14 December 2020

Dear Convener

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL: STAGE ONE REPORT

Thank you for your Committee’s detailed consideration of this Bill and for your Stage 1 Report. I recognise that hate crime is an area in which there are many opposing views, and I am grateful to you for clearly setting out these issues for the Parliament as a whole to consider.

I attach the Scottish Government’s response to the points and recommendations made in the Stage 1 Report. As you will note from my response, the Government agrees with the overwhelming majority of the Committee’s recommendations; where we cannot immediately agree we are open to further consideration of these matters.

I hope this response will enable members of the Committee to support the general principles of the Bill at stage 1.

HUMZA YOUSAF
HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

RESPONSE BY THE SCOTTISH GOVERNMENT TO THE STAGE 1 REPORT BY THE JUSTICE COMMITTEE

1. I am grateful to the Committee for its detailed and careful scrutiny of the Hate Crime and Public Order (Scotland) Bill. This paper provides the Scottish Government’s response to the specific points and recommendations made by the Justice Committee in their Stage 1 Report.

2. The Committee’s comments are shown in boxes below, along with the paragraph number in the Stage 1 report, and the Scottish Government’s response is given underneath. This response uses headings from the Stage 1 report.

Part 2 – Offences related to the stirring up of hatred

Approach to legislating on hate crime and fundamental rights

44. The Committee agrees that the right to freedom of speech includes the right to offend, shock or disturb. The Committee understands that this Bill is not intended to prohibit speech which others may find offensive, and neither is it intended to lead to any self-censorship. The Committee is anxious to ensure, however, that these are not unintended consequences of the Bill.

3. I note this recommendation and share the Committee’s desire for no unintended consequences of the Bill. I too believe people’s right to offend, shock or disturb should not be infringed, and I am confident this Bill gets the balance right between protecting these vital freedoms and protecting people from hatred.

4. The new stirring up hatred offences will only apply where a person behaves in a threatening or abusive manner or communicates threatening or abusive material with the intention of stirring up hatred. First and foremost, I want people to change their behaviour so that they do not act in such a way. If they do, however, decide to act in such a way, then the Bill will allow for criminal sanctions to be used to deal with their behaviour for all characteristics contained within the Bill. In addition and using the existing operation of stirring up racial hatred offences, where a person behaves in an insulting manner or communicates insulting material with the likelihood that hatred would be stirred up in respect of race only, this would also be liable to criminal sanction.

5. Within this context, the Bill is not intended to self-censor behaviour that does not meet this threshold and I do not consider it will lead to the self-censoring of legitimate activities, including where those legitimate activities may be offensive, shocking or disturbing to others. This is especially the case given the intended Stage 2 amendments for the new stirring up hatred offences (i.e. for all characteristics other than race) so as to require an intention to stir up hatred as an essential element of the offences. As evidence given to the Committee has made clear, this is a high threshold for criminal sanctions to be imposed.
Section 3 - Offences of stirring up hatred

70. Written evidence submitted to the Committee contained serious and widespread criticism of the scope of the new stirring up offences. As such, the Committee welcomes the Cabinet Secretary's proposal that the Bill be amended at Stage 2 to make the stirring-up offences (other than as regards race) intent only.

6. I note and welcome this recommendation.

Retention of Insulting

94. The Committee has heard strongly expressed views on both sides of the debate on whether the word “insulting” should be removed from section 3(1)(a) of the Bill. At present, racial hatred will be provided for differently in the Bill compared with offences committed regarding the other protected characteristics. The Committee considers that crimes based on racial prejudice are abhorrent. Individual Members of the Committee are persuaded differently by the evidence heard on whether “insulting” should be retained or removed.

7. I note that there is no collective view held by the Committee on the issue whether insulting should remain within the threshold of the stirring up racial hatred offences.

8. I have listened as different panels have given evidence on the Bill. Different panels gave evidence from their particular perspectives including crucially from those representing groups targeted by hate crime and I consider there was compelling testimony as to why stirring up racial hatred offences should be distinct so as to justify the retention of the existing threshold of insulting.

9. In particular, certain evidence given on 17 November made very clear the dangers of removing insulting. For example:

- Kevin Kane, representing YouthLink Scotland said: ‘…The main thing for us is that we need to continue to listen to the affected groups—black, Asian and minority ethnic groups. The view from many of those groups within our youth work equality forums was that the removal of “insulting” would weaken the proposed legislation.”

- Danny Boyle, representing BEMIS said: “…The reason that the Public Order Act 1986 contains an offence of stirring up of racial hatred is because at that time, there was in the UK a significant increase in the manifestation of far-right groups targeting people based on the colour of their skin, their ethnicity, nationality and so on. The reason that the threshold of “insulting” is in the bill is because we hear warning bells from history over a significant period of time that tell us that insulting behaviour can escalate into significant human rights violations.”
• Dr Jennifer Galbraith, representing the Coalition for Racial Equality and Rights said: “… Regarding the term “insulting”, the Scottish Government communicated in its equality impact assessment that the removal of the term could lead to people thinking that it was permissible to insult people on the basis of their race. We, too, have significant concerns about that—we agree that its removal would dilute those protections, even outside the legal context. In reality, with regard to people’s everyday lived experience, it could have a potential harmful effect on black and minority ethnic communities in Scotland.”

10. Two thirds of all recorded hate crimes in Scotland relate to race. There is unfortunately no denying the prevalence of racial hate crime offending in Scotland. This prevalence is reflected in the distinct approach which has been adopted in the Bill for race. This approach recognises the particularly damaging impact racial hate crime has on community cohesion, which could be worsened if there was a perception that protections in hate crime law were being weakened in this area.

11. There is a distinct approach for race reflected in the existing English and Welsh stirring up hatred provisions in the Public Order Act 1986 with, for example, stirring up racial hatred offences operating differently to stirring up religious hatred. Removing ‘insulting’ conduct from the scope of the stirring up racial hatred offence would mean that Scotland would become the only jurisdiction in the UK that did not criminalise insulting conduct that is intended, or likely, to stir up racial hatred.

12. I firmly consider any changes which give rise to the perception of the weakening of the existing long standing protections in this area must give everyone pause for thought.

