

# Scotland's new Hate Crime Act imperils freedom of expression

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## Legislation cited

[Hate Crime and Public Order \(Scotland\) Act 2021 \(asp 14\)](#)

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### *\*Edin. L.R. 250* A. INTRODUCTION

While there is broad consensus that hate is on the rise in the UK and that reducing this social ill is a worthwhile objective, the extent to which restrictions on freedom of expression are a legitimate or effective means to achieve this remains heavily contested. Ultimately, these debates are about the appropriate way to combat societal hatred and the extent to which restrictions on certain rights, in order to achieve this objective, are legitimate. Scotland staked out a firm position in these debates with the controversial Public Order and Hate Crime (Scotland) Act 2021 (2021 Act), most of which remains unimplemented almost a year after Royal Assent.<sup>1</sup> Among other things, the 2021 Act incorporates new stirring up hatred offences into Scottish law, which criminalise certain kinds of expression regardless of evidence of harm or violence being likely to result from them. This reflects a trend of incorporating broadly articulated hate speech offences into criminal law frameworks. With the exception of the United States, where content-based proscriptions on expression are presumptively unconstitutional, such offences are now commonplace in liberal democracies and raise significant free speech concerns.

Governments often frame increasingly onerous restrictions on expression as necessary in order to reduce societal hatred toward vulnerable and marginalised groups, rather than proffer evidence to support the position that restrictions on expression are necessary to - and effective in - achieving this legitimate objective. The necessity and effectiveness of the restrictions are simply assumed. These measures can also distract from other ways of addressing this problem that do not implicate fundamental rights. Given these concerns, rigorous scrutiny of the stirring up hatred offences in the 2021 Act is warranted. This article provides such scrutiny and argues *\*Edin. L.R. 251* that these offences will imperil freedom of expression in Scotland and that, in passing the 2021 Act, the Scottish Government disregarded relevant international human rights standards and failed to address critical questions concerning whether criminal sanctions targeting speech are a necessary and appropriate tool to serve its legitimate interest in protecting particular groups from harm.

### B. SCOTLAND'S NEW HATE CRIME ACT

The 2021 Act received Royal Assent on 23 April 2021. The Scottish Government characterised the underlying Bill, the Hate Crime and Public Order (Scotland) Bill (SP Bill 67), as "modernising, consolidating and extending of hate crime legislation in Scotland".<sup>2</sup> It was introduced into the Scottish Parliament in April 2020 following an independent review of Scotland's hate crime legislation by Lord Bracadale, which recommended, among other things, consolidation of the country's hate crime legislation into a single Bill.<sup>3</sup> Lord Bracadale's review of Scotland's hate crime legislation occurred contemporaneously with the Law Commission's review of the hate crime framework in England and Wales. In 2020, the Law Commission issued a consultation paper that included a number of proposals for reform of hate crime laws and that found a demonstrable case for

extending the stirring up offences in the Public Order Act 1986 (which currently cover race, sexual orientation, and religion) to transgender identity, disability, sex, and gender.<sup>4</sup> These reviews highlight the contemporary shift in the UK's approach to hate speech, which reflects increasing acceptance of the use of criminal law measures to capture broad swaths of expression in public discourse.

While certain provisions of the 2021 Act are currently in force, its primary parts, including the stirring up hatred offences, remain prospective. It repeals certain provisions of the Public Order Act 1986 applicable to Scotland and introduces new stirring up hatred offences based on the following characteristics: race, age, disability, religion (in the case of a social or cultural group, "perceived religious affiliation" qualifies), transgender identity, and variations in sex characteristics.<sup>5</sup> Unlike other hate crime offences, in which speech is only relevant to the issue of aggravation or sentence enhancement, expression forms the basis of the "stirring up hatred" offences.

The race offence is encompassed in section 4(1) of Part 3, which provides that a person commits the offence of stirring up hatred if they behave "in a manner that a reasonable person would consider to be threatening, abusive or insulting"; or "communicates to another person material that a reasonable person would consider to be threatening, abusive or insulting"; and in so doing either intends to "stir up hatred \*Edin. L.R. 252 against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic origin or national origins"; or "a reasonable person would consider the behaviour or communication of the material to be likely to result in hatred being stirred up against such a group". Section 4(2), which covers all remaining characteristics, is limited to circumstances in which a person behaves in a manner that a reasonable person would consider to be threatening or abusive; or communicates to another material that a reasonable person would consider threatening or abusive; and in so doing, intends to stir up hatred against a group of persons based on the protected characteristics. Liability for these offences ranges from a fine to seven years' imprisonment (or both).<sup>6</sup>

