JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM EVANGELICAL ALLIANCE

1. **Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?**

Any new criminal offences are a significant legal development and there must always be a clear need for new criminal legislation. This Bill is no exception particularly as the Bill is so wide ranging in scope, considering areas of intent, communications and speech as well as physical conduct, and also covering a wide range of locations including public places, private homes and even the performance of plays. There needs to be clarity as to why this Bill is needed, what gap in legislation is filled by the Bill and who is currently not protected by existing legislation. It is not apparent that there are clear answers to any of these questions with much of the language surrounding the bill based on terms such as 'sending a strong message' that hate crime offences 'will not be tolerated by society'.[1] Whilst these are laudable intentions that in itself is not the basis for good law.

2. **The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?**

If the Bill is considered necessary, it is understandable to use the opportunity to provide a consolidation exercise. We do, however, have concern that in drawing together different pieces of legislation together the threshold for defending free speech will be weakened.

All the existing legislation includes a defence that the accused did not 'intend to stir up hatred' whereas the current proposals replace this with a 'reasonableness test'. This would appear to reject Lord Bracadale's proposals and weaken the defence. The problem with a reasonableness test is that it lacks certainty and risks someone being guilty of a crime they did not intend to commit or know they have committed. It is also not a fixed test so what is reasonable behaviour in one context, or at one time, could later be deemed to be unreasonable based on a fresh assessment of whether it is reasonable. This legal subjectivity allows criminality to be determined by social, political and cultural trends rather than intention.

3. **Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory**

[1] Scottish Government, Policy Memorandum, Hate Crime and Public Order (Scotland) Bill, Pg. 2, Paragraph 8

aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

4. **Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?**

5. **Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?**

While we strongly oppose sectarianism in all its forms, we believe that any protections needed are adequately covered in existing law under the categories of race and religion.

6. **Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?**

Although we have sympathy for the intentions behind the desire to criminalise stirring up hatred, we have significant concerns about this part of the Bill. We are not seeking to defend hateful speech that incites violence and we agree that stirring up hatred towards people is morally wrong. However, in creating new offences in this area great care is required to ensure that someone's speech is not ruled as criminal because it is objectionable to the person who hears it. Protecting disagreement is a vital part of democratic society, even when it touches on issues that people find insulting.

Our concerns about the present proposals include the level of the criminal threshold, the lack of need to prove intent to meet the threshold for part of the two part criminal test and the point at which the criminal law can be engaged with material and communications which can be deemed illegal before ever being distributed. Taken together we believe there is a real danger that what might be deemed objectionable and offensive behaviour could now be criminalised without any intent or even knowledge of the individual exhibiting that behaviour. The introduction of this new offence would have profound implications for liberal democracy.

We hold that the law should provide certainty and clarity, and concur with the comments of Lord Hope in *Purdy v* DPP:[2]

> *"The word "law" … implies qualitative requirements, including those of* ***accessibility and foreseeability****. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable…The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with*

[2] [2009] HRLR 32 at 41.

appropriate legal advice, the consequences which a given action may entail." [emphasis added]

In the context of the proposed Bill the current wording fails this test, the burden of reasonableness is with the accused, as it is not clear what a prosecutor would need to do to prove beyond reasonable doubt that the comments were not reasonable.

Specifically, we have four concerns in this area:

1. Threating or abusive threshold (clause 3(2), 5(2))

The concept of threatening behaviour is a well understood concept both legally and by the general public. However, the term abusive however is not defined in the Bill and can mean a range of different behaviours interpreted widely by society. This does not meet the intention of the Bill to have clearly understandable legislation for the general public. Furthermore, there is a danger without definition that a wide interpretation given by a court could meet the first part of the two-part test for stirring up hatred.

We are aware of the operation of the similar threshold in Section 38 of Criminal Justice and Licensing (Scotland) Act 2010.[3] However in this act there are greater requirements for the threshold to be met with the additional requirement to cause a reasonable person fear or alarm and also the need to demonstrate intent or reckless behaviour. These requirements are missing from the current Bill.

Given the consequences of being convicted of an aggravated offence of stirring up hatred immense care should be taken, and this lower standard should be rejected. To adopt an approach such as this would potentially criminalise people for expressing disagreement or holding a divergent viewpoint that someone else considers to be abusive. As a society we should promote peaceable diversity, and acknowledge that there will always be fundamental disagreements, especially relating to religious beliefs, where some express views they passionately believe to be true and others consider such expressed views to be wrong or abusive.

For example, at the core of the Christian faith is the notion of salvation. The idea that some people will go to hell could be considered offensive, and even abusive. Likewise, while the proposed bill includes protection for comments relating to sexual orientation it does not include commensurate protection regarding discussion of gender identity. It is therefore entirely foreseeable that this could be used to deem comments relating to biological sex as abusive.

2. Definitions of stirring up and hatred

There are no definitions given of either stirring up or hatred within the Bill. These are broad and subjective terms and consequently pose a significant challenge with the second part of the two-part test. With current stirring up offences in relation to racial hatred there are a number of clearly defined offences within sections 18-23 of the Public Order Act 1986 Act.[4] By simply making a generalised offence without definition

[3] https://www.legislation.gov.uk/asp/2010/13/section/38

[4] https://www.legislation.gov.uk/ukpga/1986/64/section/18

of key terms this will potentially lead to significant confusion for both the general public and the courts.