13. Having listened to the evidence from those directly affected by hate crime, I have no plans to amend the Bill to remove insulting as a threshold for the stirring up racial hatred offences.

**The definition of “abusive”**

105. The Committee notes the evidence taken on the definition of “abusive” in the Bill and the different views expressed on whether the meaning of the word “abusive” is clear. The Committee believes that it is important that the Bill makes it clear that, for the test of “abusive” to be met, the Crown would be required to show that a reasonable person would consider the behaviour to be abusive.

14. I agree with the recommendation made by the Committee. I can confirm the policy intent is for the court to reach an objective analysis as to whether behaviour is abusive (or threatening) and I can also confirm the test, as provided for in the Bill as it currently stands, is an objective test.

15. This recommendation seeks to ensure the court will reach a decision based on an objective analysis of what is abusive behaviour as opposed to approaching
consideration of whether behaviour is abusive from the perspective of any specific person, including a person subject to the behaviour.

16. This objective standard used in the Bill as introduced was recognised during evidence by legal stakeholders including the Faculty of Advocates with the Dean of the Faculty stating on 3 November that consideration of whether behaviour was abusive was “quintessentially objective”.

17. This means it is for the police, prosecutors and ultimately the court to undertake an objective assessment of the individual facts and circumstances of each case to reach a determination as to whether behaviour was in fact abusive (or threatening). Evidence from a person who may have witnessed certain behaviour and/or been targeted by certain behaviour can of course be provided to the court to help inform the court’s objective analysis as to whether behaviour was abusive (or threatening). However, it is for the court to reach an objective view on this question.

18. This is the same as, for example, the test as to whether behaviour is abusive (or threatening) in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. In the 2010 Act, there is no wording included which provides that the court should consider whether behaviour is abusive (or threatening) on an objective basis as there is no need to do so in order to achieve this outcome.

19. While I agree with the recommendation, in light of this explanation it is not necessary to specifically amend the Bill to explicitly state that whether conduct is abusive (or threatening) is to be determined against an objective standard.

20. Indeed, I would have some concern about the possibility of unintended adverse consequences of taking such a step. On one view, amending the Bill in this way could have the potential to risk calling into question whether references to “abusive” conduct in other legislation which does not specify explicitly they are objective tests, for example section 38 of the 2010 Act, should in fact be read in a different way i.e. it may raise a question as to the objective nature of the test because there is no explicit provision stating this. The full implications of such an approach is therefore something to be carefully considered.

21. Recognising this issue has been raised by some members and stakeholders, I will add wording to the explanatory notes for the Bill to provide complete clarity that the threshold “abusive” is an objective, not a subjective test, as I note it is not currently explained in the explanatory notes themselves. I am certain this will provide the clarity the Committee requests, and mitigate any potential for unintended consequences.

22. I am happy to continue to discuss this area with the Committee as I can understand why it is considered important.
120. The Committee agrees that hate crime offences are no more acceptable if they are committed inside a person’s home than in public places. The Committee notes the evidence received that the provisions in the Bill differ from the Public Order Act 1986 and that, for some, this raises concerns.

121. The Committee believes that there should not be an absolute defence against prosecution based on whether someone was inside a dwelling or not when it comes to words expressed, behaviour or the display of written material. However, care also needs to be taken that people are not investigated for, charged with, or prosecuted for, offences based on their personal views, however abhorrent others may consider them to be, if the expression of those views took place in a private space, such as their own house, and there was no public element.

122. The Committee calls on the Cabinet Secretary to reflect on the current wording in the Bill with a view to whether behaviour falling within the scope of the stirring-up offences should be required to have a public element, even if it takes place within a private dwelling.

23. I note the views of the Committee and accept the recommendation to reflect on the approach taken in the Bill.

24. I absolutely agree that care should be exercised when a decision is made to investigate someone for potentially committing a stirring up hatred offence. Such care should be exercised no matter where an alleged offence may have been committed – whether in public or in private.

25. As the Committee notes, the operation of the stirring up hatred offences in the Bill do not exempt behaviour if it occurs in private. The reason for this is simple. If someone behaves in a threatening or abusive manner or communicates threatening or abusive material with the intention of stirring up hatred, I consider the criminal law should be capable of addressing such behaviour.

26. Michael Clancy from the Law Society of Scotland indicated in his evidence on 3 November that ‘… there is no sanctuary, in that sense, for most aspects of the criminal law and I do not think that there should be a sanctuary when it comes to hate speech.’ I very much agree with Michael Clancy and other evidence which supported this view.

27. I note the recommendation calls for reflection as to whether a requirement for a public element might be added to the operation of the stirring up hatred offences. This has been raised in evidence including when I appeared before the Committee on 24 November.

28. As was discussed when I was at Committee on 24 November, a few years ago the common law breach of the peace was restricted with the court deciding that there required to be a public element in order for a breach of the offence to be committed. This was as a result of the Harris vs HMA judgement in 2009.
29. The Harris judgement led to the creation of the statutory offence of threatening or abusive behaviour in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. This offence does not require a public element and ensured that certain types of conduct that often occur within dwellings such as domestic abuse cases, incidents of abusive behaviour towards police officers etc. could continue to be prosecuted.

30. If a person acts in a threatening or abusive manner after inviting a group of people round and they intentionally seek to stir up hatred of a particular group such as, for example, Catholics, it is not clear why such conduct should be exempt if reported to the police. While I will continue to reflect, there seems no principled justification for excluding this conduct from criminal investigation or sanction merely because it occurred in the home.

31. In addition, the recommendation seems to suggest activity that occurs in private with no public element, but outwith a dwelling could be exempted. For example, a closed meeting in a public hall to which people were only admitted by invitation. This would be a broader exception to the stirring up offences even than the dwelling offence currently provided for in the 1986 Act.

32. The criminal law is very often concerned with what goes on inside people’s homes or in closed spaces outwith a dwelling. The corrosive effects of an intention to stir up hatred against certain groups is well-known. Where hatred is intentionally stirred up, such corrosive and dangerous effects will go well beyond the confines of a dwelling or a closed space. Hate speech has no place in Scotland whether it takes place in public or in private. As such, I do not see a clear policy justification for providing a general sanctuary for hate speech within a person’s home or any other closed space when there is an intention to stir up hatred.