Section 9 of Part 3 lays out the protection for freedom of expression and is notable for its brevity. It provides that behaviour or material is not to be taken to be threatening or abusive solely on the basis that it "involves or includes discussion or criticism of matters relating to" all protected characteristics with the exception of race, as well as "discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards religion", proselytising, or urging of persons to cease practising their religions.<sup>7</sup> In the Policy Memorandum that accompanied the Bill, the Scottish Government noted Lord Bracadale's consideration of the compatibility of stirring up hatred offences with the European Convention on Human Rights (ECHR), and agreed with his conclusion that stirring up hatred offences were, in principle, compatible with Article 10.<sup>8</sup>

### C. THE PROBLEM WITH STIRRING UP HATRED OFFENCES

The stirring up hate offences raise significant concerns regarding the sufficiency of government efforts to respect the right to freedom of expression whilst protecting marginalised and vulnerable groups from harm. Much of the public discourse surrounding the potential impact of the 2021 Act on freedom of expression concerns the addition of a stirring up hatred offence based on transgender identity, which implicates public debates regarding a purported tension between transgender and women's rights, and the exclusion of sex as a protected characteristic. This discourse obscures the more significant free speech problem raised by these offences that, like broadly articulated hate speech offences in other jurisdictions, criminalise expression absent any evidence that hatred or violence resulted, or was likely to result. In so doing, they impose criminal sanctions on expression that falls well outside of traditional notions of incitement.

Additionally, in enacting these offences, the Scottish Government ignored international human rights standards and UN guidance with respect to the regulation of hate speech. As Chatham House recently noted, with its "careful calibrations \*Edin. L.R. 253 designed to protect individuals from abuse of power by authority", international law provides a useful normative framework for responses to extreme speech.<sup>9</sup> In particular, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, while geared toward the International Covenant on Civil and Political Rights, provides a useful rubric for assessing state efforts to regulate hate speech.<sup>10</sup> Adopted in 2012, the Rabat Plan is the result of a series of consultations convened by the UN High Commissioner for Human Rights on the prohibition of incitement to national, racial, or religious hatred, which explored legislative patterns and judicial practices.

One of the Rabat Plan's primary objectives is to provide for a comprehensive assessment of the state of implementation of the prohibition of incitement in conformity with international human rights law. It recommends that proscriptions on hateful expression focus exclusively on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence (rather than the advocacy of hatred without regard to its tendency to incite action by the audience) and require

a likelihood of imminent harm and a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of such incitement.<sup>11</sup> Additionally, the UN advises that only incitement to discrimination, hostility, or violence that meets all six criteria outlined in the Rabat Plan should be criminalised, and that less severe forms of incitement or hate speech warrant civil or administrative law based restrictions or public policy responses.<sup>12</sup>

By disconnecting hateful speech from its impact, the 2021 Act's stirring up hatred offences fall well short of the Rabat Plan's recommendations and UN guidance regarding the use of criminal law to regulate hate speech. While disappointing, this is unsurprising given the results of a comprehensive 2018 report produced as part of "Media Against Hate", a Europe-wide campaign initiated by the European Federation of Journalists and a coalition of civil society organisations, in which ARTICLE 19 shared its findings from a comparative review of government responses to hate speech in six European countries, including the UK.<sup>13</sup> ARTICLE 19's *\*Edin. L.R. 254* examination of the available jurisprudence revealed that the courts in the UK do not apply a specific incitement test and that it is unclear whether courts and judicial authorities were even aware of the Rabat Plan or its recommendations.<sup>14</sup>

ARTICLE 19's examination further revealed that the legal reasoning of courts in hate speech cases is "often vague, ad hoc and seemingly lacking in conceptual discipline or rigour".<sup>15</sup> It cautioned that these deficiencies rendered regulations on hate speech open to political abuse, including against those minority groups that such laws are ostensibly aimed at protecting. It further emphasised that national legal and policy frameworks were "insufficient to enable effective resolution of inter-communal tensions or poor social cohesion".<sup>16</sup> Based on its detailed analysis, ARTICLE 19 made several conclusions, including that legislation (in particular criminal law provisions) should be revised in order to comply with international human rights standards, including the high threshold for limitations on expression set out in the Rabat Plan.<sup>17</sup>

#### D. A DIFFERENT APPROACH

Criminal sanctions targeting hate speech warrant particular attention as the application of criminal law in the human rights context raises special free speech concerns. As Scotland incorporates increasingly broad speech related offences into its criminal law framework that are further attenuated from any likelihood of inciting hatred or violence, the result is proscriptions on expression that bear no causal link to any risk of demonstrable harm. This raises concerns regarding coercive overreach and raises the broader question of whether the protection of human rights requires criminal accountability.<sup>18</sup>

