

The Hate Crime and Public Order (Scotland) Bill: Views from Scottish policing

MBM Hate Crime Briefing 5

murrayblackburnmackenzie.org

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1. Introduction

In April 2020 the Scottish Government published the [Hate Crime and Public Order \(Scotland\) Bill](#). The Bill aims to consolidate existing hate crime legislation, introduce new protected characteristics, introduce new provisions for stirring up hatred for all characteristics, and abolish the common law offence of blasphemy.

The Bill has had an exceptionally difficult reception, prompting criticism from a range of organisations, including the Faculty of Advocates, the Law Society, the BBC, the National Secular Society, the Humanist Society, the Catholic Church and a raft of writers and artists. As a measure of the heat around the Bill, the [Scottish Parliament Justice Committee](#) received [around 2,000 evidence submissions](#), reported to be the highest number ever received in response to any Stage 1 bill consultation since the Scottish Parliament was established.

This briefing looks at some of the issues raised in the submissions from [Police Scotland](#), [Association of Scottish Police Superintendents \(ASPS\)](#) and the [Scottish Police Federation](#), namely those organisations who will be tasked with upholding the new law. Broadly supportive in some places and fiercely critical in others, the submissions capture the complexities that underlie the hate crime agenda, issues around public trust and police legitimacy, as well as more practical workload considerations and the costs of training 17,000 officers in what is emerging as a charged and contested area of law.

2. Stirring up hatred

The controversy principally hinges on the introduction of new ‘stirring up hatred’ offences for characteristics other than race, and the attendant implications for free speech. In brief, the offences cover “[behaviour of any kind](#)” or communicating material to another person in any way, and may “consist of a single act or a course of conduct”. For characteristics other than race, behaviour needs to be either “threatening” or “abusive”, but not both. For race, behaviour can also be “insulting”. It is not necessary to demonstrate that a person has stirred up hate, nor that a person intended to stir up hate; only that it this was a “likely” outcome.

In response to criticism, the Scottish Government has however, stated that it will lodge Stage 2 amendments to [remove the likelihood test](#), to make the new stirring up hatred offences ‘intent only’. The Bill includes a ‘reasonable defence’ provision, although this partially puts the burden of proof on the defendant, it is not particularly substantive, nor is it likely to be easily understood by a lay person.¹

¹ The Bill states ‘it is shown that the behaviour or the communication of the material was, in the particular circumstances, reasonable if – (a) evidence adduced is enough to raise an issue as to whether that is the case, and (b) the prosecution does not prove beyond reasonable doubt that it is not the case’.

[Stirring up racial hatred](#) is currently legislated for under the 1986 Public Order Act, which is UK-wide. The 1986 Act also provides for stirring up hatred in relation to [sexual orientation and religion](#) (added in 2006 and 2008 respectively), although these offences only apply in England and Wales. There are, however, significant differences between the stirring up offences in the Bill as introduced in Scotland, and the law as it stands in England and Wales, where behaviour or material must be threatening (rather than only abusive) and there must be intention to stir up hate (rather than likelihood). The offence of stirring up religious hatred in England and Wales also includes a strong [freedom of expression provision](#) that allows “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse”. Stirring up sexual orientation also has a [freedom of expression provision](#) that specifically allows for criticism of same-sex marriage.

It is worth noting that on both sides of the border stirring up legislation is rarely used. Most hate crime charges are for aggravated offences, where a hate crime aggravator is attached to an existing offence. In [Scotland](#), there were just eight proceedings for stirring up of racial hatred offences under the 1986 Act between 2011/12 and 2017/18. In [England and Wales](#), 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 between 2008 and 2012, compared to over 75,000 charges for aggravated offences. For this reason, the [Law Commission](#) concluded in 2014 that the case for extending stirring up offences to disability and transgender identity had not been made. It appears then, as also indicated in the [Bracadale Independent Review of Hate Crime Legislation in Scotland](#), that the main purpose of the new offences appears to be symbolic, or ‘sending a message’.

