

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM DR CARLTON BRICK, ACADEMICS FOR ACADEMIC FREEDOM (SCOTLAND)

Introductory Summary

This submission opposes the proposed Bill. It does so on the following principles:

- This submission notes that the proposed Hate Crime legislation is indicative of an increasingly neoliberal turn in Scottish criminal justice policy. This turn has become increasingly punitive in form. The Bill exacerbates this worrying trend.
- This submission notes that the increasingly punitive nature of the Bill will have adverse impacts upon the Scottish criminal justice system.
- This submission notes that the proposed Bill undermines the equality implicit in law required to protect a diverse society
- This submission notes that the proposed Bill undermines freedom of expression and lays a legislative basis for the criminalisation of the arts and academic enquiry

Substantive Objections

- This submission notes that the proposed Hate Crime legislation is indicative of an increasingly neoliberal turn in Scottish criminal justice. This turn has become increasingly punitive in form. This bill exacerbates this worrying trend.

Relevant literature notes the development of a distinct approach to policy development within a devolved Scotland. This ‘Scottish Style’ (Cairney 2016; 2017) so called, is characterised by an apparently progressive, collaborative approach, committed to social justice and strongly juxtaposed against the excess of the neoliberal UK government.

However recent critiques of Scottish criminal justice policy have pointed to the increasingly punitive nature of policy intervention and suggest that in recent years it has taken its own neoliberal turn. Neoliberal criminal justice is defined as the means by which legislative bodies adopt increasingly more intrusive and authoritarian outlooks and co-opt more punitive forms of legal and social control, within a wider fiscally insecure context (Mariani, 2001). Indeed, as one academic has recently suggested, that ‘Despite the SNPs previously critical stance towards New Labour’s ‘neoliberal’ approach to criminal justice’ recent trends point towards a ‘convergence with their predecessors in the Scottish Government and the UK state’ (McBride, 2020: 14). Points of differentiation between a ‘Scottish approach’ to criminal justice and a wider UK/Westminster approach becomes increasingly rhetorical under

consecutive SNP governments. ‘Style’ substitutes for real definitional distinction. As McBride (2020: 4) argues ‘The extent to which positive political rhetoric was translated into reform on the ground during the SNP minority government period (2007 -2011) was limited’, and rather than developing a distinct ‘devolved’ approach the SNP took their cue from New Labour’s ‘tough on crime’/ tough on causes of crime approach (McBride, 2020: 4).

The increasing neoliberal character of Scottish criminal justice under the SNP government is illustrated by on the one hand; its increasingly punitive nature, which has had marked impact on Scotland’s prison population and its orientation and focus towards issues of identity and the ‘criminalisation’ of particular forms of behaviours that had previously considered to be outside the jurisdiction of the criminal justice system.

- This submission notes that the increasingly punitive nature of the Bill will have adverse impacts upon the Scottish criminal justice system.

2016 Council of Europe study highlights that Scotland has the highest prison population in the EU (Scotsman March 8<sup>th</sup>, 2016). According to the study 148 people reside in a Scottish jail per 100, 000 of population. The EU average is 136. Between 2005 and 2014 the prison population increased by some 10.7% - for England and wales it was just 4.9%. Scotland also has the highest prison population density in the UK at 97.6 per 100 places. Scotland also has one of the highest rates in terms of inmates serving life sentences – 16.2% compared to an EU average of 15.3%. When placed alongside other EU countries with far greater populations than Scotland these figures are striking. For example, France has less than half (466) Scotland’s total of prisoners serving life sentences but a population of approximately 67 million (12 times Scottish population). In 2018 Scottish prison population was approximately 8,213 (0.15%) of population - ‘...one of the highest imprisonment rates in Europe (Howard League Scotland, 2018) – [and] evidence of the system’s more punitive elements’ (McBride, 2020:3)

One of principle points of opposition to the OBTC need to spell out what these stand for (which itself created 2 new ‘hate crime’ offences – 1) the offence of offensive behaviours at a regulated football match, & 2) the offence of threatening communications (see Chalmers, & Leverick, 2017: 134) in its committee stages was the question of why design a law that expands the concept of criminality which would ultimately mean bringing more people into the criminal justice system? It seems that this question remains not only unanswered by the proposed Hate Crime Bill, but totally ignored. This appears to be both counter intuitive and counterproductive to Scottish governments broader commitment to social justice.

