

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM PROFESSOR ROBERT DUNBAR, THE UNIVERSITY OF EDINBURGH

I am grateful for the opportunity to comment on the Bill.

I am generally supportive of the Bill. With regard to Part 1 of the Bill, 'Aggravation of Offences by Prejudice', I believe that attaching additional consequences to criminal acts that are aggravated by the various forms of malice and ill-will which the Bill seeks to cover is an entirely appropriate legislative response. We are fortunate to live in an open and democratic society, and I am firmly of the view that our diversity is a source of strength. We must as a society be vigilant in respect of intolerance and indeed hatred for those who differ from ourselves. The Bill is important in that it signals clearly that criminal acts that are aggravated by such intolerance or hatred are not acceptable in our society. Such a sanction must, however, be coupled with other initiatives, particularly in the area of public education, which are essential in addressing the root causes of prejudice in our society. Further, I think it is appropriate that existing hate crime laws be brought together in one piece of legislation; this will make the law easier to understand and to apply. One issue I would, however, like to raise relates to the wording of the offence. The reference in paragraph 1(1)(a) and paragraph 1(1)(b) is to 'malice *and* ill-will' (emphasis added). It would appear, therefore, that for the offence to exist, both 'malice' and 'ill-will' need to be demonstrated. It is unclear, however, what distinguishes 'malice' from 'ill-will', and it is also unclear why, apparently, both 'malice' and 'ill-will' need to be demonstrated. With regard to Part 2, I agree that this too is an important part of a strategy to deal with prejudice and I therefore support the introduction of the offences set out in that part of the Bill.

My substantive comments are directed at the characteristics of those against whom offences may be committed. These characteristics are set out in subsection 1(2) in respect of the offences covered section 1 in Part 1, in subparagraph 3(1)(b)(i) in respect of the offence covered by subsection 3(1) in Part 2, and in subparagraph 5(1)(b)(i) in respect of the offence covered by subsection 5(1), also in Part 2. In none of these provisions is explicit reference made to language, and I am strongly of the view that language should be added to the characteristics which are described in the provisions which I have mentioned.

I am a speaker of Scottish Gaelic and it is not clear that speakers of Scottish Gaelic, or indeed of other Celtic languages or other languages more generally would necessarily be protected by the legislation as it currently stands. The most obvious route by which speakers of Scottish Gaelic or other languages could be protected is through the concepts 'nationality (including citizenship), or ethnic or national origins'. With regard to Gaelic speakers, in the Final Report of the Independent Review of Hate Crime Legislation in Scotland (Scottish Government, May 2018), Lord Bracadale had cause to consider in some detail the question of whether Gaelic speakers would be covered by the concept 'ethnic group'. He concluded that "there

is a fairly strong argument that Gaelic speaking Gaels belong to an ‘ethnic group’ within the meaning of the current race aggravation”, and that therefore in a case in which hostility towards Gaelic speakers did amount to a criminal offence, the Crown Office and Procurator Fiscal Service (COPFS) “could consider prosecuting the offence as a hate crime” (para. 4.81). He also recognised that there are some Gaelic speakers who will not consider themselves, or be considered by others, to be part of a Gaelic ‘ethnic group’. He noted, however, that the concept of hostility “should not be limited to the cases where the victim does in fact have the relevant protected characteristic” and that it “should also cover cases where the hostility occurs because the victim is presumed to have the characteristic or has an association with those who do”. On that basis, he considered that this “would very likely be the case in relation to such Gaelic speakers” (para. 4.83). Lord Bracadale concluded that he did not think that any change in the law “was required to ensure that COPFS and the courts could respond appropriately if cases were to arise of criminal offences motivated by or demonstrating hostility towards Gaelic speakers” (para. 4.84).

While Lord Bracadale’s views provide a measure of reassurance that Gaelic-speakers may be protected under the Bill, his views are by no means conclusive. It is important to note that the courts have not yet had to consider the issue of whether Gaelic-speakers would be considered to be an ‘ethnic group’ where this concept has been employed in comparable legislation, for example in section 9 of the *Equality Act 2010*, or in its predecessor, the *Race Relations Act 1976*. As Lord Bracadale noted in his report, the leading case on what constitutes an ‘ethnic group’ under such legislation is *Mandla v. Dowell-Lee* [1983] 2 AC 548, in which the presence of a common language was considered by the House of Lords to be a relevant factor in determining the existence of an ethnic group but not one of the two factors considered to be essential, those being a long shared history and a cultural tradition of its own. The ambiguity with regard to the application of the category ‘ethnic group’ in cases in which the prime marker of identity is language is illustrated in *Gwynedd County Council v. Jones* [1986] ICR 833. The Employment Appeal Tribunal decided in relation to a claim under the *Race Relations Act 1976* that Welsh-speaking and English-speaking Welsh people did not constitute distinct ethnic groups. This case suggests that a conclusion that Gaelic-speakers constitute an ethnic group is by no means certain. Some comfort might be taken from the case of *BBC Scotland v. Souster* [2001] IRLR 150, in which Lord Cameron acknowledged that within Scotland, there are groups—and he specifically mentioned the Gaels—whom he said *might* lay claim to being an ethnic group (para. 33). This comment was, however, clearly *obiter dicta* and is therefore also certainly not conclusive of the issue.

I submit that the most appropriate way of resolving any ambiguity as to whether Gaelic-speakers or indeed members of any other linguistic group are protected under the Bill would be to explicitly include reference to ‘language’ as one of the characteristics listed in subsection 1(2), in subparagraph 3(1)(b)(i), and in subparagraph 5(1)(b)(i). This would eliminate the need to engage in the rather complex and lengthy enquiry that is generally required under the test for the existence of an ‘ethnic group’ that is set out in *Mandla v. Dowell-Lee*, a test that is by no means certain to lead to a conclusion that Gaelic-speakers or other speakers of minority languages, including immigrants who speak languages other than English, are protected under the Bill. I trust that in Scotland in 2020 nobody would object to

the extension of the protections afforded by the Bill to people based on their language.

Another benefit of this approach is in relation to the issue raised by Lord Bracadale in his report, namely the extent to which protection extends to those Gaelic speakers who do not consider themselves, or are not considered by others, to be part of a Gaelic ‘ethnic group’. I agree with Lord Bracadale that the law should also apply so as to “cover cases where the hostility occurs because the victim is presumed to have the characteristic or has an association with those who do”, and that this “would very likely be the case in relation to such Gaelic speakers”. I am pleased to see that the Bill does indeed extend application in the way Lord Bracadale has described. However, one cannot at this point be certain that such Gaelic speakers would in all cases be presumed to have the characteristic or to have an association with those that do—something which Lord Bracadale seems to acknowledge in his use of the formulation ‘would *very likely* be the case—and having to establish this presumption adds an additional and potentially fraught hurdle. The inclusion of ‘language’ as a characteristic, free of any necessity to establish the existence of a group and of membership in or association with that group, is much more likely to ensure that all users of a language who suffer as a result of their use of that language are covered.

It is important to note that anti-discrimination provisions of major international human rights treaties to which the UK is a party recognise language as a protected characteristic: see, for example, Article 14 of the European Convention on Human Rights, and Article 26 of the International Covenant on Civil and Political Rights. The inclusion of language as a protected characteristic would therefore be consistent with these obligations, and should certainly not be viewed as an untested innovation; quite the opposite is true.

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