JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE CAMPAIGN AGAINST CENSORSHIP

Question 1. There is a need to defend minorities from actions motivated by prejudice, but censorship is not the way to go about it. It does nothing to prevent discrimination and makes institutional or unconscious prejudice more difficult to expose. It gives people prosecuted for their opinions the opportunity to pose as defenders of “free speech”. Further, people unable to express strong negative feelings in words or images are more likely to express them in vandalism or violence. The law should concentrate on what people do, not what they think.

Question 2. There is merit in consolidating all hate crimes into one, provided that it is recognised that over time different targets for hatred may become significant and old ones fade from view (as happened to the blasphemy law). A single Act should include provision for regular reviews of the law and its enforcement.

Question 3. All protected characteristics should be treated in the same way. “Sex hostility” should apply equally to women and men. Women are not a minority whose rights need extra protection and women who ask for misogyny to be made a crime are asking not for protection but for privilege. They are asking for an unequal society in which women may express prejudice, malice or ill-will, or exhibit threatening, abusive or insulting behaviour towards men without penalty but men who do the same things to women are committing crimes. Those who lobby for misogyny to be made a crime must believe either that women are the weaker sex or that women are innately superior to and more deserving than men, which is no more true than the reverse.

Question 4. All protected characteristics should be treated in the same way. “The vulnerability of the victim” varies greatly. It should not be taken for granted that victims are more vulnerable just because they are over a certain age. The vulnerability of people under 18 should be covered by the appropriate legislation dealing with the welfare of minors.

Question 5. Definitely not. Section 11 implicitly excludes sectarian issues from the provisions of the Bill. If legal protection for sectarian groups were included it would be perceived as favouring one side. Also sectarian zealots would attempt to burden the Scottish legal system by making repeated accusations against each other. (See also replies to Question1 and Question 8.)

Question 6. Part 2 of the Bill would create a new offence, not of stirring up hatred but of intending to stir up hatred. However, Sections 3 and 5 do not say how intent is to be proved, or how it is to be proved that it was likely that the accused’s words or actions would stir up hatred, or how the accused was supposed to know that such a result was likely. Also Section 5 does not say how it is to be proved that the possessor intended to communicate material to another person. As it stands, people would be convicted on the basis not that they knew what they were doing, but that

law enforcement and the court thought that they did. The “intent” element of the proposed offences (Sections 3(1)(b), 5(1)(b) and 5(2)(b)) should be removed.

For further responses to Part 2 please see the coverage of other areas following the replies to questions.

Question 7. The Campaign questions whether abusive or insulting behaviour, which is intended to express contempt, should be equated with behaviour intended to express hatred. Legislators may also wish to consider whether threatening behaviour towards people with specific characteristcs arises from hatred or from fear. We agree with Lord Bracadale that “insulting”, at least, should be removed.

Question 8. All the characteristics listed in Sections 1(2), 3(3) and 5 (3) should be covered by the “protection of freedom of expression” provision in the Bill. An exemption from prosecution for discussions would be particularly useful in schools, colleges and universities, or anywhere where the objective is to inform, educate and encourage understanding.

Question 9. CAC agrees that this Section should not be repealed. The wording of this section is preferable to that of Sections 3 and 5 of the Bill and it is a pity that more use was not made of it when drafting those Sections.

Question 10. The Campaign welcomes without reservations the planned abolition of the offence of blasphemy.

The Campaign against Censorship

23 July 2020

Coverage of Other Areas

Part 1.

Section 1 subsection (4). Even in cases of live, real-time words and behaviour, evidence from a single source should not be sufficient to prove that an offence was aggravated by prejudice. Without a record made at the time and/or other witnesses, cases will fall into the same difficulty posed by rape cases; that it is one person’s word against another’s.

Part 2.

Sections 3 and 5. The Bill would remove most of the safeguards regarding intent contained in Sections 18, 19, 20, 21 and 23 of the Public Order Act 1986. It would cease to be a defence for the accused to show that they had not intended what they had said to be threatening, abusive or insulting and were not aware that it could be so understood. (For example, they could use a quotation without knowing its source, refer to a news item without knowing the details or use a term which was acceptable thirty or twenty years ago but is so no longer.) It should not be assumed that everyone who does give offence does so on purpose.

Section 3, subsections (4) and (5). The Campaign suggests that a person who distributes material expressing racist, religious and/or sexist views to a list consisting only of people who share those views should not be guilty of an offence.

Section 3, subsection (5)(b). In spite of the double negative, this subsection does provide a defence and is therefore welcome.

Section 3, subsections (6)(b) and (8). A sentence of up to 7 years' imprisonment, with or without a fine, is excessive for a single act which does not directly cause physical injury or material damage. The two situations, a single act and a course of conduct, should be treated differently when it comes to sentencing.

Section 4. Plays are fiction. Even if the characters on the stage represent real, living people they are not those people and their words and behaviour do not have the same impact as the real thing. Nowhere in the Bill is it suggested that novels, stories, feature films or television drama, which are also fiction, should be considered capable of stirring up hatred; nor should plays be.

Nervous managers could display "trigger warnings" outside a venue if the performance is felt to be contentious.

The people most likely to be "stirred up" by a performance are those opposed to it taking place (and who probably have not seen it). To hold performers, presenters and directors responsible for arousing hatred of which they themselves are the targets would be absurd.

Section 5. The Campaign holds the view that possession alone of any material should not be a criminal offence.

Section 9. An organisation does not have opinions or emotions separate from those of the individuals who comprise it. For an organisation to commit an offence involving opinions or emotions, such as a hate crime, an individual (or individuals) must have committed it in the organisation's name and with the knowledge of those responsible for its policies.

Section 9, subsection (3)(b)(ii). Under this subsection an organisation may be held responsible for the activities of an individual "purporting" to act in its name, who may in fact have acted without its approval or even its knowledge. This is unreasonable. If organisations are to be held responsible for offences committed in their names they should be able to claim in their defence that the offenders acted without the consent of their fellow officers, partners or members.

Section 13, subsection (3). This subsection does not so much interpret Part 2 as add another seven offences to those created by the Bill. CAC 's view is that they should be removed or, if they remain, should be described in the same detail and subjected to the same scrutiny as those in sections 1, 3, 4, 5 and 9.

Schedule 1.

Sections 2(2)(c) and 3(3)(a). According to these subsections, a service provider can be held responsible for content if the information in a transmission is selected or modified. This appears to mean that if service providers intervene and censor content they become responsible for it, which is interesting.

Sections 3(3)(c), 4(3) and 4(2). We note that, unlike an individual, a service provider may escape prosecution by "expeditiously" removing information or preventing access to it, or by having "no actual knowledge" that they were committing an offence by having it. It seems odd, to say the least, that a large business trading in information may plead ignorance where a lone individual may not. The Campaign acknowledges that service providers' responsibilities are a minefield, but suggests that this should be looked at again.