Scotland appears to be becoming Europe’s carceral capital, the Hate Crime Bill will make this appearance a reality. This regressive tendency is likely to be exacerbated by two principle elements of the proposed bill : the increase in sentencing for ‘proven’ hate crimes; and the lowering of the threshold of ‘proof’ (for example section 1(1)(b) which ‘does not require there to be a specific victim’; and section 1 (4) that ‘provides that collaboration is not required to prove that an offence was aggravated by prejudice’ (Explanatory Notes 2020: 4)

- This submission notes that the proposed Hate Crime legislation undermines the equality implicit in law required to protect a diverse society

Hate Crime legislation exacerbates the neoliberal trend towards increasingly polarised and unequal societies. Moreover, it notes that the provisions within the proposed Bill undermine the equality of integral? to the liberal rule of law.

There has been a notable increase in resistance to Hate Crime legislation by activist groups that represent communities 'particularly vulnerable to victimisation by hate crime' (Swiffen, 2018: 122). This opposition is premised upon the expansive and increasingly subjective nature of the definition of a hate crime – in that Hate Crime legislation firstly, effectively problematise all forms of behaviour as potentially 'criminal', and secondly legitimates a juridical/ legislative intervention, thus expanding the jurisdiction of the state into matters of sexual (and other) identity. Criticism of hate crime legislation that point to definitional ambiguity tend to miss a far more pressing question. The principle question is '...not whether hate violence is a social problem but whether the legislation that has been enacted accords with standards of legality, which is to say whether it is consistent with the rule of law' (Swiffen, 2018: 137) – that is, does it afford the necessary legal equality required in liberal and democratic societies for justice to prevail.

Both the creation of 'protected identities' and the increased sentencing tariff for 'proven' Hate Crimes as proposed by the Bill creates an explicit inequality in how law operates and how it relates to and mediates between individuals and society as a whole.

This is both counterproductive and counterintuitive to the underlying motivation of the proposed Bill as seeking to build a more equal and cohesive society

The demand that 'protected identities' are treated equally socially is undermined by the fact that hate crime legislation legitimates inequality of their treatment within the law. Moreover, the issue of 'identity' and one's ability to choose becomes subject and subjugated to an expanding institutional hierarchy of codified and increasingly polarised protected (and non-protected) 'identities' and 'crimes' (those provable as hate and those not). Moreover these 'identities' only become legitimated through a creeping juridification and criminalisation of the social realm. This legal legitimation of social inequality and the implicitly polarising impact of Hate Crime legislation exacerbates the legislations neoliberal nature and normalizes the inherently anti-social' conception that intersubjective relationships are problematic and potentially 'criminal'.

Furthermore, this submission notes that arguments used to propose the Bill acknowledges, legitimates, and institutionalises 'prejudice' as a reasonable motivational foundation for law. Chalmers & Leverick (2017:31) note that victims of 'hate crime' increasingly feel more fearful of people who share the same identity as the perpetrator.

However what is this 'fear' evidence of ? Is it evidence that the victim IS objectively likely to be 'attacked' by 'people who share the same identity as the perpetrator'? Or is it evidence of an understandable, but nevertheless individuated emotional

preconception? Whilst this reaction is understandable, should it be a legitimated principle upon which a law, such as this, should be justified? Is it legitimate to ‘fear’ Muslims because of the atrocities caused by Islamic terrorists? Is it justified for a victim of the Manchester bombing to think they are more likely to be attacked again ‘by people who share the same identity as the perpetrator’? Or, rather, should we attempt to encourage a more qualified, less subjectively ‘prejudicial’ approaches to understanding – indeed victims of ‘hate crime’ may well fear those that look like the perpetrator but this is the very reason why law requires an objective foundation – otherwise it undermines the status of legal objectivity by codifying ‘prejudice’.

- This submission notes that the proposed Hate Crime legislation undermines freedom of expression and lays a legislative basis for the criminalisation of the arts and academic enquiry.

Section 4 (Culpability where offence committed during public performance of play; and Section 5 (Offences of possessing inflammatory material) represents a serious threat to the individual right to freedom of expression. Moreover, it provides a juridical basis for the potential criminalisation of artistic endeavour; and furthermore, the necessary unencumbered precondition for academic enquiry and knowledge exchange.

Section 5 creates two offences of possession of inflammatory material. It provides that it is an offence for a person to have in their possession threatening or abusive material with a view to communicating the material to another person, with either the intention to stir up hatred against a group of persons based on the group being defined by reference to one of the listed characteristics, or where it is a likely that, if the material were communicated, hatred will be stirred up against such a group.