33. I do consider there is one area where further consideration could be given in respect of behaviour committed within a dwelling. It is appropriate to reflect on the position in respect of operation of the stirring up racial hatred offence when committed through behaviour that is likely to stir up hatred but it is not proven that the accused intended to stir up hatred. I accept there may be justification for considering whether there should be a requirement for a public element where the stirring up racial hatred offence is committed by behaviour that is either threatening, abusive or insulting and likely to stir up hatred.

34. It is in this area where I consider there may be merit in adjusting the Bill and I will be giving this matter further consideration ahead of Stage 2 including careful assessment of any non-Scottish Government amendments that may be lodged in this area.
Section 4 – Culpability where an offence is committed during the public performance of a play

136. The Committees noted the strongly held views from the majority of witnesses that gave evidence to the Committee that section 4 of the Bill on culpability where an offence is committed during the public performance of a play was problematic and should be removed. We welcome, therefore, the Cabinet Secretary’s commitment to lodge an amendment at Stage 2 to remove this section. Had he not done so, we would have recommended its removal.

35. I note and welcome this recommendation.

Section 5 – Offences of possessing inflammatory material

147. The Committee notes that simple possession of material that may be considered by some as inflammatory is not, in itself, sufficient for a prosecution. A person must have intent to stir up hatred. Nevertheless, the evidence we took from some bodies showed that there is a need to make sure the provisions in section 5 are clear and the term “inflammatory” is well defined and understood.

148. Such clarity can be provided if contextual factors were added to the Bill so that, in determining whether the behaviour, communication, or possession of the material is reasonable under sections 3 and 5, the court must have due regard to the literary, artistic, journalistic, comic, or scholarly character of the behaviour, communication or possession, if any.

36. In light of evidence and views offered in this area of the Bill, I have been considering whether section 5 is required within the Bill. I have listened carefully to the evidence presented by the Committee and note concerns from a number of stakeholders, ranging from Faith Groups to authors and playwrights, about section 5 of the Bill.

37. After careful consideration, I would like to advise the Committee that it is my intention to lodge Stage 2 amendments to remove section 5 from the Bill. I have listened carefully to the evidence offered and I consider there is no longer a need for such an offence which is, as noted above, based on existing precedent in the Public Order Act 1986.

38. The concerns that have been expressed have led me to re- assess the value of section 5. I have taken the view that the conduct which is criminalised by section 5 of the Bill can be covered to a significant extent by application of the general criminal law in relation to attempts to commit offences combined with the specific offences in section 3 of the Bill.

39. There is no significant policy or practical effect in removing section 5 in its entirety from the Bill therefore and I intend to lodge Stage 2 amendments to remove section 5.
40. Given my plans to lodge amendments to remove section 5, there is no need for a detailed response in respect of the issues noted in the recommendation. However, I would briefly explain it is the title of section 5 of the Bill which uses the term “inflammatory material”. The term is used in the title which appears above the text of the section, only as a short-hand description. The phrase used in the text of section 5 is, “threatening, abusive or insulting material” in relation to race and “threatening or abusive material” in relation to the other characteristics. The text of the section 5 offence does not use the term “inflammatory” and as such, there would be no need to define “inflammatory” were section 5 to remain in the Bill.

Section 6 – Powers of entry with a warrant

161. The Committee believes that police powers to enter and search a person’s premises or dwelling through a warrant are required, but must be clear, tightly defined and afford the necessary protections. The Committee calls on the Cabinet Secretary to reflect on the evidence we heard that further clarity would be helpful. The Committee also supports the call for consideration to be given to attaching a time limit on any warrants provided for in this Bill as is the case with some warrants issued for other purposes.

41. I accept the recommendation to reflect on the evidence provided to the Committee and agree with the Committee that attaching a time-limit on any warrants provided for in the Bill would be appropriate.

42. Specifically, a time-limit of 28 days will be added to the Bill by way of Stage 2 amendment. If this is agreed, a time-limit of 28 days within which the warrant has effect after being issued would be added to section 6. The effect of this will be that if a warrant granted under these powers was not enforced within 28 days, it would no longer be valid.

43. More generally, in reflecting on the powers of search and entry, I heard justice agencies explain views on the provisions in section 6. For example, I note Police Scotland remarked in their evidence on 3 November that the provision as currently framed provides for a ‘fairly traditional’ power of search under warrant.

44. Anthony McGeehan on behalf of COPFS during the evidence session on 3 November helpfully set out in a real world context how applications for warrants are made, considered and ultimately executed to illustrate how the powers provided for in this Bill are, in the view of COPFS, ‘largely unremarkable’.

45. I was also struck by much of the feedback in this area including from the Scottish Police Federation and legal stakeholders that concerns that had been raised had largely been mitigated by the proposed amendment to the operation of the new stirring up hatred offences.

46. I trust the addition of a time-limit will reassure the Committee and others as an additional safeguard over the use of the powers of search and entry provided for in the Bill.
Freedom of expression

183. The Committee welcomes the Cabinet Secretary’s agreement that he will deepen the freedom of expression provision in the Bill as regards religion and will lodge amendments at Stage 2 to that effect. The Committee welcomes the Cabinet Secretary’s proposed amendment to this provision to cover the absence of religious belief, and to clarify that mere expressions of antipathy, dislike, ridicule and insult are not, on their own, criminal behaviour.

184. However, the Committee received strong evidence that the protection of freedom of speech in section 12 also needs to be deepened and the Committee welcomes the Cabinet Secretary’s indication that he is open to considering this matter. The Committee calls on the Cabinet Secretary to set out how section 12 should be amended. The Committee looks forward to considering options for achieving this at Stage 2.

47. I can confirm to the Committee that I intend to bring forward amendments at Stage 2 to add freedom of expression clauses for the protected characteristics of transgender identity and age. I will expand on my rationale below, however before doing so let me explain my thinking in regards to the current freedom of expression clauses in the Bill.

