGBTQ community.

In Sum

In sum, we find this Bill to be vague and broad, establishing hierarchies amongst certain groups in terms of what protection they are offered and integrating speech and violence together, without adequate thought given to the ramifications on the freedom of expression. Even if a clause on freedom of expression is integrated, the low thresholds attached both to the aggravation of offences and stirring up hatred would nullify the real use of such a clause. We are concerned with the growing list of protected characteristics and the impact of a long list on the basic tenets of a free and liberal democracy. Moreover, the dangers attached to this Bill *vis-à-vis* its use against minorities are accentuated by its vagueness and breadth. In relation to this, the Scottish government must take into account the issue of under-reporting by marginalized groups and institutional bias and/or perceived institutional bias which could avert groups from approaching the criminal justice system and/or from allowing the criminal route to function well. The 'day after' punishment must also be taken into account, namely does silencing expression and enhancing punishment due to 'ill-will'

contribute to social cohesion and the empowerment of minorities? We believe that there is no substantial evidence that points to this, whilst the structural obstacles minorities face to report such offences, in addition to the real possibility of the law's use in majoritarian terms, render the Bill, in part and in whole, a step backwards in terms of the liberalization of democracy and the sincere and real participation of all members of society in society. To this end, the government should invest in tackling conscious and unconscious biases and power structures which are subsequently manifested in speech and acts. Such measures could include awareness raising, education, inter-group dialogue and positive measures for the empowerment of minorities.

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[1] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 45

[2] 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' 5 October 2012, available at: <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> [Accessed 18 July 2020]

[3] Ibid. para 44(b)

[4] Handyside v UK, Application no. 5493/72 (ECHR 7 December 1976) para. 49

[5] Lehideux and Isorni v France, Application no. 24662/94 (ECHR 23 September 1998) para. 57

[6] Incal v Turkey, Application no. 22678/93 (ECHR 9 June 1998) para. 54

[7] Balsytė-Lideikienė v Lithuania, Application no. 72596/01 (ECHR 4 February 2009) para. 81

[8] Velichking v Belarus, Communication no. 1022/2001 (20 October 2005) CCPR/C/85/D/1022/2001, reiterated in HRC General Comment 34: 'Article 19 – Freedom of Opinion and Expression' (2011) CCPR/C/GC/34, para. 22

[9] HRC General Comment 34: 'Article 19 – Freedom of Opinion and Expression' (2011) CCPR/C/GC/34, para. 34