Law Society of Scotland

# Scottish Parliament Stage 1 Briefing

14 December 2020

## Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee has previously responded to the Scottish Parliament's Justice Committee's Call for Evidence[1] on the Hate Crime and Public Order (Scotland) Bill (the Bill)[2] introduced on 23 April 2020. Now the Bill has reached Stage 1, we have the following comments ahead of the Stage 1 debate on the Bill scheduled to take place on Tuesday 15 December 2020.

Our comments are grouped into sections where we consider:

- Background to the Bill
- Bill's introduction and progress
- Consolidation (including section 50A of Criminal Law (Consolidation) (Scotland) Act 1995 and section 20 of the Public Order Act 1986)
- Sections 1, 2, 3, 5, 6, 9, 11 and 12 of the Bill

## Background to the Bill

Scotland's growing diverse ethnic and cultural communities contribute significantly to its social fabric and economic development. In 2017, National Records of Scotland estimated that 7% of the resident population of Scotland was born outside the UK.[3] Research has shown too that Scotland's "growing

[1] https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf

[2] https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf

[3] https://www.iriss.org.uk/sites/default/files/2020-06/insights-54_0.pdf#:~:text=In%202017%2C%20the%20National%20Records%20of%20Scotland%20%28NRS%29,of%20birth%20are%20Poland%2C%20Ireland%2C%20Spain%20and%20Italy.

diversity is not producing 'polarised islands of different groups' but a 'mosaic of differently mixed areas."[4] This provides the backdrop to the introduction of this important Bill.

We fully support fully the Bill's message that hate crime is not to be tolerated or acceptable for individuals in Scottish society. That is crucial to Scotland as a fair and just society requiring that the Scottish criminal justice system works effectively so "victims of crime [should be] confident that the criminal justice system will act fairly, effectively and will help to reduce the risk of further victimisation."[5]

The Bill alone will not get rid of prejudice. Alongside with the Bill if passed must be a programme of raising awareness and education for all. Importantly too, this needs to start within schools and within the GIRFEC[6] curriculum. We welcome the announcement of further information on what the Scottish Government plans plus resourcing are to tackle this issue. We see success of the Bill being interconnected with that necessary education programme.[7]

## Introduction and Progress of the Bill

The Bill's message, when introduced, was stark to the effect that hatred should have no place now or in our future society. We support the principles of the Bill in modernising hate crime laws in "shaping hate crime legislation so that it is fit for 21st century Scotland and, most importantly, afford[ing] sufficient protection for those that need it."

The Bill must promote confidence among those reporting relevant crimes. There must ensure fair, transparent and effective prosecution in the public interest and allow for appropriate sentencing to take account, specifically, of the need to ensure effective punishment and deterrence.[8]

The positive intentions regarding some of the Bill's provisions were obscured by a significant lack of policy detail when it was introduced. Much debate has ensued since the Bill's introduction where the Cabinet Secretary for Justice, in responding since, has signalled his intention to amend[9] at Stage 2 to include:

4 https://policyscotland.gla.ac.uk/ethnic-diversity-changed-scotland/#:~:text=Ethnic%20diversity%20is%20increasing%20throughout%20Scottish%20society%2C%20as,the%20extent%20to%20which%20that%20diversity%20has%20spread.

5 https://www.gov.scot/publications/justice-scotland-vision-priorities/

6 https://www.google.com/search?q=Getting+it+right+for+evey+child&rlz=1C1GCEA_enGB871GB871&oq=Getting+it+right+for+evey+child&aqs=chrome.69i57j0i13i457j0i13l6.5901j1j15&sourceid=chrome&ie=UTF-8

7 Paragraph 385 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

8 The Bill's introduction represented the culmination of policy work from September 2016 comprising several consultations and reports.

9 https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20201020CSJtoAT_HateCrimeAmendments2.pdf

- Amending sections 3 and 5 of the Bill[10] so that the new stirring up hatred offences are "intent only"
- deleting section 4 of the Bill[11]
- amending section 11 of the Bill regarding freedom of expression relating to religion[12] to align with provisions in England and Wales[13]

The setting up of a Working Group on Misogynistic Harassment chaired by Baroness Kennedy to consider the possibility of creating a new offence of misogynistic harassment in Scots law is welcomed with the Justice Committee's recommendation that it reports in a year.[14] We would like to see the membership and remit of the Group. This Working Group, while a positive step, means no measures if appropriate can be included within the current Bill.