48. The freedom of expression provisions are an important element of helping people understand the boundaries of the stirring up hatred offences within the Bill. Such provisions have a key role to play in providing clarity and reassurance as to what will continue to be behaviour that is not criminal once the offences in the legislation are in force.

49. I have considered carefully the approach in this area and, as the recommendation above notes, I announced a key change at Committee on 24 November when I explained that the freedom of expression provisions in respect of religion will be deepened.

50. These amendments will add reference to clarify that mere expressions of antipathy, dislike, ridicule and insult are not, on their own, criminal behaviour. In addition, the amendments will adjust the existing provisions in section 11 of the Bill so they will cover the ‘absence of religious belief’.

51. I note the Committee’s recommendation that the existing protection of freedom of expression clauses in relation to sexual orientation contained in section 12 of the Bill should be ‘deepened’.

52. At this initial stage in reflecting on this recommendation, I am not convinced that the existing provision at section 12 does not already provide sufficient guidance as to conduct that would not amount to an offence of stirring up hatred. However, I will give continue to give careful consideration as to whether the existing freedom of expression clauses in relation to sexual orientation contained in section 12 of the Bill would benefit from possible changes, including seeking further specific details of what the Committee would like to
see and carefully assessing any non Scottish Government amendments that may be lodged in this area.

53. Although the Committee’s recommendation seems focused on the existing protection of freedom of expression in respect of sexual orientation, it may be helpful to give an update on my consideration of freedom of expression protections in relation to other characteristics.

54. With regard race, I continue to take the view there is no requirement for freedom of expression provisions in respect of race. This is the current position in England, Wales and Scotland, the Bill on introduction did not include any freedom of expression provisions in respect of race and I did not hear any convincing argument during Committee scrutiny that suggested such provisions was in any way necessary.

55. In respect of the remaining characteristics (transgender identity, age, disability and variations in sex characteristics), I will continue to reflect on whether there is a compelling need for relevant protection of freedom of expression provisions. I am not persuaded all characteristics require protection of freedom of expression provisions, for example, I am not convinced there is a requirement for a freedom of expression provision required for the characteristic of disability. However, I can see there is merit in considering whether to introduce freedom of expression provisions to some of the other characteristics in the Bill and assess the depth of what any such provision should be. I can advise I will be bringing forward Stage 2 amendments in the areas of transgender identity and age.

56. The approach taken on religion will, if amendments at Stage 2 are agreed, result in freedom of expression provision which clarifies and reassures the public that, for example, an expression of ridicule in respect of religious belief is not, in itself, conduct that would trigger a stirring up religious hatred offence. While I believe this deepening of the provision will be helpful and provide necessary reassurance for many in the area of expression of views relating to religion, I do not consider provision in equivalent detail would be necessary or justified in respect of other characteristics such as disability.

57. My approach to protection of freedom of expression in the Bill is tailored to the policy need to provide reassurance and clarity specific to each characteristic. I will give an update to the Committee ahead of Stage 2 as to my specific thinking on Stage 2 amendments.
Reasonableness defence

199. The Committee notes the concerns expressed by some of a “chilling effect” and the impact that the mere threat of being contacted by the police could have. The Committee therefore welcomes the comments from the Cabinet Secretary that there are compelling arguments for providing further clarification on the issue of a reasonableness defence. The Committee believes that consideration should be given to the clarity of the reasonableness defence in the Bill and how this will be applied, the context in which it can be used and for which this defence is acceptable, such as possession of material for legitimate artistic, academic, comic and journalistic purposes. Clarity is also needed on the burden of proof required.

200. The Committee notes some of the options suggested to us for the way forward, including: the addition of a more specific reasonableness defence; a non-exhaustive list of factors on the face of the Bill (e.g. artistic, scholarly etc.); or a general requirement that the Bill be compatible with article 10 of the ECHR. The Committee asks the Cabinet Secretary to set out his preferences for further changes to the reasonableness defence when responding to the Committee’s report.

58. When asked about the reasonableness defence when giving evidence to the Committee on 24 November, I said the following:

‘... we will move to having intent only, so I am not sure that there is a need to make substantial changes to the reasonableness defence, although I again look forward to reading what the committee’s stage 1 report says in that regard.

I could flip the question and ask for an example of a case in relation to the new offences in which somebody’s behaviour was threatening or abusive and intended to stir up hatred in a way that was reasonable. I raised that in my first evidence session but, to this day, I have not been given a good answer.

I also noticed the evidence from the Faculty of Advocates in relation to the reasonableness defence. Roddy Dunlop, the dean of the faculty, said that “the difficulty with non-exhaustive lists is where to stop before you become exhausted.”—[Official Report, Justice Committee, 3 November 2020; c 11.] The dean has a good way of putting such matters, and I thought that his point was well made. That would be my concern about introducing a non-exhaustive list.’

59. In the report, there is no new information provided which answers this important question i.e. when would behaviour be threatening or abusive and intended to stir up hatred but nonetheless reasonable. The reasonableness defence is a component of the safeguards within the Bill which almost always would likely only be relevant to the continuing operation of the stirring up racial hatred offences, in relation to the alternative “likelihood limb”, where there is no need to prove an intention to stir up hatred.
60. I have considered carefully the suggestion that, for example, where activity occurs within a creative arena e.g. theatre, then that could be specified in some way as a relevant factor to be considered when the court is assessing whether a reasonableness defence is made out. While I will continue to reflect before reaching a final view, I would indicate at this stage I do not think it would be appropriate to place provision of this sort on the face of the Bill. Courts will, as a matter of course, take into account any factors they deem relevant in determining whether any offence has been committed.

61. If behaviour is threatening or abusive and intended to stir up hatred but nonetheless a person wishes to indicate their behaviour was reasonable, it is not clear why certain contexts within which the behaviour occurred should be highlighted over other contexts. It may be in a specific case the court will give consideration to the fact that behaviour occurred in a creative arena. Equally, in another case a different context may be considered. Why should one context within which behaviour occurred over another context be specified on the face of the Bill?