3. The view from Scottish policing

Police Scotland supports the introduction of stirring up hatred offences, candidly noting that this would ‘*to a large extent simply be returning football policing to a previous legislative position*’. This refers to the now repealed [Offensive Behaviour at Football and Threatening Communications \(Scotland\) Act 2012](#) (OBFA), which as Police Scotland note, included provisions for stirring up hatred in relation to religion, colour, race, nationality (including citizenship), ethnic or national origins, sexual orientation, transgender identity and disability. In a nod to parity between characteristics, they also state that ‘*the inclusion of any new protected characteristics would be logical alongside their addition as new aggravations in relation to baseline offences.*’

Neither the ASPS nor the Federation find the case for new stirring up offences convincing. The ASPS state that without further information on how current legislation is failing to protect the public, they are not clear as to why the new provisions, in particular the stirring up offences, are required. More directly, the Federation that that there is no such gap.

‘The SPF shares the view communicated by many others in response to the Bill that the creation of a new offence of threatening or abusive behaviour is entirely unnecessary; it already exists.’

Both the ASPS and the Federation critique the lack of clarity in the Bill. Whereas Police Scotland appears to support the stirring up hatred offences based on the de facto reinstatement of similar powers to those in the OBFA, the ASPS draw on the same repealed Act to illustrate the practical difficulties in applying “*unclear and subjective legislation*”, noting that there are “*clear lessons to be drawn*”. They also observe that the brunt of criticism of the OBFA fell on officers: ‘*public and political criticism for the failings of that 2012 Act were focused heavily upon the Police Service who were given the task of upholding the new law*’.

The Federation state that the vagueness of both the new offence and the test applied to it ‘*does not define a recognisable criminal offence*’, and that people will be unable to draw a line between fair comment and what falls within its scope.

‘The question raised by many other organisations which oppose the Bill has been: what is included within this offence? We believe that we can answer that question: there is nothing which is definitively excluded from this proposed new offence’.

4. Freedom of expression

The freedom of expression provisions in the Bill only apply to religion and sexual orientation, and both are weaker than their counterparts in England and Wales. Notably the provision for religion only covers “discussion or criticism”.

Police Scotland appear to be unmoved by this, although this may be due to a lack of clarity as to what the Bill does and does not cover. In its submission to the Justice Committee, Police Scotland simply repeat its earlier response to the 2018 Scottish Government consultation on hate crime, which had asked, in broad terms, ‘*Do you agree with Lord Bracadale’s recommendation that there should be a freedom of expression provision for offences concerning the stirring up of hatred?*’. In response to this, Police Scotland stated:

‘The inclusion of a freedom of speech provision is to be welcomed. In a football context the inclusion of such a provision in the Offensive Behaviour at Football Act 2012 provided operational officers with valuable guidance. The absence of such a clause could result in Police Scotland being burdened with vexatious reports of ‘crimes’ which are not in fact criminal in nature but which still require to be recorded and investigated to confirm if criminality is involved.’

The response appears to assume, based on the consultation question, that freedom of expression protections would apply to all the characteristics. However, this is not what the Bill provides for. Both the ASPS and the Federation pick up on the risk of unfounded complaints. The Federation note that ‘*frivolous allegations*’ are not uncommon, and express concern that if introduced, the provisions would be abused, either intentionally or unintentionally. Similarly, the ASPS state that the Bill ‘*may regularly situate police officers as the arbiters of relatively minor social disputes or expressions of opinion*’, and refer to a likely increase in ‘*myriad, and complex complaints*’.

