

JOINT OPINION OF COUNSEL

for

THE CHRISTIAN INSTITUTE

re

**THE IMPACT ON SCOTLAND OF
THE RACIAL AND RELIGIOUS
HATRED BILL**

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Re

THE IMPACT ON SCOTLAND OF THE RACIAL AND RELIGIOUS HATRED BILL

- 1) We are instructed to advise the Christian Institute (the Institute) on a particular aspect of the Racial and Religious Hatred Bill currently before the House of Lords. The Bill will create new offences relating to "Religious Hatred". According to Clause 4 of the Bill it "extends to England and Wales only" However the Institute is concerned that the proposed law will nevertheless have implications in Scotland. We have been asked to advise on that point.

General Situation

- 2) The Bill aims to amend Part III of the Public Order Act 1986 by adding the words "religious hatred" to existing offences relating to racial hatred. All Bills have a clause which indicates whether they apply to the whole of the UK, or (as is usual) only to part of it. Because Scotland has a distinct legal system of its own it is common for criminal statutes of the UK Parliament dealing with criminal law and procedure to be passed applying to Scotland alone (e.g. the Criminal Procedure (Scotland) Act 1995) or in other Acts to state that sections only apply to Scotland alone or to England and Wales. Since the passing of the Scotland Act 1998 and the re-establishment of the Scottish Parliament there have been an even greater number of detailed statutes applicable only in Scotland. Under the Scotland Act the Scottish Parliament (unlike the Welsh Assembly) has power to legislate on criminal law matters. However s28 (7) of the Scotland Act makes it clear that the Act "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

- 3) There are certain matters which have "devolved" to the Scottish Parliament. The Sewel convention is an important aspect of the devolution settlement, and is reflected in the Memorandum of Understanding between the UK Government and the Scottish Executive and in Devolution Guidance Note 10. Nothing in the Scotland Act prevents the UK Parliament from legislating on matters which are within devolved competence: section 28(7) makes that clear. However during the passage of the Scotland Act, the UK Government announced that it "would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament." (In this context 'devolved matters' does not refer just to matters that are within the legislative competence of the Scottish Parliament and could, therefore, potentially be included within an Act of the Scottish Parliament. It additionally is taken to refer to matters which, although reserved, affect the breadth of the devolved institutions' powers - i.e. the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.) This has become known as the Sewel convention, and its purpose is to reflect and respect the devolution settlement and the role of the devolved institutions.

There is a convention document known as a 'Sewel Memorandum' which can set out the proposed handling of provisions within a UK Bill in respect of matters that are within the competence of the Scottish Parliament.

- 4) A Sewell Memorandum on the proposed handling of the UK Anti-Terrorism, Crime & Security Bill was issued in which the Scottish Executive said this

"The Scottish Executive is determined to protect the people of Scotland from all forms of religious or racial hatred. The common law already provides protection to religious groups in Scotland. The law in this area is more flexible and widely used than in England. It can be, and is already, used to take account of any religious motivation in offences. Against that background, the Executive considers that the differences in Scottish law and circumstances make it essential for us to produce separate

proposals in this area that will work in Scotland. We will bring forward proposals by the end of February 2002.”

- 5) In both England and Scotland there are a variety of offences which can be used to deal with ‘hate crimes’ [understood to be crimes committed out of racial, religious or social prejudice]. In both countries the courts can take aggravating factors into account when sentencing anyone found guilty of an offence. The legislation in both England and Scotland has followed similar paths in dealing with “hate crimes”
- 6) Part III of the Public Order Act 1986 (infra) introduced offences relating to the incitement of racial hatred (with maxima of an unlimited fine and seven years imprisonment). These offences applied equally in England, Wales and Scotland.

Part 11 of the Crime and Disorder Act 1998 created “Racially Aggravated” Criminal Offences for England and Wales which involved heavier penalties being imposed for certain existing offences if those offences were motivated by racial hostility.

Section 33 of the Crime and Disorder Act 1998 also introduced an offence of racially aggravated harassment for Scotland with a maximum penalty of seven years imprisonment.

Section 39 of the Anti-terrorism, Crime and Security Act 2001 amended the provisions relating to “Racially Aggravated Offences” to make them “Racially or Religiously Aggravated” whilst section 145 Criminal Justice Act 2003 states that of Racial or Religious Hostility is to be regarded as an aggravating factor in sentencing for any offence. These provisions only apply to offences in England and Wales.