That leaves the matter of misogyny under section 15 of the Bill to be dealt with by affirmative regulations if required which we strongly oppose. That denies "the fullest scrutiny of the parliament [which should require] primary legislation for implementing any [such] change."[15] There is a recommendation if using regulations that any regulations should be subject to the super affirmative procedure to allow the relevant committee to take evidence.[16]

Our preference remains for primary legislation. Issues of misogyny and indeed importantly, misandry are much too important to be left to secondary legislation. Substantive changes to criminal law should allow for policy intentions to be fully and publicly debated.

10 https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20200923_CSJ_to_JC_Hate_Crime_Bill.pdf

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11 "We welcome, therefore, the Cabinet Secretary's commitment to lodge an amendment at Stage 2 to remove this section. Had he not done so, we would have recommended its removal." Paragraph 136https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

12 "We will propose amendments to the provision to cover the absence of religious belief, and to clarify that mere expressions of antipathy, dislike, ridicule and insult are not, on their own, criminal behaviour."

13 In his final evidence session on 24 November, the Cabinet Secretary indicated he was considering the issue of freedom of expression and the wording of sections 11 and 12. He said, "We are happy to deepen the freedom of expression provisions around religion and I will lodge amendments at Stage 2 to that effect". Paragraph 182 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

14 Paragraph 292 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

15 Paragraph 303 of the Justice Committee's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

16 Paragraph 306 of the Justice Committee's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

## Consolidation

The Bill intended to consolidate hate crime into a modern code of offences, which we called for at the outset. Removal of the archaic common law crime of blasphemy achieves that in part. We recognise that a "single accepted definition of hate crime"[17] is not possible. However, as the Bill stands, consolidation does not seem capable of being achieved. This is disappointing. In our view is this requires those concerned with dealing with hate crime such as the police and prosecution service to continue to consider various sources of legislation when potentially offending behaviour arises. This effectively defeats the benefit of a "one stop shop" as was achieved with codification of sexual offences in the Sexual Offences (Scotland) Act 2009. The aim of modernisation will be defeated as the Bill:

- Reserves regulatory making powers regarding misogyny as discussed above
- Retains the offence under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995.[18]

We note that the Justice Committee[19] supports consolidation within the Bill which is certainly preferable to having a separate standalone offence. However, we continue to support the repeal of section 50A as it

"would have no material impact on the ability to prosecute offences" and "…to leave it as an outlier would arguably be inconsistent with the approach to consolidating all relevant hate crime law in a single place. Lord Bracadale recommended the repeal of Section 50A and in doing so he observed that it would not diminish the ability of the police or prosecutors to respond to racial hate crime. That is the experience of COPFS."[20]

- (as proposed by amendment) deletes section 4 of the Bill (requiring regard to be had to section 20 of Police Order Act 1986 (1986 Act))[21]

The Cabinet Secretary has indicated that section 4 of the Bill will be removed. That is welcome but not the end of the matter. Tying in with our concerns for the Bill to achieve consolidation, effectively this reinstates section 20 of the 1986 Act which we have included in Appendix 1 of this briefing. Following our argument, this section, if retained, should be included on the Bill to provide the necessary consolidation of legislation.

[17] Paragraph 34 of the Justice Committee's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

18 Paragraph 268 of the Bill's Policy Memorandum

[19] Paragraph 268 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

20 Paragraph 263 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

21 https://www.legislation.gov.uk/ukpga/1986/64/section/14

However, section 20 of the 1986 Act suffers from the same kind of problems as did Section 4 of the Bill. Major concerns have been expressed over the freedom of expression notwithstanding that it provides a defence for performers. As highlighted before, what about the provision including "ballet" within the definition of "play"?[22] The Scottish Parliament should not remove section 4 of the Bill without dealing with section 20 of the 1986 Act. Though we recognise that Scottish Government is concerned about messages to be sent out by retaining repealing existing criminal measures, the policy intention regarding its retention need articulated. Our preferred option is to repeal section 20 of the 1986 Act in so far as it applies to Scotland. That makes the position clear in what is un-utilised provision.

Alternatively, and subject to the policy intentions being indicated, Section 20 of the 1986 Act could be amended. Leaving the position by simply removing section 4 of the Bill does not resolve the problems.

