Protecting Speech that Offends: Theory and Practice

MBM Hate Crime Briefing 11

murrayblackburnmackenzie.org

December 2020

1. Introduction

On 15 December 2020, at the Stage 1 debate of the Hate Crime and Public Order (Scotland) Bill, MSPs debated the theory of how to avoid criminalising merely offensive speech. The following day, a judgement was published in England, on the case of Kate Scottow, which shows how far from legal theory things may go in practice. This briefing considers the implications of the Scottow judgement and other recent court cases in England for the Hate Crime Bill.

2. Protecting freedom of expression in theory: Stage One debate

A repeated theme of the debate, available here, was that MSPs recognised that the law should not be used to prevent people saying things that other people simply find offensive. Several speakers quoted approvingly the Justice Committee's comment (emphasis added) that:

> **The committee agrees that the right to freedom of speech includes the right to offend, shock or disturb**. The committee understands that this bill is not intended to prohibit speech which others may find offensive, and neither is it intended to lead to any self-censorship. The committee is anxious to ensure, however, that these are not unintended consequences of the bill.

Adam Tomkins MSP, Convenor of the Justice Committee commented:

> "*We all accept that we have no right to criminalise speech just because we find it offensive—indeed, we have no right to do so no matter how offensive we find it. Freedom of expression is not absolute in our law, but at the same time there is absolutely no doubt that it extends to the right to "offend, shock or disturb". "Freedom only to speak inoffensively is not worth having", as one judge put it*…
>
> *Becky Kaufmann said that aspects of the debate on women's rights can make people and, indeed, have made her "extremely uncomfortable" and can be "very disrespectful" of people's identities, but that, nonetheless, that is no business of the criminal law.*
>
> *That brings me full circle. The bill is not about criminalising that which other people find offensive or disrespectful; it is about behaviour, including speech, that threatens or abuses, and that does so intending to stir up hatred*."

Liam McArthur MSP quoted in full a judicial ruling, also referred to more briefly by other speakers:

> "*Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having*."

The Cabinet Secretary, Humza Yousaf MSP responded

> "*I also agree that the law must not criminalise that which is purely offensive or shocking or can be described as disturbing. I was keen to stress during the committee's scrutiny that the word "offensive" is not mentioned anywhere in the bill*."

Speakers in the debate placed weight on having definitions in the Act that would prevent speech being caught that was simply offensive, disrespectful, disturbing or any of the other words quoted above.

Several speakers argued that the wording of the Bill could be relied on to create legal thresholds that in theory would only be met in extreme cases. As John Finnie MSP put it, "*It became very apparent that words and phrases are important*." Adam Tomkins highlighted the Committee's recommendation that "*a person can be charged with a stirring-up offence only if a reasonable person would have regarded their behaviour as abusive*".

The Cabinet Secretary commented "*A high threshold would exist … the test that would be applied by the courts is not a subjective one but an objective one… The new offence of stirring up hatred … must be proven beyond reasonable doubt*."

3. The Scottow judgement: protecting offensive speech in practice

In February 2019 Kate Scottow was arrested at home while caring for her young children, and taken for questioning at her local police station. She was held there for several hours and then charged with offences under the Communications Act 2003.

The judgement records:

> 'The prosecution stemmed from complaints by Stephanie Hayden about messages posted on social media. Ms Hayden is a trans woman, with a public profile as an activist and advocate on transgender rights. It is common ground that she is to an extent a public figure. Ms Scottow describes herself as a radical feminist, and takes views that oppose some of those advocated by Ms Hayden.' (para. 4)

Kate Scottow was convicted on 7 February 2020. A spokesperson for the advocacy group Gendered Intelligence welcomed the conviction, saying it would '*help end harassment against trans people*'.

Scottow appealed. At a hearing on 10 December 2020 her conviction was quashed: the court's full judgement was released this week, and is available here.

The court found that police, prosecutors, and the lower court had all misapplied the law, failing to observe properly the protections in law for freedom of expression. The judgement records 'that the prosecution did not obtain all the contextual material for the offending messages' and 'the limited fact-finding in the judgment of the District Judge' (para. 5). It adds that 'the prosecution and the Judge had insufficient regard to the legal context, which is all-important' (para. 22).

Although the complaint and the initial interview concerned alleged offences under one set of statutes, the charges brought related to different legislation, which was presented to the judge as having 'a less demanding threshold' than the offences originally identified.

> 'That, in my judgment, is also how the Judge treated the matter. I am satisfied that this was wrong in law. In addition, although the Convention was mentioned by the prosecution and the Judge the approach of both, and the Judge's analysis, were legally flawed and inadequate' (paras. 26-27).

On issues of free speech and Article 10 of the ECHR, the judgement notes (emphasis added)

> 'The Crown evidently did not appreciate the need to justify the prosecution, but saw it as the defendant's task to press the free speech argument. **The prosecution argument failed entirely to acknowledge the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another. The Judge appears to have considered that a criminal conviction was merited for acts of unkindness, and calling others names,** and that such acts could only be justified if they made a contribution to a "proper debate". Neither prosecution nor Judge considered whether some more demanding interpretation of s 127 or addressed the question of what legitimate aim was pursued, or, more importantly, whether the conviction of this defendant on these facts was necessary: whether it was a proportionate means of responding to some pressing social need' (para. 43).