62. This could risk unintended adverse consequences over time should the courts interpret the Bill as providing that behaviour which is threatening or abusive and intended to stir up hatred should be classed as reasonable if it occurs in one specific context mentioned on the face of the Bill, but not if it occurs in a different specific context not mentioned on the face of the Bill.

63. From the report, it is not clear from the Committee recommendation whether this is the policy intent of what is recommended i.e. the Committee is suggesting behaviour which is threatening or abusive and intended to stir up hatred is intrinsically more reasonable if carried out in a creative arena than if carried out in a non-creative arena. If the Committee were able to provide further information as to what the policy intent is of listing certain factors, I would be happy to consider this further.

64. However, I am very much alive to concerns that have been expressed about how the reasonableness defence may operate including the type of contexts within which conduct may occur and how the court would assess such matters. That is why I will actively consider adding wording to the explanatory notes to aid understanding in this area.

65. In respect of ECHR, I agree with the comments made by the Dean of the Faculty of Advocates when he gave evidence. On 3 November, he said: ‘… as Dr Tickell pointed out, one could have a never-ending series of factors that might be taken into account in the process (of considering the reasonableness defence). As has been pointed out, I wonder whether we are not already covered by the fact that any interpretation of the bill, or indeed of any legislation, must be convention compliant’.

66. I have reflected upon this issue carefully, but I am not persuaded there would be policy benefit to including a general requirement that the Bill must be used in a manner that is compatible with Article 10 of the ECHR. This provision would be a statement of self-evident fact for any provision and any Act of the Scottish
Parliament and merely indicating that on the face of the Bill would not provide any clarity or reassurance as to the boundaries of the criminal offences in the Bill at all.

67. The question of the burden of proof required for the operation of the reasonableness defence is addressed directly in the explanatory notes which accompany the Bill. The explanatory notes make clear that the accused is subject only to an evidential burden of proof so as to bring forward enough evidence simply to raise an issue with respect to the defence. The legal burden of proof for disproving the defence and proving that the offence has been committed remains firmly with the prosecution. This is not a new approach. There is already a reasonableness defence in Scottish criminal law under, for example, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 6 of the Domestic Abuse (Scotland) Act 2018, where the defence operates in exactly the same way.

68. I am happy to continue to discuss with the Committee their views on the reasonableness defence, but can confirm that I will consider adding new wording to the explanatory notes to aid people’s understanding of how the reasonableness defence will operate.

Part 1 – Aggravation of offences by prejudice

Use of statutory aggravators

214. The Committee agrees with Lord Bracadale and the overwhelming majority of the evidence we heard that it is appropriate and effective to tackle hate crime through an existing baseline offence and the application of a statutory aggravation.

69. I note and welcome this recommendation.

Data collection and monitoring

225. The Committee notes the evidence from some of our witnesses that more could be done to improve the ways in which hate crime offences are recorded and monitored. The Committee calls on the Cabinet Secretary to consider how this could best be achieved.

386. Furthermore, the Committee notes the evidence from some of our witnesses that more could be done to improve how hate crime offences are recorded and monitored. For example, whether Islamophobia be recorded as a separate category of hate crime (as with antisemitism) and how should offences against certain groups (e.g. Sikhs) be categorised (as an offence of a racial or religious nature?). It would also be important to ensure consistency of approach across Scotland, e.g. within Police Scotland, when it comes to recording offences.
70. I agree with the Committee that data on hate crime in Scotland needs to show a greater level of disaggregation, and I am keen to see the provision of more detailed data including information on both victims and perpetrators. This should include - but not be limited to - the particular religion(s) concerned when an offence has been aggravated by prejudice or where a stirring up hatred offence has been committed, as called for by a number of equality organisations. Such data is essential in our work to more effectively tackle hate crime in Scotland.

71. To this end I am actively considering how this could best be achieved. There is already work underway to improve the provision of hate crime data. Scottish Government statisticians are currently carrying out a study into the characteristics of police recorded hate crime, based on a review of crime records, which will provide an updated picture for each strand of hate crime. Although this project had been postponed due to COVID-19, data collection has now been completed and analysts will announce a publication date in the near future.

72. Further to this, the Scottish Government has also set up a cross justice system working group to improve the collection and reporting of evidence on race. Justice partners and stakeholder groups have been invited to join and the first meeting took place on 14 October 2020. Further announcements on the work of the group will be made in due course.

73. The Bill does not currently require the recording of aggravations to be broken down beyond the characteristics listed within the Bill. However, I understand that a number of stakeholders are calling for the Bill to include additional statutory requirements to record more information on hate crime. I will therefore consider what more can be done either through the Bill and/or by non-legislative means in order to improve the provision of hate crime data in Scotland.

Equality of approach across protected characteristics

232. The Committee believes that it is important that people with protected characteristics can “see themselves in this Bill” and be clear how the provisions improve their situation. Whilst we have some sympathy with the idea of consistency of approach, we do not believe that all characteristics must be treated in exactly the same way.

74. I note and welcome the Committee’s conclusions on this matter.
Clarity of language and terminology

238. The Committee supports the view that accessibility of the law to the layperson is an important principle and, wherever possible, legislation should be drafted in a way that can be widely understood whilst accepting that the law is often complex (and that words may have precise legal meanings). However, any changes made to the terminology used in Section 1(1) of the Bill should not have the effect of lowering the current legal threshold. The Committee is content that “evinces” can be replaced by “demonstrates” but that “malice and ill-will” should remain and not be replaced by “hostility”.

75. I note and agree with this recommendation and can confirm I intend to lodge Stage 2 amendments to make this change to the Bill so that the test will be expressed by reference to demonstrating malice and ill-will. I agree with the Committee that this should not change the threshold for the offence in any meaningful way.

Requirement on the courts to identify what difference any aggravation has made to a sentence

246. The Committee agrees that, in general terms, the requirement to identify what difference an aggravation has made to a sentence helps the process to be more transparent and may lead to a better understanding of sentencing decisions. Furthermore, we believe that the requirement helps send a clear message about how offences aggravated by prejudice will be viewed by the courts, thereby hopefully acting as a deterrent. For those reasons, the requirement set out in the Bill should be retained.

