

Hate Crime and Public Order (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Hate Crime and Public Order (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. This Bill provides for the modernisation, consolidation and extension of hate crime legislation in Scotland. Legislation in this area has evolved over time in a fragmented manner with the result that different elements of hate crime law are located in different statutes which does not make use of the relevant legislation user-friendly.

3. In addition to consolidation, the Bill seeks to modernise and extend existing hate crime legislation by:

- including age as an additional characteristic in new provisions for the aggravation of offences by prejudice under Part 1 of the Bill (existing aggravations, which the new provisions will replace, apply only in relation to disability, race, religion, sexual orientation and transgender identity);
- creating new offences relating to stirring up hatred in Part 2 of the Bill that will apply in relation to all listed characteristics, including age, disability, race, religion, sexual orientation, transgender identity and variations in sex characteristics (existing offences,

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which these new offences will largely replace, apply only in relation to race);

- updating the definition of transgender identity in Parts 1 and 2 of the Bill, including removing the term 'intersexuality' and creating a separate category for variations in sex characteristics; and
- including a power to enable the characteristic of sex to be added to the lists of characteristics referred to in Parts 1 and 2 of the Bill by regulations at a later date, once the Bill has passed.

4. In addition, the Bill will abolish the common law offence of blasphemy. The offence has not been prosecuted in Scotland for more than 175 years and is no longer considered necessary or appropriate.

5. The Bill consolidates the following existing laws:

- section 96 of the Crime and Disorder Act 1998, (statutory aggravation: race);
- section 74 of the Criminal Justice (Scotland) Act 2003, (statutory aggravation: religion);
- the Offences (Aggravation by Prejudice) (Scotland) Act 2009, (statutory aggravation: disability, sexual orientation and transgender identity);
- most of the provisions relating to the current stirring up of racial hatred offences set out under Part 3 of the Public Order Act 1986.

6. It will bring together most of the existing Scottish hate crime legislation into one statute. In so doing, some changes to language will be made to improve the usability of the legislation.

Rationale for subordinate legislation

7. The Bill contains delegated powers which are explained in more detail below. In deciding whether legislative provisions should be set out in subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- the need to make proper use of valuable Parliamentary time;

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- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

8. The relevant provisions are described in detail below. For each provision the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated Powers

Section 15 – Power to add the characteristic of sex

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative procedure

Provision

9. Part 1 of the Bill provides for the aggravation of offences by prejudice. An offence is aggravated by prejudice if either: the offender evinces malice and ill-will towards a victim based on the victim's membership (or presumed membership) of a group defined by reference to a characteristic listed in section 1(2) or, alternatively, the offence is motivated by malice and ill-will towards such a group.

10. Part 2 of the Bill provides for offences relating to stirring up hatred. An offence under section 3(2) (stirring up hatred) requires, among other

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things, either: that there is an intention to stir up hatred against a group of persons based on the group being defined by reference to a characteristic listed in section 3(3) or, alternatively, that it is likely that hatred will be stirred up against such a group. Similarly, an offence under section 5(2) (possessing inflammatory material) requires, among other things, either: that there is an intention to stir up hatred against a group of persons based on the group being defined by reference to a characteristic listed in section 5(3) or, alternatively, that it is likely that hatred will be stirred up against such a group.

11. The characteristics listed in section 1(2) are: age; disability; race, colour, nationality (including citizenship), or ethnic or national origins; religion or, in the case of a social or cultural group, perceived religious affiliation; sexual orientation; transgender identity; and variations in sex characteristics. The characteristics listed in sections 3(3) and 5(3) are the same as those listed in section 1(2), with the exception of race, colour, nationality (including citizenship), or ethnic or national origins. This is because there are separate offences in sections 3(1) and 5(1) in relation to these characteristics of race, colour, nationality, or ethnic or national origins. Section 14 makes further provision in relation to the interpretation of some of these characteristics.

12. Section 15 confers on the Scottish Ministers the power to add, by regulations, the characteristic of sex to one or more of the lists of characteristics in sections 1(2), 3(3) or 5(3). The power might be used to add the characteristic of sex to, for example, only the lists in sections 3(3) and 5(3), and not the list in section 1(2). If the power were to be used in this particular way, offences relating to stirring up hatred in section 3(2) and 5(2) would be extended so that they also apply in relation to the characteristic of sex, whereas provision for the aggravation of offences by prejudice in Part 1 of the Bill would not be extended in a similar way.

13. Regulations under this section may modify section 14 (meaning of the characteristics) by adding interpretative provision relating to the characteristic of sex. They may also make incidental, supplementary, consequential, transitional, transitory or saving provision, and make different provision for different purposes.

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Reason for taking power

14. Although Lord Bracadale recommended that gender should be added as a characteristic within hate crime law, a number of women's organisations are strongly opposed to this approach, calling for the development of a standalone offence for misogynistic harassment without hate crime legislation

15. On 23 January 2019, the First Minister's National Advisory Council on Women and Girls published its first report and recommendations¹. It included a recommendation to 'criminalise serious misogynistic harassment, filling gaps in existing laws'. In response, the Scottish Government has made a commitment, in principle, to developing a standalone offence on misogyny. In order to progress this commitment, the Scottish Government is establishing a Working Group to consider how the criminal law deals with misogyny, including whether there are gaps in legislation that could be filled with a specific offence on misogynistic harassment. The Working Group will also consider whether the characteristic of 'sex' ought to be added to one or more of the lists in sections 1(2), 3(3) and 5(3).

16. Although Lord Bracadale used the term 'gender', the term 'sex' is being used within the Hate Crime Bill, in order to remain consistent with the Equality Act 2010.

17. This enabling power is sought to provide the flexibility needed to make changes quickly, taking account of the views of the Working Group, without the need for further primary legislation. Having regard to the need to make proper use of valuable Parliamentary time, this would avoid the need for Parliament to consider new primary legislation to add the characteristic of sex to one or more of the lists in sections 1(2), 3(3) and 5(3) and any related provision.

Choice of procedure

18. By virtue of section 15(3)(c), the power to make these regulations would be subject to the affirmative procedure. Since any regulations made using the power would extend the scope of one or more existing criminal

¹ <https://onescotland.org/wp-content/uploads/2019/01/2018-Report.pdf>

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offences under the Bill, it is considered that the affirmative procedure would provide for an appropriate level of Parliamentary scrutiny and control.

Section 17 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative procedure if modifying primary legislation.

otherwise negative procedure

Provision

19. Section 17 empowers the Scottish Ministers to, by regulations, make incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Any such regulations may also make different provision for different purposes, and may modify any enactment.

Reason for taking power

20. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill. The power is sought to provide this flexibility having regard to the need to make proper use of valuable Parliamentary time.

Choice of procedure

21. By virtue of section 17(3), if regulations made using the power were to textually amend any primary legislation, they would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that

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these procedures would provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 20 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid only

Provision

22. Section 20(2) confers a power on the Scottish Ministers to, by regulations, appoint the day on which each provision of the Bill (except sections 17, 20 and 21) comes into force. Section 20(3) provides that the regulations may include transitional, transitory or savings provision, and may make different provision for different purposes.

Reason for taking power

23. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

Choice of procedure

24. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. It is considered that this provides for an appropriate level of Parliamentary scrutiny.

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