

The limits of precedent and the special case of racial hatred

MBM Hate Crime Briefing 3

murrayblackburnmackenzie.org

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1. Introduction

On 26 August, in response to a parliamentary question by Labour MSP James Kelly on the proposed stirring up hatred offences in the Hate Crime and Public Order (Scotland) Bill, and whether these should be fully deleted or heavily amended, the First Minister referenced the existing provision for stirring up racial hatred, stating:

“I hear the concerns that have been expressed. The Government will consider all of them carefully. That said, the concept of stirring up hatred offences is not new to Scots law; long-standing stirring up racial hatred offences have operated effectively in Scotland since, I think, the mid-1980s. The bill includes explicit provisions on freedom of expression and its provisions require to be interpreted in accordance with the European convention on human rights.” (26 August 2020 col. 17).

Later that day Scottish Green Party Co-Convenor Patrick Harvie MSP [tweeted](#):

‘The “stirring up hatred” offence already exists for racism. Are critics of the Bill calling for it to be abolished and stirring up racist hatred to be legalised, or are they saying that other forms of hate crime just don’t matter as much, or is their argument simply incoherent?’

In both these cases, the long-time existence of an offence of stirring up racial hatred is being used to play down or attack concerns about extending stirring up offences to a wider range of characteristics. This briefing considers this line of argument.

2. The question of “mattering as much”

Part 1 of the Bill [consolidates existing law](#), which already recognises hate crimes as offences aggravated by prejudice based on race, religion, disability, sexual orientation and transgender identity, and further adds age and variations in sex characteristics. Based on the submissions published to date, there appears to be no significant disagreement about these proposals. So it would seem that, in these circumstances, there is a broad consensus that hate crime against all the various protected characteristics “matters as much”, in Mr Harvie’s words.

The main controversy over Part 1 concerns the decision to consolidate existing law *before* reaching a settled position on whether or not hatred based on sex should be added as an aggravating factor. Sex is omitted from both current law and the characteristics covered by the Bill. A Working Group has instead been proposed on this, with provision for the Act to be updated, possibly, to include sex at a later date. Mr Harvie supports the Scottish Government’s approach here. Conversely, the Faculty of Advocates thinks that this

should be decided by parliamentarians, as do we. We have also questioned whether there is any robust evidence to support the inclusion of [variations in sex characteristics](#) in the Bill.

The argument about the scope of coverage relates principally to the proposal to create new “stirring up” offences in Part 2 of the Bill.

3. Stirring up: the special case of race

The existing offence of stirring up racial hatred referred to in the First Minister’s statement is under the [Public Order Act 1986](#), which is UK-wide legislation. This offence was regarded at the time as being uniquely necessary for race in large part due to the centrality of racial hatred to the beliefs and activities of groups on the political far right.

This position continues. In its [submission](#) to Lord Bracadale’s independent review, the Coalition for Racial Equality and Rights opposed the extension of the stirring up offence to other groups in the absence of clear evidence of need, stating:

‘CRER is not aware of evidence of stirring up of hatred against other groups, which is a stark contrast to the situation for race. White nationalist organisations and even some political parties (e.g. the British National Party) proclaim hateful stances against minority ethnic groups and could be said to stir up hatred for these groups. Racial hatred seems to remain exceptionally permissible.

This is a particular situation compared to other protected groups, and as such, we do not see the necessity for extending this offence to other groups. Nevertheless, if a need for this was evidenced, we would not oppose the creation of separate offences pertaining to the stirring up of hatred for certain groups. However, as with the standalone charge of racial harassment, we would ask that extension not be coupled with consolidation, as this weakens the important, essential, and particular message this offence conveys.’

Similarly, feminist group Woman’s Place UK, in their [submission](#) on the draft hate crime bill, stated:

‘Racially motivated crime can also be differentiated from other forms of hate crime by the degree of political organisation. For that reason, it merits a bespoke response in law and WPUK supports the retention of the offence of stirring up racial hatred.’

