



COMMUNITY JUSTICE SCOTLAND SUBMISSION

QUESTIONS RAISED BY THE JUSTICE COMMITTEE ON HATE CRIME & PUBLIC ORDER (SCOTLAND) BILL

1. *Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?*

CJS response

Community Justice Scotland (CJS) welcomes the opportunity to provide evidence on the Hate Crime and Public Order (Scotland) Bill to the Justice Committee.

CJS was established with a duty to promote the National Strategy for Community Justice (the National Strategy).¹

The vision for community justice is underpinned by the following principles which we have considered in deliberating our submission:

- People must be held to account for their offences, in a way that recognises the impact on victims of crime and is mindful of risks to the public, while being proportionate and effective in preventing and reducing further offending.
- Re-integrating those who have committed offences into the community, and helping them to realise their potential, will create a safer and fairer society for all.
- Every intervention should maximise opportunities for preventing and reducing offending as early as possible, before problems escalate.
- Community justice outcomes cannot be improved by one stakeholder alone. We must work in partnership to address these complex issues.
- Informed communities who participate in community justice will lead to more effective services and policies with greater legitimacy.
- High quality, person-centred and collaborative services should be available to address the needs of those who have committed offences, their families, and victims of crime.

¹ <https://www.gov.scot/publications/national-strategy-community-justice/pages/2/>

The National Strategy focuses on the achievement of better outcomes for people who come into contact with the justice system. We recognise the impact of hate crime and the harm that it brings to individuals and communities.

The policy intent of the Bill as outlined in the Policy Memorandum is a commitment to tackling hate crime and prejudice in Scotland. The rationale is that criminalisation will be effective in changing such hateful behaviours. We are of the view that in addition to any consideration to criminal proceedings as a result of hate crime, supporting measures must also be introduced to foster greater community cohesion.

Research on Hate Crime: Causes, Motivations and Effective interventions for Criminal Justice Social Work² highlights ‘what works’ in addressing the causes of hate crime. This includes incorporation of cultural/diversity awareness raising, reflecting on attitudes/beliefs and acknowledging the impact of hate crime on victims and communities through use of mechanisms such as diversion from prosecution and restorative justice approaches.

As an alternative to Police Fixed Penalty Notices, police officers are able to refer individuals into an available support service to address the causal factors for their offending, at the point of first engagement. Successful completion of such a diversion could be reported to Police by the service identified, and onward referral supported into universal services where required. Offences motivated by hate could also be in scope here depending on the circumstances of the individual case, and in line with a person-centred approach to achieving rehabilitation.

CJS strongly advocates a restorative approach to hate crime³. This would assist with tackling the harms caused by hate in all its manifestations rather than solely focussing on punishment of the symptoms. This aligns with the Christie⁴ principles of prevention and early intervention as well as the 2018 Council of Europe Recommendation concerning restorative justice in criminal matters⁵. We would strongly support the introduction of restorative justice approaches which could lead to better outcomes for perpetrators, victims and communities, specifically addressing the needs of the victim and leading to a potential reduction in offending. Such an approach has worked well in relation to young people under 18 within the framework of Early and Effective Intervention⁶.

² Rania Hamad, Hate Crime: Causes, Motivations and Effective Interventions for Criminal Justice Social Work, Centre for Youth & Criminal Justice, University of Edinburgh, City of Edinburgh Council, June 2017 <https://cycj.org.uk/wp-content/uploads/2017/06/Hate-Crime-causes-and-motivations.pdf>

³ ‘Whole School Restorative Justice and Liberatory Practice: Oakland’s Journey’ by Fania Davis <https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/Exec%20Summary%20OUSD%20RJReport%202014.pdf>

‘Relational leadership: a restorative response to racism and inequity’ by Kevin Reade <https://nsadvocate.org/2019/08/02/relational-leadership-a-restorative-response-to-racism-and-inequity-at-halifax-fire/>

⁴ Christie Commission on the future delivery of public services, June 2011

<https://www.gov.scot/publications/commission-future-delivery-public-services/pages/4/>

⁵ https://www.euforumrj.org/sites/default/files/2020-01/pb_on_coe_rec_general.pdf

The 2018 Council of Europe Recommendation concerning restorative justice in criminal matters

⁶ <https://www.cycj.org.uk/themes/early-intervention/> Centre for Youth & Criminal Justice, University of Strathclyde

We would cite the case of the well-publicised attack on the Welsh rugby player Gareth Thomas⁷. Although this would have been recognised as a hate offence on grounds of sexuality, he refused to press charges and instead advocated a restorative justice approach. He was quoted as saying that he hoped the teenager who attacked him due to his homosexuality would “learn” from the experience. He said he had opted to deal with his attacker using restorative justice - when a victim talks to the perpetrator about the harm they have caused - “because I thought they could learn more that way than any other way”.

We acknowledge that in certain situations a restorative justice approach may not be appropriate. We would stress that any such restorative approach needs the clear consent of both parties.

In summary CJS agrees that there is a need for consolidation of existing legislation. We do however feel that alternatives to legislation should also be considered. This should include investing in and providing services and initiatives which will achieve an understanding of the crime and rehabilitation of the hate displayed. In particular we feel that restorative justice approaches and investment in education and awareness raising to promote community cohesion would be beneficial.

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

CJS response – please refer to our answer to question 1

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

CJS response

Statutory aggravations could provide a means for prosecuting hate crimes in circumstances where a prosecution is deemed necessary. COPFS consider each case based on the individual circumstances. This is intended to allow for the likelihood of diversion where this is deemed appropriate. It is not clear whether crimes with the proposed new aggravators would be in scope for diversion.