The obviousness of a relationship between criminal law and human rights should not function to obscure its paradoxical nature.<sup>19</sup> Liora Lazarus's discussion of "coercive overreach" is particularly instructive here. Lazarus argues that an examination of the relationship between human rights and criminal law should account for the criminal law's inherent ambiguity in limiting and requiring state coercion.<sup>20</sup> It involves a coercive duty on the state toward the individual at risk of harm and a coercive duty on the state with respect to the perpetrator of the harm. While the former duty is often framed as "protective", Lazarus cautions that to conceptualise it simply as protective risks "masking the coercive sting in its tail".<sup>21</sup>

*\*Edin. L.R. 255* The 2021 Act is illustrative of the insufficient consideration paid to the inherent ambiguity of human rights law as both limiting and requiring state coercion, with too much emphasis placed on the latter. This leads to an environment in which states exercise broad latitude and discretion in curtailing freedom of expression on the grounds of protecting others from hatred and discrimination without addressing the important issue of whether the use of coercive force is necessary in order to achieve these objectives. For example, while the Scottish Government's Policy Memorandum highlights Lord Bracadale's consideration of "whether there would be a practical benefit from the creation of new" stirring up hatred offences, it does not evidence meaningful consideration of this question. Instead, it emphasises his recognition of "the *capacity* for harm acts of stirring up hatred may cause, the *potential* to result in identifiable harm to groups of people and whole communities", and that stirring up hatred has "the *potential* to contribute to a social atmosphere in which prejudice and discrimination are accepted as normal" (emphasis added).<sup>22</sup> However, no evidence is proffered to support these conclusions. This is not to suggest that such support does not exist but, rather, that there should be an onus on the Scottish Government to present relevant and compelling evidence, rather than generalised assumptions, in support of broadly articulated criminal offences that interfere with freedom of expression.

In its Policy Memorandum, the Scottish Government also noted Lord Bracadale's conclusion that the addition of a suite of stirring up hatred offences to the Scottish criminal law framework "would allow the law to serve an important symbolic and

educative function, sending a clear message that this type of behaviour attracts particular condemnation by society and will not be tolerated".<sup>23</sup> Even assuming for the sake of argument that this claim is true, it ignores the fact that there are other tools available to the Government that serve symbolic and educative functions that do not interfere with fundamental rights. By way of example, the UN advises that to combat rising levels of societal hatred, states should generally deploy tools other than criminalising and prohibiting hateful expression, such as education, counter-speech and the promotion of pluralism.<sup>24</sup> Amnesty International recommends that criminal measures be used only as a last resort where less restrictive measures have failed, and urges states to avoid exclusive or undue reliance on punitive measures in favour of holistic approaches to combating prejudices and discrimination.<sup>25</sup> Such approaches include strengthening anti-discrimination legislation, increasing the capacity of public institutions to tackle intolerance and discrimination, public information and education campaigns directed to combatting negative stereotypes \*Edin. L.R. 256 and discrimination against minority groups, and educational initiatives to promote human rights and diversity.<sup>26</sup>

These tools are preferable to criminal proscriptions on expression because they target the root causes of societal hate and, as a result, may be more effective than targeting individual speakers.<sup>27</sup> They also engage states in the important work of addressing the systemic and cultural forces that drive inequality and discrimination. These tools are increasingly important in the digital age, as hateful expression proliferates on online platforms and false narratives and conspiracy theories targeting vulnerable and marginalised populations take centre stage in public debates concerning important issues, including the COVID-19 pandemic.

Finally, it is also reasonable to question whether a preoccupation with prosecuting individual offenders for specific instances of hate speech by way of criminal sanctions may serve to obscure the ways in which such expression reflects deeply ingrained social inequity and discrimination. By focusing on and targeting individual offenders by way of a protective posture a state may claim to be addressing rising levels of hate within its borders without actively engaging in the more difficult work of instituting broader systemic change.<sup>28</sup> Such efforts may also permit a state to ignore the extent to which its own policies, and the behaviour of government officials, contribute to rising levels of social and cultural animus toward the very groups that hate speech laws are aimed at protecting.

## E. CONCLUSION

Debates over broadly articulated hate speech offences in criminal law frameworks reflect disagreements regarding the appropriate role of the state in tackling rising levels of societal hatred against vulnerable and marginalised groups. In passing the 2021 Act, the Scottish Parliament took a firm position in these debates and, in so doing, disregarded both international human rights standards and UN guidance while sidestepping critical unanswered questions, including whether criminal sanctions are an effective tool for ameliorating the societal problems to which proscriptions on hate speech are directed, whether it is appropriate to disconnect speech from its impact, and the normative justifications for using the coercive force of the state to silence or punish particular viewpoints in public discourse.

