

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM PROF. DAPHNE MCCULLOCH

Opinion overview: I applaud the Scottish Parliament for moving forward with elimination of the blasphemy law and replacement with a consolidated law addressing hate crime. Although the blasphemy law has not been applied, it is an embarrassment for a modern government to have a law on the books which effectively legalises one religion and outlaws all other religions and belief systems (or at least outlaws their expression). I have organised my views according to the questions posed (omitting questions if I do not have a substantive view).

General

1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

- I believe the Bill is necessary for clarity and modernisation and feel that the *status quo* or alternative measures would be less effective (see overview).
- I don't understand the strategy of reserving sex for a future regulation. I live in Canada where the worst recorded hate crimes (mass murders) have been directed against women and were clearly motivated by extremist misogyny.
- I would prefer that legislation refer to 'gender identity and expression' rather than being limited to 'transgender identity'. Gender identity and expression is a spectrum and a term which is inclusive of transgender identity and the gender identity of those with sexual differences as well as including non-binary gender expression and cultural differences in gender expression.

4. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?

- I think it may be very difficult to legally define a hate crime based on age or to find criminals prejudiced against a group based on age. Exploitation of vulnerability is a clearer concept and one that can be applied to those who are vulnerable for a range of reasons including being young, old, disabled, unable to understand their rights, unfamiliar with the language, etc.

- I support ‘exploitation of vulnerability’ as a new statutory aggravation, although it may be appropriate to distinguish it from a ‘hate crime’, which implies prejudiced rather than exploitative motivation.

Other forms of crime not included in the Bill

5. Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

- Although sectarianism is a major type of hate crime, I do not think it is different from hate on the basis of ‘religion’. Many religions have major and minor divisions, which can form as much prejudice as exists between religions.
- It is important however to adopt a broad definition. ‘Religion’ as a motivation for a hate crime may be interpreted as the predominant religious affiliation of a family or community, the beliefs and practices of an individual, membership or commitment to a formal religious group or belief system, membership in a secular ethical society or no affiliation. I suggest that the definition clearly includes all of the above (including misidentification of religious affiliation by a criminal).

Stirring up offences

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

- ‘Stirring up hatred’ is vague and depends on the susceptibility of others to prejudice and hate. Advocating for violence, or for limitations of human rights for a group such as exclusion from housing or neighbourhoods, limiting education or job opportunities on the basis of prejudice is clearly a hate crime and can be defined in the law. I suggest that ‘stirring up’ crimes should not be added to law and should be re-considered in existing legislation (i.e. by defining crimes that are based on the behaviour of the criminal not on the audience).
- If ‘stirring up hate’ becomes a statutory aggravation it could suppress valid debate and criticism. Beliefs and practices evolve through questioning and debate both within groups and in the wider society. How will communities and legal authorities distinguish between vigorous criticism and ‘stirring up hatred’. A response to valid or invalid criticism could be to defend and debate, to advocate for change or to develop prejudice and hate. As the proposed ‘stirring up’ crime has both intention and the lower bar of ‘hatred is likely to be

stirred up', it threatens debate and criticism. The likelihood of 'stirring up hate' is a property of the prejudice of the audience and of society in general.

- I suggest adding a specific crime of dissemination of abusive, threatening or false information motivated by prejudice, which would be a hate crime that is independent of whether or not the audience is intended or likely to be 'stirred up'. I therefore advocate for a tighter definition that focused on the criminal not on the audience.

7. Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

- I agree fully with Lord Bracadale. Threatening or abusive behaviour can be defined relatively objectively by deviations from social norms. An insult is subjective. A person can feel insulted by statements or behaviour that is rude, insensitive or simply blunt but not criminal and it could be difficult to define 'insulting' legally if it were neither abusive nor threatening. (For example, there was a recent complaint by a woman with a disability against her doctor for insulting her; he called her obese (based on her measured BMI)).
- I would however add 'stating or disseminating information that is false' as a statutory aggravation if motivated by prejudice. This is straight forward to define. Although, making false statements could be contained within the definition of abusive, or in some contexts threatening, I feel it would be clearest if it were specified in the legislation.

Other issues

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

- Very careful and specific definitions are needed to allow for criticism and debate. I believe that criticism and debate should be restricted only from advocacy of hate, violence, restriction of human rights or other crimes based on prejudice. (see comments in question 6 above)
- Criticism is a crucial component of a just society and must be protected. Practices associated with religion, culture and belief systems are to be celebrated for the strength and diversity they bring to society. However, such systems can also be used to suppress rights, education and even to perpetrate or cover criminal activity. Laws that do not clearly distinguish between criticism and clearly defined hate speech should not be enacted.

9. Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

- Yes

10. What is your view on the plans for the abolition of the offence of blasphemy?

- Excellent, a very long overdue piece of the enlightenment.

Prof. Daphne McCulloch
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