More broadly, the ASPS assert that mature democracies should be able to withstand robust discourse, without recourse to criminal law, and suggest that the Bill risks putting certain views beyond debate, unwittingly creating a secular equivalent to blasphemy:

‘The Bill in its current draft does not, in the Association’s view, provide sufficient, qualified protection for the human right of freedom of expression. Whilst the views expressed by some may insult the sensibilities of others and be intolerable to accept, a mature, democratic and truly tolerant society should be able to negotiate robust and even rude and insulting public and social discourse without recourse to the criminal law, other than in the most extreme and genuinely harmful circumstances.’

‘If the offence of blasphemy is to be repealed, then the sound rationale for that decision should be applied across all protected characteristics to ensure that the Bill does [not] unwittingly create a new, secular-age offence (with likeness to blasphemy) in the other protected characteristics, particularly where people are simply in furious disagreement, and regardless of how strongly held their particular views may be or self-belief in their absolute, infallible correctness.’

It is difficult to overstate the strength of feeling that runs throughout the Federation submission in relation to freedom of speech. The following extract exemplifies the broad thrust:

‘We cannot support a Bill which appears to paralyse freedom of speech in Scotland, particularly when threatening conduct is already a well-recognised criminal offence

which does not require duplication. This Bill will, if passed, paralyse freedom of expression for both individuals and organisations by threatening prosecution for the mere expression of opinion which may be unpopular. Individuals, organisations, or others with an interest in doing so could shut down debate on important matters by simply labelling it criminal hatred. Whether or not they are correct the impact is likely to be that free speech is stifled regardless.'

While cautioning that the freedom of speech provisions are '*flimsy and unfit for purpose*', the Federation nonetheless argue that in principle, these should apply to all characteristics. The Federation pulls no punches on the lack of a freedom of expression provision for transgender identity, noting '*people are already frightened to enter the trans debate*'. Given how unusual it is for policing organisations to speak out critically on this issue, we think these comments are worth citing in full:

'It cannot be accidental that the subject of gender identity is not covered by the sections of the Bill devoted to what are described as the freedom of expression provisions. People are already frightened to enter the trans debate or criticise any anti-racism activities (regardless of whether they agree with wider political ideologies or not) for fear of being accused of being transphobic or racist. Fear of insulting is stifling free speech and the proposals in this Bill risks compounding that.

As an example; the use of language to distinguish between sex and gender is often conflated, in what can appear as an attempt to infer outrage or discrimination simply because of irreconcilable fundamental beliefs

Individuals freely discussing for example lesbian sexual practices might believe they are covered by the free speech provisions only to find that their interpretations are considered hateful by those who take a diametrically opposing view on whether lesbian relationships are (or ought to be) sex or gender derived...

Is discussion and criticism of matters relative to the other protected groups and characteristics prohibited under this Bill? Is the proposed legislation designed to specifically exclude current hotly-contested issues such as the housing of refugees, or trans rights and how they affect biological women?'

5. Who counts?

A range of commenters (ourselves included) have expressed concerns about who is and is not protected in the Bill, and how the characteristics in are defined. In brief, the Bill adds 'age' and 'variations of sex characteristics' (VSCs) to existing provisions for race, disability, sexual orientation, and transgender identity. Sex is not included, although there is a provision to add sex as an aggravator at a later date. This will be considered by a working group appointed by Scottish Government officials who will also consider a standalone offence of misogynistic harassment and how 'sex' should be defined. The [Faculty of Advocates](#) disagree with this approach, which they believe should be a decision for the Scottish Parliament. Due to COVID-19 the establishment of the working group is currently paused with no start date.

Police Scotland do not support a standalone offence for misogynistic harassment but broadly agree with the addition of a sex aggravator, although they suggest that the Scottish Government may wish to assess the likely scope and impact. Noting that children are disproportionately represented among hate crime perpetrators, Police Scotland express caution around age and state they would welcome 'detailed consideration' on how a statutory aggravation on age hostility might be introduced without generating unintended negative consequences for children. In relation to elderly people, Police Scotland suggest that an 'Exploitation of Vulnerability' aggravation might be more effective. And in a similar

vein, the ASPS suggest examining the viability of separate vulnerability-based legislation, outwith the hate crime framework’.

