

HATE CRIME AND PUBLIC ORDER (SCOTLAND) ACT 2021

EXPLANATORY NOTES

THE ACT

Part 3 – Offences relating to stirring up hatred

Further provisions relating to the offences

Section 5 – Powers of entry etc. with warrant

46. **Section 5** provides for powers of entry etc. under warrant in circumstances where there are reasonable grounds to suspect that an offence under section 4 has been, or is being, committed at the premises or there is evidence at the premises of the commission of an offence under that section.
47. **Section 5(1)** provides that a sheriff or justice of the peace may, where there are such reasonable grounds, grant a warrant authorising a constable to enter the premises in question.
48. **Section 5(2)** provides that such a warrant remains in force for 28 days beginning with the day on which it was granted.
49. **Section 5(3)** sets out what such a warrant may authorise a constable to do– that is, enter the premises (by force if necessary), search the premises and any person found on the premises, and seize and detain any material found there. But material may only be seized and detained if the constable has reasonable grounds for suspecting that it may provide evidence of the commission of an offence under section 4. This includes any material in the possession of a person on those premises.
50. **Section 5(4)** provides that the power of a constable to seize and detain material under this section includes the power to, among other things, require any electronic information to be produced or converted in a way that it can be removed from the premises.
51. **Section 5(5)** defines “constable” and “premises” for the purposes of section 6.

Section 6 – Recording conviction for an offence under section 4

52. **Section 6** makes provision about the recording of a conviction for offences under section 4 (relating to stirring up hatred).
53. Where a person is convicted of an offence under section 4, section 6 requires the court to state on conviction, and to also record the conviction in a manner which shows, the particular characteristic (or characteristics) to which the offence relates.

Section 7 – Forfeiture and disposal of material to which offence relates

54. **Section 7(1)** provides for a court to order the forfeiture and disposal of any material relating to the commission of an offence under section 4 upon conviction. Section 7(2) provides that any order made under this section does not take effect until after any appeal is finally decided or abandoned or, if no such appeal is brought, after the expiry of the period within which an appeal against conviction or sentence may be brought. Section 7(3) defines the meaning of the bringing of an appeal for the purposes of section 7(2).

Section 8 – Individual culpability where organisation commits offence

55. **Section 8** makes provision for certain persons associated with different types of organisations to be held criminally liable for committing an offence under section 4, in addition to the organisation.
56. For that to happen, any person referred to in section 8 as a “responsible individual” must have consented to, or connived in, the organisation’s commission of the offence. Section 8(4) sets out a table explaining which type of person is a “responsible individual” in relation to different types of organisation listed in the table. For example, the director or secretary of a company, and a partner in a firm, are responsible individuals, so potentially have criminal liability for offences under section 4 committed by the company or partnership, respectively.

Section 9 – Protection of freedom of expression

57. **Section 9** should be read in conjunction with section 4 of the Act (see paragraphs 34 – 45).
58. This section, which makes provision for the protection of freedom of expression, applies only for the purposes of the offence of stirring up hatred in section 4(2) which deals with hatred based on age, disability, religion, sexual orientation, transgender identity, or variations in sex characteristics. It does not therefore apply in relation to the offence of stirring up hatred in section 4(1) which deals with hatred based on race, colour, nationality (including citizenship), or ethnic or national origins.
59. For a person to commit an offence under section 4(2), two elements must be proved beyond a reasonable doubt—
- the first element to be proved is that the person either—
 - behaved in a manner that a reasonable person would consider to be threatening or abusive, or
 - communicated to another person material that a reasonable person would consider to be threatening or abusive,
 - the second element to be proved is that, in doing this, the person intended to stir up hatred against a group of persons (based on the group being defined by reference to a characteristic mentioned in section 4(3)).
60. The first element requires the person to behave in a threatening or abusive manner, or to communicate material that is threatening or abusive. Behaviour or material which is threatening or abusive could arise in any setting, such as—
- on social media, such as Twitter, Facebook etc.,
 - at the dinner table or elsewhere in the home,
 - in an office or workplace,
 - in a teaching environment, including religious education,

*These notes relate to the Hate Crime and Public Order (Scotland)
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- during a religious sermon or as part of religious preaching or practice,
 - in a public or private meeting,
 - in a newspaper, blogpost or other media setting,
 - when performing, including in a play or a show on stage or in a film.
61. Whether the behaviour or material was threatening or abusive in any particular context must be determined objectively by reference to what a “reasonable person” would consider to be threatening or abusive.
62. But for an offence to be committed under section 4(2), the second element must also be proved i.e. in doing so, there must also have been an intention to stir up hatred against a group of persons (as defined above).
63. **Section 9** operates only in relation to the first element of the offence. It provides that the behaviour of, or material communicated by, a person 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 age, disability, sexual orientation, transgender identity and variations in sex characteristics,
 - discussion or criticism relating to, or expressions of antipathy, dislike, ridicule or insult towards, religion, religious beliefs or practices, or the position of not holding religious beliefs,
 - proselytising, or urging of persons to cease practising their religions.
64. Behaviour or material could not therefore be taken to be threatening or abusive solely on the basis that it involved or included, for example, discussion or criticism associated with age, disability, religion, sexual orientation, transgender identity, or variations in sex characteristics.
65. Something more is required for any such discussion or criticism to be taken to be threatening or abusive. For example, if it were proved that a reasonable person would consider that the criticism was expressed in a threatening or abusive way, or the material containing the criticism also included other threatening or abusive comments, it could still be taken to be behaviour or material that is threatening or abusive and therefore satisfy the first element of the offence. For the offence to be committed, however, the second element (i.e. the intention to stir up hatred, as mentioned earlier) would also have to be proved beyond reasonable doubt.

Section 10 – Interpretation of Part 3

66. **Section 10** makes provision for the interpretation of various terms used in Part 3.