

Audrey Nicoll MSP
Convener
Criminal Justice Committee
The Scottish Parliament

10 March 2024

Dear Convener,

We write to raise our concern about planned commencement of the Hate Crime and Public Order (Scotland) Act 2021. Police Scotland confirmed to us yesterday that the plan remains to bring the legislation into force on Easter Monday, 1 April.

Bringing the Act into force is a significant step. It extends the offence of ‘stirring up’ hate into several new areas and brings activities within private settings within the reach of the law. At the time of the Act’s passage, serious concerns were raised about the adequacy of its protection for freedom of expression, and the risk of chilling effects from the investigation and prosecution of complaints made under the Act, even where these do not result in prosecutions.

The then convener of the Committee which examined the Bill said at Stage 3:

“I hope that we have done enough to ensure that women’s fears about the bill are not realised in practice, but that will depend not on the words that we are writing into the law, but on the training that we give to our police officers and prosecutors, and on the way that we explain the legislation to the public. In particular, it must be widely understood that, just because one is offended, hurt or upset by something that someone has said about an aspect of one’s identity, that does not mean that a hate crime has been committed.”

(Adam Tomkins MSP, 11 March 2021)

Before the Act comes into force, there are several areas we want to draw to the attention of MSPs.

Lack of reassurance on freedom of expression protections

Many women are concerned that some people who object to women talking in plain language about how sex can’t be changed, and why and when this matters to them, will make complaints to the police, using the stirring up hatred provisions. During

debates on the Bill, the then Cabinet Secretary sought to provide reassurances that it was not the intention of the government that the extension of the scope of stirring up offences should for be used to draw people into the criminal justice system simply for making statements that other people disagreed with or found offensive. What systems and internal guidance Police Scotland has put in place to ensure that it is not drawn into acting on such complaints remains unknown, however.

Contradiction between policy and law

Under existing Police Scotland policy, officers are required to record all ‘hate incident’ reports, even if there is no evidence of a crime, based on the perception of the person reporting an incident to them.¹ Following a successful legal challenge to a very similar policy, police forces in England and Wales must not record anything that is ‘trivial, malicious or irrational’.² Police Scotland has stated that it intends to review its own policy in response to this development; but that any changes will not be made ahead of the 2021 Act coming into force.³

Unless immediate action is taken, this means that officers will be required on the one hand to regard all reports of ‘hate’ as subjectively true on the perception of the complainer; and on the other, to apply what Ministers described as a ‘high threshold’, for whether a ‘reasonable person’ would regard the material as ‘threatening **or** abusive’, and whether it is intended to ‘stir up hate’ under the 2021 Act. This is clearly contradictory, and it is unclear how officers are being guided to manage that tension.⁴

Lack of information on training

Police Scotland have provided no detail or assurance on how it will protect freedom of expression. We understand that training for frontline officers largely consists of an online package.

We have tried to meet Police Scotland twice since Christmas, most recently at the end of last week, hoping to use this to obtain further information on how it has approached protection for freedom of expression in its training. However, Police Scotland has had to cancel both meetings shortly beforehand. We currently have a meeting rescheduled for Tuesday 12 March.

¹ Police Scotland (2021) [Hate Crime National Guidance](#)

² College of Policing (2023) [New Code and guidance for non-crime hate incidents](#)

³ Police Scotland (2023) [Annual Police Plan Bi-Annual Progress Report Q2 2023/24](#). See page 36.

⁴ For further detail and references see: MBM (2024) [He says, she says. How Police Scotland policy risks weaponising hate crime.](#)

Lack of promised post-legislative engagement

During the passage of the Bill the then Justice Minister Humza Yousaf promised that the Scottish Government would allow some concerned stakeholders, including ourselves, post-legislative input on the explanatory notes.

“I will end by making an offer to those who would like to see more specific detail in the bill. I will continue to engage with stakeholders and members of the committee. The convener asked about my next steps. I have several phone calls lined up over the next two days with most, if not all, members of the Justice Committee and a number of stakeholders. If the Government does not go down the path of putting more specific detail in the bill, I suggest that I engage with stakeholders to see where we might be able to give them some reassurance in the explanatory notes that sit alongside the bill. That detail is not in the bill but, as the name suggests, those notes are there to explain how certain provisions in the bill work.