In terms of the larger framework, both the ASPS and the Federation observe that the Bill affords unequal protections to different groups. Highlighting inconsistencies between the characteristics in the Bill and those in the Equality Act 2010, the ASPS suggest that *‘there may be merit in considering applying consistency and offer the same protection for all characteristics defined in other laws’*. They also observe that some of the new characteristics are *‘not maturely defined elsewhere in law’*. Noting the limitations of a framework based on a fixed number of characteristics, the Federation suggest such an approach risks undermining the principle of equal treatment before the law.

Hate crime is an increasingly fluid term with ever increasing sections of society demanding special status for their particular group. As this trend continues to grow it erodes the basic principal that everyone should be equal in the eyes of the law. It creates competition over which victim deserves the greatest sympathy or public outrage over their experience(s).

6. Workload and costs

The Federation anticipate a *‘significant’* uplift in workload as a result of the Bill, and a corresponding demand on COPFS and the courts. The [Scottish Government](#) anticipate that the costs for Police Scotland will be modest, at around £50,000 for training and £50,000 for its share of IT changes.

Police Scotland, the ASPS and the Federation all strongly reject this analysis. In its submission to the Finance and Constitution Committee [Police Scotland](#) estimate £932,000 in training costs. The ASPS believe that the government estimates *‘fall woefully short of what will actually be required for comprehensive training and support to officers and staff’*. And the [Federation](#) describe the estimated costs as a *‘gross underestimation’*, noting that several days training will be required, and that *‘a very conservative estimate of the cost of a single day’s training for every police officer in Scotland is £3.5 – £4M’*. They also refer to costs arising from complaints against police officers and staff, an inevitable increase in freedom of information requests relating to the legislation, and to the opportunity cost of officers attending additional court hearings.

7. What happens next?

Set against an exceptionally tight parliamentary timetable and a global pandemic, it is difficult to predict the next steps. The Scottish Government has previously pressed ahead with legislation in the face of professional concerns, including the Railway Policing (Scotland) Act, which remains uncommenced due to operational and financial challenges. There are also parallels with the [now repealed OBFA](#), which the [Scottish Justices Association](#) saw as *‘an expensive... and complicated way of addressing a problem which is already addressed in existing offences’*, and the [Law Society](#) cautioned that *‘the new offences may cause confusion with particular reference to what type of behaviour is to be considered unacceptable at regulated football matches’*.

A recent motion by the Scottish Conservatives to scrap the Bill and go back to the drawing board failed, with the Parliament instead voting to reform the draft Bill. In addition to the now well-rehearsed concerns around the proposed stirring up offences, as shown above, the committee will need to consider other issues, including the characteristics in the Bill, how these are defined, and who is not protected. In relation to the latter, it seems clear from the various speeches in the recent Holyrood debate, that the omission of sex in particular, is likely to gain traction. There is also the matter of 2,000 submissions, and the prospect of fresh issues to consider.

The Justice Secretary has however, assured the Parliament that he is prepared to make compromises. As noted earlier, the Scottish Government has now stated that it will lodge Stage 2 amendments to remove the likelihood test, and make the new stirring up offences 'intent only'. While welcoming this change, the [Faculty of Advocates](#) have stated that it does not address all their concerns.

The removal of Part 2, which sets out the new stirring up hatred offences remains the simplest option here. This would address risks around freedom of expression, as well as the complexity of legislating for what are very different characteristics. Alternatively, the Scottish Government could expand stirring up offences in Scotland in line with those in England and Wales under the Public Order Act 1986, namely to religion and sexual orientation, with the same carefully tailored freedom of expression provisions and tighter conditions. As the Scottish Government has acknowledged, these provisions operate effectively without raising concerns over freedom of expression. In drawing on an established evidence base, such an approach could help to secure consensus and, against a ticking clock, allow the Bill to be completed in time.

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