

HATE CRIME AND PUBLIC ORDER (SCOTLAND) ACT 2021

EXPLANATORY NOTES

THE ACT

Part 3 – Offences relating to stirring up hatred

Offences of stirring up hatred

Section 4 – Offences of stirring up hatred

34. [Section 4](#) creates two offences of stirring up hatred. It should be read in conjunction with section 9 of the Act (see paragraphs 57 – 65).
35. [Section 4\(1\)\(a\)](#) and (b) creates an offence of stirring up racial hatred. It provides that it is an offence for a person to behave in a manner that a reasonable person would consider to be threatening, abusive or insulting, or to communicate to another person material that a reasonable person would consider to be threatening, abusive or insulting, either with the intention to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins, or in circumstances where a reasonable person would consider the behaviour or the communication of the material to be likely to result in hatred being stirred up against such a group.
36. The phrase “a reasonable person would consider” in section 4(1)(a)(i) and (ii) makes it clear that an objective standard is to be applied as to whether the behaviour and material referred to is threatening, abusive or insulting. Similarly, the same phrase in section 4(1)(b)(ii) makes it clear that an objective standard is to be applied as to whether the behaviour or communication of material referred to is likely to result in hatred being stirred up against a group defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins.
37. [Section 4\(2\)\(a\)](#) and (b) creates an offence of stirring up hatred against a group of persons defined by reference to certain characteristics. The characteristics to which this offence applies are listed in section 4(3) (discussed below). It provides that it is an offence for a person to behave in a manner that a reasonable person would consider to be threatening or abusive, or to communicate to another person material that a reasonable person would consider to be threatening or abusive, with the intention to stir up hatred against a group of persons based on the group being defined by reference to one of the listed characteristics. The phrase “a reasonable person would consider” in section 4(2)(a)(i) and (ii) makes it clear that an objective standard is to be applied as to whether the behaviour or material referred to is threatening or abusive.
38. [Section 4\(3\)](#) lists the characteristics by which a group may be defined, in respect of which it is an offence to stir up hatred. These are: age; disability; religion or, in the case of a social or cultural group, perceived religious affiliation; sexual orientation; transgender identity; and variations in sex characteristics.

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39. **Section 4(4)** provides that it is a defence to an offence under section 4(1) or (2) for the accused to show that the behaviour or the communication was, in the particular circumstances, reasonable. This may apply where, for example, a person communicates a threat of serious violence made by someone else for the purpose of alerting a journalist or a journalist reporting a threat of serious violence made by another person.
40. **Section 4(5)** provides that, for the purposes of the operation of the reasonableness defence in section 4(4), the court should have particular regard to the importance of the right to freedom of expression in determining whether behaviour or communication of material was reasonable. The right to freedom of expression by virtue of Article 10 of the European Convention on Human Rights, which is referred to in section 4(5), includes the general principle that the right applies to the expression of information or ideas that offend, shock or disturb. In particular, Article 10.1 of the Convention states that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”. But this right is subject to Article 10.2 which states that “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”.
41. **Section 4(6)** provides that, for the purposes of the defence in subsection (4), the accused is subject to an evidential burden of proof to bring forward enough evidence to raise an issue with respect to the defence. The legal burden of disproving the defence and proving that the offence has been committed remains with the prosecution.
42. **Section 4(7)(a)** makes it clear that a person’s behaviour for the purpose of section 4(1)(a)(i) and (2)(a)(i) includes behaviour of any kind and, in particular, things said (therefore the spoken word, unrecorded speech) or otherwise communicated (e.g. displaying a poster, placard or banner; the printed media on the internet through websites, email, blogs, podcasts etc.), as well as things done by the person.
43. **Section 4(7)(b)** also provides that, for the purpose of that section, the person’s behaviour may consist of a single act or a course of conduct.
44. **Section 4(8)** defines the different ways in which a person may communicate material to another person for the purposes of an offence under section 4. The different ways in which a person may communicate material to another person are by:
- Displaying, publishing or distributing the material e.g. on a sign; on the internet through websites, blogs, podcasts, social media etc., either directly, or by forwarding or repeating material that originates from a third party; through printed media such as magazine publications or leaflets, etc.
 - Giving, sending, showing or playing the material to another person e.g. through online streaming, by email, playing a video, through public performance of a play, etc.
 - Making the material available to another person in any way e.g. through the spoken word, the written word, electronic communications, etc. either directly (as the originator of the material), or by forwarding or repeating the material.
45. **Section 4(9)** provides for the available maximum penalties for an offence under section 4(1) and (2).

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,
 - 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,

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- 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.