However, Section 5(4) does provide ‘that it is a defence to an offence under section 5(1) or (2) for the accused to show that the possession of the material was, in the particular circumstances, reasonable.’ But this so called ‘protection’ is itself a barrier to the freedom of expression as it seriously undermines the individual’s autonomy in formulating a judgement on what is ‘reasonable’; and presumes the necessary intervention of an ‘objective’ 3<sup>rd</sup> party as mediator. Both these undermine individual autonomy and curtails the freedom of expression. It is illustrative of a creeping criminalisation wherein artistic endeavour and academic knowledge exchange become framed as potentially ‘hateful’.

This tendency is also exacerbated by Section 5 (6) of the Bill which defines the different ways in which a person may communicate material to another person for the purposes of an offence under section 5(1) or (2). This includes ‘Displaying, publishing or distributing... websites blogs, podcasts, social media etc. either directly, or by forwarding or repeating material that originates from a third party’ etc. ‘Giving, sending, showing or playing the material to another person’ & ‘Making the material available to another person in any other way e.g. through the spoken word, the written word, electronic communications, etc, either directly (as the originator of the material), or by forwarding or repeating the material.’ (Explanatory Notes 2020:10).

It is in this respect that the legislation, coupled with its emphasis upon institutional liability, lays a juridical foundation for the criminalisation of academic discourse; knowledge exchange; research; and open debate.

Take for example the distribution or, study and discussion of the works and ideas of Hugh MacDiarmid (1892-1978), Scotland's foremost modernist writer and poet, and the intellectual father of modern Scottish nationalism. A fascist sympathiser, in 1923 MacDiarmid published two substantive texts outlining his call for a fascist Scotland. In private correspondence during the WW2, he claimed that Nazi Germany and its allies were 'less dangerous than our own (British) government'. A self-confessed and often celebrated Anglophile, in his poem 'On the imminent destruction of London, June 1940', MacDiarmid expresses his lack of concern that thousands of ordinary people were suffering under the Blitz: 'That I hardly care' that is any place be 'burned and lost, it may as well be London. Nay, London far better than most.' These writings are available in the national Library of Scotland, as are his other works throughout the public and academic libraries of Scotland. Personally, I find both MacDiarmid's political and private ideas particularly distasteful and his Anglophobia most certainly hateful. However, MacDiarmid's work is fundamentally important to understanding his legacy in the development of Scottish culture., and should be studied, discussed and debated free from censure, liability and the threat of legislative intervention.

### Concluding Remarks

Equality is not the same as fairness – indeed equality may often seem 'unfair' i.e. that it treats subjects as equal (the same) despite 'obvious differences' and 'different abilities' – in particular spheres these differences are 'equalised' through measures that seek to 'level out' the inequality (for example work legislation). However, in the spheres of democracy and law the unconditional and non-discriminatory nature of equality is most important. Democracies are dependent upon the idea that regardless of class, economic or educational status for example each member's opinion and vote carries equal weight. Likewise, central to the equality of law is the notion that it does not discriminate – it is 'blind' to status. However, once the law begins to discriminate and treat sections of society differently, it institutionalises inequality and moves from a society of free individuals bound by the rule of law, towards a society of unfree individuals bound by law and nothing else. The proposed Hate Crime and Public Order (Scotland) Bill is indicative of such a shift.

### Selected References

Chalmers, J & Leverick, F (2017) A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review (University of Glasgow)

Explanatory Notes (2020) SP Bill 67-EN Session 5

<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/explanatory-notes-hate-crime-and-public-order-scotland-bill.pdf>

Mariani, P (2001) 'Law, Order and Neoliberalism', *Social Justice*, 28, 3.

<https://www.socialjusticejournal.org/SJEdits/85Edit.html>

McBride, M (2020) 'Tackling offensive behaviour in Scottish football: A how (not) to guide to developing criminal justice policy', *Criminology & Criminal Justice*, pp 1-19, <https://doi.org/10.1177%2F1748895820912313>

Swiffen, A (2018) 'New resistance to Hate Crime legislation and the concept of law', *Law Culture & the Humanities*, 14(1), pp 121-139  
<https://journals.sagepub.com/doi/abs/10.1177/1743872114534017>

Dr Carlton Brick, Academics for Academic Freedom (Scotland)  
20 July 2020