76. I note and welcome this recommendation.

Different approach to race

267. The Committee is of the view that there is a strong case to be made for treating race differently in relation to offences of stirring up racial hatred provided for at Section 3(1)(b). The historic nature of racial hate crime and the relative volume of offences is justification for this approach. In this respect, we agree with conclusion of the Cabinet Secretary.

77. As I advised the Committee when giving evidence, and have mentioned above, the seriousness and prevalence of racial hate crime, as well as its historical and structural features, merits a unique approach. Above all, the impact of racial hate crime on community cohesion must continue to be recognised and reflected in Scotland’s hate crime legislative framework.

78. I therefore note and welcome this recommendation, and the conclusion reached by the Committee on this matter.
Section 50A and the offence of racially aggravated harassment

268. In the Committee’s view, the offence in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be consolidated into this Bill. It should be consolidated into this Bill.

79. I accept the Committee’s recommendation and I can confirm that I will bring forward amendments at Stage 2 that will seek to consolidate section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 – i.e. the standalone offence of racially aggravated harassment – into the Bill. This will mean that all of Scotland’s hate crime offences will be situated in the Bill.

80. It should be noted that, when consolidating section 50A, the Scottish Government will need to consider the wording of the offence, in line with the aim to modernise hate crime legislation and to ensure it is consistent with the language used elsewhere in the Bill.

81. As part of that, consideration will need to be given to the language of the section 50A offence in light of the changes I have agreed to make to the language of section 1 of the Bill (see response to paragraph 238).

82. Finally, it should be noted that, even though the language of the offence is likely to change via the consolidation process, it is not my intention to alter the practical effects of how the offence is applied.

Other hate crime characteristics including sex and misogynistic harassment

Section 15: Power to add the characteristic of sex/sex aggravator

292. The Committee notes the strongly expressed views given to it on both sides of the argument as to whether sex should be included as a hate crime characteristic. Whilst the arguments are finely balanced, the Committee considers it might be wise to wait until the Working Group on Misogynistic Harassment has reported before Parliament considers legislating to add sex as hate crime characteristic. The Committee calls on the Working Group to complete its work within a year.

83. There is a clear need to tackle misogyny in Scotland. Whilst I recognise that there are mixed views on whether sex should be included as a hate crime characteristic, I am pleased that the Committee has recommended that the Working Group be afforded the time and space needed to complete its work and report on its findings.

84. The Working Group will consider the addition of ‘sex’ to the Bill in addition to their work on whether a new offence is necessary to deal with misogynistic behaviour. It is important to note that the Working Group will be likely to draw upon experts who will review how the criminal law deals more broadly with misogyny to allow a distinct approach to be developed to tackle misogyny that
is in line with Equally Safe\(^1\), Scotland’s strategy for preventing and eradicating violence against women and girls.

85. I note that the Committee has gone further, calling on the Working Group to complete its considerations within 12 months. The Chair has taken note of the Committee’s preferred timescales and we are in agreement that pace is important. I will be seeking regular updates through the Chair and the Secretariat to the working group and keeping sight of the importance of the work being completed without unnecessary delay.

86. With that said, it is up to the Chair of the Working Group to agree the frequency of meetings and overall timescales to deliver what is being asked of them. She has my full support in this. In addition, the challenge that faces this group is not to be underestimated. There is no single definition which is commonly used in a criminal context within Scotland which would encapsulate the breadth of behaviours which have been described under the umbrella term of misogyny. That is distinguishable from the position with the domestic abuse offence which was widely based on an understanding of coercive and controlling behaviour within the context of an intimate relationship. Our starting point for misogyny is therefore different in this regard. For this reason, I am of the view that the Working Group needs to be given sufficient time and space to deliver upon its remit.

**Separate offence of misogynistic harassment/Working Group**

300. The Committee welcomes the announcement that Baroness Helena Kennedy QC will chair the Working Group on Misogynistic Harassment and looks forward to engaging with the Working Group as its work gets underway.

87. The Working Group will consider how criminal law deals with misogyny, including whether it would be appropriate to add the characteristic of sex to the hate crime framework in the future (by means of the Bill’s enabling power).

88. Baroness Kennedy is considering the detailed remit, membership and timescales for the group in order that this vital work can move forward at pace. With Baroness Kennedy’s expertise regarding women, human rights and the legal system in Scotland, the Working Group will provide strong, independent advice to inform future developments in this area.

89. When formally accepting this position, Baroness Kennedy, said: “The law has often failed to provide adequate remedies and justice for the harassment, assault and sexual violence experienced by women. Women have had to fight hard to properly criminalise such behaviour. The everyday abuse of women too often involves verbal degradation of the darkest and most threatening kind. I am impressed that Scotland is taking a pioneering position in exploring how law can be harnessed to address this conduct directed specifically at women”.

\(^1\) https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/
90. The Working Group will be formally convened in due course and Baroness Kennedy will be having discussions with potential members over coming weeks. We expect that its inaugural meeting will be in January. I will keep Parliament, through the Committee, up to date with its progress.

Use of secondary legislation and the timetable for parliamentary scrutiny

306. The Committee welcomes the recognition by the Cabinet Secretary that adding sex as a hate crime characteristic is a sensitive matter and would require the fullest possible parliamentary scrutiny. If the change is to be made by secondary legislation, the Bill should be amended to ensure this is done by a super-affirmative procedure.

91. I accept this recommendation from the Committee.

92. As part of its remit, the Working Group will consider whether the characteristic of ‘sex’ ought to be added (by regulations) to the list of characteristics which apply in relation to the aggravation of offences by prejudice in Part 1 of the Bill and/or to the lists of characteristics which apply in relation to offences relating to stirring up hatred in Part 2 of the Bill. To this end an enabling power is included in section 15 of the Bill. This will specifically allow sex to be included as an additional characteristic within the hate crime legislative framework at a later date, for example if that is recommended by the Working Group.

93. The Delegated Powers and Law Reform Committee (DPLRC) has considered the enabling power in section 15 of the Bill and has indicated that it is content with this power and that it is subject to the affirmative procedure, giving the Parliament a high level of scrutiny.