The Bill should include a measure of future proofing so the Bill, once implemented, does not require frequent amendment. The Committee debates on the conclusion whether other groups should be included also brought differing views into consideration. The groups of "Gypsy, Gypsy Travellers, Roma and Travellers, asylum seekers and refugees" represent a wide community. The reassurance from the Scottish Government on how such different groups and other can be adequately safeguarded from hate crimes under the current wording of this Bill is important[23].

We continue to highlight issues as the Bill still lacks the certainty required by criminal law in order to uphold the rule of law for the public to respect and obey the law, and to ensure Scotland functions effectively as a multi-cultural society. Legislation calls those responsible to account as this is fundamental, recognising collective responsibility to address all racism and other forms of hate, while ensuring dignity, respect and compassion for those affected in society.

When creating new criminal offences restricting existing personal freedom, the law must be fair and balanced so that the Bill avoids the need for clarification through caselaw in the future. The Bill must stand on its own so that there is no role for "guidance to accompany the legislation [should it be passed] [to] help explain how the law operates in user friendly ways so that those who may benefit most from the operation of the legislation are aware of how it operates."[24]

**Section 1 of the Bill - Aggravation of offences by prejudice**

We support the statutory aggravation model as the means to prosecute hate crime to maintain similar and appropriate thresholds for criminal offending as exist at present. Adding to the characteristics by including age is relevant for today and fully reflects contemporary societal values.

[22] Section 18(1) (a) of the Theatres Act 1968

[23] Paragraph 337 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

24 paragraphs 80 and 81 of Policy Memorandum of the Bill

The continued use of “evince malice and ill-will should be removed as being “archaic language [that] plays a role in promoting that confusion as well.”[25] “Accessibility of the law to the layperson is an important principle and, wherever possible, legislation should be drafted in a way that can be widely understood whilst accepting that the law is often complex (and that words may have precise legal meanings).”[26] We support the use of simple English in legislation where possible.

We agree that any changes made to the terminology used in Section 1(1) of the Bill should not have the effect of any dilution of the offence. We agree with the Justice Committee that “evinces” can be replaced by “demonstrates” and are content with “malice and ill-will” remaining.

**Section 2 of the Bill - Consequences of aggravation by prejudice**

We recommend the deletion of section 2(2)(d) of the Bill despite the Justice Committee’s view.[27] That provides for the court to state:

- where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
- otherwise, the reasons for there being no such difference.

This was not the earlier recommendation from consultation.[28] We continue to consider that this practice can give rise to potential appeals and to a perception of, if not actual, inconsistencies in sentencing. Consistency of sentencing across Scotland is vital. Factors in sentencing are complex and completely agree that a clear and transparent message is sent to those who have offended and includes public denunciation of the offending behaviour. The role and understanding of judicial sentencing in relation to offending behaviour is crucial in preventing hate crimes

Victims should not feel aggrieved by considering that the sentence did not properly reflect the aggravation. Roles also exist for judicial education and awareness raising and the production of future sentencing guidelines.[29]

[25] https://www.lawscot.org.uk/media/361864/22-2-2019-crim-one-scotland-hate-has-no-home-here-consultation-response_.pdf

[26] Paragraph 238 of the Bill’s Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

[27] Paragraph 246 of the Bill’s Stage 1 report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

[28] “There should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.” Recommendation 8 of Lord Bracadale’s Independent Review of Hate Crime Legislation http://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/ 25

[29] Scottish Sentencing Council and the Judicial Institute for Scotland

**Section 3 of the Bill- Offences of stirring up hatred**

Part 2 of the Bill introduces the offences relating to stirring up hatred. Sections 3(1) and 5(1) of the Bill concern offences of stirring up hatred/possessing of inflammatory material and generally replicate sections 18-21 of the Public Order Act 1986 though that applied merely to racial hatred. Sections 3(2) and 5(2) of the Bill set out the new standalone offences.

