

F/T: 0300 244 4000
E: scottish.ministers@gov.scot

Ian Murray
Executive Director
Society of Editors
office@societyofeditors.org

Ar faidhle/Our ref: 202000041757
15 June 2020

Dear Ian

Thank you for your letter of 26 May regarding the Hate Crime and Public Order (Scotland) Bill ("the Bill") which was recently introduced to the Scottish Parliament.

I understand your concerns relate to the stirring up of hatred offences contained in the Bill. I recognise the vital importance of ensuring that the media is able to report freely and impartially on sensitive and controversial topics without fear of censure or even criminal prosecution. However, I do not consider that the offences contained in the Bill interfere with the media's ability to do so. It may be helpful if I set out in more detail the Scottish Government's position on the points you make in your letter.

Stirring up hatred offences and freedom of expression

You are concerned the offences in the Bill carry the risk of stifling genuine debate, represent draconian measures and will reduce freedoms, which will present a serious threat to free speech and a free media not just in Scotland but throughout the whole of the United Kingdom. You are of the view the offences in the Bill reverse the long-held understanding that no one has the right not to be offended and will allow anyone with hurt feelings to trump long-held freedom of speech rights.

In light of your concerns I think it is important to highlight why we have stirring up offences at the moment, what the Bill does, and the threshold for criminal conduct.

There are very real harms created by conduct that stirs up hatred. Stirring up hatred can incite people to commit offences against individuals in the targeted group and contribute to an atmosphere in which prejudice and discrimination are accepted as normal. It can result in entire communities feeling isolated, scared and vulnerable to attack.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

In the most serious cases, the effect of a person who says or does things that stirs up hatred can be that it directly encourages activity which threatens or endangers life. It is vital, therefore, that the criminal law protects people from this type of conduct.

Stirring up hatred offences are **not** new. There have been offences of stirring up racial hatred in Scots law – and indeed the whole of the UK – for decades.

The current stirring up of racial hatred offences are contained in the Public Order Act 1986, which is a UK Act with certain provisions extending to Scotland. The origins of these offences are even earlier, contained in the Race Relations Act 1965. The Hate Crime Bill does not introduce any new legal thresholds for racial stirring up hatred offences, but simply modernises and consolidates existing criminal offences so they are found in one place.

What the Bill does do is create new offences of stirring up hatred in Scotland to cover all of the other characteristics listed in the Bill, including religion and sexual orientation.

The new stirring up hatred offences in the Bill cannot be easily committed. A person can only commit an offence if two separate things can be proven beyond reasonable doubt.

Firstly, a person has to behave in a **threatening or abusive** manner or communicate material that is **threatening or abusive**. This is an existing and well-recognised legal threshold for conduct in Scottish criminal law which the courts and practitioners are familiar with.

Secondly, it needs to be proven that by a persons' conduct they intended to stir up hatred in others or it is likely that hatred will be stirred up. This means that the conduct was intended, or likely to, encourage, in other people, the intense emotion of hatred toward a group.

Here, "likely" does not simply mean "possible". Our independent courts will determine whether hatred is likely to be stirred up or was intended to be stirred up by a person's conduct, on the basis of an independent, objective assessment of the available evidence. The context will be key, including the likely audience.

The Bill also provides for a defence that the conduct was reasonable in the circumstances.

Taken together, this all means that there is a high bar before conduct is criminalised.

It is also worth emphasising the European Convention of on Human Rights (ECHR) guarantees all of us freedom of speech. This right cannot be taken away by the Bill and will continue to apply as it does at the moment. The ECHR protects your right to express views even if they shock, offend or disturb others, but it does not give the right to threaten and abuse others where that is likely or intended to encourage a hatred of them.

Requirement to prove intent

You have said the offences in the Bill avoid including the requirement to show intent on the part of someone accused of making or reporting a statement later held to be within the scope of the legislation, which you consider will have a severe deadening effect on media freedom.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

You also refer to notes provided with the Bill explaining that a requirement to show intent to stir up hatred is not desirable because it would make it prohibitively hard to achieve a prosecution rather than enabling journalists and others to defend their work.

For background, I can advise the Policy Memorandum which accompanied the Bill explained the development of the Bill's provisions, which followed an independent review of hate crime legislation in Scotland by Lord Bracadale. For stirring up hatred offences, Lord Bracadale recommended that the criminal intent associated with any new stirring up offence should include a requirement of (a) an intention to stir up hatred, or (b) having regard to all the circumstances hatred in relation to the particular characteristic is likely to be stirred up. The Scottish Government accepted Lord Bracadale's view that to confine a stirring up offence to an intention to stir up hatred alone would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused's intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.

Accordingly, for all of the stirring up hatred offences contained in the Bill, as explained above, the prosecution must show that a person either intended to stir up hatred in others or having regard to all the circumstances hatred is likely to be stirred up.

I hope this clarifies what the Bill does and, importantly what it does not do. The Bill does not seek to stifle criticism or rigorous debate nor does the Bill criminalise expressing views just because they are offensive or controversial. What the Bill does do is criminalise and hold to account those who express or demonstrate their prejudice in a way that is threatening or abusive and either intended to stir up hatred or likely to stir up hatred.

A series of information notes were published about the Bill, and a note concerning stirring up of hatred offences specifically can be found at the following link, which you may find helpful: <https://www.gov.scot/publications/hate-crime-bill-what-it-will-do/>

I would of course be happy to discuss this further. Should you wish to do so please contact my Private Office at [REDACTED] and my diary secretary will arrange a suitable time for a call.



HUMZA YOUSAF

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

Taigh Naomh Anndrais, Rathad Regent, Dùn Èideann EH1 3DG
St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