94. However, I recognise the sensitivity of this matter and that Parliament is seeking further opportunity to scrutinise the potential addition of the characteristic of sex to hate crime legislation via the enabling power. Therefore, although the DPLRC indicated that it is content with the affirmative procedure, the Scottish Government accepts this recommendation to include a form of super-affirmative procedure. I will bring forward an amendment at Stage 2 to provide for some additional pre-condition to apply to use of this enabling power to enable the full scrutiny the Committee has asked for.

Transgender identity

318. The Committee is clear that the Bill is not intended to chill public debate on matters such as women’s rights or debates about the immutability (or otherwise) of sex. The Committee has been anxious, none the less, to ensure that chilling public debate on matters such as these is not an unintended consequence of the Bill.
319. With this in mind, the Committee makes the following observations which, it hopes, illuminate the issues as clearly as possible. The Bill should not criminalise speech that others may find offensive. Stirring-up hatred with regard to transgender identity should be an offence under the Bill only where behaviour (or speech) is threatening or abusive. That is to say, even if such behaviour or speech is insulting, it should not meet the criminal threshold unless it is also threatening or abusive. Further, as we have explained, the Cabinet Secretary has proposed that the new offence of stirring-up hatred as regards transgender identity will be committed only if the Crown can prove that the accused acted with the intent to stir up hatred.

320. Parliament will have to judge whether, in its view, these safeguards are sufficient to ensure that public and vigorous debate on matters such as gender recognition and women's rights can take place untouched by this Bill.

95. I note this recommendation and welcome the Committee seeking to make your views known on how the offences operate.

96. For the avoidance of doubt, it may however be helpful to state that the offence within the Bill of stirring up hatred on the grounds of transgender identity is committed where behaviour or material:
   - is threatening or abusive, and
   - intended to stir up hatred.

97. This is a two-part test. The wording above suggests ‘...stirring up hatred with regard to transgender identity should be an offence under the Bill only where behaviour (or speech) is threatening or abusive’. This of course only relates to the first part of the two part test. While the wording in the recommendation does then go onto describe that an intention to stir up hatred is also a requirement, I consider it vital to always describe the operation of the offence as being a two-part test as otherwise the risk is run that confusion may arise.

98. In respect of transgender identity, what this means is that:
   - if behaviour or material is not threatening or abusive, it is not an offence under the Bill.
   - if behaviour or material is threatening or abusive, but not intended to stir up hatred then it is not an offence under the Bill; and
   - if behaviour or material is intended to stir up hatred, but not threatening or abusive then it is not an offence under the Bill.

99. Both parts of the two-part test must be met for an offence to be committed.
Variations in sex characteristics or intersex

329. The Committee welcomes the separation of variations in sex characteristics from transgender identity. The two are not the same and should be kept distinct.

330. The Committee has heard sharply contrasting views on whether variations in sex characteristics should be included in the Bill as a hate crime characteristic. This is an exceptionally sensitive matter, which Parliament will want to reflect on carefully as the Bill is debated further.

100. I welcome the Committee’s comments on the characteristic of variations in sex characteristics within the Bill.

101. The Bill’s provisions ensure that characteristics currently protected within the hate crime legislative framework continue to be protected to the same extent, with updated language that reflects changes over time in wider society.

102. It has become clear that there are concerns with listing ‘intersexuality’ as an aspect of transgender identity (as is currently the case in existing hate crime legislation). Therefore, so as not to lose protection for this group of people, the Bill includes ‘variations in sex characteristics’ as a separate characteristic within hate crime law.

103. I recognise that there is a lack of consensus on the issue of whether variations in sex characteristics should be included as a characteristic within the Bill, highlighted in the Committee’s evidence in the contrasting views expressed by dsdFamilies and the Klinefelter’s Syndrome Association. I note the concerns raised and I would like to offer reassurance that I recognise the need to consider all issues which concern people with variations of sex characteristics, including health issues. I also recognise the need to support parents of children with variations in sex characteristics.

104. However, recognising there are other areas of work required should not prevent people with variations in sex characteristics from being included in this hate crime legislation.

Gypsy, gypsy travellers, the Roma community, asylum seekers and refugees

337. The Committee believes that Gypsies, Gypsy Travellers, Roma and Travellers, asylum seekers and refugees are important communities that society in Scotland should protect. The Committee notes the views expressed to us that the existing provisions in the Bill and the existing characteristics should be sufficient to afford these groups protection from hate crimes. There were, however, differing views. Gypsy, Gypsy Travellers, Roma and Travellers, asylum seekers and refugees is a wide community and we seek reassurance from the Cabinet Secretary at Stage 1 that all of these different groups can be adequately safeguarded from hate crimes under the current wording of this Bill.
105. I agree with the Committee that Gypsies, Gypsy Travellers, Roma and Travellers, asylum seekers and refugees are important communities and should be afforded protection by this Bill.

106. As part of his review, Lord Bracadale concluded that the existing statutory aggravation in connection with prejudice based on race is defined widely enough to capture prejudice towards Gypsies, Gypsy Travellers, Roma and Travellers in so far as they are examples of groups defined by reference to ethnic origins.

107. Lord Bracadale also considered that prejudice toward asylum seekers and refugees would be captured in so far as such prejudice is related to nationality or national origins.

108. I am persuaded by Lord Bracadale’s conclusions on this matter and can provide reassurance to the Committee that these groups are covered within the Bill’s definition of race.

**Age or vulnerability?**

344. The Committee notes the evidence we have received and the conclusion of the research we commissioned, that the approach to this issue should be one based on vulnerability and not age. We further note that Lord Bracadale recommended that the Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability. The Committee asks the Cabinet Secretary to set out his plans for dealing with the exploitation of people based on their vulnerability outwith this particular Bill, and to report these to the Committee.

109. I am committed to considering whether there should be reforms to the criminal law to improve the protection available to people who may be at increased risk of being exploited and becoming victims of crime because of their vulnerability.

110. Under common law powers, the court has the ability to take into account all facts and circumstances of a case when deciding sentence in any given case before the court. It is clear that the vulnerability of a victim will often be at the forefront of the factors the court takes into account when sentencing.