Two series of tweets, in 2018 and 2019, were deemed relevant in the original case. On the later set of tweets, the judgement states (emphasis added):

> 'No convincing, relevant or sufficient reasons have been given for the decision to prosecute Ms Scottow under s 127 for those tweets, and there was and is in my judgment no pressing social need to do so. **A prosecution and conviction on these facts would represent a grossly disproportionate and entirely unjustified state interference with free speech**' (para. 47).

Kate Scottow was caught in the criminal justice system for almost two years, in the course of which she was arrested, held for hours at a police station, waited a year for a trial, put through a trial and spent most of a year with a criminal conviction, with all the personal pressure and cost involved, before a higher court decided the police, the prosecutors and a lower court had all failed to apply the thresholds that the law required, and failed specifically to respect the right to offend.

4. Previous cases

Kate Scottow is not an isolated case. Other prosecutions have been brought in England, behind which lie disagreements over what can be said about sex and gender, where a court has rejected that the law justified intervention by police and/or prosecutors.

Miranda Yardley

In April 2018, Miranda Yardley (a transwoman who rejects the view that 'trans women are women' and who has been strongly criticised by some activists) was reported to the police, and charged with harassment aggravated by hatred towards transgender identity. The Crown Prosecution Service agreed to prosecute: more detail is available here. On 2 March 2019 the case reached court, where it was thrown out on the first day. The judge, having heard the initial representations, commented that "*There is no case and never was a case*". Miranda Yardley described going "through ten months of hell"..

Harry Miller

In the case of Harry Miller, there was no prosecution, but the police called at his workplace about comments posted on social media. The judgement records that:

> 'The Claimant's tweets were reported to Humberside Police by a transgender woman called Mrs B. Mrs B read the tweets when a friend told her about them. She regarded them as 'transphobic'. They were recorded by the police as a non-crime hate incident. Of all the people who read the tweets, Mrs B was the only person to complain.'

Harry Miller took Humberside Police and the College of Policing (whose guidance Humberside Police cited as justifying their action) to judicial review. Around a year after the initial contact from the police, in February 2020, the judge found that:

> 'the combination of the police visiting the Claimant's place of work, and their subsequent statements in relation to the possibility of prosecution, were a disproportionate interference with the Claimant's right to freedom of expression because of their potential chilling effect'.

The BBC reported advocacy group Trans Media Watch's reaction:

> 'I think trans people will be worried it could become open season on us because the court didn't really define what the threshold for acceptable speech was. … We hope that his words today will not have the result of putting other minority groups which may become the subject of intense media attention in a position where hatred displayed towards them is less likely to be treated seriously.'

Harry Miller is appealing the judge's decision that the police were entitled to keep records tweets of the reported to them, while Humberside Police is appealing the finding against them.

Maria MacLachlan

Another case relevant to questions of free speech and penalties applied in the criminal justice system for speech deemed simply to be disrespectful, is the denial of compensation to Maria MacLachlan, after a supporter of gender self-identification was convicted of assaulting her. One reason for this denial, explained by the judge, was that "*It was notable that when I asked Ms MacLachlan to refer to Ms Wolf as 'she', she did so with bad grace – having asked her to do so she continued to refer to Ms Wolf as 'he' and 'him'*". Maria MacLachlan has commented since:

> **"***My experience of court was much worse than the assault… I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea that any of them identified as women… It was while I was having to relive the assault and answer questions about it while watching it on video that I slipped back to using "he" and earned a rebuke from the judge. I responded that I thought of the defendant "who is male, as a male*."

5. Conclusion: the protection of speech deemed offensive in theory and practice

As Adam Tomkins observed in the debate, "*Getting that balance right [between protecting freedom of expression and protecting victims of hate-related offending] is not easy—it is not a question of science, but is a matter of judgment*". That judgement has to be exercised with regard for the state of the world into which legislation arrives. As Liam McArthur noted "*As witnesses observed time and again, in an already combustible debate there is a risk of making it even more explosive*."

The experience of Kate Scottow and others demonstrates the vulnerability of the police, prosecutors, and courts to becoming drawn into the fierce contest over the limits of acceptable speech in the context of sex and gender, and to misapplying and over-stepping in this context the legal thresholds which exist on paper. Only at the personal cost of persistence, time and expense has this been reversed.

In the current climate, MSPs need to be aware that there are those who would see the threshold for speech in this area that should be criminalised as lower than witnesses to the Committee argued for. This, and the evidence from England of the potential for parts of the criminal justice system to pursue cases in this area without applying as much rigour as the

law provides for in protecting speech some people may find offensive, need to be taken into account in considering whether and how to legislate here.

Creating a new offence in this area carries a real risk of creating new ways to draw the justice system into what is, at the core, a disagreement over a set of beliefs and how rigorously particular views on what is respectful should be enforced using the law.

In evidence to the Parliament on the Bill, and in comments and letters to the press, a picture is emerging where practising lawyers and front-line police are expressing more anxiety about how the Bill may work in practice, than academic legal experts, including experts in this specific area. The cases above suggest that MSPs should be wary of how far risks can be mitigated in the current climate simply through drafting more refined legal tests.

The more explicit any protections are, the better chance there will be of lessening the impact of complaints based on being simply offensive, disrespectful, disturbing, irritating, unwelcome, shocking, provocative, heretical, or uncomfortable. But avoiding any such impacts purely through how the Bill is worded looks optimistic.

If legislation does proceed here, procedural safeguards should also be considered: in England prosecutions for stirring up offences require the consent of the Attorney General.

Meanwhile the task of legislators and those scrutinising them continues to be made harder by the Scottish Government still not having provided any hard examples of the specific behaviours it intends its proposed new offence to address.