

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM DAVID LAING

Views on the Hate Crime and Public Order (Scotland) Bill

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 do not believe that the incidence of so-called aggravated offences in Scotland is so great that it cannot be dealt with through the criminal justice system. I do not believe that judges need the guidance of additional legislation. Are we not at risk of asking judges to define malice, ill-will and hatred – and is that frankly possible?

Consolidation

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

The Bill adds new offences – and effectively does that with the concept of aggravated offences – so it is going beyond consolidation. I believe that the Bill does much more than simply consolidate existing laws which have served Scotland well.

How to prosecute hate crime?

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

While I am not convinced that the Bill is necessary, looking at the Bill as it stands I would see no reason to treat different situations differently. However my fear is that the default offence of breach of the peace (which we know can be applied to a wide range of scenarios) may be used simply as a peg on which to hang an aggravation. Thus street preaching has in some circumstances been prosecuted as a breach of the peace – if a preacher were known to have once expressed frustration at someone with a different protected characteristic, the evidence of the person who heard him might under section 1(4) be sufficient to swing the pendulum against the preacher as evidence of malice or ill-will given the minimal requirement of section 1(3), even if his preaching on the day contained no such expression of frustration. How the courts will

interpret malice or ill-will may well be influenced by the strength of the complaining interest group with unintended consequences. Evidence from a single source sets a very low standard of proof.

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?

No specific comment on this question.

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?

If the Bill goes ahead I think the reference to religion is sufficient.

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?

The provisions of this Part have the potential to undermine all rights of free speech and expression with unintended consequences, and accordingly the provisions should be reconsidered.

The definition of hatred is critical to these sections. The Bill if passed in this form will require the courts to interpret "hatred" and the other expressions used according to a wide range of circumstances and the defences and the protections of freedom of expression may not be adequate to balance the interests of all concerned.

Specifically:

- "Threatening" should not be interpreted to include one person's good faith expression of the consequences of another person's action where, for example, the first person is not expressing his own intention of carrying out some harm to the second person
- "Abusive" should not be interpreted to include language which simply expresses promotion of one lawful action or way of life and rejection of another
- "Insulting" cannot simply be interpreted according to the sensitivities of the second person.

The tests in sections 3 and 5 require

- Behaviour or
- Communication of material AND
- Intention or
- Likelihood

How "likelihood" will be interpreted by the courts is impossible to predict but could it include the circumstance where the person accused did nothing to broadcast his behaviour or to publish his material outside a group but a third party comes to hear of

the behaviour or becomes aware of the material? This brings us close to giving any citizen the right to be offended at anything he dislikes – but no citizen has that right. The absence of a requirement for intention is a serious omission because it may leave the innocent and peaceful promoter of an unpopular view at the mercy of those who, in bad faith, use the expression of that view to stir up hatred.

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?

The three categories of behaviour are exclusive of each other – only one needs to be "satisfied" to meet the requirements of sections 3(1)(a) and 5(1)(a). Inclusion of "insulting" creates precisely the problem described above – it will be difficult to establish an objective test which gives citizens some certainty as to what the provision means in practice. "Insulting" should therefore be excluded – on the understanding that "abusive" must mean something considerably more abhorrent than "insulting". The problem is that the two expressions are often considered as synonymous.

Other issues

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

I note that both of sections 11(2) and 12(2) exclude the word "insulting" and I believe that it is essential that, if sections 3(1) and 5(1) include that word, the protections of freedom are extended because this is one area in practice which may raise most complaints.

See the earlier comments about the possibly wide interpretation of "threatening". Sections 11(2) and 12(2) might be phrased differently because the behaviour or material may occur in the context of the "discussion, urging or proselytising" rather than the former "involves or includes" the latter.

Section 12(2) ought, for completeness and consistency, to include reference not only to sexual conduct or practices but also sexual orientation, transgender identity and variations in sexual characteristics (picking up the language of sections 3(3) and 5(3)).

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?

This offence has its origins in the teaching of the Bible and reflects the scriptural injunction for those in authority to uphold its teaching and recognise the authority of its Author. We dismantle elements of our Christian tradition at our peril. Many of the core values which this Bill seeks to uphold have their own origins in Christian teaching.

However I recognise that an offence which will never be prosecuted should probably be dropped.

The teachings of most religions as well as those of atheists may, at different times and in different ways, be offensive or insulting to those of other faiths or none. The Scottish Parliament should use its legislative power to ensure that freedom of expression is preserved and indeed promoted in all areas of civic life consistent with the maintenance of god order.

Please read the extracts from current literature which are appended below.

Yours truly

- Words attributed to Voltaire:

“I disapprove of what you say, but I will defend to the death your right to say it”.

- D A Carson in *The Intolerance of Tolerance*:

“Intolerance is no longer a refusal to allow contrary opinions to say their piece in public, but must be understood to be any questioning or contradicting that all opinions are equal in value, that all worldviews have the same worth, that all stances are equally valid.”

- M Pearse in *Why the Rest Hates the West*:

“Where the old tolerance allowed hard differences on religion and morality to rub shoulders and compete freely in the public square, the new variety wishes to lock them all indoors as matters of private judgement; the public square must be given over to indistinctness. If the old tolerance was, at least, a real value, the new intolerant “tolerance” might better be described as an antivalue; it is a disposition of hostility to any suggestion that one thing is “better” than another, or even that any way of life needs protected space from its alternatives”.

David K Laing

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