Even with the amendments to the Bill, we have continuing concerns with the inclusion of "insulting" which should not form part of the new offence. By including "insulting" in section 3(1) of the Bill and its exclusion in section 3(2) of the Bill this could possibly be discriminatory and arguably creates a hierarchy of victims which is not the purpose of the Bill. Its inclusion continues to be defended that:

"… groups will tell you that they do not want any perceived dilution or weakening of the current stirring up of hatred offence with, as far as I can see- feel free to challenge this- barely any controversy whatsoever."[30]

We do not accept that justification to be persuasive as can be handled when the Bill is commenced to avoid any misconception. What matters is that there should be no hierarchy of crimes of victims which should continue to be a strength of the Bill should be.

In further support, we are aware when the Crown Office and Procurator Fiscal Service conducted a review of relevant cases in relation to prosecutions under the Public Order Act 1986 since 2009 that they found that "the removal of the word 'insulting' would not diminish the ability of the Crown to take appropriate prosecutorial action in relation to those reported offences[31]" Combined with the evidence from Victim Support Scotland who signalled that they could live with this change, we can see no basis for its retention.

Under section 3 of the Bill, the offences of stirring up hatred are not worded in identical terms to those in the Public Order Act 1986. Under that Act, stirring up racial hatred cannot be committed by a person inside a private dwelling.

We recognise that there is a balance to be achieved given the concerns over freedom of expression within one's own house. Questions were considered on how many for instance should be present in a private house before an offence should be committed? The issue focuses on whether "there does not seem to be about whether it is "about public order in the public space or public order in the private space."[32]

There should be no sanctuary when it comes to hate speech within a dwelling house where we agree with the Justice Committee at Paragraph 121 that:

[30] https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill

31 Paragraph 81 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

32 Michael Clancy Law Society of Scotland Official Report 3 November https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12919&mode=pdf

"there should not be an absolute defence against prosecution based on whether someone was inside a dwelling or not when it comes to words expressed, behaviour or the display of written material."[33]

What must be stressed is that "people are not investigated for, charged with, or prosecuted for, offences based on their personal views, however abhorrent others may consider them to be, if the expression of those views took place in a private space, such as their own house, and there was no public element."

What must be avoided is any danger that actions are investigated and prosecuted which have significant implications and stress for all concerned requiring justification of the relevant defences. That can have just as serious effects as ultimately in being convicted.

**Section 5 of the Bill - Offences of possessing inflammatory material**

Simple possession of material considered by some as inflammatory should not be sufficient for a prosecution so that any person must have the intent to stir up hatred. The term "inflammatory" is well understood. We support further clarity when determining whether the behaviour, communication, or possession of the material is reasonable under sections 3 and 5 of the Bill, there must have due regard to the literary, artistic, journalistic, comic, or possession, if any.[34]

**Section 6 of the Bill "powers of entry etc. with warrant."**

Any warrant to be granted under section 6 of the Bill lacks specification given its wide scope and may be considered to be unduly oppressive in terms of Article 8 of the European Convention Of Human Rights (right to private life). Where warrants are to be granted, the relevant provisions "must be clear, tightly defined and afford the necessary protections."[35] We endorse the Justice's Committee's call for further clarity. Additionally

- A time period for execution (section 6(1)) such as a period of 28 days[36] should be included. Warrants should not be open-ended.
- Section 6(2) of the Bill permits a warrant to be granted to the police or a member of police staff.[37] This is wide as are the provisions permitting searching of any person in the premises where there are reasonable grounds for suspecting that this may provide evidence of a commission of a section

33 https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

34 Paragraph 147 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

35 Paragraph 161 of the Bill's Justice Committee Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

36 Misuse of Drugs Act 1971

37 section 26 of the Police and Fire Reform (Scotland) Act 2012 which includes those employed by the police. Under section 26 (2) (b) of that Act includes those persons provided to the police under arrangements between police and a third party.

3 or 5 offence. Exactly what would constitute reasonable grounds if a warrant were taken for a newspaper/media organisation? Any potential "fishing expedition" must be avoided

- Section 6(3) of the Bill authorises where materials are being seized that are only: "capable of being looked at, read, watched or listened to (as the case may be) after conversion from data stored in another form, requires that the material (a) be converted into such a form in a way which enables it to be taken away, or (b) be produced in a form which is capable of being taken away and from which it can be readily converted." No time period is specified for undertaking this exercise and presumably, though not stated, that the cost would need to be borne by the person required to undertake the conversion. This seems potentially wide and unreasonable.

