
BRIEFING:

Hate Crime and Public Order (Scotland) Bill

October 2020

OVERVIEW

Whist we share the aspiration of building a more equal and inclusive Scotland, we consider aspects of this bill to be excessive and represent an unacceptable erosion of freedom of expression.

All citizens have a responsibility to challenge prejudice in order to ensure Scotland is an inclusive and respectful society. However, criminalising speech is a draconian and ultimately counterproductive means of achieving that aim.

'STIRRING UP HATRED' OFFENCES

Our primary concerns centre around the creation of new and unnecessary 'stirring up' of hatred offences, which threaten freedom of expression and conscience.

Introducing the bill, Justice Secretary Humza Yousaf remarked: "Stirring up of hatred can contribute to a social atmosphere in which discrimination is accepted as normal." The idea that speech "can contribute to a social atmosphere" is flimsy grounds for prosecuting those who say it and certainly not enough to reduce a fundamental freedom. Well-established anti-discrimination laws already protect individuals with protected characteristics from discrimination and send the clear signal that such discrimination is unacceptable.

The new law is also **unnecessary** in that genuine criminal activity that the proposed offences are seeking to address are already captured by Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The proposed new offence (in Section 3 of the Hate Crime and Public Order (Scotland) Bill) of stirring up hatred makes it an offence for a person to behave in a threatening or abusive manner against a group of persons defined by reference to certain characteristics. However, **existing legislation already outlaws threatening or abusive behaviour against anyone where such behaviour would be likely to "cause a reasonable person to suffer fear or alarm"**.¹

THRESHOLDS

We welcome the justice secretary's decision to revise the legislation in light of concerns from a range of stakeholders, including ourselves, to limit the stirring up hatred offences to 'intent'.

However, we remain concerned by proposals to criminalise 'abusive' speech and believe any new stirring up hatred offences should only cover threatening conduct.

The Oxford dictionary defines abusive as "offensive and insulting"². The term is ambiguous, highly subjective and can quite easily be utilised to stifle robust commentary about religious beliefs and practices. Beliefs should not be protected by law in this way.

¹ <http://www.legislation.gov.uk/asp/2010/13/section/38>

² <https://www.lexico.com/definition/abusive>

We respectfully disagree with the conclusions of Lord Bracadale that the requirement for ‘threatening’ behaviour alone sets the legal threshold too high. On the contrary, the inclusion of “abusive” poses a serious risk to freedom of expression by promoting the idea that there should be a right not to be offended. It risks capturing vast array of robust yet legitimate speech and will create an unreasonable expectation that religious sensibilities are protected by something akin to a blasphemy law.

Where someone is abusive about someone else’s beliefs, the believer can quite reasonably argue that they are abusing them personally too. Therefore, if we wish to apply criminal sanctions to protect people from feeling “abused” when someone criticises or attacks their beliefs, it is obvious that the beliefs themselves as well as the individual who feels insulted or abused are being protected. Some sincerely held religious beliefs and practices – likewise the failure to follow such beliefs or practices – are seen as profoundly irrational and inhumane by others. Rational and liberal critics may reasonably regard some beliefs as ‘hateful’ and deserving of mockery, abuse and hatred. The right to express this must not be restricted by law.

The legislation as drafted risks capturing comedians, performing artists, cartoonists, and all manner of expressions that may subjectively cause offence and be perceived as “abusive”.

Removing “abusive” is necessary to protect free speech in Scotland and would be in alignment with the reasonable threshold applied in English law.

FREE SPEECH PROTECTIONS

European Council Resolution 1510, on freedom of expression and respect for religious beliefs, states:

“The progress of society and the development of every individual depend on the possibility of receiving and imparting information and ideas. This freedom is not only applicable to expressions that are favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population, in accordance with Article 10 of the European Convention on Human Rights.”

Any protection of freedom of expression provision should reflect this. The protections offered in this bill fail to do so. A free speech protection that only protects polite discussion or criticism offers no meaningful protection at all.

The protection of freedom of expression sections in the bill are substantially weaker than the much more robust equivalent in England and Wales.

The Racial and Religious Hatred Act 2006 explicitly protects “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents”.³

In contrast, free speech provisions in the proposed bill only protect the ‘discussion or criticism’. Complainants will be likely to argue that speech they dislike is “abusive” and “likely” to stir up hatred.

If stirring up offences are introduced the freedom of expression protection clause must be strengthened to avoid seriously chilling free speech.

PROPOSAL TO ABOLISH BLASPHEMY LAW

We welcome the proposal to abolish of the common law offence of blasphemy. Religious ideas should not enjoy privileged legal protection.

However, this advancement for human rights will be fundamentally undermined by the introduction of vague ‘stirring up’ of hatred offences, unless far more robust freedom of expression protections are put in place.

³ 29J Protection of freedom of expression
<http://www.legislation.gov.uk/ukpga/2006/1/schedule>