In Scotland Section 74 of the Criminal Justice (Scotland) Act 2003, passed as a result of the Cross Party Report On Legislation To Tackle Religious Hatred – after public consultation, is in similar vein to the pattern of the Legislation in England and Wales. The Section states that an offence is aggravated by religious prejudice if immediately before, during or after the offence, the offender evinces malice and ill-will

based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation. Equally, an offence is aggravated by religious prejudice if the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group. When this occurs, the court must take the aggravation into account when determining the appropriate sentence and if the sentence is different from that the court would have imposed if the offence had not been aggravated by religious prejudice, the court must state the extent of and reasons for that difference. This applies only to Scotland.

- 7) On first sight clause 4 of the Bill (which restricts its effects to England and Wales) appears routine however in the circumstances of this particular Bill it produces a rather strange effect. At present Part III of the Public Order Act 1986 (which creates the offence of Racial Hatred) applies uniformly throughout Great Britain but the amended Part III will only apply in England and Wales. This will result in the peculiar situation of two different versions of Part III Public Order Act 1986 being in force simultaneously. Old sections 17 to 29 applying to Scotland and amended ss17 to 29 applying to England and Wales.
- 8) Apart from the Sewel Convention it may be considered there is a logical inconsistency in this. The Government claims that the existing legislation on Racial Hatred in England and Wales is inadequate to protect Muslims and is unfair because it provides protection to Sikhs and Jews. The Muslim Council of Britain (which operates in Scotland) vehemently contends that the existing law is discriminatory. If these criticisms are correct care must be taken to ensure that the legislation is in fact unnecessary in Scotland otherwise the acute question is why only change the law in England and Wales? Under the Scotland Act the UK Parliament remains responsible for legislating in the area of Discrimination and the legislation on Religious Hatred is being justified on the basis that the existing legislation is discriminatory. Logically therefore it might be thought that any change to that legislation should apply to Scotland as well as

England and Wales unless Scots Law does in fact already deal with the issues adequately. For that reason if the law on Religious Hatred is enacted in England and Wales and it differs from that already existing in Scotland there will be strong political pressure, especially from the MCB, for the legislation to be changed in Scotland also. This may require a "tidying up" exercise if there are real differences. The Scottish Executive had expressed its decision in principle following the appropriate consultation process and now Westminster is responding to the situation in England and Wales.

- 9) The fact that the legislation will be changed only so far as it applies to England and Wales also raises Human Rights issues under the Human Rights Act and the European Convention on Human Rights. The proposed crime of Religious Hatred unquestionably affects rights guaranteed by the Convention in particular Articles 9 (Freedom of Religion) and Article 10 (Freedom of Expression). Under Article 14 these rights must be secured "without discrimination on any ground". However if the law is amended in England and Wales but not in Scotland then someone prosecuted in England may seek to argue that their Article 9 & 10 rights have been affected in a way that discriminates against them compared to someone doing or saying the same thing in Scotland provided they could show that is the fact of the matter. If such a case were to be contested before the European Court of Human Rights then the Government could arguably find itself in difficulty because it could not claim that the difference in Human Rights between UK citizens in England and those in Scotland was due to any historic difference between English and Scottish law.

Effect on Scotland

- 10) Though the proposed creation of a Religious Hatred Offence in England and Wales will not directly affect Scotland there will be clear indirect effects. These will come in particular from

- s19 (Publishing or distributing written material),
- s20 (Public performance of play),
- s21 (Distributing, showing or playing a recording),
- s22 (Broadcasting or including programme in programme service)

Despite the differences between English and Scots law there has always been a general assumption in Britain that books, magazines, newspapers, videos television programmes etc which are legal in one jurisdiction will be legal in another jurisdiction. Once a Religious Hatred law applies in England and Wales and if it differs from that in Scotland that assumption will no longer be correct.

- 11) This is more than a theoretical danger to persons and organisations in Scotland. If a Police Officer in England and Wales has reasonable cause to believe that someone in Scotland has committed an offence of Religious Hatred affecting England then they may go to Scotland, arrest that person, bring them to England and search their premises in Scotland and seize items such as computers books etc regardless of the fact that no offence had been committed contrary to Scots law (section 136 to 141 Criminal Justice and Public Order act 1994).
- 12) Despite ss136 to 141 the general presumption in English law is that Scotland is to be regarded as a “foreign” jurisdiction. Under English Common Law actions in a foreign jurisdiction cannot be prosecuted in England unless they have consequences in England. However actions outside England can be prosecuted in England if their consequences involve a criminal offence being committed in England (R. v Harden [1963] 1 aB 8, R. v Manning [1998] 2 Cr. App. R 461). The main constraint on jurisdiction is the practical one of getting a foreign offender before the English courts but, as already explained, this would not be a problem in relation to defendants who can be arrested either by English Police Officers or by Scottish Police Officers acting on an English warrant.