The Bill itself deals with race slightly differently from other characteristics. The Policy Memorandum argues that a separate approach for race can be justified “*due to the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion*” ([para. 152](#)).

The case for the existing offence therefore rests on it providing a general recognition in law of the unique extent, effect, and history of political organisation round racial hatred. How far it has been effective at the wider societal level in reducing offences against individuals is more difficult to say. Racial crime remains the most commonly reported hate crime under other legislation. [Crown Office and Procurator Fiscal Service \(COPFS\) statistics](#) show that 3,038 charges relating to race crime were reported in 2019/20, compared to 1,486 for sexual orientation aggravated crime, 660 religiously aggravated charges, 387 disability aggravated charges, and 41 transgender identity aggravated charges in the same period.

In England and Wales stirring up offences were later extended to religion and sexual orientation. The Law Commission examined the case for extending these further to disability and gender identity. The Commission concluded that a practical need had not been established, given the low number of charges as matters stood for stirring up racial hatred, religion, or sexual orientation, compared to the number of charges for aggravated offences ([2014: para. 1.68 n 45](#)). The Commission states:

‘between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a magistrates’ court. We contrasted this with over 75,000 charges for the aggravated offences over the same period.’

4. Stirring up and freedom of expression: the limited precedent of existing law

The arguments being used by the Scottish Government are based on an assumption that the existing law on stirring up racial hatred tells us how a law extended to a much wider group of characteristics would work. **This fails to recognise that different characteristics raise different issues for freedom of expression.**

The existing legislation covering England and Wales already recognises that other characteristics raise more complex questions for freedom of expression than does race. It has extended stirring up provisions more cautiously, only to religion and sexual orientation, and, in contrast to race, includes specific protections for freedom of expression for both. Indeed, in highlighting the freedom of expression provisions in the Bill, the First Minister has already conceded that the existing law on stirring up racial hatred does not provide a straightforward precedent for all other characteristics.

The freedom of expression provisions in the Bill only extend to religion and sexual orientation,¹ and are weaker than the equivalent provisions that already apply in England and Wales. They have failed to reassure a range of organisations, including the Law Society of Scotland, Faculty of Advocates and Scottish Police Federation. No additional protections are provided in relation to academic freedom and no consideration is given to potential cross-border effects. In contrast to England and Wales, there is no need to show that material is threatening, and no need to prove intent.

Significantly, the Bill contains no freedom of expression protection in relation to transgender identity. Arriving at a point when public debate on sex and gender identity is contested and a chilling effect is already evident, the risks in legislating for stirring up hate on transgender identity in such a volatile atmosphere should be obvious.

In our [submission](#) to the Justice Committee, we argue that even if freedom of expression protections are added for transgender identity and the other threshold tests raised, the concept of “hate” is itself so deeply contested here that **any** stirring up provision would most likely result in vexatious, malicious, or unfounded complaints. We also argue that the fear of such complaints and uncertainty about how they would be handled in the criminal justice system, would interfere with freedom of expression.

5. Summary

The Scottish Government argues that the long-time existence of a stirring up offence for race is evidence that such offences would be “effective” and unproblematic if extended more widely. Patrick Harvie MSP argues that a challenge to the extension of stirring up hatred must logically also be a challenge to the existing provision for race, or show a lesser care for other types of hate. **These lines of argument are based on a failure to recognise that in relation to “stirring up” there are unique issues related to race, and that other characteristics raise larger issues for freedom of expression.**

This distinction was understood by MPs at Westminster, who in 2006 [voted against the then Labour government](#) in order to secure additional safeguards and raise the criminalisation threshold for the new offence of stirring up religious hatred, compared to racial hatred. Those expressing concern about extending the stirring up offences in the current Bill, while retaining the existing law on stirring up racial hatred, also understand this difference. The

¹ Those not granted any such protection are disability, age, transgender identity and variations in sex characteristics.

Scottish Government and its supporters in the Scottish Parliament now need to show they understand it too, if the Bill is to get the quality of discussion it deserves.