**Section 9 of the Bill relates to "individual culpability where organisation commits offence"**

These provisions relate to the imposition of responsibility in the commission of offences under sections 3 and 5 of the Bill. With no policy justification or explanation in the Bill's Policy Memorandum, the scope and policy intentions need clarified.

There should only be criminal liability imposed where that is the clear policy intention. It should be restricted to where the person was acting within the scope of their office or employment or on behalf of the legal person at the time or where offences have resulted from company policies or practices or other systemic failures to ensure compliance with the criminal law, provided that these failures can be ascribed to a director or similar person.

Criminal liability is provided on the basis of consent, connivance or neglect. Neglect appears too low a standard. It imports a civil standard into criminal law and should be deleted.

Since this section replicates wording found in section 28 of the Public Order Act 1986 as we could find no case law to help interpret, clarification must be obtained during the Bill's passage as to understanding what form of conduct it is seeking to prevent and who is responsible for preventing its commission.

**Sections 11 and 12 – Freedom of expression – religion and sexual orientation**

Of major importance have been the discussions over how far the right to freedom of speech extends as we cited in our written evidence[38] that that "freedom only to speak inoffensively is not worth having."[39] Freedom of speech includes the right to offend, shock or disturb.[40]

[38] https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf

[39] Lord Justice Sedley *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733

[40] Paragraph 44 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

The specific freedom of expression defence applies only to the stirring up hatred offences in relation to religion and sexual orientation. A person prosecuted for stirring up hatred on the grounds of any of the other characteristics would need to rely on Article 10 on European Convention on Human Rights or the 'reasonable' defence as set out under section 3(4) and 5(4) of the Bill.

There may be "compelling arguments for providing further clarification on the issue of a reasonableness defence." That would include clarification of the reasonableness defence in the Bill, how this will be applied, the context in which it can be used and for which this defence is acceptable, such as possession of material for legitimate for artistic, academic, comic and journalistic purposes. Clarity is also needed on the burden of proof required.[41]

One route may be as Dr Tickell indicated that freedom of expression protections regarding the meaning of reasonable should be clarified by producing a list of non-exhaustive examples such as "artistic, journalistic, scholarly and academic expression [indicating that] one might wish to add more to that list.."[42] In any event further clarification is required to avoid unintended consequences and long term adverse effects of the Bill to ensure that the Bill must not prohibit speech which others may find offensive and must not lead to any self-censorship.

**Section 14 of the Bill deals with the meaning of the characteristics.**

Section 14 of the Bill is an interpretation section dealing with the meaning of the characteristic.

Widening of section 14(4) of the Bill should be considered where it refers to "a medical condition which has (or may have) a substantial or long-term effect …." Under that wording, if the condition is substantial but not long-term, it is covered, but only while the person has it. If at some future date someone commits what would otherwise be a hate crime against everyone who has suffered from COVID-19 and recovered, that would not be covered by the legislation. That does not seem to be reasonable, particularly if it would be a crime if the conduct were directed at people who do at the time, have COVID-19. An amendment to include "or has had" would suffice.

[41] Paragraph 199 of the Bill's Stage 1 Report https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS52020R22Stage1ReportontheHateCrimeandPublicOrderBill20201210SPPaper878_.pdf

[42] Official Report of Justice Committee 3 November 2020 https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12919&mode=pdf

## Appendix 1 Section 20 of the Public Order Act 1986

20 Public performance of play

(1) If a public performance of a play is given which involves the use of threatening, abusive or insulting words or behaviour, any person who presents or directs the performance is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby.

(2) If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove—

(a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour, or

(b) that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting, or

(c) that he did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up.

(3) This section does not apply to a performance given solely or primarily for one or more of the following purposes—

(a) rehearsal,

(b) making a recording of the performance, or

(c) enabling the performance to be included in a programme service;

but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purposes mentioned above.

(4) For the purposes of this section—

(a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,

(b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse, he performs otherwise than in accordance with that person's direction, and

(c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(5) In this section "play" and "public performance" have the same meaning as in the Theatres Act 1968[43].

(6) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act—

- section 9 (script as evidence of what was performed),
- section 10 (power to make copies of script),
- section 15 (powers of entry and inspection).

[43] Under Section 18(1)(a) "play" means (a)any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or action, involves the playing of a role; and (b)any ballet given wholly or in part by one or more persons actually present and performing, whether or not it falls within paragraph (a) of this definition;

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