

AMENDMENTS AT STAGE 3 TO THE HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL: FREEDOM OF EXPRESSION

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Introduction

This note considers how a general freedom of expression provision might be framed in the Bill, for all characteristics other than religion.

It is provided without prejudice to our strong view that the approach recommended to the Scottish Government and the Committee by Lord Bracadale, of detailed tailored amendments for each characteristic on the model of the Public Order Act 1986, is needed. Only this approach can provide clear points of reference on what the law is *not* intended to do, for those involved in the criminal justice system and also, equally importantly, for individuals and organisations who may be threatened with legal action, or fear such threats.

If a general provision is nevertheless pursued, we suggest the logic of all the statements made at Stage 2 so far is that it should be modelled as closely as possible on the proposed provision for religion, including the amendments to that which have already agreed between the parties.

The 1986 Act

The Act (Annex A) includes a detailed provision for each of the two characteristics added subsequent to race.

The section for religion (29J) makes clear that it is intended to cover much more than the relatively inoffensive terms “discussion and criticism”.

The provision for sexual orientation (29JA) identifies two specific topics. The Equality Network deprecates that approach as a “laundry list”: we suggest MSPs resist this rhetoric, which pre-judges there is no case for including specific examples.

Bracadale Report

Lord Bracadale’s review concluded that in introducing stirring up offences, careful provision needed to be made in relation to freedom of expression. His report recommended following the examples in the 1986 Act.

For whatever reason, the SG read this as following the example in that Act *only for the characteristics included in that Act*. It also softened the wording in both cases (also Annex A).

Lord Bracadale’s evidence to the Committee (relevant extracts at Annex B) made clear this was a misreading on the SG’s part, and his expectation in recommending stirring up offences was that there would be clarifying provisions modelled on the 1986 Act for each new characteristic added.

Religion as amended

The SG has proposed changes to the religion section which take it much closer to the 1986 Act, and to what Lord Bracadale recommended. The proposed amended section appears to be:

11 Protection of freedom of expression: religion

(1) This section applies for the purposes of sections 3(2) and 5(2).

(2) Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—

(a) discussion or criticism of or expressions of antipathy, dislike, ridicule or insult towards—

(i) religion, whether religions generally or a particular religion,

(ii) religious beliefs or practices, whether religious beliefs or practices generally or a particular religious belief or practice,

() the position of not holding religious beliefs, whether religious beliefs generally or a particular religious belief,

(b) proselytising, or

(c) urging of persons to cease practising their religions

Nothing below should be used as an argument to reverse the decisions now taken here.

General provision for remaining characteristics

Following the logic put forward for a general provision by the government and others, the approach here

- seeks to avoid a hierarchy between religion and other characteristics, and
- takes account of Lord Bracadale's advice, as far as this approach allows.

That argues for provision for other characteristics which is **as close as possible to the (amended) section already agreed for religion**. The burden of proof should be on the government, and the groups it is listening to, to explain why the formulation for religion should not apply also to other characteristics.

In legislating here, it is critical to understand that issues related to “beliefs” and “practices” are not uniquely relevant to religion.

We can see already that it is differences of *belief* (about the nature of gender identity, its significance relative to sex, how many sexes there are, whether a human being can literally change sex, what defines being a woman or a man etc, whether a person can literally be “born in the wrong body”, and so on) that are generating much of the deep disagreement in relation to transgender identity. **The explicit ability to reject beliefs is also needed, as in this particular context rejection of particular beliefs is regarded as intrinsically hateful.**

It is differences of belief which explain why some people who would describe themselves as transsexual or transgender have been attacked, up to the level of unsuccessful prosecutions, and disciplinary hearings, as “transphobic”, for rejecting some or all of the beliefs others (many of whom would not describe themselves as transgender) hold about the nature of transgender identity.