Scottish Newspapers and Books

- 13) The consequences of this in relation to Scottish newspapers is that they would have to obey both current Scots law and the “English Religious Hatred Law” for any editions of their newspapers which were sold in England and Wales. If, for example, an article in ‘The Scotsman’ was held to breach the Religious Hatred Law then the Scottish publisher, could be prosecuted as well as the English distributor. Therefore Scottish newspapers which do sell copies south of the Border will either have to provide specially vetted “English Editions” to sell south of the Border or they will have to ensure that all their articles conform to an English law that does not apply in Scotland. The fact that the article did not contravene Scots law would not provide a defence to a prosecution in England since by selling their newspaper in England they would have “published” and “distributed” in England.
- 14) The same logic would apply to a Scottish publisher selling books to bookshops in England or to English customers via mail order or the Internet. Once they do that they are “publishing” and “distributing” for the purposes of s19 and could be arrested and prosecuted. Once again the fact that the book in question did not contravene Scots law would not provide any defence to a prosecution in England.
- 15) If however the Scottish publisher only sold books or videos in Scotland then it would be immune from prosecution in England if the contravention was of English law. However an English visitor who bought a book or video when in Scotland could be prosecuted under s23 (Possession of inflammatory material if it fell into that category) upon returning to England. The fact that they had bought the book or video, quite legally, in Scotland would not offer them any defence.


Scottish TV and Radio programmes and Videos

- 16) If a TV or radio programme is broadcast in Scotland and is not intended to be heard in England then it would only fall under the jurisdiction of the Scottish courts. However if it is broadcast from Scotland with the intention that it should be heard in England then it would fall under the jurisdiction of English law.

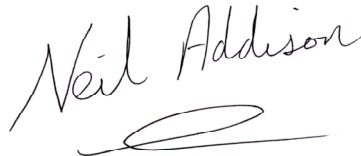
For example if a Scottish Member of the UK Parliament was in the BBC Edinburgh studios being interviewed on Newsnight, or the Manager of a well known Glasgow football club was in Glasgow being interviewed by Grandstand then both of them would be liable for prosecution if what they said contravened the “English” Religious Hatred Law because both programmes are broadcast in England. Furthermore most radio stations offer their programmes on the Internet which exposes them to potential liability in a plethora of countries including, in this instance, England.

- 17) If a Video is produced in Scotland but is sold or distributed in England then the producers of it must also ensure that it conforms to English law. As with books and newspapers the fact that it conforms to Scots law is not a defence once it is sold in England.
- 18) If a Scottish “event” is to be broadcast in England then the broadcasters will need to ensure that it conforms to both Scots and English law. For example it has been reported that some comedians have threatened to defy the Religious Hatred Law in relation to their jokes in the Edinburgh Festival. Since the religious hatred law will not apply in Scotland in precisely the same way this is a somewhat less artistically courageous than they might pretend and in any event they may commit an offence under Scots law. However if BBC Scotland intend to broadcast any of these “jokes” they will need to ensure that those jokes conform to the Religious Hatred law of England even if they are quite legal in Scotland
- 19) The consequence of all of this is that, possibly for the first time since the Act of Union, Scottish publishers, newspapers and broadcasters will have to get separate English and Scottish legal advice in order to ensure that what they publish is legal and does not lead to prosecution. Therefore though it is correct to say that the Religious Hatred law will not directly apply to Scotland it is simplistic to say that it will have no effect on Scotland. In practical terms the law will affect Scotland and every institution in Scotland which is in any way involved in writing, publishing or broadcasting will have to obey it even

though it is not part of Scots law. The law is being criticised in England because of its “chilling” effect on religious debate and because it will inevitably lead to “self censorship” and caution. It will certainly have those effects in Scotland also.

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HERBERT A. KERRIGAN Q.C. OF THE SCOTTISH BAR
AND OF MIDDLE TEMPLE, BARRISTER

Handwritten signature of Neil Addison in black ink, with a horizontal line underneath.

NEIL ADDISON BARRISTER OF GRAYS INN

5th. October 2005