We might need to insert some more specific examples—perhaps some of the examples that Lucy Hunter Blackburn mentions about the belief of some people that sex is immutable and that people cannot transition from male to female and vice versa. If stakeholders would like some examples in the explanatory notes, I am keen to discuss that with them and with the Equality Network, the Scottish Trans Alliance and others to see whether that might be a common-ground compromise”.

(Humza Yousaf MSP, [22 February 2021](#))

The Scottish Government did not honour that promise, despite repeated assurances over the following months that it would. Instead, it told us a year later that it had finalised the Explanatory Notes. Our correspondence with Government is appended to this letter. We draw to the Committee’s attention the comments made by the Law Commission for England and Wales about the need for freedom of expression protections specific to this issue, when legislating in this area, which we shared with the Scottish Government on 9 December 2021.

Given the points above, we would strongly urge the Committee to seek urgent reassurances from Police Scotland about what measures it has put in place to ensure that complaints made to it under the Act cannot be used to exert a chilling effect on lawful freedom of expression, including sight of the training material and guidance material being provided to officers. We would also ask that the Committee seeks an explanation from the Scottish Government as to why it reneged on the undertaking made to the Parliament by the now First Minister to engage further with stakeholders concerned about the Act, after it was passed.

A copy of this letter goes to the Convener of the Delegated Powers and Law Reform Committee.

Yours sincerely,

Dr Lucy Hunter Blackburn

Dr Kath Murray

Lisa Mackenzie

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Correspondence with Scottish Government officials on post-legislative input

1. MBM to Humza Yousaf MSP, 15 March 2021

Dear Cabinet Secretary,

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL: EXPLANATORY NOTES

At the meeting of the Justice Committee on 22 February you helpfully commented that

“If the Government does not go down the path of putting more specific detail in the bill, I suggest that I engage with stakeholders to see where we might be able to give them some reassurance in the explanatory notes that sit alongside the bill. That detail is not in the bill but, as the name suggests, those notes are there to explain how certain provisions in the bill work.

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We wrote to you jointly with ForWomenScotland the following day to say that we welcomed the offer to use the Explanatory Notes to provide some additional clarification, and recognised that this would be helpful, if no further detail were added to the face of the Bill, beyond the “discussion or criticism” formula proposed by the government for characteristics other than religion.

Now that the Bill has been agreed by the Parliament, we are not sure what the process or timetable is for taking forward your commitment to the Committee, so we are writing again to ask to be included in discussions about the content of the Explanatory Notes to the Bill.

We would be pleased to hear from your officials how the commitment made at the Justice Committee meeting on 22 February will be taken forward.

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2. Scottish Government to MBM 15 March 2021

In respect of the issue of the updating of the explanatory notes for the Bill, I can advise the Scottish Government will engage in correspondence with a range of interests to seek views on what could be included in the explanatory notes to help explain the operation of freedom of expression provision within the Bill. We have noted the interests of MBM in this regard and will ensure you are included as this process is progressed.

3. MBM to Scottish Government 8 April 2021

Further to your helpful letter of 15 March, this is to ask if you are able to give any indication yet of the timetable for finalising the Explanatory Notes? As we work largely on a voluntary basis, it would be helpful to have some idea of when you will be seeking to engage with us, so that we can plan for that properly.

May we also draw to your attention the tweet at the bottom of this screenshot? We are sharing it as an early example of intentions to use the legislation to suppress the expression of legitimate views, of which we think the government ought to be aware.

4. Scottish Government to MBM 23 April 2021

Thank you for your email of 8 April in respect of the explanatory notes for the Hate Crime and Public Order (Scotland) Act.

In light of the pre-election period, I can advise it will not be until after the Scottish elections and the next administration is in place before the explanatory notes are finalised.

5. MBM to Scottish Government 6 June 2021

Further to your letter of 23 April, we wondered whether you are in a better position yet to provide further information on the planned timetable for external engagement on the draft of the Explanatory Notes to the Hate Crime Act?