111. To confirm why this Bill is not being used to legislate in the area of vulnerability and the criminal law, Lord Bracadale made clear in his report that this area of law is not something that should be covered by hate crime law. This is because crimes motivated by seeking to take advantage of a person’s either actual or perceived vulnerability are not crimes motivated by prejudice i.e. they are not hate crimes.

112. This can be seen in the long title of the Bill which includes wording that the Bill is for the purposes of ‘… making provision about the aggravation of offences by prejudice…’. To include, for example, a new statutory aggravation for offences committed to take advantage of a person’s actual or perceived vulnerability
would not fit within legislation which is fundamentally about offences committed as a result of prejudice.

113. Having age as a characteristic within hate crime law and separately to seek to introduce at some future date new criminal law reforms in respect of vulnerability are of course not mutually exclusive as they would be seeking to achieve different policy intents. I very much consider this Bill is the place to add age as a characteristic into hate crime law and I am committed to explore whether changes in respect of vulnerability could be introduced in future legislation separate to hate crime law.

Sectarianism

352. The Committee believes that any form of sectarianism is unacceptable. In the context of this Bill, the Committee does not believe that sectarianism should be added so as to create a further statutory aggravator. The Committee notes the assessment of Lord Bracadale and others that the current statutory aggravations in relation to race and religion are sufficient to address behaviours that are broadly understood to be sectarian in nature.

114. I agree with the assessment of Lord Bracadale and others that it is not necessary at this time to create any new offence or statutory aggravation to address behaviours that are sectarian in nature.

115. As provisions for race and religious aggravations already cover criminal conduct motivated by sectarianism we are not introducing a new sectarian aggravation in the Bill.

116. I therefore welcome the Committee's recommendation in this area.

Homelessness

357. The Committee is inclined to agree with the Cabinet Secretary that, notwithstanding the undoubted seriousness of crimes committed against rough sleepers, hate crimes are better understood as offences of prejudice than as offences relating to vulnerability.

117. I welcome the Committee's comments on this matter.

118. In his review, Lord Bracadale did not consider it necessary for there to be new statutory aggravations in connection with prejudice toward homeless people. That is because he concluded that socioeconomic status is different to the types of identity characteristics included in the Bill. He explained that ‘it is a matter of fact determined by a number of factors (employment, poverty, security of housing etc.) which will change over time’. Although I appreciate that these factors may mean that an individual is vulnerable to particular offending patterns, I agree with Lord Bracadale that it would stretch the concept of hate crime too far.
119. The Scottish Government will consider whether there should be reforms to the criminal law to improve the protection available to people who may be at increased risk of becoming victims of crime because of their vulnerability. As Lord Bracadale noted, this is not something that should be covered by hate crime law as crimes motivated by seeking to take advantage of a person’s either actual or perceived vulnerability are not crimes motivated by prejudice i.e. not a hate crime.

Other Issues

Financial resources and the financial memorandum

367. The Committee notes the views originally expressed by the Scottish Courts and Tribunals Service about the impact of the Bill on the resources needed by Scotland’s courts and the evidence we took from Police Scotland and representatives of police officers. The Committee believes that, whilst always a process of estimation, the resources attached to implementing this Bill may have been under-estimated. The Committee calls on the Cabinet Secretary to respond to the concerns heard about the level of resources and report back on this issue.

120. I note this recommendation. The Financial Memorandum was drawn up after extensive dialogue with the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, Police Scotland, the Scottish Prisons Service, the Scottish Legal Aid Board, the Scottish Criminal Justice Social Work and the Convention of Scottish Local Authorities (COSLA).

121. The Financial Memorandum provides estimates for the ongoing costs relating to the changes set out in the Bill and one-off implementation costs. I note that both the Scottish Police Federation and the Scottish Courts and Tribunals Service raised concerns regarding the financial implications relating to the implementation of the Bill’s provisions, especially relating to IT, training and guidance.

122. I will continue to work with criminal justice organisations on the costs and in setting out appropriate implementation plans for the Bill and if necessary the Scottish Government will publish a revised Financial Memorandum following Stage 2.

Blasphemy

370. On that basis, the Committee supports the Scottish Government’s intention of removing the offence of blasphemy from Scots law through this Bill.

123. I welcome the wide support received for the repeal of the offence of blasphemy.
Other non-legislative measures that need to be enhanced

385. Hate crime legislation will not, of itself, rid Scotland of prejudice. In pursuing that goal, education is likely to be far more important than necessarily creating new criminal offences. As such, the Committee seeks further information from the Scottish Government on what further steps it proposes to take and what additional resources it intends to provide, including in relation to education, to tackle prejudice in Scottish society.

124. I agree with the Committee that legislation will not, in and of itself, rid Scotland of hate crime and prejudice.

125. The Scottish Government is committed to tackling hate crime and prejudice, and in June 2017 we published an ambitious programme of work – our Tackling Prejudice and Building Connected Communities Action Plan. The report included, amongst other things, a commitment to developing public awareness raising campaigns in order to improve understanding of hate crime and encourage reporting. We have launched a number of hate crime campaigns since 2017 and we remain committed to engaging with stakeholders as we consider future hate crime campaign activity.

126. I recognise that education and awareness raising continue to be important aspects in terms of tackling hate crime and prejudice and we will work with key stakeholders to undertake a review of the current action plan with a view to develop a refreshed action plan in 2021.

127. I have responded to your paragraph 386 above, at paragraph 70.

387. The Committee asks the Cabinet Secretary to reflect on all the evidence we received on non-legislative measures that could support the aims of this Bill and to outline his views at Stage 1.

128. I welcome the Committee’s comments and would like to reassure the Committee that Ministers will reflect on all the evidence received on non-legislative measures to tackling hate crime.

390. For some members of the Committee, support for this Bill will depend on whether the Scottish Government makes the further changes to the Bill needed to bring it into line with the recommendations we have agreed unanimously in this report. Subject to those amendments being made, the Committee recommends that the general principles of the Bill be approved.

129. The Scottish Government agrees with the overwhelming majority of the Committee’s recommendations, and where we cannot immediately agree we are open to further consideration of these matters. I hope this response will enable members of the Committee to support the general principles of the Bill at stage 1.