In [a recent briefing](#) providing multiple examples of the low threshold applied for accusations of hatred in this area, we noted:

The Stonewall definition of transphobia includes “denying [someone’s] gender identity or refusing to accept it”. This is often read as requiring people to adopt as their own belief another person’s declaration that they are a woman or a man (or male or female), or neither, irrespective of their physical sex.

and

A definition of transphobia published by the University of Edinburgh includes “disbelief of trans and gender non-conforming people”

The most recent example of many here is the [definition of transphobia](#) proposed on 30 January 2021 by a group called Labour Trans Equality. This includes, “Deliberately misgendering trans people at any time by calling trans women, “men” or trans men “women”, or non-binary people “men” or “women” is transphobic.”

In the case of transgender identity, it is also evident that ***propositions for law and policy based on particular beliefs*** are often more directly the focus of disagreement than the core beliefs. Our recent briefing noted that:

Bristol University Feminist Society stated that the views expressed at a meeting to discuss GRA reform “amount[ed] to hate speech” and endangered transwomen.

The Labour Trans Equality proposed definition quoted above includes, “Claiming there is a “conflict” between trans people’s rights and women’s or other communities’ rights is transphobic.”

The concept of “practices” is recognised in the 1986 Act, and in the SG’s original amendment, as relevant to sexual orientation. Both beliefs and practices could prove relevant to the other characteristics in ways the legislative process has not had time to explore.

For characteristics other than religion, it is possible that **issues could also arise which are not related to practice or belief**, so some additional provision recognising that would make sense.

A general provision fails to anticipate where there will be flashpoints for which the law needs to provide a clear reference point. So it would make sense to include **a power to make further, more detailed provision as needed**, providing further examples of what statements are not intended to be *of themselves* taken to be abusive and/or intended to stir up hatred, which can be used as and when there is evidence it is needed.

It would be better to be clear that the activities listed should not be taken either as “threatening or abusive” **or as “stirring up hatred”**, as it is specifically the concept of “hate” that is invoked against individuals. Regardless of whether it is regarded as *legally* necessary, the law needs to make it clear that the “hatred” threshold specifically is not passed merely by activities listed. There is a precedent for this formula in the Section 29JA of the 1986 Act.

A suggested draft

This reasoning gives as a suggested draft:

Freedom of expression: generic

- (1) This section applies for the purposes of sections 3(2) and 5(2).
- (2) Behaviour or material is not to be taken to be threatening or abusive or as stirring up hatred solely on the basis that it involves or includes -
 - (1) discussion, criticism or rejection of [or expressions of antipathy, dislike, ridicule or insult] towards any beliefs or practices relating to any characteristics, or any propositions or proposals based on such beliefs, or
 - (2) discussion or criticism of other matters relating to any characteristic, or
 - [(3) urging of persons to cease any practices or to cease to hold any beliefs associated with any characteristic.]
- (3) Ministers may by Order make further provision providing examples of behaviour or material that is not to be taken to be threatening or abusive or as stirring up hatred solely on the basis of what it involves or includes, for one or more individual characteristics.

Some parts are square bracketed only on the assumption that there may be political reluctance to treat other practices and beliefs in the same way as religious ones; and similarly to include an “urging” provision for other characteristics. Urging is currently part of the 1986 Act provision for both characteristics covered, and was included in the Bill as introduced for both.

The exact wording of the Order making power is a technical point that should be remitted to the government.

Conclusion

We do not believe a general provision can provide the secure and clear point of reference that experience already shows is needed for transgender identity; which all scrutiny of the bill to date has assumed will apply for sexual orientation; and which further careful exploration might show is needed for others.

If the Parliament is nevertheless determined to legislate in this area using only a general provision, we suggest that that ought to be as close as possible to what is already proposed for religion, and ideally would include provision to make more specific provision at a later date, as needed.

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The Public Order Act 1986

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.

[The Hate Crime and Public Order \(Scotland\) Bill](#) as introduced

11 Protection of freedom of expression: religion

- (1) This section applies for the purposes of sections 3(2) and 5(2).
- (2) Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—
 - (a) discussion or criticism of—
 - (i) religion, whether religions generally or a particular religion,
 - (ii) religious beliefs or practices,
 - (b) proselytising, or
 - (c) urging of persons to cease practising their religions.

