

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM DR GRAHAM KEITH

I have written comments on four of the issues/questions raised by the Justice Committee on the Hate Crime and Public Order (Scotland) Bill. These are all written in a personal capacity. They do not reflect the views of any group.

Question 5 – I am pleased that sectarianism is **not** included in the Bill. I have never been impressed with definitions of sectarianism proposed by drafters of laws or indeed by academic ‘experts’. Their definitions have seemed to focus on one or two examples of a much wider phenomenon. Clearly they have had difficulty in finding a form of words that covers all animosities between kindred groups.

Just as it is difficult in a pluralistic society to define what constitutes a religion as distinct from a general philosophy of life, so it is hard to distinguish religious sectarianism from tensions of a more social nature. And there is the further question – do we want to talk about ‘political sectarianism’? I would argue that such a phenomenon exists – e.g. historically among different types of Marxist. But that is something for careful academic debate. It is not something to be enshrined in a law to be observed by everyone.

In short, problems of accurate and generally comprehensible definition make this a minefield that contemporary legislators in Scotland would be advised to avoid.

Question 6 – I think this legislation is unnecessary and so broadly directed as to constitute a serious danger to freedom of religious expression, freedom of academic inquiry and debate, and freedom of speech more generally.

It is unnecessary because Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 already criminalises threatening or abusive behaviour likely to cause fear or alarm. Besides, this earlier legislation has a much more objective standard against which criminality can be measured. If guilt is to be established, the offender must either intend to cause fear or be reckless as to whether they did. But under the current Bill a person may be guilty of an offence without any such intention. They may, for example, use a form of words which have a connotation to others of which they were unaware.

The drafters of the Bill take what I would term a ‘precisionist’ view of language. They assume there are some words that are always abusive and others that are always innocent. The reality, however, is different. Not only do words change in meaning over time, but they vary from person to person at the same period of time. Each of us has his/her own ‘idelect’ where we give the English (or whatever) language our own individual nuances. At times this can understandably lead to misunderstanding not only of meaning but even of the tone intended by the speaker. Thus, it is almost impossible to give a complete range of ‘abusive’ terms or to identify in every case whether abuse was intended.

Now, I am well aware that the Bill does not set out a list of abusive terminology. But that means that it will be left to the judicial officers of society (i.e. the police and especially the courts) to determine what is abusive and what is not. Such choices may be arbitrary, or they may reflect the prejudices of a minority who happen to be in power. The Scottish Government may offer assurances that if the Bill becomes law, it will not be interpreted in such-and-such a way. But in reality they can, with such a vague and ill-defined bill, offer no valid assurances. Interpretations have been left to the courts – and who can predict what they will say on the matter?

Indeed, the interpretations of the courts may impose restrictions on what politicians can say in the Scottish Parliament and elsewhere. (I presume politicians are not exempt from the legislation!) The result will be that our politicians will become even more practised in giving bland and irrelevant responses on burning issues than they tend to do at present. Here the Bill will damage our democracy.

The Bill is also anti-democratic in the sense that it employs a definition of religion that hardly anyone would recognise. I refer to Section 14 (5) of the Bill where a religious group is defined by reference (amongst other things) to 'religious belief or *lack of religious belief* (italics mine). Ask people in the street to name or define some religious groups – who would come up with a group lacking religious beliefs? This is not only counterintuitive, but crazy.

It is difficult enough to make a serious and convincing definition of a religion, even if we were to confine this to group manifestations of religion. But to embrace groups that are outwardly non-religious is to enter some Alice-in-Wonderland world where words and phrases mean what the lawmakers choose them to mean, not what the general public take them to mean. This is another reason why it is anti-democratic. Nor is this some minute technical point, but involves one of the 'characteristics' central to the protections of the Bill. If the Bill fails to achieve clarity at this point, it will fail altogether. There are similar difficulties about the definition of another characteristic, 'age', which I will not detail since they will be obvious to any one who cares to read the relevant section (14).

I wonder if the legislators have considered the effect of this Bill, especially the provision about inflammatory material, on public and academic libraries. Many works held in such libraries, dating from the past, might well be considered abusive to racial and religious groups, with the potential of stirring up hatred against them. Are these works to be censored? Are the library authorities to be open to prosecution if they leave such works on the open shelves? And who is to determine which works are offensive and which not?

This leads on to the broader issue of academic freedom. Undoubtedly, this will be seriously infringed by this Bill. Academics will feel restricted in what they can debate openly and what exactly can be said, even in those areas where some dispute is permissible. I expect that academics working in Scotland will move elsewhere if they think their area of expertise is affected. In time, the Scottish academic scene will become a third-rate backwater, sullied by a reputation that it has become one of the foremost places in Europe for clamping down on free speech.

Question 8 – Protection of freedom of expression - Under **religion** the provisions do not go far enough. It is too weak to allow no more than ‘discussion or criticism of religious beliefs or practices’, which gives the impression of cosy, armchair conversations. In reality healthy religious discourse involves a lot more, including the ridicule of ideas or practices that are foolish, and the denunciation of ideas or practices that are seen as wrong and dangerous. The current Bill falls short of the much stronger safeguard in an earlier law which specifically protected ‘expressions of antipathy, dislike, ridicule, insult or abuse’ towards religious beliefs or practices. This or a similar safeguard should be introduced into this Bill.

The drafters of the Bill also seem unaware that religion can be used as a cover for criminal or terrorist activities. Under the current provisions of the Bill such groups could ward off criticism or serious investigation by claiming that they were victims of hate crime.

The Bill also does not go far enough in the freedom of expression on **sexual orientation**. I urge that the Bill adopt language used in the equivalent legislation in England and Wales which protects beliefs about same-sex marriage – ‘any discussion or criticism of marriage which concerns the sex of the parties to the marriage.’

It is remarkable that no free speech protection covers the area of **transgender identity**. Given the current vigorous controversy over this in a number of respects, not least within the LGBT community itself, the silence on this speaks volumes. It appears the drafters of the Bill have caved in completely to those who demand that we all subscribe to mantras like – ‘trans women are women’. I can draw no other conclusion than that the drafters of the Bill have wished to close down all debate on this matter. Moreover, at the present time, if the Bill fudges this area, it will lose all credibility. After all, this is an issue that affects not only subjective concerns about personal identity but about how we relate to one another (do we see one another as male and female or an innumerable mass of genders?); whether we allow invasive, irreversible surgery on our young people for reasons other than physical health; whether we burden the NHS with further non-essential procedures at a time when it is reeling under the impact of Covid-19; what sort of things can legitimately be researched in our universities; whether a radical ideology should be imposed on the susceptible minds of young children from the earliest stages of primary school – to mention only the most obvious. This not an exclusively sexual issue. That is why more, not less public debate should be allowed on this.

Question 10 – While I agree that the crime of blasphemy has become obsolete and should be abolished, I was surprised at one remark from the supporting information provided by the Scottish Government. This information correctly recognised that in some countries the charge of blasphemy is a tool used by the government to persecute certain of their citizens. Could not exactly the same be said for elements of this hate crime legislation? i.e. Could it not become a weapon for the government or any strongly politicised group to attack its opponents and effectively silence them?

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