This Bill does not propose covering all protected equality characteristics with aggravators at this stage. We note that there is not an intention to add the characteristic of sex to the list of aggravations although powers to do so at a later stage are included in the Bill. Such a proposal seems inconsistent with parity of treatment and may create an unintended hierarchy of characteristics. We understand however that a working group to look at specific laws relating to misogyny have been proposed although we are unaware of the status of this group or the timescales for its deliberations.

⁷ <https://inews.co.uk/news/gareth-thomas-hate-crime/>

CJS wishes to highlight the fact that aggravated sentences will presumably extend sentence length. This leads us to conclude that we are talking about custodial sentences and an increase in punitive measures whereas the key issue should be how to deal with the causes underlying offending behaviour to prevent a recurrence with more of an emphasis on rehabilitation and community-based sentences.

Approaches to reducing hate crime should follow the principles of the National Strategy⁸ which aims to ensure that people are held to account for their offences in ways that help to **prevent and reduce further offending**. The split between the crime/aggravation is often not clear. A question we would wish to raise is what part of a sentence refers to the aggravation as opposed to the crime? Clear sentencing guidelines would be required should this Bill become legislation.

The impact of such aggravations on the Disclosure regime are unclear. Some examples in the accompanying Policy Memorandum would have been helpful.

4. *Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?*

CJS response – we would again highlight that, as with the proposed exclusion of sex characteristics, to not include age seems inconsistent with parity of treatment and may create an unintended hierarchy of characteristics. Vulnerability is not a protected characteristic under equalities legislation and would be difficult to define.

5. *Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?*

CJS response

Sectarianism is not a protected characteristic in equalities legislation unlike for example religion and race. The issue of hate crime on sectarian grounds could potentially be covered in the Bill under the provisions relating to religion which is partly defined in the Bill under Part 3, 14 (3) (d) as ‘participation in activities associated with such a culture or such traditions’.

6. *Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?*

Yes. The Financial Memorandum states at paragraph 25 that ‘in many cases conduct amounting to the stirring up of hatred can already be prosecuted in Scottish courts using existing laws’ relating to racial hatred. The accompanying Table 2 at paragraph 30 shows that there have been only 8 stirring up cases proceeded with since 2011 (until 2018) under these existing laws. This raises the issue of whether creating additional legislation is proportionate or the most appropriate route to follow.

⁸ National Strategy op cit.

The Financial Memorandum at Table 4 on paragraph 35 suggests that the maximum number of additional stirring up cases anticipated as a result of these proposals is three. Again it is therefore difficult to determine whether the legislation is proportionate. No examples are provided of what kinds of cases this would encompass nor are there examples of similar or alternative approaches taken to tackle hate crime in other countries and the impact that this has had on people's rehabilitation and further offending.

No examples are provided in the accompanying Policy Memorandum to explain how the law would work in practice particularly in relation to freedom of speech and expression. It is not clear what would count as stirring up hatred.

We understand that there have been very few stirring up prosecutions in England & Wales and the presumption as evidenced in the Financial Memorandum is that such a law would only create a very few additional cases here. There is however no guarantee that this would be the case.

7. Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

Yes. Our issue relates to the implication that, by additionally specifying 'insulting' behaviour only in relation to race hate crimes and not for others, there is a hierarchy of equality under the law. It is not clear where a case that could be characterised as 'insulting' could not also be characterised as 'abusive'. This proposal does not seem consistent with parity of treatment for protected characteristics.

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

CJS response

Yes. Paragraphs 11 and 12 imply freedom of expression will only apply in relation to sexual orientation and religion. It may be more appropriate to consider in the preamble to this Bill how freedom of expression, consistent with the Human Rights Act Article 10⁹, can be achieved in this Bill. The intent should be to make a clear statement about the progressive country that Scotland wishes to be.

9. Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

CJS response

No. Given part of the policy intent behind this Bill is consolidation and simplification of legislation then the purpose of consolidation should be to render equivalent legislation on the same topic obsolete.

⁹ <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression>

10. What is your view on the plans for the abolition of the offence of blasphemy?

CJS response -no comment.

Your response does not need to cover all of these areas and you can focus on those that are relevant to you or your organisation. Also, you are welcome to cover other areas in your submission that you think are relevant to the Committee's consideration of the Bill.

CJS additional comments

Other issues we would wish to raise outwith the Committee's direct line of questions are as follows.

The Bill does not clearly define what is meant by 'hate'; nor indeed is there much in the Bill that relates to 'public order' both of which are in the title of the Bill. As per Rania Hamad's research¹⁰ 'People may not be truly motivated by hate for their victims, and there is potential for obscuring the everyday 'ordinary experiences of prejudice that people may encounter.'

We would wish to highlight the danger of criminalising language that is in common use in some of our communities without providing the necessary public education and awareness campaigns to change such attitudes and behaviours, which can often be inter-generational. This is further complicated by the current political climate and the sometimes inflammatory language which is widely reported in the media, e.g. such as that arising from the Brexit debate.

When the language and actions of those in positions of public leadership can reinforce attitudes that may be viewed as encouraging hate then it may be unreasonable to expect the wider public to be clear as to what constitutes acceptable language and behaviour. This highlights a tension between stirring up hatred and notions of free speech which are complex.

In relation to the costings outlined in the Financial Memorandum we note that they are indicative at this stage. CJS would wish to highlight that as a provider of statutory training for Criminal Justice Social Work in relation to Hate Crime and Restorative Justice we would be required to amend and update our training materials to align with the new legislative framework and potentially also provide refresher training. We will work with Scottish Government colleagues to identify the costings linked to this but would stress that this would be an additional cost to CJS.

¹⁰ Rania Hamad, op cit