12 Protection of freedom of expression: sexual orientation

- (1) This section applies for the purposes of sections 3(2) and 5(2).
- (2) Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—
 - (a) discussion or criticism of sexual conduct or practices, or
 - (b) urging of persons to refrain from or modify sexual conduct or practices

Lord Bracadale's comments to the Justice Committee on freedom of expression provisions, 27 October 2020
(Emphasis added)

James Kelly:

First, can I deal with the issue of freedom of expression? It has been the subject of some debate around how the bill seeks to protect freedom of expression against potential prosecution for stirring up hatred offences. As drafted, the bill protects on the basis of sex and religion. Others have argued that that is too minimalist an approach, that protections around freedom of expression should be extended to more characteristics and that further offences should be allowed. What is your view on that?

Lord Bracadale:

Any stirring up of hatred offence would have to meet the requirements of the European convention on human rights. There are two approaches that can be taken to the protection of freedom of expression clauses. One is not to use them at all and to rely purely on the court applying the ECHR. If you are going to use them, they should reflect the approach of the ECHR and, in particular, **they should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised.**

The formula that was used in the Public Order Act 1986 and in section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 had more strength about it than the formula that is used in relation to religion in the bill. **I recommended that there should be freedom of expression clauses, and I would have expected them to extend across all protected characteristics, because I was trying to avoid any kind of hierarchy of protected characteristics.**

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The Convener:

I take Lord Bracadale back to his answer to James Kelly's first question about the free speech provisions in sections 11 and 12 of the bill. You compared those provisions with those in section 7 of the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and section 29J of the Public Order Act 1986. I think that you said that both those sections offered greater protection for freedom of speech—that they were both stronger—than sections 11 and 12 of the bill. Can you clarify what you mean by that? While you do so, can you also reflect on what the cabinet secretary said earlier—that he was minded, although he did not commit himself, to consider amendments that both broaden and deepen the protection of free speech in the provisions in sections 11 and 12?

The cabinet secretary explained that to broaden the protection of free speech would mean that protection would apply to all the characteristics and not just to two of them, and that to deepen the protection of free speech would imply that it should not only pertain to discussion or criticism, which is what the bill says at the moment, but extend

to the expression of antipathy, dislike, ridicule or insult, which are words that are used elsewhere in other statutes. I invite you to reflect on those comments.

Lord Bracadale:

My recommendation was effectively that the protection of freedom of speech would mirror precisely what you have described, although the reference to abuse in some of the earlier legislation would obviously have to come out. **Such amendments to the bill would be an expression of the kind of line that we want to identify between “offensive behaviour” on one side and “threatening and abusive behaviour” on the other, with whatever other threshold there is.**

.....

The Convener:

... the core point remains. I do not want to put words into your mouth, but I want to be sure that the committee fully understands the exact implications of what you are saying. **Your view is that the depth of the free speech protections in sections 11 and 12 should be extended to capture antipathy, dislike, ridicule and insult in addition to discussion or criticism.** Was that the force of your recommendation, and is it the case that you have not changed your mind on that?

Lord Bracadale:

I have not changed my mind.

The Convener:

That is helpful. Thank you.

Liam McArthur also has a supplementary in that area...

Liam McArthur:

Good afternoon, Lord Bracadale. I thank you not only for your work on the area but for your willingness to engage with those of us in the Parliament who have an interest in it.

Earlier, the cabinet secretary alluded to concerns about the legal difficulties that might be involved in enhancing the protections for freedom of expression. He was a little more coy about the nature of those difficulties. I wonder whether you foresee them or are reasonably comfortable that, as the convener has explained, that process could be done relatively straightforwardly.

Lord Bracadale:

The test is really whether the protection reflects what is in article 17 and article 10 of the European convention on human rights. **I think that the formula that we have discussed does that. I do not know what are the legal difficulties to which the cabinet secretary alluded.**

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