

Hate Crime and Public Order (Scotland) Bill: An Option for Securing Consensus on Part 2

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- It is highly desirable to ensure any hate crime legislation has **solid foundations in political and public consensus**. Law passed in an atmosphere of argument and anxiety is a particularly bad idea here.
- Leaving out Part 2 is the simplest way to recognise that the proposals raise complicated and divisive issues which, if got wrong, could have serious negative unintended impacts on freedom of expression.
- But there is an alternative under which most, perhaps all, of the concerns expressed about freedom of expression would be immediately met.
- This would be to take full advantage of existing evidence, based on years of experience south of the border, and **expand stirring up offences in Scotland exactly in line with those for England and Wales**, as legislated for in the Public Order Act 1986.
- MSPs could rely with confidence on this approach having operated for many years without raising substantial concerns about impacts on freedom of expression. The 1986 Act was amended to add religion in 2006 and sexual orientation in 2010.
- This approach requires **copying the model for England and Wales very closely** (the detail is attached in an annex to this note). Experience to date in England quickly becomes irrelevant if there is any departure from that model.
- For any new Scottish legislation this would mean:
 - The act/material must be **threatening** (remove abusive)
 - There must be **intent** (remove likelihood)
 - Only religion and sexual orientation must be covered
 - The **very specific freedom of expression protections** applied separately to each of these must be applied, as devised for the Public Order 1986 (subject to any Scots law issues). *There is no experience in England of successfully implementing generic freedom of expression provisions across more than one characteristic, as the current bill proposes.*
- It is essential to recognise that experience with one characteristic **does not** predict experience with another.
- The Public Order Act 1986 recognises as a basic principle that different groups raise specific issues in relation to protecting freedom of expression, so each characteristic has its own distinct tailored approach to freedom of expression protection in the 1986 Act. **Adding any more characteristics would take the proposals immediately back into untested, higher risk territory.**
- The approach outlined here still allows progress from the point of view of groups representing the new areas covered, and:
 - Means coverage against stirring up hate is no less extensive than in England and Wales
 - Saves parliamentary time, allowing more attention to be focussed on Part 1
 - Reduces the risks being taken with freedom of expression to a minimum
- **It need not be the end of the story in following up the Bracadale Review**, but it is what can be safely done in the final months of this parliament.

Annex. Public Order Act 1986 extracts

29B Use of words or behaviour or display of written material

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) [Repealed]

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

29C Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

(2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

29G Possession of inflammatory material

(1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to—

(a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another,

is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.

29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

29JA Protection of freedom of expression (sexual orientation)

(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

[Further detailed provisions on: Public performance of plays, Distributing, showing or playing a recording, Broadcasting or including programme in programme service all use same formulation of threatening and intent.]