



I am writing in respect of your interest in the wording of the explanatory notes for the Hate Crime and Public Order (Scotland) Act 2021 (“the Act”). Your interest relates to the wording to be used to explain the operation of the freedom of expression provision in the Act (section 9).

At Stage 3 of consideration of the Hate Crime and Public Order (Scotland) Bill, you’ll be aware that there was extensive and detailed scrutiny of the freedom of expression provisions. During this scrutiny, the then Cabinet Secretary for Justice, Humza Yousaf MSP, spoke extensively about the operation of the freedom of expression provision and responded to a number of queries about how the provision now in section 9 would operate.

This scrutiny informed the deliberations of Parliament in assessing the freedom of expression provision. A majority in Parliament then voted in favour of the relevant Stage 3 amendment that brought the freedom of expression provision as provided for in the final Act into the legislation. This scrutiny placed in the public domain the intent of the Scottish Government in proposing the freedom of expression provision and informed the decision of Parliament in supporting the freedom of expression provision.

Within this context, I detail in the annex the wording that the Scottish Government will be including in the final explanatory notes for the Act on the freedom of expression provision. This wording gives a factual explanation of the operation of the freedom of expression provision.

I hope this is helpful in explaining the approach of the Scottish Government in this area.

Criminal Justice Division
Scottish Government
March 2022



Explanatory notes for section 9 (protection of freedom of expression)

Section 9 (protection of freedom of expression)

1. Section 9 should be read in conjunction with section 4 of the Act.

2. This section, which makes provision for the protection of freedom of expression, applies only for the purposes of the offence of stirring up hatred in section 4(2) which deals with hatred based on age, disability, religion, sexual orientation, transgender identity, or variations in sex characteristics. It does not therefore apply in relation to the offence of stirring up hatred in section 4(1) which deals with hatred based on race, colour, nationality (including citizenship), or ethnic or national origins.

3. For a person to commit an offence under section 4(2), two elements must be proved beyond a reasonable doubt—

- the first element to be proved is that the person either—
 - behaved in a manner that a reasonable person would consider to be threatening or abusive, or
 - communicated to another person material that a reasonable person would consider to be threatening or abusive,
- the second element to be proved is that, in doing this, the person intended to stir up hatred against a group of persons (based on the group being defined by reference to a characteristic mentioned in section 4(3)).

4. The first element requires the person to behave in a threatening or abusive manner, or to communicate material that is threatening or abusive. Behaviour or material which is threatening or abusive could arise in any setting, such as—

- on social media, such as Twitter, Facebook etc.,
- at the dinner table or elsewhere in the home,
- in an office or workplace,
- in a teaching environment, including religious education,
- during a religious sermon or as part of religious preaching or practice,
- in a public or private meeting,
- in a newspaper, blogpost or other media setting,
- when performing, including in a play or a show on stage or in a film.



5. Whether the behaviour or material was threatening or abusive in any particular context must be determined objectively by reference to what a ‘reasonable person’ would consider to be threatening or abusive.

6. But for an offence to be committed under section 4(2), the second element must also be proved i.e. in doing so, there must also have been an intention to stir up hatred against a group of persons (as defined above).

7. Section 9 operates only in relation to the first element of the offence. It provides that the behaviour of, or material communicated by, a person is not to be taken to be threatening or abusive solely on the basis that it involves or includes—

- discussion or criticism of matters relating to age, disability, sexual orientation, transgender identity and variations in sex characteristics,
- discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards, religion, religious beliefs or practices, or the position of not holding religious beliefs,
- proselytising, or urging of persons to cease practising their religions.

8. Behaviour or material could not therefore be taken to be threatening or abusive solely on the basis that it involved or included, for example, discussion or criticism associated with age, disability, religion, sexual orientation, transgender identity, or variations in sex characteristics.

9. Something more is required for any such discussion or criticism to be taken to be threatening or abusive. For example, if it were proved that a reasonable person would consider that the criticism was expressed in a threatening or abusive way, or the material containing the criticism also included other threatening or abusive comments, it could still be taken to be behaviour or material that is threatening or abusive and therefore satisfy the first element of the offence. For the offence to be committed, however, the second element (i.e. the intention to stir up hatred, as mentioned earlier) would also have to be proved beyond reasonable doubt.

