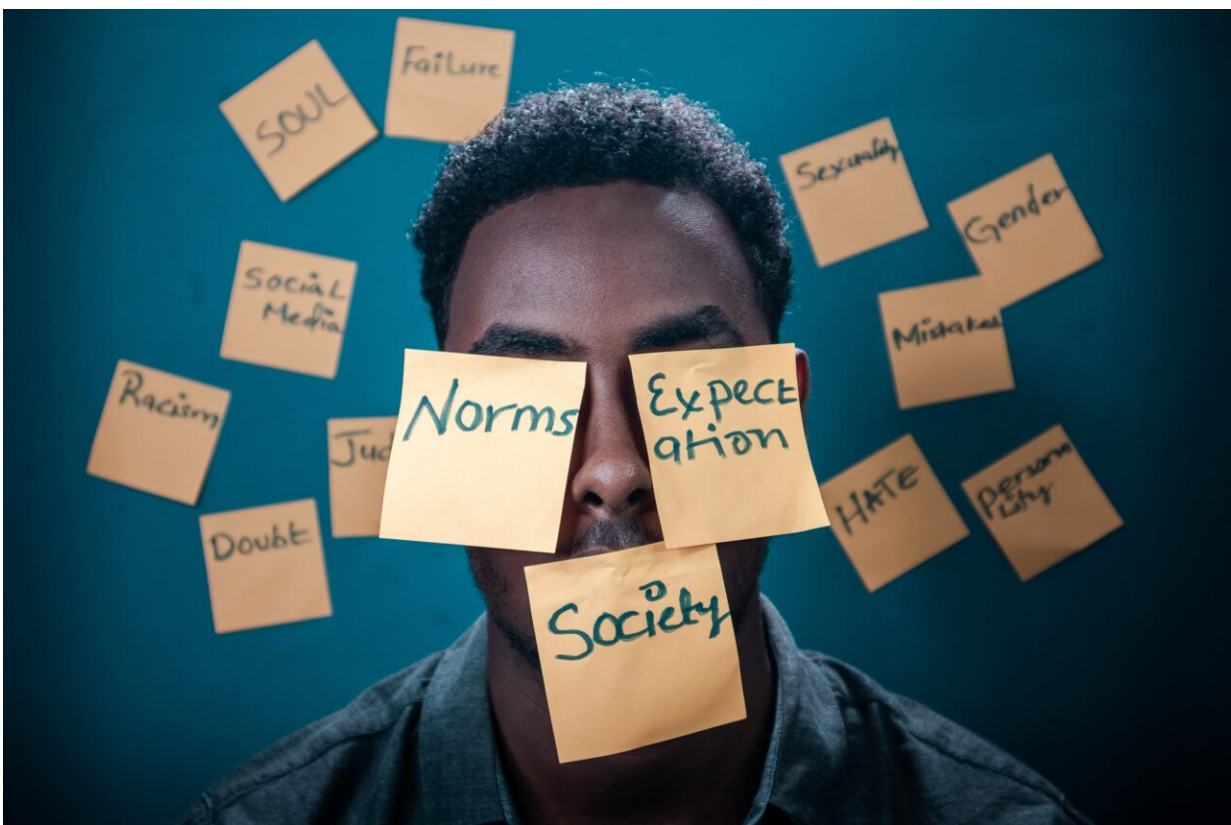


# Scotland's hate crime law: The problem with using public order laws to govern online speech

April 24 2024, by Laura Higson-Bliss

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Scotland's new hate crime law came into force on April 1, sparking immediate controversy over its potential effects on freedom of speech

and expression, especially online. The Hate Crime and Public Order (Scotland) [Act](#) expands on current laws about crimes that have the possibility to stir up hatred, in Scotland only.

A "[hate crime](#)" itself is not its own specific offense under existing laws, or the new law. But if you are found to commit another crime (for example, assault) and it is proven that this was based on hostility against someone's protected characteristic (usually race, religion, disability or [sexual orientation](#)) you can be given a harsher sentence.

The new law in Scotland introduces the [offense](#) of "stirring up hatred"—either in person or online—related to age, disability, religion, sexual orientation, transgender identity or being intersex. This does not extend beyond Scotland.

A stirring up offense is committed if someone behaves in a way that the average person on the street would consider to be threatening or abusive, and that behavior is based on the victim's protected characteristic. To find someone guilty, it must be proven that their aim or purpose was to stir up hatred. This is a high threshold and difficult to prove.

Alongside threatening or abusive behavior in person, the law criminalizes sending such communications online. This has been the most controversial change. Critics fear it could [harm free speech](#), especially online, where context is everything, but is often lost.

Of particular concern have been discussions over transgender identity—author JK Rowling challenged police to arrest her over a series of posts describing transgender women as men, though police say this [did not amount](#) to a crime.

But should a law like this even be used to govern online speech?

## Stirring up offenses online

The rationale behind public order legislation, including the new Scottish law, has always been to maintain public order during a time of disorder. It is difficult to argue that online comments can amount to criminal offenses that threaten public order.

Public order prosecutions of people who make hateful or prejudicial comments online [are rare](#)—and successful convictions even rarer. There are only a handful of cases in the [public domain](#) to use as examples.

In 2012, Liam Stacey, a student, was [sentenced to 56 days](#) in jail under the Public Order Act 1986 for sending tweets intended to stir up racial hatred aimed at footballer [Fabrice Muamba](#). As I and other legal scholars [have argued](#), while Stacey's tweets were clearly abusive, they never threatened public order. And yet, he was convicted of a public order offense, under a law enacted 20 years before Twitter even existed.

The act was also successfully used to prosecute 45-year-old Wigan man [Stuart Sutton](#), who received a 16-month custodial sentence in 2022 for posting anti-Semitic and racist commentary online.

Distinguishing between intent to stir up hatred and speech intended to inform rather than offend is incredibly complex, especially online where proving public order is under threat is near impossible. Indeed, speech intended to inform is protected under the [European Convention of Human Rights](#), even if it could be construed as racist.

In most cases, online comments have been successfully prosecuted under other existing laws, such as communications offenses.

Following England's defeat in the 2020 Euros, three people were [arrested](#) for public order offenses relating to stirring up racial hatred.

But, in the event, [each was](#) later [charged](#) and [convicted](#) of sending a grossly offensive message in violation of the [Communications Act](#), as opposed to a public order offense.

Scotland had another law that dealt specifically with threatening communications, as well as behavior at football matches, with provisions in place to uplift sentencing for communications grounded in hate. This law was used [32 times](#), and was later repealed following concerns that it was illiberal and unfairly targeted football fans.

In England and Wales, provisions such as the Malicious Communications Act and the Protection from Harassment Act have been used to prosecute people for offensive comments online. The [Sentencing Act](#) also allows the courts to "uplift" a person's sentence under any criminal provision, if their offense is proven to be aggravated by hate. This is used much more commonly than specific public order offenses.

## **Fighting hate online**

Scottish government officials have [hailed the new law](#) as a significant step forward in protecting people from hate and prejudice. The reporting of hate crimes across Scotland has been [relatively low](#) compared to other jurisdictions.

But there is little evidence that the offense of stirring up hatred itself is effective in tackling [online hate](#), which is certainly [on the rise](#). The reality is that prosecutions for harmful online speech are likely to fall under other existing laws.

If we really want to tackle the rise in hate online (which [recent debates](#) seem to suggest we do), public order legislation and the weight of the criminal law will never work. It is only through open and public debate and better education that we can enact change.

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