3. Place of intent

The second part of the test allows for the threshold to be met without any reference to intent of the alleged perpetrator, simply that hatred is 'likely to be stirred up' by the actions taken. This must mean that it is possible to meet this part of the test unintentionally. In the Bill this applies to both sections 3 and 5 in relation to conduct and communications covering an extremely broad range of behaviours. If part one of the test is met the lack of *mens rea* ensures a very low bar to meet the full test – particularly with the lack of definitions of 'stirring up and hatred' as noted above.

Ordinarily where *mens rea* is not required (for example with strict liability in driving offences) there are clear statutory defences. Whilst there are statutory defences in the Bill, when viewed against the existing law they are significantly weakened. The undefined reasonableness test does not provide the same level of protection, nor the clarity required for the law.

4. Possession of inflammatory material (clause 5)

Similar to the wider challenges related to intent outlined above, clause 5 of the Bill relating to inflammatory material also raises concerns as to its breadth. In particular, the fact that communications do not need to have been sent but merely possessed means that it is possible to be convicted without any actual sending of communications in a threatening or abusive way.

Furthermore, we are concerned that texts such as the Bible are perceived by some groups as being 'threatening, abusive or insulting material' in a number of ways. With the breadth of the current offence as drafted and a free speech clause that leaves a number of gaps in its current form, it is not clear where the protections lie for those, from a variety of faith traditions, for whom scriptural teaching and the sharing of this teaching is significant part of their life and faith practice.

7. Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

Racial hatred is abhorrent and recent events have reminded everyone of the scourge of racism locally and globally. As a Christian organisation we hold that all human beings are created equally in dignity and worth, as outlined in the opening pages of the Bible, and racism is the antithesis of this. We are therefore sympathetic to the government not wishing to send a signal that somehow protections against racism are being weakened at this time. That said, the threshold of insulting is a low one which if applied without sufficient and clear defences available does criminalise significant areas of free speech.

The possible challenges of this have been raised recently by Roddy Dunlop QC, Dean of the Faculty of Advocates, who has highlighted that in the context of comedy traditional jokes made against nationality may become subject to this offence as well as classic racism:

> *"People could complain that the joke discriminates against Scottish people's national identity. We worry it will be too wide and too much of a curb on freedom of expression"*[5]

In the existing Public Order Act 1986 stirring up offences such clear defences do exist as outlined by the recent commentary from Fred Mackintosh QC. Once again these primarily relate to the issue of intent:

> *"The problem with consolidating the four offences into one is that some of the specific detail and defences which are an important part of the existing separate offences have been lost. All five of the existing defences have a defence which enables the argument to be made by an accused, who did not intend to stir up racial hatred, to prove he did not intend, and had no reason to suspect, that his conduct was threatening, abusive or insulting.*[6]

If 'insulting' is to be retained within the Bill, the same available defences should likewise be retained, rather than weakened as is currently the case.

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

There are two free speech clauses in the Bill relating to religion and sexual orientation which are welcome and provide a level of protection for discussion of both. As a faith-based organisation, we strongly support freedom of religion and belief to debate and discuss ideas and this freedom is most especially needed in areas of passionate disagreement.

However, the protections are narrow, and they do not cover any other aspect of the Bill, not least the current gender identity conversation that is taking place in society. So, these must be strengthened both in breadth to cover all aspects covered by the Bill and in detail about what is protected in each area. Given the protection afforded to comments relating to sexual orientation for consistency this should also relate to other characteristics such as gender identity. Again, this is not about seeking to promote hatred of anyone but rather to allow for honest conversation and democratic disagreement about some very contested areas of views.

In the European Court of Human Right judgment in the case of Handyside the court noted:

> *Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of*

[5] https://www.thetimes.co.uk/article/hate-law-may-criminalise-comedy-g3zfxv0f5

[6] https://www.scottishlegal.com/article/fred-mackintosh-qc-practical-problems-with-the-hate-crime-and-public-order-bill

> *every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".*[7]

A further concern is that the proposed definition of "hate speech" does not necessarily require the speech to be false. It is our view that traditional defences of 'fair' and 'honest comment' should be considered within any proposed expansion. Moreover, we would contend that recognition of the broad freedoms afforded to individuals, particularly pursuant to Articles 9 (freedom of religion) and 10 (freedom of expression) of the European Convention of Human Rights should feature prominently in any definition, so to prevent the inappropriate use of the term 'hate speech' to silence peaceful opinion on controversial topics.

We consider a broad protection for the freedom of speech similar to that included in the Westminster 2006 Racial and Religious Hatred Act to be preferable. This states:

> *Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*[8]

This Act also had the added protection that it applied only to threatening, and not threatening or abusive speech.

9. **Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?**

10. **What is your view on the plans for the abolition of the offence of blasphemy?**

Evangelical Alliance
24 July 2020

[7] *Handyside versus the United Kingdom* (1976) paragraph 49
[8] 2006 Racial and Religious Hatred Act Section 29J