Response to Public Order and Hate Crime Bill – Justice Committee call for evidence

24 July 2020

Open Rights Group Scotland is a digital rights campaigning organisation. We exist to ensure the rights of privacy and freedom of expression online are respected, protected and fulfilled. We welcome the opportunity to respond to the Justice Committee's consultation on the Public Order and Hate Crime Bill.

We are going to respond to a specific and narrow feature of the Bill, namely the question of the Committee regarding:

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?

Open Rights Group Scotland is supportive of the aims to modernise speech laws in Scotland, and the principle behind the Bill in modernising, consolidating and extending of hate crime legislation in Scotland and are mostly supportive of new offences of stirring up hatred for threatening and abusive behaviour.

However, we feel retaining the threshold of "insulting" in the new stand alone (not aggravated) offences of stirring up racial hatred fails to reflect the lessons learned in other parts of the United Kingdom on seeking clarity on speech law thresholds, particularly in terms of online communication, and reflecting international freedom of expression standards.

Retaining the "insulting" threshold risks undermining the aim of the Government in the Explanatory Memorandum of "having clear legislation about hate crime" and instead of sending a strong message, risks creating a system that victims might perceive to not deliver the expected outcomes.

Open Rights Group Scotland agrees that insulting behaviour that risks stirring up hate crime is a problem in society and one which should be tackled. However, we disagree that criminalising it is the appropriate step to take and refer back to the Government's own recognition that legislation and criminal prosecution is not the only activity to undertake to tackle hate crime.

"Insulting" is a particularly low threshold with a wide variety of potential interpretations. Religious disagreements or poor taste jokes are likely to be perceived as "insulting".

These examples would not normally reach the normal threshold for criminalised speech, which needs to demonstrate that significant harm such as physical danger results from the speech concerned. Indeed, plain disagreements could be caught under such a threshold.

International Standards

The right to freedom of expression is set out in Article 19 International Covenant on Civil and Political Rights, and is tracked through regional human rights standards such as the European Convention on Human Rights (Article 10) which is brought into UK domestic legislation Human Rights Act 1998. It receives heated scrutiny from various sectors in society. In recent years it has been seen to be embraced as a shield by online trolls and harassers to allow for their behaviour to persist. However it must be remembered that freedom of expression is a cherished right, one relied upon by political activists fighting for human rights and recognition across the world in countries that would rather not have truth spoken to them. This is the scope of the right to freedom of expression whether one likes it or not, and no clearer is that scope evident than online.

The right is a qualified right, allowing for limitations and restrictions where "necessary in a democratic society" amongst others. Relevant for the discussion of this Bill are "public safety... for the protection of the reputation of health or morals". Freedom of expression is not just a right for those ideas that are welcome or inoffensive, as the European Court of Human Rights set out in the seminal Handyside v. United Kingdom[1] judgment in 1976:

> Freedom of expression... is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

In General Comment 34 in 2011 from the United Nations Human Rights Committee at paragraph 11 that the scope of the right "embraces expression that may be regarded as deeply offensive".[2]

Government proposals

The Government is proposing to introduce a new offence of "stirring up hatred" at section 3 which is committed if a person "behaves in [or communicates] threatening, abuse[ive] or insulting material to another person" that it is likely to stir up hatred against a group based on their race, colour, nationality, or ethnic or national origins. It is also proposed to introduce an offence at section 5 of possession of inflammatory material which does not require communication but that the individual has "a view to communicating that material to another person". The reference to "insulting" material is specific to racial or ethnic origin, and not to other characteristics.

Lessons learned from other speech crimes

The Law Commission of England and Wales is currently reviewing speech laws.[3] In their preliminary review they have identified a potential reform of section 127 of the Communications Act 2003 which criminalises "grossly offensive" communications sent over public electronic communications network. The Law Commission states that terms like "gross offensiveness" are ambiguous, leaving significant discretion to courts and prosecutors. "Insulting" material is a

[1] Handyside v. United Kingdom, 5493/72, Para. 49, http://hudoc.echr.coe.int/eng?i=001-57499.

[2] Human Rights Committee, General Comment 34, 2011 para 11, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[3] Law Commission, Reform of Communication Offences, https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/

threshold that we think would suffer from a similar ambiguity, and risk undermining the aims of creating clear and comprehensive hate crime laws for Scotland.

