Humanist Society Scotland
For an ethical future

Fraser Sutherland
CEO, Humanist Society Scotland
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Dear Chief Constable,

I write with regard to recent media coverage of discussions at a Scottish Police Authority meeting concerning the implementation of the Hate Crime and Public Order (Scotland) Bill.

I note that your recent discussion covers unease from some quarters about the interpretation of thresholds and indeed where and how the legal defence of freedom of expression within the act may be utilised. It is my view that the law as drafted has, thanks to amendments during parliamentary process, significant protections against prosecutions in order to protect ECHR rights of freedom of expression and other freedoms. For the avoidance of doubt, I believe it was right that these protections were introduced.

As you'll recognise, however, this does not limit where, how, and when police may investigate potential stirring-up offence complaints. I understand many of the concerns expressed recently relate to pre-charge investigations and how this may have a chilling effect on freedom of expression.

Since the Lord Bracadale review in 2017, Humanist Society Scotland has highlighted the usefulness of the United Nations High Commissioner for Human Rights's (OHCHR) Rabat Plan of Action on Freedom of Expression versus incitement to hatred. This outlines exactly the kind of conflict the police are being asked to grapple with, which is causing much of the concern expressed in the public domain.

I have previously discussed the Rabat Plan threshold test with then Cabinet Secretary Humza Yousaf and supporting civil servants during the passage of the Bill and with the Justice Committee during their deliberations of the Bill.

I further wrote to the later Cabinet Secretary Keith Brown in February 2022 again asking for the Rabat thresholds to be reviewed and brought in as part of guidance or training. In his response in April 2022 he stated,

"I hope you will appreciate that – with regards to the training and guidance requirements for police officers (including those in relation to the Rabat Principles) – that these are operational matters for the Chief Constable of Police Scotland. Furthermore, the training of prosecutors is a matter for the independent Lord Advocate and, finally, the training of the judiciary is a matter for the Lord President and the work of the Judicial Studies Institute. The Scottish Government will fully engage with relevant justice agencies to ensure that full consideration is given to the relevant training requirements of those agencies ahead of the Act coming into force. I have also asked my officials to direct the specifics of your letter to these agencies, through the appropriate channels and for them to consider, as work to implement the Act continues.

The government's most recent official position on the Rabat Plan can be best summarised in correspondence I received from the Scottish Government who stated in July 2023:

"You had asked about the application of the Rabat Action Plan at the call yesterday so I thought it might useful to follow up by setting out our response to the plan. It provides a helpful independent framework against which the threat posed by hate crime incidents can be evaluated, and we welcome also the extent to which it recognises the importance of protecting the right to freedom of expression. The Rabat document is not a treaty and does not give rise to international law obligations, so in that sense we have no current plans to ensure compliance. It is of course open to COPFS and Police Scotland to make use of the criteria within their own decision making processes, but as I explained yesterday the SG has no role in relation to prosecutorial matters or operational policing."

I also raised the Rabat Plan with Michael Fletcher and Marcus Littlejohn from Police Scotland with regard to their work on developing police training on the Bill last year. I shared with them a useful toolkit from the organisation Article 19 around hate speech that I thought may be useful in drafting internal training for the police on thresholds.

The Rabat Plan provides a six-part threshold test, where each of these six parts should be met in order for a statement to be considered a criminal offence. These are:

1. Context: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
2. Speaker: The speaker's position or status in the society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed
3. Intent: Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience
4. Content and form: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed
5. Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public
6. Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

To date I am not aware that the Police or the Government have properly utilised the Rabat Thresholds in guidance or training for officers. These not only give a clear framework for officers to work from but, if made public, would also provide clear reassurance where and how the new law may be enacted and where it would not be.

The Rabat Plan thresholds are well respected in the international community in dealing with the issue raised with stirring up offences. Indeed the European Court of Human Rights - the ultimate ruling court on any appeal against a conviction under the new legislation on ECHR grounds - referred to the Rabat Thresholds in the *Pussy Riot* case [Mariya Alekhina and Others V. Russia, 2018].

In 2019 the OSCE Office for Democratic Institutions and Human Rights published its policy guidance on "Freedom of Religion or Belief and Security". The policy guidance also encourages States to train law enforcement officials and the judiciary to understand and apply the six-part test set out in the Rabat Plan of Action (context; speaker; intent; content or form; extent of the speech; and likelihood of harm occurring, including imminence), in order to determine whether the threshold of incitement to hatred is met or not.

In addition the UN High Commissioner has made reference to the thresholds as 'useful guidance in distinguishing between permissible speech and speech that may amount to incitement'.

With this background and context I would be obliged if you could:

- Detail what consideration Police Scotland has given to introducing the Rabat Thresholds as guidance for officers on implementing the Act?
- If Police Scotland intend to use these thresholds in investigating stirring up offences? If not, could you please provide the rationale for this decision?
- Confirm whether Police Scotland has reviewed the OSCE Freedom of Religion or Belief and Security: Policy Guidance (2019)

I write on behalf of Humanist Society Scotland's over 18,000 members, who value the freedoms stipulated under ECHR including freedom of expression and freedom of religion and belief. We are individuals who are acutely aware of the consequences of failing to protect minorities from hate crimes and overzealous censorship of freedom of expression. Too many of our humanist friends from other parts of the world have faced state censorship for offending religion at one end of the spectrum to mob violence resulting in their death from their status as apostates and police refusing to intervene.

Yours Sincerely,

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