6. Scottish Government to MBM, 24 June 2021

Thank you for your email of 6 June in respect of the engagement process for the explanatory notes for the Hate Crime and Public Order (Scotland) Act 2021.

I can advise that the exact process for engagement is not yet determined, but I will be in touch once the process is finalised.

7. MBM to Scottish Government, 9 December 2021

At a meeting of the Justice Committee on 22 February on what is now the Hate Crime and Public Order (Scotland) Act 2021, the then Cabinet Secretary for Justice, Humza Yousaf MSP, undertook to address concerns about protection for freedom of expression by engaging with stakeholders on the content of the Explanatory Notes. In your last letter to us on this, of 24 June, you explained that “I can advise that the exact process for engagement is not yet determined, but I will be in touch once the process is finalised.”

We are writing now to draw to your attention the report of the Law Commission in England on proposed changes there to hate crime legislation, published on 6 December. Discussing the need for protection of freedom of expression in extending “stirring up” offences to cover “gender identity” (the term used in the legislation there as equivalent to transgender identity), it states (emphasis added):

10.509 We do not agree with GIRES that such discussion necessarily amounts to “vilification” or “dehumanises” trans people, still less that it encourages others to do so. Indeed, we think that characterising it as GIRES does demonstrates the risk that without explicit protection, such discourse – which has been recognised as protected speech – risks being perceived, reported, and potentially investigated as hate speech.

and

10.512 Moreover, the rulings in Miller and Forstater have now made it clear that the expression of “gender critical” views is protected under human rights laws. The issue, therefore, is not whether such expression should be protected, it is whether the stirring up offences would require a provision to make clear it is protected.

10.513 We have concluded that it would. There have now been several cases in which legal authorities have wrongly applied the law in the context of the expression of gender critical views – including the first-tier Tribunal in Forstater, Humberside Police in Miller, the magistrates’ court in Scottow, and the CPS in Yardley. While the rulings in Forstater and Miller may have

provided some legal certainty, we conclude that were the stirring up offences to be extended to cover gender identity without an explicit freedom of expression clause, there is a very real risk of the law being misapplied.

10.514 In the consultation paper, we also drew attention to the findings of the court in Miller about the nature of the ongoing debate about trans rights. It is not hard to imagine that without such protection, activists would seek to test the limits of the extended offence.

The Commission's concerns echo those we and others raised during the passage of the Act. At Stage 3, Johann Lamont MSP argued unsuccessfully for an amendment which directly foreshadowed the recommendation of the Law Commission (para 10.539) that "in extending the stirring up offences to cover hatred towards trans or gender diverse people, a new protection should be introduced for view that sex is binary and immutable, and the use of language which expresses this."

We drew your attention to the judgement in Forstater in our email of 10 June, and drew MSPs' attention to several of the earlier cases noted by the Law Commission, during the passage of the Bill. You will no doubt also be aware of a relevant attempted prosecution this year in Scotland under existing legislation, which was eventually dropped six months after the individual concerned was first contacted by the police, and only after charges had been brought and the case had proceeded to an initial hearing, and was scheduled for a further one.

In the light of the Commission's comments, we would be grateful for a reassurance that the relevant part of the Act will not be commenced until the Explanatory Notes have been finalised, so as to ensure that the implications of the Forstater judgement have been properly taken into account. We would also welcome reassurance that this part of the legislation will not come into force before related training for police, prosecutors and courts has been put in place.

We would also welcome advice on whether the Scottish Government is able to say more yet about its plans for engaging with external stakeholders on the development of the Explanatory Notes, as promised to the Justice Committee in February.

8. Scottish Government to MBM, 8 March 2022

Justice Directorate
Criminal Justice Division



Scottish Government
Riaghaltas na h-Alba
gov.scot

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

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9. MBM to Scottish Government, 9 March 2022

We have noted your letter. We are taking this to mean that those parts of the Explanatory Notes covered by the Cabinet Secretary's offer of discussion with stakeholders made at the Justice Committee on 21 February 2021, and relevant to our subsequent correspondence with you, have now been finalised.

10. Scottish Government to MBM, 9 March 2022

Yes, that is correct.