While authorities await guidance regarding the implementation and enforcement of the 2021 Act, it is clear that the Scottish Government has not made a compelling case for the addition of stirring up hatred offences to its criminal law framework. Moreover, given the extent to which broadly articulated hate speech offences interfere with the right to freedom of expression and that there are other more \*Edin. L.R. 257 effective tools at the Government's disposal, it is highly questionable whether such offences are necessary to tackle rising levels of societal hatred. The task of addressing the underlying systemic and societal factors that contribute to rising levels of societal hatred against groups that the Scottish Government has an interest in protecting from harm may well be more difficult than enacting criminal laws targeting individual offenders. But it is important work and it should be undertaken without interfering with fundamental rights.

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## Footnotes

- 1 Public Order and Hate Crime Act (Scotland) 2021.
- 2 Scottish Government, *Hate Crime and Public Order (Scotland) Bill Policy Memorandum*, SP Bill 67-PM 1 Session 5 (2020) 1.
- 3 *Independent review of hate crime legislation in Scotland: final report* (31 May 2018), available at <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>.
- 4 Law Commission, "Hate crime laws: a consultation paper", Consultation Paper 250 (23 September 2020).
- 5 2021 Act Part 3.
- 6 2021 Act Part 3(4)(9).
- 7 2021 Act Part 3(9)(b).
- 8 Policy Memorandum (n 2) 48. For an in-depth and critical analysis of the ECtHR's "hate speech" jurisprudence, see J Mchangama and N Alkiviadou, "Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock, or Disturb?" (2021) 21(4) HRL Rev 1008.
- 9 Kate Jones, "Online Disinformation and Political Discourse: Applying a Human Rights Framework" (Chatham House International Law Program, 6 November 2019) 2, available at [www.chathamhouse.org/2019/11/online-disinformation-and-political-discourse-applying-human-rights-framework](http://www.chathamhouse.org/2019/11/online-disinformation-and-political-discourse-applying-human-rights-framework).
- 10 UNCHR, "Addendum to the Annual report of the United Nations High Commissioner for Human Rights" (UNHCR, 11 January 2013) UN Doc A/HRC/22/17/Add.4.
- 11 The Rabat Plan (*ibid*) outlines a six-part threshold test taking into account: (1) the social and political context; (2) status of the speaker; (3) intent to incite the audience against a target group; (4) content and form of the speech; (5) extent of its dissemination; and (6) likelihood of harm, including imminence. See UNHCR, "One-pager on "incitement to hatred"", available at [https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_threshold\\_test.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf).
- 12 UNCHR, "Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences" (September 2020), available at [https://www.un.org/en/genocideprevention/documents/UNStrategyandPoAonHateSpeech\\_GuidanceonAddressinginfield.pdf](https://www.un.org/en/genocideprevention/documents/UNStrategyandPoAonHateSpeech_GuidanceonAddressinginfield.pdf).
- 13 Government responses were assessed in light of relevant international standards, including Article 20(2) of the ICCPR and the Rabat Plan. See ARTICLE 19, *Responding to "Hate Speech": Comparative Overview of Six EU countries* (2018), available at <https://www.article19.org/resources/responding-hate-speech-comparative-overview-six-eu-countries/>.
- 14 ARTICLE 19 (n 13) 18.
- 15 *Ibid* 16.
- 16 *Ibid* 4.
- 17 *Ibid* 41.
- 18 See M Pinto, "Historical Trends of Human Rights Gone Criminal (2020) 42(4) HRQ 729, 731-732.
- 19 F Tulkens, "The Paradoxical Relationship between Criminal Law and Human Rights (2011) 9 J Intl Crim Just 577.
- 20 L Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce", in Lucia Zedner and Julian V Roberts (eds), *Principals and Values in Criminal Law and Criminal Justice* (2012) 137.
- 21 *Ibid* 202.
- 22 Policy Memorandum (n 2) 36.
- 23 *Ibid*.
- 24 UNGA, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (9 October 2019) UN Doc A/74/486, 12.
- 25 Amnesty International, "Written contribution the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination" (28 August 2012), available at <https://www.amnesty.org/download/Documents/24000/ior420022012en.pdf>.
- 26 See, eg, ARTICLE 19, *"Hate Speech" Explained: A Toolkit* (2015), available at <https://www.article19.org/resources/hate-speech-explained-a-toolkit/>.

- 27 See N Mavronicola, "Coercive Overreach, Dilution and Diversion: Potential Dangers of Aligning Human Rights Protection with Criminal Law (Enforcement)", in Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (2020).
- 28 See N Strossen, "Interview with Nadine Strossen", in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (2012) 380-381.
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