The effect of ambiguous terms like “gross offensiveness” lead to confusion around when an offence has been committed in particular when the expression of an unpopular view, or a joke that is in poor taste, should cross that threshold into criminal conduct. The leading example of this is Chambers v. DPP[4], also known as the Twitter Joke Trial. The effect of that trial and numerous others lead then Director of Public Prosecutions Keir Starmer to release guidance[5] and embark on an exercise of clarification[6] on the scope of the offence. Even with that attempt at clarification, the Law Commission feels the law is in need of reform to head off the risk of over criminalisation, and address controversy regarding charging and prosecuting decisions.[7]

There is a risk that a similar path awaits Scottish criminal law if insulting continues to be used, including both the communicating of, and to be in possession of “insulting” material that is likely to stir up hatred. The level of subjectivity is one that will inevitably require clarification, with charges that don’t amount to prosecution which risk wasting COPFS time. The memo from the Scottish Government for the Bill clearly acknowledges that retaining “insulting” is about sending a message to ethnic communities about the support the Government wants to provide.The concerns that removing insulting from the stirring up racial hatred offence, expressed at para 150, cuts both ways. It may lead to more accusations but less prosecutorial action which may be interpreted as leaving communities behind. We would urge the Scottish Government to consider carefully the lessons that England and Wales have learned from speech crimes.

The Goverment’s rationale that what as a result of “insulting” being included in the aggravating offence, it can exist in the stand alone offence ignores its own findings. Firstly, that the existing data which the Government refers to as evidence is for aggravated offences to justify retention of “insulting”, not standalone offences which stirring up racial hatred would constitute. This is a new offence, and one which has a scope not yet clearly defined so referring to this evidence base is misleading. Further, Bracadale points out that the removal of “insulting’ from the harassment offence in section 5 of the 1986 Act did not have any negative impact on the ability to prosecute such conduct and was supported by the Crown Prosecution Service, in particular the finding of the Crown Prosecution Service following a review that they were “unable to find any case where the conduct being prosecuted could not be characterised as ‘abusive’ as well as ‘insulting’. This suggests that abuse and threatening suitably covers the behaviour at issue.[8]

Online speech

Speech online opens up more lines of communication across communities which inevitably leads to coming across more views that some may consider insulting to racial or national origins or unwanted, but should not reach the threshold of criminal.

[4] Chambers v. DPP [2012] EWHC 2157 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/chambers-v-dpp.pdf

[5] Social Media - Guidelines on prosecuting cases involving communications sent via social media, https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media

[6] DPP’s Guidance on Social Media Prosecutions, https://www.scl.org/news/2563-dpp-s-guidance-on-social-media-prosecutions.

[7] Abusive and Offensive Communications Online Communications, page 6, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6.5013_LC_Online-Summary-Report_FINAL_WEB.pdf.

[8] Hate Crime and Public Order Scotland Bill,, Policy Memorandum, para 137, https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf.

For example the misguided and deeply offensive remarks by the President of the United States of America regarding COVID-19 and China are undoubtedly insulting and based on national origins. If someone in Scotland were to retweet or even to prepare a retweet with a comment, would it be right for Scotland take a prosecution against that indivdual? Do we even want to have to have that conversation in a court setting as to whether a Retweet of a misguided world leader constitutes stirring up racial hatred?

Or perhaps some of the discussions currently occurring in the Labour Party and anti-semitism in the party. Should views, insulting and based on national origins, be considered to stir up racial hatred?

Or further, regarding the offence of possession of insulting material, an individual with copies of old 1970s magazines, within which all manner of jokes on race, colour, nationality, or ethnic or national origins. If that person were to share these on their WhatsApp group should they be criminally liable? If a police officer were to discover these images on a device, not yet communicated or in a draft message should that be sufficient to merit a charge under section 5 of the Bill?

These are examples of things that are not wanted, and are undoubtedly insulting, but are they criminal? Open Rights Group would suggest that these are impossibly contentious areas that are worthy of public debate even of public scorn, but not worthy of criminal prosecution.

We hope the Committee will consider carefully the merit of removing “insulting” material from stirring up racial hatred in the current Bill. We are keenly aware of the effect that this may have on the perception that the Scottish Government may be turning away from minority and ethnic communities but the aims of clear, modern hate crime laws,should conclude that “insulting” risks creating unnecessary ambiguity and undermine the trust that those communities can place in the Bill. We have seen ambiguous speech crimes create further work for the criminal justice system and the open-ended nature of online speech will widen the spread of insulting material, inevitably. But these are issues for society to deal with open debate, not criminal prosecution.